Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 708684/2020

RIVERKEEPER, INC., CONNECTICUT FUND FOR THE ENVIRONMENT, INC. d/b/a SAVE THE SOUND, BRONX COUNCIL FOR ENVIRONMENTAL QUALITY, NEWTOWN CREEK ALLIANCE, HUDSON RIVER WATERTRAIL ASSOCIATION d/b/a NEW YORK CITY WATER TRAIL ASSOCIATION, RARITAN BAYKEEPER d/b/a NY/NJ BAYKEEPER AND WATERKEEPER ALLIANCE,

Motion
Date: September 25, 2023

Motion Cal. No.: 20

Motion Sequence No.:1

Petitioners/Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent/Defendant.

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The following e-file papers numbered 1, 4-11, 14-20 submitted and considered on this Petition by Riverkeeper, Inc., Connecticut Fund For the Environment, Inc. d/b/a Save The Sound, Bronx Council For Environmental Quality, Newtown Creek Alliance, Hudson River Watertrail Association d/b/a New York City Water Trail Association, Raritan Baykeeper d/b/a NY/NJ Baykeeper, and Waterkeeper Alliance, Inc., verified on October 3, 2019 seeking an Order and Judgment pursuant Article 78 of the Civil Practice Law and Rules for the relief demanded in the Verified Petition.

	Papers Numbered
Notice of Petition-Affidavits-Exhibits and all papers under Index number 6106/2019.....	EF 1, 4-10
Answer and Opposition-Affidavits-Exhibits.....	EF 14-20
Decision of Appellate Division, Second Department dated March 29, 2023.....	EF 11

This is a hybrid proceeding brought under CPLR Article 78 in the nature of mandamus and for declaratory relief (CPLR 3001) to compel the Respondent/Defendant New York City Department of Environmental Protection ("DEP") to comply with certain provisions contained in the Sewage Pollution Right to Know Act. Petitioners/Plaintiffs (hereinafter referred to herein "Petitioners") seek to compel DEP to provide proper notification to the public for combined sewer overflow ("CSO") discharges of untreated and partially untreated sewage under the Sewage Pollution Right to Know Act ("SPRTKA" or the "Act"), New York Environmental Conservation Law ("ECL") §17-0826-a(2) ; 6 NYCRR § 750-2.7(b)(2). Petitioners claimed that DEP has violated its legal duty under the Act by failing to notify the public after learning of sewage discharges, as publicly owned treatment works ("POTW") or the operator of a publicly owned sewer system ("POSS") are mandated by the Act to publicly report a discharge after it is discovered. Petitioners argue that despite conceding to dozens of discharges, DEP has a pattern of failing to notify the public in just about every occurrence of a CSO discharge, in violation of the Act, and that the pattern continued up to the filing of the Petition. DEP's failure to advise the public of CSO discharges from the 460 CSO outfalls that are on the shoreline throughout all five boroughs of the City of New York jeopardizes the health and safety of residents and those who work or recreate on the City's waters because they may unintentionally come into contact with waters which have been contaminated with raw sewage.

PARTIES

Petitioners describe themselves as follows: Riverkeeper, Inc. (hereinafter "Riverkeeper") is a not-for-profit organization authorized to conduct business and with members in New York State. Its mission is the protection of the water quality and environmental, recreational and commercial integrity of the Hudson River, its tributaries, which would include the waters in and surrounding New York City. Its efforts include the restoration of the Hudson River ecosystem, by its emphasis on minimizing the killing of fish as well as water pollution. Riverkeeper maintains a vessel which allows it to carry out its mission as a water pollution watchdog and it routinely conducts patrols and monitors samples of the New York City waters in this case.

Petitioner Connecticut Fund for the Environment, Inc. d/b/a Save the Sound ("CFE" or "Save the Sound") was founded in 1978. It was founded to protect and improve the land, air and water by using advocacy as well as scientific knowledge and expertise to benefit the environment for current and future generations. It is a not-for-profit corporation, which was incorporated in the State of Connecticut, with an office in Mamaroneck, New York. It represents more than 4700 member households in Connecticut and New York. Save the Sound was founded in 1972 as the Long Island Sound Taskforce to preserve and protect Long Island Sound. In 2004, Connecticut Fund for the Environment merged with Save the Sound. CFE/Save the Sound seeks to protect, conserve and enhance the environmental health and also the natural resources contained in the Long Island Sound, and it has represented its members to protect the environment in legal proceeding commenced in Federal and State Courts, as well as before Administrative Agencies.

Bronx Council for Environmental Quality (hereinafter "BCEQ") was formed in 1971. It is a not-for-profit corporation organized under New York State laws and it is based in Bronx County. BCEQ is made up entirely of volunteers, and it does not have any staff. As its mission, BCEQ seeks to establish "as an inherent human right" to environmental policy regarding an unpolluted environment and the protection of a natural and historic heritage. For over fifteen years it has highlighted the need for clean water at its annual meetings and semi-annual mini-conferences pertaining to the Bronx and New York City's waterways. It focuses on waters in the Bronx, East Harlem, Hudson & Hutchinson Rivers; the Bronx Kill; Tibbetts Brook; the Long Island Sound; and Westchester Creek. It is concerned with the pollution from the Harlem River, including what it stated was the largest combined sewer outfall in the city, to the Bronx and Hutchinson Rivers and Westchester Creek, which all contain unabated combined sewer outfalls of which is of concern to members that were boating, swimming or fishing on the aforementioned rivers when it was unsafe to do so.

The not-for-profit organization The Newtown Creek Alliance was organized under the laws of New York State and is located in Brooklyn, New York. The members of this group comprise primarily persons that live or work around Newtown Creek. It is run by members of the community and its mission is to "reveal, restore and revitalize Newtown Creek". Newtown Creek is a 3.8 mile waterway which serves as the Brooklyn/Queens border. The Newtown Creek Alliance asserted that Newtown Creek has suffered from centuries of environmental abuse and neglect, which has led to its designation as a Federal Superfund site.[1] In addition to its contamination, its water quality is impaired due to billions of gallons of untreated sewage and stormwater discharged into its tributaries each year, posing a threat to the local marine ecosystem. The Newtown Creek Alliance stated that the community cannot safely access and use it as an asset for recreation and education. Untreated sewage, stormwater runoff and plastic debris that results from CSOs causes the Newtown Creek to be an eyesore and odorous, and it poses a health risk to recreational users such as fishers and canoers.

[1] See Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 USC § 103 et seq.; Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 USC § 9601 et seq.; *see also* 6 NYCRR §§375-1.8 & 375-2.8; ECL § 27-1313.)

The New York City Water Trail Association ("NYCWTA") is an advocacy group which operates under the aegis of the Hudson River Watertrail Association, a non-profit corporation organized under the laws of New York State. It aims to represent over twenty community boating organizations which are located in and around New York City. Its focus is the safe use of the Water Trail which was created by the New York City Parks Department in 2008; the improvement of resources for non-motorized small boat users; and, the promotion of free access to the public waterways. For the past six years, NYCWTA has coordinated a water quality monitoring program that performs weekly tests for sewage pollution at more than seventy (70) sites in or near New York Harbor. The purpose of the program is to provide its constituents of human-powered boaters with a predictive database so that they can make informed decisions about when and where to launch. Petitioners stated that probably more than any other group, its constituents are impacted by the City's ongoing sewage discharges and the consequences of risk to exposure to harmful pathogens while recreating on public waterways.

