

## **COMMITTEE'S PLAN OF ACTION**

**November 2, 2011**

### **I. PREAMBLE**

On September 9, 2011, the Court entered an Opinion and Order that created this Root Cause Committee to review barriers to short and long-term compliance. Pursuant to that order, this Committee was given sixty days to develop a plan and present that plan to the Court for its consideration. While the Committee was bound by a Confidentiality Order to its internal process, the members of the Committee were permitted to solicit and receive input from various sources with knowledge of the Detroit Water and Sewerage Department (hereinafter "DWSD" or "the Department") operations and utility operations more generally. Specifically, the Committee received input from the following sources:

- The Detroit City Council
- The Board of Water Commissioners
- DWSD Management Staff
- Union Representatives
- Management-side Labor Counsel
- Industry Professionals
- Current DWSD Vendors
- Rate Consultant
- Regulatory Agency Input

The Committee had available and reviewed the historical reports prepared on the Department's root cause issues. After careful study of the problems and based on our meetings, our review of the Findings of Facts by the Parties, by the Court through its own findings contained in its Opinion and Order of September 9, 2011 through our review of various studies and reports contained therein, the Committee has determined that there are essentially five root cause issues which must be addressed in order to allow DWSD to achieve accountability and long-term compliance with state and federal laws. The five areas of concern we will address with more specificity below include:

- Human Resources
- Procurement
- Law
- Finance
- Rates

It is important to note that the changes recommended by the Committee in these

areas are significant, but critical to changing the environment of non-compliance at DWSD. It is equally important to note that **these changes do not contemplate DWSD becoming a separate entity**. That is to say, **DWSD, and all of the assets of the DWSD, shall remain a department of the City of Detroit**, despite any changes in structure or governance recommended by this Committee.

This Committee's recommended Plan of Action ("the Plan") is organized into 3 main categories: Governance, Legal Barriers, and Transition Issues. In putting this Plan together, the Committee has attempted to respond to all known root causes and provide recommended solutions. However, in recognizing that the Court's judicial relief must be as minimally intrusive as possible to achieve long-term compliance, we believe that there may need to be additional changes made in the future, possibly through a second-phase plan once we have the ability to work with the implementation of this Plan.

## **II. GOVERNANCE**

The structure of DWSD is essentially a unitary department whose water and wastewater systems are currently managed and operated by the City of Detroit as a department of city government, although managed as a separate enterprise fund. The DWSD provides water service to less than four million people in Detroit and neighboring southeast Michigan communities. The DWSD also provides wastewater collection and treatment for Detroit and approximately 76 municipal suburban communities.

The combined functions of the DWSD are recommended to be broken into two divisions – operations and administration. We have examined these separate divisions in detail in order to make recommendations to address the long-term problems at DWSD and to streamline the function of both aspects of the Department.

The operations side of DWSD deals with the infrastructure and day-to-day operations of water treatment and sewage removal. The administrative component will include the functions of human resources, finance, legal and procurement services for the entire Department. These services are currently subject to the institutional procedures applied to City Departments. In general we conclude that operations can best be streamlined through recommendations in sub-paragraph (A). The administrative end of DWSD may be best addressed by streamlining the approval process in the above-mentioned key areas as outlined in sub-paragraph (C).

### **A. OPERATIONS**

#### ***(1) Divisional Structure within DWSD Administration***

DWSD shall establish an autonomous administrative structure within the Department to provide for its own divisions of Purchasing, Human Resources, Law, and

Finance. These divisions shall report to the Director of DWSD and shall not have any reporting requirements to the similar functions of the City of Detroit.

## ***(2) Procurement Policy for DWSD***

Since the Committee has determined that DWSD should be exempted from following the requirements of the City of Detroit's procurement ordinance in order to promote efficiency and ensure long-term compliance, the Committee has prepared the attached DWSD Procurement Policy to govern the procurement activities of DWSD. We recognize that the policy is a broad overview of a full procurement process and may need to be expanded to be fully implemented by the Department. At the same time, we understand that this policy will ultimately require formal adoption by the Board of Water Commissioners at a later time, consistent with the parameters we have laid out.

## ***(3) Immediate needs for Human Resources***

### **(a) Employees Covered by Collective Bargaining Agreements**

The Committee reviewed the historical reports referenced earlier which discussed the root cause issues of non-compliance. It is evident from the various historical reports, and current conditions, that certain CBA provisions and work rules have limited DWSD from maintaining long-term environmental compliance. These issues, along with others, at least contribute to not achieving and maintaining long-term compliance by limiting manpower and workforce flexibility.

