

**Combined Sewer Overflows
Long Term Control Plan
Inter-Municipal Agreement
For Phase II: Implementation**

This Inter-Municipal Agreement (“Agreement”) is dated February 25, 2015 and entered into by and among the CITY OF ALBANY (“Albany”), the ALBANY WATER BOARD, the CITY OF COHOES (“Cohoes”), the VILLAGE OF GREEN ISLAND (“Green Island”), the CITY OF TROY (“Troy”), the CITY OF RENSSELAER (“Rensselaer”), and the CITY OF WATERVLIET (“Watervliet”).

RECITALS

Article 5-G of the New York General Municipal Law authorizes municipal corporations to perform their functions, duties and powers on a cooperative basis with other municipal corporations pursuant to municipal cooperation agreements.

Title 1-A of Article 2 of the New York Local Finance Law authorizes municipal corporations to finance on a joint or several basis certain water, sewage or drainage projects that such municipal corporations have agreed to undertake jointly on a cooperative basis pursuant to Article 5-G of the New York General Municipal Law.

Each of Albany, Cohoes, Green Island, Troy, Rensselaer, and Watervliet (collectively, the “Albany Pool Communities,” or the “Parties”) entered a Municipal Cooperation Agreement dated January 1, 2007 to prepare a Combined Sewer Overflow Long Term Control Plan (“LTCP”) for submission to, and approval by, the New York State Department of Environmental Conservation (“NYSDEC”).

The Albany Pool Communities and NYSDEC entered an administrative Order on Consent dated January 15, 2014 (“Consent Order”), and NYSDEC approved the Albany Pool Communities’ LTCP simultaneously with its execution of the Consent Order. A copy of the Consent Order is attached as Appendix A.

The Albany Pool Communities wish to enter this Agreement pursuant to the Consent Order, in order to provide for the implementation of the LTCP by the Parties, to establish the Parties’ respective responsibilities with regard to the implementation of the LTCP, in order to assist the Parties in implementing the LTCP, to provide for the creation of a local development corporation, and to authorize the financing of all, or a portion, of the costs of the LTCP pursuant to the issuance of debt by the Albany Pool Communities.

NOW, THEREFORE, in consideration of the above and the promises and the mutual covenants and conditions contained in this Agreement, the Parties agree as follows.

ARTICLE 1

DEFINITIONS AND INTERPRETATION

SECTION 1.1 DEFINITIONS. As used in this Agreement, the following terms shall have the meanings set forth below.

(A) “Albany” means the City of Albany, which is represented in this Agreement, and as to all matters to be performed pursuant to this Agreement, by the Albany Water Board.

(B) “Albany Pool Communities” or “Parties” means Albany, Cohoes, Green Island, Troy, Rensselaer, and Watervliet.

(C) “Allocation Formula” means the percentages of total payments to be paid by each of the Albany Pool Communities, as set forth in Section 5.2, below.

(D) “Cohoes” means the City of Cohoes, New York.

(E) “CSO” means combined sewer overflow.

(F) “Defaulting Party” means a party in default of any obligation under this Agreement, as specified in Section 6.4.

(G) “EFC” means the New York State Environmental Facilities Corporation.

(H) “Green Island” means the Village of Green Island, New York.

(I) “Governmental Body” means any governmental department, commission, board, regulatory authority, bureau, legislative body, agency, or instrumentality of any federal, state, local or municipal government or domestic court.

(J) “IMA Board” means the Board of Directors of the Parties, as established by this Agreement.

(K) “Local Development Corporation” or “LDC” means the Local Development Corporation that the Parties agree to incorporate and organize under this Agreement.

(L) “Long Term Control Plan” or “LTCP” means the Albany Pool CSO Long Term Control Plan dated June 30, 2011 together with the Albany Pool CSO Long Term Control Plan Supplemental Documentation, dated October 2013, as both were approved by the NYSDEC on January 15, 2014 by letter from Koon Tang of the NYSDEC to the Albany Pool Communities, as well as any amendments or revisions to those documents that may be made from time to time and approved in writing by the NYSDEC.

(M) “LTCP Project Costs” means the cost of the projects identified in the approved LTCP as projects to be implemented by the Albany Pool Communities. LTCP Project Costs include all costs, as required to implement the LTCP, of planning, design, procurement, permitting, administration, implementation, insurance, construction, and post-construction inspection and approval, costs of issuance related to all financings for the LTCP Projects, and

costs incurred under this Agreement of indemnification and insurance as provided in Section 4.5 below. LTCP Project Costs include costs to operate the LDC, such as overhead, salaries, insurance, and expenses of the LDC. Costs of management, operation and maintenance of facilities and equipment are LTCP Project Costs if such activities are within the purview of the LTCP. LTCP Project Costs also include costs related to region-wide projects required by the LTCP, such as costs of management and development of plans and manuals. Notwithstanding any other provision of this Agreement, LTCP Project Costs do not include costs of projects identified in the LTCP as projects to be implemented by the Albany and Rensselaer County Sewer Districts, or any projects separately required by a Party's individual Consent Order with NYSDEC or any other agency with jurisdiction.

(N) "NYSDEC" means the New York State Department of Environmental Conservation.

(O) "Consent Order" means the administrative Order on Consent between the Albany Pool Communities, the Albany and Rensselaer County Sewer Districts, and NYSDEC, dated January 15, 2014, including all appendices thereto, and any revisions, amendments, or other modifications thereto, as may be approved in writing by the Parties and NYSDEC from time to time. A copy of the Consent Order is attached as Appendix A.

(P) "Party" means any single party to this Agreement.

(Q) "Planning Commission" or "CDRPC" means the Capital District Regional Planning Commission, having an office at One Park Place, Suite 102, Albany, New York 12205.

(R) "Rensselaer" means the City of Rensselaer, New York.

(S) "State" means the State of New York.

(T) "Troy" means the City of Troy, New York.

(U) "Watervliet" means the City of Watervliet, New York.

SECTION 1.2. INTERPRETATION. In this Agreement, unless the context otherwise requires:

(A) The terms "hereby," "hereof," "herein," "hereunder," and any similar terms refer to this Agreement, and the term "hereafter" means after, and the term "heretofore" means before, the date of this Agreement. References herein to any "Article" shall be an Article of this Agreement unless otherwise specified.

(B) Words importing the singular number mean and include the plural number and vice versa.

(C) Words referring to persons include firms, companies, associations, general partnerships, limited partnerships, trusts, business trusts, corporations and other legal entities, including public bodies, as well as individuals.

(D) The table of contents and any headings preceding the text of the Articles of this

Agreement shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

ARTICLE 2 REPRESENTATIONS AND WARRANTIES

SECTION 2.1. ALBANY REPRESENTATIONS AND WARRANTIES. Albany hereby represents and warrants to each of the Albany Pool Communities and the Planning Commission that:

(A) Albany is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement. Albany is represented as to all matters in this Agreement by the Albany Water Board, which is a water board validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations and the obligations of Albany under this Agreement.

(B) Albany has duly executed and delivered this Agreement, and this Agreement has also been duly executed and delivered by the Albany Water Board, and constitutes the legal, valid, and binding obligation of Albany, enforceable against Albany in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Albany of this Agreement nor the performance by Albany of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Albany, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Albany is a party or by which Albany or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Albany of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Albany or any other Governmental Body in order for this Agreement to be carried out.

(E) Albany has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Albany of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Albany's best knowledge, threatened against Albany wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Albany in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Albany of its obligations hereunder or under any such other agreement or instrument.

(G) Albany has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

SECTION 2.2. COHOES REPRESENTATIONS AND WARRANTIES. Cohoes hereby represents and warrants to each of the other Albany Pool Communities and the Planning Commission that:

(A) Cohoes is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

(B) Cohoes has duly authorized the execution and delivery of this Agreement, and this Agreement has been duly executed and delivered by Cohoes and constitutes the legal, valid and binding obligation of Cohoes, enforceable against Cohoes in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Cohoes of this Agreement nor the performance by Cohoes of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Cohoes, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Cohoes is a party or by which Cohoes or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Cohoes of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Cohoes or any other Governmental Body in order for this Agreement to be carried out.

(E) Cohoes has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Cohoes of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Cohoes' best knowledge, threatened against Cohoes wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Cohoes in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Cohoes of its obligations hereunder or under any such other agreement or instrument.

(G) Cohoes has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

SECTION 2.3. GREEN ISLAND REPRESENTATIONS AND WARRANTIES. Green Island hereby represents and warrants to each of the other Albany Pool Communities that:

(A) Green Island is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

(B) Green Island has duly authorized the execution and delivery of this Agreement, and this Agreement has been duly executed and delivered by Green Island and constitutes the legal, valid and binding obligation of Green Island, enforceable against Green Island in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Green Island of this Agreement nor the performance by Green Island of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Green Island, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Green Island is a party or by which Green Island or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Green Island of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Green Island or any other Governmental Body in order for this Agreement to be carried out.

(E) Green Island has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Green Island of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Green Island's best knowledge, threatened against Green Island wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Green Island in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Green Island of its obligations hereunder or under any such other agreement or instrument.

(G) Green Island has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

SECTION 2.4. RENSSELAER REPRESENTATIONS AND WARRANTIES. Rensselaer hereby represents and warrants to each of the other Albany Pool Communities and the Planning Commission that:

(A) Rensselaer is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

(B) Rensselaer has duly authorized the execution and delivery of this Agreement, and this Agreement has been duly executed and delivered by Rensselaer and constitutes the legal, valid and binding obligation of Rensselaer, enforceable against Rensselaer in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Rensselaer of this Agreement nor the performance by Rensselaer of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Rensselaer, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Rensselaer is a party or by which Rensselaer or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Rensselaer of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Rensselaer or any other Governmental Body in order for this Agreement to be carried out.

(E) Rensselaer has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Rensselaer of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Rensselaer's best knowledge, threatened against Rensselaer wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Rensselaer in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Rensselaer of its obligations hereunder or under any such other agreement or instrument.

(G) Rensselaer has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

SECTION 2.5. TROY REPRESENTATIONS AND WARRANTIES. Troy hereby represents and warrants to each of the other Albany Pool Communities and the Planning Commission that:

(A) Troy is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

(B) Troy has duly authorized the execution and delivery of this Agreement, and this Agreement has been duly executed and delivered by Troy and constitutes the legal, valid and binding obligation of Troy, enforceable against Troy in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Troy of this Agreement nor the performance by Troy of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Troy, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Troy is a party or by which Troy or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Troy of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Troy or any other Governmental Body in order for this Agreement to be carried out.

(E) Troy has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Troy of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Troy's best knowledge, threatened against Troy wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Troy in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Troy of its obligations hereunder or under any such other agreement or instrument.

(G) Troy has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

SECTION 2.6. WATERVLiet REPRESENTATIONS AND WARRANTIES.

Watervliet hereby represents and warrants to each of the other Albany Pool Communities and the Planning Commission that:

(A) Watervliet is a municipal corporation validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

(B) Watervliet has duly authorized the execution and delivery of this Agreement, and this Agreement has been duly executed and delivered by Watervliet and constitutes the legal, valid and binding obligation of Watervliet, enforceable against Watervliet in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) Neither the execution nor the delivery by Watervliet of this Agreement nor the performance by Watervliet of its obligations hereunder (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to Watervliet, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which Watervliet is a party or by which Watervliet or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No approval, authorization, order or consent of, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery by Watervliet of this Agreement, except such as have been duly obtained or made. No ordinance must be enacted by Watervliet or any other Governmental Body in order for this Agreement to be carried out.

(E) Watervliet has no knowledge of any applicable law in effect on the date as of which this representation is being made which would prohibit the performance by Watervliet of this Agreement and the transactions contemplated hereby.

(F) There is no action, suit or other proceeding, at law or in equity, before or by any court or Governmental Body, pending, or, to Watervliet's best knowledge, threatened against Watervliet wherein an unfavorable decision, ruling or finding would materially and adversely affect the validity or enforceability of this Agreement or any other agreement or instrument to be entered into by Watervliet in connection with the transaction contemplated hereby, or which would materially and adversely affect the performance by Watervliet of its obligations hereunder or under any such other agreement or instrument.

(G) Watervliet has entered into this Agreement to qualify the LTCP as a project under New York Local Finance Law § 15.00 and thereby authorizing the issuance of debt by the Parties to finance all or a portion of the costs of undertaking the LTCP.

ARTICLE 3 PURPOSE, SCOPE, AND ACCESS

SECTION 3.1 PURPOSE. The purpose of this Agreement is to allow the Albany Pool Communities to implement the Long Term Control Plan, in compliance with the requirements applicable to the LTCP and to the Parties' storm water and wastewater management facilities, to carry out the requirements of the Consent Order, to authorize the Albany Pool Communities to finance on a several basis all or a portion of the costs of the LTCP, to establish the Parties' respective responsibilities with regard to the implementation of the LTCP and with regard to the control of CSO discharges from the combined sewer system addressed by the Consent Order.

SECTION 3.2 COOPERATION. The Parties shall cooperate with respect to all matters necessary and appropriate to implement the Long Term Control Plan and to carry out the requirements of the Consent Order.

SECTION 3.3 ACCESS AND INTEREST. To the extent necessary and appropriate to implement the LTCP and to provide for the issuance of debt, if applicable, each Party hereby grants rights of access, use, and occupancy of property owned or controlled by such Party, to

each of the other Parties, the CDRPC, the Local Development Corporation, the appropriate County Sewer District, and any person or entity assisting or acting on behalf of the above entities in implementing the LTCP, including consultants, contractors, attorneys, agents, officers, and employees of the above entities. This grant of access and interest shall continue for as long as necessary to implement the LTCP, and shall survive the expiration or earlier termination of this Agreement.

SECTION 3.4. TERM. The term of this Agreement shall commence as of February 25, 2015. Since some of the debt required or permitted to be issued under this Agreement will qualify for a forty year period of probable usefulness pursuant to Section 11.00.a.4 of the Local Finance Law, the term of this Agreement shall continue through February 25, 2055. This Agreement may be renewed upon its expiration or earlier termination, by written agreement of the Parties.

ARTICLE 4 ORGANIZATION

SECTION 4.1 BOARD OF DIRECTORS. The Parties to this Agreement hereby establish a Board of Directors (“IMA Board”), which shall be comprised of: the Chief Elected Officials of Cohoes, Green Island, Rensselaer, Troy, and Watervliet; and the Chair of the Albany Water Board. The Chief Executive Officers of the Albany County Sewer District and the Rensselaer County Sewer District may serve as advisory, non-voting Directors, subject to the agreement of the Parties. Each of the Directors may appoint a designee to represent the Director on the Board. The IMA Board shall, at its first meeting and annually thereafter, elect one of its Directors as the Chair of the IMA Board.

SECTION 4.2 APPROVALS OF THE IMA BOARD. The approval of the IMA Board is required for any of the following.

(A) Documents required to incorporate the LDC, and the determination to file documents and take other actions necessary to incorporate the LDC, but documents required to organize the LDC shall not be subject to the approval of the IMA Board.

(B) In connection with the financing of the implementation of the LTCP pursuant to this Agreement, (1) any issuance of debt by all or any combination of the Parties, and (2) any execution and delivery of a project finance agreement by any of the Parties with the New York State Environmental Facilities Corporation. The IMA Board’s approval shall not be required for the issuance of debt by the LDC, which shall be subject to appropriate approvals of the LDC.

(C) Amendments or revisions to the LTCP.

(D) Amendments or revisions to the Consent Order.

(E) Amendments or revisions to the Responsibility Matrix appended to this Agreement as Appendix B.

(F) Any decision to pay penalties to NYSDEC under the Consent Order on behalf of all of the Albany Pool Communities, or to designate all or part of any penalty levied by

NYSDEC against any Party or Parties under the Consent Order as an LTCP Project Cost.

(G) Any action required by the IMA Board or the Parties under Section 4.5 below.

(H) Determinations regarding a Party's default or constructive withdrawal from this Agreement, in accordance with Section 6.4 below.

SECTION 4.3 MEETINGS OF THE IMA BOARD.

(A) Regular meetings of the IMA Board shall be held at such times and places as may from time to time be fixed by the IMA Board. Notice need not be given of regular meetings of the IMA Board. Special meetings of the IMA Board may be held at any time upon the call of the Chair of the IMA Board and shall be called by the Chair or the Planning Commission if directed by a majority of Directors. Written notice of each special meeting of the IMA Board shall be sent to each Director not less than two business days before such meeting. Attendance by a Director at a meeting of the IMA Board without protesting the lack of notice at the beginning of the meeting waives the requirement of notice as to that Director.

(B) The transactions of any meeting of the IMA Board, however called and noticed, or whenever held, shall be as valid as though had at a meeting duly held after regular call and notice when, either before or after the meeting, each of the Directors not present at the meeting delivers to the Planning Commission a written waiver of notice. Neither the business to be transacted at the meeting nor the purpose of such meeting need be specified in the waiver of notice of the meeting. All such waivers shall be made a part of the minutes of the meeting.

(C) Any group of Directors holding a total of at least seven (7) voting points, as set forth in Section 4.4 below, shall constitute a quorum for the transaction of the business of the IMA Board. If a quorum is not present at any meeting of the IMA Board, the directors present may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

(D) Any action which may be authorized or taken at a meeting of the IMA Board may be authorized or taken without a meeting, by conference telephone call, if such actions and the votes, if any, of the Directors of the IMA Board are recorded in a writing or writings signed by all of the Directors, which writing or writings shall be filed with or entered upon the records of the Albany Pool Communities as maintained by the Planning Commission.

SECTION 4.4 VOTES OF THE IMA BOARD. Each Party's representative on the IMA Board shall hold voting points for actions of the IMA Board, for a total of nine voting points, as follows: Albany – three points; Troy – two points; Cohoes – one point; Green Island – one point; Rensselaer – one point; Watervliet – one point. A supermajority vote of seven points shall be required for all actions by the IMA Board, unless expressly stated otherwise in this Agreement.

SECTION 4.5 LIABILITY, INDEMNIFICATION, AND INSURANCE.

(A) **LIABILITY.** Neither a Director of the IMA Board nor the Planning

Commission, (including any commissioner, officer, or employee of the Planning Commission who for purposes of this Section 4.5, shall be termed an “administrator”), shall be personally liable to the Parties in the Parties’ own behalf or for the benefit of the Parties’ creditors for damages for any breach of duty as a Director or administrator; provided, however, that the foregoing shall not eliminate or limit the liability of a Director or the Planning Commission if a judgment or other final adjudication adverse to such Director, the Planning Commission, or administrator establishes that the acts of the Director, the Planning Commission, or administrator were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that the Director, the Planning Commission, or administrator personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

(B) **INDEMNIFICATION.** If a Director of the IMA Board, the Planning Commission, or an administrator is made, or threatened to be made, a party to any civil or criminal action or proceeding (including without limitation, actions or proceedings of an administrative or investigative nature) in any matter arising from the performance by the Director or Planning Commission of his, her, or its duties under this Agreement, then, to the full extent permitted by law, the Parties shall:

1. Promptly upon written request to the Parties by, or on behalf of, any Director or the Planning Commission therefor, undertake the defense of any such action or proceeding for the benefit of the Director or the Planning Commission, or administrator at the Parties’ expense, subject to the right granted to such Director or the Planning Commission or administrator hereby to select legal counsel of his, her, or its reasonable choice or to participate in his or her own defense, and subject also to receipt of an undertaking to repay such amount in the event that the Director, Planning Commission, or administrator is determined to be liable under Section 4.5(A) above; and

2. Indemnify such Director, the Planning Commission, or administrator for all sums paid by him, her, or it in the way of judgments, fines, amounts paid in settlement, and reasonable expenses, including attorneys’ fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, subject to the proper application of credit for any sums advanced to the Director or the Planning Commission pursuant to clause (A)(1) of this section, provided however, that the Parties shall not be required to indemnify such Director, the Planning Commission, or administrator if the Director, Planning Commission, or administrator is determined to be liable under Section 4.5(A) above.

This right of indemnification shall be a contract right that may be enforced in any manner desired by the Director, the Planning Commission, or administrator. This right of indemnification shall not be exclusive of any other right that the Director or the Planning Commission may have or hereafter acquire. Without limiting the generality of the foregoing, the Director or the Planning Commission shall be entitled to his, her, or its rights of indemnification under any agreement, resolution of the Parties, resolution of the Directors of the IMA Board, provision of law or otherwise, as well as his or her rights under this Section.

(C) **INSURANCE FOR INDEMNIFICATION OF DIRECTORS AND THE**

PLANNING COMMISSION. To the extent not prohibited by law, the Parties may, by resolution of the IMA Board, purchase and maintain insurance:

1. To defend and indemnify the Parties for any liability that they may incur as a result of the indemnification of Directors or the Planning Commission; and
2. To defend and indemnify Directors or the Planning Commission against any liability, whether or not the Parties would have the power or obligation to indemnify the Director or Planning Commission against such liability under this Agreement.

The Parties may also provide insurance for their respective Directors on the IMA Board through insurance policies separately held or obtained by the Parties in the normal course of performing their governmental functions. Periodically, the Parties shall individually review the scope of any such coverage, and the Parties may coordinate the scope of any insurance provided under this Section with the scope of insurance that may be separately provided by the Parties.

SECTION 4.6 ADMINISTRATOR. The Parties appoint the CDRPC as the Administrator of all actions taken pursuant to this Agreement, including, in coordination with the Local Development Corporation, the assessment and collection of payments under this Agreement, and the assignment and organization of projects to be implemented under the LTCP. The Planning Commission shall maintain records of the meetings and votes of the IMA Board, and of actions taken under this Agreement.

SECTION 4.7 WITHDRAWAL. A Party may withdraw from this Agreement only on the following terms.

(A) A Party that wishes to withdraw from this Agreement shall give written notice to the IMA Board of its intent to withdraw from the Agreement at least 120 days prior to its proposed withdrawal date.

(B) The withdrawing Party shall remain responsible to pay for its percentage share, as determined by the Allocation Formula, of the total LTCP Project Costs, including LTCP Project Costs incurred or realized after the Party's withdrawal, accounting for any credit that may be due by virtue of any received grant that may offset such costs. The withdrawing Party shall not be responsible for the costs of any project added to the LTCP after the Party's withdrawal from this Agreement.

(C) The withdrawing Party shall cooperate with the remaining Parties to minimize potential disruption caused by the Party's withdrawal to the implementation of the LTCP and of the Parties' obligations under the Consent Order. The withdrawing Party's cooperation includes executing assignments of agreements and continuing to provide access to property owned or controlled by the Party, pursuant to Section 3.3 above.

(D) The withdrawing Party shall pay to the Local Development Corporation all costs, fees, and expenses arising from any disruption to the implementation of the LTCP caused by the Party's withdrawal from this Agreement. Such costs, fees, and expenses shall be described with particularity in a statement or invoice to the withdrawing Party.

(E) The remaining Albany Pool Communities shall direct CDRPC or the Local Development Corporation to notify the NYSDEC of the withdrawing Party's withdrawal from this Agreement.

(F) A Party's withdrawal from this Agreement has no bearing on the continued requirements and obligations of each Party under the Consent Order. Subject to determination by NYSDEC, a Party's withdrawal from this Agreement may constitute a violation of the Consent Order, trigger civil penalties under the Consent Order, and affect the liabilities of other Parties under the Consent Order.

SECTION 4.8 LOCAL DEVELOPMENT CORPORATION. The Albany Pool Communities shall form, organize, and govern a Local Development Corporation pursuant to N.Y. Not-for-Profit Corporation Law § 1411. The Local Development Corporation shall be formed, organized, and operated to qualify as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. Each of the Albany Pool Communities will be a member of the Local Development Corporation, and Albany will be represented on the Local Development Corporation's Board of Directors by the Albany Water Board. The Albany and Rensselaer County Sewer Districts may serve on the Local Development Corporation's Board in an advisory capacity, subject to the agreement of the members of the Local Development Corporation.

ARTICLE 5 FINANCIAL MATTERS

SECTION 5.1 AGREEMENT TO PAY.

(A) Each of the Parties shall pay its percentage share, as determined by the Allocation Formula, of the LTCP Project Costs. This obligation shall survive the expiration or early termination of, or any individual Party's withdrawal from, this Agreement.

(B) The cost of the projects as identified in the approved LTCP are estimates and subject to change upon project design and implementation. Adjustments to each Party's required payment, to account for actual costs, will be made by the Planning Commission or the Local Development Corporation based on the Allocation Formula.

(C) LTCP Project Costs subject to payment by the Parties in accordance with the Allocation Formula will be reduced by the amount of any grant obtained by the Albany Pool Communities or the Local Development Corporation for the implementation of the LTCP. The Local Development Corporation will defer reimbursement of grant money in order to maintain a reserve fund to ensure timely payment of bills and other expenses; however, the IMA Board may vote to allow the Local Development Corporation to pay any reimbursement or credit due to the Parties by virtue of a grant, in proportion to the Parties' percentage share under the Allocation Formula.

(D) The Local Development Corporation, as formed under this Agreement, will submit invoices to each Party on a monthly basis. Subject to the approval of the IMA Board and any reasonable conditions or limitations that the IMA Board may impose, the Local Development Corporation may control invoicing of the communities to ensure timely payment of

bills for the LTCP's implementation; these controls may include advanced invoicing or deferred reimbursement after receipt of funds received by the Albany Pool Communities through grants or loans, as set out in Section 5.1(C), above.

SECTION 5.2 ALLOCATION FORMULA. Each Party's percentage share of LTCP Project Costs for projects required under the LTCP at the time of the execution of the Consent Order is as follows:

- Albany – 58.68%;
- Cohoes – 2.74%;
- Green Island – 0.53%;
- Rensselaer – 2.13%;
- Troy – 34.76%;
- Watervliet – 1.16%.

This Allocation Formula is weighted 85% by total CSO flow from each community, based on the CSO volume statistics for the Baseline Conditions, as presented in the Albany Pool CSO LTCP, and 15% by population of each community, based on the 2010 Census. If projects are added to the LTCP after the Consent Order is executed, each Party's percentage share of the costs to implement each additional project shall be calculated based on the modeled total CSO flow from each community assuming implementation of the LTCP projects has occurred.

SECTION 5.3 FINANCING.

(A) The Parties acknowledge and agree that (1) the costs of all or a portion of the LTCP will be financed by debt issued by some or all of the Parties under the New York Local Finance Law, and (2) the LTCP will be divided into phases in order to provide for the orderly undertaking and financing of the LTCP.

(B) The Parties agree as follows:

(1) The LTCP constitutes the implementation of a joint project to make water quality improvements to the Hudson River as required pursuant to the Consent Order and provided under New York Local Finance Law § 15.00.

(2) Any of the Parties issuing debt to finance its percentage share of LTCP Project Costs agrees to coordinate with the other Parties on the use of model (or substantially similar) bond resolutions and related financing documents to ensure compliance with the requirements of the New York Local Finance Law.

(3) If the EFC is providing any portion of the financing for the undertaking of the LTCP, the following shall apply:

(a) A project finance agreement and disbursing agreement may be required to be executed and delivered by the Parties to provide for the deposit and disbursement of monies to undertake the LTCP. The Parties will comply with the terms and provisions of EFC's standard Project Finance Agreement and Bid Package, copies of which are appended hereto as Appendices C and D.

(b) The Parties shall notify EFC of any change in (i) any of the financing arrangements for the LTCP or (ii) this Agreement.

(c) The Party or Parties bound by the project finance agreement with EFC shall comply with the applicable statutory and regulatory requirements, including New York Environmental Conservation Law § 17-1909, title 6 of the New York Codes, Rules and Regulations ("NYCRR"), Part 649, and 21 NYCRR Part 2602, and further including the requirement that during the term of a project's financing by the EFC, the recipient of funding shall have, or acquire, such title, estate or interest in the site of the project to ensure the undisturbed use and possession of the project site during construction and for the term of the Party's obligations under the project finance agreement.

(4) If required by the New York Local Finance Law or the EFC in connection with the issuance of debt by any of the Parties to finance a portion of the LTCP, to grant an interest in such financed portion of the LTCP to the Party issuing such debt.

(5) To coordinate among themselves with respect to the satisfaction of timetables, adoption of resolutions, receipt, collection and deposit of monies, and the issuance of debt, if applicable, to ensure that sufficient funds are available to undertake and complete each phase of the LTCP.

(6) Any Party or Parties seeking an advance under any EFC project finance agreement to finance LTCP Project Costs shall submit such requisition for a loan advance to the LDC, and the LDC shall obtain and administer such requisitions on behalf of the Party or Parties.

ARTICLE 6 RESPONSIBILITY FOR LTCP PROJECTS

SECTION 6.1 RESPONSIBILITY FOR LTCP PROJECT IMPLEMENTATION. The Parties shall be responsible for the implementation of portions of each LTCP Project as designated in the Responsibility Matrix appended to this Agreement as Appendix B, which is an enforceable part of this Agreement. The costs to each Party of its implementation of its responsibilities with respect to each project are LTCP Project Costs.

SECTION 6.2 CHANGES IN RESPONSIBILITY. The Parties may revise the designations of responsibility for portions of each LTCP Project set forth in Appendix B by a unanimous vote of the IMA Board, and the revised Responsibility Matrix shall be appended to this Agreement as Appendix B, replacing the prior version of the appendix. Any changes to the Parties'

responsibilities must be in compliance with the Consent Order, and in particular Section III(A)(1) of the Consent Order, before the change may be adopted as a term of this Agreement.

SECTION 6.3 PROJECT STATUS REPORTS. Each Party shall submit to the Planning Commission quarterly status reports regarding the Party's implementation of each LTCP Project, or each portion of an LTCP Project, that is assigned to the Party for implementation in the Responsibility Matrix.

SECTION 6.4 COMPLIANCE WITH THE CONSENT ORDER. Each Party acknowledges that in addition to the requirements of this Agreement, it is separately responsible under the Consent Order for implementation of the components of LTCP projects assigned to that Party by the LTCP and the Compliance Schedule appended to the Consent Order, which are enforceable parts of the Consent Order. Any penalties that NYSDEC imposes upon a Party under the Consent Order will be paid by the Party or Parties on which the penalties were levied; penalties imposed on more than one Party shall be paid to NYSDEC *pro rata* by the penalized Parties. Penalties imposed by NYSDEC under the Consent Order are not LTCP Project Costs, unless they are imposed on all of the Albany Pool Communities and the IMA Board agrees to include the penalties as LTCP Project Costs. Nothing in this Agreement releases the Parties from liability under the Consent Order. In the event of a dispute between any Party or Parties and NYSDEC with respect to any matter addressed by the Consent Order, the terms of the Consent Order shall govern that dispute.

SECTION 6.5 DEFAULT. In an event of a documented default by any Party ("Defaulting Party"), including without limitation a default in the provision of funding required by this Agreement or pursuant to any Financial Plan adopted under this Agreement, or with respect to the prosecution of any specific project required by this Agreement, the remaining Parties are authorized as follows:

(A) At a regular or special meeting of the IMA Board, to adopt, by a majority of the voting shares allocated to the remaining Parties, a finding that the Defaulting Party is in default of a specific obligation under this Agreement, and such finding shall constitute evidence that such default has occurred; or

(B) At a regular or special meeting of the IMA Board, to adopt, by unanimity of the voting shares allocated to the remaining Parties, a finding that the Defaulting Party has constructively withdrawn from this Agreement by defaulting in its obligations hereunder, and terminating the Defaulting Party's participation in this Agreement consistent with Section 4.7.

In its discretion, the IMA Board may suspend or condition any finding or resolution under this Section on the Defaulting Party's cure of its default, according to any terms that the IMA Board may require for such cure, including timeframes, payment of fees or penalties incurred because of the default, or other actions to remedy any harm caused by the default.

ARTICLE 7 MISCELLANEOUS

SECTION 7.1 AMENDMENTS. This Agreement may not be changed, modified, amended or waived except by written agreement duly authorized and executed by all of the Albany Pool Communities; provided, however, that the consent of all the Albany Pool Communities is not required where the change, modification, amendment or waiver is required to (A) qualify this Agreement as a municipal cooperation agreement under Article 5-G of the New York General Municipal Law, (B) qualify the LTCP as a project under New York Local Finance Law § 15.00, or (C) maintain or qualify the interest on any debt issued by the Parties as excludible from gross income for federal income tax purposes.

SECTION 7.2 ASSIGNMENT. Neither this Agreement nor any rights or obligations hereunder may be assigned by any party without the prior written consent of the other parties. If any party withdraws from this Agreement, its approval shall not be required for any modifications to this Agreement after its withdrawal.

SECTION 7.3 NOTICES. Unless a party instructs otherwise in writing, all notices, consents, invoices and other communications required, permitted or otherwise delivered under this Agreement shall be in writing and shall be sufficiently given if sent by facsimile or email, delivered in person, sent by regular first class mail, postage prepaid or by a nationally recognized overnight delivery service, addressed as follows:

If to Albany:

David Maguire, Chair
Albany Water Board
10 North Enterprise Dr.
Albany, NY 12204

If to Cohoes:

Mayor, City of Cohoes
Cohoes City Hall 97 Mohawk Street
Cohoes, New York 12047

If to Green Island:

Mayor, Village of Green Island
20 Clinton Street
Green Island, New York 12183

If to Rensselaer:

Mayor, City of Rensselaer
Rensselaer City Hall
505 Broadway
Rensselaer, New York 12144

If to Troy:

Mayor Lou Rosamilia
433 River Street
5th Floor
Troy, NY 12180

and

Chris Wheland
Superintendent of Public Utilities
25 Water Plant Road
Troy, NY 12182

If to Watervliet:

City of Watervliet
2 Fifteenth Street
Watervliet, New York 12189

SECTION 7.4 ENTIRE AGREEMENT. This Agreement constitutes the entire and complete agreement between the parties with respect to the subject matter hereof, and all previous discussions, understandings, arrangements and correspondence with respect to the subject matter hereof are superseded by the execution of this Agreement. Notwithstanding the previous sentence, this agreement does not supersede or alter the Consent Order, the Municipal Cooperation Agreements for Phase I, Part A, dated September 1, 2005, and for Phase I, Part B, dated February 8, 2007 and amended June 28, 2013, or any duly executed written amendments or other agreements thereunder.