Raritan Baykeeper d/b/a NY/NJ Baykeeper ("NY/NJ Baykeeper") is a 501(c) (3) not-for-profit organized under the laws of New Jersey. Its membership consists of local residents in communities situated around the New York-New Jersey Harbor Estuary and its watershed. It is dedicated to protecting the health of its waterways and watershed via advocacy, legal actions, educational programs, restoration projects and outreach. It focuses on protecting, preserving the various fish and wildlife habitats which exist in its watersheds located in urban areas of northern New Jersey and New York City, including the waters at issue in this matter. It often represents the interests of underserved and front-line communities where poor water quality affects the population the most. Waters of concern include Upper New York Bay, Kill Van Kull, Arthur Kill and tributaries of Jamaica Bay. Lack of notice of sewage discharge puts these families at risk when they are kayaking, canoeing or engaging in an activity which would cause them to come into contact with the water. In fact, some residents do not use the local waterways and travel outside of their own neighborhoods in order to access safe, clean water. Unfortunately, some are not so fortunate to be able to travel elsewhere and thus they are prevented from accessing safe, clean water.

Waterkeeper Alliance ("Waterkeeper") is a not-for-profit corporation organized under the laws of New York State. It is a member supported, international environmental advocacy organization, with headquarters in New York City. It is comprised of about 350 member organizations and affiliates around the world. It is stated that it is the largest and fastest growing non-profit focused on clean water only. Its goal is drinkable, swimmable and fishable water everywhere. Pursuant to its Clean Water Defense campaign, it fights attempts to weaken current environmental protections such as the Clean Water Act and advocates for stronger legal safeguards for the world's water resources. It holds polluters accountable and advocates for strong regulations and strenuous enforcement of environmental laws.

DEP is an agency established by the City of New York, with its headquarters in Flushing, New York. It is the agency responsible for New York City's environment by regulating local air and water quality, hazardous waste and other quality of life issues such as noise.

BASIS OF STANDING

Petitioners claim that they have standing to bring this Petition and Complaint because the Act was created by the New York State Legislature in part to provide raw sewage discharge information to persons who use or recreate on waters which would be affected by the discharges, including Petitioners, so that they can notify Petitioner organizations that sewage is entering a waterbody, and to protect their health and safety. If they are not notified by POTW or POSS of any sewage discharges, they will not receive the information in order to disseminate it and thereby their and the public health will be affected negatively due to the lack of information. There is a public notification provision contained in the Act which is meant to inform Petitioners, their members, and the public at large, of the frequency of raw sewage discharges and the safety of various waterbodies around New York City. Monitoring pollution discharges and protection of water quality of those waters is paramount to Petitioners' missions as well as their members' interest. Petitioners claim that their staff and members' health and safety are at risk by the lack of discharge notifications because they may come into contact with contaminated waters while performing routine water quality monitoring and obtaining samples when there have been raw sewage discharges. The staff and members or are at increased risk of suffering illnesses, including gastroenteritis; skin and eye conditions, ear, nose and throat issues, respiratory infections, meningitis and hepatitis when they come into contact with raw sewage without being given the proper notice.

Riverkeeper member Timothy Willis Elkins (hereinafter "Elkins") works for Newtown Creek Alliance and has been a member for several years. He submitted his affidavit in support of the Petition/Complaint, stating that he personally has sustained harm from the action or inaction of DEP.

JURISDICTION AND VENUE

Petitioners argue that the Court has jurisdiction based upon New York Civil Practice Law and Rules ("CPLR") sections 504(3), 506(b) and 7804(b) et seq. to review administrative action or the failure of public officials or bodies to perform a duty enjoined by law. Petitioners argue DEP has repeatedly failed to perform its required public duty to notify the public under SPRTKA, and therefore it is properly the subject of an Article 78 proceeding. Additionally, Petitioners argue that this Court has jurisdiction pursuant to CPLR § 3001 to render declaratory relief to declare that Respondent's failure to issue public notices for all CSO discharge events is not lawful.

Once the Court exercises its jurisdiction, it has the power to grant declaratory relief, as well as coercive relieve, whether or not it is specifically requested in the complaint (*see New York Cent. R.R. v Lefkowitz*, 12 NY2d 305 [1963]). Petitioners argue that Respondent's omissions and inaction have injured Petitioners, and that there is no remedy at law. They do not request an advisory opinion, but a Court declaration that Respondent's actions as complained of herein violated SPRTKA and 6 NYCRR § 750-2.7(b)(2).

Venue is placed in Queens County based upon CPLR § 506(b) as claims are asserted against the City, and the causes of action arose, inter alia, in Queens County and DEP has offices in Queens County.

BACKGROUND REGARDING THE BASIS OF THE FILING OF THE PETITION

Petitioners claimed that they routinely observe or are otherwise aware of untreated and partially treated sewage discharges that occur in waterways throughout the City and in the East River, particularly. When significant rainfall occurs in the City, storm water usually combines with raw sewage to overwhelm DEP's water treatment capacity, which results in direct pollutant discharges to CSOs. Raw sewage contains human excrement, industrial drainage, debris such as sanitary napkins, medications, condoms and plastics. It affects people of all ages, ethnicities and income levels where people, live, fish or recreate or are in other direct water contact activities. Untreated sewage and polluted runoff in the water contains bacteria and other pathogens which can cause serious illnesses such as gastroenteritis, skin rashes, pinkeye, ear, nose and throat issues, respiratory infections, meningitis and hepatitis. Consequences are more severe for children, the elderly and pregnant women and anyone with a compromised immune system.

Petitioners stated that there are approximately 460 CSO outfall discharge points throughout all boroughs of the City and about 154 on the East River. Kayakers, canoers and other boaters commonly use, monitor, sample and recreate on City waters, and are putting themselves at risk of untreated sewage–related illnesses. After every combined sewer overflow event, Respondent is required by SPRTKA and state regulations to warn the public. (*See* ECL § 17-0826-a[2]; 6 NYCRR §750-2.7[b][2].) Where an outfall is monitored, the Act requires that DEP's notification that an an event has occurred or is continuing to occur must come "as soon as possible, but no later than four hours from discovery of the discharge". (*See* 6 NYCRR §750-2.7[b][2][ii][b].) In the alternative, if Respondent does not have any "real-time telemetered discharge monitoring and detection" the Act requires that the Respondent "expeditiously issue advisories to the general public through appropriate electronic media as determined by the department when, based on actual rainfall data or predictive models, enough rain has fallen that combined sewer overflows may discharge. Advisories may be provided on a waterbody basis rather than by individualized combined sewer overflow points." (*See* 6 NYCRR §750-2.7[b] [2] [iii].) "Expeditiously" is not defined in the Act, but in order to comply with the Act, public notifications need to be released "no later than four hours" after discovery of the discharge. (*See* ECL § 17-0826-a[2].) The regulation cannot alter the plain language in the Act, therefore Petitioners maintain that the word "expeditiously" must therefore mean four hours or less. Petitioners maintained that DEP does send some limited information to the public regarding water quality or CSO events via two means: the NY Alert system and Waterbody Advisories. Petitioner states that neither of these systems satisfies the Act, and even if they did, many CSO events are not being reported under either system.

