

EXhibit 22



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

Dr. Gregg A. Pane, M.D.  
Director  
District of Columbia Department of Health  
51 N Street, N.E., Suite 5000  
Washington, D.C. 20002

FEB 15 2006

Dear Dr. Pane:

On March 18, 2005, the District of Columbia Department of Health (DOH) published in the D.C. Register proposed revisions to the District of Columbia's surface water quality standards (WQS). The proposed revisions resulted from a publication in the D.C. Register on May 30, 2003, that DOH was initiating a triennial review of the District's surface WQS as required under Section 303(c) of the Clean Water Act (CWA) and was soliciting input from the public on any issues of concern. DOH also sent electronic notices directly to identified interested parties.

DOH held a public hearing on the proposed revisions on April 27, 2005, followed by a review and comment period which closed on May 11, 2005. The Environmental Protection Agency (EPA) provided testimony in support of the revisions to the District's WQS at the public hearing and submitted written comments by letter dated May 3, 2005. DOH published the enclosed final WQS revisions without substantive change in the D.C. Register on October 28, 2005. The Attorney General's Office of Enforcement, Compliance, and Environmental Justice certified in a letter dated November 2, 2005, that the revisions to the surface WQS regulations were promulgated consistent with the District's laws. EPA received from DOH the WQS package for review on November 14, 2005. As promulgated, the final WQS include, among others, new narrative criteria for aquatic life use and numeric criteria for 34 additional constituents including E. coli, and update the numeric criteria for over 100 pollutant constituents.

EPA has completed its review of the revisions and modifications to the District's WQS. On behalf of the Region, I would like to commend DOH for its diligent efforts in completing this year's triennial review of their WQS regulations, including the adoption of E. coli as a bacteriological indicator, and narrative and numeric criteria to support designated uses within the tidally influenced waters of the Chesapeake Bay watershed area. Based on this review, EPA is pleased to approve all of the WQS revisions with the exception of the following items:

- Section 1104.8- First sentence of Note 1, Table 1 - "This criterion shall apply to E. coli bacteria determined by the Director to be of non-wildlife origin based on best scientific judgement using available information".

•Section 1199 -Modification of the definition for Primary Contact Recreation (second sentence) - "Such uses are not expected during times of high current velocity, floods, electrical storms, hurricanes, tornadoes, winter temperatures, heavy ice conditions and other adverse natural conditions;" and the added definition for "adverse natural conditions."

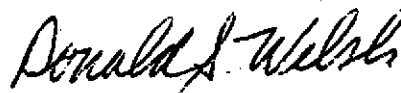
The attached enclosure discusses the reasons for the disapproval of these revisions, and provides the rationale supporting the approval of all other WQS.

The new or revised WQS approved today are now effective for CWA purposes. Because the disapproved revisions, which had the effect to limit or restrict the application of certain WQS, are not effective for the purpose of the CWA, and the resulting approved WQS are consistent with the CWA, EPA has determined that it is not necessary to promulgate replacement water quality standards for the disapproved revisions.

As part of our approval process, EPA prepared a Biological Evaluation to determine if our approval of the new and revised sections of the WQS regulations would adversely affect endangered or threatened species and their critical habitats within the District of Columbia. Our Biological Evaluation found that our approval action would not adversely affect these species or their critical habitats. The Biological Evaluation has been reviewed by the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration National Marine Fisheries Service ("The Services") both of which have concurred with our findings. We have enclosed copies of the evaluation and concurrence letters for your information. The completion of the Biological Evaluation and concurrences from the Services fulfills our obligation to comply with Section 7 of the Federal Endangered Species Act on this WQS action.

We look forward to working with you and your staff on the District's next triennial review of their surface WQS regulations which is scheduled for completion in FY 2009. Should you have any questions concerning this correspondence, please feel free to contact me or have your staff contact Mr. Garrison D. Miller at (215) 814-5745.

