Assessment of Public Comment (APC)
Adoption of Clarifying Rule Revisions to sections 701.13 and 701.14
of Title 6 of the New York Codes, Rules and Regulations
Comment Period October 23, 2019 – January 13, 2020

1. **Comment**: The amendments to 6 NYCRR §§ 701.13 and 701.14, through this proposed rule making, weaken standards and remove protections for the Class I waters and Class SD waters. (Commenters 1, 2, 3, 4, 6, 7, 9, 11, 14, 16, 17, 18, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34, 36, 39, 42, 45, 46 & 48)

   Response: Through this proposed rule making, protections have not been weakened or removed. All water quality criteria used to protect the best uses of Class I waters (secondary contact recreation and fishing) and Class SD waters (fishing) are unchanged in the proposed rule making from the criteria NYSDEC implemented through the 2015 rule making.

2. **Comment**: NYSDEC changed the best uses of the Class I and Class SD waters through the suitability language in the 2015 rule making and is now attempting to rollback those best uses to less protective best uses. (Commenters 5, 7, 8, 10, 13, 15, 19, 23, 24, 25, 29, 30, 32, 34, 35, 37, 38, 41, 47 & 50)

   Response: The best uses of the Class I and Class SD waters were not changed in the 2015 rule making. The express terms of the 2015 rule making did not delete or add any language to the following statements: "[t]he best usages of Class I waters are secondary contact recreation and fishing" and "[t]he best usage of Class SD waters is fishing." 6 NYCRR §§ 701.13 and 701.14, respectively. In the proposed rule making, this language has not been amended; the best uses remain secondary contact recreation and fishing (Class I) and fishing (Class SD). Therefore, the removal of the suitability language is not a change in best use.

3. **Comment**: NYSDEC needs to perform a Use Attainability Analysis (UAA) to remove the suitability language from 6 NYCRR §§ 701.13 and 701.14. (Commenters 7, 13, 24, 28, 29, 32, 35, 38, 45 & 48)

   Response: See response to comment #2. In the proposed rule making, the best use language has not been amended; the best uses remain secondary contact recreation and fishing (Class I) and fishing (Class SD). The removal of the suitability language is not a change in best use. As explained further in response to comment #7, the removal of the suitability language also does not remove an existing use. 40 CFR § 131.10(g) says, "States may designate a use, or remove a use that is not an existing use, if the State conducts a [UAA]…". NYSDEC has not taken either of those actions; therefore, a UAA is not required.

4. **Comment**: NYSDEC must adopt the enterococcus water quality criteria from the 2012 USEPA Recreational Water Quality Criteria for the Class I and Class SD waters. (Commenters 7, 8, 13, 24, 27, 28, 29, 31, 35, 37, 38, 41, 45 & 48)

Response: See response to comment #2. In the proposed rule making, the best use language has not been amended; the best uses remain secondary contact recreation and fishing (Class I) and fishing (Class SD). The 2012 USEPA Recreational Water Quality Criteria do not apply to the Class I and Class SD waters, as those waters do not have a primary contact recreation best use.

5. **Comment**: NYSDEC's response to pollution from combined sewer overflows (CSOs) has been slow and/or inadequate. (Commenters 1, 3, 14, 23, 28, 33, 42, 44 & 47)

   Response: These comments are outside of the scope of the proposed rule making. NYSDEC's oversight of New York City's CSO control program is not the subject of the proposed rule making.

6. **Comment**: NYSDEC should eliminate the use of Class SD for all New York State waters. (Commenters 5, 10, 30, 47 & 50)

   Response: These comments are outside the scope of the proposed rule making. Waterbody reclassification requires a separate administrative action which is not the subject of the proposed rule making.

7. **Comment**: Recreation is already occurring in the subject Class I and Class SD waterbodies constituting an existing use; therefore, NYSDEC must act to protect recreation and those participating in it. (Commenters 7, 12, 35 & 47)

   Response: The commenters inaccurately characterize USEPA's definition of an "existing use." According to 40 CFR § 131.3(e), "[e]xisting uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." The presence of bathers in a waterbody alone does not constitute "attainment" of an existing use of primary contact recreation and additional factors, such as the safety of bathers, may be considered before upgrading a best use. See also response to comments #2 and 11.

8. **Comment**: NYSDEC's public outreach effort on the proposed amendments was inadequate. (Commenters 14, 26 & 47)

   Response: As required by the New York State Environmental Conservation Law (ECL) § 17-0301(4), NYSDEC held a public hearing at NYSDEC's Region 2 office in Long Island City on January 8, 2020. Pursuant to the State Administrative Procedure Act § 202(1)(ii), notice of the proposed rule making was published at least sixty days prior to the scheduled public hearing. Specifically, on October 23, 2019, notice of this hearing was published in the New York State Register, The New York Post, Newsday, NYSDEC's Environmental Notice Bulletin, and on NYSDEC's website.