The Acting Director of DWSD submitted to the Committee a report on root cause problems and solutions. That report also provided recommendations for specific collective bargaining agreement (hereinafter "CBA") and work rules changes. The Department requested relief from specific items across all CBAs. In particular, Appendix 12 of the Plan was reviewed and discussed. The Appendix listed approximately 30 specific provisions and changes in the AFSCME CBA and seeks to apply similar changes to all the CBAs that apply to DWSD employees.

The Committee was aware that there are various approaches to addressing the concerns referenced in that report that fall along a scale of intrusiveness including: (i) the approach provided in State legislation for emergency managers that would terminate all collective bargaining agreements; (ii) suspension of the duty to bargain for 5 years as provided in certain State emergency laws; (iii) establishing a regional authority as a new employer for DWSD employees; (iv) terminating the workforce so DWSD would start with a blank slate; (v) outsourcing plant operations so corporate representations or warranties of compliance could be enforced; and (vi) ordering that negotiations take place to address the various identified problems.

The Committee spent considerable time discussing the option of negotiating the changes requested, or that may be necessary, with the 20 unions that represent the DWSD workforce.

The Committee agreed that all collective bargaining agreements that apply to DWSD workforce shall remain in force. However, the Committee agreed that certain changes to the CBAs need to occur. The Committee could not agree on how to achieve the desired changes.

The problem areas that were identified and require solutions are:

1. Effective employee training programs, employee assessment programs, and apprenticeship training programs should be developed and provided for by DWSD.
2. DWSD should act on behalf of the City of Detroit to have its own collective bargaining agreements after July 1, 2012. In other words, agreements with DWSD should not include employees of other City of Detroit departments.
3. DWSD should adopt a separate seniority system for the department that does not provide for rights across city of Detroit departments. This should also eliminate the confusion caused by bumping rights from other departments into DWSD.
4. Any prohibition on subcontracting or outsourcing should be eliminated from the CBAs. DWSD must be free to explore all available avenues to achieve long-term compliance.
5. Excused hours from work for union activities should be limited to attending grievance hearings and union negotiations, with prior notification to DWSD Management.
6. The timeline on use of past discipline should be three years.
7. The number of DWSD employee classifications should be reduced to the minimum identified by the Director to assure flexibility and long term compliance.
8. Promotions should be at the discretion of management and based upon the individual's skill, knowledge and ability, and then taking seniority into account.
9. Past practices on operational issues should not limit operational changes initiated by management.

10. Overtime should be assigned to employees most capable of performing work in a classification, at the discretion of management.

It was recognized that the provisions of all the CBAs would have to be modified with respect to each of the issues listed above, and ancillary provisions interpreted consistent with these changes. Any work rules, written or unwritten, which exist that are contrary to these changes would have to be terminated.

While the Committee was able to identify the above CBA and work rule challenges, it could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required.

(b) DWSD Executive Management Team

DWSD shall develop an Executive Management Team of exempt non-union, at-will positions. The members of the Executive Management Team, other than the Director of DWSD, shall serve at the pleasure of the Director of DWSD and may be removed with or without cause. The Executive Management Team cannot exceed ten percent (10%) of the total workforce of DWSD. This Executive Management Team is in addition to the three technical advisors to the BOWC, as outlined the Court's stipulated order of February 11, 2011. Nothing in this Plan will prevent the Director of DWSD from hiring non-employees of DWSD to perform some or all of the services of the Executive Management Team if that is deemed necessary to improve the operations of DWSD to ensure Long-Term Compliance.

The DWSD Executive Management Team should develop a formal succession plan to be presented to the BOWC for its review and approval.

**B. RATES**

(1) Approval Authority

In the past, City Council has been required to approve water and sewerage rates charged by DWSD. The City Council assumed this responsibility pursuant to MCL §117.5e which provides that a municipal water or sewerage system:

which serves more than 40% of the population of the state shall hold at least 1 public hearing at least 120 days before a proposed rate increase is scheduled to take effect and that [a] final vote by the governing body of the city to implement a proposed rate increase shall not be taken until the hearings provided for in this subdivision are concluded and the results of those hearings are considered by the city's governing body.

M.C.L. § 117.5e(b).

According to the most recent census data collected by the U.S. Census Bureau, the City of Detroit has received documentation that DWSD does not service more than 40% of Michigan's population. As a consequence, City Council no longer need to approve water and sewerage rates for DWSD customers pursuant to State law, City Ordinance, or City Charter.

It is, however, the recommendation of the Committee that retail rates for the citizens of the City of Detroit shall still require City Council approval, only after a public hearing for City of Detroit residents. All wholesale rates will be fully and finally approved by the Board of Water Commissioners.