Sincerely,



Donald S. Welsh  
Regional Administrator

Enclosures

cc: Ms. Marie Sansone, DCDOE

ENVIRONMENTAL PROTECTION AGENCY  
 DISTRICT OF COLUMBIA SURFACE WATER QUALITY STANDARD REGULATIONS  
 NOTICE OF FINAL RULEMAKING DATED OCTOBER 28, 2005  
 SUMMARY OF APPROVAL OF NEW AND REVISED CHANGES

SECTION	DESCRIPTION OF REVISION	EPA RATIONALE
Section 1101 (Surface Waters)	Sec. 1101.2: Separated Rock Creek and tributaries into different stream segments for use classification	Although Rock Creek and its tributaries are now separate segments for use designation, the same current and designated uses continue to apply to both segments. Because there is no change in use designation in these waters, the change is minor and it meets the requirements of the Clean Water Act (CWA) and EPA regulations at 40 CFR 131.10.
	Minor changes and administrative corrections	All other changes in this section were minor changes/revisions which did not alter the meaning or scope of the water quality standards regulation and do not require EPA approval.
Sections 1102 (Antidegradation Policy)	Secs. 1102.2 , 1102.03 and 1102.4: Amended subsections to include District's Continuous Planning Process (CPP) and public participation in antidegradation review	Meet the requirements of the CWA and EPA regulations at 40 CFR 131.12(a)
Section 1104 (Standards)	Sec. 1104.6: Added new Chlorophyll a narrative criterion for tidally influenced Class C waters.	Meets the requirements of 40 C.F.R 131.11; scientifically defensible as discussed in "Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and its Tidal Tributaries" (EPA 903-R-03-002) and 2004 Addendum.

	<p>Sec.1104.8 Table 1 - Bacteriological criteria (<i>E. coli</i>), except for applicable Note 1 - Added new criteria based on new indicator for Class A waters</p>	<p>Consistent with EPA 304(a) recommended criteria (see 40 C.F.R. 131.11(b)(1)(i)); scientifically defensible for the reasons discussed in Ambient Quality Criteria for Bacteria-1986 (EPA 440/5-84-002) and 68 Fed. Reg 67218 (Nov. 16, 2004).</p>
	<p>Sec.1104.8 Table 1- Note 1 - Limiting the application of the bacteria criteria to bacteria of wildlife origin; limiting the application of single sample maximum to water quality trend assessment</p>	<p>First sentence of Note 1 disapproved - see explanation below. The remainder of the Note is approved as consistent with EPA 304(a) recommended criteria and scientifically defensible for the reasons discussed in Ambient Quality Criteria for Bacteria-1986 (EPA 440/5-84-002). See also 68 Fed. Reg 67218, 77224-26 (Nov. 16, 2004).</p>
	<p>Sec.1104.8 Table 1- Bacteriological criteria (Fecal coliform), Note 2 - Limiting the application of the fecal coliform bacteria until Dec. 31, 2007</p>	<p>DC has now adopted the EPA 304(a) recommended criteria for bacteria based on <i>E.coli</i> indicators. The new <i>E.coli</i>-based criteria, which apply immediately, are protective of the use and substitute the fecal coliform criteria. The DC narrative criteria prohibiting contamination that causes injury or adverse physiological effects on humans also applies.</p>
	<p>Sec. 1104.8 Table 1 - Dissolved oxygen criteria and Notes 3 and 4 - Replaced existing DO criteria with recommended Chesapeake Bay watershed DO criteria</p>	<p>Meets the requirements of 40 C.F.R 131.11; scientifically defensible as discussed in "Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and its Tidal Tributaries" (EPA 903-R-03-002) and 2004 Addendum.</p>