SECTION 7.5 SEVERABILITY. In the event that any of the provisions, portions, or applications of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the parties shall negotiate an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement and the validity and enforceability of the remaining provisions, portions or applications thereof shall not be affected thereby.

SECTION 7.6 GOVERNING LAW. The interpretation and performance of this Agreement shall be in accordance with and controlled by the laws of the State of New York.

SECTION 7.7 COUNTERPARTS. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same instrument. This Agreement and any counterpart thereof may be delivered via facsimile or e-mail, it being the express intent of the parties that such Agreement and any counterpart thereof delivered via facsimile or e-mail (together with the signatures thereon) shall have the same force and effect as if they were originals.

IN WITNESS WHEREOF, the parties hereto have duly caused this Agreement to be executed and delivered by their duly authorized representative on the date and year first above written.

CITY OF ALBANY

By: 

Printed Name: Kathy M. Steehan

Title: Mayor

ALBANY WATER BOARD

By: 

Printed Name: David D. McGuire

Title: Chair of AWB.

CITY OF COHOES

By: _____

Printed Name: _____

Title: _____

SECTION 7.7 COUNTERPARTS. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same instrument. This Agreement and any counterpart thereof may be delivered via facsimile or e-mail, it being the express intent of the parties that such Agreement and any counterpart thereof delivered via facsimile or e-mail (together with the signatures thereon) shall have the same force and effect as if they were originals.

IN WITNESS WHEREOF, the parties hereto have duly caused this Agreement to be executed and delivered by their duly authorized representative on the date and year first above written.

CITY OF ALBANY

By: _____

Printed Name: _____

Title: _____

ALBANY WATER BOARD

By: _____

Printed Name: _____

Title: _____

CITY OF COHOES

By:  _____

Printed Name: George E Primeau Sr

Title: Mayor

VILLAGE OF GREEN ISLAND

By: Ellen M. McNulty-Ryan

Printed Name: **Ellen M. McNulty-Ryan**

Title: **Mayor**

CITY OF TROY

By: _____

Printed Name: _____

Title: _____

CITY OF RENSSELAER

By: _____

Printed Name: _____

Title: _____

CITY OF WATERVLIET

By: _____

Printed Name: _____

Title: _____

VILLAGE OF GREEN ISLAND

By: _____

Printed Name: _____

Title: _____

CITY OF TROY

By: Louis A. Rosamilia

Printed Name: LOUIS A. ROSAMILIA

Title: MAYOR

CITY OF RENSSELAER

By: _____

Printed Name: _____

Title: _____

CITY OF WATERVLIET

By: _____

Printed Name: _____

Title: _____

VILLAGE OF GREEN ISLAND

By: _____

Printed Name: _____

Title: _____

CITY OF TROY

By: _____

Printed Name: _____

Title: _____

CITY OF RENSSELAER

By: _____ 

Printed Name: Hon. Daniel Dwyer

Title: Mayor

CITY OF WATERVLIET

By: _____

Printed Name: _____

Title: _____

VILLAGE OF GREEN ISLAND

By: _____

Printed Name: _____

Title: _____

CITY OF TROY

By: _____

Printed Name: _____

Title: _____

CITY OF RENSSELAER

By: _____

Printed Name: _____

Title: _____

CITY OF WATERVLIET

By: Michael P Manning

Printed Name: Michael P Manning

Title: Mayor

Appendix A

[Copy of Consent Order]

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

-----X
In the Matter of the Violations of Articles 17 of the Environmental
Conservation Law and Part 750 *et seq.*, of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York (6 NYCRR);

**ORDER ON
CONSENT**
(Albany Pool
CSO LTCP)

-by-

City of Albany; SPDES Permit No. NY-002 5747
Albany Water Board
35 Erie Boulevard, Albany, NY 12204

City of Cohoes; SPDES Permit No. NY-003 1046
City Hall, 97 Mohawk Street, Cohoes, NY 12047

DEC Case #
CO 4-20120911-01

City of Rensselaer; SPDES Permit No. NY-002 6026
62 Washington Street, Rensselaer, NY 12144

DM# 447767

City of Troy; SPDES Permit No. NY-009 9309
Department of Public Utilities
25 Water Plant Road, Troy, NY 12180

City of Watervliet; SPDES Permit No. NY-003 0899
2 Fifteenth Street, Watervliet, NY 12189

Village of Green Island; SPDES Permit No. NY-003 3031
20 Clinton Street, Green Island, NY 12183

Albany County Sewer Districts (North and South)
SPDES Permit Nos. NY-002 6875 (Menands) and
NY-002 6867 (Albany)
P.O. Box 4187, Albany, NY 12204

Rensselaer County Sewer District; SPDES Permit No. NY-008 7971
Water Street, Troy, NY 12180,

Respondents.

-----X
WHEREAS:

Jurisdiction

1. The Department of Environmental Conservation (the “Department” or “DEC”) is a Department of the State of New York with jurisdiction to enforce the environmental laws of the State, pursuant to the Environmental Conservation Law (“ECL”), Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (“NYCRR”), and Orders issued thereunder.

2. The Department has jurisdiction over the abatement and prevention of pollution to the waters of the State pursuant to Article 17 of the ECL and 6 NYCRR Part 750, *et seq.* This jurisdiction also authorizes DEC, as a State agency with an approved program per §§ 318, 402 and 405 of the federal Clean Water Act (“CWA”), 33 U.S.C. §1251, *et seq.*, to regulate the discharge of pollutants from point sources into the waters of the State in conformity with the CWA.

Law, Regulation and Guidance Applicable to CSO Long Term Control Plans

3. Pursuant to its authority to protect the waters of the State, the Department administers the State Pollutant Discharge Elimination System (“SPDES”) permit program, ECL §17-0801, *et seq.* In general, the SPDES program prohibits any discharge of pollutants to the waters of the State without a permit establishing pollutant limitations and treatment requirements. Thus, SPDES permits set certain effluent limitation parameters (“parameters”), determined according to ECL §17-0809 and 6 NYCRR §750-1.11, in order to avoid contravention of mandated water pollution control requirements and water quality standards (“WQS”). Those conditions address not only the allowable range of parameters for discharge of pollutants to the waters of the State, but also the manner in which the permittee is to operate, maintain, monitor, and report on its regulated facilities and activities.

4. Combined sewer overflows (“CSOs”) are wet weather discharges from a Combined Sewer System (“CSS”) of untreated domestic sewage, and industrial wastewaters, combined with stormwater and/or snow melt, at a point prior to reaching the Waste Water Treatment Plant (“WWTP”). CSOs are point sources subject to SPDES permit requirements including both technology-based and water quality-based requirements of the CWA, ECL Article 17, and 6 NYCRR Parts 703 and 750. CSO discharges may cause or contribute to violations of State WQS.

5. On April 19, 1994, EPA officially noticed the *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18688 (“*CSO Control Policy*”), to establish a consistent national approach for controlling discharges from all CSOs to the waters of the United States. The *CSO Control Policy* provides guidance to national and state permittees and permitting authorities on the implementation of the CWA with regard to CSOs, including its “nine minimum controls” and the development and implementation of Long Term Control Plans (“LTCPs”), which include measures to comply with the CWA including attainment of WQS.

6. To help permittees and SPDES permitting and water quality authorities implement the provisions of the *CSO Control Policy*, EPA issued several guidance documents including, without limitation, *Combined Sewer Overflows—Guidance for Long-Term Control Plan* (EPA, 1995a); *Combined Sewer Overflows—Guidance for Screening and Ranking* (EPA, 1995c), *Combined Sewer Overflows—Guidance for Monitoring and Modeling* (EPA, 1995d), *Combined Sewer Overflows—Guidance for Financial Capability Assessment* (EPA, 1995e), *Combined Sewer Overflows—Guidance for Permit Writers* (EPA 1995g), *Combined Sewer Overflows—Guidance for monitoring and Modeling* (USEPA 832-B-99-002 (January 1999)) and the more recent *CSO Post Construction Compliance Monitoring Guidance* (USEPA 833-K-11-001 (May 2012)).

7. On December 15, 2000, amendments to §402 the CWA (known as the Wet Weather Water Quality Act of 2000) were enacted. These amendments require that all permits or orders for CSO discharges, issued pursuant to the CWA after December 15, 2000, conform to the *CSO Control Policy*. Pursuant to 33 U.S.C. §1342(q)(1) [CWA §402(q)(1)], “[e]ach permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the *Combined Sewer Overflow Control Policy* signed by the Administrator on April 11, 1994 (in this subsection referred to as the ‘CSO control policy’).”

8. ECL § 17-0815(7) authorizes the Department to include in SPDES permits any provisions necessary to meet the requirements of the federal CWA. This includes the CSO requirements contained at § 402(q)(1) of the federal CWA. Section 402(q)(1) of the CWA and ECL § 17-0807(4) provide that SPDES permits or orders for CSOs require an LTCP to address CSOs.

The Albany Pool SPDES Permits and Draft LTCP

9. Six municipalities in the greater Albany area of New York State refer to themselves as the Albany Pool Communities and consist of the Cities of Albany, Cohoes, Rensselaer, Troy and Watervliet, and the Village of Green Island. The Albany Pool Communities are referred collectively herein as the “Albany Pool” or “Communities” or “Albany Pool Respondents.”

10. The Communities, taken together, own, operate, and are responsible for over 90 CSO outfalls to the Hudson River and for collection and conveyance sewage infrastructure associated with CSO outfalls.

11. Each of the six Albany Pool Respondents has a SPDES permit with CSO outfalls and other CSS appurtenances specified in it. Each of these SPDES permits was issued by DEC, has been administratively renewed and modified by DEC, and is identified by its permit number in the caption of this Order on Consent and in Paragraph 12, below. Each SPDES permit authorizes the discharge of CSOs through the listed CSO outfalls to the Hudson River and its tributaries, but only from a “properly operating CSS.” Further, each SPDES permit includes conditions requiring the planning and implementation of strategies designed to control CSOs, including the development and implementation of an LTCP.

12. The number of CSOs listed in the SPDES permits of the Albany Pool Communities are as follows: eleven (11) CSOs in the City of Albany SPDES Permit No. NY-002 5747; seventeen (17) CSOs in the City of Cohoes SPDES Permit No. NY-003 1046; eight (8) CSOs in the City of Rensselaer SPDES Permit No. NY-002 6026; forty-eight (48) CSOs in the City of Troy SPDES Permit No. NY-009 9309; five (5) CSOs in the City of Watervliet SPDES Permit No. NY-002 0899; and three (3) CSOs in the Village of Green Island SPDES Permit No. NY-003 3031. The number of CSO outfalls, as currently listed in the respective SPDES permits, may be updated through the revision of the LTCP and permit modification process.

13. The LTCP provision in the SPDES permit of each of the Communities requires, without limitation, the development of an LTCP according to the above-referenced *CSO Control Policy* and relevant guidance, as follows:

“The development of a Long Term Control Plan (LTCP) for the abatement of combined sewer overflow (CSO) discharges shall be in accordance with the Phase I Long Term CSO Control Plan requirements specified in the United States Environmental Protection Agency’s (USEPA) CSO Policy (Federal Register Vol. 59, No.75, 4/19/1994). This abatement plan shall contain the LTCP elements specified in Section II. C of the National CSO Policy, and further detailed in the USEPA Guidance Document, Combined Sewer Overflows, Guidance for Long-Term Control Plan, dated September 1995 (EPA 832-B-95-002) and as further summarized below.”

14. The Albany Pool Respondents submitted a draft LTCP to the Department on June 30, 2011.

15. The Albany Pool Respondents met with the Department on numerous occasions during the development of the draft LTCP required by their SPDES permits; conducted detailed presentations to the Department of plans, modeling results and related information; and received written approvals by the Department of certain project elements required by the SPDES permits.

16. The Department disapproved the draft LTCP by letter dated December 5, 2012 based primarily on the absence of various elements required by the *CSO Control Policy* and its implementing guidance documents. The letter is attached hereto as **Appendix A** and is incorporated into and made a part hereof.

Albany Pool Violations

17. The Department determined the Albany Pool Respondents are each, respectively, in violation of § 402(q)(1) of the CWA, ECL § 17-0807(4), and the LTCP provision in their respective SPDES permits based on the failure to submit an LTCP that conformed to the *CSO Control Policy* and was “approvable” by the Department under 6 NYCRR § 750-1.2(a)(8). In so doing, the Albany Pool Respondents did not and have yet to meet the deadline in their SPDES

permits, as amended, for the submission of a draft LTCP that conforms to the *CSO Control Policy* and is “approvable.” As is more fully set forth in the Department’s December disapproval letter in Appendix A, the Department determined the draft LTCP was missing material elements of an LTCP, including the evaluation of a slate of CSO control alternatives, as distinct from non-CSO controls, along with the data and rationale supporting the recommendation of one CSO control alternative over the other alternatives.

18. The violation of a SPDES permit condition issued under ECL Article 17 constitutes a violation of ECL §§17-0701, 17-0803, 17-0807, 17-0815 and 6 NYCRR §750-1.4.

19. The Department determined the CSO discharges from the Albany Pool Respondents’ CSOs have caused or contributed to the violation of WQS for floatable solids in the Hudson River in violation of ECL § 17-0501. ECL § 17-0501 makes it unlawful for any person to discharge pollutants to the waters of the State that cause or contribute to a violation of WQS. The Department determined the Albany Pool Respondents are in violation of ECL § 17-0501 for having caused or contributed to WQS violations.

20. Pursuant to ECL § 71-1929, a person who violates any of the provisions of, or who fails to perform any duty imposed by, ECL Article 17 or the rules or regulations of the Department promulgated pursuant thereto, or the terms of any permit or order issued there under, shall, *inter alia*, be liable for a penalty not to exceed thirty-seven thousand, five-hundred dollars (\$37,500) per day for each violation, and may also be enjoined from conducting such activity.

Albany Pool’s Consent to Administrative Order

21. In order to address the violations noted above, the Albany Pool Respondents agree to enter into this Order on Consent, including the compliance schedule in **Appendix B** hereto, which together contain milestones and schedules governing their revision and implementation of the Albany Pool LTCP for CSO discharges.

22. Compliance with this Order on Consent requires the Albany Pool Respondents to, without limitation: (a) pay a civil penalty; (b) submit, prior to the effective date of this Order, a revised LTCP that is consistent with the *CSO Control Policy*, is fully responsive to DEC’s December 5, 2012 comments as set forth in Appendix A hereto, and warrants final approval under the CWA; and (c) implement, construct, operate, maintain and monitor the facilities and projects that are called for in the LTCP, once approved, and this Order on Consent, including the attached Compliance Schedule (Appendix B hereto), in compliance with the terms thereof and the respective SPDES permits of the Respondents.

23. In settlement of the above-stated violations, each of the Albany Pool Respondents, having been duly advised, waives the right to a hearing concerning the violations set forth herein and the entry of this Order on Consent and, instead, consents to the making and execution of this Order on Consent and, upon full execution, agrees to be bound by the terms, provisions and conditions contained herein.

**The Waste Water Treatment Plant (“WWTP”) Respondents,
Their SPDES Permits, and the Draft LTCP**

24. Respondent, Rensselaer County Sewer District (“RCSD”), is a “person” as defined in ECL § 17-0105.1 and in 6 NYCRR Subpart 750-1.2(64), and has offices located at the foot of Water Street, Troy, NY 12180.

25. Respondent RCSD owns and/or has responsibility for the Rensselaer County Sewer District No. 1 Waste Water Treatment Plant (“WWTP”), a POTW located on Water Street in Troy.

26. Respondent RCSD accepts combined sanitary wastewater and stormwater from two of the Albany Pool communities: The Cities of Rensselaer and Troy.

27. Respondent RCSD is responsible for the operation and maintenance of the WWTP, including its appurtenant disposal facilities located in the Cities of Rensselaer and Troy such as, without limitation, its interceptor line, pump stations, regulators, diversion dams and tide gates.

28. Respondent RCSD’s SPDES permit is identified in the Department’s records as SPDES Permit No. NY-0087971; DEC No. 4-3832-00011/00001.

29. Respondent RCSD is authorized to discharge treated sewage from the WWTP to the Hudson River from a single outfall by and in accordance with the terms of its SPDES permit.

30. The Director of RCSD is the responsible official designated by the SPDES permit for submitting required reports to the Department.

31. Respondent, Albany County Sewer District (“ACSD”), is a “person” as defined in ECL § 17-0105.1 and in 6 NYCRR Subpart 750-1.2(64), and has offices located at 1 Canal Road South, Menands, NY 12204 and at Church Street, Port of Albany, Albany, NY 12202.

32. Respondent ACSD owns and/or has responsibility for two Waste Water Treatment Plants (“WWTPs”), designated as the North Plant and South Plant, and located at the Menands and Albany addresses, respectively, set forth in Paragraph 31.

33. Respondent ACSD accepts combined sanitary wastewater and stormwater from four of the Albany Pool communities: The Cities of Albany, Cohoes, and Watervliet, and the Village of Green Island.

34. Respondent ACSD is responsible for the operation and maintenance of the North and South WWTPs, including the disposal facilities appurtenant to the North WWTP and located in the Cities of Albany, Cohoes, and Watervliet, and in the Village of Green Island, and further including the disposal facilities appurtenant to the South WWTP and located in the City of Albany.

35. Respondent ACSD's SPDES permits are identified in the Department's records as SPDES Permit No. NY-0026875, DEC No. 4-0126-00138/00001 for the North WWTP; and SPDES Permit No. NY-0026867, DEC No. 4-0101-0020-00001 for the South WWTP.

36. Respondent ACSD is authorized to discharge treated sewage from the North and South WWTPs to the Hudson River from a single outfall at each WWTP by and in accordance with the terms of the above-referenced two SPDES permits.

37. The Director of ACSD is the responsible official designated by the SPDES permit for submitting required reports to the Department.

38. ACSD and RCSD are not part of the Albany Pool and do not own or operate the CSOs. Instead, the ACSD and RCSD Respondents are responsible to properly intercept and divert most of the sewage, including combined sewage, generated within the Albany Pool Communities to the three WWTPs for treatment in accordance with applicable law and their respective SPDES permits of the ACSD and RCSD Respondents. The two county sewer districts, ACSD and RCSD, are referred to collectively herein as the "WWTP Respondents."

39. The SPDES permits of each of the respective WWTP Respondents, as captioned above in this Order on Consent, require them to "*participate in the development of the [Albany Pool] LTCP as delineated in this permit.*" The WWTP Respondents are, at a minimum, required to provide information requested by the Albany Pool and "*participate in the evaluation of all alternatives assessed by the Albany Pool, whether related to the District owned systems or not.*"

40. The Albany Pool Respondents and the WWTP Respondents worked together to produce the June 30, 2011 LTCP.

41. This Consent Order includes the WWTP Respondents with respect to the revision of the LTCP, as specified herein, and the construction of any projects expressly required of them under the LTCP, once approved, and such other functions as are expressly required of them there under.

WWTP Respondents' Consent to Administrative Order

42. The WWTP Respondents agree to enter into this Order on Consent, including the compliance schedule in Appendix B hereto, which together contain milestones and schedules governing the revision and implementation of the Albany Pool LTCP for CSO discharges.

43. Compliance with this Order on Consent and the SPDES Permits requires the WWTP Respondents to: (a) fully cooperate with the Albany Pool Respondents' work to submit, prior to the effective date of this Order, a revised LTCP that is consistent with the *CSO Control Policy*, is fully responsive to DEC's December 5, 2012 comments as set forth in Appendix A hereto, and warrants final approval under the CWA; and (b) implement or construct any projects and complete such other functions as are expressly required of them under the LTCP, once

approved, and this Order on Consent, including the attached Compliance Schedule (Appendix B) hereto.

44. The WWTP Respondents, having been duly advised, waive the right to a hearing concerning the entry of this Order on Consent and, instead, each consents to the making and execution of this Order on Consent and agrees upon its full execution to be bound by the terms, provisions and conditions contained herein.

THEREFORE, having considered this matter, and the Respondents having been duly advised, **IT IS HEREBY ORDERED:**

I. EFFECT ON PREVIOUS ORDERS

The requirements set forth in this Order on Consent are additional to, and do not affect any requirements set forth in, any Orders on Consent executed between the Department and any of the Respondents listed herein prior to the effective date of this Order on Consent.

II. CIVIL PENALTY

A. With respect to the violations set forth above, the Albany Pool Respondents are, collectively, hereby assessed a civil penalty in the amount of \$99,900 which shall be payable to the Department within thirty (30) days.

B. The Albany Pool Respondents shall pay the civil penalty amount, as identified in Subparagraph II.A in this Order on Consent, by one or more check(s) made payable to the “Department of Environmental Conservation,” which shall be forwarded to the Department of Environmental Conservation, Office of General Counsel, 625 Broadway, 14th Floor, Albany, NY 12233-5500, attention: Elissa Armater. The DEC case number appearing on the first page of this Order on Consent shall be endorsed on the face of the check(s).

III. COMPLIANCE SCHEDULE

A. Each of the Respondents shall comply with the requirements and reporting deadlines set forth in this Order on Consent and, according to the designation of responsible parties in the Compliance Schedule in Appendix B, once approved, the construction project milestones contained in such Appendix. The Compliance Schedule shall set forth the deadlines and milestones with which designated Respondents must comply in implementing the LTCP. The Compliance Schedule shall consist of, and the designated Respondents shall comply with, the final compliance schedule contained in an approved LTCP which compliance schedule shall include design, construction, post-construction monitoring, and operation deadlines and milestones and shall be appended hereto and incorporated herein as the Compliance Schedule in Appendix B to this Order on Consent. The Compliance Schedule may be developed with the expectation that the Department’s review of Completed Plans and Specifications would occur within sixty (60) days.

1. Respondents may revise the designations of responsible parties in the Compliance Schedule in Appendix B at their discretion and without modification of this Order on Consent on the condition that (1) the revised designation identifies one of Respondents; (2) every project listed in Appendix B shall have one or more designated responsible parties at all times during the term of this Order on Consent; (3) no revised designation shall become effective until notice of the same is provided to the Department under Article XIII (Communications) of this Order on Consent along with a certification by the Respondents to this Order on Consent that the revised designation has the consent of all Respondents to this Order on Consent and is in compliance with the applicable inter-municipal agreement(s) in effect between the parties concerning this LTCP; (4) such revised designation is accepted by the Department, which written acceptance shall not be unreasonably withheld, and a written denial, if any, will indicate the rationale therefore; (5) no such revised designation purports to change or has the effect of changing any deadline or milestone in the LTCP Compliance Schedule, once approved, or Appendix B hereto; and (6) within ten days of the Department's written acceptance of the revised designation of responsible parties, a revised LTCP Compliance Schedule and Appendix B to this Order on Consent shall be prepared to conform to the revised designation of responsible parties and submitted to the Department under Article XIII of this Order on Consent. A revised designation of responsible parties that does not satisfy the six elements herein set forth shall be a violation of this Order on Consent.

B. The Compliance Schedule in Appendix B is attached to and hereby incorporated into and made an enforceable part of this Order on Consent with respect to all Respondents. To comply with the appropriate deadline or milestone for a report or written submission, all documents must be submitted by the milestone dates set forth in Appendix B, in final form, and, unless otherwise agreed to in writing by the Department, which agreement shall not be unreasonably withheld, under the signature and seal of a professional engineer currently licensed to practice in New York State. Any violation of the terms, deadlines or milestones contained in Appendix B shall be a violation of the terms of this Order.

C. A schedule or deadline for submission of a report or submission under this Paragraph may be extended for good cause shown by written agreement of the Department and all Respondents. In order to request an extension of a deadline for a report or submission, Respondents shall submit a written request for extension to the Department in accordance with Paragraph XI herein at least 60 days prior to the date on which the report or submission is due. A request for an extension of a deadline for a written submission shall not alter any other milestones and deadlines in the Compliance Schedule in Appendix B unless specifically addressed in the request.

D. Compliance with the terms and requirements of this Order on Consent, including the schedules, timetables and requirements set forth in Appendix B and the LTCP, once approved, is required irrespective of the availability of financial assistance from Federal, State or other sources.

IV. WRITTEN SUBMITTALS TO THE DEPARTMENT OF PLANS, REPORTS AND COMPLIANCE CERTIFICATIONS

A. In order to be deemed in compliance with the deadlines and milestones in this Order on Consent, including those in Appendix B, all submittals of written work plans, reports and other deliverables required under this Order on Consent shall be:

1. (i) materially complete, (ii) submitted by the deadline set forth, and (iii) under the signature and seal of a professional engineer currently licensed to practice in New York State unless otherwise specifically agreed to in writing, which agreement shall not be unreasonably withheld;

2. in accordance with (i) the specified project descriptions and schedules set forth herein, (ii) the CWA and its relevant and applicable regulations, (iii) the *CSO Control Policy* as adopted at 33 U.S.C. §1342(q)(1), (iv) the ECL and its relevant and applicable regulations in 6 NYCRR Parts 750 and 703, and (v) the Respondents' respective SPDES permits; and

3. if the deadline or milestone referenced in Subparagraph A herein above pertains to the initial submission of a deliverable, then such submission shall be "approvable" by the Department with only "minimal revision" in response to Department comments. Consistent with 6 NYCRR § 750-1.2(8), minimal revision shall mean the submittal can be suitably revised and resubmitted to the Department within 60 days of notification by the Department that the revisions are necessary. Stipulated penalties pursuant to Paragraph XII in this Order on Consent and based on the failure to submit an approvable submittal, shall not begin to accrue unless, 60 days after the date of the Department's comments on a submittal, Respondents have not submitted a revised document that warrants final approval by the Department under the terms of this Order on Consent and pursuant to the requirements of the CWA and its applicable regulations, the *CSO Control Policy* as adopted at 33 U.S.C. §1342(q)(1) and the ECL and its applicable regulations in 6 NYCRR Parts 750 and 703. It is expressly understood that stipulated penalties begin to accrue upon day 61 after the date of the Department's comments on a submittal if Respondents did not submit a revised submittal that warrants final approval by the Department and on or before the close of the 60th day as herein described. For the purposes of this subparagraph, the submittal date must be verifiable by (i) electronic mail that has been properly addressed and transmitted on or before the close of the 60th day as herein described, or (ii) postmarked U.S. Certified Mail, return receipt requested, on or before the 60th day.

B. The date of a Respondent's submission to the Department must be verifiable by (i) electronic mail that has been properly addressed and transmitted on or before the close of the applicable deadline or milestone, or (ii) postmarked U.S. Certified Mail, return receipt requested, on or before the deadline.

C. After review of any plan, report, or other item that is required to be submitted pursuant to this Order on Consent, the Department may in writing: i) approve the submission or ii) provide comments to be resolved, explained and/or addressed in a single revised submittal that

shall warrant final approval by the Department under the terms of this Order on Consent and pursuant to the requirements of the CWA and its applicable regulations, the *CSO Control Policy* as adopted at 33 U.S.C. §1342(q)(1) and the ECL and its applicable regulations in 6 NYCRR Parts 750 and 703.

1. If the submission is approved, it will thereby be incorporated into and made an enforceable part of this Order on Consent with respect to all Respondents unless otherwise specifically limited in writing. Respondents shall take all actions required by the operative terms of the plan, report, or other document, in accordance with the schedules and requirements therein, as approved. Any violation of the operative terms of the approved submission shall be a violation of the terms of this Order on Consent by the responsible Respondent or Respondents.

2. If the submission is the subject of a comment letter from the Department, Respondents shall respond to all comments and correct all deficiencies in the submission in accordance with the Department's comments and resubmit the plan, report, or other item for final approval, in accordance with this Paragraph. If the resubmission is approved, the approved submission shall be incorporated and made an enforceable part of this Order, and Respondents shall proceed, as set forth in the preceding subparagraph IV.C.1 herein.

3. If a re-submitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, (i) the Respondents shall be in violation of this Order on Consent, (ii) the Department may again demand that Respondents correct any deficiencies in accordance with this subparagraph, and (iii) the disapproved resubmission shall be subject to the accrual of and the Department's right to seek stipulated penalties as provided in Paragraph XIII herein.

D. Upon approval by the Department, Respondents shall implement and take all actions required by the studies, plans, engineering designs, facility construction and LTCP, as submitted pursuant to paragraphs IV.A-C above, in accordance with the schedules and terms of Appendix B and approved plans.

E. Up to 14 days following each date or milestone in Appendix B, Respondents shall submit to the Department a written Certification of Compliance or Non-compliance with the requirement.

F. In the Semi-annual Status Reports required in Paragraph VIII of this Order, Respondents shall include a copy of each written "Certification of Compliance" and "Certification of Non-compliance" regarding the every date or milestone set forth or incorporated into Appendix B during the reporting period. This includes the submission of a Certification of Compliance and Certification of Non-compliance for each Design Completion, Notice to Proceed to Construction, and Construction Completion, respectively. Such Certifications shall also be sent to the parties identified in Paragraph XII below.

G. To comply with the construction milestones in the Compliance Schedule in

Appendix B, all milestones for “Design Completion,” the “Notice to Proceed to Construction,” and the “Construction Completion,” shall be met. The following definitions shall apply to the implementation of, and compliance with, this Order:

1. “Design Completion.” Design shall be considered complete upon the Respondents’ submission of approvable plans and specifications to the Department for review.
2. “Notice to Proceed to Construction” (“NTPC”). Pursuant to the Wicks Law, all contracts consist of 4 elements: “G (general construction),” “P (plumbing),” “E (electrical),” and “H (heating, ventilation and air conditioning).” NTPC milestones shall be met when, at a minimum, the “G” element is noticed to proceed to construction. The noticing of any and/or all the other elements of a contract shall not be considered compliance with an NTPC milestone, until the “G” element is noticed.
3. “Construction Completion.” Construction shall be considered complete when the process-related equipment and facilities are constructed in accordance with the approved plans and specifications, and are placed in operation to meet the applicable SPDES permit requirements. In addition to the foregoing, and subject to any schedule enforceable under this Order on Consent, Respondents shall make best efforts to place in operation all treatment units and associated automatic controls as soon as they are operable in order to maximize CSO capture and treatment consistent with compliance with the terms and conditions of the SPDES permits as soon as possible, up until the time the Respondents comply with their respective SPDES permit requirements.

H. Respondents shall submit a completed SPDES permit application for any SPDES permit modification that may be necessary with the design submissions. Respondents shall not issue a Notice to Proceed to Construction on any CSO abatement or other project under this Order until after the necessary modification of the SPDES permit(s) for that specific project has been issued by the Department.

I. Within 30 days of the effective date of this Order on Consent, the Respondents shall designate an entity which reports to the respective Respondents and will be responsible to the Respondents for coordinating the smooth and efficient implementation of the LTCP and assisting the Respondents in meeting their obligations to comply with the terms of this Order on Consent. The Respondents may at their sole discretion designate a different entity at any time during the term of the Order on Consent. The Respondents shall likewise notify the Department of such designation within such 30-day period or within 5 business days of any subsequent change of such designation.

The designated entity shall retain a Program Coordinator who shall have, at a minimum, the following functions:

A. Coordinate the Respondents’ activities and those of its consultants in order to expedite compliance with the terms of this Order on Consent, and coordinate meeting schedules such that appropriate representatives of the Respondents are able to attend the semi-

annual status meetings set forth in Paragraph VIII herein;

B. Assist as appropriate in the procurement of additional consultants for the Respondents;

C. Attend all semi-annual status meetings;

D. Submit or file all necessary reports in a timely manner;

E. Track implementation of the LTCP with the purpose of detecting problems that might delay the Respondents' implementation of this Order on Consent, coordinate responses to such problems among the Respondents, and facilitate communication with the Department in connection with the same; and

F. Submit to the Department the written certifications of compliance required by this Order on Consent

G. The Program Coordinator shall be the Respondents' point of contact for the Department for technical matters arising under this Order on Consent.

V. DEVELOPMENT OF REVISED LTCP

A. Prior to the effective date of this Order on Consent, Respondents shall submit a revised LTCP that is fully responsive to the Department's written comments and in conformance with the terms of this Order on Consent, the Respondents' respective SPDES permits, the CWA and its applicable regulations, the *CSO Control Policy*, as adopted at 33 U.S.C. §1342(q)(1), and the ECL and its applicable regulations in 6 NYCRR Parts 750 and 703.

B. The revised LTCP shall properly evaluate CSO control alternatives, and provide for the construction and implementation of all Sewer System and WWTP improvements and other measures necessary to ensure the control of CSO discharges in compliance with the CWA and its applicable regulations, the *CSO Control Policy*, as adopted at 33 U.S.C. §1342(q)(1), and the ECL and its applicable regulations in 6 NYCRR Parts 750 and 703.

C. LTCP Schedule. The schedule included in the revised LTCP shall (i) prioritize projects in such a manner that the most significant human health and environmental needs are addressed first; (ii) set forth a deadline of no more than fifteen months following the effective date of this Order on Consent for the execution of a single inter-municipal agreement ("IMA") among the Albany Pool Respondents to this Order on Consent, and an additional IMA or IMAs between the Albany Pool Respondents and the WWTP Respondents on this Order on Consent; (iii) clearly set forth the specific tasks to be undertaken by each Respondent to this Order on Consent, indicate whether each such task is to be undertaken individually or jointly, and if jointly, specify each such Respondent that is jointly responsible for the task; and (iv) ensure the design, construction, and implementation of all control/treatment measures selected by Respondents are carried out as expeditiously as practicable, following any applicable

environmental impact assessment review pursuant to the New York State Environmental Quality Review Act (“SEQR review”), but, subject to the terms of this Order on Consent, not later than December 31, 2028.

