ATTORNEY GENERAL OF THE STATE OF NEW YORK
ENVIRONMENTAL PROTECTION BUREAU
----------X

In the Matter of

CITY OF WHITE PLAINS,

Respondent.

----------X

ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Executive Law § 63, Eliot Spitzer, Attorney General of the State of New York, caused an investigation (the Investigation) to be made into alleged illegal conduct by the City of White Plains (White Plains or the City) relating to the discharge of pollutants into the Bronx River from White Plains Storm Sewer Outfalls (as defined below). The City has cooperated in good faith with the Attorney General in the Investigation and has agreed to resolve this matter in accordance with Sections II through VI of this Assurance of Discontinuance (Assurance), without litigation and without admission of any liability or fact with respect to the Attorney General's findings set forth in Section I below.

I. INVESTIGATION AND FINDINGS

Based on the Investigation, the Attorney General has made the following findings:

1. The Bronx River is a unique and valuable resource to the people of the State of New York, and especially to residents of Westchester and Bronx counties; however, the River's water quality and ecology have been harmed as a result of decades of development within the watershed, physical alterations to the River's natural flow, and pollutant discharges.

2. Many local, state, and federal agencies, including the Office of the Attorney General

(OAG), and community-based organizations have recently joined in efforts to restore the Bronx River's environmental health, and large numbers of people now use the River for boating, swimming, river restoration, and educational and research activities.

3. Pursuant to its Bronx River Watershed Initiative, OAG on behalf of the State of New York (the State), has been investigating illegal discharges of raw sewage and other pollutants into the Bronx River, and has obtained Assurances of Discontinuance under Executive Law § 63(15) requiring the Bronx Zoo, the New York Botanical Gardens, and Yonkers Racing Corporation to abate their pollutant discharges into the River, and a judgment in State of New York v. City of Yonkers, Supreme Court of the State of New York, County of Westchester, Index No. 02-21081 (Justice Nicolai), requiring the City of Yonkers to eliminate raw sewage discharges from its storm sewers into the River.

4. As part of its Bronx River Watershed Initiative, OAG conducted a survey and sampling program along the River in Westchester County outside of the City of Yonkers between December 2004 and June 2005. The purpose of this program was to investigate ongoing pollution discharges to the River during dry weather conditions.

5. On August 1, 2005, OAG wrote to several Westchester municipalities, including the City, informing them that OAG's survey and sampling work had disclosed discharges of raw sewage into the Bronx River from numerous municipal storm sewer pipes during dry weather, and requesting assistance from the municipalities in investigating and eliminating the sources of these discharges. The City has neither sought nor received a State Pollutant Discharge Elimination System (SPDES) permit from the New York State Department of Environmental Conservation (DEC) for these discharges. DEC has formally joined in the Investigation by

referring this matter to OAG for enforcement, and has provided environmental technical and legal assistance to OAG to help resolve White Plains' violations of state and federal water pollution control laws.

6. White Plains has cooperated and provided assistance in the OAG Investigation but has not fully eliminated its dry weather discharges of untreated sewage into the Bronx River.

7. By discharging pollutants, including raw sewage and fecal coliform bacteria, into the Bronx River from point sources without a National Pollutant Discharge Elimination System permit from the United States Environmental Protection Agency (EPA) or SPDES permit from DEC authorizing such discharges, the City has violated Section 402(a) of the federal Clean Water Act, 33 U.S.C. § 1342(a), and New York Environmental Conservation Law (ECL) §§ 17-0505, 17-0701(1), 17-0803.

8. By discharging into the Bronx River raw sewage, without treating the sewage to remove its harmful constituents, White Plains has violated ECL §17-0509(2), which sets "effective secondary treatment [as the] minimum degree of treatment required for the discharge of sanitary sewage into the surface waters of the state . . . ."

