



NATURAL RESOURCES DEFENSE COUNCIL

together with
**AMERICAN RIVERS · ANACOSTIA RIVERKEEPER
ANACOSTIA WATERSHED CITIZENS ADVISORY COMMITTEE
ANACOSTIA WATERSHED SOCIETY · AUDUBON NATURALIST SOCIETY
EARTHJUSTICE · CHESAPEAKE BAY FOUNDATION
GROUNDWORK ANACOSTIA RIVER DC · POTOMAC CONSERVANCY
POTOMAC RIVERKEEPER**

July 8, 2013

District Department of the Environment
Attn: Brian Van Wye, Natural Resources Administration
1200 First Street, NE, 5th Floor
Washington, DC 20002
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Re: Second Proposed Stormwater Rule Comments

The Natural Resources Defense Council (NRDC) appreciates this opportunity to provide comment to the District Department of the Environment (DDOE) on its second proposed stormwater rule. NRDC is a national non-profit environmental organization that has long advocated for improved stormwater management in the Washington, DC region and nationwide. These comments are additionally joined by American Rivers, Anacostia Riverkeeper, Anacostia Watershed Citizens Advisory Committee, Anacostia Watershed Society, Audubon Naturalist Society, Chesapeake Bay Foundation, Earthjustice, Groundwork Anacostia River DC, Potomac Conservancy, and Potomac Riverkeeper.

We sincerely appreciate DDOE's openness and transparency throughout this lengthy rulemaking process, and we hope that the final regulations will benefit from multiple rounds of input from many diverse stakeholders. The environmental community of Washington, DC continues to support DDOE's efforts to develop an innovative and cost-effective method of implementing stormwater controls required by the District's municipal separate storm sewer system (MS4) permit.¹ The increased stormwater retention driven by these new regulations will help to diminish the harmful impacts of polluted runoff on our rivers and streams. Installing retention capacity while property is being developed or redeveloped is a critical effort given that

¹ For all subsequent references to the MS4 permit, *see* U.S. EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221 (effective Oct. 7, 2011, modified Nov. 9, 2012), available at <http://www.epa.gov/reg3wapd/npdes/dcpermits.htm>.

the life cycle of a developed site can span half a century. Moreover, the District's stormwater regulations may not be revised again for many years. We are aware of the opportunity that this rulemaking represents and are determined to see DDOE take full advantage of it. We believe that DDOE wants this program to be robust as well so that the District can serve as a positive model for other cities upgrading their own stormwater management programs.

The second proposed draft of the regulations contains some positive changes, and its preamble sets forth some good ideas that DDOE should commit to pursue. Yet the fact remains that the bulk of the concerns we have raised on previous drafts have been inappropriately rejected, and in fact, this new proposal contains several negative developments that further undermine the ability of these rules to meet legal requirements.

DDOE Should Retain Certain Positive Changes In The Final Promulgated Regulations

- Duty To Notify DDOE If A Property Containing An SRC-Generating Practice Is Sold Or Transferred

We support DDOE's decision to strengthen the provisions relating to maintenance of SRC-generating practices, specifically the new provision in Section 531.9(g) that requires applications for SRC certification to include a signed promise from the owner of the property to notify DDOE if the property where the practice is located is transferred or sold during the certification period.

This requirement is a positive development compared to the previous draft because it puts DDOE in a position to look out for potential maintenance failures after the property changes hands, and to take corrective action if such failures should occur. These steps are necessary because DDOE must ensure that all retention represented by certified SRCs actually occurs in order to meet the MS4 permit's retention requirement.

However, a declaration of covenants stating the property's maintenance responsibilities would better guarantee this result because it would put the property's subsequent owners on notice of the obligation, as the DDOE notification requirement does not. While DDOE has already rejected our suggestion to impose such a recordation requirement on properties containing SRC-generating practices, we continue to believe that it would be preferable to put subsequent owners on notice of the obligation in the first instance rather than relying on DDOE to take corrective action after the fact, as described in the response to comments document.² At minimum, though, DDOE should retain the current notification requirement in section 531.9(g) in the final regulations.