Petitioners claimed Issues with NY Alerts

Petitioners allege that Respondents provides limited information through this system based upon rainfall, and such alerts fail to identify the combined sewer overflow point and/or the receiving

waterbody, and also provides inaccurate or misleading information about whether and to what extent sewage discharges have occurred in the following ways:

> 1. Instead of listing a "discharge location" Respondent's NY Alerts refer to the Current NYC Waterbodies Advisory website which does contain information on water quality, but it does not provide information on whether and to what extent there has been a CSO discharge.
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> 2. Instead of listing the "location details" NY Alerts refer to the Current NYC Waterbodies Advisory site which contains information on water quality but fails to provide information on whether and to what extent there has been a CSO discharge.
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> 3. Instead of listing the "waterbody affected," NY Alerts refers to the Current NYC Waterbodies Advisory site, which contains information on water quality, but no information on whether and to what extent there has been a CSO discharge.
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> 4. Upon information and belief, the "discharge duration" is always listed as two hours, and is not based on an actual estimate of duration.
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> 5. Upon information and belief, the volume/rate of discharge is always listed as "0 gallons per minute estimated," and is not based upon the actual or estimated volume or rate of discharge.

Petitioners annexed an example of a NY Alert to their papers. In an instance where there was a sewer discharge into a waterbody but no corresponding predicted water quality violation, a NY Alerts recipient would reasonably but mistakenly assume there was no sewage discharge into that water body at all based upon the information from the associated alert. Thus, Petitioners argue that NY Alerts does not comply with the Act. The NY Alerts fail to come within four hours of the CSO event, no CSO outfall or specific waterbody is identified, and virtually none of the information which is mandated by the Act is even included in the NY Alerts.

Claimed Issues with Waterbody Advisories

Petitioners, alleged that upon information and belief, the Current NYC Waterbody Advisory website is not based upon actual sewage discharges to the water body as required by law. DEP issues Waterbody Advisories only when, according to its modeling systems, it expects that the volume and bacterial concentration of CSO discharges will have been so extreme in the responsive receiving waterbody or waterbodies that state water quality standards for primary contact waters under 6 NYCRR part 703 have been exceeded or otherwise violated throughout the waterbody segment. When DEP expects that water quality standards will not exceed following a sewage overflow or while such overflow is still occurring, DEP does not issue any Water Quality Advisory. DEP issues any such Water Quality Advisories only once per day through text and/or email through

the Notify NYC system. Such notifications come the morning after a rainfall, regardless of when it rained the day prior or when any discharge occurred. Upon information and belief, DEP issued no Water Quality Advisories for the East River in 2018, yet in its 2018 SPDES Permit Report issued in May 2019, DEP later acknowledged dozens of CSO discharge events which occurred in the East River during the year 2018. According to the 2018 SPDES Permit report the five East River CSO outfalls with the greatest number of CSO discharges were HP-011 with 82 CSO events; HP-025 with 82 events; TI-003 with 75 events; BB-034 with 73 events; and BB-041 with 70 events in 2018. According to Petitioners, DEP failed to notify the general public of a single one of those CSO discharges. Thus, the Waterbody Advisories do not comply with the Act; they are not necessarily issued within four hours of the CSO event, do not identify any specific CSO discharge and for the majority of CSO events, DEP issues no Waterbody Advisory at all.

CSO events in recent years

Petitioners claimed that they used daily precipitation data from the National Oceanic and Atmospheric Association (hereinafter "NOAA") New York City Central Park Station and cross-referenced the most intense precipitation days against DEP's record of CSO events for each outfall, as detailed in the 2018 SPDES Permit Report, and based on the number of CSO events in the year 2018, they identified the respective intensity of rainfall over 24-hour time frame that would trigger a CSO event. They estimated that the volume of precipitation over a 24-hour period which would typically trigger a CSO event at each of five example outfalls in the East River:

a. Upon information and belief, the volume of precipitation in 24 hours that triggers a CSO event at outfall HP-011 and outfall HP-025 is roughly 0.18 inches.

b. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall TI-003 is roughly 0.22 inches.

c. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall BB-034 is roughly 0.24 inches.

d. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall BB-041 is roughly 0.25 inches.

Petitioners stated that based upon DEP's own reporting of past CSO discharges, any twenty-four (24) hour period that incurred these volumes of rainfall actually resulted in a discharge into the East River, for which DEP was required to notify the public. Based upon these precipitation volumes, as of the filing of this action, the five CSO outfalls identified above likely discharged raw or partially treated sewage into the East River at least fifty-two (52) times in 2019 on the following dates: 1/5/2019; 1/19/2019; 1/20/2019; 1/24/2019; 1/29/2019; 2/6/2019; 2/8/2019; 2/12/2019;

2/20/2019; 2/24/2019; 3/2/2019; 3/3/2019; 3/4/2019; 3/10/2019; 3/15/2019; 3/21/2019; 3/22/2019; 4/5/2019; 4/8/2019; 4/12/2019; 4/13/2019; 4/15/2019; 4/20/2019; 4/22/2019; 4/26/2019; 5/5/2019; 5/12/2019; 5/13/2019; 5/14/2019; 5/23/2019; 5/26/2019; 5/29/2019; 5/30/2019; 6/2/2019; 6/21/2019; 6/25/2019; 7/11/2019; 7/17/2019; 7/18/2019; 7/22/2019; 7/23/2019; 7/23/2019; 7/31/2019; 8/3/2019; 8/7/2019; 8/18/2019; and 8/22/2019. According to Petitioners neither the NY Alert system or the Waterbody Advisory system comply with the Act, as they provided no notice of these CSO's to the public, in direct violation of the Act. Assuming that the NY Alert system did comply with the Act, enough rain fell to trigger a CSO event into the East River, however, no NY Alert was released on the following dates: 1/19/2019; 1/29/2019; 2/12/2019; 2/20/2019; 3/15/2019; 3/21/2019; 4/5/2019; 4/22/2019; 5/14/2019; 5/26/2019; 6/2/2019; 6/10/2019; 6/13/2019; 6/18/2019; 6/25/2019; 7/11/2019; 7/17/2019; 7/22/2019; 7/31/2019 and 8/7/2019. Petitioners further state that for reporting purposes under its Clean Water Act permit, DEP keeps records of such discharges and will have more precise data on the number of days of discharges.

Further, there were only eleven (11) East River Waterbody Advisories issued on the following dates in 2019: 5/5/2019; 5/6/2019; 5/23/2019; 6/11/2019; 6/19/2019; 6/20/2019; 6/21/2019; 7/18/2019; 7/19/2019; 7/23/2019 and 7/24/2019, thus, for the majority of the 52 CSO events thus far in 2019.

Based upon the foregoing, Petitioner's First Cause of Action seeks mandamus to compel DEP to promptly notify the public of discharges of untreated and partially untreated sewage. Petitioner's Second Cause of Action seeks a declaratory judgment that DEP has not complied with the Act and must promptly notify the public of discharges of untreated and partially untreated sewage.

Respondent's Answer to the Petition and Statement of Facts

DEP filed its verified answer to the Petition on June 21, 2023, along with the affidavit of Keith Mahoney, P.E. (hereinafter "Mahoney") dated June 21, 2023. The foregoing information was included in the Mahoney affidavit. DEP stated that, the purpose of SPRTKA is to "strike[] a balance by increasing the amount of information available to the general public without imposing a financial burden on municipalities." (Mem. in Support of Legislation, Bill Jacket, L 2012, ch. 368 at 4.) Thus, SPRTKA does require municipalities to report certain sewage discharges to the public, however, only "to the extent knowable with existing systems and models." (ECL § 17-0826-a[1]; SPRTKA § 1.)