9. By discharging into the Bronx River raw sewage and fecal coliform bacteria, the City has violated ECL § 17-0501 by causing and contributing to the contravention of water quality standards for the Bronx River set forth in 6 New York Codes, Rules, and Regulations (NYCRR) §§ 701.1, 701.7, 701.8, 703.2, and 703.4(b). Specifically, these discharges, together with pollutant discharges by others, have rendered the Bronx River not suitable for "primary and secondary contact recreation [e.g., swimming and boating, respectively]" and not suitable for "fish propagation and survival," the River's best usages. 6 NYCRR §§ 701.1, 701.7, 701.8,

703.2. The concentration of White Plains' discharges of fecal coliform bacteria into the Bronx River has exceeded 200 fecal coliforms per 100 milliliters of discharge, the numerical water quality standard established by DEC, based on studies by EPA, to protect the health of people having contact with the water. Accordingly, such discharges have caused and contributed to violations of that numerical water quality standard for fecal coliform in the Bronx River. 6 NYCRR § 703.4(b).

10. In State of New York v. City of Yonkers, Index No. 02-21081 (Sup. Ct. Westchester Cty. October 26, 2004 Decision, p. 19) (Nicolai, J.), the Court held that discharges of raw sewage by the City of Yonkers from its storm sewer outfalls are illegal, constitute a public nuisance, and have rendered the Bronx River "unsafe for recreational purposes, dangerous to human health and detrimental to the propagation and maintenance of the fish population." Although the City's raw sewage discharges into the Bronx River are very small in comparison to those of the City of Yonkers, White Plains' discharges have contributed to this public nuisance.

11. OAG and White Plains wish to prevent future discharges of pollutants from the City's storm sewer pipes into the Bronx River and to resolve the State's claims for injunctive relief and civil penalties arising from White Plains' past discharges.

II. REMEDIAL PROGRAM

12. White Plains is permanently enjoined from discharging into the Bronx River from its storm sewers and storm sewer outfalls during Dry Weather untreated sewage or any pollutants identified in Attachment A to this Assurance in violation of State and federal laws and regulations, and shall implement the following remedial measures.

13. Definitions: The following definitions shall apply in this Assurance:

a. *White Plains Storm Sewer Outfalls* means all storm sewer outfalls to the Bronx River owned or operated by the City including, without limitation, STRO-13 (latitude 41 degrees, 1 minute, 301 seconds; longitude -73 degrees, 47 minutes, 78 seconds), STRO-14 (latitude 41 degrees, 1 minute, 431 seconds; longitude -73 degrees, 46 minutes, 970 seconds), STRO-15 (latitude 41 degrees, 1 minute, 599 seconds; longitude -73 degrees, 46 minutes, 852 seconds), STRO-16 (latitude 41 degrees, 1 minute, 647 seconds; longitude -73 degrees, 46 minutes, 799 seconds), STRO-17 (latitude 41 degrees, 1 minute, 687 seconds; longitude -73 degrees, 46 minutes, 772 seconds), STRO-18 (latitude 41 degrees, 1 minute, 765 seconds; longitude -73 degrees, 46 minutes, 615 seconds), STRO-19 (latitude 41 degrees, 1 minute, 800 seconds; longitude -73 degrees, 46 minutes, 529 seconds), STRO-20 (latitude 41 degrees, 2 minutes, 56 seconds; longitude -73 degrees, 46 minutes, 583 seconds), and STRO-21 (latitude 41 degrees, 2 minutes, 742 seconds; longitude -73 degrees, 46 minutes, 463 seconds).

b. *Polluting White Plains Storm Sewer Outfalls* means outfalls STRO-13, STRO-18, STRO-19, STRO-20, and STRO-21, shown to be discharging into the Bronx River untreated sewage in Dry Weather with fecal coliform concentrations exceeding 200/100 ml based on sampling performed by Conrad Geoscience Corp. on May 9 and May 20, 2005.

c. *Drainage Area* means the geographic area encompassing all sources of discharges from a White Plains Storm Sewer Outfall into the Bronx River. Each Drainage Area will be identified by the White Plains Storm Sewer Outfall to which such area drains.

