UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
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JAN 2 0 2019

Mr. Mark Klotz, P.E., Director
Division of Water
New York State Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, New York 12233-3500

Dear Mr. Klotz:

Thank you for your letter, dated June 13, 2018, which responds to EPA's letter, dated March 7, 2018, in which EPA disapproved, under Section 303(c) of the Clean Water Act (CWA), NYSDEC's revised water quality criteria for total and fecal coliform for Class SD and Class I waters (at 6 NYCRR §§ 703.4(a) and (b)) because they were not protective of primary contact recreation uses. I also want to thank you and your staff for your engaged dialogue on this matter.

As noted in your letter, in a letter dated May 9, 2016, EPA approved, under Section 303(c) of the CWA, NYSDEC's revisions to its water quality standards (at 6 NYCRR §§ 701.13 and 701.14), to include the phrase "...the water quality shall be suitable for primary contact recreation, although other factors may limit the use for this purpose" as specifying primary contact recreation to be the applicable designated use for Class SD and Class I waters.[1] These revised water quality standards were adopted by the State on November 4, 2015. (2015 Rulemaking).

In your letter, you ask EPA to reconsider its March 7, 2018 disapproval of NYSDEC's revised water quality criteria for total and fecal coliform for Class SD and Class I waters. Specifically, you state, "NYSDEC did not revise the 'best usages' of Class SD and Class I waters. The best usages of those waters were, and remain, 'fishing,' and 'secondary contact recreation and fishing,' respectively." You explain that "NYSDEC's use of the term 'best usage' is equivalent to EPA's use of the term 'designated use'" and that "NYSDEC does not equate its 'suitability' designations, which are separate from its 'best usage' designations, to be 'designated uses.'" You further state, "[i]nstead, by adding the suitability, it was NYSDEC's intent to improve the water quality of the Class SD and Class I saline surface waters towards achieving Congress' goal in the Clean Water Act of rendering all the nation's waters fit for swimming. NYSDEC purposely used the term 'suitable' instead of 'best usage' because it was not NYSDEC's intent to impose, at that time, the more stringent criteria (e.g., enterococcus) required for waters whose best usage is primary contact recreation. NYSDEC will continue to evaluate and assess the appropriate criteria to be applied to the Class SD and Class I waters."

The explanation provided in your June 13, 2018 letter runs counter to NYSDEC's record for its 2015 rulemaking, including NYSDEC's stated purpose in its proposed and final rules: "[t]o amend New

[1] For Class SD waters, NYSDEC revised the classification and use description, at 6 NYCRR 701.14, by adding the phrase, "...the water quality shall be suitable for primary and secondary contact recreation, although other factors may limit the use for these purposes."

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York's water quality standards for Class I and Class SD waters to meet the "swimmable" goal of the Clean Water Act," "require that the quality of Class I and Class SD waters be suitable for 'primary contact recreation,' and to adopt corresponding total and fecal coliform standards in 6 NYCRR Part 703 (Part 703)." In the notice for its public hearing for the 2015 Rulemaking (Attachment A), NYSDEC stated that the hearing is on NYSDEC's "proposal surface waters be suitable for primary contact recreation, such as swimming." As reflected in the transcript for the public hearing (Attachment B), NYSDEC stated that "[t]he purpose of this rule is to ensure that the Class 1 and Class SD waters meet the swimmable goal of the federal Clean Water Act. The proposed rule would accomplish this by requiring, in 6 NYCRR Part 701, that the water quality for Class I and Class SD waters be suitable for primary contact recreation, and in 6 NYCRR Part 703, by adopting corresponding standards for total and fecal coliforms to protect the quality of Class I and Class SD waters for this use." In addition, NYSDEC made numerous statements in its response to comments on the 2015 Rulemaking that requiring water quality to be suitable for primary contact recreation protects these waters for primary contact recreation (Attachment C). In summary, as a result of EPA's review of the public record for the 2015 rulemaking, EPA believes that the record reflects that NYSDEC's intent for this rulemaking is for Class SD and Class I waters to support primary contact recreation.

We note that pursuant to 40 CFR § 131.3(f), "[d]esignated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained." EPA has long stated that designated uses communicate a state's environmental objectives for its waters and drive on-the-ground water quality decision-making and improvement. However, if it is NYSDEC's current intent that Class SD and I waters not support primary contact recreation, NYSDEC will need to provide to EPA additional information as specified below, along with an action plan, for EPA to reconsider its disapproval of the revised criteria:

- Please explain what actions NYSDEC will take to correct the record for the 2015 Rulemaking and provide a demonstration of how the criteria will protect NYSDEC's intended designated use(s) consistent with 40 CFR § 131.10.
- Please also identify the relevant administrative procedures under State law that NYSDEC will follow to inform the public of the change in intent and purpose of the water quality standards that NYSDEC adopted for Class SD and I waters.
- NYSDEC's revisions to its water quality standards include the phrase "...the water quality shall be suitable for primary contact recreation, although other factors may limit the use for this purpose." Although you are clear in your June 13, 2018 letter about what this "suitability" language does not mean, please explain what this "suitability" language does mean for purposes of water quality standards and the CWA requirements, particularly given that NYSDEC simultaneously revised the water quality criteria that apply to Class SD and I waters but the revised water quality criteria do not render the water quality "suitable" for primary contact recreation.

Please note that, pursuant to 40 CFR §§ 131.5(6) and 131.6(e), where the state develops a new record to support the revised water quality standards and submits that record to EPA for review, the submission would need to be accompanied by an updated certification by the State Attorney General. Importantly, EPA notes that NYSDEC's stated position in its June 13, 2018 letter may impact Class C, D, and SC waters, because NYSDEC's regulations for these classes of waters also include the "suitability" language and do not include a "best usage" of primary (or secondary) contact recreation. Thus, it is important that we work together to determine the appropriate path forward to make clear NYSDEC's intended level of protection for these waters as well.

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I appreciate our close working relationship on this and other matters and look forward to our continued collaboration with the NYSDEC to further improve New York State's water quality standards. If you have any questions, please call me at 212-637-4125 or have your staff contact Alyssa Arcaya, Chief, Clean Water Regulatory Branch at 212-637-3730.

Sincerely,

Javier Laureano, M.P.A., Ph.D.
Director
Clean Water Division

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