	<p>Sec. 1104.8 Table 1 - Notes 3 and 5 applicable to Secchi Depth and Chlorophyll a Criteria - Expanded application of these criteria to all tidally influenced waters</p>	<p>Meets the requirements of 40 C.F.R. 131.11; scientifically defensible as discussed in "Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and its Tidal Tributaries" (EPA 903-R-03-002) and 2004 Addendum.</p>
	<p>Section 1104.8 Table 2 (Trace Metals and Inorganics), including Notes - Several criteria revised, and units of measurement changed</p>	<p>All revisions consistent with EPA 304(a) recommended criteria (40 C.F.R. 131.11(b)(1)(i)); see December 1999 Ammonia criteria document (EPA-822-R-99-014) and November 2002 National Recommended Water Quality Criteria (EPA-822-R-02-047)); scientifically defensible for the reasons articulated in Section 304(a) criteria support documents.</p>
	<p>Section 1104.8 Table 3 (Organics), including Notes - Most of the criteria revised</p>	<p>All revisions consistent with EPA 304(a) recommended criteria (40 C.F.R. 131.11(b)(1)(i)); see November 2002 National Recommended Water Quality Criteria (EPA-822-R-02-047)); scientifically defensible for the reasons articulated in Section 304(a) criteria support documents.</p>
	<p>Minor changes, renumbering and administrative corrections</p>	<p>All other changes in this section were minor changes/revisions which did not alter the meaning or scope of the water quality standards regulation and do not require EPA approval.</p>
<p>Sections 1105 (Implementation and Applicability) and 1106 (Site-Specific Standards)</p>	<p>Minor changes and administrative corrections</p>	<p>All changes in these sections were minor changes/revisions which did not alter the meaning or scope of the water quality standards regulation and do not require EPA approval.</p>

<p><b>Section 1158 (Enforcement)</b></p>	<p>Revision of citation of enforcement authorities, as well as other minor changes and administrative corrections.</p>	<p>Revision of authorities is consistent with the CWA and Water Quality Standards Regulation at 40 CFR 131. Minor changes which did not alter the meaning or scope of the water quality standards regulation do not require EPA approval.</p>
<p><b>Section 1199 (Definitions)</b></p>	<p>The following definitions were added and/or revised:</p> <ul style="list-style-type: none"> <li>-Anadromous fish</li> <li>-Aquatic Life</li> <li>-Best Management Practices</li> <li>-Consumption of Fish and Shellfish</li> <li>-MPN.</li> <li>-Navigation</li> <li>-Semi-anadromous fish</li> <li>-Short term degradation</li> <li>-Tidally influenced waters</li> <li>-Wildlife</li> <li>-minor corrections and administrative changes in several definitions.</li> </ul>	<p>EPA reviewed these definitions in the context of the DC's approved Water Quality Standards. EPA approves the use of the terms defined here as they are applied in the approved WQS.</p>
	<p>The following definitions were added and/or revised:</p> <ul style="list-style-type: none"> <li>-The definition of "primary contact recreation" was revised, by adding this sentence: "Such uses are not expected during times of high current velocity, floods, electrical storms, hurricanes, tornadoes, winter temperatures, heavy ice conditions and other adverse natural conditions."</li> <li>-The definition of "adverse natural conditions" was added.</li> </ul>	<p>-Disapproved - see explanation below.</p> <p>-Inapplicable in light of the disapproval above.</p>

## Disapproval of New and Revised Items

EPA is disapproving the following revisions:

1. First sentence of Note 1 of Table 1, in Section 1104.8. The first sentence of Note 1, which applies to the *E. coli* bacteriological criteria, reads:

This criterion shall apply to *E. coli* bacteria determined by the Director to be of non-wildlife origin based on best scientific judgment using available information.

The effect of this sentence is to limit the application of the bacteria criteria to those bacteria which the Director determines are of human and/or domestic animal origin.

2. The added sentence modifying the definition of "primary contact recreation," which reads:

Such uses are not expected during times of high current velocity, floods, electrical storms, hurricanes, tornadoes, winter temperatures, heavy ice conditions and other adverse natural conditions.