DEP asserted that City has a uniquely vast and complex sewer system based on its geography, age, population size and population density. It has approximately 418 combined sewer outfalls located at several waterbodies throughout the City. Thus, modeling the City's sewer system and receiving water quality is a challenging task that DEP completed over the course of more than ten years, with ongoing periodic updates. So, the sewer system and water quality models have been vetted by modelers for over twenty years of knowledge and expertise and it is adjusted based upon years of historic monitoring data.

DEP maintained that its existing model can predict, on a waterbody basis, water quality impacts from rainfall-triggering flows to City waterbodies from various sources, including CSOs, separate storm sewers and overland flows. These predicted water quality impacts are reported by DEP under SPRTKA, using criteria which the New York State Department of Health ("NYSDOH") uses in order to make a determination whether waterbodies are safe for the public to swim in. Therefore, DEP's approach is consistent with SPRTKA, which requires only "public notification of discharges that may present a threat to public health..." (*Id*. at § 4.)

DEP is of the belief and opinion that it is in compliance with SPRTKA. Petitioners' interpretation of SPRTKA would require DEP to develop new models which could predict **all** instances when CSOs may discharge. However, this ignores the plain language of the law and regulations that limits public reporting "to the extent knowable with existing systems and models" *(Id.* at §1). DEP's argued that its existing reporting notifies the public when water quality is not suitable for recreation in the water, rather than the mere fact that a CSO event may have occurred, and it is consistent with SPRTKA's focus on discharges which may present a threat to the public health, particularly so since DEP does not have existing systems or models to generate real time CSO discharges. DEP contention is that SPRTKA would not envision that a city would need to divert hundreds of hours of employee manpower to develop new models, install new infrastructure or the hiring of several full-time employees responsible for analyzing and inputting data manually for the purpose of complying with this law. Thus, DEP contends, Petitioners are arguing that a law which explicitly stated its goal is not to impose a financial burden on municipalities should be applied in a way that would potentially result in hundreds of thousands of dollars annually in order for the City to hire additional staff. DEP stated that it works closely with stakeholders, including the Petitioners, in order to make significant improvements to its CSO and water quality notification program. Such improvements include DEP's Waterbody Advisories website, which includes a live map of water quality advisories throughout the City of New York, as well as DEP's citywide Notify NYC Waterbody Advisories. Thus, DEP concludes that Petitioners have failed to allege a cause of action, have failed to demonstrate a sufficient basis for either mandamus or a declaratory judgment, and that therefore, the Petition must be denied.

By way of background and regulation of the City's combined sewer system, DEP submitted affidavits of Keith Mahoney, P.E. DEP has the the largest water and wastewater utility in the nation. DEP provides over one billion gallons of drinking water daily to more than eight million New York City residents, one million upstate customers, and millions of visitors and commuters. The source waters for the City drinking water supply include freshwater streams, creeks and rivers in upstate New York, located dozens to over a hundred miles outside the City and therefore, the City's drinking water is not affected by the subject matter of this litigation. It also collects and treats wastewater, approximately 1.2 billion gallons per day collected through 7,500 miles of sewers, ninety-six pumping stations and fourteen in-City sewage treatment plants, wastewater resource recovery facilities, which are referred to as ("WRRF's") that are responsible for the removal of bacteria and other pollutants from wastewater. DEP also operates four CSO retention facilities (ranging from five million gallons to fifty million gallons in storage capacity) and it is in the process of designing and constructing additional CSO facilities, which is costly.

The City's sewer system is older, and approximately sixty percent of it is a combined system in which the sewer pipes are designed to and do convey both sanitary sewage flow and stormwater runoff. In dry weather, City's wastewater is treated at one of DEP's fourteen WRRFs. To accommodate the increase in flows in the combined system during wet weather, these WRRFs can typically treat up to twice their designed dry weather wastewater flow capacity. So, during wet-weather conditions, the system can treat up to 3.6 billion gallons per day of combined storm and sanitary flow. But, during certain rain events, the amount of stormwater entering the combined sewer system can exceed the wet weather design capacity of the WRRFs. Too much flow sent to the WRRFs puts facilities at risk for wash out of biological organisms which are used to break down and treat waste, structural damage to the sewer and wastewater systems, and/or failure to meet effluent quality requirements. The combined sewer systems are also designed to prevent neighborhood flooding during rain events, thus combined sewer systems are equipped with relief structures or combined sewer outfalls, CSO, which are designed to protect the community, critical infrastructure as well as the biological treatment process in the WRRF's. Thus, when the sewer system is at full capacity during certain rainfall events, stormwater runoff mixed with untreated sanitary flow must be released through these combined sewer outfalls and discharged into waterbodies in and around the City to prevent the aforementioned risks to the WRRFs and neighborhood flooding. These discharges are called combined sewer overflows or CSO's. The CSO's discharge to the saline water bodies within the City which are not used for the public water supply.

Legal Framework Governing CSO's

According to DEP, CSOs are authorized under Federal law and by permits which are issued by Department of Environmental Conservation ("DEC"), which is the regulatory body with delegated authority to administer the Federal Clean Water Act (CWA) (33 USC § 1251 et seq.) in the State of New York. As a condition of the state permits, and under a series of consent order with the State of New York, DEP, as well as other municipal utilities with CSO's, is required to undertake programs which would reduce the impact of CSO's on local waters. The CSO programs are governed by the United States Environmental Protection Agency's ("EPA") CSO Control Policy, 59 Fed. Reg. 18,688, 18,692 (Apr. 14, 1994) which was incorporated into the CWA in 2000 as 33 USC § 1342(q). DEP claimed that since the 1980's, City has invested over $45 billion dollars to build new WRRF's and to upgrade existing WRRF's as well as about $3.7 billion dollars in grey and green infrastructure projects to date in order to reduce CSO's. DEP indicated that the projects that have been built to date have reduced CSO discharges by about eighty percent from the levels in the 1980's. DEP funded projects are paid for by ratepayers. Under the CSO program, it is required to erect several large scale projects to abate CSOs. Also, with Federal requirements applicable to all CSO communities and DEP's Clean Water Act State Pollutant Discharge Elimination System permits, DEP submits long-term control plans ("LTCP's") for every waterbody in the City that has CSO outfalls. The LTCP for each one includes extensive information which characterizes the sewer system and the receiving waterbodies. According to DEP, both the sewer system models and water quality models go through an extensive calibration and validation process as well as a peer review. These models are the basis for the current DEP advisories that estimate potential water quality impairments which are based on a correlation of historic rainfall volume and intensity data versus the corresponding water quality projected to be attained.