D. Inter-municipal Agreement. There shall be a single fully-executed IMA among the Albany Pool Respondents to this Order on Consent, and an additional fully-executed IMA or IMAs between the Albany Pool Respondents and the WWTP Respondents. The IMAs shall be executed within the time frame required in Sub-paragraph V.C. The IMAs shall be enforceable as between the Respondents, meaning each IMA shall lay out the actions to restore compliance in the event of a breach of the respective IMA as well as immediate consequences that provide a deterrent effect in the event of a breach of the IMA by any one or more of the Respondent parties. The IMAs shall be submitted to the Department for review and acceptance six months in advance of the fifteen-month deadline under Sub-paragraph V.C unless a shorter time frame is specifically agreed to in writing with the Department. Each of the IMAs must be acceptable to the Department as satisfying the terms and purposes set forth in this subparagraph. Each IMA with a WWTP Respondent must further be acceptable to the Department under 6 NYCRR § 750-2.9(a)(4). The IMAs shall include all provisions necessary to allow the Albany Pool permittees to cooperatively control the CSO discharges from this inter-municipal CSS in accordance with law, including the implementation of an approved LTCP. The IMAs must address each Respondent’s responsibility as required by their respective SPDES permits and this Order on Consent, and shall specify and designate, at a minimum, the ownership, operation, maintenance, funding, cost-sharing, indemnity, access and enforcement provisions necessary to finance and carry out the terms of the IMAs, an approved LTCP, and the requirements of this Order on Consent. The submission of the draft IMAs to the Department must include a schedule for the enactment of any ordinances necessary in order for the agreement to be carried out. The schedule will become an enforceable part of this Order following Department review and acceptance. In addition to the required IMAs, if the Respondents form a charitable organization under the section 501(c)(3) of the Internal Revenue Code, the formative documents that are relevant to carrying out the terms, conditions and requirements of this subparagraph shall also be submitted to the Department six months in advance of the fifteen-month deadline under Sub-paragraph V.C unless a shorter time frame is specifically agreed to in writing with the Department. IMAs and 501(c)(3) and other documents submitted pursuant to this Paragraph D shall not be subject to the terms of Article IV of this Order on Consent.

E. Green Infrastructure. The Department encourages Respondents to utilize Green Infrastructure Projects as appropriate to reduce or replace Gray Infrastructure Projects included in the draft LTCP, provided that any Green Infrastructure Project proposed is anticipated to provide substantially the same or greater level of control as the alternative Gray Infrastructure Project. Should Respondents rely on other entities to implement Green Infrastructure Projects, Respondents must have in place agreements as appropriate, to ensure proper operation and maintenance of the Green Infrastructure Project. The revised LTCP may also include Green Infrastructure Demonstration Projects. Such demonstration projects shall not be subject to the terms and conditions of this Section V(E).

1. For any Green Infrastructure Project submitted as part of the revised

LTCP, Respondents shall include a Green Infrastructure Project Proposal outlining each proposed project. This proposal shall be consistent with this Order on Consent and shall at a minimum include the following for each project:

(a) Data on location, sizing, design, and the performance criteria expected to be achieved with the implementation of the Green Infrastructure Project, where the performance criteria shall mean the standards of performance or performance levels that each control measure is designed to achieve for reductions in discharges or pollutants;

(b) A description of how the proposed project utilizes or relies on information and models that Respondents used in developing the LTCP, and any monitoring information used in formulating the proposal;

(c) A demonstration of the long term effectiveness and performance expected to be achieved with implementation of the project;

(d) A description of the work required to implement the Green Infrastructure Project and a schedule for completion of this work and implementation of the project that is consistent with this Order on Consent, its Appendices, and the date set forth herein in Paragraph V.C for completion of construction and full implementation of all remedial and control measures;

(e) A description of the proposed ownership of and access to the Green Infrastructure Project, and should Respondents rely on other entities to implement Green Infrastructure Project, Respondents must explain what agreements will be necessary to ensure proper operation and maintenance of the Green Infrastructure Project (i.e., permanent access, sufficient control over key aspects of the project), and how they will be enforced to ensure proper operation and maintenance of the Green Infrastructure Project; and

(f) A description of any post-construction monitoring and modeling to be performed that is necessary to determine whether the performance criteria set forth, as noted above, will be met upon completion and implementation of the Green Infrastructure Project.

2. Upon review of Respondents' Green Infrastructure Project proposal, the Department will comment, approve or disapprove the proposal. Each Green Infrastructure Project that is approved by the Department shall be incorporated into and made an enforceable part of this Order on Consent. Respondents shall implement each Green Infrastructure Project approved by the Department in accordance with the provisions and schedule in the approved Proposal.

3. In the event that Respondents implements an approved Green Infrastructure Project proposal that fails to meet the specified performance criteria set forth in the project proposal and LTCP, Respondents shall propose, within 180 days after submittal of the applicable post-construction monitoring report documenting said failure, an additional Green or Gray Infrastructure Project designed to achieve the performance criteria with a schedule for

completion of this work and implementation of the Project that is consistent with this Order on Consent, its Appendices, and the date set forth herein in Paragraph V.C for completion of construction and full implementation of all remedial and control measures. In the alternative, where Respondents have substantially met the performance criteria, Respondents may, within sixty (60) days after its knowledge of a Project's failure to meet the performance criteria, petition the Department for a change in the performance criteria. In the event that the Department disapproves of Respondents' request for a change in the performance criteria, Respondents shall, within 180 days after the Department's disapproval, propose additional control measures designed to achieve the performance criteria with a schedule for completion of this work and implementation of the Project that is consistent with this Order on Consent, its Appendices, and the date set forth herein in Paragraph V.C for completion of construction and full implementation of all remedial and control measures.

4. The Department encourages the Respondents to propose revisions to the approved LTCP to utilize green infrastructure as appropriate to reduce CSOs by modifying or replacing Gray Infrastructure Projects included in the final LTCP. If Respondents seeks to replace any Gray Infrastructure Projects provided in the LTCP, after its approval, Respondents shall submit to the Department a detailed Green Infrastructure Project proposal outlining each proposed project consistent with the requirements of Subparagraph V.E. Any proposal submitted under this subparagraph shall be subject to the provisions of Paragraph V.B, V.D and V.E.

F. The revised LTCP, once approved by the Department in writing, shall be thereby incorporated by reference and made an enforceable part of this Order on Consent. Upon issuance, an approval letter from the Department concerning the LTCP shall be attached hereto as **Appendix C** and incorporated into and made a part hereof. A Respondent's violation of the approved LTCP shall constitute a violation of this Order on Consent in addition to any related violation of the ECL, 6 NYCRR Part 750, and the respective SPDES permit(s). Such a violation may, under the circumstances, constitute a joint violation by two or more Respondents.

VI. IMPLEMENTATION OF AN APPROVED LTCP

Upon receipt of final written approval of the LTCP, the Albany Pool Respondents and the WWTP Respondents shall implement the LTCP subject to the terms and schedule in the approved LTCP, the terms of this Order on Consent, including Appendix B, their respective SPDES permits, and according to the requirements of the CWA and its regulations, *CSO Control Policy*, as adopted at 33 U.S.C. §1342(q)(1), the ECL and its applicable regulations in 6 NYCRR Parts 750 and 703.

VII. WET WEATHER OPERATING PLANS

The WWTP Respondents shall revise and resubmit their respective Wet Weather Operating Plans, required in the Best Management Practices of their respective SPDES permits, whenever any of the WWTPs or wet weather operations at any of the WWTPs is modified.

VIII. STATUS REPORT REQUIREMENTS

A. **Semi-Annual Status Reports.** Upon the Effective Date of this Order on Consent, until this Order on Consent terminates in accordance with Paragraph XX, Respondents shall submit written Semi-Annual Status Reports to the Department. These reports shall be submitted no later than March 1st of each year for the “reporting period” from July 1 through December 31 of the previous calendar year, and no later than September 15th of each year for the “reporting period” from January 1 through June 30 of the same year as the September 15th deadline. The Semi-Annual Status Reports may be provided either as paper documents or in electronic format, provided that the electronic format (i) is compatible with the Department software, (ii) is accompanied by a written certification on paper in accordance with Subparagraph XII.D, and (iii) and such written certification is sent via certified or overnight mail. In each written Semi-Annual Status Report, Respondents shall provide, at a minimum, the following:

1. A statement setting forth (i) the deadlines and other terms that Respondents have been required by this Order on Consent to meet since the date of the last statement; (ii) whether and to what extent Respondents have met those requirements; and (iii) the reasons for any noncompliance (notification to the Department of any anticipated delay shall not, by itself, excuse the delay);

2. A general description of the work completed within the prior reporting period, and, to the extent known, a statement as to whether the work completed in that period meets applicable design criteria;

3. A projection of work to be performed pursuant to this Order on Consent during the next six-month period;

4. A notification of any anticipated delays for the upcoming six month period of time; and

5. A summary of any activities conducted during the reporting period pursuant to the Public Participation Plan. If any public meeting were held, the report should include a copy of any advertisements placed for the meeting, any materials or handouts, formal meeting notes, and a summary of the meeting.

B. **Semi-Annual Status Meetings.** Representatives of the Respondents shall conduct semi-annual meetings with the Department to discuss Respondents’ compliance status with the provisions of this Order on Consent. Respondents shall schedule these meetings to occur during the months of March or April to discuss the immediately-preceding reporting period, and September or October to discuss the immediately-preceding reporting period. The meeting can be conducted telephonically if agreed in writing (including electronic correspondence) by all parties in advance.

C. The frequency of the semi-annual status reports and meetings may be reduced upon written agreement (including electronic correspondence) from the Department.

D. Annual Post Construction Monitoring Report. Upon the Effective Date of this Order on Consent, until this Order on Consent terminates in accordance with Paragraph XX, Respondents shall submit annually with its September 1st Semi-Annual Report an Annual Post Construction Monitoring Report containing information generated in accordance with the Post-Construction Monitoring Program that is a required element for an approved LTCP. The Annual Post Construction Monitoring Report may be provided either as paper documents or in electronic format, provided that the electronic format (i) is compatible with the Department software, (ii) is accompanied by a written certification on paper in accordance with Paragraph XII.D, and (iii) and such written certification is sent via certified or overnight mail. The frequency of reports, and the reporting period, may be amended upon written agreement from the Department.

IX. NOTIFICATION OF NON-COMPLIANCE

In addition to the other reports required by this Order on Consent, if Respondents fail to comply with any requirement of this Order on Consent, Respondents shall notify the Department of such failure and the likely duration of the period of noncompliance in writing within ten (10) working days of the day Respondents first becomes aware of the noncompliance, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize it. If the cause of the noncompliance cannot be fully explained at the time the report is due, Respondents shall include a statement to that effect in the report. Respondents shall immediately investigate to determine the cause of the noncompliance and then shall submit an amendment to the report, including a full explanation of the cause of the noncompliance, within thirty (30) days of the day Respondents becomes aware of the cause of the noncompliance.

X. COMPLIANCE WITH SPDES PERMITS

Every Respondent shall comply with the terms and conditions of its SPDES Permit. A Respondent's violation of a SPDES permit shall constitute a violation of this Order on Consent in addition to any related violation of the ECL and 6 NYCRR Part 750. Such a violation may, under the circumstances, be a joint violation by two or more Respondents. Approval of an LTCP shall constitute compliance with the SPDES terms and conditions requiring development of an approvable LTCP.

XI. PERMITS AND APPROVALS

Where any compliance obligation under this Order on Consent requires Respondents to obtain federal, state, or local permits or approvals, or triggers review under the State Environmental Quality Review Act (SEQRA), Respondents shall submit timely and complete applications, or timely perform the SEQRA review, and take all other actions necessary to obtain all such permits or approvals or to ensure compliance with SEQRA. Respondents may seek relief under the provisions of Paragraph XVI for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval or the completion of a SEQRA review required to fulfill such obligation, if Respondents have submitted timely and complete applications and have taken all other actions required by

applicable law to obtain all such permits or approvals and to ensure compliance with SEQRA. The reporting requirements of this Order on Consent do not relieve Respondents of any reporting obligations required by the CWA or its implementing regulations, or by any other federal, state, or local law, regulation, permit, or requirement, including Respondents' SPDES Permits.

XII. COMMUNICATIONS

A. All correspondence, plans, reports, and any other written deliverables submitted to the Department under the terms and requirements of this Order on Consent shall be sent to the following contacts or their successors at the Department:

Original to:

Paul Kolakowski, P.E., Wastewater Permits Section
Division of Water NYSDEC, 625 Broadway, 4th Floor,
Albany, NY 12233-3506

With one copy to:

Joseph DiMura, P.E., Director, Bureau of Water Compliance Programs
Division of Water NYSDEC, 625 Broadway, 4th Floor
Albany, NY 12233-3505

Andrea Dzierwa, P.E., Regional Water Engineer
NYSDEC Region 4, 1130 North Wescott Road
Schenectady, NY 12306

Derek Thorsland, P.E., DEC Region 4
NYSDEC Region 4, 1130 North Wescott Road
Schenectady, NY 12306

and

Carol Conyers, Esq., Office of General Counsel
NYSDEC, 625 Broadway, 14th Floor
Albany, NY 12233-5500

Copies of all correspondence from the Department to Respondents required under this Order on Consent shall be provided to the following or their successors:

Original to: Mr. Rocco Ferraro, Executive Director
CDRPC, One Park Place, Albany, NY 12205
rocky@cdrpc.org

With one copy to: Project Coordinator, Albany Pool LTCP Project
CDRPC, One Park Place, Albany, NY 12205
c/o rocky@cdrpc.org.

Richard S. Davis, Esq., Principal
Beveridge & Diamond, P.C.
1350 I Street, NW Suite 700, Washington, DC 20005
RDavis@bdlaw.com

Mr. Anthony J. Ferrara, Albany Water Board
City of Albany, 15 Erie Boulevard, Albany, NY 12204
bellm@ci.albany.ny.us

Mr. Gary Nathan, P.E., City Engineer
City of Cohoes, City Hall, 97 Mohawk Street, Cohoes, NY 12047
gnathan@ci.cohoes.ny.us

Mike Brown, Engineering Aide
City of Rensselaer, 62 Washington Street, Rensselaer, NY 12214
Mike.Brown@rensselaer.ny.gov

Mr. Chris Wheland, Superintendent of Public Works
City of Troy, Department of Public Utilities, 25 Water Plant Road, Troy,
NY 12182
chris.wheland@troyny.gov

Mr. David Dressel, City Hall
City of Watervliet, Watervliet, NY 12182
ddressel@watervliet.com

Mr. Sean Ward
Village of Green Island, 20 Clinton Street, Green Island, NY 12183
seanw@villageofgreenisland.com

Mr. Richard Lyons, Executive Director
Albany County Sewer District, P.O. Box 4187, Albany, NY 12204
Richard.lyons@albanycounty.com

Mr. Gerard Moscinski, P.E., Administrative Director
Rensselaer County Sewer District, 1600 7th Avenue, Troy, NY 12180
GMoscinski@rensco.com

B. Any party may change its designee(s) under this paragraph upon written notice to the other parties.

C. Notices and submissions provided pursuant to this Paragraph shall be deemed effective upon receipt, unless otherwise provided in this Order on Consent or by mutual agreement of the Parties in writing.

D. Each notice, report or submission submitted by Respondents under this Order on

Consent shall be signed by an official of Respondents and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my inquiry of those individuals immediately responsible for obtaining the information, that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

XIII. STIPULATED PENALTIES

A. In the event that one or more Respondent(s) responsible for performance of an activity subject to a milestone set forth in Appendix B fail(s) to satisfy any milestone task or deadline for completion of any milestone task for which it or they are responsible as set forth in Appendix B to this Order on Consent, or violate(s) any term of this Order on Consent, the Department shall be entitled to judgment against that Respondent(s). Each Respondent, respectively, hereby consents to the entry of judgment against it in New York State Supreme Court, for a stipulated penalty encompassing each day of such violation of this Order. Said stipulated penalties shall be in the following amounts:

<u>PERIOD OF NON-COMPLIANCE</u>	<u>PENALTY PER DAY</u>
1st Day through 30th Day	\$ 500/day
31st Day through 60th Day	\$ 1,000/day
Each Day beyond the 60th Day	\$ 1,500/day

B. Any stipulated penalty judgment shall become due and payable, and may be entered, upon ten (10) calendar days notice to Respondent(s).

C. These stipulated penalties shall be in addition to the civil penalty already assessed by the Department as set forth in paragraph II, above.

D. All stipulated penalties shall begin to accrue on the day after the performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order on Consent, except that when two or more violations are based upon the same noncompliance, the higher stipulated penalty shall apply.

E. Payment of Stipulated Penalties to the Department.

1. Payment. Stipulated penalties payable to the Department shall be paid by certified or cashier's check in the amount due, payable to the New York Department of Environmental Conservation@ delivered to the Office of General Counsel, 625 Broadway, 14th

Floor, Albany, NY 12233-5500, attention: Elissa Armater. The DEC case number appearing on the first page of this Order on Consent shall be endorsed on the face of the check.

2. Late Payment. Should Respondents fail to pay stipulated penalties and accrued interest payable to the Department in accordance with the terms of this Order on Consent, the Department shall be entitled to collect interest and late payment costs and fees, together with the costs (including attorneys fees) incurred in any action necessary to collect any such stipulated penalties, interest, or late payment costs or fees.

3. Respondents' payment of stipulated penalties under this Paragraph shall be in addition to any other rights or remedies available to the Department by reason of Respondents' failure to comply with any requirement of this Order on Consent or applicable law.

XIV. DEFAULT

The failure of one or more Respondents to comply fully and/or in a timely fashion with any provision of this Order on Consent shall constitute a default and a failure to perform an obligation under this Order and under the ECL by the Respondent(s), and shall constitute sufficient grounds for revocation pursuant to 6 NYCRR § 621.13 of any permit, license, certification or approval issued to the Respondent(s) by the Department unless said permit, license, certification or approval is completely unrelated to the facilities, requirements and obligations addressed in this Order on Consent.

XV. BINDING EFFECT

A. This Order shall be deemed to bind according to its terms each Respondent, its respective officers, directors, agents, employees, contractors, successors and assigns, and all persons, firms and corporations acting under or for each Respondent, respectively, including, without limitation, any subsequent operator of the facilities that are the subject of the respective, above-cited SPDES permits ("permitted facilities), who may carry on activities now conducted by any of the respective Respondents at the permitted facilities, and any successor in title to the respective permitted facilities or to any interest therein.

B. Each Respondent, respectively, shall provide a copy of this Order on Consent (including any submissions incorporated herein) to any contractor or subcontractor hired to perform work required under this Order on Consent, and shall require compliance with this Order on Consent as a term of any contract for performance of work under this Order on Consent. Respondents shall nonetheless be responsible for ensuring that all work performed under this Order on Consent is in compliance with the terms of this Order.

XVI. FORCE MAJEURE

A. A Respondent shall not be in default of the provisions of this Order on Consent if its non-compliance is directly attributable to an Act of God, war, insurrection, terrorism, strike, judicial injunction, catastrophic condition, or other circumstance that is entirely beyond its control and which Respondent's due diligence could not prevent (force majeure). If such a force majeure event occurs, Respondents shall be entitled to an extension of the Compliance Schedule milestone(s), limited to the period of time caused by such event that placed compliance with a

provision of this Order beyond Respondents' control.

B. As a condition precedent to obtaining a schedule extension under this provision, Respondents shall notify the Department in writing that a force majeure event has occurred, no later than fourteen (14) days after the date Respondents knew or should have known of the occurrence of any force majeure event. Respondents shall include in such notice the measures taken and to be taken by the Respondents to avoid or mitigate the delay, and may request an extension or modification of the applicable deadline(s) under this Order equal to the period of delay directly attributable to the force majeure event. Failure to give such notice within such fourteen-day period constitutes a waiver of any claim that that a delay is not subject to penalties.

C. Whenever a milestone is missed, pursuant to a force majeure event or otherwise, the Respondents shall exercise their best efforts to recoup all lost time, including where appropriate, the payment of extraordinary expenses for overtime, double shifts, or additional contractors or consultants, or alternative methods to the extent allowable under local law.

D. If the Department determines that no force majeure event occurred and a stipulated penalty is due, Respondents shall promptly pay the stipulated penalty pursuant to Paragraph XIII in this Order on Consent plus interest from the date of the missed milestone.

E. Regardless of any force majeure event asserted under this paragraph, nothing set forth herein relieves any Respondent of its respective obligations to provide 24-hour notices, file Non-compliance Reports and Certifications, and submit or issue any other notices and reports as required by law, its respective SPDES permit, or this Order on Consent.

F. Each Respondent shall have the burden of proving that its respective non-compliance with this Order, if any, is directly attributable to a force majeure event, and that its compliance with this Paragraph XVI constitutes a defense to compliance with this Order on Consent.

XVII. ACCESS

For the purpose of insuring compliance with this Order on Consent, each Respondent shall allow duly authorized Department representatives access to its respective facilities and any appurtenances involved herein, without prior notice, to enable Department representatives to inspect and determine the status of the Respondent's compliance with this Order on Consent.

XVIII. EFFECT OF SETTLEMENT

A. This Order on Consent is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Respondents are responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits (including their respective SPDES Permits), and Respondents' compliance with this Order on Consent shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The Department does not, by its consent to the entry of this Order on Consent, warrant or aver in any manner that Respondents' compliance with any aspect of this Order on Consent will result in compliance with provisions of the CWA, or with any other provisions of federal, State, or local laws, regulations, or permits, including Respondents' respective SPDES Permits.

B. This Order on Consent does not limit or affect the rights of Respondents or of the United States or the State against any third parties, not party to this Order on Consent, nor does it limit the rights of third parties, not party to this Order on Consent, against Respondents, except as otherwise provided by law.

C. This Order on Consent shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Order on Consent.

XIX. DISPUTE RESOLUTION

In the event of a dispute between the Department and one or more Respondents with respect to the performance under this Order on Consent, including, without limitation, a dispute arising under Subparagraphs IV.C.2 or IV.C.3 herein, the parties shall make reasonable efforts over the course of no more than 45 days to meet and confer in an effort to resolve such dispute. Such efforts to meet and confer are to be initiated by Respondent(s) in writing pursuant to Para XII (Communications). Review under New York Civil Practice Law and Rules Article 78 shall be available for all final agency actions under this Order on Consent. Should Respondents invoke Dispute Resolution under this Paragraph, stipulated penalties shall nonetheless continue to accrue and shall be payable either (i) not more than ten days after the informal resolution of the dispute in the Department's favor within the designated 45-day period or (ii) within ten days of the issuance of a civil order or judgment unless and to the extent that a civil order or judgment is issued in Respondents' favor.

XX. MODIFICATION

If a Respondent desires that any of the provisions, terms or conditions of this Order on Consent be changed, it shall make timely written application setting forth the grounds for the relief sought to Carol Conyers, Esq. or her successor in the Office of General Counsel, at the above address, and shall send a copy simultaneously to the other Respondents. Grounds for modification may include, without limitation, a review by the Department of Completed Plans and Specifications that extends beyond sixty (60) days. Any change to this Order on Consent must be in writing and signed by all of the Respondents and the Commissioner or the Commissioner's designee.

XXI. TERMINATION AND RESERVATION OF RIGHTS

A. This Order on Consent shall be deemed completely satisfied and shall terminate when each of the following conditions has been fully satisfied by all Respondents: (1) the Respondents have paid the civil penalty set forth in paragraph II above; (2) the Department has received from each Respondent written Compliance Certifications under Subparagraph IV.E of completion of the respective compliance actions required of each Respondent by Appendix B; (3) all stipulated penalties demanded, due and owing under this Order on Consent have been paid; and (4) the Department has provided each Respondent with a written verification of the Compliance Certifications received, which verification shall be timely provided by

Respondent(s) and not unreasonably denied by the Department.

B. Upon timely payment of civil penalty required under paragraph II, above, and the completion of the compliance items set forth in Appendix B, the Department shall release the Respondents from further liability for penalties under the ECL arising from the violations set forth herein. Approval of a revised LTCP hereunder shall constitute satisfaction of Respondents' obligations to develop an approvable LTCP.

C. However, nothing herein shall be construed as a release or waiver by the Department of its rights to: (1) seek injunctive relief to abate any violation of law or this Order on Consent; (2) seek stipulated penalties and entry of judgment as provided in paragraph XIII of this Order; (3) seek penalties and other relief for any violations not set forth in this Order on Consent, including its Appendices; (4) re-allege the violations listed in this Order on Consent to obtain injunctive relief or damages in support of natural resource damage claims; (5) seek to modify, suspend, or revoke any Department-issued permit; (6) seek any applicable criminal sanctions against any Respondent or any other party; or (7) seek issuance by the Commissioner or his duly authorized representative of a summary abatement order against any or all Respondents. In addition, the Department reserves all such rights as it has to require Respondents to take any additional measures required to protect human health or the environment.

XXII. SIGNATORIES TO ORDER

Each undersigned representative of Respondents certifies that he or she is fully authorized to enter into the terms and conditions of this Order on Consent and to execute and legally bind the Party he or she represents to this document. This Order on Consent may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

XXIII. INDEMNIFICATION

Each Respondent shall indemnify and hold harmless New York State, the Department, and any of its employees, contractors or representatives for any and all claims, actions, suits, damages, and costs of every name and description, arising out of or resulting from each respective Respondents' acts, or from actions taken by the Department in fulfillment or attempted fulfillment of the provisions of this Order on Consent to the extent that any such claims, actions, suits, damages, and costs are not caused by intentional or grossly negligent acts of New York State, the Department or any of their employees or contractors.

XXIV. ENTIRE ORDER

This Order on Consent and its Appendices, A and B, which are attached to and incorporated in this Order on Consent, constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Order on Consent, and supersede all prior agreements and understandings, whether oral or written. Unless expressly incorporated herein, no other document, representation, inducement, agreement, understanding, or promise constitutes any part of this Order on Consent or the settlement it represents, nor shall it be used in construing the terms of this Order on Consent.

XXIV. EFFECTIVE DATE

The effective date of this Order is the date it is signed by the DEC Commissioner or the Commissioner's designee.

DATED: January 15, 2013

ALBANY, NEW YORK

New York State Department of
Environmental Conservation by:


JOSEPH J. MARTENS, Commissioner

EDMS# 447767

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

CITY OF ALBANY

By: *Anthony J. Ferrara*
(signature)

Name: Anthony J. Ferrara
(print or type)

Title: Chairman, Albany Water Board
(print or type)

Date: 12/30/13

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF Albany)

On the 30th day of December, in the year 2013, before me, the undersigned, personally appeared Anthony J. Ferrara, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Rose V. DeMarco
NOTARY PUBLIC

Rose V. DeMarco
Commissioner of Deeds,
City of Albany
Term Expires Dec. 31 2014

Commissioner of Deeds

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

CITY OF TROY

By: Louis A. Rosamilia
(signature)

Name: Louis A. Rosamilia
(print or type)

Title: MAYOR
(print or type)

Date: JAN. 7, 2014

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF Rensselaer)

On the 2nd day of January, in the year 2014, before me, the undersigned, personally appeared Louis A. Rosamilia, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.


NOTARY PUBLIC

IAN H. SILVERMAN
Notary Public, State of New York
Qualified in Rensselaer County
No. 02SI6257313 Exp. 3/12/ 16

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

CITY OF RENSSELAER

By: Daniel J. Dwyer
(signature)

Name: Daniel J. Dwyer
(print or type)

Title: Mayor
(print or type)

Date: 1/10/14

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF Rensselaer)

On the 10th day of January, in the year 2014, before me, the undersigned, personally appeared Daniel J. Dwyer, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Jennifer L. Moore
NOTARY PUBLIC

Jennifer L. Moore
01MA6105573
Notary Public, State of New York
Qualified in Rensselaer County
My commission expires FEBRUARY 9th, 2016

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

CITY OF COHOES

By: 

(signature)

Name: George E Primeau Sr

(print or type)

Title: Mayor

(print or type)

Date: 10/18/13

ACKNOWLEDGMENT

STATE OF NEW YORK)

COUNTY OF Albany)

ss:

On the 18 day of October, in the year 2013, before me, the undersigned, personally appeared George E. Primeau, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.


NOTARY PUBLIC

LORI A. YANDO

NOTARY PUBLIC - STATE OF NEW YORK

NO 01-YA6063542


QUALIFIED IN ALBANY COUNTY

MY COMMISSION EXPIRES 09-04-2017

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

CITY OF WATERVLIET

By: 
(signature)
Name: MICHAEL P. MANNING
(print or type)
Title: MAYOR
(print or type)
Date: 10/25/13

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

On the 25th day of October, in the year 2013, before me, the undersigned, personally appeared MICHAEL P. MANNING, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

BRUCE A. MOLEY
Notary Public, State of New York
Reg. No. 01HI6001621
Qualified in Albany County 14.
Commission Expires January 20, 2014.


NOTARY PUBLIC

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

VILLAGE OF GREEN ISLAND

By: Ellen M. McNulty-Ryan
(signature)

Name: Ellen M. McNulty-Ryan
(print or type)

Title: Mayor
(print or type)

Date: January 7, 2014

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF Albany)

On the 7th day of January, in the year 2014, before me, the undersigned, personally appeared Ellen M. McNulty-Ryan, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

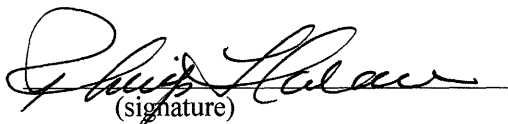
Anne M. Strizzi
NOTARY PUBLIC

ANNE M. STRIZZI
Notary Public, State of New York
Qualified in Albany County
Reg. No. 4694623
My Commission Expires Mar. 30, 2015

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

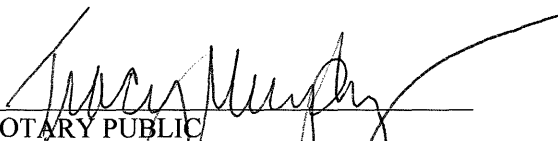
ALBANY COUNTY SEWER DISTRICT

By: 
(signature)
Name: Philip Calderone
(print or type)
Title: Deputy County Executive
(print or type)
Date: 1-10-14

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF Albany)

On the 10th day of January, in the year 2014, before me, the undersigned, personally appeared Philip Calderone, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

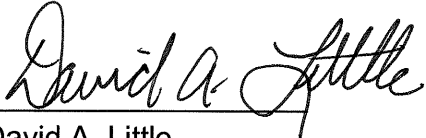

NOTARY PUBLIC
TRACY A MURPHY
Notary Public, State of New York
No. 02MU6263245
Qualified in Albany County
Commission Expires June 11, 2016

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein as provided by law, and agrees to be bound by the terms, conditions and provisions contained herein. The undersigned represents and affirms that they have the legal authority to bind Respondent to the terms and conditions of this Order.

RENSSELAER COUNTY SEWER DISTRICT NO. 1:

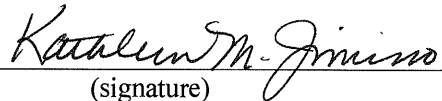
Approved as to Form


David A. Little

Legal Counsel

Rensselaer County Sewer District No. 1

By:


(signature)

Name:

Kathleen M. Jimino

(print or type)

Title:

County Executive

(print or type)

Date:

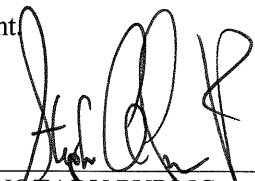
January 10, 2014

ACKNOWLEDGMENT


STATE OF NEW YORK)
) ss:
COUNTY OF RENSSELAER

On the 10th day of January, 2014, ~~in the year 2014~~, before me, the undersigned, personally appeared Kathleen M. Jimino, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her capacity as shown in the instrument, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Stephen A. Pechenik
Notary Public, State of New York
Registration No. 02PE4684612
Qualified in Rensselaer County
Commission Expires April 30, 2014


NOTARY PUBLIC

Approved as to form

 1/10/14
STEPHEN A. PECHENIK
Rensselaer County Attorney

Stephen A. Pechenik
Notary Public, State of New York
Registration No. 02PE4684612
Qualified in Rensselaer County
Commission Expires April 30, 2014

APPENDIX A
NYSDEC COMMENT LETTER of DECEMBER 5, 2012 on
ALBANY POOL DRAFT LTCP (DM # 458013)

New York State Department of Environmental Conservation

Division of Water,

Bureau of Water Permits, 4th Floor

625 Broadway, Albany, New York 12233-3505

Phone: (518) 402-8111 • Fax: (518) 402-9029

Website: www.dec.ny.gov



Joe Martens
Commissioner

December 5, 2012

Mr. Rocco Ferraro
Executive Director
CDRPC
One Park Place
Albany, NY 12205

Mr. Neil Bonesteel, P.E.
Chief Water Plant Operator
City of Troy Public Utilities
25 Water Plant Road
Troy, NY 12182

Mr. Sean Ward
Village of Green Island
20 Clinton Street
Green Island, NY 12183

Ms. Mary Bell
Albany Water Board
City of Albany
35 Erie Boulevard
Albany, NY 12204

Mr. David Dressel
City Hall
2 Fifteenth Street
Watervliet, NY 12182

Mr. Richard Lyons
Executive Director
Albany County Sewer District
P.O. Box 4187
Albany, NY 12204

Ms. Sarah Crowell
Director of Planning
City of Rensselaer
62 Washington Street
Rensselaer, NY 12214

Mr. Garry Nathan, P.E.
City Engineer
City of Cohoes
City Hall
97 Mohawk Street
Cohoes, NY 12047

Mr. Gerald Moscinski, P.E.
Administrative Director
Rensselaer County Sewer Dist
Water Street
Troy, NY 12180

Re: Albany Pool Long Term Control Plan, dated June 30, 2011
SPDES Permit No. NY-002 5747 (City of Albany)
SPDES Permit No. NY-002 6026 (City of Rensselaer)
SPDES Permit No. NY-009 9309 (City of Troy)
SPDES Permit No. NY-003 0899 (City of Watervliet)
SPDES Permit No. NY-003 1046 (City of Cohoes)
SPDES Permit No. NY-003 3031 (Village of Green Island)

Dear Sir/Madame:

As a follow-up to prior detailed technical discussions, this letter formally presents the New York State Department of Environmental Conservation's ("DEC's") technical assessment of the proposed June 30, 2011 Albany Pool Long Term Control Plan ("LTCP"). The short-hand phrase "Albany Pool" is used to reference the six permitted communities listed above that own or operate a Combined Sewer Overflow ("CSO") outfall. DEC continues to endorse and support the Albany Pool communities' collective approach to assessing and reducing the adverse impacts of CSOs so as to improve the shared waters and waterfronts of this stretch of the Hudson River.

