

**Appendix D**  
**Memorandum of Understanding**

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**Memorandum of Understanding between the New York State Department of  
Environmental Conservation and the County of Onondaga**

WHEREAS:

1. The New York State Department of Environmental Conservation (“NYSDEC”) is an agency of the State of New York, which among other things, has the authority to classify the waters of New York State and adopt water quality standards (“WQS”). See Environmental Conservation Law §§ 17-0301, *et seq.* (hereafter “ECL”); and 6 NYCRR Part 609.
2. The County of Onondaga (“County”) and Onondaga County Department of Water Environment Protection (“OCDWEP”) own and operate the Metropolitan Syracuse (“Metro”) Wastewater Treatment Plant (“WWTP”), which is the largest of the County’s 6 WWTPs and discharges to Onondaga Lake. In connection with owning and operating the Metro WWTP, the County and WEP are also responsible for Combined Sewer Overflows (“CSOs”) in the County and ensuring that, consistent with EPA’s CSO Control Policy (“CSO Policy”) and State Pollutant Discharge Elimination System permits (SPDES) permits issued by NYSDEC, discharges from County CSO’s attain WQS.
3. NYSDEC and the County entered into a Consent Judgment in 1989 to resolve Clean Water Act (“CWA”) litigation in the United States District Court for the Northern District of New York (88-CV-0066) and to bring effluent discharges from the Metro WWTP and CSOs into compliance with WQS (hereafter “Consent Judgment”), which Consent Judgment was subsequently amended four times over the next twenty years, resulting in the 2009 Fourth Stipulation and Order to the Consent Judgment (hereafter “ACJ”). The first Consent Judgment amendment, signed in 1998, committed the County to, *inter alia*, conduct major infrastructure upgrades at Metro WWTP, comply with effluent limits for ammonia and phosphorous, construct and operate floatables control, comprehensive water quality and biological monitoring of Onondaga Lake and its tributaries, CSO controls, 85% CSO volume capture, and reporting requirements. The ACJ, filed November 16, 2009, significantly altered the terms of and approach to CSO control by the County, increasing CSO volume control to 95% capture by December 31, 2018, which is higher than the federal CSO Policy guidelines’ “presumptive” compliance goal of 85%, and emphasizing an additional green infrastructure approach to CSO control. The County has achieved the required 95% capture rate and have stated they have exceeded this ACJ requirement. Despite considerable public investment and the fulfillment of all construction milestones and the attainment of all CSO capture goals set forth in the ACJ, CSOs continue to cause and/or contribute to the nonattainment of WQS for fecal coliform in CSO tributaries. The County is currently advancing select CSO Abatement projects pursuant to remaining ACJ obligations pertaining to tributary water quality compliance and is in the process of negotiating a Consent Order with NYSDEC to replace the ACJ, subject to court approval (“Consent Order”); which Consent Order will likewise commit the County to planning, designing and implementing limited additional CSO Abatement projects, in accordance with an approved Interim CSO Corrective Measure Plan, concurrent with the actions agreed to in this Memorandum of Understanding (“MOU”).

4. As memorialized by this MOU, NYSDEC and the County have agreed to a series of work efforts to examine, review, and if appropriate, seek revision of water body classifications and/or site-specific WQS (collectively, "Site-Specific Standards") for fecal coliform parameters in the CSO tributaries to Onondaga Lake (i.e., Harbor Brook, Ley Creek, Onondaga Creek) to ensure that CSO Abatement projects, as approved by NYSDEC, result in compliance with applicable WQS.

#### Regulatory Framework for State WOS Review

5. The CWA calls upon states to establish waterbody classifications and WQS, which consist of uses designated for the water bodies and criteria to protect those uses. The CWA also establishes an anti-degradation policy to ensure that where waterbodies do, or through water quality improvements can, accommodate certain uses, those uses will be protected.

6. In New York, waterbody classifications "provide for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the water, and take into account the use and value of public water supplies, . . ." 6 NYCRR § 609.1.

7. The implementing regulations of the CWA recognize, however, that in some situations, certain designated uses are not in fact achieved in a water body, and those uses cannot be attained due to any one or more of the six factors set forth at 40 CFR Part 131.10(g). In such situations, and consistent with the ECL, the overall anti-degradation policy of the CWA and its implementing regulations, the federal regulations allow for revising designated uses and/or WQS for such water bodies. See 40 CFR § 131.10(g). Any such revisions, however, must also comply with Article 17 of the ECL. See ECL § 17-0301.

