

Exhibit 7

DEPARTMENT OF HEALTH
Environmental Health Administration

★ ★ ★ Office of Enforcement, Compliance
& Environmental Justice

MEMORANDUM

TO: Bruce Brennan, Assistant Attorney General
Office of the Attorney General

THRU: Kenneth Campbell
General Counsel

THRU: Kendolyn Hodges-Simons
Interim Chief

FROM: Caroline Burnett, Attorney-Advisor
Watershed Protection Division
Water Quality Division

DATE: November 4, 2004

SUBJECT: DOH Legal Sufficiency Review of the District of Columbia
Certification of the Long Term Control Plan Submitted by WASA
Pursuant to the 1994 CSO Policy

I. ISSUE & BACKGROUND

This memorandum responds to a request by the federal Department of Justice for certification that the District of Columbia Department of Health's certification of the Water and Sewer Authority's Long Term Control Plan for discharges to the District's combined sewer system, required by the Environmental Protection Agency's 1994 Combined Sewer Overflow Control Policy (CSO), is legally sufficient. The 1994 CSO Policy, 59 Fed. Reg. 18688 (April 19, 1994), is incorporated into Section 402(q) of the Clean Water Act (33 U.S.C. § 1342(q)). The 1994 CSO Policy regulates the planning, selection and implementation of water quality management practices and controls to meet the requirements of the Clean Water Act (CWA) (33 U.S.C. § 1251 *et seq.*) and requires full public involvement during the decisionmaking process.

On September 5, 1997, the Environmental Protection Agency (EPA) awarded a \$7.1M federal CWA Section 201 facility-planning grant to the Water and Sewer Authority (WASA) for its LTCP, under Title II of the CWA. The LTCP provides for a combination of pump station improvements, storage tunnels, sewer separation, outfall consolidation,

regular improvements, low impact development and excess flow treatment at Blue Plains. The LTCP further provides that the combined sewer system will be sized to control the one-year 24-hour storm (it is recognized that there is considerable variation in such a storm and antecedent events)¹. Based on the capacity of the system from the one-year 24-hour storm, in the average rainfall year the LTCP will reduce overflows to the Anacostia River by 98%, to the Potomac by 93%, and to Rock Creek by 90%. In an average year there would be two overflow events to the Anacostia, four overflow events to the Potomac and four to Rock Creek².

Pursuant to CWA regulations (40 C.F.R § 35.917-7) and the 1994 CSO Policy, the District of Columbia (as the state) is required to review and certify WASA's plans. By letter dated August 28, 2003, (hereinafter referred to as the "Certification Letter") the Department of Health (DOH), Environmental Health Administration (EHA), Bureau of Environmental Quality (BEQ), after carefully reviewing the information contained in the LTCP, certified that WASA's LTCP complies with the 1994 CSO Policy and the District's Water Pollution Control Act of 1984 (the Act), as amended, effective March 16, 1985; D.C. Official Code § 8-103.01 *et seq.*, and its implementing regulations (Title 21 of the District of Columbia Municipal Regulations (DCMR), Chapters 11 and 19).

II. CONCLUSION

The Office of Enforcement, Compliance & Environmental Justice has determined that the DOH/EHA certification of the LTCP is legally sufficient for the following reasons. First, DOH/EHA has authority to certify the LTCP pursuant to District law and Mayor's Order. Second, the DOH/EHA certification is based on a review of the LTCP against the District and federal water quality standards, specifically: (1) whether the LTCP would violate the District's water quality standards for attainment of designated uses (21 DCMR § 1101.1) and the District's Total Maximum Daily Loads (TMDL); (2) whether the overflows in the LTCP would violate the District's water quality standard (21 DCMR § 1104.3), which states that, "Class A waters shall be free of discharges of untreated sewage; and (3) whether the LTCP adequately provides for the monitoring of District waters to evaluate the water quality impacts pursuant to the District's water quality standards (D.C. Official Code §§ 8-103.04 and 8-103.05) and the 1994 CSO Policy. Lastly, the DOH/EHA certification evaluated whether there was compliance with the federal CWA regulations (40 C.F.R. § 35.917-2) and the 1994 CSO Policy requiring full public participation in the decision making process on the LTCP.

III. DISCUSSION

A. DOH/EHA Authority to Certify the Long Term Control Plan (LTCP)

The DOH/EHA is authorized to certify the LTCP pursuant to the District's Water Pollution Control Act (the Act) and Mayor's Order issued to effectuate this Act. District of Columbia Official Code §§ 8-103.04 and 8-103.05 authorize the development of

water quality standards, the classification of beneficial uses of District waters and the monitoring and reviews of these waters³. District of Columbia Official Code §§ 8-103.06 through 8-103.08 establish the basic structure for regulating District waters including permitting certain discharges; providing for the review of terms of permits, the effects of federal permits, the location of discharges, the recognition of reduction of pollutants; and placing restrictions on quantity of materials discharged.