The Albany Pool LTCP was evaluated under the standards of Section 402(q)(1) of the Clean Water Act and the specific terms of the State Pollutant Discharge Elimination System ("SPDES") permits that cover the Albany Pool communities. To be approvable, the LTCP also must conform to the U.S. Environmental Protection Agency ("EPA") Combined Sewer Overflow Control Policy (Federal Register Volume 59, Number 75, Pages 18688-18698) ("Policy"). EPA guidance documents also offer extensive information to those responsible for developing a compliant LTCP.¹ The technical comments in this letter incorporate the oversight comments of EPA.

At the outset, I would like to recognize your extensive good work toward the LTCP to date, including numerous technical studies and thoughtful submissions. DEC is seeking to continue to work in a collaborative fashion with the Albany Pool communities to finalize the LTCP, and assure active and cost-effective implementation.

The June 30, 2011 LTCP submitted by the Albany Pool Communities, however, does not meet some of the objectives and requirements specified in the Clean Water Act and EPA's Policy. The revised LTCP must address the comments provided by this letter and the enclosed attachment, and be re-submitted to DEC within 6 months of the date of this letter.

Intent of the Federal CSO Control Program.

The proposed LTCP strategy often focuses on controlling *non-CSO* sources of bacteria in the Albany Pool portion of the Hudson River. While containing useful elements, this strategy does not demonstrate that the LTCP will: (i) result in compliance with water quality standards in Hudson River tributaries impacted by CSOs; (ii) provide the maximum pollution reduction benefits reasonably attainable through CSO abatement; and (iii) be designed to allow cost effective expansion or cost effective retrofitting to address CSO flows should additional controls be determined necessary in the future (e.g., due to community growth accompanied by increased stormwater and sewage flows) to meet water quality standards. (See, EPA Policy Section II.C.4.b).

The LTCP must be revised to evaluate the effectiveness, costs and water quality impacts of a broader array of alternative programs to address the control of CSOs. The Albany Pool sewer systems contain flows from combined sewers that often exceed the interceptor and regulator capacity, resulting in raw sewage being discharged directly to the Hudson River before any treatment. The proposed abatement of CSOs proposed in the draft LTCP (i.e., the proposed approach of reducing non-CSO sources of bacteria levels in the Hudson River) is not a complete approach, necessitating the need for the Albany Pool communities to develop and evaluate a more stringent set of alternative CSO control programs for consideration by DEC, EPA and the affected community.

The LTCP must Adequately Address CSO Mitigation Alternatives as follows:

1. *Alternatives screening process*

Section 7.4 of the LTCP provides a summary of a screening analysis of CSO abatement technologies. For each potential individual control option, the LTCP indicates whether

¹ Many of the LTCP guidance documents may be accessed at: <http://cfpub1.epa.gov/npdes/cso/guidedocs.cfm>.

that technology should be included as part of the LTCP strategy. However, the LTCP provides no information on the screening process itself or the criteria used and data relied upon to determine whether an individual control option should be retained or rejected. Without such an evaluation, DEC cannot determine whether the recommended control alternative meets the regulatory standard of maximum pollution reduction benefits reasonably attainable.

2. *Maximize Capture for Treatment*

The LTCP should evaluate controls that achieve 100% capture, 90% capture, 85% capture, 80% capture and 75% capture of the CSO total annual volume for treatment at the three wastewater treatment plants in the Albany Pool. (See, Section II.C.4 'Evaluation of Alternatives' in the CSO Control Policy). The alternatives analysis must be sufficient to provide enough data to make a cost/performance curve to demonstrate the relationship between the cost and the benefits among the different level of CSO capture. The goal of this cost and performance assessment is to determine if the incremental reduction in the pollutant of concern, pathogen in this case, diminishes as cost increases. This comment is related to the "Knee of Curve" comment below.

3. *Tributary Water Quality Impacts*

The LTCP must include data and information concerning the water quality impacts from CSO outfalls to waters tributary to the Hudson River. The data must be presented, evaluated and incorporated into the LTCP's demonstration approach to the alternatives analysis under Section II.C.4.b of the Policy (e.g., Albany – Krumkill / Cohoes – Mohawk River, Salt Kill, Eagles Nest Ravine / Rensselaer – Mill Creek).

Green Infrastructure. The LTCP proposes very little Green Infrastructure as a means of controlling or reducing CSOs. A more substantive Green Infrastructure program is required. Properly planned green practices naturally manage stormwater and improve water quality by keeping water out of the CSO collection systems. EPA strongly promotes the use of green infrastructure to manage wet weather through infiltration, evapotranspiration and rain water harvesting.² The Albany Pool communities will need to address the use of public and private Green Infrastructure projects in the LTCP and identify the mechanisms for implementation (e.g., maintenance agreements for green controls on privately owned properties). State grant funding is currently available to assist in Green Infrastructure projects. Many communities, including Syracuse and New York City, are implementing extensive Green Infrastructure programs as part of their CSO abatement program.

Cost/Performance Considerations. The required cost/performance considerations lack sufficient information.

1. *Evaluation of Costs.*

Cost data for the various projects are provided in Chapter 7 of the draft LTCP and summarized in Table 7-2. These costs, however, are not related to performance. There is no comparison of different potential control scenarios that would allow the DEC to undertake a cost/performance analysis for the proposed control alternatives;

² *Protecting Water Quality with Green Infrastructure in EPA Water Permitting and Enforcement Programs*, April 20, 2011 memo. http://water.epa.gov/infrastructure/greeninfrastructure/upload/gi_memo_protectingwaterquality.pdf

2. *"Knee of the Curve" analysis.*

The LTCP does not provide the necessary "knee of the curve"³ analysis to evaluate the incremental costs of additional CSO controls to determine whether increased control can be achieved at a reasonable cost (See, Section II.C.5 of the Policy).

3. *Content of cost calculations.*

Some projects identified in the LTCP are already required by existing Consent Orders as well as other "non-LTCP" permit requirements. Inclusion of such projects in the cost calculations for the Albany Pool LTCP is inappropriate. The Department recognizes the Albany Pool Communities' effort to improve water quality of the Hudson River by implementing these projects. However, these projects need to be removed from the cost/performance calculations in the revised Albany Pool CSO LTCP because these are non-CSO sources of pollution. The following are examples of non-CSO projects that are already required: the disinfection upgrades at the three major sewage treatment plants under the respective county sewer district SPDES permits; the elimination of Dry Weather Overflows (DWOs) of raw sewage and the implementation of three green infrastructure Environmental Benefit Projects by the Rensselaer County Sewer District under a Consent Order (4-20091123-154).;

Implementation Schedule. The LTCP is also incomplete because it does not provide all pertinent information necessary to develop the construction and financing schedule for implementation of CSO controls. (See, Section II.C.8 of the EPA Policy). For example, the revised LTCP will need to separate all of the proposed projects by municipal/political entities (as between each of the six Albany Pool Communities and the county sewer districts) responsible for the implementation and payment of projects. The projects that are proposed to be shared by those entities must be specifically identified and their cost sharing arrangement detailed (see, Section 4.4, pg. 4-13 in *Combined Sewer Overflows, Guidance for Long-Term Control Plan (EPA 832-B-95-002)*, September, 1995: "It is important that the individuals and entities responsible for implementing each aspect of the program be identified in the LTCP"). The six municipalities and the county sewer districts will need to enter into inter-municipal agreement(s) ("IMA's") or equivalent legal mechanism that must be executed within the first year of the approved LTCP implementation schedule. The IMA's or equivalent legal mechanism need to document any agreement(s) between the Albany Pool Communities and county sewer districts concerning the specific municipal and inter-municipal responsibilities and commitments, funding responsibilities, and cost-allocation or cost-sharing arrangements.

Additional LTCP Comments Attached

In addition to the above items, a list of DEC comments on very specific aspects of the draft LTCP is attached. EPA's comments have been incorporated into the DEC's comments. However, a copy of EPA's comments is also enclosed to provide their complete context.

³ A Knee-of-the-Curve analysis is a management technique that optimizes pollution control versus cost with respect to diminishing returns. The Knee-of-the-Curve is the point at which incremental improvements become progressively smaller in relation to incremental increases in design size and cost.

Next Steps in LTCP Process

The anticipated LTCP schedule of 15 years exceeds the statutory maximum term for a SPDES permit of five years. It is therefore necessary to incorporate the revised LTCP into a Consent Order to make it enforceable and legally provide sufficient time for community implementation. DEC's Office of General Counsel will be forwarding a proposed Consent Order to you in the near future that will require the submittal of a revised LTCP, consistent with the above and enclosed comments, within six months of the date of this letter. Once the LTCP and its schedule are approved by DEC, the LTCP and its schedule will become enforceable under the Order. This is standard practice.

The requirement to submit the revised LTCP to DEC within six months of the date of this letter will be enforced pursuant to the SPDES permits and regulations, notwithstanding the execution of an Order on Consent by all parties. DEC will contact you in the near future to schedule meetings to discuss our comments and the process needed for obtaining approval of the LTCP.

If you have any questions regarding the comments or would like to set up a meeting or conference call, please contact Paul Kolakowski, P.E., Project Engineer at (518) 402-8104. Any questions about the proposed Order on Consent should be directed to Carol Conyers, Esq. at (518) 402-9512.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Koon Tang', with a large, sweeping initial 'K'.

Koon Tang, P.E.

Director, Bureau of Water Permits

Enclosures

ec (w/ encls):

- Shayne Mitchell, NYSDEC, BWP
- Paul Kolakowski, NYSDEC, BWP
- Joe DiMura, NYSDEC, BWC
- Andrea Dzierwa, NYSDEC, R4
- Derek Thorsland, NYSDEC, R4
- Cheryle Webber, NYSEFC
- Carol Conyers, NYSDEC OGC
- Stan Stephansen, EPA, Region 2

**Attachment to the Department's December 5, 2012 comment letter on
the Albany Pool draft LTCP**

This Attachment provides detailed comments, as well as additional general comments, on the Albany Pool draft LTCP dated June 30, 2011. The comments are organized in the format of the LTCP. The Albany Pool needs to respond to the comments in the Department's letter and this Attachment, and address the comments in the LTCP as appropriate to generate an approvable LTCP.

Executive Summary (ALL)

Page ES-15, BMPs/System Optimization: The report states that projects within this category will focus on SPDES permit BMPs and maximizing the performance of the existing infrastructure through regulator and weir modifications, reduction of system inflow, capacity upgrades, and improved operations. The report should specifically identify what will be done for each of these categories. If any of the projects will be undertaken pursuant to the terms of a separate administrative consent order, that must be stated.

In general, the report shall provide more specific details/narrative on what each of the recommended projects will be.

Page ES-17, Green Projects: Incorporate more green infrastructure projects. The report lists a few green pilot or demonstration projects that have been completed or are presently under development but these are very limited.

Page ES-19, Governance: The report states that it is the intent among the Albany Pool communities to establish a Phase II inter-municipal arrangement for future governance of the Albany Pool CSO program. With regard to the anticipated application to the Department of State for a Shared Services Municipal Planning Grant, provide the status of this effort and time frame for completion.

Chapter 2

Page 2-21, Patroon Creek: This section states that there is a significant source of bacteria between Rensselaer Lake and the Fuller Road sampling location and additional investigations are ongoing with remedial actions proposed as part of the LTCP. Describe the investigations, and present and evaluate the proposed remedial actions. It is also stated that the Patroon Creek is negatively impacted by Sand Creek. The Department repeats the same comment: Describe the investigations and present and evaluate remedial actions for this area. (ALB)

Page 2-21, Normans Kill: The Krum Kill location showed exceedances of the bacteria standards. Same comment. (ALB)

Page 2-22, Mill Creek: Same comment. (REN)

Page 2-24, Wet Weather Conditions Observed in 2009: Patroon Creek, Normans Kill, Krum Kill, Wynantskill, Poestenkill, and Mill Creek results all showed exceedances of bacteria standards. Same comment. In particular, the Krum Kill may be impacted by the Woodville Pump Station overflow. An assessment needs to be done on the effect of overflows from this station on the water quality in the Krum Kill. (TROY, ALB, RCSD, ACSD)

2.5.3.5 The Department has identified an unpermitted CSO on Broadway to Mill Creek in the City of Rensselaer. This CSO was overflowing under dry weather during an inspection with City staff. The City of Rensselaer is required to eliminate this CSO under the terms of an existing Consent Order and so this project will occur regardless of the LTCP. However, the Albany Pool is to include the presence of this unpermitted CSO into Mill Creek among the contributing sources to the exceedances of water quality standards that must be analyzed and properly addressed by the LTCP. (REN)

2.5.4.3 Although no SSOs were reported to the Department during the time that sampling occurred, complaints from residents in the Brookside Avenue area have indicated that SSOs regularly occurred in that area during wet weather events. The Town of North Greenbush is required to eliminate the SSOs under the terms of an existing Consent Order. Detail in the LTCP how this is being investigated and resolved under the Consent Order. (REN)

Chapter 5

Page 5-10, Troy: Tide gates at most of the regulators north of the Federal Dam are susceptible to leakage under high stage conditions. The Rensselaer County Sewer District is required to investigate and address the impact of this leakage under the terms of an existing Consent Order (CO4-20091123-154). The LTCP must acknowledge this issue. (TROY)

Page 5-16, Table 5-3: Most Active CSOs by Volume: Identify in the LTCP which projects will address the most active CSOs. Highlight projects associated with these outfalls. (ALB, TROY)

5.3.1 through 5.3.3 Identify how often flows in the collection system exceed the flow capacity at the WWTPs and/or Pump Stations. Identify whether the model represents this condition (i.e. backup to first upstream CSO) at the Albany North and South WWTPs, and at the RCSD WWTP, and if so, describe how the model does so. (COHOES, WAT, GI, ALB, REN, TROY)

5.6.2 The LTCP must properly address the large volume of infiltration and inflow (“I/I”) identified in the Albany South interceptor. (ALB)

5.8 DWOs must be eliminated. Identify whether the control alternatives (113th Street Stream Separation / Hoosick Street Storm Sewer Extension) are for the purpose of eliminating the DWOs at CSOs 013 & 024. If so, clarify that these control alternatives are under Consent Order (CO4-20091123-154). If these control alternatives serve a different purpose, fully explain as requested in the general comments. Priority must be given to completing these projects in the near term. (TROY)

Chapter 6

The wet weather capacity discussion must mention where collection system capacity limits flow delivery to the WWTPs. (Examples: 1. Influent flows to ACSD South are restricted by the sluice gates. 2. Influent flows to RCSD are restricted by pump station capacity.) (ALL)

6.2 and 6.3 Considering the capacities of ACSD North and South, it appears there may be an opportunity to divert some flow from the overburdened South sewershed to the North Plant. This could reduce the overall volume of CSO. This must be evaluated in the LTCP. (ALB, COHOES, GI, WAT, ACSD)

Chapter 7

7.3 Scenarios 2 and 2A presume that there will be improvements in headwaters and tributary water quality. Because the tributaries in question flow through Albany Pool communities and improvements are required to ensure maintenance of water quality standards in the Hudson River, the LTCP must include the projects necessary to produce and maintain the improvements in order to support the recommended control strategy. (ALL)

7.3 The sanitary loading may be greater in the morning or evening based on a typical diurnal curve. The executive summary indicates that the noon value was compared to the daily average but was not compared to the value when the sanitary loading is greatest. Identify whether the number of exceedances increases if the geometric means are calculated based on values other than noon (12 pm). If so, evaluate compliance using the more conservative values. (ALL)

7.3 Determine whether water quality standards would be met year-round if disinfection was performed year-round. (ALL)

7.3 Identify the daily maximum fecal coliform concentration that could be achieved by the recommended alternatives. (ALL)

7.4 This subsection provides a summary of a screening analysis of CSO abatement technologies. The list includes quantity and quality source control measures; collection system controls; CSO storage technologies; and CSO treatment technologies. For each potential individual control option, the LTCP indicates whether that technology should be included as part of the LTCP strategy. The results of this evaluation included: the practice is already being implemented and it should be continued; the practice should be adopted as part of the LTCP; or the practice is “not feasible or appropriate.” However, the LTCP provides no information on the screening process itself or the criteria to determine whether an individual control option should be retained or rejected. Therefore, the alternatives screening process is incomplete. Revise this subsection to include an approvable alternatives screening process. (ALL)

Pages 7-3 to 7-5, Identification and Screening of CSO Abatement Technologies: Table 7-2 provides a listing of CSO abatement technologies. For the technologies deemed not feasible or appropriate, ~~should~~ more justification shall be provided for each technology regarding why it is

not appropriate. Provide the information relied upon and the rationale supporting the rejection of each such CSO abatement technology. (ALL)

Page 7-6: Green Infrastructure Strategies: Explain the promotion of Green Infrastructure Practices within Municipal Capital Improvement Programs, and describe how such promotion efforts will be accomplished. (ALL)

7.9, Summary of Recommended CSO LTCP : More detail must be provided on each of the proposed projects. Include a narrative summary/description for each project. (Examples: 1. Explain if the RCSD Pump Station upgrade project increases Pump Station capacity to the 63.5 MGD plant capacity. 2.- Explain what the water quality webpage will include. (ALL)

Cost/performance considerations. Cost for the various projects is provided in Chapter 7 and summarized in Table 7-2. However, these costs are not related to performance. As with the evaluation of alternatives, there is no comparison of different potential control scenarios that would allow the reader to evaluate the tradeoffs in cost versus benefit of individual projects. There is also no “knee of the curve” analysis to show where increased CSO control yields diminishing incremental returns. Summarize the cost and potential benefits of all proposed projects in the form of a table. Information should be presented to demonstrate the following:

- Sufficient information to determine if the planned control program will provide the maximum pollution reduction benefits reasonably attainable.
- Cost/performance curves that demonstrate if the planned control program will provide the maximum pollution reduction benefits reasonably attainable.

(ALL)

Post construction compliance monitoring program. The LTCP proposes a robust post construction compliance monitoring program that is summarized in Section 7-11. The post construction compliance monitoring program focuses on evaluating the same beach sites monitored during the receiving water monitoring to ensure that water quality standards at sensitive areas are met. Clearly outline how the post construction information will be presented. (ALL)

Chapter 9

9.2 The water quality webpage should be implemented as soon as possible. Indicate when this can be developed. Explain why is there so much time (5 years) in the schedule for implementation of the WQ webpage. (ALL)

9.4.3 An additional river transect(s) should be considered in the Hudson River mid-pool to determine attainment throughout the Albany Pool. Sampling must cover the waters other than the Hudson River with CSO outfalls (see comments in this Attachment on Chapter 2, above). (ALL)

9.4.4 Sampling events must be coordinated to capture wet-weather events. Expand the subsection to confirm and describe how this will be accomplished. (ALL)

9.4.4.2 Clarify in this subsection that if wet-weather conditions are causing or contributing to non-attainment, existing information will first be used to try to determine which source(s) should be addressed prior to undertaking an additional monitoring and modeling study. (ALL)

Chapter 10

Discussion of public participation. Chapter 10 of the LTCP is devoted to public participation. The LTCP makes it clear that the stakeholders and the general public had multiple opportunities for becoming involved in the LTCP process. However, there does not appear to be a summary of any input that the public had into the process, and how any public input was addressed. Supplement this section to include this public input. (ALL)

Appendix J, Chapter1

1.3.5.1 Wastewater Treatment Plant Improvements

Provide a thorough analysis of increasing the capacity of the Albany County Sewer District (ACSD) and Rensselaer County Sewer District (RCSD) Wastewater Treatment Plants to handle higher peak wet weather flows because this is one way to reduce the frequency and volume of untreated CSO discharges upstream in the collection system. A justification is required for the cut off point for secondary bypasses and/or a feasible alternatives assessment for the secondary bypasses. Appendix J of the LTCP addresses some WWTP improvements but does not mention anything about expansion of primary or secondary capacity. (ACSD, RCSD)

GENERAL COMMENTS: (ALL)

The Best Management Practices and implementation of the 9 minimum (or 15 minimum as numerated in the conditions in the permits) controls have not been fully developed. Many of the items in the LTCP should have been completed under a fully executed BMP. For example, the Dry Weather Overflows (DWOs) should have been addressed under the BMPs.

The projects identified are expected to meet water quality standards and attain the best usage for the Hudson River in the Albany Pool area. Revise the sequencing of the projects to address projects with the greatest benefit(s) first.

The Proposed Implementation Schedule (Figure 9-3), needs to be modified to group projects into sub-categories that can easily be put into a schedule of compliance/consent order for the individual permits for the communities.

Consideration of sensitive areas. There is no specific discussion of sensitive areas. However, the compliance strategy is based on achieving water quality standards at two potential beach sites during the recreation season. These beach sites could reasonably be assumed to be the sensitive areas of concern. The LTCP should refer to these sites as sensitive areas, and properly address them as such in accordance with the EPA CSO Policy and guidance.

Wet Weather Operational Plan. There is no explicit operation plan included in the LTCP, nor is their explicit discussion of the future operation of the collection system and the WWTPs to manage CSOs or minimize their impacts. The LTCP needs to refer to status of BMP #5 (an approved Wet Weather Operating Plan) for each of the three sewer districts. Additionally, there needs to be an inter-municipal wet weather operating plan for the CSS to control and minimize CSOs.

Justification for “laterally well-mixed” assumption. The Albany Pool LTCP treats the Hudson River as laterally well-mixed in the impact assessment and modeling and asserts that little lateral variation was observed for bacteria concentrations during dry and wet weather (see, for example, Executive Summary subsections 2.1.1.1 and 2.1.1.3 as well as Chapter 2 subsection 2.4.4 and 2.6). Provide additional explanation, analysis and justification of the adequacy of the laterally well-mixed approach for assessing river bacteria compliance.

KEY:

ALB – Albany
COHOES – Cohoes
GI – Green Island
REN – Rensselaer
TROY -- Troy
WAT – Watervliet

ACSD – Albany County Sewer District
RCSD – Rensselaer County Sewer District

Memorandum

DATE: October 13, 2011
FROM: Tim Schmitt, John Marr
PROJECT:

TO: Stan Stephansen, EPA Region 2

CC: Jim Collins, Tetra Tech

SUBJECT: Review of Albany Pool CSO LTCP

Background

As requested by EPA Region 2, LimnoTech has reviewed the Albany Pool CSO Long Term Control Plan (LTCP), dated June 30, 2011, and associated documents, including the SPDES permits for the Albany Pool facilities, EPA's 1994 CSO Control Policy, EPA guidance documents (Guidance for Nine Minimum Controls; Guidance For Long-Term Control Plan; Guidance For Monitoring and Modeling; Guidance: Coordinating Combined Sewer Overflow (CSO) Long-Term Planning with Water Quality Standards Reviews; Guidance for Financial Capability Assessment and Schedule Development; Combined Sewer Overflows Guidance For Funding Options; CSO Post Construction Compliance Monitoring; and LTCP Checklist Evaluation), and the New York State Department of Environmental Conservation Long Term Control Plan Guidance. LimnoTech completed a LTCP Checklist for the Albany Pool CSO Long Term Control Plan, and also developed this document to summarize our findings and recommendations regarding the LTCP.

Synopsis of Review

While the LTCP is comprehensive and includes most of the major elements required of a LTCP, it seems flawed with respect to the basic goal of controlling CSOs. The control strategy discussed in this document focuses on controlling non-CSO sources of bacteria such that CSOs will not preclude attainment of water quality standards in the mainstems of the Hudson or Mohawk Rivers. However, the LTCP will only result in a 25 percent reduction in CSO volume, and will not actually reduce the overall number of CSOs compared to the present. In addition, while the study focuses on attainment of water quality standards in the mainstems of the Hudson and Mohawk Rivers, CSOs also discharge into several tributaries of the Hudson and Mohawk Rivers, and this is not addressed. The document contains little information on how the controls that do focus on CSOs were chosen and what the goals are for CSO control as opposed to the goals for bacteria control). Finally, there is very little information presented regarding the selected control approach and any potentially feasible alternatives to this approach. There is no "knee of the curve" analysis to evaluate the incremental costs of additional CSO controls to determine whether increased control can be achieved at a reasonable cost.

LTCP Review

The remainder of this document discusses the LTCP and its specific elements, and how the LTCP conforms to expectations of the CSO Control Policy, LTCP requirements, and other guidance.

Elements of CSO LTCP

The Albany Pool CSO Long Term Control Plan contains most of the major required elements of a LTCP, including:

- Characterization, monitoring and modeling. The LTCP includes an abundance of information on this aspect of the LTCP. Chapter 2 includes discussions of receiving water monitoring; Chapter 3 discusses CSS mapping; Chapter 4 discusses CSS monitoring; and Chapter 5 discusses CSS, CSO, and receiving water monitoring. Modeling of the receiving waters is critical to predict compliance with water quality standards after implementation of the recommended control program.
- Discussion of public participation. Chapter 10 of the LTCP is devoted to public participation. The LTCP makes it clear that the stakeholders and the general public had multiple opportunities for becoming involved in the LTCP process. However, there does not appear to be a summary of any input that the public had into the process, and how any public input was addressed.
- Consideration of sensitive areas. There is no specific discussion of sensitive areas. However, the compliance strategy is based on achieving water quality standards at two potential beach sites during the recreation season. These beach sites could reasonably be assumed to be the sensitive areas of concern.
- Evaluation of alternatives. Section 7.4 of the LTCP provides a summary of a screening analysis of CSO abatement technologies. The list includes quantity and quality source control measures; collection system controls; CSO storage technologies; and CSO treatment technologies. For each potential individual control option, the LTCP indicates whether that technology should be included as part of the LTCP strategy. The results of this evaluation included: the practice is already being implemented and it should be continued; the practice should be adopted as part of the LTCP; or the practice is “not feasible or appropriate.” However, the LTCP provides no information on the screening process itself or the criteria to determine whether an individual control option should be retained or rejected. Therefore, it is difficult to determine whether the control plan chosen is the best option.
- Cost/performance considerations. Cost for the various projects is provided in Chapter 7 and summarized in Table 7-2. However, these costs are not related to performance. As with the evaluation of alternatives, there is no comparison of different potential control scenarios that would allow the reader to evaluate the tradeoffs in cost versus benefit of individual projects. There is also no “knee of the curve” analysis to show where increased CSO control yields diminishing incremental returns.
- Operational plan. There is no explicit operation plan included in the LTCP, nor is their explicit discussion of the future operation of the collection system and the WWTPs to manage CSOs or minimize their impacts.
- Maximization of treatment at the existing WWTPs. Chapter 6, Wastewater Treatment Plant Wet Weather Capacity Study, summarizes the capacity analysis for each WWTP that is required as part of the SPDES permit. The purpose of the studies was to determine process and hydraulic capacities and to identify cost effective alternatives to increase the

WWTP's ability to handle sustained wet weather flows while complying with the effluent limits specified in the plant's SPDES permits.

- Implementation schedule. Chapter 9 of the LTCP summarizes the proposed implementation schedule for the LTCP. The LTCP proposes an implementation schedule of 15 years for the CSO controls, with the WWTP disinfection projects (which are already required by the WWTP SPDES permits) at the beginning of the schedule. The proposed 15-year schedule is supported by a financial capability analysis, which is summarized in Chapter 8.
- Post construction compliance monitoring program. The LTCP proposes a robust post construction compliance monitoring program that is summarized in Section 7-11. The post construction compliance monitoring program focuses on evaluating the same beach sites monitored during the receiving water monitoring to ensure that water quality standards at sensitive areas are met.

Consistency with NYDEC LTCP Requirements

The Albany Pool LTCP is generally consistent with NYDEC LTCP requirements. The LTCP includes discussions of public participation, CSS characterization (including review of rainfall and CSS records; CSO and water quality monitoring; identification of sensitive areas; and CSS and receiving water monitoring); discussion of CSO control alternatives; evaluation of CSO control alternatives and selection of a strategy; inclusion of a schedule; and inclusion of a post construction compliance monitoring plan. Our review concludes that several of the NYDEC LTCP requirements were not met, including:

- Sufficient information to determine if the planned control program will provide the maximum pollution reduction benefits reasonably attainable.
- Cost/performance curves that demonstrate if the planned control program will provide the maximum pollution reduction benefits reasonably attainable.
- Discussion of a wet weather operating plan.

These specific requirements are also part of EPA's expectations for LTCPs, and so these deficiencies are discussed in other sections within this document.

Receiving Water Quality Assessment and Modeling

Lateral Well Mixed River System: The Albany Pool LTCP treats the Hudson River as laterally well-mixed in the impact assessment and modeling and makes repeated assertions that no significant lateral differences were observed for bacteria concentrations during dry and wet weather. The physical characteristics of the river and CSO discharges and the large apparent differences side to side shown in the 2008-2009 wet weather data (Figures 5-2 to 5-9 of *Receiving Water Quality Assessment*, February 2009) seem to conflict with this important modeling assumption. This particular situation, with surface and near surface CSO discharges to a 1,000-foot-wide river with non-turbulent river flow and negligible sinuosity, disfavors rapid lateral mixing, even with some tidal influence present. In addition, the wet weather fecal coliform and E.coli river data presented in a companion report (*Receiving Water Quality Assessment, Albany Pool Part B Long Term Control Plan*, dated February 2009) exhibit what appear to be significant lateral differences at locations downstream of CSOs - sometimes an order of magnitude and more. The general rule of thumb for determining a river situation to be laterally well mixed for chemical constituents (e.g. dye, salinity, conductivity, etc.) is no more than a 5 or 10 percent difference side-to-side, though the inherent imprecision of bacteria count

measurements warrants a less stringent application. Using laterally averaged forecasts from the one-dimensional river model combined with the 30 day geometric standard could, in LimnoTech's opinion, overestimate bacteria standard compliance along the east and west sides due to discharges from CSOs. Additional analysis and justification therefore should be provided confirming the adequacy of the laterally well-mixed approach for assessing river bacteria compliance. Additional justification could include some combination of the following approaches: detailed statistical and group comparisons of existing coincidental bacteria samples at CSO-impacted transects- especially at peak concentrations; analysis of the lateral homogeneity of available river conductivity and temperature measurements; a dye study during representative wet weather conditions; or river plume modeling of representative CSO discharges during typical wet weather conditions using a generally accepted model like CORMIX or VisualPlumes.

Tributary Impacts: There are several statements in the Albany Pool LTCP that suggest that there are CSO discharges directly into tributaries that each presumably have less dilution and assimilative capacity than the Hudson River. There were no data or evaluations presented of the CSO impacts on the tributaries or CSO controls to achieve compliance with the water quality standards therein. If indeed there are existing CSO discharges to the tributaries, then they should be evaluated and addressed as part of the overall Albany Pool LTCP. Bacteria and perhaps also dissolved oxygen water quality standard compliance might be issues for the tributaries receiving CSO discharges.

CSO Control Strategy

The primary strategy of the plan in the LTCP is to control WWTP and upstream sources of bacteria (both tributary sources and sources to the mainstem of the Hudson River) such that the remaining CSOs do not preclude the attainment of water quality standards in the Hudson River. However, LimnoTech is concerned about several ramifications of this strategy and the details leading to the formation of this strategy. First, this strategy actually has very little focus on CSOs, and instead focuses on other sources of bacteria. In that respect, this is really a watershed bacteria control plan, and not a CSO LTCP. For example, Table 5 in the Executive Summary shows that controls proposed in this LTCP will result in no reduction in the number of CSOs and will capture only about 25 percent additional volume of CSOs versus the current baseline. Table 7-4 lists projects recommended as part of the LTCP. Approximately \$31M are devoted to upgrading the three WWTPs in the Albany Pool system for disinfection and enhanced screening, degritting and settling. According to Section 9.2 of the LTCP, the Albany County Sewer District (ACSD) and Rensselaer County Sewer District (RCSD) SPDES permits include requirements for implementation of seasonal disinfection. ACSD is required to install and commence operation of disinfection facilities at their WWTPs within 30 months of approval of the LTCP, while RCSD is required to complete disinfection facilities by September 2012. Therefore, these facilities would implement seasonal disinfection regardless of the development and implementation of the CSO LTCP. The CSO LTCP also includes \$15.7M in system optimization and BMP implementation; \$32.1M in sewer separation and stormwater storage; \$25.8M in floatables control projects; \$2.8M in tributary enhancements (primarily trackdown of non-CSO bacteria sources); and \$1.5M in "additional poolwide projects," such as a water quality advisory webpage and an asset management plan. The total projected cost of the CSO LTCP is \$109.6M.

Analyzing the percentage of spending on different control types, the primary strategies of adding disinfection at WWTPs and reducing bacteria in tributary streams is approximately 17 percent of the cost of the LTCP (\$18.77M out of \$109.6M). Looking at the costs another way, WWTP and

tributary projects are approximately 31.5 percent of the cost of the LTCP (\$34.5M out of \$109.6M), while 14 percent is devoted to system optimization and BMPs (\$15.7M out of \$109.6M), 23 percent to floatables control (\$25.75M out of \$109.6M), 29 percent to sewer separation and stormwater storage (\$32.1M out of \$109.6M); and a little over one percent (\$1.5M out of \$109.6M) to Additional Pool-Wide Projects. Of these projects, the system optimization and BMPs and sewer separation and stormwater storage projects, which represent 43 percent of the cost of the LTCP, are the most directly applicable to addressing CSO frequency and volume, while the floatables control projects relate more directly to water quality.