8. The federal regulations and EPA guidance provide State WQS authorities with a mechanism for reviewing and revising WQS. In particular, State WQS authorities may undertake a Use Attainability Analysis ("UAA"), a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological and economic factors as described [above]." 40 CFR §131.3(g).

9. In particular, UAAs may be appropriate "to reflect site-specific conditions including those related to CSOs" and "site specific criteria for a particular pollutant", and the CSO Policy encourages intermunicipal agreements as to the "data, information and analyses needed" and "monitoring protocols and models that will be used" to review applicable WQS. CSO Policy, 59 FR at 18694; 33 U.S.C. § 1342(q).

10. In New York, entities, including municipalities, may petition the NYSDEC for reclassification of waters of the State. ECL § 17-0301, 6 NYCRR Part 609.

#### Coordinating CSO Long-Term Planning with Water Quality Standards Reviews

11. The CSO Policy establishes certain key principles to ensure that CSO controls are cost-effective and meet the requirements of the CWA. The CSO Policy expressly recognizes

that there are circumstances where appropriate CSO abatement may not result in the attainment of current WQS. In such cases, the CSO Policy explains that the State WQS authority may revise Site-Specific Standards as part of the planning process for developing long-term CSO control plans to reflect the site-specific wet weather impacts of CSOs.

12. The CSO Policy sets forth a series of steps that the municipality and the permitting authority should undertake in order to develop an approved approach to managing CSO discharges, and examining WQS attainment and revision. A key principle in the CSO Policy is that the development of a municipality's Long-Term Control Plan ("LTCP") should be coordinated with the review and appropriate revision of WQS to ensure that the LTCP will be sufficient to meet WQS. CSO Policy § III.A. The CSO Policy is predicated on the fact that EPA regulations and guidance provide states with flexibility to adapt WQS to reflect site-specific conditions, including those related to CSOs. *Id.* § III.B.

13. To better explain how the revision of WQS envisioned under the CSO Policy should occur, EPA developed the July 31, 2001 Guidance: *Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* ("2001 EPA Guidance"). The 2001 EPA Guidance suggests close coordination among CSO communities, NPDES authorities, State Water Directors, EPA, and the public in the WQS review process and the development of an LTCP designed to meet the resulting WQS. *Id.* at 36-37.

14. The 2001 EPA Guidance provides that the NPDES authority will establish a coordination team, including, at a minimum, representatives of the municipality and the state, to oversee LTCP development and WQS review. *Id.* at 39. It also recommended that the coordination team include EPA. *Id.* The coordination team will agree on the data and analysis to support LTCP development and WQS review. *Id.* at 40.

15. The data and analysis should include, among other things: monitoring and modeling of the sewer system and its impacts on the receiving water body; a detailed description of existing and designated uses of the water body; analyses of the potential for use attainment; and the evaluation of alternative control levels, including cost and performance information for each control alternative evaluated. *Id.* at 39-41. The 2001 EPA Guidance recognizes that these elements are common to both the LTCP and the WQS review, and promotes "integrating water quality standards reviews with the development and implementation of an affordable level of CSO control." *Id.* at 41.

16. Based on that analysis, the municipality submits a draft LTCP to the state, which includes the data and analysis assessing the attainability of current WQS. *Id.* at 44. If the state agrees that the data and analysis support the revision of WQS, based on the criteria set forth in 40 CFR § 131.10(g), the state should proceed to propose and adopt the revisions. *Id.* at 45. If the WQS revision differs from what the municipality anticipated, the draft LTCP must be revised. *Id.* at 46.

17. After the WQS are reviewed and the final LTCP is developed, the municipality implements the control measures of the final LTCP and performs post-construction monitoring to ensure that the controls are operating as anticipated and that the discharges comply with

the WQS as revised. *Id.* at 47.

18. The CSO Policy provides that if the WQS review and revision is still underway at the time a SPDES permit is issued for the discharge, a WQS variance may be appropriate where the state is uncertain as to whether a standard can be attained. *See* CSO Policy § III.B; *see also*, NYSDEC Division of Water Technical and Operational Guidance Series (TOGS) 1.6.3(1). As envisioned by the CSO Policy, a variance would allow a SPDES permit containing CSO discharges to be written to meet the WQS while the analyses are underway, and time is needed for the state to conduct additional analyses on the attainability of the standard. *Id.*

19. NYSDEC is authorized to grant variances from water quality based effluent limitations under certain circumstances. 6 NYCRR § 702.17; TOGS 1.6.3(1).