DEP claimed that it uses its existing systems and models for Public Reporting and is in compliance with SPRTKA. The regulations implementing SPRTKA under 6 NYCRR 750-2.7(b)(2) allows municipalities to report on the release of untreated sewage into waterways by either the use of telemetry discharge monitoring technology in real time, or by predictive models in real time. According to DEP, as stated in the Mahoney affidavit, it does not possess "real-time telemetered discharge monitoring and detection" for CSO events, and it also has not developed a model that would predict CSO discharges in real time. DEP has a water quality model ("WQM") to determine as to each waterbody, whether a waterbody's real time bacteria levels cause a fecal coliform water quality issue rendering that waterbody unsafe for recreation, such as swimming and it issues a NY-Alert to the general public whenever its WQM determines such an occurrence. DEP began creating its existing sewer systems and WQM prior to 2003 and it stated that since that time, it has been calibrating, recalibrating, and validating this model, which had been approved by modelers with over twenty years of this type of modeling experience. The WQM analyzes many inputs to predict when rainfall may impact water quality based on the associated pathogen response, and this includes historical CSO discharge data, storm sewer discharges, overland flows and hydrodynamics of the system, which includes currents, temperature, wind and salinity. DEP claimed that its method is reliable as well as scientific. DEP issues Waterbody Advisories measuring pathogen levels in accordance with standards issued by the New York State Department of Health ("NYSDOH") for single sample maximum bacteria concentrations which compose a potential health hazard if used for bathing (*see* 10 NYCRR 6-2.15[a]). When DEP issues Waterbody Advisories same appear on a map that updates hourly and is accessible to the public through DEP's website in real-time.

DEP alleged that complying with Petitioners' demands would be both costly and time consuming. Petitioners' are demanding that the DEP report CSO events, rather that water quality impacts, which is not a feasible task, whether same is done by telemetry or modeling. DEP does not possess the technology or infrastructure to produce such real-time reporting by telemetry, and the majority of CSO sites are not connected to the electrical grid, and therefore have no power source to operate such apparatuses.

Further, as stated by Mahoney in his affidavit, the City does not have a model to track CSO events in real-time because it uses a model that measures water quality, not CSO events. (*See* 6 NYCRR § 750-2.7[b][2][iii].) The complexity of both the modeling and the extensive time requirements needed for analysis, reporting and data input DEP claimed are unique to the City of New York. Its WQM is based on fourteen separate rain gauges, which can often reflect different weather conditions at different locations at any given time. The City has more water bodies than other municipalities, and significantly more CSO outfalls, thus the creation of new models for the sole purpose of SPRTKA reporting would be a time-consuming task, and create a diversion of hundreds of hours of time from personnel engaged in other essential activities.

Moreover, the New York State approved SPRTKA reporting system, NY Alerts requires data to be entered manually into several different fields, which process cannot be done by automation. The manual entry could require DEP to hire several new employees to ensure the data are analyzed and entered into the system in accordance with the statutory time frames, which would require DEP to incur several hundreds of thousands of dollars in annual costs in additional staff alone.

Petitioners' Reply

In their reply, Petitioners continued to argue that DEP has violated its legal duty under SPRTKA by failing to notify the public after learning of sewage discharges within four hours of discovery. This neglect of duty has risked the health of the public that live, work or recreate on City waters and may unknowingly come into contact with waters contaminated by raw sewage. DEP puts a heightened burden of proof on Petitioners, and ignores the fact that the Petitioners have indeed established a clear legal right to mandamus and provided sufficient justification for this Court to award declaratory relief. To the extent DEP argued that it cannot issue discharge notifications because the requisite information is "unknowable," its own submissions clearly indicate that it does have the necessary information at its disposal but refuses to use it due to cost concerns. Cost concerns do not excuse its failure to comply with the Act. Petitioners do not demand that DEP develop new systems to fulfill its duty under the Act, only that DEP use information already "knowable" from its existing to estimate likely discharges and issue prompt notices in accordance with statutory guidelines. DEP also alleged that its current technology does not allow it to notify the public when a CSO discharge may occur. However, DEP reported that roughly twenty-three percent of its CSO outfalls are monitored by telemetry technology.[2]

Relevant Procedural History

In 2020, DEP previously moved to dismiss the Verified Petition and Complaint on the grounds that the Court did not have subject matter jurisdiction, the Petitioners sought to compel a discretionary act and that the Petitioners failed to state a cause of action. In support of the motion to dismiss, Respondent submitted an affidavit of its Deputy Commissioner, which, among other things, described its existing systems and models and the manner in which water quality impacts from wet weather events were reported. Hon. Joseph J. Esposito granted Respondent's motion on May 2, 2020 and Petitioners appealed to the Appellate Division, Second Department, which reversed and remanded the case back to the Supreme Court. (*See Riverkeeper, Inc.v New York City Dept. of Envtl. Prot*., 214 AD3d 986 [2d Dept 2023].) The Second Department held that "[o]n a motion pursuant to CPLR 7804(f) to dismiss a petition, only the petition is to be considered, all of its allegations are to be deemed true, and the petitioner is to be accorded the benefit of every possible inference." Further the Court held that affidavits submitted by a movant "will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [petitioner] has no [claim or] cause of action." *(Id*.)

Law and Application

[2] See, e.g. NY State Dept. of Envtl. Conservation, State Pollutant Discharge Elimination System (SPDES) Permit for Newtown Creek Wastewater Resource Recovery Facility, Jul. 1, 2022, at 3-6, https://www.dec.ny.gov/data/IF/SPDES/NY0026204/Permit.IndSPDES.NY0026204.2022-07-01.2022RECORD.Renewal&Reissuance_x.pdf (confirming that 17 of 82 outfalls covered by the permit have telemetry technology).

Jurisdiction, Venue and Standing

The Court finds that it has jurisdiction over this matter and venue is proper pursuant to CPLR sections 504(3), 506(b), 3001 and 7804(b). Petitioners have standing to bring this Article 78 proceeding, as Petitioners fall into the class of persons which SPRTKA seeks to protect.

Mandamus

Mandamus is "an extraordinary remedy that is available only in limited circumstances." (See *County of Fulton v State*, 76 NY2d 675 [1990] quoting *Klostermann v Cuomo*, 61 NY2d 525 [1984] [internal quotation marks omitted]). Here, the Petitioners bear the burden of demonstrating a clear legal right to the relief in the nature of mandamus. (*See Council of NYC v Bloomberg*, 6 NY3d 380 [2006], quoting *Brusco v Braun*, 84 NY2d 674 [1994]; *NY Civil Liberties Union v State of NY*, 4 NY3d 175, 184 [2005]; *Altamore v Barrios-Paoli*, 90 NY2d 378, 385 [1997]; *Matter of Myron v Kelly*, 259 AD2d 487 [2d Dept 1999].) Under CPLR Article 78, mandamus is available when a "body or officer failed to perform a duty enjoined upon it by law." (See CPLR § 7803). Thus mandamus only lies to compel acts that a body or officer is duty-bound to perform, not discretionary acts. "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." *NY Civil Liberties Union v State of NY*, 4 NY3d 175, 184 [2005] quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983] [internal quotation mark omitted]).

Declaratory Judgment

Under CPLR § 3001, the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." NY CPLR § 3001. Respondents argue that here there is no "justiciable controversy." (*See Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD1022 [2d Dept 2018]; *Premier Restorations of NY Corp v NY State Dept of Motor Vehicles*, 127 AD3d 1049 [2d Dept 2015] [prejudice to plaintiff cannot be merely hypothetical, contingent or remote."]; *see also Waterways Dev. Corp. v Lavelle*, 28 AD3d 539 [2d Dept 2006]). The dispute between the parties must also involve a substantial legal interest (*see Peter v Smolian*, 154 AD3d 980 [2d Dept 2017]; *Palm v Tuckahoe Union Free Sch. Dist*., 95 AD3d 1087 [2d Dept 2012]). Third, "a declaratory judgment should only be granted when it will have a direct and immediate effect upon the rights of the parties." (*See Enlarged City Sch. Dist. of Middlesex* v *City of Middlesex,* 96 AD3d 840 [2d Dept 2012]). And, the declaratory judgment must have a practical effect bearing on resolution of the matter (*see Fragoso v Romano*, 268 AD2d 457 [2d Dept 2000]).