District of Columbia Official Code § 8-103.11(d) grants the Mayor authority to certify that water quality management plans from "the state, the local or federal government are acceptable". The Mayor delegated his authority under the Act to the Director of the DOH or his or her designee, pursuant to Mayor's Order 98-50, dated April 15, 1998. Through the Department of Health Organization Order No. 21, dated November 8, 1998, the Director of DOH established the Environmental Health Administration (EHA), Bureau of Environmental Quality (BEQ), Water Quality Division (WQD). The EHA/BEQ/WQD was mandated, to, among other things, regulate the discharges of pollutants to surface and ground water in order to protect water quality and the public health.⁴ Review and approval of WASA's LTCP impacts the quality of surface water in the District and the certification of the LTCP is within EHA/BEQ/WQD's⁵ regulatory authority.

B. DOH/EHA Review of the Long-Term Control Plan (LTCP) for Compliance with District and Federal Water Quality Standards

As indicated, DOH/EHA reviewed the *Final Report* LTCP, dated July 2002, for compliance with water quality standards, in accordance with EPA's 1994 CSO Policy, and issued a Certification Letter dated August 28, 2003. The DOH/EHA Certification Letter evaluated WASA's LTCP overflow events to determine: (1) whether the LTCP would allow for attainment of the District's water quality standards for designated uses (21 DCMR § 1101.1) and the District's Total Maximum Daily Loads (TMDLs); (2) whether the overflows in the LTCP would violate the District's water quality standard (21 DCMR § 1104.3), which states that, "Class A waters shall be free of discharges of untreated sewage; and (3) whether the LTCP adequately provides for the monitoring of District waters to evaluate the water quality impacts of overflows pursuant to the District's water quality standards (21 DCMR Chapter 11) and the 1994 CSO Policy. Lastly, the Certification evaluated whether there was compliance with the federal CWA regulations (40 C.F.R. § 35.917-2) and the 1994 CSO Policy requiring full-scale public participation in the decision making process on the LTCP.

1. Attainment of Water Quality Standards for Designated Use

The DOH/EHA reviewed the LTCP to determine whether the plan as designed will allow attainment of the designated use of the District's waters as set out in the District's Water Quality Standards (21 DCMR § 1101.1) and the District's Total Maximum Daily Loads (TMDLs), which were established pursuant to the requirements of the CWA, Section 303(d)(1)(c) and published at www.epa.gov/reg3wapd. According to the District's Water

Quality Standards, the District's waters are classified on the basis of their current use and designated beneficial uses. Specific categories of beneficial uses are as follows: Class A- primary contact recreation⁶; Class B- secondary contact recreation⁷; Class C- protection and propagation of fish, shellfish, and wildlife; Class D- protection of human health related to consumption of fish and shellfish; and Class E- navigation. Class A is listed as a designated use for the District's waters affected by CSO overflows.

At the time of DOH/EHA certification, the DOH/EHA established, and EPA approved, a total maximum daily load (TMDL) allocation for bacteria (including fecal coliform), biochemical oxygen demand, toxics and total suspended solids in the Anacostia River, for the combined sewer system. The Certification letter indicated that the LTCP is in conformance with the TMDLs. DOH/EHA concluded that the TMDLs demonstrate attainment of the water quality standard.⁸

According to the Certification Letter, DOH/EHA reviewed the water quality computer modeling done for the LTCP and the water quality standards for Rock Creek and the Potomac, and determined that the studies and modeling in the LTCP demonstrated that the remaining overflows, after implementation of the LTCP, will meet the water quality standards, as long as other sources of pollution receive similar levels of reduction. The DOH/EHA analysis of the LTCP indicated that in a few areas, for a few days of the year, the risk of pollution from the CSO would be higher than usual. Some Class A uses that involve limited immersion will have a lower risk than those with prolonged immersion⁹. To address this, however, the LTCP calls for the installation of signs and warning lights regarding those levels to provide real time guides to users to ensure that any risk from CSO discharges are minimal¹⁰.

However, the DOH/EHA concluded that these occurrences would not negate attainment of the waste loads allocated to the combined sewer system. Attainment of the designated use would be limited by storm flows from Maryland waters into District waters, rather than any projected overflows. Since the District of Columbia is located at the Fall Line where free flowing rivers become tidally influenced estuaries, the majority of the pollution loads that are in the District of Columbia waters originate outside of the District of Columbia.