#### Overview of Efforts to Abate CSOs in Onondaga County

20. Pursuant to Section 208 of the CWA, the 1989 Consent Judgment, as amended in 1998, 2006, 2008 and 2009 (ACJ), which also serves as the County's LTCP, and the July 2017 SPDES permit, the County is undertaking a program to evaluate and abate CSOs and improve water quality. In keeping with the applicable policy and guidance and goal to terminate the ACJ, the County submitted a draft LTCP to NYSDEC in 2019 ("County LTCP"). The County LTCP has not yet been approved by NYSDEC and is in the process of being revised in accordance with applicable federal and state laws, regulations and CSO guidance and as set forth in this MOU.

21. As a result of current and historic publicly available information concerning sampling, monitoring and remediation associated with Onondaga Lake and its environs pursuant to CERCLA and the CWA, or otherwise, performed by municipal, County, state and federal authorities and private parties, as well as the sampling and monitoring performed by the County pursuant to the ACJ, e.g., Ambient Monitoring Plan, and otherwise, there exists a wealth a data, information and analyses on Onondaga Lake and CSO tributary water quality and a familiarity with and general approval of the County's monitoring protocols and models, i.e., the SWMM model.

22. In accordance with the CSO Policy, the revised County LTCP shall include a "knee-of-the-curve" approach, evaluate cost versus water quality benefits and recognize the point where each additional dollar spent results in diminishing water quality improvements. The County also submitted a Financial Capability Assessment. Although the County LTCP does not demonstrate attainment of WQS in CSO tributaries, given the site-specific water quality considerations of each site, the revised County LTCP shall represent cost-effective CSO controls which, when constructed, will significantly improve water quality in those waterbodies.

23. In light of the fact that implementation of the County LTCP will not result in attainment in CSO tributaries of WQS under all circumstances, and consistent with the State and federal authority, policy and guidance cited above, under this MOU, the County will complete

UAAs for CSO affected segments that will be necessary to support NYSDEC's review and, if appropriate, revision of WQS and approval of the County LTCP. In this regard, the County will initiate development of a revised County LTCP. Through the approaches described in the CSO Policy, the County LTCP will evaluate, among other things: (1) the impacts of implementing the CSO abatement projects set forth in the County LTCP; (2) if any additional reasonable CSO control measures may be available to meet WQS; and (3) the impacts of elimination of CSOs through complete sewer separation, to determine if WQS could ever be achieved in each of the waterbodies affected by CSOs.

24. The County, together with NYSDEC and in coordination with EPA, will focus on reviewing and analyzing existing information and data to identify existing and desired waterbody and riparian uses and impediments, water quality issues, and a prioritization of use goals, and review any plans and/or standard operating procedures, for use in developing a UAA. In particular, the UAA will be focused to site-specific conditions of Harbor Brook, Onondaga Creek and Ley Creek related to CSO contributions and fecal coliform parameters, a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological and economic factors as described [above]." 40 CFR §131.3(g). CSO Policy, 59 FR at 18694; 33 U.S.C. § 1342(q).

25. The County has agreed to provide the necessary resources to undertake and finish the technical requirements of the UAA/WQS review process and will be utilizing the existing exhaustive data set available for the CSO tributaries in the development of the UAA, as well as any additional reasonably necessary data to characterize CSO pollutants and/or pollutant loadings in the tributaries. Furthermore, the UAA prepared by the County will be limited in that it will only focus on segments of Onondaga Creek, Harbor Brook, and Ley Creek that are impacted by CSOs and any areas impacted downstream of CSO discharges.

NOW THEREFORE:

Scope of Work

1. The County and NYSDEC acknowledge and agree that the scope of work necessary to develop a UAA shall be limited to the segments of Harbor Brook, Onondaga Creek and Ley Creek impacted by CSOs and areas impacted downstream of CSO discharges; recreational use water quality standards, namely total and fecal coliforms parameters as listed in 6 NYCRR 703.4; and, any other waterbody uses impacted by CSOs.
2. The County and NYSDEC further acknowledge the value of existing and relevant information, data, analyses and modeling pertaining to the physical, chemical, biological and economic qualities of Onondaga Lake, its tributaries, environs and surroundings; and agree to the County's use of such existing data, analyses, models and protocols for the UAA development. Notwithstanding the existing and relevant data, the parties also acknowledge that whenever it reasonably appears, after a review of all such existing and relevant data, that additional data is necessary to measure pollutants in CSOs that cause or contribute to water quality criteria excursions or to identify sources beyond CSO discharges that may be contributing to non-attainment, additional tributary data both

downstream and immediately upstream of the individual CSOs shall be collected. Water sample collection sites shall be at the same location as previously approved by the NYSDEC for the County's AMP, as set forth below:

- a. Onondaga Creek – Dorwin Ave. (upstream of CSOs) and Kirkpatrick Street (downstream of CSOs)
  - b. Harbor Brook – Velasko Rd. (upstream of CSOs) and Hiawatha Blvd. (downstream of CSOs)
  - c. Ley Creek – Thompson Rd. (upstream of CSOs) and Park St. (downstream of CSOs)
3. The County and NYSDEC agree that any determination as to the reasonable need for additional data collection, sampling, and/or monitoring shall wait until a review of all existing and relevant data to determine any data gaps and/or the needs of the UAA application are complete. NYSDEC and the County will cooperate and coordinate with respect to conducting a timely review of existing data, with NYSDEC initiating the process of indexing the data, reviewing for QA/QC, working with the County to arrange existing data into a usable format, and analyzing said data. It is the parties' intent and goal to complete the review of existing and relevant data within one (1) year of executing a Consent Order so that any additional data collection and the subsequent preparation and submittal of a UAA can be accomplished within the anticipated five-year duration of said Consent Order.

#### County Work

1. The County is solely responsible for preparing, revising if necessary, and implementing the County LTCP.
2. The County will evaluate the effects of implementing the County LTCP using a watershed-based approach to determine any causes of non-attainment of WQS and identify the highest reasonably attainable uses of the waterbodies via control of County CSOs. The County will not be responsible for control of other third party sources of impairment. The revised County LTCP will provide the technical background for NYSDEC's review of Site-Specific Water Quality Standards. The revised County LTCP will support the process on a site-specific and tributary-specific basis and will describe the status of the nine EPA recommended elements of a LTCP. Further, the revised County LTCP will examine the extent to which additional reasonable CSO control measures may result in WQS being met.
3. The County will produce UAA reports ("UAA Reports") for each waterbody segment that has CSO outfalls, to identify what aquatic life, recreational, and aesthetic uses can be attained through implementation of the County LTCP, as revised. These UAA Reports will identify existing uses, use impediments, and reasonably attainable uses based on modeling the impacts of implementing the County LTCP. The UAA Reports will also analyze, for each tributary, the applicability of the criteria set forth in 40 CFR § 131.10(g) for modifying WQS for fecal coliform.

4. Finally, the County, if it believes circumstances warrant, will petition NYSDEC for review and revision of Site-Specific Standards of such waters in accordance with 6 NYCRR Part 609 ("Petition").

#### NYSDEC Work

1. NYSDEC will work with the County to review the revised County LTCP and UAA Reports and strive to identify regulatory options to ensure the County's compliance with WQS. Upon the County's completion of UAA Reports, NYSDEC will use the reports, in addition to any other appropriate analyses, as a basis for regulatory reviews of Site-Specific Standards in Harbor Brook, Onondaga Creek, and Ley Creek in accordance with this MOU, including the above Scope of Work, and standards set forth in 40 CFR § 131.10(g) and 6 NYCRR Part 609.
2. NYSDEC will commence such regulatory reviews identified above in a timely fashion upon the County's completion of the UAA Reports and submission of Petitions or any combined UAA Report and Petition. NYSDEC shall diligently proceed with those reviews and, if appropriate, revisions to the Site-Specific Standards in accordance with, and subject to, all applicable laws and procedures including, but not limited to, public review by the CSO Community, the State Environmental Quality Review Act, ECL Art. 8, ECL Art. 17, the State Administrative Procedures Act, and 6 NYCRR Part 609.

#### Schedule

The County and NYSDEC shall collectively, to the maximum extent practicable, diligently progress submission, review, and approval of the County LTCP and, if appropriate, revisions to the Site-Specific Standards. The County's and NYSDEC's goal is to complete a review of all existing and relevant data within the first year of the Consent Order, with any necessary additional data collection/monitoring to be completed by the fourth year, so as to permit finalization, submission, and review of any UAA Reports and revised County LTCP in the fifth and final year of such Consent Order.

In the event a UAA is approved by EPA, the Consent Order and Interim CSO Corrective Measure Plan may be converted into a revised County LTCP with UAA.

#### Termination

This MOU shall be deemed completely satisfied and shall terminate when all Petitions for review and appropriate revision of use classifications have been processed and upon completion of Order on Consent.

Nothing in this MOU shall be construed as effecting the Parties' obligations under applicable federal or state laws or regulations.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

By: James M. Tierney  
James M. Tierney,  
Deputy Commissioner of Water Resources

Dated: 9-29-2020

ONONDAGA COUNTY, NEW YORK

copy

By: J. Ryan McMahon, II  
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County Executive

Dated: 10/15/20