Respondents argue that SPRTKA contains an express limitation that municipalities are only required to report information "to the extent knowable with existing systems and models." DEP does not have existing systems and models that can predict CSO discharges for the purposes of SPRTK, therefore there is no violation of law and Petitioners' claims must be dismissed. Its reporting is in compliance with SPRTK. Petitioners demand for a different reporting system would necessarily require DEP to develop new models and systems, which seeks to compel a discretionary act, not a ministerial act, therefore mandamus does not lie in this case. DEP is in compliance with

all applicable laws relating to CSO reporting.

In 2013, New York State enacted the Sewage Pollution Right to Know Act to help the New York State Department of Environmental Conservation (hereinafter "DEC") track CSO discharges. The Act states that there should be a public notification to warn residents that live nearby waterbodies which have been polluted by sewage discharges to protect their health and safety. ECL 17-0826-(a)(4); NY State Dept. Envtl. Conservation, Summary of Revised Regulatory Impact Statement for SPRTKA, available at https://www.dec.ny.gov/regulations/106449.html. Under SPRTKA, DEP must notify DEC within two hours of a discharge of raw or partially treated sewage.

6 NYCRR §750-2.7 titled "Incident reporting and notification requirements" states the following:

> (a) Anticipated noncompliance. The permittee shall give at least 45 days advance notice to the Regional Water Engineer of any change in the permitted facility or activity that the permittee knows or has reason to know would occur as part of a construction project, which is part of the permittee's routine maintenance program, or which the permittee knows or has reason to know about 60 or more days before it occurs, and that is very likely or certain to result in a bypass or other noncompliance with permit requirements.
>
> (1) Such notice shall contain:
> (i) a description of the treatment units to be effected;
> (ii) the anticipated character and volume of wastewater and/or storm water to be discharged;
> (iii) the need for the changes;
> (iv) the anticipated duration of the noncompliance;
> (v) the receiving stream for the noncomplying wastewater and/or storm water;
> (vi) the anticipated benefits of the change;
> (vii) the alternatives considered; and
> (viii) such additional information requested by the Regional Water Engineer to assess the effects of and need for such a change.
>
> (2) In the time between notification of a planned change and the date scheduled for the change the department may choose to do one or more of the following:
> (i) Require additional information that can reasonably be used to decide the necessity of such noncompliance;
> (ii) Require that the permittee delay the planned change up to 45 additional days until the department may adequately assess the necessity for the planned change;
> (iii) Require the permittee to modify the planned change;
> (iv) Prohibit the planned change; or
> (v) Apply no conditions to the planned change.

(b) Reporting and notification requirements for bypasses, upsets and discharges of untreated and partially treated sewage.

(1) Two hour reporting requirements for SPDES permittees that are non-POTWs. For discharges from a non-POTW permittee's wastewater treatment plant or sewer system that would affect bathing areas during the bathing season, shellfishing or public drinking water intakes, the non-POTW permittee shall, within two hours of discovery of the discharge, report orally to the regional water engineer and the local health department of any discharge of untreated or partially treated sewage, except a discharge in accordance with a department approved plan for managing wastewater (provided that such plan is in compliance with applicable law and regulation). Such report shall include:

(i) the date and time of discovery of the discharge and a brief description of the reason for the discharge, bypass, upset, or other incident;

(ii) the location of the discharge, bypass, upset or other incident including the receiving water effected by the discharge, bypass, upset, or other incident;

(iii) the estimated volume and treated state (untreated or partially treated)of the discharge at the time of the oral report;

(iv) a brief description of the measures taken and planned to contain the discharge, bypass, upset, or other incident; and

(v) the expected duration of the discharge, bypass, upset, or other incident and the total expected volume of the discharge.

(2) Requirements for POTWs and POSSs. Owners and operators of POTWs and POSSs must comply with the reporting and notification requirements described in subparagraphs (i), (ii), (iii) and (iv) of this paragraph through use of the department approved form of electronic media. POTWs and POSSs are in compliance with the reporting and notification requirements in subparagraphs (i), (ii), (iii) and (iv) of this paragraph if they register to use the department approved form of electronic media and submit timely and sufficient reports and notifications when required. A CSO is considered to be untreated sewage for purposes of the reporting and notification requirements specified in subparagraphs (i), (ii) and (iii) of this paragraph. The department may temporarily waive or suspend these requirements in instances of emergencies, extreme weather or when other conditions present a greater risk to human health.

(i) Two hour reporting requirements for POTWs and POSSs. Immediately, but in no case later than two hours after discovery of the discharge, owners and operators of POTWs and POSSs must report all discharges of untreated or partially treated sewage, including combined sewer overflows, to the department and the local health department, or if there is none, the New York State Department of Health. This reporting requirement applies to all untreated and partially treated sewage discharges to waters of the State except

partially treated sewage discharged directly from a POTW that is in compliance with a department approved plan or permit. These initial discharge reports shall be submitted using appropriate electronic media as determined by the department and shall, at a minimum, include to the extent knowable with existing systems and models the following:

(a) the date and time of discovery of the discharge and a brief description of the reason for the discharge;

(b) the location of the discharge including the receiving water effected by the discharge;

(c) the estimated volume and treated state (untreated or partially treated) of the discharge at the time of the report;

(d) a brief description of the measures taken and planned to contain the discharge except for wet weather combined sewer overflow discharges; and

(e) the expected duration of the discharge and the total expected volume of the discharge.

(ii) Four hour notification requirements for POTWs and POSSs.

(a) Notification to municipalities. As soon as possible, but no later than four hours from discovery of the discharge, owners and operators of POTWs and POSSs must notify the chief elected official, or authorized designee, of the municipality in which the discharge occurred and the chief elected official, or authorized designee, of any adjoining municipality that may be affected of untreated or partially treated sewage discharges, including combined sewer overflows, to waters of the State except underground waters, through appropriate electronic media as determined by the department. This notification is not required for partially treated sewage discharged directly from a POTW that is in compliance with a department approved plan or permit. For purposes of this clause, municipality means a city, town or village and adjoining municipality means any municipality that is adjacent to the municipality in which the discharge occurred.

(b) Notification to the general public. As soon as possible, but no later than four hours from discovery of the discharge, owners and operators of POTWs and POSSs must notify the general public of untreated or partially treated sewage discharges, including combined sewer overflows, to waters of the State except underground waters, through appropriate electronic media as determined by the department. This notification is not required for partially treated sewage discharged directly from a POTW that is in compliance with a department approved plan or permit.

(iii) Notification requirements for certain combined sewer overflows. For combined sewer overflows for which real-time telemetered discharge monitoring and detection does not exist, owners and operators of POTWs and POSSs must expeditiously issue advisories to the general public through appropriate electronic media as determined by the department when, based on actual rainfall data or predictive models, enough rain has fallen that combined sewer overflows may discharge. Advisories may be done on a waterbody basis rather than by individual combined sewer overflow points.