² District Department of the Environment, *Response to Comments on Notice of Proposed Rulemaking – Stormwater Management, and Soil Erosion and Sediment Control – 59 CDR 009486 (Aug. 10, 2012)* at 60 (June 2013), available at http://ddoe.dc.gov/sites/default/files/dc/sites/ddoe/page_content/attachments/Response%20to%20Comments%20on%20Proposed%20SW%20Rule.pdf.

- Application Of Unused SRCs To Unfulfilled Retention Obligations

We support DDOE’s decision to specify in Section 527.16 that, when property owners fail to satisfy their offsite retention obligations, DDOE may apply unused SRCs owned by that property owner to the obligation. This provision will help to ensure that necessary retention is accounted for even when property owners fall out of compliance and fail to timely pay the in-lieu fee or other penalties that DDOE assesses.

- Specification That Retrofits Installed Pursuant To Legal Requirements Cannot Generate SRCs

We support the inclusion of the specific prohibition, in Section 531.3(a)(3), against certification of SRCs for practices that are installed to comply with legal requirements relating to stormwater management. As explained in our comments on previous drafts of these regulations, DDOE must not allow projects to be double-counted toward satisfaction of multiple obligations which have been imposed independently of each other. In particular, the two requirements specifically mentioned in this section—combined sewer overflow (CSO) reduction and implementation of the Chesapeake Bay TMDL—will require significant amounts of stormwater reduction; the District will need to avoid underperformance due to double-counting if it is to succeed in these efforts.

DDOE Should Commit To Undertake Several Actions That It Proposes In The Preamble

- Building Internal Capacity At DDOE

We strongly support the capacity-building efforts that DDOE describes in the preamble to the proposed regulations. Implementing the new credit trading program will be an enormous undertaking for the Department due to its scope and complexity. DDOE must take steps now to procure the staff, training, and other tools it needs to ensure that the program functions smoothly. Grant agreements with non-profit organizations may be an efficient means of building capacity, although we urge DDOE to ensure that any such arrangements hold third party organizations to the same standards as DDOE’s own employees, and to confirm that DDOE itself is ultimately responsible for the performance of the program.

- Creating A Portfolio Of Priority SRC-Generating Projects

DDOE should follow through with its proposal on page 13 of the preamble to identify a portfolio of potential SRC-generating retrofit projects on public property that would be available for private developers to carry out. This portfolio could prove very useful to DDOE and private developers alike. It would provide developers with a ready-made list of available locations to install revenue-generating retrofits. It would also allow DDOE to direct stormwater retrofits to areas that need them most, like neighborhoods with lower rates of redevelopment and therefore

less green infrastructure implementation; areas experiencing pollution “hot spots”; or watersheds lagging behind others in water quality improvement.

We encourage DDOE to add retrofit locations identified in the Anacostia Restoration Plan to any portfolio that it develops.³ The Anacostia River faces the steepest uphill battle toward restoration of any water body in the District, and the land area in its contributing watershed includes some of the Wards with the highest percentages of minority and low-income residents. As a result, implementation of ARP projects would further both water quality and environmental justice goals.

- Retiring SRCs to Help Meet Water Quality Objectives

We support DDOE’s proposal on page 13 of the preamble to purchase and retire SRCs generated by newly installed retention capacity to help meet water quality objectives. Retiring unused SRCs would lead to retention practices being installed and maintained outside of the context of regulated projects’ compliance obligations. Essentially, it would allow DDOE to purchase “extra” retention capacity from private parties.

DDOE could use these SRCs to meet its retrofit requirement under the MS4 permit, which directs the District to retrofit 18 million square feet of impervious surfaces during the permit term,⁴ as long as the credits are not needed to compensate for any retention shortfalls that are caused by regulated parties falling out of compliance or by the trading program leading to less retention than required under the permit. In order to use these SRCs in fulfillment of the retrofit requirement, DDOE would have to verify that their use would satisfy the permit’s other conditions for retrofits, including its performance metrics and the requirement to estimate retrofit projects’ pollutant load and volume reductions.⁵

DDOE Should Eliminate Certain Negative Changes From The Proposed Rule And Retract Various Proposals From The Preamble

- A Longer Transition Period Applying To Additional Projects

As we detailed in our comments on the revised rule, the transition period DDOE has proposed unlawfully violates the terms of the District’s MS4 permit. The second proposed rule, rather than eliminating or shortening the delay period as we have urged, would lengthen the transition for substantial improvement projects and would allow additional categories of projects to be grandfathered under the old stormwater management regulations. We reiterate our strong objections to this proposal on legal and practical grounds and reincorporate our previous

³ Anacostia Watershed Restoration Partnership, *Anacostia River Watershed Restoration Plan* (2010), available at <http://www.anacostia.net/plan.html>.