Although 43 percent of the cost of the LTCP is devoted to system optimization and BMPs and sewer separation and stormwater storage projects to control CSO frequency and volume, there is almost no detail provided regarding the specifics of these projects. No information is provided on the details of these projects with respect to their impact on individual CSOs, the benefit versus the expense of the project, or how it was determined that this specific suite of projects provided the optimal amount of CSO control for the cost. At several points in the LTCP, the document refers to the increased percent capture of CSO volume that would occur as a result of the LTCP, but nowhere are other potential CSO control alternatives given to allow the reader to determine if the recommended scenario provides the most benefit for the dollars, or if other control alternatives should be explored.

In summary, the Albany Pool LTCP does not provide detailed information on the costs and benefits of individual projects, and so the reader cannot evaluate the potential benefits of projects to CSO controls versus non-CSO controls to determine the specific tradeoffs between reducing CSO impacts versus achieving improved water quality without CSO benefit.

Recommendations

The Albany Pool LTCP is a comprehensive, well-written document that appears to offer a strategy for achieving compliance with bacteria water quality standards at identified sensitive areas. However, the assumptions underlying the modeling of compliance scenarios are based on a well-mixed river system, and this may not be the case. We recommend that the LTCP be updated to provide more evidence that the assumptions of a well-mixed river system are valid.

The LTCP also seems to ignore CSO-related water quality concerns in the tributaries. There is no information on the water quality standards in the tributaries, how CSOs contribute to any impairments in the tributaries, and how this LTCP will achieve water quality standards in the tributaries. We recommend that the LTCP be updated to address these issues.

In addition, the LTCP seems to be more of a watershed-based strategy for achieving water quality standards, rather than a CSO control plan. Most of the plan is devoted to non-CSO controls (e.g., disinfection at WWTPs; control of upstream sources of bacteria), and the plan does not reduce CSO frequency at all, and only reduces overall CSO volume by 25 percent. While the main water quality goal of this document is clear, this goal is not specifically a CSO control goal, and the specific reasoning behind the chosen CSO control approaches is unclear. We recommend that the LTCP be updated to discuss various alternatives for CSO control (not non-CSO control approaches like disinfection at WWTPs), and that the discussion of CSO controls include a clear discussion of the goals of the CSO control program (e.g., reduce number of CSO discharges by X percent and reduce CSO overflow volume by x percent), and provide a “knee of the curve” analysis that shows incremental costs of increased CSO control. This type of discussion and analysis is critical for providing stakeholders with the data they need to help

make informed decisions about the level of CSO control that is technically and financially feasible.

APPENDIX B
CONSENT ORDER COMPLIANCE SCHEDULE

Albany Pool CSO LTCP Schedule of Compliance

Responsible Party has advanced construction plans and specifications, and in some cases, construction activities have commenced.

Responsible Party	Project Name	Project Milestones/Deadlines
Process Improvements at Wastewater Treatment Plants		
RCSD	Primary Sludge Degritting	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/18 Operational Start-Up Date: 12/15/18
RCSD	Evaluation of Secondary Clarification Improvements	Task Start Date: 6/1/19 Task Completion Date: 6/1/20
BMPs/System Optimization		
Albany Water Board	McCormack Pump Station Upgrades, City of Albany	Construction Completion Date: 9/30/14 Operational Start-Up Date: 9/30/14
Albany Water Board	Sewer Rehabilitation Projects Throughout the City of Albany	Construction Completion Date: 12/15/13 Operational Start-Up Date: 12/15/13
APCs	Remove Schyler Overflow, City of Albany	Completed Plans & Specifications: 10/1/26 NTP to Construction: 4/1/27 Construction Completion Date: 12/15/27 Operational Start-Up Date: 12/15/27
APCs	Remove Liberty Overflow, City of Albany	Completed Plans & Specifications: 10/1/25 NTP to Construction: 4/1/26 Construction Completion Date: 12/15/26 Operational Start-Up Date: 12/15/26
APCs	Modify Bouck Regulator, City of Albany	Completed Plans & Specifications: 10/1/26 NTP to Construction: 4/1/27 Construction Completion Date: 12/15/27 Operational Start-Up Date: 12/15/27
APCs	Improvements at up to Eleven Regulators, City of Cohoes	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
APCs	Swan Street and Hamilton Street Regulator Improvements, Village of Green Island	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
APCs	Improvements at Five Regulators, City of Watervliet	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
City of Rensselaer	Partition Street Trunk Sewer Evaluation, City of Rensselaer	Task Start Date: 9/1/13 Task Completion Date: 3/1/14
RCSD	Upgrade Pump Stations Located in Rensselaer	Completed Plans & Specifications: 3/1/14 NTP to Construction: 7/1/14 Construction Completion Date: 4/15/15 Operational Start-Up Date: 4/15/15
RCSD	Upgrade Pump Stations Located in Troy	Completed Plans & Specifications: 9/1/14 NTP to Construction: 3/1/15 Construction Completion Date: 4/1/16 Operational Start-Up Date: 4/1/16
RCSD	Regulator Capacity Improvements	Completed Plans & Specifications: 10/1/14 NTP to Construction: 4/1/15 Construction Completion Date: 12/15/15 Operational Start-Up Date: 12/15/15

Albany Pool CSO LTCP

Schedule of Compliance

Responsible Party has advanced construction plans and specifications, and in some cases, construction activities have commenced.

Responsible Party	Project Name	Project Milestones/Deadlines
APCs	Outside Community Metering	Completed Plans & Specifications: 10/1/17 Construction Start Date: 4/1/18 Construction Completion Date: 12/15/18 Operational Start-Up Date: 12/15/18
APCs	18th Street and Avenue A Weir Improvements, City of Watervliet	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
Sewer Separation/Stormwater Storage		
APCs	Marietta Place Stormwater Storage Facility, City of Albany	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/18 Operational Start-Up Date: 12/15/18
APCs	Mereline Combined Sewage Storage, City of Albany	Completed Plans & Specifications: 10/1/18 NTP to Construction: 4/1/19 Construction Completion Date: 12/15/20 Operational Start-Up Date: 12/15/20
APCs	Upper Washington Avenue Groundwater Recharge, City of Albany	Completed Plans & Specifications: 2/15/14 NTP to Construction: 8/15/14 Construction Completion Date: 12/15/15 Operational Start-Up Date: 12/15/15
APCs	Melrose/Winthrop Groundwater Recharge Basins, City of Albany	Completed Plans & Specifications: 10/1/14 NTP to Construction: 4/1/15 Construction Completion Date: 12/15/16 Operational Start-Up Date: 12/15/16
APCs	Vliet Street Sewer Rehabilitation, Replacement and Separation, City of Cohoes	Completed Plans & Specifications: 10/1/21 NTP to Construction: 4/1/22 Construction Completion Date: 12/15/23 Operational Start-Up Date: 12/15/23
APCs	Manor Avenue Sewer Rehabilitation, Replacement and Separation, City of Cohoes	Completed Plans & Specifications: 10/1/26 NTP to Construction: 4/1/27 Construction Completion Date: 12/15/27 Operational Start-Up Date: 12/15/27
APCs	Columbia Street Phase II Separation, City of Cohoes	Completed Plans & Specifications: 10/1/21 NTP to Construction: 4/1/22 Construction Completion Date: 12/15/22 Operational Start-Up Date: 12/15/22
APCs	George Street Sewer Separation, City of Cohoes	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
APCs	Middle Vliet Street Sewer Separation, City of Cohoes	Completed Plans & Specifications: 10/1/16 NTP to Construction: 4/1/17 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
APCs	Partition Street/Broadway Sewer and Drain Improvements, City of Rensselaer	Completed Plans & Specifications: 3/1/14 NTP to Construction: 9/1/14 Construction Completion Date: 12/31/15 Operational Start-Up Date: 12/31/15

Albany Pool CSO LTCP

Schedule of Compliance

Responsible Party has advanced construction plans and specifications, and in some cases, construction activities have commenced.

Responsible Party	Project Name	Project Milestones/Deadlines
APCs	123rd Street Stream Separation, City of Troy	Completed Plans & Specifications: 10/1/18 NTP to Construction: 4/1/19 Construction Completion Date: 12/15/20 Operational Start-Up Date: 12/15/20
APCs	Van Buren Street Stream Separation, City of Troy	Completed Plans & Specifications: 10/1/22 NTP to Construction: 4/1/23 Construction Completion Date: 12/15/24 Operational Start-Up Date: 12/15/24
APCs	Polk Street Stream Separation, City of Troy	Completed Plans & Specifications: 10/1/21 NTP to Construction: 4/1/22 Construction Completion Date: 12/15/22 Operational Start-Up Date: 12/15/22
APCs	Hoosick Street Storm Sewer Extension, City of Troy	Completed Plans & Specifications: 10/1/17 NTP to Construction: 4/1/18 Construction Completion Date: 12/15/18 Operational Start-Up Date: 12/15/18
Green Infrastructure Program		
APCs	Performance of a Codes and Local Law Review	Task Start Date: 8/1/15 Task Completion Date: 8/1/16
APCs	Green Infrastructure Technical Design Guidance	Task Start Date: 8/1/15 Task Completion Date: 8/1/17
APCs	Documentation/Reporting of New Public and Private Green Projects	Task Start Date: 8/1/14 Task Completion Date: 3/1/19
APCs	Completion of a Feasibility Assessment for a "Green Infrastructure Banking System"	Task Start Date: 8/1/15 Task Completion Date: 8/1/17
APCs	Quail Street Green Infrastructure Project, City of Albany	Completed Plans & Specifications: 10/1/14 NTP to Construction: 4/1/15 Construction Completion Date: 12/15/16 Operational Start-Up Date: 12/15/16
APCs	North Swan Street Park Revitalization, City of Albany	Completed Plans & Specifications: 12/15/13 NTP to Construction: 6/15/14 Construction Completion Date: 12/15/15 Operational Start-Up Date: 12/15/15
APCs	Route 32 Green Street Project, City of Watervliet	Completed Plans & Specifications: 10/1/15 NTP to Construction: 4/1/16 Construction Completion Date: 12/15/17 Operational Start-Up Date: 12/15/17
APCs	Monument Square Green Infrastructure Project, City of Troy	Completed Plans & Specifications: 10/1/15 NTP to Construction: 4/1/16 Construction Completion Date: 12/15/16 Operational Start-Up Date: 12/15/16
Village of Green Island	Albany Avenue Green Street Project, Village of Green Island	Construction Completion Date: 12/15/14 Operational Start-Up Date: 12/15/14

Albany Pool CSO LTCP Schedule of Compliance

Responsible Party has advanced construction plans and specifications, and in some cases, construction activities have commenced.

Responsible Party	Project Name	Project Milestones/Deadlines
Satellite Treatment and/or Floatables Control Facilities		
APCs	"Big C" Disinfection and Floatables Control Facility, City of Albany	Begin Preliminary Design Report: 8/1/15 Completed Preliminary Design Report: 8/1/16 Begin SEQR & Eminent Domain Process: 2/1/17 Completed SEQR & Eminent Domain Process: 2/1/21 Begin Final Design: 12/15/18 Completed Plans & Specifications: 10/1/20 NTP to Construction: 4/1/21 Construction Completion Date: 12/15/22 Operational Start-Up Date: 5/1/23
APCs	Floatables Control Facility for CSO 026 Outfall (Regulators Maiden, Stuben and Orange), City of Albany	Completed Plans & Specifications: 10/1/17 NTP to Construction: 4/1/18 Construction Completion Date: 12/15/19 Operational Start-Up Date: 12/15/19
APCs	Floatables Control Facility for CSO 030 Outfall (Regulators Quackenbush, Jackson and Livingston), City of Albany	Completed Plans & Specifications: 10/1/17 NTP to Construction: 4/1/18 Construction Completion Date: 12/15/19 Operational Start-Up Date: 12/15/19
APCs	"Little C" Floatables Control Facility, City of Cohoes	Completed Plans & Specifications: 10/1/24 NTP to Construction: 4/1/25 Construction Completion Date: 12/15/26 Operational Start-Up Date: 12/15/26
Tributary Enhancements		
APCs	Investigate Non-CSO Bacteria Sources Along Mill Creek, Poesten Kill, and Wynants Kill	Task Start Date: 4/1/16 Task Completed Date: 12/15/17
APCs	Cross Street Sewer Outfall Repairs and/or Replacment, City of Troy	Completed Plans & Specifications: 4/1/14 NTP to Construction: 8/1/14 Construction Completion Date: 12/15/14 Operational Start-Up Date: 12/15/14
City of Troy	Cross Street Trunk Sewer Rehabilitation Phase I, City of Troy	Construction Completion Date: 12/15/14 Operational Start-Up Date: 12/15/14
APCs	Cross Street Trunk Sewer Rehabilitation Phase II, City of Troy	Completed Plans & Specifications: 10/1/24 NTP to Construction: 4/1/25 Construction Completion Date: 12/15/25 Operational Start-Up Date: 12/15/25
Additional Pool-Wide Projects		
APCs	Discharge Notification System for Albany Pool CSOs	Task Start Date: 12/1/13 Task Completion Date: 12/1/14
APCs	Hudson River Water Quality Public Advisory	Task Start Date: 4/1/18 Task Completion Date: 4/1/19
APCs	Development of the Post-Construction Monitoring Program	Task Start Date: 4/1/14 Task Completion Date: 10/1/14
APCs	Implementation of the Post-Construction Monitoring Program	Task Start Date: 5/1/15 Task Completion Date: 10/1/27
APCs	Execution of IMA(s) in compliance with Section V(C) of the Order on Consent	Task Start Date: Effective Date of the Order on Consent Task Completion Date: 15 Months after the Effective Date of the Order on Consent
Albany Water Board, Cohoes, Watervliet, Green Island	Sewer System Operations, Maintenance and Inspection Plans	Task Start Date: 4/1/14 Task Completion Date: 12/1/15
Albany Water Board, Cohoes, Watervliet, Green Island	Asset Management Plans	Task Start Date: 4/1/15 Task Completion Date: 12/1/17

APPENDIX C
LTCP APPROVAL LETTER

New York State Department of Environmental Conservation

Division of Water,

Bureau of Water Permits, 4th Floor

625 Broadway, Albany, New York 12233-3505

Phone: (518) 402-8111 • Fax: (518) 402-9029

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Joe Martens
Commissioner

January 15, 2014

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Re: Albany Pool Long Term Control Plan, as revised September 2013
SPDES Permit No. NY-002 5747 (City of Albany)
SPDES Permit No. NY-002 6026 (City of Rensselaer)
SPDES Permit No. NY-009 9309 (City of Troy)
SPDES Permit No. NY-003 0899 (City of Watervliet)
SPDES Permit No. NY-003 1046 (City of Cohoes)
SPDES Permit No. NY-003 3031 (Village of Green Island)
Order on Consent # CO 4-20120911-01

To the above-listed addressees:

The New York State Department of Environmental Conservation (NYSDEC) has reviewed your September 2013 Long Term Control Plan ("LTCP") Supplement that addressed the NYSDEC December 2012 comments on the draft LTCP dated June 30, 2011. The Supplement was

thereafter replaced with a document entitled, "October 2013 Albany Pool CSO Long Term Control Plan Supplemental Documentation." The proposed 2011 LTCP and its October 2013 Supplement are hereby approved as the Albany Pool LTCP.

The term "Albany Pool" refers to six communities (the cities of Albany, Cohoes, Rensselaer, Troy and Watervliet, and the Village of Green Island) that own or operate Combined Sewer Overflow ("CSOs") outfalls in the local reach of the Hudson River. The Albany Pool LTCP was prepared by the six Albany Pool Communities as well as the two above-listed county sewer districts under the project management and coordination of the Capital District Regional Planning Commission. NYSDEC evaluated the draft LTCP and Supplements under the standards of Section 402(q)(1) of the Clean Water Act and the specific terms of the New York State Pollutant Discharge Elimination System ("SPDES") permits that cover the Albany Pool communities and the two county sewer districts. To be approvable, the draft LTCP and Supplement also had to meet the U.S. Environmental Protection Agency ("USEPA") Combined Sewer Overflow Control Policy, enacted as federal law at Federal Register Volume 59, Number 75, pages 18688-18698 ("USEPA Policy").

The approved Albany Pool LTCP includes the following documents:

1. The June 30, 2011 Albany Pool CSO LTCP, including its appendices:
 - a. Appendix A - Receiving Water Quality Sampling Plan
 - b. Appendix B - Receiving Water Quality Report (2008 Sampling)
 - c. Appendix C - Albany Pool Tributary Water Quality Assessment Report (2009 Sampling)
 - d. Appendix D - DO Correspondence from DEC dated April 13, 2010
 - e. Appendix E - Combined Sewer System Monitoring Plan
 - f. Appendix F - Combined Sewer System Modeling Work Plan
 - g. Appendix G - CSO Model Development and Baseline Conditions Report
 - h. Appendix H - Receiving Water Quality Model Development Report
 - i. Appendix I - WWTP Wet Weather Capacity Study
 - j. Appendix J - Development and Evaluation of CSO Control Alternatives Report
 - k. Appendix K - Financial Capability Assessment
 - l. Appendix L - CAC Meeting Presentations
 - m. Appendix M - Public Meeting Presentations; and
2. The October 2013 Supplemental Documentation to the Albany Pool CSO LTCP, including its appendices:
 - a. Appendix N - Response to Comments
 - b. Appendix O - Program Definition
 - c. Appendix P - Program Implementation Schedule

In accordance with the terms of the above-referenced fully-executed Order on Consent, the approved Albany Pool LTCP is incorporated into and made an enforceable part of the Order on

Consent. Please ensure all staff and contractors working on the LTCP are fully familiar with the terms, deadlines, and requirements of the LTCP and the Order on Consent.

Paul Kolakowski, P.E., Project Engineer, has been assigned the Department's project manager for the implementation of the approved LTCP. Please contact Mr. Kolakowski at (518)402-8104 if you have any questions. Any questions about the Order on Consent should be directed to Carol Conyers, Esq. at (518) 402-9512.

Sincerely,



Koon Tang, P.E.

Director, Bureau of Water Permits

ec: Project Coordinator, Albany Pool LTCP Project
CDRPC, One Park Place, Albany, NY 12205
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Appendix B

[Responsibility Matrix]

CSO LTCP Matrix Of Responsibility

Unique Identifier	Project Name	Project Type	Responsible Party (Order & LTCP)	Project Location	CSO Outfall No	Operation	Own	Maintain
APW-01	Discharge Notification System for Albany Pool CSOs	Additional Pool-Wide Projects	APCs	N/A	N/A	N/A	N/A	N/A
APW-02	Execution of IMA(s) in compliance with Section V(C) of the Order on Consent	Additional Pool-Wide Projects	APCs	N/A	N/A	N/A	N/A	N/A
APW-03	Development of the Post-Construction Monitoring Program (PCMP)	Additional Pool-Wide Projects	APCs	N/A	N/A	N/A	N/A	N/A
APW-04	Sewer System Operations, Maintenance and Inspection Plans	Additional Pool-Wide Projects	Albany Water Board, Cohoes, Watervliet, Green Island	N/A	All outfalls	N/A	N/A	N/A
APW-05	Asset Management Plans	Additional Pool-Wide Projects	Albany Water Board, Cohoes, Watervliet, Green Island	N/A	All outfalls	N/A	N/A	N/A
APW-06	Implementation of the Post-Construction Monitoring Program	Additional Pool-Wide Projects	APCs	N/A	N/A	N/A	N/A	N/A
APW-07	Hudson River Water Quality Public Advisory	Additional Pool-Wide Projects	APCs	N/A	N/A	N/A	N/A	N/A
BMP-01	Sewer Rehabilitation Projects Throughout the City of Albany	BMPs/System Optimization	Albany Water Board	Albany	A-016, A-012			
BMP-02	McCormack Pump Station Upgrades	BMPs/System Optimization	Albany Water Board	Albany	A-016			
BMP-03	Upgrade Pump Stations	BMPs/System Optimization	RCSD	Rensselaer	R-002 to 010 (once regulators are opened)	RCSD	RCSD	RCSD
BMP-04	Regulator Capacity Improvements	BMPs/System Optimization	RCSD	Rensselaer County	T-001 to 043, 046A, 046B, 047, R-002, 003, 006, 010	RCSD	RCSD	RCSD
BMP-05	Upgrade Pump Stations Located in Troy	BMPs/System Optimization	RCSD	Troy	T-002 to 044	RCSD	RCSD	RCSD
BMP-06	18th St. and Ave. A Weir Improvements	BMPs/System Optimization	APCs	Watervliet	W-005	Watervliet	Watervliet	Watervliet
BMP-07	Improvements at Five Regulators	BMPs/System Optimization	APCs	Watervliet	W-001 to 004, 006	ACSD / Watervliet	Watervliet	ACSD / Watervliet
BMP-08	Improvements at up to Eleven Regulators	BMPs/System Optimization	APCs	Cohoes	C-001 to 007, 010 to 012, 015	ACSD / Cohoes	Cohoes	ACSD / Cohoes
BMP-09	Swan St. and Hamilton St. Regulator Improvements	BMPs/System Optimization	APCs	Green Island	GI-002, 003	ACSD/ Green Island	Green Island	ACSD/ Green Island
BMP-10	Outside Community Metering	BMPs/System Optimization	APCs	Troy	T-001, 024, 045	Troy	Troy	Troy
BMP-11	Remove Liberty Overflow	BMPs/System Optimization	APCs	Albany	A-022	AWB	AWB	AWB
BMP-12	Modify Bouck Regulator	BMPs/System Optimization	APCs	Albany	A-013	AWB	AWB	AWB
BMP-13	Remove Schuyler Overflow	BMPs/System Optimization	APCs	Albany	A-015	AWB	AWB	AWB
BMP-14	Partition St. Trunk Sewer Evaluation	BMPs/System Optimization	Rensselaer	Rensselaer	R-006	Rensselaer	Rensselaer	Rensselaer
GI-01	Albany Ave. Green St. Project	Green Infrastructure Program	Village of Green Island	Green Island	GI-004	APCs - GI only	Green Island	APCs - GI only
GI-02	North Swan St. Park Revitalization	Green Infrastructure Program	APCs	Albany	A-030	APCs - GI only	AWB	APCs - GI only
GI-03	Quail St. Green Infrastructure Project	Green Infrastructure Program	APCs	Albany	A-016	APCs - GI only	AWB	APCs - GI only
GI-04	Monument Square Green Infrastructure Project	Green Infrastructure Program	APCs	Troy	T-030	APCs - GI only	Troy	APCs - GI only
GI-05	Route 32 Green St. Project	Green Infrastructure Program	APCs	Watervliet	Potential CSO's effected, W-001 to 004	APCs - GI only	Watervliet	APCs - GI only
GI-06	Documentation/Reporting of New Public and Private Green Projects	Green Infrastructure Program	APCs	N/A	N/A	N/A	N/A	N/A
GI-07	Performance of a Codes and Local Law Review	Green Infrastructure Program	APCs	N/A	N/A	N/A	N/A	N/A
GI-08	Completion of a Feasibility Assessment for a "Green Infrastructure Banking System"	Green Infrastructure Program	APCs	N/A	N/A	N/A	N/A	N/A
GI-09	Green Infrastructure Technical Design Guidance	Green Infrastructure Program	APCs	N/A	N/A	N/A	N/A	N/A
PIW-01	Primary Sludge Degritting	Process Improvements at Wastewater Treatment Plants	RCSD	Rensselaer County	N/A	RCSD	RCSD	RCSD
PIW-02	Evaluation of Secondary Clarification Improvements	Process Improvements at Wastewater Treatment Plants	RCSD	Rensselaer County	N/A	RCSD	RCSD	RCSD
SSS-01	Upper Washington Ave. Groundwater Recharge	Sewer Separation/Stormwater Storage	APCs	Albany	A-016	AWB	AWB	AWB
SSS-02	Partition St./Broadway Sewer and Drain Improvements	Sewer Separation/Stormwater Storage	APCs	Rensselaer	R-006	Rensselaer	Rensselaer	Rensselaer
SSS-03	Melrose/Winthrop Groundwater Recharge Basins	Sewer Separation/Stormwater Storage	APCs	Albany	A-016	AWB	AWB	AWB

Unique Identifier	Project Name	Project Type	Responsible Party (Order & LTCP)	Project Location	CSO Outfall No	Operation	Own	Maintain
SSS-04	George St. Sewer Separation	Sewer Separation/Stormwater Storage	APCs	Cohoes	C-008, 015	Cohoes	Cohoes	Cohoes
SSS-05	Middle Vliet St. Sewer Separation	Sewer Separation/Stormwater Storage	APCs	Cohoes	C-007	Cohoes	Cohoes	Cohoes
SSS-06	Marietta Place Stormwater Storage Facility	Sewer Separation/Stormwater Storage	APCs	Albany	A-013	AWB	AWB	AWB
SSS-07	Hoosick St. Storm Sewer Extension	Sewer Separation/Stormwater Storage	APCs	Troy	T-024	Troy	Troy	Troy
SSS-08	123rd St. Stream Separation	Sewer Separation/Stormwater Storage	APCs	Troy	T-002	Troy	Troy	Troy
SSS-09	Mereline Combined Sewage Storage	Sewer Separation/Stormwater Storage	APCs	Albany	A-013	AWB	AWB	AWB
SSS-10	Columbia St. Phase II Separation	Sewer Separation/Stormwater Storage	APCs	Cohoes	C-008, 015	Cohoes	Cohoes	Cohoes
SSS-11	Polk St. Stream Separation	Sewer Separation/Stormwater Storage	APCs	Troy	T-044	Troy	Troy	Troy
SSS-12	Vliet St. Sewer Rehabilitation, Replacement & Separation	Sewer Separation/Stormwater Storage	APCs	Cohoes	C-007	Cohoes	Cohoes	Cohoes
SSS-13	Van Buren St. Stream Separation	Sewer Separation/Stormwater Storage	APCs	Troy	T-041	Troy	Troy	Troy
SSS-14	Manor Ave. Sewer Rehabilitation, Replacement & Separation	Sewer Separation/Stormwater Storage	APCs	Cohoes	C-007	Cohoes	Cohoes	Cohoes
STCF-01	Floatables Control Facility for CSO 026 Outfall (Regulators Maiden, Stuben and Orange)	Satellite Treatment and/or Floatables Control Facilities	APCs	Albany	A-026	APCs	AWB	APCs
STCF-02	Floatables Control Facility for CSO 030 Outfall (Regulators Quackenbush, Jackson and Livingston)	Satellite Treatment and/or Floatables Control Facilities	APCs	Albany	A-030	APCs	AWB	APCs
STCF-03	"Big C" Disinfection and Floatables Control Facility	Satellite Treatment and/or Floatables Control Facilities	APCs	Albany	A-016	APCs	AWB	APCs
STCF-04	"Little C" Floatables Control Facility	Satellite Treatment and/or Floatables Control Facilities	APCs	Cohoes	C-008, 015	APCs	Cohoes	APCs
TE-01	Cross St. Sewer Outfall Repairs and/or Replacement	Tributary Enhancements	APCs	Troy	T-045	Troy	Troy	Troy
TE-02	Cross St. Trunk Sewer Rehabilitation Phase I	Tributary Enhancements	Troy	Troy	T-045	Troy	Troy	Troy
TE-03	Cross St. Trunk Sewer Rehabilitation Phase II	Tributary Enhancements	APCs	Troy	T-045	Troy	Troy	Troy
TE-04	Investigate Non-CSO Bacteria Sources Along Mill Creek, Poesten Kill, & Wynants Kill	Tributary Enhancements	APCs	Rensselaer County	N/A	N/A	N/A	N/A
TE-05	Cross Street Sewer Outfall Evaluation	Tributary Enhancements	Troy	Troy	T-045	Troy	Troy	Troy

Appendix C

[EFC's standard Project Finance Agreement]

The Project Finance Agreement to be in the form prepared by EFC pursuant to their program guidelines.

Appendix D

[EFC's standard Bid Packets]



NY State Revolving Fund
MWBE / EEO / DBRA
Bid Packet for

Construction Contracts

Effective October 1, 2013

New York State Environmental Facilities Corporation
625 Broadway, Albany, NY 12207-2997
(800) 882 9721
P: (518) 402-7396 F: (518) 402-7456
www.efc.ny.gov

GUIDANCE FOR CONSTRUCTION CONTRACTS

NEW YORK CLEAN WATER and DRINKING WATER STATE REVOLVING FUNDS

Administered by the New York State Environmental Facilities Corporation (EFC)

Contents of Bid Packet

- **PART 1: REQUIRED TERMS FOR PROJECT CONTRACTS AND SUBCONTRACTS**

The required contract language to be inserted into all construction contracts to satisfy Davis Bacon, Equal Employment Opportunity (EEO), Disadvantaged Business Enterprise (DBE) & Minority & Women Owned Business Enterprise (MWBE) and some other Clean/Drinking Water State Revolving Fund (SRF) Program requirements

- **PART 2: GUIDANCE MATERIALS**

Guidance 1: Equal Employment Opportunity and Minority & Women-Owned Business Enterprise Programs

A description of the EEO & MWBE requirements as they relate to construction contracts funded in whole or in part by the New York State Revolving Funds – all contracts and subcontracts

Guidance 2: Construction Contracts: Requirements of the Davis Bacon Related Acts (DBRA)

Description of Davis Bacon requirements as they relate to construction contracts

- **PART 3: REQUIRED FORMS**

A list and summary description of forms required for the MWBE, EEO and DBRA programs.

PART 1:

REQUIRED CONTRACT LANGUAGE

Required Terms for Project Contracts and Subcontracts

The following two exhibits must be included in ALL construction contracts and subcontracts being funded in whole or in part with SRF funds.

Check EFC's website (www.efc.ny.gov/mwbe) for updates.

Exhibit 1: EEO & MWBE Language & Goals and other program requirements

Exhibit 2: Davis Bacon Related Acts (DBRA) Language and Prevailing Wage Requirements for SRF Recipients*

*Only applies to 212 or 319 projects that qualify as treatment works or at community water systems

*If recipient is a non-governmental entity please discuss applicability with EFC.

EXHIBIT 1

REQUIRED TERMS FOR PROJECT CONTRACTS AND SUBCONTRACTS

In accordance with the terms and conditions set forth in Section 5.1 of the Project Finance Agreement, Recipient agrees that the following language will be included in all contracts and subcontracts regarding the Project including but not limited to those relating to construction, engineering, architectural, legal and fiscal services, as required by federal and State laws, regulations, and executive orders applicable to this Project:

DEFINED TERMS:

The term “Bid Packets” means the New York State Revolving Fund (SRF) Bid Packet for Construction Contracts and Bid Packet for Non-Construction Contracts and Service Providers, available at www.efc.ny.gov/mwbe.

The term “contractor”, as used in this contract or subcontract, means, and applies to, all prime contractors, consultants and service providers as hereinafter defined, unless specifically referred to otherwise.

The term “subcontractor”, as used in this contract or subcontract, means, and applies to, any individual or business enterprise that has an agreement with a contractor.

The term “EEO policy statement” means a statement of the contractor and subcontractor setting forth at least the following:

- (i) A statement that the contractor will provide for and promote equal employment opportunity free of discrimination and harassment against any person on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination and will make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on contracts relating to the Project.
- (ii) An agreement that all of contractor’s solicitations or advertisements for employees will state that, in the performance of the contract relating to this Project, all qualified applicants will be provided with equal employment opportunity free of discrimination and harassment against any person on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.
- (iii) An agreement to request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate or harass on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law and that such union or representative will affirmatively cooperate in the implementation of the contractor’s obligations herein.
- (iv) An agreement to comply with the provisions of the Human Rights Law (Article 15 of the Executive Law), including those relating to non-discrimination on the basis of prior criminal conviction and prior arrest, and with all other State and federal statutory constitutional non-discrimination provisions.

The term “EFC” means the New York State Environmental Facilities Corporation.

The term “EPA” means the United States Environmental Protection Agency.

The term “ESD” means the Empire State Development Corporation - Division of Minority and Women’s Business Development.

The term “Recipient” means the party, other than EFC, to a grant agreement or a project finance agreement with EFC through which funds for the payment of amounts due hereunder are being paid in whole or in part.

The term “Service Providers” means professional services, such as legal, engineering, financial advisory or other professional services, supplies, commodities, equipment, materials, and travel.

The term “State” means the State of New York.

INTERPRETATION:

This contract is subject to Article 15-A of the Executive Law (Article 15-A) and 5 NYCRR 140-145 (the Regulations) and shall be considered a State Contract as defined therein. If any of the terms herein conflict with Article 15-A or the Regulations, such law and regulations shall supersede these requirements.

REPRESENTATIONS AND ACKNOWLEDGMENTS OF CONTRACTOR & SUBCONTRACTOR:

The contractor acknowledges that funds for the payment of amounts due under this contract are being provided in whole or in part subject to the terms and conditions of a grant agreement or a project finance agreement with EFC.

The contractor represents that it has submitted an EEO policy statement, an EEO Workforce Staffing Plan for Service Provider (Non-construction) Contracts (if applicable), and an MWBE Utilization Plan (prime contractors only), **prior to the execution of this contract.**

Suspension/Debarment - The contractor is not a debarred or suspended party under 2 CFR Part 180, 2 CFR Part 1532 and 40 CFR Part 32. Further, neither the contractor nor any of its subcontractors have contracted with, or will contract with, any debarred or suspended party under the foregoing regulations or with any party that has been determined to be ineligible to bid under Section 316 of the Executive Law.