(iv) Daily and termination reports. A daily report shall be made by owners and operators of POTWs and POSSs for each day that the discharge continues after the date the initial discharge report is made, except that on the day the discharge terminates, a report documenting termination of the previously reported discharge may be made in lieu of the daily report. Daily and termination reports must be made within 24 hours of the previous report using an appropriate form of electronic media as determined by the department. Daily and termination reports must include, at a minimum, the criteria required for the initial discharge report, except that subsequent to the initial discharge report the department may modify or waive reporting requirements for daily and termination reports on a case by case basis if acceptable alternate reporting methods are available. POTWs and POSSs are not required to file daily and termination reports for wet weather CSO events.

(c) Twenty-four hour oral reporting of bypass, upset or other incident.

(1) Non-POTW SPDES permittees shall report, including the same information required to be reported under subdivision (b) of this section, orally to the regional water engineer within 24 hours from the time the non-POTW permittee becomes aware of a discharge of untreated or partially treated sewage that would otherwise be treated, except a discharge in accordance with a department approved plan for managing wastewater and/or storm water (provided that such plan is in compliance with applicable law and regulation).

(2) All SPDES permittees shall report, including the same information required to be reported under subdivision (b) of this section, orally to the regional water engineer within 24 hours from the time the permittee becomes aware of any of the following incidents:

(i) a discharge of untreated wastewater and/or storm water that would otherwise be treated, except a discharge in accordance with a department approved plan for managing wastewater (provided that such plan is in compliance with applicable law and regulation). Twenty-four hour reporting is not required if the discharge is sewage and the non-POTW SPDES permittee or POTW has fully complied with applicable two hour reporting requirements described in this section;

(ii) a spill that may result in a discharge that may:

(a) violate permit limitations of pollutants limited in the SPDES permit;
(b) exceed an action level or more than one action level in the SPDES permit;
(c) cause discharges of pollutants not explicitly listed in the SPDES permit, in amounts in excess of normal effluent variability of the level of discharge that may reasonably be expected for that pollutant from information provided in the SPDES permit application record; or
(d) which would result in dilution in lieu of treatment of a discharge authorized by a SPDES permit;

(iii) a spill to waters of the State of greater than the reportable quantity for releases to water as set forth in Part 597 of this Title; or

(iv) a bypass, upset or other incident that a reasonable practitioner in water pollution control would consider to be similar in severity and consequences to the incidents set forth in this subdivision.

(d) Five-day written incident report requirements for SPDES permittees and POSSs. SPDES permittees and owners and operators of POSSs must provide a written report to the department of a discharge, bypass, upset or other incident reported under subdivisions (b) and (c) of this section within five days of discovery by the permittee or the owner or operator of the POSS. The written report shall be submitted on a form prescribed by the department and, at a minimum, shall contain a description of the discharge, bypass, upset, or other incident and its cause; the period of the discharge, bypass, upset, or other incident, including exact dates and times, and if the discharge, bypass, upset, or other incident has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent the discharge, bypass, upset, or other incident and its reoccurrence. The department may waive the written report on a case-by-case basis if reports have been received within the time periods required under subdivisions (b) and (c) of this section. Five day written incident reports are not required for wet weather combined sewer overflows that are in compliance with a department approved plan or permit.

(e) Additional reporting. The permittee shall report all instances of noncompliance with permit conditions not otherwise required to be reported under these regulations or the SPDES permit, with each submitted copy of its discharge monitoring reports until such noncompliance ceases. Such noncompliance reports shall contain the same information required to be submitted under subdivision (d) of this section.

(f) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the permit, which has a reasonable likelihood of adversely affecting human health or the environment.

(g) Duty to assess. Where a bypass, upset, or other incident occurs as defined in subdivision (b) or (c) of this section that can reasonably be expected to create detectable discharges of a substance where that substance was not detectable prior to the bypass, upset, or other incident or the bypass, upset, or other incident can reasonably be expected to increase the discharge of a substance or substances by 20 percent or more, the permittee shall collect at least one representative sample for each day of discharge effected by the bypass, upset or other incident

in a manner that can be used to assess compliance with the permit. Each sample should be monitored for the parameters which the permittee knows or has reason to believe will be detectable or increased by 20 percent or more in the discharge due to the bypass, upset, or other incident.

ECL § 17-0826-a. titled "Mandatory sewage release reporting and notification by publicly owned treatment works and operators of publicly owned sewer systems" states the following:

> 1. Publicly owned treatment works or the operator of a publicly owned sewer system shall immediately, but in no case later than two hours after discovery, report discharges of untreated or partially treated sewage, including combined sewer overflows, except partially treated sewage discharged directly from a publicly owned treatment works that is in compliance with a department approved plan or permit, to the department and the local health department, or if there is none, the New York state health department. Such report shall, at a minimum, include, to the extent knowable with existing systems and models:
>
> (a) the volume and treated state of the discharge;
> (b) the date and time of the discharge;
> (c) the expected duration of the discharge;
> (d) a brief description of the steps being taken to contain the discharge except for wet weather combined sewer overflow discharges;
> (e) the location of the discharge, with the maximum level of specificity possible; and
> (f) the reason for the discharge.
>
> 2. In addition to subdivision one of this section, as soon as possible, but no later than four hours from discovery of the discharge, the publicly owned treatment works or the operator of a publicly owned sewer system shall notify the local health department or if there is none, the New York state health department, the chief elected official or their authorized designee of the municipality in which the discharge occurred and the chief elected official or their authorized designee of any adjoining municipality that may be affected. The same notification shall also be provided within the same timeframe to the general public, pursuant to regulations to be promulgated under subdivision four of this section through appropriate electronic media, including, but not limited to, electronic mail or voice communication as determined by the department.
> 3. The department, in consultation with the department of health, shall post reported information on its website expeditiously and shall prepare a report on publicly owned treatment works and sewer system discharges annually. The report shall, at a minimum, include: the total number of

> discharges, details of such discharges including the volume and treated state of the discharge, and the duration and location of each discharge; as well as any remedial responses taken to mitigate impacts and avoid further discharges.
> 4. The department shall promulgate rules and regulations that are necessary for the implementation of this section. Such regulations as are necessary for the implementation of the public notification requirements of subdivision two of this section shall provide only for public notification of discharges that may present a threat to public health, considering the potential for exposure and other relevant factors. Such regulations may also include preconditions for notification of any discharge that is not subject to a permit issued under this title and does not present a threat to public health, considering the potential for exposure and other relevant factors.

The notification must include the following to the extent available:

> (a) the volume and treated state of the discharge;
> (b) the date and time of the discharge;
> (c) the expected duration of the discharge;
> (d) a brief description of the steps being taken to contain the discharge except for wet weather combined sewer overflow discharges;
> (e) the location of the discharge, with the maximum level of specificity possible: and,
> (f) the reason for the discharge.

6 NYCRR § 750-2.7(b)(2)(i) contains similar reporting requirements. Additionally, DEP must also notify the local health department and the public within four hours of the discharge. (*See* ECL § 17-0826-a[2]). Since the notifications to DEC and the public are similarly triggered, implicit in the structure of the statute and regulations is that the public should get the same or close to the same information which will be transmitted to DEC. Under the Act, DEP must notify the general public no later than four (4) hours from discovery of any discharges of untreated sewage to surface water, no matter the volume:

> "As soon as possible, but no later than four hours from discovery of the discharge, owners and operators of POTWs and POSSs must notify the general public of untreated of partially treated sewage discharges, including combined sewer overflows, to waters of the State except underground waters, through appropriate electronic media as determined by the department."