2. Surface Waters "Free of Discharges of Untreated Sewage"

The DOH/EHA reviewed the LTCP to determine whether the overflows in the LTCP are in conflict with regulations at 21 DCMR §1104.3, which state that, "Class A waters shall be free of discharges of untreated sewage". Untreated sewage is not defined by the regulation. However, the standards provide at 21 DCMR § 1104.1 that:

The surface waters of the District shall be free from substances in amounts or combinations that do any one of the following:

- (a) Settle to form objectionable deposits;

- (b) Float as debris, scum, oil, or other matter to form nuisances;
- (c) Produce objectionable odor, color, taste, or turbidity;
- (d) Cause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans, plants, or animals;
- (e) Produce undesirable or nuisance aquatic life or result in the dominance of nuisance species; or
- (f) Impair the biological community that naturally occurs in the waters or depends on the waters for its survival and propagation.

DOH/EHA determined that since the LTCP provides some level of treatment for the overflow events, it is not in conflict with the "free of discharges of untreated sewage" regulations at 21 DCMR §1104.3; and that the combination of the measures under the LTCP would result in "partially treated sewage"¹¹ and the physical reduction of solids in wastewater, pursuant to EPA's "Combined Sewer Overflow Technology Fact Sheet, *Alternative Disinfection Methods*" (EPA 832-F-99-033). According to this EPA Fact Sheet, "preliminary reduction of microorganisms and bacteria may be accomplished through physical reduction of solids in the wastewater, primarily through sedimentation, flotation, and filtration". The EPA 1994 CSO Policy recognized the importance of controlling solid and floatable materials in CSOs¹². According to the DOH/EHA, the LTCP contains several methods of floatables control, including baffles, catch basin modifications, netting systems, containing booms, skimming processes and trash rack devices¹³. The LTCP requires a total capture of the first flush loads containing the most concentrated combined sewage¹⁴. The remaining load is screened of floatables and large solids prior to discharge. Screening is the first unit operation used at wastewater treatment plants. Screening removes objects such as rags, paper, plastics, and metals to prevent damage and clogging of downstream equipment, piping, and appurtenances. This is in keeping with the methods outlined in the Environmental Protection Agency's (EPA) CSO Technology Fact Sheet entitled "Combined Sewer Overflow Technology Fact Sheet, *Screens*" (EPA 832-F-99-040).

Second, the DOH/EHA determined that the LTCP contains several treatment measures designed to control the quantity of pollutants and to improve the water quality of any overflows from the system¹⁵. They are: (1) street cleaning, (2) catch basin maintenance, (3) sediment and erosion control (21 DCMR Chapter 5), and (4) the industrial pretreatment and permit requirements (21 DCMR § 1511.3). The implementation of these components of the Nine Minimum Controls described in the 1994 CSO Policy improves the quality of the combined overflows.¹⁶

3. Monitoring of District Waters

The DOH/EHA reviewed the LTCP to determine whether the LTCP adequately provides for the monitoring of District waters to evaluate the water quality impacts of

overflows pursuant to the District's water quality standards for monitoring (D.C. Official Code §§ 8-103.04 and 8-103.05 and 21 DCMR §1901) and monitoring data as required by the 1994 CSO Policy for District waters.

DOH/EHA reviewed the monitoring and compliance measures detailed in the LTCP for compliance with the WASA National Pollution Discharges Elimination System NPDES Permit No. DC0021199, for the Blue Plains Waste Water Treatment Plant. DOH/EHA determined that the monitoring and compliance measures, including post-construction monitoring described in the LTCP¹⁷ would provide adequate measurements to evaluate the water quality impact during the operation of the facilities. The phased post-construction monitoring program in the LTCP will provide adequate information to review the overall performance after the plan has been in operation.

The DOH/EHA also actively participated¹⁸ in ensuring that accurate, consistent and reproducible water quality monitoring data was produced in the LTCP, pursuant to regulations at 21 DCMR Chapter 19¹⁹ and the 1994 CSO Policy.

C. Public Involvement Requirement

Finally, WASA and the District complied with the requirement for a full-scale public participation program in the decision making process on the LTCP, as required by regulations implementing the federal Clean Water Act, 40 C.F.R. § 35.917-5, and the Water Pollution Control Act, D.C. Official Code § 8-103.06(i). WASA instituted a full-scale public participation program because of the significant impact on the environmentally sensitive Potomac and Anacostia Rivers²⁰; the substantial total cost to the community or substantial increased cost to users, and significant public controversy.