EQUAL EMPLOYMENT OPPORTUNITY (EEO), AFFIRMATIVE ACTION, MWBE AND OTHER COVENANTS:

Contractor and subcontractor shall comply with all federal and State laws, regulations, and executive orders applicable to this Project, and shall provide such documentation, including periodic reports, as may be requested from time to time and as set forth in guidance documentation available at www.efc.ny.gov/mwbe, including but not limited to the Bid Packets.

With respect to this contract, the contractor and subcontractor shall undertake or continue existing programs of affirmative action and equal employment opportunity to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, color, national origin (including limited English proficiency), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law. For these purposes, affirmative action shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

MWBE

MWBE Goals - The contractor agrees to pursue MWBE goals in effect at the time of execution of this contract. The MWBE goals shall be applied to the total amount being funded pursuant to the grant agreement or project finance agreement with EFC.

10/1/2012 – Present	MWBE Combined Goal*
All counties	20%

*May be any combination of MBE and/or WBE participation

Contractors shall solicit participation of MWBE contractors (including subcontractors, consultants and service providers) for SRF-funded projects in accordance with the aforementioned goals. The contractor must submit sufficient documentation to demonstrate good faith efforts to provide opportunities for MWBE participation for work related to the SRF-funded project in the event respective goals are not achieved. Guidance pertaining to documentation of good faith efforts is set forth in the Bid Packet.

The contractor agrees that for purposes of providing meaningful participation by MWBEs on the contract and achieving the goals, contractor will reference the directory of New York State Certified MWBEs found at the following internet address: ny.newnycontracts.com.

Subcontractors who in turn subcontract work shall also comply with MWBE requirements for that contract.

MWBE Utilization Plan (MWBE Utilization Plan requirements apply to contractors and are submitted prior to execution of a contract.) – Each contractor shall prepare and submit to the Recipient for approval an MWBE Utilization Plan, and any revision or amendment thereto, that provides information describing MBEs and WBEs to be utilized at various times during the performance of this contract. The MWBE Utilization Plan shall identify the contractor's proposed MBE and WBE utilization for this contract and the MWBE participation goals for this contract as established by EFC. The MBEs and WBEs identified in the MWBE Utilization Plan must be certified by, or have applied for certification from ESD.

In the event that contractor's approved MWBE Utilization Plan does not propose achievement of the MWBE participation goals for this contract, contractor shall complete a waiver request as hereinafter referenced.

Submission – Within 30 days of execution of this contract, contractor shall submit to the Recipient copies of all signed subcontracts, agreements, and/or purchase orders referred to in the MWBE Utilization Plan.

Compliance – Contractor agrees to adhere to its approved MWBE Utilization Plan for the participation of MWBEs on this contract pursuant to their respective MWBE goals.

Waivers – If contractor's application of good faith efforts does not result in the utilization of MBE and/or WBE firms to achieve the aforementioned goals, prior to execution of a contract, the contractor shall complete the waiver request portion of the MWBE Utilization Plan and submit it to the Recipient. Contractor is entitled to receive a written notice of acceptance or denial within 20 days of receipt. Upon receipt of a notice of deficiency from Recipient, Contractor shall respond with written remedy to such notice within 7 days. Such response may include a request for a total or partial waiver of the aforementioned goals.

Contractor shall comply with the requirements set forth in the Bid Packets regarding waivers.

Required Reports - MWBE Monthly Report – Contractor agrees to submit a report to the Recipient by the 3rd business day following each end of month over the term of this contract documenting the progress made towards achievement of the MWBE goals of this contract.

EEO

EEO Workforce Staffing Plan – All Service Provider (non-construction) contractors and subcontractors shall submit an acceptable EEO Workforce Staffing Plan setting forth the anticipated work force to be utilized on such contract or, where required, information on the service provider's total work force, including apprentices, broken down by specific ethnic background, gender and Federal occupational categories or other appropriate categories specified by the Recipient. The EEO Workforce Staffing Plan is submitted prior to execution of a contract.

Required Reports - EEO Workforce Utilization Reports – Applies to Service Provider (Non-Construction) Contracts and Subcontracts

During the term of this contract, the contractor and subcontractor shall update and provide notice to the Recipient of any changes to the previously submitted Staffing Plan in the form of an EEO Workforce Utilization Report. Contractor shall submit this information on a quarterly basis during the term of this contract to report the actual workforce utilized in the performance of the contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The EEO Workforce Utilization Report must be submitted to report this information. In the event a Contractor and Subcontractor's workforce does not change within the Quarterly period, the Contractor shall notify the Recipient in writing.

Required Reports - EEO Workforce Utilization Reports – Applies to Construction Contracts and Subcontracts

During the term of this contract, the contractor and subcontractor shall submit to the Recipient EEO Workforce Utilization Reports. Contractor and subcontractor shall submit this information on a monthly basis to report the actual labor hours utilized in the performance of this contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The EEO Workforce Utilization Report must be submitted to report this information.

All EEO Workforce Utilization Reports submitted by the contractor and subcontractor shall reflect a separation of the workforce utilized in the performance of this contract from contractor or subcontractor's total workforce. Contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided relates to the actual workforce utilized on this contract. If contractor or subcontractor fails to separate the workforce to be utilized on this contract from the total workforce as determined by Recipient contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided is contractor or subcontractor's total workforce during the subject time frame, not limited to work specifically under this contract.

Disadvantaged Business Enterprises - The contractor and subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor and subcontractor shall carry out applicable requirements of 40 CFR Part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor and subcontractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies. Contractors and subcontractors shall comply with the requirements set forth in the Bid Packets regarding Disadvantaged Business Enterprises.

REMEDIES:

Upon a determination by the Recipient of contractor's non-responsiveness, non-responsibility or breach as a result of a failure to comply with the requirements of Article 15-A and the Regulations, Recipient may withhold funds under this contract or take such other actions, impose liquidated damages or commence enforcement proceedings as set forth herein or as otherwise allowed by law or in equity.

If contractor or subcontractor fails to submit to Recipient an EEO policy statement consistent with the provisions set forth in clauses (i), (ii), (iii) and (iv) of the definition thereof and within the timeframe required

therefor, Recipient may declare this contract to be null and void.

Contractor and subcontractor agree that a failure to submit and/or adhere to its EEO policy statement, EEO Workforce Staffing Plan for Service Provider (Non-construction) Contracts (if applicable), and an MWBE Utilization Plan (contractors only), and any other required periodic reports, shall constitute a material breach of the terms of this contract, entitling Recipient to any remedy provided herein, including but not limited to, a finding of contractor non-responsiveness.

Liquidated or Other Damages - If it has been determined by the Recipient or NYSEFC that the contractor is not in compliance with the requirements herein or refuses to comply with such requirements, or if contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, in accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, contractor shall be obligated to pay to Recipient liquidated damages or other appropriate damages as determined by the Recipient or EFC.

Liquidated damages shall be calculated as an amount not to exceed the difference between:

1. All sums identified for payment to MWBEs had the contractor achieved the contractual MWBE goals; and
2. All sums actually paid to MWBEs for work performed or materials supplied under this contract.

In the event a determination has been made by the Recipient or EFC which requires the payment of liquidated damages and such identified sums have not been withheld, contractor shall pay such liquidated damages to Recipient within sixty (60) days after they are assessed unless prior to the expiration of such sixtieth day, contractor has filed a complaint with ESD pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director of ESD renders a decision in favor of Recipient.

RESTRICTIONS ON LOBBYING:

Contractor and subcontractor executing a contract in excess of \$100,000 agree to provide to the Recipient an executed Certification For Contracts, Grants, Loans, and Cooperative Agreements 40 CFR 34, in the form attached hereto, consistent with the requirements of 40 CFR Part 34.

EXHIBIT 2

DAVIS-BACON (DB) PREVAILING WAGE REQUIREMENTS FOR SRF RECIPIENTS

The Recipient acknowledges and hereby agrees to comply with the Wage Rate Requirements under the Davis-Bacon Act, which are hereby restated in pertinent part as follows:

Preamble

The Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) require that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the SRF shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR Parts 1, 3, and 5 to implement the Davis-Bacon (DB) and related Acts. Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard DB contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the SRF shall ensure that the standard DB contract clauses found in 29 CFR 5.5(a) are incorporated in any resultant covered contracts that are in excess of \$2,000 for construction, alteration or repair (including painting and decorating).

With respect to the Clean Water and Safe Drinking Water State revolving Funds, EPA provides capitalization grants to the State which in turn, through the Corporation, provides subgrants or loans to eligible entities within the State (Recipient(s)). Typically, the Recipients are municipal or other local governmental entities. For these types of Recipients, the provisions set forth under Roman Numeral I, below, shall apply. Although EPA and the State remain responsible for ensuring Recipients' compliance with the wage rate requirements set forth herein, those Recipients shall have the primary responsibility to maintain payroll records as described in Section 3(ii)(A), below and for compliance as described in Section I-5.

I. Requirements under the Davis-Bacon Act For Recipients

The following terms and conditions specify how the Corporation and governmental Recipients will meet the DB requirements. If a Recipient has questions regarding when DB applies, obtaining the correct DB wage determinations, DB provisions, or compliance monitoring, it may contact the Corporation. The Corporation or Recipient may also obtain additional guidance from the web site of the Department of Labor (DOL) at <http://www.dol.gov/whd/programs/dbra/>.

1. Applicability of the Davis-Bacon (DB) prevailing wage requirements.

Davis-Bacon prevailing wage requirements apply to the construction, alteration, and repair activity of infrastructure, including all construction, alteration and repair activity involving waste water or drinking water treatment plants as subject to DB. If a Recipient encounters a unique situation at a site that presents uncertainties regarding DB applicability, the Recipient must discuss the situation with the Corporation before authorizing work on that site.

2. Obtaining Wage Determinations.

(a). Recipients shall obtain the wage determination for the locality in which a covered activity subject to DB will take place prior to issuing requests for bids, proposals, quotes or other methods for soliciting contracts (solicitation) for activities subject to DB. These wage determinations shall be incorporated into solicitations and any subsequent contracts. Prime contracts must contain a provision requiring that subcontractors follow the wage determination incorporated into the prime contract.

- (i) While the solicitation remains open, the Recipient shall monitor www.wdol.gov on a weekly basis to ensure that the wage determination contained in the solicitation remains current. The Recipients shall amend the solicitation if DOL issues a modification more than 10 days prior to the closing date (i.e. bid opening) for the solicitation. If DOL modifies or supersedes the applicable wage determination less than 10 days prior to the closing date, the Recipients may request a finding from the Corporation that there is not a reasonable time to notify interested contractors of the modification of the wage determination. The Corporation will provide a report of its findings to the Recipient.
 - (ii) If the Recipient does not award the contract within 90 days of the closure of the solicitation, any modifications or supersedes DOL makes to the wage determination contained in the solicitation shall be effective unless the Corporation, at the request of the Recipient, obtains an extension of the 90 day period from DOL pursuant to 29 CFR 1.6(c)(3)(iv). The Recipient shall monitor www.wdol.gov on a weekly basis if it does not award the contract within 90 days of closure of the solicitation to ensure that wage determinations contained in the solicitation remain current.
- (b). If the Recipient carries out activity subject to DB by issuing a task order, work assignment or similar instrument to an existing contractor (ordering instrument) rather than by publishing a solicitation, the Recipient shall insert the appropriate DOL wage determination from www.wdol.gov into the ordering instrument.
- (c). Recipient shall review all subcontracts subject to DB entered into by prime contractors to verify that the prime contractor has required its subcontractors to include the applicable wage determinations.
- (d). As provided in 29 CFR 1.6(f), DOL may issue a revised wage determination applicable to a Recipient's contract after the award of a contract or the issuance of an ordering instrument if DOL determines that the Recipient has failed to incorporate a wage determination or has used a wage determination that clearly does not apply to the contract or ordering instrument. If this occurs, the Recipient shall either terminate the contract or ordering instrument and issue a revised solicitation or ordering instrument or incorporate DOL's wage determination retroactive to the beginning of the contract or ordering instrument by change order. The Recipient's contractor must be compensated for any increases in wages resulting from the use of DOL's revised wage determination.

3. Contract and Subcontract provisions.

(a) The Recipient(s) shall insert in full in any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in § 5.1, the following clauses:

(1) Minimum wages.

(i) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the

contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

Recipients may obtain wage determinations from the U.S. Department of Labor's web site, www.wdol.gov.

(ii)(A) The Recipient(s), on behalf of EPA, shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The EPA award official shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Recipient(s) agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the Recipient(s) to the State award official. The State award official will transmit the report, to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the State award official or will notify the State award official within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the and the Recipient(s) do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the award official shall refer the questions, including the views of all interested parties and the recommendation of the State award official, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification

under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding.

The Recipient(s), shall upon written request of the EPA Award Official or an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly, for each week in which any contract work is performed, a copy of all payrolls to the Recipient, that is, the entity that receives the sub-grant or loan from the Corporation. Such documentation shall be available on request of the Corporation or EPA. As to each payroll copy received, the Recipient shall provide written confirmation in a form satisfactory to the State indicating whether or not the project is in compliance with the requirements of 29 CFR 5.5(a)(1) based on the most recent payroll copies for the specified week. The payrolls shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i),

except that full social security numbers and home addresses shall not be included on the weekly payrolls. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Recipient(s) for transmission to the State or EPA if requested by EPA, the State, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the Recipient(s).

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the State, EPA or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency or State may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees--

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training

Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements

of 29 CFR part 3, which are incorporated by reference in this contract.

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the EPA determines may be appropriate, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and Recipient(s), State, EPA, the U.S. Department of Labor, or the employees or their representatives.

(10) Certification of eligibility.

(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

4. Contract Provision for Contracts in Excess of \$100,000.

(a) Contract Work Hours and Safety Standards Act. The Recipient shall insert the following clauses set forth in paragraphs (a)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by Item 3, above or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (a)(1) of this section the contractor and any subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall

be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (a)(1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (a)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The Recipient, upon written request of the EPA Award Official or an authorized representative of the Department of Labor, shall withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (a)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (a)(1) through (4) of this section.

(b) In addition to the clauses contained in Item 3, above, in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in 29 CFR 5.1, the Recipient shall insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Recipient shall insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

5. Compliance Verification

(a). The Recipient shall periodically interview a sufficient number of employees entitled to DB prevailing wages (covered employees) to verify that contractors or subcontractors are paying the appropriate wage rates. As provided in 29 CFR 5.6(a)(6), all interviews must be conducted in confidence. The Recipient must use Standard Form 1445 or equivalent documentation to memorialize the interviews. Copies of the SF 1445 are available from EPA on request.

(b). The Recipient shall establish and follow an interview schedule based on its assessment of the risks of noncompliance with DB posed by contractors or subcontractors and the duration of the contract or subcontract. Recipients must increase the frequency of the interviews if the initial interviews or other information indicates that there is a risk that the contractor or subcontractor is not complying with DB. Recipients shall immediately conduct necessary interviews in response to an alleged violation of the prevailing wage requirements. All interviews shall be conducted in confidence.

(c). The Recipient shall periodically conduct spot checks of a representative sample of weekly payroll data to verify that contractors or subcontractors are paying the appropriate wage rates. The Recipient shall establish and follow a spot check schedule based on its assessment of the risks of noncompliance with DB posed by contractors or subcontractors and the duration of the contract or

subcontract. At a minimum, the Recipient must spot check payroll data within two weeks of each contractor or subcontractor's submission of its initial payroll data and two weeks prior to the completion date the contract or subcontract. Recipients must conduct more frequent spot checks if the initial spot check or other information indicates that there is a risk that the contractor or subcontractor is not complying with DB. In addition, during the examinations the Recipient shall verify evidence of fringe benefit plans and payments thereunder by contractors and subcontractors who claim credit for fringe benefit contributions.

(d). The Recipient shall periodically review contractors and subcontractors use of apprentices and trainees to verify registration and certification with respect to apprenticeship and training programs approved by either the U.S Department of Labor or a state, as appropriate, and that contractors and subcontractors are not using disproportionate numbers of, laborers, trainees and apprentices. These reviews shall be conducted in accordance with the schedules for spot checks and interviews described in Item 5(b) and (c) above.

(e). Recipients must immediately report potential violations of the DB prevailing wage requirements to the EPA DB contact listed above and to the appropriate DOL Wage and Hour District Office listed at <http://www.wdol.gov/>

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PART 2:

GUIDANCE MATERIALS

Equal Employment Opportunity (EEO) and Minority & Women-Owned Business Enterprise (MWBE) Programs

A description of the EEO & MWBE requirements as they relate to construction contracts funded in whole or in part by the New York State Revolving Funds:

Applicability:

This guidance applies to construction contracts entered into between an SRF recipient (Recipient) and a contractor (or subcontractor) when SRF funds are expended for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereof.

Purpose of Documents:

This guidance is designed to complement the required contract language as set forth in Part 1, by providing additional information intended to assist SRF Recipients and bidders in complying with EEO, MWBE, and other requirements of the SRF programs, including:

- New York State Executive Law, Article 15-A and New York Code of Rules and Regulations, Title 5 (5 NYCRR) Parts 140-145 (Regulations of the Commissioner of Economic Development)
- 40 Code of Federal Regulations (CFR) Part 33 – “Participation by Disadvantaged Business Enterprises in US EPA Programs”
- Davis Bacon Related Acts (DBRA) consisting of the following:
The Davis Bacon Act; Copeland Act 40 U.S.C. 3145; Reorganization Plan No. 14;
Department of Labor 29 CFR Parts 1, 3, and 5; Contract Work Hours and Safety Standards Act
- Restrictions on Lobbying

Contractors are required to engage in procurement practices that will provide opportunities for meaningful participation of minority and women-owned business enterprises (MWBE) in providing construction, labor, travel, equipment, materials, supplies, services (including legal, financial, engineering or other professional services), or any combination of the above, and practices to encourage the employment of minorities and women in the workforce.

Contractors are required to engage in oversight practices that ensure that the wages paid to employees and subcontractors are consistent with DBRA requirements including payment of the higher of the state or federal wages.

Failure to report on EEO participation or to meet all the requirements of MWBE, DBE and DBRA regulations in a timely manner may result in withholding of disbursements of SRF funds or other remedies as reflected in the SRF financial assistance agreement. This may affect the contractor's payments.

Reference the EFC website to ensure the most recent forms and language. (www.efc.ny.gov/mwbe)

Guidance 1: EEO & MWBE Programs

The New York State Environmental Facilities Corporation (EFC) implements the New York State Revolving Fund (SRF) for both Clean Water and Drinking Water projects. This guidance outlines the activities that must be performed by each contractor on an SRF funded project in order to comply with federal and New York State laws and regulations.

I. EQUAL EMPLOYMENT OPPORTUNITY

A. WORKFORCE DIVERSITY

Contractors are required to document their efforts to meet EEO goals for the employment of minorities and women on all SRF funded projects (EEO Workforce Utilization Report). The United States Department of Labor (DOL) has established EEO goals for employment of minority and women. The goals are available on EFC's website. (www.efc.ny.gov/mwbe - Refer to *Prime Contractor* Folder)

B. EEO POLICY STATEMENT

The EEO Policy Statement is documentation of a contractor's policy of non-discrimination in accordance with federal and State laws. The EEO Policy Statement must: be submitted to Recipient's MBO as part of any bid proposal; include language as defined above (see Required Terms for Project Contracts and Subcontracts – EEO Policy Statement definition); and be signed by each potential bidder.

The EEO Policy Statement can be found in the required forms section of this document and on EFC's website at www.efc.ny.gov/mwbe (Refer to *Prime Contractor & Subcontractor* folder).

C. EEO WORKFORCE UTILIZATION REPORTS

Upon the execution of the contract and monthly thereafter, the contractor shall submit to the Recipient's MBO an *EEO Workforce Utilization Report* of the actual labor hours worked by ALL contractor AND subcontractor employees during the prior month period, on activities related to the contract, broken down by specific ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the Recipient.

The *EEO Workforce Utilization Report* is part of the MWBE Monthly Payment Reports. Both the EEO Workforce Utilization Report and MWBE Monthly Report are found on the EFC website. (www.efc.ny.gov/mwbe - Refer to *Prime Contractor* folder).

All EEO Workforce Utilization Reports submitted by the contractor and subcontractor must reflect a separation of the workforce utilized in the performance of this contract from contractor or subcontractor's total workforce. The EEO Workforce Utilization Report must indicate that the information provided relates to the actual workforce utilized. If the contractor or subcontractor fails to separate the workforce to be utilized on this contract from the total workforce as determined by Recipient, contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided is contractor or subcontractor's total workforce during the subject time frame, not limited to work specifically under a particular contract.

II. MINORITY & WOMEN-OWNED BUSINESS ENTERPRISE (Prime Contracts Only)

A. MWBE REQUIREMENTS – Construction Contracts

Recipients, contractors and subcontractors must comply with New York State Executive Law, Article 15-A and New York Code of Rules and Regulations, Title 5 (5 NYCRR) Parts 140-145 (Regulations of the Commissioner of Economic Development).

Construction contracts with a value greater than \$100,000 funded with SRF financial assistance are subject to MWBE requirements.

Construction contracts, for the purposes of SRF MWBE compliance, are written agreements between an SRF Recipient and a contractor (or subcontractor) whereby the SRF Recipient commits to expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereof in support of an SRF financed project.

Amendments or change orders for such construction contracts with a value greater than \$25,000 may be subject to MWBE requirements as well. The Prime contractor is to seek additional MWBE participation for the additional value of the contract.

If contracts with a value of \$100,000 or less have subsequent change orders or amendments that bring the total contract value to greater than \$100,000, the full value of the contract will then be subject to MWBE requirements.

B. MWBE PARTICIPATION GOALS (FAIR SHARE OBJECTIVES)

Based on the report The State of Minority and Women-Owned Business Enterprise: Evidence of New York (April 29, 2010) (NYS Disparity Study), there is a demonstrated availability of MWBEs throughout New York State. Contractors are required to solicit participation of MWBE contractors (including subcontractors, consultants, and service providers) for SRF funded projects.

MWBE participation goals will be based on the execution date of each respective contract, unless MWBE participation goals have been otherwise specified in an executed SRF financial assistance agreement.

10/1/2012 – Present	MWBE Combined Goal*
All counties	20%

*May be any combination of MBE and/or WBE participation

10/1/2011 – 9/30/2012	MBE Goals	WBE Goals
New York City (Bronx, Brooklyn, Manhattan, Queens, Staten Island)	17%	8%
Dutchess Nassau Orange	Putnam Rockland Sullivan	Suffolk Ulster Westchester
All counties not listed above	10%	6%
	9%	5%

10/2009 – 9/30/2011	MBE Goals	WBE Goals
New York City and Long Island Region (Bronx, Brooklyn, Manhattan, Queens, Staten Island, Nassau, Suffolk)	21.5%	13.7%
All Counties not listed above	6%	6%

1994 – 9/2009	MBE Goals*	WBE Goals*
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* Speak with EFC representative for specific MWBE participation goals

C. RECEIVING CREDIT UNDER THE EFC MWBE PROGRAM

To receive MWBE participation credit, contractors performing work that have been identified in an approved MWBE Utilization Plan (See Subsection D1 below for more information) must be certified as an MBE or WBE by the Division of Minority and

Women's Business Development, Empire State Development Corporation (ESDC). Conditional credit will be given for firms that have applications pending with ESDC.

Prime contractors that are certified MWBE will receive credit for MWBE participation.

A list of firms certified in New York State can be found on the ESD website at **ny.newnycontracts.com**. Searches can be performed by the business name and commodity code or business description.

D. CONSTRUCTION CONTRACTOR'S MWBE RESPONSIBILITIES

At the Time of Bid:

The completed forms listed below shall be part of the official bid submission by each competing contractor:

- **EPA Form 6100-3 "DBE Subcontractor Performance Form"** – Each potential bidder shall complete this form and submit it to the MBO for each MWBE firm contacted during the bid or proposal preparation process, and make reasonable efforts to obtain signatures from the MBEs and WBEs contacted.
- **EPA Form 6100-4 "DBE Subcontractor Utilization Form"** – This form shall be completed by each potential bidder and submitted to the MBO as part of the bid submission. On this form, each bidder offers their estimated plan for MBE and WBE utilization for their contract.

NOTE: The EEO Policy Statement should be completed and submitted at this time. See EEO section.

Prior to Award of the Contract:

- **EPA Form 6100-2 "DBE Subcontractor Participation Form"** - Distribute the form to MWBE Subcontractors who are listed on the 6100-4 form. Submit documented proof (e.g. email, letter, certified mail receipt) to the MBO that the 6100-2 form was sent to the MWBE Subcontractors. (See Required Forms)

NOTE: The EPA forms are not required for projects valued at \$250,000 or less in a year.

After Award of the Contract:

Each prime contractor is obligated to seek MWBE participation and document their good faith efforts to meet MWBE goals.

1. MWBE Utilization Plan

- a. **Due Date:** MWBE Utilization Plans and any revision or amendment thereto, are required to be submitted to the MBO no later than the date of execution of the contract.
- b. **Preparation:** Each contractor shall prepare an MWBE Utilization Plan that provides information describing MBEs and WBEs to be utilized during the term of the contract. The MWBE Utilization Plan will reflect the EFC MWBE goals that apply to the contract as well as the contractor's anticipated MWBE participation. The contractor will transmit the completed MWBE Utilization Plan form, with all pages filled out, to the MBO. Blank MWBE Utilization Plan forms are available on the EFC website. (www.efc.ny.gov/mwbe)

Utilization Plan revisions or amendments must be submitted to the MBO, preferably with the next monthly report.

- c. **NYS Certified:** The MBEs and WBEs identified in the MWBE Utilization Plan must be certified by, or have applied for certification from:

Empire State Development Corporation
 Division of Minority and Women's Business Development
 625 Broadway
 Albany, New York 12245
 Phone: 1-800-782-8639
 ny.newnycontracts.com

- d. **Supplier Credit:** Credit for MBE/WBE participation shall be granted for MWBE firms performing a commercially useful business function according to custom and practice in the industry.

"Commercially useful functions" normally include:

- i. Providing technical assistance to a purchaser prior to a purchase, during installation, and after the supplies or equipment are placed in service;
- ii. Manufacturing or being the first tier below the manufacturer of supplies or equipment; or
- iii. Providing functions other than merely accepting and referring requests for supplies or equipment to another party for direct shipment to a contractor.

MBE/WBE goal crediting:

- i. For MWBE suppliers who are manufacturers, fabricators, or official manufacturer's representatives who are warehousing such goods, up to 100% of the MBE/WBE objective may be credited.
- ii. For non-manufacturer suppliers, up to 25% of the MBE/WBE objective may be credited.
- iii. No credit will be granted for MBEs and/or WBEs acting merely as a passive conduit of funds from one firm to another.

- e. **Broker Credit:** Firms that are identified as brokers (on the ESD website or at EFC's discretion) may only be credited up to 25% of their full contract value.
- f. **Waiver Request:** If the contractor's application of good faith efforts does not result in the utilization of MBE and/or WBE firms to achieve the aforementioned goals or a specialty equipment/service waiver is requested, the contractor shall complete the waiver request portion of the MWBE Utilization Plan, attach appropriate documentation, and submit it to the MBO.
See Section F for more information.

- g. **MWBE Utilization Plan Acceptance vs. Notice of Deficiency:** The MBO will evaluate a completed MWBE Utilization Plan. Upon review and application of the requirements set forth in this guidance, if the MBO finds the UP acceptable, they will forward to EFC for review. If the MBO finds the UP insufficient, they will work with the contractor to address deficiencies before submitting to EFC for review. A written notice of acceptance or denial will be issued by EFC within 20 business days of receipt of the UP. Upon notice of deficiency to the contractor from either the MBO or EFC, the contractor shall respond with a written remedy to such notice within seven (7) business days.

In coordination with the MBO, EFC will accept a Utilization Plan upon consideration of many factors, including the following:

- i. The Utilization Plan indicates that the MWBE proposed goals for the project will be achieved;

- ii. A prime contractor, who is a certified MBE or WBE, will be credited for up to 100% of the category of their certification. However, good faith efforts to seek participation in the other category are required;
 - iii. Adequate documentation to demonstrate good faith effort as described in Section D2.
- h. **UP Acceptance:** Within 10 days of the final acceptance of a MWBE Utilization Plan or Waiver Request, EFC will post the approved MWBE Utilization Plan or Waiver Request on the EFC website. www.efc.ny.gov/mwbe.
- i. **Conditional UP:** In coordination with the MBO, EFC may issue conditional acceptance of Utilization Plans pending submission of additional documentation that demonstrates there will be an increase in MWBE participation.
- j. **Revisions of the MWBE Utilization Plans:** If project conditions change such that the information submitted in the MWBE Utilization Plan is no longer valid, the contractor shall indicate the changes within the next monthly report to the MBO. At EFC's discretion, a completely revised MWBE Utilization Plan form and good faith effort documentation may be required to be submitted.
- k. **Projects co-Funded with other state/federal agencies:** In the event EFC is providing financial assistance to a project that is also financially supported by other state/federal agencies, EFC may defer to the MBE and WBE participation goals established for the project by those agencies.

2. Good Faith Effort Documentation

Prime contractors shall solicit participation of MWBE firms (including subcontractor, consultants and service providers) for SRF-funded projects in an effort to meet the appropriate goals. In the event respective goals are not achieved, the contractor must submit sufficient documentation to demonstrate good faith efforts have been made to provide opportunities to certified MWBE firms to participate in SRF-funded projects.

Examples of documentation of good faith efforts are set forth below:

- Information on the scope of work related to the contract and specific steps taken to reasonably structure the scope of work to break out tasks or equipment needs for the purpose of providing opportunities for subcontracting with or obtaining supplies or services from MBEs or WBEs.
- Printed screenshots of the directory of Certified Minority and Women Owned Businesses (MWBE directory) on ESD's website (ny.newnycontracts.com) on a statewide basis, if appropriate, for both MBEs and WBEs that provide the services or equipment necessary for the contract. Contact the MBO for assistance in performing a proper search including identifying a sufficient number of solicitations to show that good faith effort was made.
- Copies of timely solicitations and documentation that the contractor offered relevant plans, specifications, or other related materials to MBE and WBE firms on ESD's MWBE directory to participate in the work, with the responses.

The contractor is to offer sufficient advance notice proportional to the size and complexity of the contract to enable MBEs and WBEs to prepare an informed response to the solicitations for participation as a subcontractor or supplier. The solicitations and responses are required to be documented in a log to be submitted in the case where the goal is not met. The log should consist of the list of MBE and WBE firms solicited, their contact information, the type of work they were solicited to perform (or equipment to provide), how the solicitation was made (fax, phone, email)

and the contact information, the contacts name and the outcome. If a bid was received, the bid price should also be included in the log. See a sample log entry below:

Date	M/WBE Type	Company	Scope of work	Contact Name	Phone/ Email	Solicitation Format	MWBE Response	Negotiation Required?	Selected? If not, Explain

If no response was received to an initial solicitation, at least one follow-up solicitation should be made in a different format than the first, e.g. fax followed by phone call. Any bids received from non-MWBE firms should also be tracked on the log.

Submit the EPA 6100-3 and 6100-4 forms that are required as part of all bids or proposals. A properly completed EPA 6100-3 form is good indication of a contact to an MWBE and their response to the contact. If solicitations do not result in obtaining sufficient participation of MWBE firms due to non-responsiveness, please contact the MBO or EFC MWBE representative for support.

- Copies of any advertisements of sufficient duration to effectively seek participation of certified MBE and WBEs timely published in appropriate general circulation, trade and MWBE oriented publications, together with listing and dates of publication of such advertisements. A log should be kept of the responses to the ads, similar to the log for MWBE firm solicitation and should include the non-MWBE firms that responded and the bid prices. Any negotiations should be documented in the log.
 - Documents demonstrating that insufficient MBEs or WBEs are reasonably available to perform the work. Based on the NYS Disparity Study, there is a presumption of MBE and WBE statewide availability, unless information is submitted indicating otherwise.
 - A written demonstration that the contractor offered to make up any inability to meet the project MWBE participation goals in other contracts and/or agreements performed by the contractor on another SRF funded project.
 - The date of pre-bid, pre-award, or other meetings scheduled by the Recipient, if any, and the contact information of any MBEs and WBEs who attended and are capable of performing work on the project.
 - Any other information or documentation that demonstrates the contractor conducted good faith efforts to provide opportunities for MWBE participation in their work. For instance, prime contractors and MBOs should develop a list of MWBE firms that have expressed interest in working on SRF funded projects
 - The use of certified Disadvantaged Business Enterprises (DBE), Small Business Administration (SBA), and Veteran-Owned Small Businesses (VOSB) may be considered as a demonstration of Good Faith Efforts.
- 3. Subcontract Agreements** - The contractor shall submit copies of all legally signed subcontracts, agreements, and purchase orders that are referred to in the MWBE Utilization Plan to the MBO within 30 days of their execution. These subcontracts and/or purchase orders must include the following information:
- a. Actual dollar amount of the subcontract;
 - b. A job description of the work to be performed by the subcontractor;
 - c. Signatures of both parties;
 - d. Date of execution;
 - e. MWBE language (included in this bid packet); and
 - f. A signed EEO Policy Statement Agreement (See Required Forms).

NOTE: Purchase orders must be sent with copies of both sides of cancelled checks.

- 4. Monthly Reports** - The contractor must submit monthly MWBE payment reports supplemented with proof of payment to the MBO. Blank monthly report forms are available at www.efc.ny.gov/mwbe or from the MBO. Monthly reports should be submitted to the MBO within 3 business days after the end of each month being reported.

As part of the Monthly Report, the contractor must provide documentation to the MBO that subcontractors have been paid within 30 days of receipt of payment from the Recipient.

The final monthly payment report must reflect all Utilization Plan revisions or amendments.