d. *Dry Weather* means a condition in White Plains in which: (i) there is currently no precipitation or snow melt within the outfall's Drainage Area and, (ii) there has been no such precipitation or snow melt greater than .1 inches of rain or its snow melt equivalent

during the previous 48 hours.

e. *Cross-Connection* means a condition in which sewage from a sanitary sewer pipe owned or operated by the City can be transmitted to a storm sewer pipe owned or operated by the City as a result of a direct or indirect connection between these pipes.

f. *Private Connection* means a condition in which sewage from a property owner other than White Plains can be transmitted to a storm sewer pipe owned or operated by the City as a result of a direct connection between a sanitary sewer pipe owned or operated by such property owner and the City's storm sewer pipe, or as a result of an indirect connection between these pipes.

g. *State Determination or Determination* means a decision by the State disapproving and revising any submittal by White Plains, requiring the City to abate future discharges in accordance with paragraph 15.b below, selecting Environmental Benefit Projects other than stormwater retrofit projects in accordance with paragraph 18 below, assessing penalties for violations of this Assurance in accordance with paragraphs 19 and 20 below, or otherwise relating to the investigation and remediation work to be performed by the City under the Remedial Program set forth herein.

14. *Investigation and Remediation of Outfalls STRO-13, STRO-18, STRO-19, STRO-20, and STRO-21*:

a. White Plains shall investigate and eliminate all Cross-Connections, Private Connections, and other sources of sewage or other pollutants discharging into the Bronx River from outfalls STRO-13, STRO-18, STRO-19, STRO-20, and STRO-21 and shall certify to the State its elimination of such sources, by no later than May 1, 2007. Notwithstanding the

foregoing, White Plains is not required to eliminate the connection between the pipe owned or operated by the State Department of Transportation or State Thruway Authority and the White Plains storm sewer discharging into the River from STRO-21. However, White Plains shall provide the State Department of Transportation and State Thruway Authority access to this connection and shall cooperate with all efforts by these entities to eliminate the connection.

b. By May 1, 2007, the City shall also prepare, and submit to the State, a Remediation Report. This report shall tabulate and discuss in narrative form all actions taken by White Plains to investigate and eliminate potential Cross-Connections, Private Connections, and other sources of pollutants to the Bronx River in the Drainage Areas of outfalls STRO-13, STRO-14, STRO-15, STRO-16, STRO-17, STRO-18, STRO-19, STRO-20, and STRO-21. The report shall also provide all underlying documentation for the City's remedial work.

15. *Ensuring Future Compliance*:

a. *Four Year Survey and Sampling Program*: Within six months following the Effective Date of this Assurance, White Plains shall conduct a survey during Dry Weather of White Plains Storm Sewer Outfalls, take samples of any discharges into the Bronx River observed from such pipes, and provide the State a written report of survey and sampling results. The City shall conduct subsequent survey and sampling work and provide reports to the State every six months thereafter during the next 3 1/2 years. The Survey and Sampling Program shall comply with the protocol attached to (and incorporated by reference within) this Assurance as Attachment A.

b. *Abatement of Future Discharges*: In the event that the Four Year Survey and Sampling Program discloses discharges of sewage into the Bronx River from White Plains

Storm Sewer Outfalls as demonstrated by fecal coliform concentrations exceeding 200/100 ml, the City shall investigate and eliminate all Cross-Connections, Private Connections, and other sources of sewage discharges from such outfalls, and shall certify to the State its elimination of such sources, pursuant to a schedule set by the State in a State Determination. A State Determination may also require White Plains periodically to prepare and submit to the State Remedial Program Progress reports. Such reports would tabulate and discuss in narrative form the status of the City's remedial efforts and plans for further remedial work, identify all actions taken by it (and to be taken by it) to investigate and eliminate potential Cross-Connections, Private Connections, and other sources of pollutants to the Bronx River, and provide underlying documentation for its remedial work. Based on results from the Four Year Survey and Sampling Program or other information obtained by the State showing the discharge of pollutants other than sewage from White Plains Storm Sewer Outfalls, the State may also issue a Determination requiring the City to investigate and eliminate such discharges and require it to submit remedial progress reports for such work.