(*See* 6 NYCRR 750-2.7[b][2][ii][b]).

In the alternative, to the extent that DEP's CSO outfalls do not have "real time telemetered discharges monitoring and detection," regulations require that DEP must "expeditiously issue

advisories to the general public" when "enough rain has fallen that combined sewer overflows may discharge." (*See* 6 NYCRR 750-2.7[b][2][iii]). It is permissible that these advisories may be provided on a waterbody basis rather than by individual combined sewer overflow points. The word "expeditiously" is not defined, but it must be no more than four hours in order to be in compliance with the Act. The Health Department and the public must be notified within four hours of discovery of a discharge under the Act. (*See* ECL § 17-0826-[a][2].) Petitioners asserted that DEP only issues Waterbody Advisories sporadically and for many discharges that occur, they have not issued Waterbody Advisories at all. NY Alerts also does not provide notification on an outfall basis or any advisory on a waterbody basis, and the NY Alerts are not issued within four hours of the discovery of a discharge. Although the form for each NY Alert contains lines that state "Location" and "Waterbody Affected," the NY Alerts refers the recipient of the alert to the Current NYC Waterbody Advisories website for this information. However the information on the website is based upon water quality, not actual or projected sewage discharges and fails to include details necessary for the public to understand when or where CSOs are discharging or the nature of the discharge. The repeated failures to comply with SPRTKA constitute instances where the body or officer has not performed its duty which is required of it by law under CPLR § 7803(1). Thus, Petitioners seek a mandamus to compel the Respondent to release notifications to the public concerning past discharges. Petitioners also seek a declaration that Respondent's practices of issuing Water Quality Advisories up to 24 hours following only the most severe discharges and NY Alerts that provide no information regarding the nature or extent of the discharge or the waterbody affected are insufficient to comply with SPRTKA, and seek an order to compel Respondent to modify its notification system to release sewage discharge notifications consistent with the Act.

DEP asserted that the only discharges at issue in this case are CSOs and the only reports at issue are the public notifications under NY Alerts. DEC's implementing regulations echo the SPRTKA reporting requirements. DEC has a section of the regulation dedicated to municipalities with "combined sewer overflows for which real-time telemetered discharge monitoring and detection does not exist," 6 NYCRR § 750-2.7(b)(2)(iii), governing the City's public reporting requirements for CSOs, since none of the City's CSO's have usable real-time telemetered discharge monitoring or detection. Thus, DEP contends, any deficiencies in the NYAlert system cannot be addressed by the City since it is the reporting option approved by the DEC. They further argue that, Petitioners assume that one CSO discharge equals one required notification under SPRTKA; municipalities can report on a waterbody basis rather than in the form of individual discharges from individual CSOs and predictive models are approximate and cannot therefore forecast every actual discharge. When there is ongoing rainfall, predictive models rely on real-time rainfall data, which DEP asserted often proves inaccurate. Also, models may predict false positives, where a discharge is predicted but does not occur. Even retroactive models cannot correlate completely with actual discharges. Therefore, Petitioners analysis is completely speculative. Under SPRTKA municipalities need only report CSOs to the extent knowable with existing systems and models. DEP argued that the New York State Legislature would not have required municipalities to develop new systems or models to predict CSOs and then simultaneously allow them to use existing systems and models to report specific information about CSOs, this interpretation would render the language meaningless as cities would have to develop new models or systems regardless of the phrase's inclusion in the statute. Further, DEP said Petitioners seek to compel a discretionary act, and Respondents only need to report to the public CSOs that may present a threat to public health. Lastly, DEP contends that the Appellate

Division, Second Department's ruling had no bearing on the merits of the case; instead, in reversing the lower court, the Second Department held that the petition could not be dismissed if it alleged a "bona fide justiciable controversy."

CONCLUSION

"In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment." (*See Coma Realty Corp. v Davis*, 200 AD3d 975 [2d Dept 2021].)

Petitioners have satisfied their burden of demonstrating a "clear legal right" to mandamus relief. (*See NY Civ. Liberties Union v State of New York* 4 NY3d 175 [2005]). The provision of SPRTKA requiring DEP to provide public notice within four hours of raw or partially treated sewage discharges is a mandatory duty required by law, not discretionary, and this duty to report to the public has not been complied with by DEP since at least 2018 to present (*see* ECL §§ 17-0826-a[1]-[2]).

DEP never stated that the NY Alert reporting system as described by Petitioners in relation to the reporting or failure to report CSO discharges was incorrect, it basically argued that meeting the Petitioners' demands would be costly and time consuming. DEP therefore agrees that in the spirit of the intent of SPRTKA, in order for the general public to obtain the necessary information it requires, it can at least hire additional employees to manually enter data into the system. DEP also alleged that its current technology does not allow it to notify the public when a CSO discharge may occur. However, DEP reported that roughly twenty-three percent of its CSO outfalls are monitored by telemetry technology. DEP cannot downplay the harm that Petitioners are, will and have sustained due to its failure to comply with SPRTKA. Therefore, it is

ORDERED and **ADJUDGED**, that the First Cause of Action in the Petition seeking mandamus to compel New York City to promptly notify the public of discharges of untreated and partially untreated sewage is granted. Respondent/Defendant is directed to promptly notify the public of discharges of untreated and partially untreated sewage as directed in Sewage Pollution Right to Know Act, ECL § 17-0826-(a)(4); 6 NYCRR §750-2.7, and comply with any other laws related to same, within **ninety (90**) days; and it is further

ORDERED and **ADJUDGED**, that Respondent/Defendant is directed to provide Petitioners with a list, including dates and times and waterbody or individual outfall basis information related to actual CSO discharges which are now known and which were not reported as required in NY Alerts and NYC Waterbody Advisories websites from the year 2018 to June 21, 2023 within **ninety (90)** days; and it is further

ORDERED, that Petitioners are directed to move for summary judgment pursuant to CPLR 3212 on the second cause of action seeking declaratory relief pursuant to CPLR § 3001 within **one-hundred and eighty (180)** days of the date of this Order served with Notice of Entry.

Date: November 24, 2023

Hon. Cherié A. Buggs, JSC

FILED & RECORDED
11/30/2023, 10:49:52 AM
COUNTY CLERK
QUEENS COUNTY

Clerk

State of New York Supreme Court:
County of Queens

In the Matter of RIVERKEEPER, INC. et. al. *Petitioner,* v. NEW YORK CITY DEPARTMENT OF ENVIROMENTAL PROTECTION *Respondent.*	Index No. 708684/2020 **Affirmation of Service**

I, Todd D. Ommen, an attorney duly admitted to practice law before the courts of the State of New York, affirms under the penalties of perjury as follows:

1. I am an attorney at the Pace Environmental Litigation Clinic, am over 18 years of age and am not a party to this action.
2. On December 12, 2023, I served the attached Notices of Entry by email by consent of the parties in an e-filed case upon the following parties at the address indicated below:

   PLACHE, WILLIAM SAMUEL MACGREGOR

   DERNBACH, THERESA CLARE

   STEFFAN, ANDREW THOMAS
3. Said service was made by sending the attached by electronic mail to the email addresses identified by the parties on NYSCEF.

Dated: December 12, 2023
White Plains, New York

Todd D. Ommen