Chapter 10 of the LTCP details the opportunities for significant public involvement provided by WASA. WASA established an advisory group, the Stakeholder Advisory Panel. This panel provided a formal liaison between the facilities planning advisory group, which included DOH, EPA Region III, Montgomery County and Prince George's County. WASA also conducted neighborhood meetings to discuss the plan. WASA notified ratepayers and stakeholders directly about the plan review process through educational mailers in water and sewer bills, and through the mailing of newsletters. The plan was publicized in the media, and also on the District's city cable channel. In addition, WASA provided questionnaires to the public on the LTCP, and received over 2,300 comments. Citizens were provided with information at three (3) public hearings, about and opportunities to become involved in the assessment of the District's water quality problems and needs, the identification and evaluation of locations for waste water treatment facilities, and of alternative treatment technologies and systems. Notice requirements were met as notice was given in four (4) local newspapers of general circulation thirty (30) to forty-five (45) days before each public meeting.²¹

The DOH/EHA was represented at a majority of the public meetings. Therefore, DOH/EHA has determined that WASA met the requirements of a full-scale public

participation program in the planning process of the LTCP.

We have included nine (9) attachments to facilitate your review. If you have any further questions regarding this matter, please contact Kenneth Campbell at (202) 442-5970.

Attachments (9)

1. Certification Letter dated August 28, 2003
2. EPA Combined Sewer Overflow (CSO) Control Policy dated April 19, 1994
3. Mayor's Order 98-50 dated April 15, 1998
4. DOH Organizational Order dated November 6, 1998
5. Water Pollution Control Act, D.C. Official Code § 8-103.01 *et seq.*
6. District of Columbia Water Quality Standards, 21 DCMR §1100 *et seq.*
7. EPA Combined Sewer Overflow Technology Fact Sheet (*Screens*) – September 1999
8. EPA Combined Sewer Overflow Technology Fact Sheet (*Alternative Disinfection Methods*) - September 1999
9. 40 C.F.R. § 35.917.-7

¹ DOH/ certification letter to Jon Capacasa, EPA, dated August 28, 2003 , page 1.

²Final Report LTCP, Chapter 13.3.4 and 13.4.

³D.C. Official Code § 8-103.4 states:

(a) At least once every 3 years, the Mayor shall review the water quality standards and if appropriate revise the classification of the beneficial uses of the waters and the criteria for water needed for the particular classes of beneficial uses.

(b) The classifications and the criteria shall accompany guidelines for preserving the waters for the beneficial uses and for preventing harm to the water quality.

(c) Before promulgating the classifications, criteria, and guidelines, the Mayor shall consider the environmental, technological, institutional, and socio-economic impact of applying and enforcing them.

(d) The Mayor shall regularly monitor District waters, according to their classification under subsection (a) of this section, to determine whether the water fulfills the quality standards established under this subchapter.

⁴ The Director issued the Organizational Order pursuant to the authority in the Reorganization Plan No. 4 of 1996, effective July 17, 1996 (part A of subchapter XIV of Chapter 15 of Title 1, D.C. Official Code).

⁵ Hereinafter referred to as the DOH BEQ.

⁶Primary contact recreation - those water contact sports or activities which result in frequent whole body immersion and/or involve significant risks of ingestion of the water.

⁷Secondary contact recreation - those water contact sports or activities which seldom result in whole body immersion and/or do not involve significant risks of ingestion of the water.

⁸ Certification Letter, page 2.

⁹ Certification Letter, page 2.

¹⁰ Certification Letter, page 2.

¹¹ Certification Letter, page 2.

¹² EPA 1994 CSO Policy, section II.B.6.

¹³Final Report LTCP, dated July 2002, Section 13.3.4.

¹⁴Final Report LTCP, dated July 2002, Section 13.3.4.

¹⁵Final Report LTCP, dated July 2002, Chapter 7.

¹⁶ The procedures outlined in the LTCP are also recognized as acceptable source control methods by the structural engineering text, Metcalf and Eddy, 1991, *Wastewater Engineering - Collection, Treatment, Disposal*, McGraw-Hill, Inc., New York.

¹⁷Final Report LTCP, Chapter 15.

¹⁸Final Report, LTCP, Section 10.2.3

¹⁹ 21 DCMR Section 1900.1 states:

The purpose of this chapter is to provide for accurate, consistent and reproducible water quality monitoring data for decisionmaking purposes. This chapter shall apply to ambient surface and ground water quality monitoring, special monitoring studies, compliance monitoring, monitoring required as a part of a permit, or to modify a permit, and self-monitoring of discharges.

²⁰ Certification Letter, page 2.

²¹Final Report, LTCP, Section 10.2.1.