9. **Comment**: NYSDEC is abandoning/ignoring the goals of the Clean Water Act (CWA). (Commenters 21, 28 & 46)

   Response: Application of the 2015 total coliform and fecal coliform criteria support New York State's progress towards meeting the fishable/swimmable goals of the CWA. NYSDEC continues to work closely with the City of New York, where the majority of

the Class I and Class SD waters are, to improve water quality by setting water quality targets and engaging in measured actions to facilitate improvement. See also responses to comments #2 and 14

10. **Comment**: The Class I and Class SD waters subject to the proposed rule making are Coastal Recreation Waters, and therefore, are covered under the Federal Beaches Environmental Assessment and Coastal Health (BEACH) Act (P.L. 106-284) and must be protected accordingly. (Commenters 12 & 32)

    Response: The boundaries of Coastal Recreation Waters are defined in Federal Law and identified in 6 NYCRR § 700.1. As defined, the Coastal Recreation Waters do not include the Class I and Class SD waters that are subject to the proposed rule making because they do not have a primary contact recreation best use.

11. **Comment**: "As DEP has documented, and as DEC has classified these waters, primary contact uses are inconsistent with their status as working waterbodies with active navigational uses or other constraints, such as bulkheading, low flows, or security restrictions. . . . DEP supports the clarification and the recognition by DEC that the use of Class I waters and Class SD waterbodies remains secondary contact recreation and fishing and fishing respectively." (Commenter 40)

    Response: NYSDEC acknowledges this comment and concurs that the Class I and Class SD waters contain hazards. As stated in the Regulatory Impact Statement, there is an increased risk of personal injury or death due to hazards should the Class I and Class SD waters be used for primary contact recreation. In the proposed rule making, the best use language has not been amended; the best uses remain secondary contact recreation and fishing (Class I) and fishing (Class SD).

12. **Comment**: NYSDEC "must conduct an assessment of existing uses of Class SD and I waters in the city during all seasons to accurately evaluate the 'recreational season' when sampling is typically required." (Commenters 7 & 28)

    Response: There is no seasonal aspect of the proposed rule making or the 2015 rule making. Any discussion of seasonality is outside of scope of the proposed rule making; however, see response to comment #7 regarding existing uses.

13. **Comment**: "The proposed changes seem to be intended to accommodate the desires of the U.S. Environmental Protection Agency to avoid its responsibilities under the Clean Water Act." (Commenter 15)

    Response: See response to comment #2. In the 2015 rule making, NYSDEC did not change the best uses of the Class I and Class SD waters. Recognizing that some entities were misinterpreting NYSDEC's intent and the effect of the suitability language added in the 2015 rule making, NYSDEC undertook the proposed rule making to clarify. In the proposed rule making, the best use language has not been amended; the best uses remain secondary contact recreation and fishing (Class I) and fishing (Class SD). The removal of the suitability language is not a change in best use.

14. **Comment**: NYSDEC cannot remove the suitability language and keep the fecal coliform criteria that was adopted in the 2015 rule making. (Commenter 29)

    Response: The adoption of total coliform and fecal coliform criteria for Class I and Class SD waters in 2015 supports New York State's progress towards meeting the fishable/swimmable goals of the CWA; removing the suitability language, added in 2015 to 6 NYCRR §§ 701.13 and 701.14, does not change that. Per ECL § 17-0301(4), the department adopted the 2015 total coliform and fecal coliform criteria to prescribe what qualities and properties of water shall indicate a polluted condition of the waters of the state which is actually or potentially deleterious, harmful, detrimental or injurious to the public health, safety or welfare. Water quality which meets these total and fecal coliform criteria will be supportive of the secondary contact recreation use in accordance with these regulations. See also responses to comments #2 and 11.

15. **Comment**: NYSDEC's "Change in WQS language will cause ecosystem damage." (Commenter 49)

    Response: This comment is outside of the scope of the proposed rule making. The suitability language has no impact on the fishing best use or the water quality criteria that protect aquatic life.

16. **Comment**: "In my career in the water industry I have seen a significant increase in the scrutiny of our effluent limits. These same restrictions on discharge limits need to be applied to our water." (Commenter 43)

    Response: This comment is outside of the scope of the proposed rule making. All water quality criteria used to protect the best uses of Class I waters (secondary contact recreation and fishing) and Class SD waters (fishing) are unchanged in the proposed rule making from the criteria NYSDEC implemented through the 2015 rule making.

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6	Carle, Rolf
7	Chamberlain, Casey – Hudson Point Park Conservancy
8	Chuchuka, David – NYC H2O
9	Cohen, Linda
10	Diegel, Eymund – Gowanus Dredgers Canoe Club
11	Donargo, Krista
12	Donnelly, Marlene - FROGG (Fiends & Residents of Greater Gowanus)
13	DuLong, Mike – Hudson Riverkeeper
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28	Levin, Stephen – New York City Council District 33
29	Levine, Larry – Natural Resources Defense Council
30	Mariano, Linda – Gowanus CAG & FROGG (Fiends & Residents of Greater Gowanus)
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