c. *Discharges During the Remedial Program*: If White Plains fully and timely complies with each of its obligations under this Assurance (including its obligations set forth in State Determinations) during the Remedial Program, the State will not seek civil penalties from the City for its discharges of sewage or the pollutants listed in Schedule A occurring during that program.

III. CIVIL PENALTY AND PAYMENT FOR ENVIRONMENTAL BENEFIT PROJECTS

16. White Plains shall make payments in the sum of $63,180 consisting of $6,318 as a Civil Penalty and $56,862 for Environmental Benefit Projects to benefit the Bronx River. These monies shall be paid by separate certified or bank checks made payable to the "State of New York" and shall be delivered to the New York State Attorney General's Office, The Capitol, Albany, New York 12224, Attention: Philip M. Bein, Assistant Attorney General, Environmental Protection Bureau, within 60 days of the Effective Date of this Assurance.

17. The payment of $56,862, and all interest earned on such payment, will be held by the State in an Escrow Account and will fund stormwater retrofit projects within the Bronx River drainage basin to be selected by OAG in consultation with DEC which are not otherwise required by law or planned to be implemented. The purposes of the stormwater retrofit projects are to improve water quality and the River's ecology by reducing the concentrations and loadings of pollutants discharged into the River in stormwater and reducing the volumes and peak flows of stormwater discharges into the River. White Plains, other Bronx River municipalities, government and private entities, and members of the public will have the opportunity to propose stormwater retrofit projects and seek funding for such projects from the Escrow Account and from other escrow accounts created to fund stormwater retrofits pursuant to OAG's Bronx River Watershed Initiative including, without limitation, the Escrow Account to be created pursuant to OAG's Assurance of Discontinuance with the Yonkers Racing Corporation, effective October 6, 2006.

18. Notwithstanding the foregoing, in the event that the State decides in the future that

such Environmental Benefit Projects are infeasible, ineffective, impracticable, or less beneficial than alternative projects that would benefit the Bronx River or the public's safe use and enjoyment of the River, the State may issue a State Determination (as defined in paragraph 13.g above) concerning that decision, and the State shall disburse funds from the Escrow Account to such other projects or to the State treasury as a civil penalty as specified in the State Determination.

IV. ENFORCEMENT, STATE DETERMINATIONS, DISPUTE RESOLUTION, FORCE MAJEURE, COSTS

19. To ensure White Plains' prompt compliance with this Assurance and subject to provisions concerning dispute resolution described below, in the event the City fails to perform any obligation required under this Assurance, it will be liable and pay penalties to the State in the amounts set forth in paragraph 20 below for each day that elapses from 10 days after such failure to perform the obligation until the City's failure is cured. A failure to perform an obligation required under this Assurance is defined to include a failure to make a timely submittal to the State (by failing to make a submittal to the State in accordance with any schedule set forth in this Assurance, in a submittal approved by the State, or in a State Determination), or a failure to take any action (or to refrain from taking any action) required by this Assurance or required by any submittal approved by the State or by a State Determination.

20. For each failure to perform an obligation, White Plains shall be liable for penalties to the State as follows:

Length of Violation	Stipulated Penalty
Day 1 through 30	$100/day
Day 31 through 60	$500/day
Day 61 and thereafter	$1,000/day

21. Nothing herein may be construed to affect in any way the State's obtaining additional or alternative legal or equitable remedies relating to any violations of this Assurance, and the City may assert any defenses, rights, or remedies with respect to such additional or alternative remedies to the extent permitted by law.

22. A State Determination is final and binding upon White Plains subject to its right to dispute such Determination under paragraphs 23 and 24 below.