In addition, EPA is not reviewing the definition of "adverse natural conditions." That definition applies only to the disapproved revision of the primary contact recreation definition. In light of the disapproval of that revision, the definition of adverse natural condition does not apply to any water quality standard.

### Disapproval Rationale:

1. Limitation on application of the bacteriological criteria to bacteria of nonwildlife origin

In 1986 EPA revised its recommended bacteria water quality criteria for primary contact recreation. See Ambient Water Quality Criteria for Bacteria (January 1986 EPA440/5-84-002). EPA recommended that the bacteria criteria be based on *E. coli* or enterococci indicators. EPA also recommended that the criteria be applied to bacteria from all sources "unless sanitary and epidemiological studies show the sources of the indicator bacteria to be non-human and that the indicator densities are not indicative of a health risk to those swimming in such waters." Id. at 10.

As EPA explained in the recent rulemaking promulgating bacteria criteria for coastal waters, the data on characterizing the public health risk posed by non-human sources, including wildlife sources, is still too limited to support a distinction in the application of bacteria as a general matter. 69 Fed. Reg. 67218, 67228 (Nov. 16, 2004). Recent studies suggest that waterborne fecal contamination from nonhuman sources may pose risk to humans, and have attributed particular cases of recreational water disease outbreaks to nonhuman sources of fecal contamination, including wildlife. Id.; 69 Fed. Reg. 41720, 41730 (July 9, 2004). Given the potential for risk from bacteria from nonhuman sources, and the limited knowledge in this area, the Agency does not exclude any source of fecal bacteria from the application of its recommended criteria.



Nonetheless, where sanitary source survey or bacteria tracking indicate that bacteria do not originate from human or domestic animal sources, and where a State or Territory has studied the risk which the bacteria present in its waters pose to bathers, such studies could support a distinction in the application of the criteria based on bacteria source. 69 Fed. Reg. 67218, 67228. In the case at hand, the District has not provided any scientifically defensible evidence showing that bacteria present in District waters are from wildlife sources, and that bacteria from such origin in District waters do not pose a risk to bathers. Because EPA's regulations at 40 CFR 131.11(a) require that criteria protect the designated use and DC has not submitted evidence nor is EPA aware of any evidence that the distinction between wildlife and nonwildlife sources is protective of the recreational use within the District of Columbia, EPA is disapproving this provision.

The District could address this disapproval in either of two ways. The District could amend its WQS to provide for the application of the bacteria criteria to all sources regardless of origin. (This would correspond with the effect of the EPA disapproval of this revision. For the purpose of the CWA, the effect of our disapproval of Note 1 to the bacteria criteria is that the bacteria criteria in Table 1 applies regardless of origin.) Alternatively, the District could submit scientifically defensible evidence showing that bacteria of wildlife origin in the District do not pose a risk to bathers.

## 2. Modification of the definition of primary contact recreation

The modification of the definition of primary contact recreation appears to limit the application of the designated use under the circumstances listed in the sentence. The District has not submitted any support for limiting the designated use in these circumstances nor has the District defined in its regulations the specific conditions in which the limitation would apply.<sup>1</sup>

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<sup>1</sup> In response to EPA's comments, the District indicated that "high current velocity" is intended to have the same meaning as "high flow conditions" as defined in Section 1105.6:

1105.6 High flow conditions in the District of Columbia waters are defined as follows:

(a) For the Potomac River, the following conditions shall be considered a high flow:

(i) A flow that may result due to a rainfall with an average intensity greater than two-tenths of an inch (0.2") per hour for a period of one (1) hour in the portion of the District of Columbia tributary to the Potomac River, or

(ii) A flow equivalent to a three hundred percent (300%) increase in flow during a twenty-four (24) hour period.