5. Other Construction Contractor Responsibilities:

- a. Continue good faith efforts to seek opportunities for MBE and WBE participation even if proposed goals have been achieved. In addition, any revisions to an MWBE Utilization Plan must be documented in the next monthly report to the MBO for approval.
- b. Provide written notification to the MBO and EFC of any termination of an MBE or WBE subcontractor. This should be reported as part of the revised MWBE Utilization Plan.
- c. The EEO poster shall be displayed at the project site in a visible location. The EEO poster is at <http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm>
- d. Provide timely and complete responses to inquiries from either the MBO or EFC staff as requested.
- e. Make all MWBE & EEO documents and records available upon request to EFC staff, the MBO, or their authorized representatives.
- f. Manage the project in a manner that creates meaningful opportunities for participation by MBEs and WBEs.
- g. Provide programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination on the basis of race, color, national origin (including limited English provision), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.

Additional guidance and requirements pertaining to the preparation and submission of the MWBE Utilization Plans can be found in the Exhibit 1: Required Terms for Project Contracts and Subcontracts.

NOTE: Failure by the contractor to receive acceptance of the MWBE Utilization Plan by the Recipient or EFC may result in withholding of progress payments. Such withholding of progress payments shall not relieve the contractor of any contract requirements including the completion of the project within the specified contract time.

E. SUBCONTRACTOR'S MWBE RESPONSIBILITIES

Subcontractors are those individuals or business enterprises that contract directly with contractors. Subcontractors should:

1. Maintain their MWBE certifications, and notify the contractor and MBO of any change in their certification status.

2. Respond promptly to solicitation requests by completing and submitting bid information in a timely manner.
3. Maintain business records that should include, but not be limited to, contracts/agreements, records of receipts, correspondence, purchase orders, and canceled checks.
4. Complete and submit the EPA Form 6100-3 "DBE Subcontractor Performance Form" to the contractor prior to submission of the bid. Provide a receipt of EPA Form 6100-2 "DBE Subcontractor Participation Form" to the contractor prior to award of contract.
5. Ensure that a required EEO Policy Statement is included in each subcontract. Additionally, signed versions of each subcontract should be sent to the MBO within 30 days of execution.
6. Provide programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination on the basis of race, color, national origin (including limited English provision), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.
7. Notify the MBO and EFC when contract problems arise, such as non-payment for services or when the subcontractor is not employed as described in the MWBE Utilization Plan.
8. Perform the subcontracted scope of work in a professional and timely manner.

F. WAIVER REQUESTS

1. Each contractor is required to create meaningful opportunities for certified MWBE participation and to offer the MWBE certified firms a fair share of their work. After making good faith efforts to create meaningful opportunities, a contractor may find that it is not possible to meet the MWBE goals. In that case, the contractor shall request for an MWBE waiver.
2. Even if an MWBE waiver is granted, EEO information must still be submitted. The EEO information is submitted as part of the Monthly Report.
3. **Preparation:** The contractor shall complete the waiver request portion of the MWBE Utilization Plan and submit it to the MBO along with adequate good faith effort documentation.
4. **Waiver Review:** The MBO and EFC will review each waiver request based on the good faith effort criteria presented above and the documentation submitted with the waiver request. EFC will not issue any automatic waivers from MWBE responsibilities. A full or partial waiver from the MWBE goals can be requested.
5. **Specialty Equipment/Service Waiver:** A specialty equipment/service waiver may be granted in cases where:
 - a. equipment is made by only one manufacturer,
 - b. the contract specifications call for equipment that is not available through an MWBE supplier;
 - c. the equipment is constructed on site by specially trained non-MWBE labor;
 - d. the service is not available through an MWBE (such as work done by National Grid);
 - e. the service is proprietary in nature (such as use of certain computer software necessary for control systems); or
 - f. the service cannot be subcontracted (such as litigation services).

If the contract includes specialty equipment or services, and documentation is submitted demonstrating that there are no MBE/WBE firms capable of completing this portion of the contract, the specialty amount of the contract may be deducted from the total contract amount and the goals would be applied to the MWBE Eligible Amount. This determination is made at the discretion of the MBO and EFC.

Example:

\$200,000	-	\$50,000	=	\$150,000
(Contract)		(Specialty equipment/service)		(MWBE Eligible Amount)

The MWBE goal is applied to the remaining balance.

A request for this specialty equipment/service deduction can be completed by filling out section two of the MWBE Utilization Plan and submitting it to the MBO. The request must include a copy of the page from the contract where the equipment/service is described and the cost of each item. For construction contracts, the schedule of values or bid tabulation sheet should also be submitted. Additional documentation may be requested by the MBO or EFC.

G. PROTESTS/COMPLAINTS

Subcontractors or contractors who have any concerns, issues, or complaints regarding the implementation of the SRF MWBE/EEO Program, or wish to protest should do so in writing to the project MBO and EFC. The MBO, in consultation with EFC, will review the circumstances described in the submission, investigate to develop additional information, if warranted, and determine whether action is required. If the subcontractor believes the issue has not been resolved to their satisfaction, they may appeal in writing to EFC for consideration.

H. WASTE, FRAUD AND ABUSE

Subcontractors, contractors, service providers, or Recipients who know of or suspect any instances of waste, fraud, or abuse within the MWBE & EEO Program should notify the project MBO and EFC immediately. Additionally, suspected fraud activity should be reported to the USEPA – Office of Inspector General Hotline at (888) 546-8740 or the New York State Office of Inspector General at (800) 367-4448.

I. REMEDIES

If a Recipient makes a determination that a contractor has been non-responsive, is non-responsible, or is in breach as a result of a failure to comply with the requirements of Article 15-A and the Regulations, Recipient may withhold funds under the contract or take such other actions, impose liquidated damages or commence enforcement proceedings.

If a contractor or subcontractor fails to submit to Recipient an EEO policy statement within the required timeframe, Recipient may declare the contract to be null and void.

A failure to submit and/or adhere to an EEO policy statement and an MWBE Utilization Plan, and any other required reports, shall constitute a material breach of the terms of the contract between contractor and Recipient, and justify a finding of contractor non-responsiveness.

Liquidated or Other Damages - If it has been determined by the Recipient or EFC that the contractor is not in compliance with the requirements herein or refuses to comply with such requirements, or if contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, in accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, contractor shall be obligated to pay to Recipient liquidated damages or other appropriate damages as determined by the Recipient or EFC.

Liquidated damages shall be calculated as an amount not to exceed the difference between:

1. All sums identified for payment to MWBEs had the contractor achieved the contractual MWBE goals; and
2. All sums actually paid to MWBEs for work performed or materials supplied under this contract.

In the event a determination has been made by the Recipient or EFC which requires the payment of liquidated damages and such identified sums have not been withheld, contractor shall pay such liquidated damages to Recipient within sixty (60) days after they are assessed unless prior to the expiration of such sixtieth day, contractor has filed a complaint with ESD pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director of ESD renders a decision in favor of Recipient.

J. RESTRICTIONS ON LOBBYING

Each contractor and subcontractor which has a contract with Recipient exceeding \$100,000 shall provide to the Recipient an executed certification on the form provided, that it will not expend appropriated federal funds to pay any person for influencing or attempting to influence an officer or employee of any agency, Member of Congress, officer or employee of Congress or any employee of any Member of Congress in accordance with the provisions of 40 CFR Part 34, and to maintain such certification for their own records.

PART 2:

GUIDANCE MATERIALS

continued

Requirements of the Davis Bacon Related Acts

A description of Davis Bacon requirements as they relate to construction contracts.

*Only applies to 212 or 319 projects that qualify as treatment works or at community water systems

*If recipient is a non-governmental entity please discuss applicability with EFC.

GUIDANCE 2: REQUIREMENTS OF THE DAVIS BACON RELATED ACTS

The Davis Bacon Related Act (DBRA) applies to any federally funded construction contract in excess of \$2,000 that is under construction after October 30, 2009. When SRF funding is sought for contracts where the construction started prior to October 30, 2009 but construction is still ongoing, it will be necessary to execute a change order to incorporate the DBRA provisions. DBRA requirements do not apply to non-construction contracts or for construction work categorized by EPA as non-point source projects or estuary management program projects, unless the project involves treatment plant work. (Call EFC 800-882-9721, prior to bid if you have these types of projects.)

I. Program

The following activities must be implemented by each contractor on an SRF funded project in order to maintain compliance with the DBRA. These contractual obligations are included in the contract language in Required Terms for Project Contracts and Subcontracts and expanded upon below.

Prior to bid and execution of any SRF eligible contracts, complete the following activities:

A. FEDERAL AND STATE WAGE RATES

When preparing the bid for SRF project, the contractor must use the higher of the prevailing federal, state, or applicable local wage rates paid to each trade. These rates apply to subcontractors working on the project as well. Federal wage rates can be found at www.wdol.gov.

B. DEBARRED OR SUSPENDED CONTRACTORS

The contractor should ensure that the subcontractors bidding on the work are not included on either the state or federal debarred or suspended contractor's list, located within the state wage rate packet and available on the US Department of Labor website. <https://www.sam.gov/portal/public/SAM/>

C. CONTRACT LANGUAGE AND WAGE RATES

The contractor must ensure that the most recent DBRA contract language and federal wage rates are included in the contract before execution.

Davis Bacon regulations require that Recipients must amend the solicitation if the Department of Labor issues a modification to the wage rates more than 10 days prior to the closing date (i.e. bid opening) for the solicitation.

Also, if the contract has not been awarded within 90 days after bid opening, the Recipient must modify the solicitation or contract to include the most recent federal wage rates, if they have been modified. The federal wage website includes a list of wage determinations that are due for revision.

After execution of any contracts, complete the following activities:

A. WAGE RATE COMPLIANCE VERIFICATION

Contractor/Subcontractor Responsibilities:

1. Post Davis Bacon Wage Poster and federal, state, and applicable local wages in a visible area at the construction site. This poster may be found on the EFC website under the Resource Library. (Refer to Required Forms section)
2. Make your employees and subcontractors' employees available for wage interviews if necessary. Wage interviews must be conducted confidentially and using Labor Standard Interview Form (SF-1445) which can be found on the EFC

website (www.efc.ny.gov) and in the Required Forms section.

3. Use federal payroll form WH-347 and complete the certifications on the back. If another form is being used, inform the Recipient and obtain a determination that the form is equivalent to the federal form. (Refer to Required Forms section)
4. Pay the higher of prevailing federal, state, or applicable local wages, including benefits (fringe & holidays), to each trade and overtime not less than one and one-half times the basic rate of pay for hours in excess of forty hours on contracts in excess of \$100,000. The wage rates apply to subcontractor trades as well.
5. Maintain proof of apprentice and trainee ratios for both contractor and subcontractor and certifications onsite.
6. Pay wages to your employees and your subcontractors on a weekly basis. Ensure that your subcontractors are paying their employees weekly.
7. Ensure that the subcontracts contain the Davis Bacon contract language, the federal, state, or applicable local wage determinations and equal employment opportunity language. This language is provided in the Required Terms for Project Contracts and Subcontracts. Federal wage determinations are available at www.wdol.gov.
8. Provide payroll forms and apprentice and trainee certifications to the Recipient for their records.
9. Report potential waste, fraud and abuse violations to the EPA Davis Bacon Contact and DOL Wages and Hours District Office found on their website. <http://www.wdol.gov/>.
10. Any violations in payroll reporting or unpaid wages are subject to a daily monetary penalty.

Note that EFC expects to perform interim and final construction inspections. The EFC inspector can be expected to verify that the steps above are being followed and also check to ensure the proper signs and wage rates are posted in a visible area.

PART 3:

REQUIRED FORMS

FOR CONSTRUCTION CONTRACTS

All MWBE & EEO required forms can be found on the EFC website (www.efc.ny.gov/mwbe)

The following (Attached) SRF forms are required for the bidding process:

1. EPA Form 6100-2 "DBE Subcontractor Participation Form"
This form is to be distributed to all MWBE subcontractors and proof of distribution should be submitted to the MBO.
2. EPA Form 6100-3 "DBE Subcontractor Performance Form"
This form should be completed by each MWBE subcontractor contacted during the bid preparation process for construction contracts, maintained in the contractor's files, and submitted to the MBO with the bid.
3. EPA Form 6100-4 "DBE Subcontractor Utilization Form"
This form should be completed by the construction contractor as an estimate of which MWBE subcontractors will be used on the project, maintained in the contractor's files, and submitted to the MBO with the bid.
4. EEO Policy Statement
To be completed by all contractors and submitted to the MBO with the bid. This form may be included in the contract.
5. Lobbying Certification
To be completed by all contractors and subcontractors (over \$100,000) and submitted to the Recipient with the bid.

The following (Not Attached) SRF forms are required subsequent to the bid award:

1. MWBE Utilization Plan and/or Waiver Request
These forms are completed by the contractor and submitted to the MBO *no later than date of execution of the contract*.
2. EEO Workforce Utilization Report
This form is completed by the contractor and submitted with the Monthly Reports to the MBO. It reports the actual labor hours utilized in performance of the contract, including subcontracted staff.
3. MWBE Monthly Report Form
To be completed by the contractor and submitted to the MBO.

Davis Bacon forms are used once the construction has started (www.efc.ny.gov):

1. (ATTACHED) Federal Payroll Form (WH-347) - weekly
2. (ATTACHED) Labor Standards Interview Form (SF 1445) - during the course of the contract
3. (ATTACHED) Davis Bacon Poster (WH-1321) - posted conspicuously



Environmental
Protection Agency

OMB Control No: 2090-0030
Approved: 05/01/2008

EPA Form 6100-2

**Disadvantaged Business Enterprise Program
DBE Subcontractor Participation Form**

NAME OF SUBCONTRACTOR¹	PROJECT NAME
ADDRESS	CONTRACT NO.
TELEPHONE NO.	EMAIL ADDRESS
PRIME CONTRACTOR NAME	

Please use the space below to report any concerns regarding the above EPA-funded project (e.g., reason for termination by prime contractor, late payment, etc.).

CONTRACT ITEM NO.	ITEM OF WORK OR DESCRIPTION OF SERVICES RECEIVED FROM THE PRIME CONTRACTOR	AMOUNT SUBCONTRACTOR WAS PAID BY PRIME CONTRACTOR
<hr/> <div>Subcontractor Signature</div> <div>Title/Date</div>		

¹Subcontractor is defined as a company, firm, joint venture, or individual who enters into an agreement with a contractor to provide services pursuant to an EPA award of financial assistance.



Environmental
Protection Agency

Disadvantaged Business Enterprise Program DBE Subcontractor Participation Form

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed EPA DBE Subcontractor Participation Form to this address.



EPA Form 6100-3

NAME OF SUBCONTRACTOR ₁		PROJECT NAME	
ADDRESS		BID/PROPOSAL NO.	
TELEPHONE NO.		E-MAIL ADDRESS	
PRIME CONTRACTOR NAME			
CONTRACT ITEM NO.	ITEM OF WORK OR DESCRIPTION OF SERVICES BID TO PRIME		PRICE OF WORK SUBMITTED TO PRIME CONTRACTOR
Currently certified as an MBE or WBE under EPA's DBE Program? _____ Yes _____ No Signature of Prime Contractor Date Print Name Title _____ _____ Signature of Subcontractor Date _____ Print Name Title			

EPA FORM 6100-3 (DBE Subcontractor Performance Form)



Environmental
Protection Agency

**Disadvantaged Business Enterprise Program
DBE Subcontractor Performance Form**

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed EPA DBE Subcontractor Performance Form to this address.



Environmental
Protection Agency

OMB Control No: 2090-0030
Approved: 05/01/2008

Disadvantaged Business Enterprise Program DBE Subcontractor Utilization Form

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed EPA DBE Subcontractor Utilization Form to this address.

**AGREEMENT TO ABIDE BY EQUAL EMPLOYMENT OPPORTUNITY
POLICY STATEMENT REQUIREMENTS
NEW YORK STATE REVOLVING FUND (SRF)**

I, _____, am the authorized representative of _____.

Name of Representative

Name of Contractor/Service Provider

I hereby certify that _____ will abide by the equal employment

Name of Contractor/Service Provider

opportunity (EEO) policy statement provisions outlined below.

- (i) A statement that the contractor will not discriminate on the basis of race, creed, color, national origin, sex, age, disability, or marital status against any employee or applicant for employment, will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination and will make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on contracts relating to the Project.
- (ii) An agreement that all of contractor's solicitations or advertisements for employees will state that, in the performance of the contract relating to this Project, all qualified applicants will be afforded equal employment opportunities without discrimination on the basis of race, creed, color, national origin, sex, age, disability or marital status.
- (iii) An agreement to request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein.
- (iv) An agreement to comply with the provisions of the Human Rights Law (Article 15 of the Executive Law), including those relating to non-discrimination on the basis of prior criminal conviction and prior arrest, and with all other State and federal statutory constitutional non-discrimination provisions.

Blank EEO Policy Statements are available at www.efc.ny.gov/mwbe, if needed.

If contractor fails to submit to Recipient an EEO policy statement consistent with the provisions set forth above in clauses (i), (ii), (iii) and (iv) and within the timeframe required thereof, Recipient may declare this contract to be null and void.

X

Contractor/Service Provider Representative

Once completed, please provide to the Prime Contractor and/or the community MBO

**CERTIFICATION
FOR
CONTRACTS, GRANTS, LOANS, AND
COOPERATIVE AGREEMENTS
40 CFR 34**

SRF Project No.: _____

The undersigned each certify, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including sub-contracts, sub-grants, and contracts under grant, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31 U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

By: _____

Name:

Title:

Date: _____

Contract ID: _____

Wage and Hour Division

PAYROLL

(For Contractor's Optional Use; See Instructions at www.dol.gov/whd/forms/wh347instr.htm)

Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.



Rev. Dec. 2008

OMB No.: 1215-0149
Expires: 12/31/2011

[illegible]

While completion of Form WH-347 is optional, it is mandatory for covered contractors and subcontractors performing work on Federally financed or assisted construction contracts to respond to the information collection contained in 29 C.F.R. §§ 3.3, 5.5(a). The Copeland Act (40 U.S.C. § 3145) requires contractors and subcontractors performing work on Federally financed or assisted construction contracts to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." U.S. Department of Labor (DOL) regulations at 29 C.F.R. § 5.5(a)(3)(ii) require contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project, accompanied by a signed "Statement of Compliance" indicating that the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed. DOL and federal contracting agencies receiving this information review the information to determine that employees have received legally required wages and fringe benefits.

Public Burden Statement

We estimate that it will take an average of 55 minutes to complete this collection, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S3502, 200 Constitution Avenue, N.W. Washington, D.C. 20210

(over)

Date _____

I, _____
(Name of Signatory Party) (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by _____ on the _____
(Contractor or Subcontractor)
_____ ; that during the payroll period commencing on the _____
(Building or Work)
_____ day of _____, _____, and ending the _____ day of _____, _____,
all persons employed on said project have been paid the full weekly wages earned, that no rebates have
been or will be made either directly or indirectly to or on behalf of said _____
_____ from the full
(Contractor or Subcontractor)

weekly wages earned by any person and that no deductions have been made either directly or indirectly
from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part
3 (29 C.F.R. Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948,
63 Stat. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. § 3145), and described below:

(2) That any payrolls otherwise under this contract required to be submitted for the above period are
correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the
applicable wage rates contained in any wage determination incorporated into the contract; that the
classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide
apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of
Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a
State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:
(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

- in addition to the basic hourly wage rates paid to each laborer or mechanic listed in
the above referenced payroll, payments of fringe benefits as listed in the contract
have been or will be made to appropriate programs for the benefit of such
employees, except as noted in section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

- Each laborer or mechanic listed in the above referenced payroll has been paid,
as indicated on the payroll, an amount not less than the sum of the applicable
basic hourly wage rate plus the amount of the required fringe benefits as listed
in the contract, except as noted in section 4(c) below.

(c) EXCEPTIONS

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:

NAME AND TITLE	SIGNATURE

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR
SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE
31 OF THE UNITED STATES CODE.

LABOR STANDARDS INTERVIEW

CONTRACT NUMBER			EMPLOYEE INFORMATION			
NAME OF PRIME CONTRACTOR			LAST NAME		FIRST NAME	MI
			STREET ADDRESS			
NAME OF EMPLOYER			CITY		STATE	ZIP CODE
SUPERVISOR'S NAME			WORK CLASSIFICATION		WAGE RATE	
LAST NAME	FIRST NAME	MI				

ACTION	CHECK BELOW	
	YES	NO
Do you work over 8 hours per day?		
Do you work over 40 hours per week?		
Are you paid at least time and a half for overtime hours?		
Are you receiving any cash payments for fringe benefits required by the posted wage determination decision?		
WHAT DEDUCTIONS OTHER THAN TAXES AND SOCIAL SECURITY ARE MADE FROM YOUR PAY?		

HOW MANY HOURS DID YOU WORK ON YOUR LAST WORK DAY BEFORE THIS INTERVIEW?	TOOLS YOU USE	
DATE OF LAST WORK DAY BEFORE INTERVIEW (YYMMDD)		
DATE YOU BEGAN WORK ON THIS PROJECT (YYMMDD)		

THE ABOVE IS CORRECT TO THE BEST OF MY KNOWLEDGE

EMPLOYEE'S SIGNATURE			DATE (YYMMDD)
INTERVIEWER	SIGNATURE	TYPED OR PRINTED NAME	DATE (YYMMDD)

INTERVIEWER'S COMMENTS

WORK EMPLOYEE WAS DOING WHEN INTERVIEWED	ACTION <i>(If explanation is needed, use comments section)</i>	YES	NO
	IS EMPLOYEE PROPERLY CLASSIFIED AND PAID?		
	ARE WAGE RATES AND POSTERS DISPLAYED?		

FOR USE BY PAYROLL CHECKER

IS ABOVE INFORMATION IN AGREEMENT WITH PAYROLL DATA?

☐ YES ☐ NO

COMMENTS

CHECKER			
LAST NAME	FIRST NAME	MI	JOB TITLE
SIGNATURE			DATE (YYMMDD)

EMPLOYEE RIGHTS UNDER THE DAVIS-BACON ACT

FOR LABORERS AND MECHANICS EMPLOYED ON FEDERAL OR FEDERALLY ASSISTED CONSTRUCTION PROJECTS

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

PREVAILING WAGES	You must be paid not less than the wage rate listed in the Davis-Bacon Wage Decision posted with this Notice for the work you perform.
OVERTIME	You must be paid not less than one and one-half times your basic rate of pay for all hours worked over 40 in a work week. There are few exceptions.
ENFORCEMENT	Contract payments can be withheld to ensure workers receive wages and overtime pay due, and liquidated damages may apply if overtime pay requirements are not met. Davis-Bacon contract clauses allow contract termination and debarment of contractors from future federal contracts for up to three years. A contractor who falsifies certified payroll records or induces wage kickbacks may be subject to civil or criminal prosecution, fines and/or imprisonment.
APPRENTICES	Apprentice rates apply only to apprentices properly registered under approved Federal or State apprenticeship programs.
PROPER PAY	If you do not receive proper pay, or require further information on the applicable wages, contact the Contracting Officer listed below:

or contact the U.S. Department of Labor's Wage and Hour Division.



For additional information:
1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-5627



WWW.WAGEHOUR.DOL.GOV



NY State Revolving Fund
MWBE / EEO
Bid Packet for

Non-Construction Contracts

Effective October 1, 2013

New York State Environmental Facilities Corporation
625 Broadway, Albany, NY 12207-2997
(800) 882 9721
P: (518) 402-7396 F: (518) 402-7456
www.efc.ny.gov

GUIDANCE FOR NON-CONSTRUCTION CONTRACTS

NEW YORK CLEAN WATER and DRINKING WATER STATE REVOLVING FUNDS

Administered by the New York State Environmental Facilities Corporation (EFC)

Contents of Bid Packet

- **PART 1: REQUIRED TERMS FOR PROJECT CONTRACTS AND SUBCONTRACTS**

The required contract language to be inserted into all non-construction contracts to satisfy Equal Employment Opportunity (EEO), Disadvantaged Business Enterprise (DBE) & Minority & Women Owned Business Enterprise (MWBE) and some other Clean/Drinking Water State Revolving Fund (SRF) Program requirements

- **PART 2: GUIDANCE MATERIALS**

Guidance 1: Equal Employment Opportunity and Minority & Women-Owned Business Enterprise Programs

A description of the EEO & MWBE requirements as they relate to non-construction contracts funded in whole or in part by the New York State Revolving Funds – all contracts and subcontracts

- **PART 3: REQUIRED FORMS**

A list and summary description of forms required for the MWBE and EEO programs.

PART 1:

REQUIRED CONTRACT LANGUAGE

Required Terms for Project Contracts and Subcontracts

The following exhibit must be included in ALL non-construction contracts and subcontracts funded in whole or in part with SRF funds.

Check EFC's website (www.efc.ny.gov/mwbe) for updates.

Exhibit 1: EEO & MWBE Language & Goals and other program requirements

EXHIBIT 1

REQUIRED TERMS FOR PROJECT CONTRACTS AND SUBCONTRACTS

In accordance with the terms and conditions set forth in Section 5.1 of the Project Finance Agreement, Recipient agrees that the following language will be included in all contracts and subcontracts regarding the Project including but not limited to those relating to non-construction, engineering, architectural, legal and fiscal services, as required by federal and State laws, regulations, and executive orders applicable to this Project:

DEFINED TERMS:

The term “Bid Packets” means the New York State Revolving Fund (SRF) Bid Packet for Construction Contracts and Bid Packet for Non-Construction Contracts and Service Providers, available at www.efc.ny.gov/mwbe.

The term “contractor”, as used in this contract or subcontract, means, and applies to, all prime contractors, consultants and service providers as hereinafter defined, unless specifically referred to otherwise.

The term “subcontractor”, as used in this contract or subcontract, means, and applies to, any individual or business enterprise that has an agreement with a contractor.

The term “EEO policy statement” means a statement of the contractor and subcontractor setting forth at least the following:

- (i) A statement that the contractor will provide for and promote equal employment opportunity free of discrimination and harassment against any person on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination and will make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on contracts relating to the Project.
- (ii) An agreement that all of contractor’s solicitations or advertisements for employees will state that, in the performance of the contract relating to this Project, all qualified applicants will be provided with equal employment opportunity free of discrimination and harassment against any person on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.
- (iii) An agreement to request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate or harass on the basis of race, color, national origin, age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law and that such union or representative will affirmatively cooperate in the implementation of the contractor’s obligations herein.
- (iv) An agreement to comply with the provisions of the Human Rights Law (Article 15 of the Executive Law), including those relating to non-discrimination on the basis of prior criminal conviction and prior arrest, and with all other State and federal statutory constitutional non-discrimination provisions.

The term “EFC” means the New York State Environmental Facilities Corporation.

The term “EPA” means the United States Environmental Protection Agency.

The term “ESD” means the Empire State Development Corporation - Division of Minority and Women’s Business Development.

The term “Recipient” means the party, other than EFC, to a grant agreement or a project finance agreement with EFC through which funds for the payment of amounts due hereunder are being paid in whole or in part.

The term “Service Providers” means professional services, such as legal, engineering, financial advisory or other professional services, supplies, commodities, equipment, materials, and travel.

The term “State” means the State of New York.

INTERPRETATION:

This contract is subject to Article 15-A of the Executive Law (Article 15-A) and 5 NYCRR 140-145 (the Regulations) and shall be considered a State Contract as defined therein. If any of the terms herein conflict with Article 15-A or the Regulations, such law and regulations shall supersede these requirements.

REPRESENTATIONS AND ACKNOWLEDGMENTS OF CONTRACTOR & SUBCONTRACTOR:

The contractor acknowledges that funds for the payment of amounts due under this contract are being provided in whole or in part subject to the terms and conditions of a grant agreement or a project finance agreement with EFC.

The contractor represents that it has submitted an EEO policy statement, an EEO Workforce Staffing Plan for Service Provider (Non-construction) Contracts (if applicable), and an MWBE Utilization Plan (prime contractors only), **prior to the execution of this contract.**

Suspension/Debarment - The contractor is not a debarred or suspended party under 2 CFR Part 180, 2 CFR Part 1532 and 40 CFR Part 32. Further, neither the contractor nor any of its subcontractors have contracted with, or will contract with, any debarred or suspended party under the foregoing regulations or with any party that has been determined to be ineligible to bid under Section 316 of the Executive Law.

EQUAL EMPLOYMENT OPPORTUNITY (EEO), AFFIRMATIVE ACTION, MWBE AND OTHER COVENANTS:

Contractor and subcontractor shall comply with all federal and State laws, regulations, and executive orders applicable to this Project, and shall provide such documentation, including periodic reports, as may be requested from time to time and as set forth in guidance documentation available at www.efc.ny.gov/mwbe, including but not limited to the Bid Packets.

With respect to this contract, the contractor and subcontractor shall undertake or continue existing programs of affirmative action and equal employment opportunity to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, color, national origin (including limited English proficiency), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law. For these purposes, affirmative action shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

MWBE

MWBE Goals - The contractor agrees to pursue MWBE goals in effect at the time of execution of this contract. The MWBE goals shall be applied to the total amount being funded pursuant to the grant agreement or project finance agreement with EFC.

10/1/2012 – Present	MWBE Combined Goal*
All counties	20%

*May be any combination of MBE and/or WBE participation

Contractors shall solicit participation of MWBE contractors (including subcontractors, consultants and service providers) for SRF-funded projects in accordance with the aforementioned goals. The contractor must submit sufficient documentation to demonstrate good faith efforts to provide opportunities for MWBE participation for work related to the SRF-funded project in the event respective goals are not achieved. Guidance pertaining to documentation of good faith efforts is set forth in the Bid Packet.

The contractor agrees that for purposes of providing meaningful participation by MWBEs on the contract and achieving the goals, contractor will reference the directory of New York State Certified MWBEs found at the following internet address: ny.newnycontracts.com.

Subcontractors who in turn subcontract work shall also comply with MWBE requirements for that contract.

MWBE Utilization Plan (MWBE Utilization Plan requirements apply to contractors and are submitted prior to execution of a contract.) – Each contractor shall prepare and submit to the Recipient for approval an MWBE Utilization Plan, and any revision or amendment thereto, that provides information describing MBEs and WBEs to be utilized at various times during the performance of this contract. The MWBE Utilization Plan shall identify the contractor's proposed MBE and WBE utilization for this contract and the MWBE participation goals for this contract as established by EFC. The MBEs and WBEs identified in the MWBE Utilization Plan must be certified by, or have applied for certification from ESD.

In the event that contractor's approved MWBE Utilization Plan does not propose achievement of the MWBE participation goals for this contract, contractor shall complete a waiver request as hereinafter referenced.

Submission – Within 30 days of execution of this contract, contractor shall submit to the Recipient copies of all signed subcontracts, agreements, and/or purchase orders referred to in the MWBE Utilization Plan.

Compliance – Contractor agrees to adhere to its approved MWBE Utilization Plan for the participation of MWBEs on this contract pursuant to their respective MWBE goals.

Waivers – If contractor's application of good faith efforts does not result in the utilization of MBE and/or WBE firms to achieve the aforementioned goals, prior to execution of a contract, the contractor shall complete the waiver request portion of the MWBE Utilization Plan and submit it to the Recipient. Contractor is entitled to receive a written notice of acceptance or denial within 20 days of receipt. Upon receipt of a notice of deficiency from Recipient, Contractor shall respond with written remedy to such notice within 7 days. Such response may include a request for a total or partial waiver of the aforementioned goals.

Contractor shall comply with the requirements set forth in the Bid Packets regarding waivers.

Required Reports - MWBE Monthly Report – Contractor agrees to submit a report to the Recipient by the 3rd business day following each end of month over the term of this contract documenting the progress made towards achievement of the MWBE goals of this contract.

EEO

EEO Workforce Staffing Plan – All Service Provider (non-construction) contractors and subcontractors shall submit an acceptable EEO Workforce Staffing Plan setting forth the anticipated work force to be utilized on such contract or, where required, information on the service provider's total work force, including apprentices, broken down by specific ethnic background, gender and Federal occupational categories or other appropriate categories specified by the Recipient. The EEO Workforce Staffing Plan is submitted prior to execution of a contract.

Required Reports - EEO Workforce Utilization Reports – Applies to Service Provider (Non-construction) Contracts and Subcontracts

During the term of this contract, the contractor and subcontractor shall update and provide notice to the Recipient of any changes to the previously submitted Staffing Plan in the form of an EEO Workforce Utilization Report. Contractor shall submit this information on a quarterly basis during the term of this contract to report the actual workforce utilized in the performance of the contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The EEO Workforce Utilization Report must be submitted to report this information. In the event a Contractor and Subcontractor's workforce does not change within the Quarterly period, the Contractor shall notify the Recipient in writing.

Required Reports - EEO Workforce Utilization Reports – Applies to Non-construction Contracts and Subcontracts

During the term of this contract, the contractor and subcontractor shall submit to the Recipient EEO Workforce Utilization Reports. Contractor and subcontractor shall submit this information on a monthly basis to report the actual labor hours utilized in the performance of this contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The EEO Workforce Utilization Report must be submitted to report this information.

All EEO Workforce Utilization Reports submitted by the contractor and subcontractor shall reflect a separation of the workforce utilized in the performance of this contract from contractor or subcontractor's total workforce. Contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided relates to the actual workforce utilized on this contract. If contractor or subcontractor fails to separate the workforce to be utilized on this contract from the total workforce as determined by Recipient contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided is contractor or subcontractor's total workforce during the subject time frame, not limited to work specifically under this contract.

Disadvantaged Business Enterprises - The contractor and subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor and subcontractor shall carry out applicable requirements of 40 CFR Part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor and subcontractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies. Contractors and subcontractors shall comply with the requirements set forth in the Bid Packets regarding Disadvantaged Business Enterprises.

REMEDIES:

Upon a determination by the Recipient of contractor's non-responsiveness, non-responsibility or breach as a result of a failure to comply with the requirements of Article 15-A and the Regulations, Recipient may withhold funds under this contract or take such other actions, impose liquidated damages or commence enforcement proceedings as set forth herein or as otherwise allowed by law or in equity.