23. The City may seek to dispute any State Determination by serving upon the State, and filing with New York State Supreme Court, Westchester County, Environmental Claims Part, in a timely fashion, a petition or complaint to void, annul or modify such State Determination on the ground that the State Determination breaches the Assurance. To be timely, a petition/complaint must be served and filed within 45 days of service of the State Determination being challenged. If White Plains fails to timely serve and file such petition/complaint following a State Determination, such Determination shall be final and binding upon the City.

24. A State Determination will be deemed in breach of the Assurance only if such Determination is arbitrary, capricious, contrary to law, or inconsistent with the Assurance. The

procedures and standards applicable to a proceeding under Article 78 of the CPLR shall apply to any petition/complaint by the City seeking dispute resolution. White Plains shall have the burden of proof in any petition/complaint challenging a State Determination.

25. If any event arising from causes beyond the reasonable control and best efforts of White Plains or its agents delays or prevents the performance of any of the City's obligations under this Assurance despite White Plains' best efforts and due diligence to fulfill the obligation (hereinafter, a Force Majeure Event), then any such obligations will be suspended for the duration of the Force Majeure Event; provided, however, that the City: (a) notifies the State of the Force Majeure Event in full compliance with paragraph 26 below, and (b) undertakes best efforts and due diligence to minimize the duration and impact of the Force Majeure Event.

26. Initial notification of the Force Majeure Event must be provided to the State orally as soon as possible (but by no later than 10 business days after the City or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur) by contacting the Office of the Attorney General's Environmental Protection Bureau at (518) 474-7178. Written notice shall be provided no later than 20 business days after the City or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur. Written notice shall be accompanied by all available documentation and shall contain the following: (a) a description of the circumstances constituting the Force Majeure Event; (b) the actions (including pertinent dates) that White Plains has taken and plans to take to minimize the delay, and (c) the date the City expects to complete the delayed obligation. White Plains' failure to comply with these notification requirements will deprive it of an extension of time to the City's obligations and foreclose a defense based upon force majeure to a State

Determination assessing penalties.

27. White Plains shall reimburse the State within 60 days of a written demand made by the State for reasonable and customary out-of-pocket costs paid by the State to outside contractors for any future inspection, surveying, sampling, and laboratory analysis work concerning the Remedial Program except for costs that the City disputes by timely serving and filing a petition/complaint disputing such costs pursuant to paragraphs 23 and 24 above. In the event and to the extent that White Plains does not succeed in its petition, it shall reimburse the State for disputed costs plus interest in accordance with CPLR § 5004 within 30 days of entry of final judgment concerning the petition. Interest shall be applied beginning 60 days from the State's written demand through the date of payment of costs by the City to the State.

V. RELEASE

28. White Plains' payment of the Civil Penalty and payment for Environmental Benefit Projects shall release it from all State claims for civil penalties or other monetary relief arising from the City's past discharges of sewage or other pollutants listed in Attachment A from White Plains Storm Sewer Outfalls into the Bronx River through the Effective Date. This release shall not apply to past discharges of pollutants by the City from White Plains Storm Sewer Outfalls into the Bronx River known by the City but not disclosed to OAG, and shall not apply to claims under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., ECL Article 27, title 13, or New York common law for cost recovery and natural resource damages relating to the Bronx River.

VI. MISCELLANEOUS

29. The Effective Date of this Assurance is November 21, 2006.

30. White Plains shall allow the State, its employees and agents reasonable access to its sewage systems within the Drainage Areas of the White Plains Storm Sewer Outfalls to monitor the City's compliance with this Assurance and to conduct further investigations relating to the Remedial Program. The City shall provide to the State all information and documentation relating to the Remedial Program upon request by the State. Subject to the availability of lawful appropriations and consistent with Section 8 of the State Court of Claims Act, the State shall hold White Plains harmless from and indemnify it for any final judgment of a court of competent jurisdiction arising from the State's access to the City's sewage systems to the extent attributable to the negligence of the State or of its officers or employees when acting within the course and scope of their employment.