(b) For the Anacostia River, the following conditions shall be considered a high flow:

(i) A flow that may result due to a rainfall with an average intensity greater than two-tenths of an inch (0.2") per hour for a period of one (1) hour in the portion of the District of Columbia tributary to the Anacostia River, or

(ii) A flow equivalent to a three hundred percent (300%) increase in flow during a

As currently written, the provision could permit broad exemptions in the application of the designated use. As a result, EPA is disapproving this revision.

In general, EPA views the adoption of seasonal and subcategories of recreational uses as the most appropriate approach to incorporating these types of exemptions into state water quality standards. EPA recommends several approaches if the District wishes to incorporate this type of exemption to its primary contact recreation use. If the District wants to limit the application of the primary contact recreation use during winter conditions, EPA suggests that the District consider the adoption of a seasonal recreation use as allowed by the regulations at 40 C.F.R. §131.10(f). If the District wishes to pursue this approach, such seasonal uses should identify the period of time, or the ambient temperature to which the seasonal use would apply (e.g. The use applies from May 1<sup>st</sup> through September 30<sup>th</sup>). The seasonal use subcategory should correlate to the recreational season of the District waters. An appropriate season for the District waters may not be the same as for the waters of Maine or the waters of Florida.

Other limitations or refinements of a use that may result in the application of less stringent criteria require that the State or Territory show that the use is not an existing use in such circumstances and that the use is not feasible for one or more of the reasons specified in 40 C.F.R. § 131.10(g), and should be supported by a Use Attainability Analysis (UAA) as required by 40 C.F.R. § 131.10(j). The complexity of the analysis depends on the limitation that would apply to a use. For example, showing that primary recreation is not an existing use and is not attainable during an electrical storm, a tornado or a hurricane should not be a challenging task.

If the District wants to limit the application of the primary contact recreation use during wet weather conditions, EPA encourages the District to consider recreational use subcategories correlated to wet weather, supported by a UAA that cites to one of the factors contained in 40 C.F.R. §131.10(g). For example, EPA has approved a designated use subcategory of primary contact recreation which defined the use as applying at all times except during a certain number of combined sewer overflow events (e.g., 4 overflows per year). However, such use subcategorization was supported by existing use data and a UAA analysis. That is not the case here.

The District could address this disapproval by either revising its regulations to contain

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twenty-four (24) hour period.

(c) For Rock Creek and tributaries, the following conditions shall be considered a high flow:

(i) A flow that may result due to a rainfall with an average intensity greater than two-tenths of an inch (0.2") per hour for a period of one (1) hour in the portion of the District of Columbia tributary to Rock Creek, or

(ii) A flow equivalent to a three hundred percent (300%) increase in flow during a twenty-four (24) hour period.

(d) For other tributaries to the Potomac and Anacostia Rivers, a flow equivalent to a five hundred percent (500%) increase in flow during a twenty-four (24) hour period, shall be considered a high flow.

one or both of the approaches described above or the District could amend its regulations to remove the disapproved revision. (The latter would correspond with the effect of the EPA disapproval of this modification. For the purpose of the CWA, the effect of our disapproval of the modification of the definition for primary contact recreation is that the primary contact recreation use (Class A) applies in the District waters without any regulatory subcategories or limitations.) If the District chooses the first approach, EPA expects that the District would submit appropriate supporting documentation consistent the federal regulations for each of the limitations, including seasonal use, disaster conditions and wet weather, as applicable.

Under Federal regulations at 40 CFR 131.21(b), where EPA disapproves the submission of any water quality standard (submitted after May 30, 2000), that standard is not effective for purposes of the CWA, including the issuance of NPDES permits. Only the approved revisions are effective under the CWA. Thus, under the CWA neither the disapproved limitation on the application of the approved bacteria criteria, nor the disapproved modification of the primary contact recreation apply. Because the resulting approved revisions are consistent with the CWA requirements, EPA has determined that it is not necessary to promulgate replacement water quality standard for the disapproved revisions. EPA does recommend that the District delete the disapproved revisions for the sake of clarity (unless the District plans on submitting the required supporting documentation as described above).