If contractor or subcontractor fails to submit to Recipient an EEO policy statement consistent with the provisions set forth in clauses (i), (ii), (iii) and (iv) of the definition thereof and within the timeframe required

therefor, Recipient may declare this contract to be null and void.

Contractor and subcontractor agree that a failure to submit and/or adhere to its EEO policy statement, EEO Workforce Staffing Plan for Service Provider (Non-construction) Contracts (if applicable), and an MWBE Utilization Plan (contractors only), and any other required periodic reports, shall constitute a material breach of the terms of this contract, entitling Recipient to any remedy provided herein, including but not limited to, a finding of contractor non-responsiveness.

Liquidated or Other Damages - If it has been determined by the Recipient or NYSEFC that the contractor is not in compliance with the requirements herein or refuses to comply with such requirements, or if contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, in accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, contractor shall be obligated to pay to Recipient liquidated damages or other appropriate damages as determined by the Recipient or EFC.

Liquidated damages shall be calculated as an amount not to exceed the difference between:

1. All sums identified for payment to MWBEs had the contractor achieved the contractual MWBE goals; and
2. All sums actually paid to MWBEs for work performed or materials supplied under this contract.

In the event a determination has been made by the Recipient or EFC which requires the payment of liquidated damages and such identified sums have not been withheld, contractor shall pay such liquidated damages to Recipient within sixty (60) days after they are assessed unless prior to the expiration of such sixtieth day, contractor has filed a complaint with ESD pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director of ESD renders a decision in favor of Recipient.

RESTRICTIONS ON LOBBYING:

Contractor and subcontractor executing a contract in excess of \$100,000 agree to provide to the Recipient an executed Certification For Contracts, Grants, Loans, and Cooperative Agreements 40 CFR 34, in the form attached hereto, consistent with the requirements of 40 CFR Part 34.

PART 2:

GUIDANCE MATERIALS

Equal Employment Opportunity (EEO) and Minority & Women-Owned Business Enterprise (MWBE) Programs

A description of the EEO & MWBE requirements as they relate to non-construction contracts funded in whole or in part by the New York State Revolving Funds:

Applicability:

This guidance applies to service provider (non-construction) contracts are written agreements where the SRF recipient (Recipient) commits to expend funds for services (including legal, engineering, financial advisory or other professional services, and labor); supplies; commodities; equipment; materials; and travel, or any combination thereof.

Purpose of Documents:

This guidance is designed to complement the required contract language as set forth in Part 1, by providing additional information intended to assist SRF Recipients and bidders in complying with EEO, MWBE, and other requirements of the SRF programs, including:

- New York State Executive Law, Article 15-A and New York Code of Rules and Regulations, Title 5 (5 NYCRR) Parts 140-145 (Regulations of the Commissioner of Economic Development)
- 40 Code of Federal Regulations (CFR) Part 33 – “Participation by Disadvantaged Business Enterprises in US EPA Programs”
- Restrictions on Lobbying

Service Providers are required to engage in procurement practices that will provide opportunities for meaningful participation of minority and women-owned business enterprises (MWBE) in providing labor, travel, equipment, materials, supplies, services (including legal, financial, engineering or other professional services), or any combination of the above, and practices to encourage the employment of minorities and women in the workforce.

Failure to report on EEO participation or to meet all the requirements of MWBE & DBE regulations in a timely manner may result in withholding of disbursements of SRF funds or other remedies as cited in the SRF financing agreement. This may affect the Service Provider's payments. If this is a project with a not-for-profit entity, please contact EFC for appropriate guidance.

Reference the EFC website to ensure the most recent forms and language. (www.efc.ny.gov/mwbe)

Guidance 1: EEO & MWBE Programs

The New York State Environmental Facilities Corporation (EFC) implements the New York State Revolving Fund (SRF) for both Clean Water and Drinking Water projects. This guidance outlines the activities that must be performed by each contractor on an SRF funded project in order to comply with federal and New York State laws and regulations.

I. EQUAL EMPLOYMENT OPPORTUNITY

A. WORKFORCE DIVERSITY

Service Providers are required to document their efforts to meet EEO goals for the employment of minorities and women on all SRF funded projects (EEO Workforce Utilization Report). The United States Department of Labor (DOL) has established EEO goals for employment of minority and women. The goals are available on EFC's website. (www.efc.ny.gov/mwbe - Refer to *Prime Contractor* Folder)

B. EEO POLICY STATEMENT

The EEO Policy Statement is documentation of a contractor's policy of non-discrimination in accordance with federal and State laws. The EEO Policy Statement must: be submitted to Recipient's MBO as part of any bid proposal; include language as defined above (see Required Terms for Project Contracts and Subcontracts – EEO Policy Statement definition); and be signed by each potential bidder.

The EEO Policy Statement can be found in the required forms section of this document and on EFC's website at www.efc.ny.gov/mwbe (Refer to *Prime Contractor & Subcontractor* folder).

C. EEO WORKFORCE STAFFING PLAN

With the Bid or when offering services, each Service Provider shall submit to the SRF Recipient an *EEO Workforce Staffing Plan* estimating the anticipated work force to be utilized on the project. The EEO Workforce Staffing Plan shall include information on the service provider's total work force, including apprentices, broken down by specific ethnic background, gender and Federal occupational categories.

Blank EEO Workforce Staffing Plans are found in the Required Forms section of this document and on EFC's website at www.efc.ny.gov/mwbe.

D. EEO WORKFORCE UTILIZATION REPORTS

Upon the execution of the contract and monthly thereafter, the contractor shall submit to the Recipient's MBO an *EEO Workforce Utilization Report* of the actual labor hours worked by ALL contractor AND subcontractor employees during the prior month period, on activities related to the contract, broken down by specific ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the Recipient.

The *EEO Workforce Utilization Report* is part of the MWBE Monthly Payment Reports. Both the EEO Workforce Utilization Report and MWBE Monthly Report are found on the EFC website. (www.efc.ny.gov/mwbe - Refer to *Prime Contractor* folder).

All EEO Workforce Utilization Reports submitted by the contractor and subcontractor must reflect a separation of the workforce utilized in the performance of this contract from contractor or subcontractor's total workforce. The EEO Workforce Utilization Report must indicate that the information provided relates to the actual workforce utilized. If the contractor or subcontractor fails to separate the workforce to be utilized on this contract

from the total workforce as determined by Recipient, contractor shall submit the EEO Workforce Utilization Report and indicate that the information provided is contractor or subcontractor's total workforce during the subject time frame, not limited to work specifically under a particular contract.

II. MINORITY & WOMEN-OWNED BUSINESS ENTERPRISE (Prime Contracts Only)

A. MWBE REQUIREMENTS – Non-Construction Contracts

Recipients, contractors and subcontractors must comply with New York State Executive Law, Article 15-A and New York Code of Rules and Regulations, Title 5 (5 NYCRR) Parts 140-145 (Regulations of the Commissioner of Economic Development).

Non-construction contracts executed after October 13, 2010 with a value greater than \$25,000 funded with SRF financial assistance are subject to MWBE requirements.

Non-construction contracts, for the purposes of SRF MWBE compliance, are written agreements between an SRF Recipient and a Service Provider (or subcontractor) whereby the SRF Recipient commits to expend funds for the services (i.e. legal, engineering, financial advisory or other professional services, and labor); supplies; commodities; equipment; materials; and travel, or combination thereof in support of an SRF financed project.

Amendments or change orders for such non-construction contracts with a value greater than \$25,000 may be subject to MWBE requirements as well. The Prime contractor is to seek additional MWBE participation for the additional value of the contract.

If contracts with a value of \$25,000 or less have subsequent change orders or amendments that bring the total contract value to greater than \$25,000, the full value of the contract will then be subject to MWBE requirements.

B. MWBE PARTICIPATION GOALS (FAIR SHARE OBJECTIVES)

Based on the report The State of Minority and Women-Owned Business Enterprise: Evidence of New York (April 29, 2010) (NYS Disparity Study), there is a demonstrated availability of MWBEs throughout New York State. Contractors are required to solicit participation of MWBE contractors (including subcontractors, consultants, and service providers) for SRF funded projects.

MWBE participation goals will be based on the execution date of each respective contract, unless MWBE participation goals have been otherwise specified in an executed SRF financial assistance agreement.

10/1/2012 – Present	MWBE Combined Goal*
All counties	20%

*May be any combination of MBE and/or WBE participation

10/1/2011 – 9/30/2012	MWBE Combined Goal*
All counties	10%

*May be any combination of MBE and/or WBE participation

10/13/2010 – 9/30/2011	MBE Goals	WBE Goals
All other counties non-NYC	8.8%	8.8%
New York City and Long Island Region (Bronx, Brooklyn, Manhattan, Queens, Staten Island, Nassau, Suffolk)	18.8%	20.5%

C. RECEIVING CREDIT UNDER THE EFC MWBE PROGRAM

To receive MWBE participation credit, contractors performing work that have been identified in an approved MWBE Utilization Plan (See Subsection D1 below for more information) must be certified as an MBE or WBE by the Division of Minority and

Women's Business Development, Empire State Development Corporation (ESDC). Conditional credit will be given for firms that have applications pending with ESDC.

Prime contractors that are certified MWBE will receive credit for MWBE participation.

A list of firms certified in New York State can be found on the ESD website at **ny.newnycontracts.com**. Searches can be performed by the business name and commodity code or business description.

D. NON-CONSTRUCTION CONTRACTOR'S MWBE RESPONSIBILITIES

At the Time of Bid:

The completed forms listed below shall be part of the official bid submission by each competing contractor:

- **EPA Form 6100-3 "DBE Subcontractor Performance Form"** – Each potential bidder shall complete this form and submit it to the MBO for each MWBE firm contacted during the bid or proposal preparation process, and make reasonable efforts to obtain signatures from the MBEs and WBEs contacted.
- **EPA Form 6100-4 "DBE Subcontractor Utilization Form"** – This form shall be completed by each potential bidder and submitted to the MBO as part of the bid submission. On this form, each bidder offers their estimated plan for MBE and WBE utilization for their contract.

NOTE: The EEO Policy Statement should be completed and submitted at this time. See EEO section.

Prior to Award of the Contract:

- **EPA Form 6100-2 "DBE Subcontractor Participation Form"** - Distribute the form to MWBE Subcontractors who are listed on the 6100-4 form. Submit documented proof (e.g. email, letter, certified mail receipt) to the MBO that the 6100-2 form was sent to the MWBE Subcontractors. (See Required Forms)

NOTE: The EPA forms are not required for projects valued at \$250,000 or less in a year.

After Award of the Contract:

Each prime contractor is obligated to seek MWBE participation and document their good faith efforts to meet MWBE goals.

1. MWBE Utilization Plan

- a. **Due Date:** MWBE Utilization Plans and any revision or amendment thereto, are required to be submitted to the MBO no later than the date of execution of the contract.
- b. **Preparation:** Each contractor shall prepare an MWBE Utilization Plan that provides information describing MBEs and WBEs to be utilized during the term of the contract. The MWBE Utilization Plan will reflect the EFC MWBE goals that apply to the contract as well as the contractor's anticipated MWBE participation. The contractor will transmit the completed MWBE Utilization Plan form, with all pages filled out, to the MBO. Blank MWBE Utilization Plan forms are available on the EFC website. (www.efc.ny.gov/mwbe)

Utilization Plan revisions or amendments must be submitted to the MBO, preferably with the next monthly report.

- c. **NYS Certified:** The MBEs and WBEs identified in the MWBE Utilization Plan must be certified by, or have applied for certification from:

Empire State Development Corporation
 Division of Minority and Women's Business Development
 625 Broadway
 Albany, New York 12245
 Phone: 1-800-782-8639
 ny.newnycontracts.com

- d. **Supplier Credit:** Credit for MBE/WBE participation shall be granted for MWBE firms performing a commercially useful business function according to custom and practice in the industry.

"Commercially useful functions" normally include:

- i. Providing technical assistance to a purchaser prior to a purchase, during installation, and after the supplies or equipment are placed in service;
- ii. Manufacturing or being the first tier below the manufacturer of supplies or equipment; or
- iii. Providing functions other than merely accepting and referring requests for supplies or equipment to another party for direct shipment to a contractor.

MBE/WBE goal crediting:

- i. For MWBE suppliers who are manufacturers, fabricators, or official manufacturer's representatives who are warehousing such goods, up to 100% of the MBE/WBE objective may be credited.
- ii. For non-manufacturer suppliers, up to 25% of the MBE/WBE objective may be credited.
- iii. No credit will be granted for MBEs and/or WBEs acting merely as a passive conduit of funds from one firm to another.

- e. **Broker Credit:** Firms that are identified as brokers (on the ESD website or at EFC's discretion) may only be credited up to 25% of their full contract value.
- f. **Waiver Request:** If the contractor's application of good faith efforts does not result in the utilization of MBE and/or WBE firms to achieve the aforementioned goals or a specialty equipment/service waiver is requested, the contractor shall complete the waiver request portion of the MWBE Utilization Plan, attach appropriate documentation, and submit it to the MBO.
See Section F for more information.

- g. **MWBE Utilization Plan Acceptance vs. Notice of Deficiency:** The MBO will evaluate a completed MWBE Utilization Plan. Upon review and application of the requirements set forth in this guidance, if the MBO finds the UP acceptable, they will forward to EFC for review. If the MBO finds the UP insufficient, they will work with the contractor to address deficiencies before submitting to EFC for review. A written notice of acceptance or denial will be issued by EFC within 20 business days of receipt of the UP. Upon notice of deficiency to the contractor from either the MBO or EFC, the contractor shall respond with a written remedy to such notice within seven (7) business days.

In coordination with the MBO, EFC will accept a Utilization Plan upon consideration of many factors, including the following:

- i. The Utilization Plan indicates that the MWBE proposed goals for the project will be achieved;

- ii. A prime contractor, who is a certified MBE or WBE, will be credited for up to 100% of the category of their certification. However, good faith efforts to seek participation in the other category are required;
 - iii. Adequate documentation to demonstrate good faith effort as described in Section D2.
- h. **UP Acceptance:** Within 10 days of the final acceptance of a MWBE Utilization Plan or Waiver Request, EFC will post the approved MWBE Utilization Plan or Waiver Request on the EFC website. www.efc.ny.gov/mwbe.
- i. **Conditional UP:** In coordination with the MBO, EFC may issue conditional acceptance of Utilization Plans pending submission of additional documentation that demonstrates there will be an increase in MWBE participation.
- j. **Revisions of the MWBE Utilization Plans:** If project conditions change such that the information submitted in the MWBE Utilization Plan is no longer valid, the contractor shall indicate the changes within the next monthly report to the MBO. At EFC's discretion, a completely revised MWBE Utilization Plan form and good faith effort documentation may be required to be submitted.
- k. **Projects co-Funded with other state/federal agencies:** In the event EFC is providing financial assistance to a project that is also financially supported by other state/federal agencies, EFC may defer to the MBE and WBE participation goals established for the project by those agencies.

2. Good Faith Effort Documentation

Prime contractors shall solicit participation of MWBE firms (including subcontractor, consultants and service providers) for SRF-funded projects in an effort to meet the appropriate goals. In the event respective goals are not achieved, the contractor must submit sufficient documentation to demonstrate good faith efforts have been made to provide opportunities to certified MWBE firms to participate in SRF-funded projects.

Examples of documentation of good faith efforts are set forth below:

- Information on the scope of work related to the contract and specific steps taken to reasonably structure the scope of work to break out tasks or equipment needs for the purpose of providing opportunities for subcontracting with or obtaining supplies or services from MBEs or WBEs.
- Printed screenshots of the directory of Certified Minority and Women Owned Businesses (MWBE directory) on ESD's website (ny.newnycontracts.com) on a statewide basis, if appropriate, for both MBEs and WBEs that provide the services or equipment necessary for the contract. Contact the MBO for assistance in performing a proper search including identifying a sufficient number of solicitations to show that good faith effort was made.
- Copies of timely solicitations and documentation that the contractor offered relevant plans, specifications, or other related materials to MBE and WBE firms on ESD's MWBE directory to participate in the work, with the responses.

The contractor is to offer sufficient advance notice proportional to the size and complexity of the contract to enable MBEs and WBEs to prepare an informed response to the solicitations for participation as a subcontractor or supplier. The solicitations and responses are required to be documented in a log to be submitted in the case where the goal is not met. The log should consist of the list of MBE and WBE firms solicited, their contact information, the type of work they were solicited to perform (or equipment to provide), how the solicitation was made (fax, phone, email)

and the contact information, the contacts name and the outcome. If a bid was received, the bid price should also be included in the log. See a sample log entry below:

Date	M/WBE Type	Company	Scope of work	Contact Name	Phone/ Email	Solicitation Format	MWBE Response	Negotiation Required?	Selected? If not, Explain

If no response was received to an initial solicitation, at least one follow-up solicitation should be made in a different format than the first, e.g. fax followed by phone call. Any bids received from non-MWBE firms should also be tracked on the log.

Submit the EPA 6100-3 and 6100-4 forms that are required as part of all bids or proposals. A properly completed EPA 6100-3 form is good indication of a contact to an MWBE and their response to the contact. If solicitations do not result in obtaining sufficient participation of MWBE firms due to non-responsiveness, please contact the MBO or EFC MWBE representative for support.

- Copies of any advertisements of sufficient duration to effectively seek participation of certified MBE and WBEs timely published in appropriate general circulation, trade and MWBE oriented publications, together with listing and dates of publication of such advertisements. A log should be kept of the responses to the ads, similar to the log for MWBE firm solicitation and should include the non-MWBE firms that responded and the bid prices. Any negotiations should be documented in the log.
 - Documents demonstrating that insufficient MBEs or WBEs are reasonably available to perform the work. Based on the NYS Disparity Study, there is a presumption of MBE and WBE statewide availability, unless information is submitted indicating otherwise.
 - A written demonstration that the contractor offered to make up any inability to meet the project MWBE participation goals in other contracts and/or agreements performed by the contractor on another SRF funded project.
 - The date of pre-bid, pre-award, or other meetings scheduled by the Recipient, if any, and the contact information of any MBEs and WBEs who attended and are capable of performing work on the project.
 - Any other information or documentation that demonstrates the contractor conducted good faith efforts to provide opportunities for MWBE participation in their work. For instance, prime contractors and MBOs should develop a list of MWBE firms that have expressed interest in working on SRF funded projects
 - The use of certified Disadvantaged Business Enterprises (DBE), Small Business Administration (SBA), and Veteran-Owned Small Businesses (VOSB) may be considered as a demonstration of Good Faith Efforts.
- 3. Subcontract Agreements** - The contractor shall submit copies of all legally signed subcontracts, agreements, and purchase orders that are referred to in the MWBE Utilization Plan to the MBO within 30 days of their execution. These subcontracts and/or purchase orders must include the following information:
- a. Actual dollar amount of the subcontract;
 - b. A job description of the work to be performed by the subcontractor;
 - c. Signatures of both parties;
 - d. Date of execution;
 - e. MWBE language (included in this bid packet); and
 - f. A signed EEO Policy Statement Agreement (See Required Forms).

NOTE: Purchase orders must be sent with copies of both sides of cancelled checks.

- 4. Monthly Reports** - The contractor must submit monthly MWBE payment reports supplemented with proof of payment to the MBO. Blank monthly report forms are available at www.efc.ny.gov/mwbe or from the MBO. Monthly reports should be submitted to the MBO within 3 business days after the end of each month being reported.

As part of the Monthly Report, the contractor must provide documentation to the MBO that subcontractors have been paid within 30 days of receipt of payment from the Recipient.

The final monthly payment report must reflect all Utilization Plan revisions or amendments.

5. Other Service Provider Responsibilities:

- a. Continue good faith efforts to seek opportunities for MBE and WBE participation even if proposed goals have been achieved. In addition, any revisions to an MWBE Utilization Plan must be documented in the next monthly report to the MBO for approval.
- b. Provide written notification to the MBO and EFC of any termination of an MBE or WBE subcontractor. This should be reported as part of the revised MWBE Utilization Plan.
- c. The EEO poster shall be displayed at the project site in a visible location. The EEO poster is at <http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm>
- d. Provide timely and complete responses to inquiries from either the MBO or EFC staff as requested.
- e. Make all MWBE & EEO documents and records available upon request to EFC staff, the MBO, or their authorized representatives.
- f. Manage the project in a manner that creates meaningful opportunities for participation by MBEs and WBEs.
- g. Provide programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination on the basis of race, color, national origin (including limited English provision), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.

Additional guidance and requirements pertaining to the preparation and submission of the MWBE Utilization Plans can be found in the Exhibit 1: Required Terms for Project Contracts and Subcontracts.

NOTE: Failure by the contractor to receive acceptance of the MWBE Utilization Plan by the Recipient or EFC may result in withholding of progress payments. Such withholding of progress payments shall not relieve the contractor of any contract requirements including the completion of the project within the specified contract time.

E. SUBCONTRACTOR'S MWBE RESPONSIBILITIES

Subcontractors are those individuals or business enterprises that contract directly with contractors. Subcontractors should:

1. Maintain their MWBE certifications, and notify the contractor and MBO of any change in their certification status.

2. Respond promptly to solicitation requests by completing and submitting bid information in a timely manner.
3. Maintain business records that should include, but not be limited to, contracts/agreements, records of receipts, correspondence, purchase orders, and canceled checks.
4. Complete and submit the EPA Form 6100-3 "DBE Subcontractor Performance Form" to the contractor prior to submission of the bid. Provide a receipt of EPA Form 6100-2 "DBE Subcontractor Participation Form" to the contractor prior to award of contract.
5. Ensure that a required EEO Policy Statement is included in each subcontract. Additionally, signed versions of each subcontract should be sent to the MBO within 30 days of execution.
6. Provide programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination on the basis of race, color, national origin (including limited English provision), age, disability, sex, gender, sexual orientation, religion, genetic characteristics or information, status as a victim of domestic violence, veteran or military status, marital or family status, or any other discrimination prohibited by law.
7. Notify the MBO and EFC when contract problems arise, such as non-payment for services or when the subcontractor is not employed as described in the MWBE Utilization Plan.
8. Perform the subcontracted scope of work in a professional and timely manner.

F. WAIVER REQUESTS

1. Each contractor is required to create meaningful opportunities for certified MWBE participation and to offer the MWBE certified firms a fair share of their work. After making good faith efforts to create meaningful opportunities, a contractor may find that it is not possible to meet the MWBE goals. In that case, the contractor shall request for an MWBE waiver.
2. Even if an MWBE waiver is granted, EEO information must still be submitted. The EEO information is submitted as part of the Monthly Report.
3. **Preparation:** The contractor shall complete the waiver request portion of the MWBE Utilization Plan and submit it to the MBO along with adequate good faith effort documentation.
4. **Waiver Review:** The MBO and EFC will review each waiver request based on the good faith effort criteria presented above and the documentation submitted with the waiver request. EFC will not issue any automatic waivers from MWBE responsibilities. A full or partial waiver from the MWBE goals can be requested.
5. **Specialty Equipment/Service Waiver:** A specialty equipment/service waiver may be granted in cases where:
 - a. equipment is made by only one manufacturer,
 - b. the contract specifications call for equipment that is not available through an MWBE supplier;
 - c. the equipment is constructed on site by specially trained non-MWBE labor;
 - d. the service is not available through an MWBE (such as work done by National Grid);
 - e. the service is proprietary in nature (such as use of certain computer software necessary for control systems); or
 - f. the service cannot be subcontracted (such as litigation services).

If the contract includes specialty equipment or services, and documentation is submitted demonstrating that there are no MBE/WBE firms capable of completing this portion of the contract, the specialty amount of the contract may be deducted from the total contract amount and the goals would be applied to the MWBE Eligible Amount. This determination is made at the discretion of the MBO and EFC.

Example:

\$200,000	-	\$50,000	=	\$150,000
(Contract)		(Specialty equipment/service)		(MWBE Eligible Amount)

The MWBE goal is applied to the remaining balance.

A request for this specialty equipment/service deduction can be completed by filling out section two of the MWBE Utilization Plan and submitting it to the MBO. The request must include a copy of the page from the contract where the equipment/service is described and the cost of each item. Additional documentation may be requested by the MBO or EFC.

G. PROTESTS/COMPLAINTS

Subcontractors or contractors who have any concerns, issues, or complaints regarding the implementation of the SRF MWBE/EEO Program, or wish to protest should do so in writing to the project MBO and EFC. The MBO, in consultation with EFC, will review the circumstances described in the submission, investigate to develop additional information, if warranted, and determine whether action is required. If the subcontractor believes the issue has not been resolved to their satisfaction, they may appeal in writing to EFC for consideration.

H. WASTE, FRAUD AND ABUSE

Subcontractors, contractors, service providers, or Recipients who know of or suspect any instances of waste, fraud, or abuse within the MWBE & EEO Program should notify the project MBO and EFC immediately. Additionally, suspected fraud activity should be reported to the USEPA – Office of Inspector General Hotline at (888) 546-8740 or the New York State Office of Inspector General at (800) 367-4448.

I. REMEDIES

If a Recipient makes a determination that a contractor has been non-responsive, is non-responsible, or is in breach as a result of a failure to comply with the requirements of Article 15-A and the Regulations, Recipient may withhold funds under the contract or take such other actions, impose liquidated damages or commence enforcement proceedings.

If a contractor or subcontractor fails to submit to Recipient an EEO policy statement within the required timeframe, Recipient may declare the contract to be null and void.

A failure to submit and/or adhere to an EEO policy statement and an MWBE Utilization Plan, and any other required reports, shall constitute a material breach of the terms of the contract between contractor and Recipient, and justify a finding of contractor non-responsiveness.

Liquidated or Other Damages - If it has been determined by the Recipient or EFC that the contractor is not in compliance with the requirements herein or refuses to comply with such requirements, or if contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, in accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, contractor shall be obligated to pay to Recipient liquidated damages or other appropriate damages as determined by the Recipient or EFC.

Liquidated damages shall be calculated as an amount not to exceed the difference

between:

1. All sums identified for payment to MWBEs had the contractor achieved the contractual MWBE goals; and
2. All sums actually paid to MWBEs for work performed or materials supplied under this contract.

In the event a determination has been made by the Recipient or EFC which requires the payment of liquidated damages and such identified sums have not been withheld, contractor shall pay such liquidated damages to Recipient within sixty (60) days after they are assessed unless prior to the expiration of such sixtieth day, contractor has filed a complaint with ESD pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director of ESD renders a decision in favor of Recipient.

J. RESTRICTIONS ON LOBBYING

Each contractor and subcontractor which has a contract with Recipient exceeding \$100,000 shall provide to the Recipient an executed certification on the form provided, that it will not expend appropriated federal funds to pay any person for influencing or attempting to influence an officer or employee of any agency, Member of Congress, officer or employee of Congress or any employee of any Member of Congress in accordance with the provisions of 40 CFR Part 34, and to maintain such certification for their own records.

PART 3:

REQUIRED FORMS

FOR NON-CONSTRUCTION CONTRACTS

All MWBE & EEO required forms can be found on the EFC website (www.efc.ny.gov/mwbe)

The following (Attached) SRF forms are required for the bidding process:

1. EPA Form 6100-2 "DBE Subcontractor Participation Form"
This form is to be distributed to all MWBE subcontractors and proof of distribution should be submitted to the MBO.
2. EPA Form 6100-3 "DBE Subcontractor Performance Form"
This form should be completed by each MWBE subcontractor contacted during the bid preparation process for non-construction contracts, maintained in the contractor's files, and submitted to the MBO with the bid.
3. EPA Form 6100-4 "DBE Subcontractor Utilization Form"
This form should be completed by the Service Provider as an estimate of which MWBE subcontractors will be used on the project, maintained in the contractor's files, and submitted to the MBO with the bid.
4. EEO Policy Statement
To be completed by all Service Providers and submitted to the MBO with the bid. This form may be included in the contract.
5. Lobbying Certification
To be completed by all Service Providers and subcontractors (over \$100,000) and submitted to the Recipient with the bid.

The following (Non-Attached) SRF forms are required subsequent to the bid award:

1. MWBE Utilization Plan and/or Waiver Request
These forms are completed by the Service Provider and submitted to the MBO *no later than date of execution of the contract*.
2. EEO Staffing Plan
This form is completed by the Service Provider and submitted with the Utilization Plan to the MBO. It summarizes the character of the work force related to the contract, including subcontracted staff.
3. EEO Workforce Utilization Report
This form is completed by the Service Provider and submitted on a Quarterly basis to the MBO. It summarizes the character of the actual work force related to the contract, including subcontracted staff.
4. MWBE Monthly Report Form
To be completed by the Service Provider and submitted to the MBO.



Environmental
Protection Agency

OMB Control No: 2090-0030
Approved: 05/01/2008

EPA Form 6100-2

**Disadvantaged Business Enterprise Program
DBE Subcontractor Participation Form**

NAME OF SUBCONTRACTOR¹	PROJECT NAME
ADDRESS	CONTRACT NO.
TELEPHONE NO.	EMAIL ADDRESS
PRIME CONTRACTOR NAME	

Please use the space below to report any concerns regarding the above EPA-funded project (e.g., reason for termination by prime contractor, late payment, etc.).

CONTRACT ITEM NO.	ITEM OF WORK OR DESCRIPTION OF SERVICES RECEIVED FROM THE PRIME CONTRACTOR	AMOUNT SUBCONTRACTOR WAS PAID BY PRIME CONTRACTOR
<hr/> <div>Subcontractor Signature</div> <hr/> <div>Title/Date</div>		

¹Subcontractor is defined as a company, firm, joint venture, or individual who enters into an agreement with a contractor to provide services pursuant to an EPA award of financial assistance.



Environmental
Protection Agency

**Disadvantaged Business Enterprise Program
DBE Subcontractor Participation Form**

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed EPA DBE Subcontractor Participation Form to this address.



EPA Form 6100-3

NAME OF SUBCONTRACTOR ₁		PROJECT NAME	
ADDRESS		BID/PROPOSAL NO.	
TELEPHONE NO.		E-MAIL ADDRESS	
PRIME CONTRACTOR NAME			
CONTRACT ITEM NO.	ITEM OF WORK OR DESCRIPTION OF SERVICES BID TO PRIME		PRICE OF WORK SUBMITTED TO PRIME CONTRACTOR
Currently certified as an MBE or WBE under EPA's DBE Program? _____ Yes _____ No Signature of Prime Contractor Date Print Name Title _____ _____ Signature of Subcontractor Date _____ Print Name Title			

EPA FORM 6100-3 (DBE Subcontractor Performance Form)



Environmental
Protection Agency

**Disadvantaged Business Enterprise Program
DBE Subcontractor Performance Form**

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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EPA Form 6100-4

Disadvantaged Business Enterprise Program DBE Subcontractor Utilization Form

BID/PROPOSAL NO.	PROJECT NAME
NAME OF PRIME BIDDER/PROPOSER	E-MAIL ADDRESS
ADDRESS	
TELEPHONE NO.	FAX NO.

The following subcontractors ¹ will be used on this project:			
COMPANY NAME, ADDRESS, PHONE NUMBER, AND E-MAIL ADDRESS	TYPE OF WORK TO BE PERFORMED	ESTIMATE D DOLLAR AMOUNT	CURRENTLY CERTIFIED AS AN MBE OR WBE?

I certify under penalty of perjury that the foregoing statements are true and correct. In the event of a replacement of a subcontractor, I will adhere to the replacement requirements set forth in 40 CFR Part 33 Section 33.302(c).

_____ Signature of Prime Contractor	_____ Date
_____ Print Name	_____ Title

EPA FORM 6100-4 (DBE Subcontractor Utilization Form)



Environmental
Protection Agency

OMB Control No: 2090-0030
Approved: 05/01/2008

Disadvantaged Business Enterprise Program DBE Subcontractor Utilization Form

The public reporting and recordkeeping burden for this collection of information is estimated to average fifteen (15) minutes. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed EPA DBE Subcontractor Utilization Form to this address.

**AGREEMENT TO ABIDE BY EQUAL EMPLOYMENT OPPORTUNITY
POLICY STATEMENT REQUIREMENTS
NEW YORK STATE REVOLVING FUND (SRF)**

I, _____, am the authorized representative of _____.

Name of Representative

Name of Contractor/Service Provider

I hereby certify that _____ will abide by the equal employment

Name of Contractor/Service Provider

opportunity (EEO) policy statement provisions outlined below.

- (i) A statement that the contractor will not discriminate on the basis of race, creed, color, national origin, sex, age, disability, or marital status against any employee or applicant for employment, will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination and will make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on contracts relating to the Project.
- (ii) An agreement that all of contractor's solicitations or advertisements for employees will state that, in the performance of the contract relating to this Project, all qualified applicants will be afforded equal employment opportunities without discrimination on the basis of race, creed, color, national origin, sex, age, disability or marital status.
- (iii) An agreement to request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein.
- (iv) An agreement to comply with the provisions of the Human Rights Law (Article 15 of the Executive Law), including those relating to non-discrimination on the basis of prior criminal conviction and prior arrest, and with all other State and federal statutory constitutional non-discrimination provisions.

Blank EEO Policy Statements are available at www.efc.ny.gov/mwbe, if needed.

If contractor fails to submit to Recipient an EEO policy statement consistent with the provisions set forth above in clauses (i), (ii), (iii) and (iv) and within the timeframe required thereof, Recipient may declare this contract to be null and void.

X

Contractor/Service Provider Representative

Once completed, please provide to the Prime Contractor and/or the community MBO

**CERTIFICATION
FOR
CONTRACTS, GRANTS, LOANS, AND
COOPERATIVE AGREEMENTS
40 CFR 34**

SRF Project No.: _____

The undersigned each certify, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including sub-contracts, sub-grants, and contracts under grant, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31 U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

By: _____

Name:

Title:

Date: _____

Contract ID: _____