31. All written communications, notices, reports, or other documents from White Plains to the State (other than a petition or complaint under paragraph 23) shall be served upon Philip Bein, Assistant Attorney General, Office of the Attorney General, Environmental Protection Bureau, The Capitol, Albany, New York 12224, and upon Scott Crisafulli, Chief of the Bureau of Enforcement, Compliance, and Assurance, DEC, 625 Broadway – 14th floor, Albany, New York 12233. All written communications, notices, reports, or other documents from the State to the City shall be served upon Edward P. Dunphy, Corporation Counsel, City of White Plains, Municipal Building, 255 Main Street, White Plains, New York 10601. Service may be made by facsimile transmission or by e-mail, but must be followed in hard copy by mail.

32. White Plains shall indemnify and hold harmless the State (including DEC, OAG,

and its other departments and agencies) and State representatives, employees, agents and contractors for all claims, suits, actions, damages and costs of every name and description arising from the acts or omissions of the City taken in an effort to comply with its obligations under this Assurance. Notwithstanding anything to the contrary, this Assurance does not require the City to indemnify or hold harmless the State from the State's negligent or intentional acts or omissions.

33. This Assurance shall terminate upon White Plains' performance of all its obligations herein, including the City's obligations set forth in State Determinations and its payment to the State of penalties and costs assessed in such Determinations.

For the Office of Attorney General:

ELIOT SPITZER
Attorney General
State of New York

By: Philip Bein Date: 11/27/06
Philip Bein
Assistant Attorney General
New York State Department of Law
The Capitol
Albany, NY 12224
(518) 474-7178

For Respondent City of White Plains:

EDWARD P. DUNPHY
Corporation Counsel
City of White Plains
Attorney for Respondent
City of White Plains

By: Edward P. Dunphy Date: 11/21/06
Edward P. Dunphy
Corporation Counsel
City of White Plains
Municipal Building
255 Main Street
White Plains, New York 10601
(914) 422-1244

ATTACHMENT A

SURVEY AND SAMPLING PROTOCOL

A. Sampling of dry-weather discharges is to take place in the absence of snow melt and no sooner than 48 hours after a rainfall. The preceding dry-weather interval shall be documented with records available for White Plains, Westchester County, at the National Weather Service website, www.nws.noaa.gov, which provides a two-day history of weather observations.

B. All necessary prearrangements for sample collection and analysis of samples shall be made with the Environmental Laboratory of the Westchester County Department of Laboratories and Research[1] prior to each day's survey and sampling. Sampling personnel shall bring with them all necessary chain-of-custody forms, laboratory-provided sample containers, coolers, and other supplies needed to conduct the sampling and analysis. Sampling personnel shall complete chain-of-custody forms and adhere to sample holding times specified by the Lab.

C. A digital photograph shall be taken of each discharge prior to sampling. A note shall be made of any sheens, color, odor or extraneous materials in the discharge. The collection time for each sample shall be recorded. The rate of discharge shall be measured and recorded after collecting each sample. All photographs, notes, records, and documentation relating to sampling shall be included in reports to be submitted to the State.

D. Samples shall be analyzed for the following parameters using the specified methods:

PARAMETER	METHOD
a) Fluoride- Non potable	EPA1979 340.2
b) Oxygen, Dissolved	EPA1979 360.1/ 360.2
c) Color	SM18 2120B
d) Conductance	SM18 2510B
e) Turbidity	EPA1979 180.1
f) Methylene Blue Activated Substances	EPA1979 425.1
g) Fecal Coliform MPN (five serial decimal dilutions: 1, 10, 100, 1,000, and 10,000)	SM18 9221C,E

[1] Environmental Laboratory Services, 10 Dana Road, Valhalla, NY 10595, Tel. (914) 231-1620, Fax (914) 231-1772.