(2) Additional Considerations

The Committee spent a substantial amount of time discussing the need to create an incentive within Detroit and DWSD to support making difficult decisions that would promote improving the efficiency of DWSD. This Efficient Compliance Payment concept would allow for a calculation and cost sharing whereby the savings associated with a reduction in operating expenses is shared by DWSD, the City of Detroit, Staff of DWSD, and the customers of DWSD. This type of arrangement will help focus everyone's efforts on the ultimate goal of insuring long-term compliance, continually improving efficiency of operations, and ultimately reducing the administrative component<sup>1</sup> of the rate expense. The Acting Director of DWSD presented a detailed proposal on computing the Efficient Compliance Payment at Appendix 13 of the attached report.

Additionally, the transition to a more autonomous DWSD will result in a substantial reduction in chargeback revenues to the City of Detroit from the operations of DWSD. This is the result of DWSD no longer reimbursing the City of Detroit for the cost of staff associated with City Departments within Finance, Procurement, Law, Human Resources, and Information Technology Services. Since the ability of DWSD to hire its own staff to fulfill these functions will be quicker than the City's ability to reduce its staff and expenses commensurate with those changes, a budget deficit will be created within the City that the Committee feels needs to be addressed. Therefore, the Committee

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<sup>1</sup> It is understood that wholesale rates consist globally of two components: Capital Expenditures and Operating Expenditures. Since Capital Expenditures are tied to investing in the core business of the utility, it is not helpful to the long-term interest of DWSD to provide an incentive to lower the Cap Ex commitment. Rather, the incentive should rest on reducing the administrative expenses which are solely under the control of DWSD management.

discussed the need for a temporary, time-limited, transition payment to the City of Detroit to prevent the implementation of this plan from causing a deficit within the City of Detroit's General Fund. The Committee was unable to reach consensus on the amount and the number of years needed for the transition payment at this time.

Further, the Committee agreed that there was a need to explore Payment in Lieu of Taxes arrangements for DWSD that would mirror agreements in place with other public utilities throughout the State of Michigan.

While the Committee believes that these concepts are all important and that some combination of these concepts is critical to the long-term viability of this Plan, the Committee was unable to achieve consensus on a recommended path due to the complexity of the concepts under consideration and the amount of research required to complete this task in the time available.

### **C. ADMINISTRATIVE - APPROVAL AUTHORITY**

In order to assist the City and DWSD in achieving substantial compliance, we have determined that there is a need to streamline the approval process for various activities within the DWSD operations and create a more direct culture of accountability within the staff at DWSD. To achieve this objective, the Committee has agreed to reduce, and in many instances, eliminate, redundant approval processes and provide for clearer lines of approval. The approval authority we propose is divided along two lines: final approvals to be housed within DWSD and final approvals to be held by the Detroit City Council. These approvals are outlined in greater detail below.

As previously stated, the DWSD will remain a department of the City of Detroit. Nevertheless, there is an efficiency of operations need to allow final approval authority to vest in the Director of DWSD with respect to the signing of several types of legal documents on behalf of DWSD's operations. Therefore, it is recommended that the Director of DWSD be vested with delegated authority to sign documents of the type referenced within this Plan and that the delegated authority shall include the right to bind the City of Detroit to the terms of the agreements contained therein.

In addition to all powers currently vested in DWSD pursuant to the City Charter, City Ordinances, State Law, and the By-Laws for the Detroit Water and Sewerage Department Board of Water Commissioners ("BOWC"), DWSD, acting through its Director upon authorization by the Board of Water Commissioners, shall have final authority to approve the following types of documents without any further approvals from other departments, board, agencies, or offices of the City of Detroit:

- Legal Settlements and Claims paid by DWSD;
- Collective Bargaining Agreements for employees of DWSD;

- Terms and Conditions of Employment for employees of DWSD;
- The Budget for DWSD (Subject to approval of Rates) as outlined above;
- Wage scales for DWSD employees, subject to City Council's veto rights as outlined below; and
- Those procurements not covered by the Board of Water Commissioners' and the Detroit City Council's approval outlined in the attached DWSD Procurement Policy.

The Committee also examined the process for the recruitment, hiring, and dismissal of the DWSD Director and believes that there is an opportunity to improve that process. At the same time, we recognize that efforts to fill the current vacancy in the Director position is well on its way to completion and that a new process for recruitment should not impact the current search. With this in mind, we recommend that the process be amended as follows:

- (a) A Director search committee should be established that will include representation from the Mayor's office, a member of the Board of Water Commissioners selected by the Board and who is not a resident of Detroit, and a member of the Detroit City Council appointed by the President.
- (b) The hiring of the Director should be unchanged from the current process.
- (c) The removal of the Director should require either:
  - a. Five (5) votes by the Board of Water Commissioners; or
  - b. A two-thirds (2/3) vote of the Detroit City Council and the approval of the Mayor.

The Detroit City Council, as the legislative branch of the City of Detroit, recognizes the need to increase accountability for performance within DWSD in order to achieve long-term compliance with the Clean Water Act. As a result, the role of the Detroit City Council in approving actions of DWSD will be more targeted to broader policy issues. Specifically, the Detroit City Council will retain authority to approve the following items, subject to ratification by the Mayor:

- DWSD Rate approval as outlined in the Rate Section, above,
- Approval of the final City of Detroit Budget, which shall incorporate the DWSD enterprise fund budget as an attachment. However, there shall not be a need for DWSD to appear for a budget hearing as the components of the budget are approved within the Rate approval vote that has already taken place prior to the budget approval.
- Salary ranges for City employees are contained within a document commonly known as the "white book." With respect to non-represented employees of DWSD, the rates shall be deemed approved by the Detroit City Council if they are not rejected by a majority vote of the Detroit City Council within 30 days of their being presented to the Council.



In addition to the specific approval authority cited above, the Detroit City Council will continue to serve an important role in monitoring the overall performance of the Detroit Water and Sewerage Department. The Director of DWSD shall provide the City Council with copies of its quarterly MDEQ reports on the status of its implementation of the compliance program as required by Section 3.10 of the ACO and shall be required to make appearances before the Detroit City Council no less than semi-annually to explain efforts to remain in compliance with the ACO. The monitoring role shall include requesting reports on environmental compliance, scheduling meetings with the DWSD Director and DWSD staff, and reviewing DWSD's compliance with the court orders.

### **III. Legal Barriers**

One of the key areas of concern throughout the Court's oversight of DWSD's non-compliance with the Clean Water Act is the existing City of Detroit procurement process. While this Committee does not have the time needed to perform an exhaustive review of the existing procurement process and to make specific recommendations to modify that system, it is clear that the current process has failed DWSD. In order to achieve long-term compliance, this committee agrees that DWSD will need to be relieved of the requirement to fully comply with the existing provisions of the City of Detroit's Procurement Ordinance. As a by-product of this decision, it is also clear that DWSD cannot be expected to fully comply with the Charter provisions related to Privatization (Charter Section 6-307).

While we agree that DWSD should be free from the language of those laws outlined above, as currently written, we do believe that several of the key concepts must still control the operations of DWSD's procurement process. That discussion will occur under the Procurement Section of this report.

There are two provisions of the Detroit City Charter that speak to the approval authorities for the sale of property of DWSD. After considerable discussion in the Committee on DWSD's need to find better ways to operate in an efficient and effective manner and adapt the system to meet the needs of the current customer base as opposed to the capacity that the system was originally designed to support, the Committee felt that there was a need to seek relief from Charter Sections Charter 7-1504 and Charter 4-112. The Committee suggests that the sale of property by DWSD shall be overseen by the Detroit City Council as provided by the procurement policy. Therefore, the Committee suggests that the sale of property within DWSD should be solely governed by the provisions of the proposed procurement policy attached to this Plan.

### **IV. TRANSITIONAL PLAN**

In order to assist DWSD in obtaining the administrative support services that it needs to insure accountability in order to achieve long-term compliance, it is agreed that DWSD will be free to seek its own new staff in filling the newly created administrative

positions within DWSD's Administrative Division with respect to HR, Finance, Law, and Procurement. Existing staff within City of Detroit Departments of Finance, Budget, Human Resources and Labor Relations, and Law that support the activities of DWSD will be addressed through the City of Detroit's traditional process for addressing staffing reduction or bumping decisions, consistent with this order.

Finally, the Committee recognizes that we may need the assistance of professional labor and bond attorneys to help us navigate the transitional issues associated with Collective Bargaining Agreements and existing and/or future Bond transactions within the context of the Governance and Approval recommended changes outlined above. It is our intent to vest the Director of DWSD with the exclusive authority to sign CBAs on behalf of DWSD for its employees and to negotiate the terms and conditions of employment for DWSD employees. Equally, it is our intent to support all existing bond commitments that have been made by the City of Detroit as well as to avoid impairing DWSD's ability to issue future bonds to support our Capital Expenditure needs.

At the end of this process, we would recommend that the Court's final order instruct the Board of Water Commissioners to amend their By-laws to make them consistent with this Plan as we have outlined.

We the undersigned, hereby submit this Plan, as presented, to the Special Master upon our recommendation that the Court accept this proposal.

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Chris Brown  
Chief Operating Officer  
Mayor's Office

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James Fausone  
Board Member  
Board of Water Commissioners

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Gary Brown  
President Pro Tem,  
Detroit City Council

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Charles Pugh  
President  
Detroit City Council

Attachment