⁴ MS4 Permit at 4.1.5.4.

⁵ *Id.* at 4.1.5.1, 4.1.5.3.

comments by reference. This implementation delay would contravene the MS4 permit's July 22, 2013 implementation deadline and cause the District to miss its Bay TMDL two-year milestones.

- Broader Exemptions From The Regulations

DDOE does not have the authority to offer blanket exemptions from the regulations for projects that are unrelated to increasing stormwater retention capacity in the District, as we explained in our comments on the revised rule. The text of the second proposed rule appears to remedy the revised rule's improper exemptions by placing all categories of exempted projects within a subsection (a) of section 517.2, which specifies that projects may be exempted only if they are conducted solely to retain stormwater. However, DDOE recently announced that this "fix" was a typographical error and that project category (6) – "a utility project that is being conducted solely to protect or restore surface water quality, including projects for improving wastewater treatment and reducing CSOs" – was actually intended to be a separate subsection (b) not subject to the stormwater retention criterion of subsection (a).⁶

We reiterate our opposition to a broad exemption for DC Water infrastructure projects and reincorporate our previous comments by reference. Not only is this exemption beyond DDOE's legal discretion, but it is also completely irrational given that DC Water needs additional stormwater retention capacity to be installed in the District in order to reduce combined sewer overflows. DDOE should finalize section 517.2 of the second proposed rule as written in the second proposed rule and *not* as it would appear in the superseding rule.

- Affirmatively Encouraging Pre-Existing BMPs To Apply For Credit

DDOE states on page 12 of the preamble to the second proposed rule that it intends to conduct outreach to owners of property where existing retention BMPs are located to encourage them to apply for certification of SRCs. As we noted in our comments on the revised rule, certification of credits for existing retention capacity violates the MS4 permit's retention requirement because it will lead to insufficient additional retention beyond baseline conditions. We opposed DDOE's proposal to allow existing BMP owners to apply for credit, and we now further oppose DDOE's new proposal to seek them out and actively encourage them to apply.

DDOE notes on page 18 of the preamble that there is roughly 1.35 million gallons of existing retention capacity in the District, which could generate 4 million SRCs if all apply for three years of credit at the outset. If SRC demand is on the low end of DDOE's projected range (0.5 to 10.4 million SRCs in 2015), existing BMP-generated credit could meet all demand, and *no* new retention capacity would need to be installed in the early stages of the program. This outcome clearly runs contrary to the intent of the MS4 permit's retention requirement and associated off-site mitigation provisions.

⁶ Email from Brian Van Wye, DDOE, to Interested Stakeholders (June 28, 2013); *see also* 60 D.C. Reg. 9738 (June 28, 2013).

We understand that DDOE has stated policy reasons why it believes certification of SRCs for pre-existing BMPs is desirable, but these rationales cannot override existing legal requirements. We hereby reiterate our objections to this proposal and reincorporate our previous comments on this point by reference.

- Presuming Without Factual Basis That Projects Within The Anacostia Waterfront Development Zone (AWDZ) Will Qualify For Off-Site Mitigation

As DDOE rightly notes in the preamble, the Anacostia Waterfront Environmental Standards Amendment Act of 2012 requires DDOE to consider individual site conditions for a project within the AWDZ before allowing the use of off-site retention.⁷ Specifically, the Act permits the use of off-site mitigation for AWDZ projects only if “site conditions, including soil or groundwater contamination, local geology, or impacts of surrounding landowners, limit the feasibility or appropriateness of on-site stormwater management.”⁸

Contrary to DDOE’s statements on page 23 of the preamble, the statute does *not* direct DDOE to consider “appropriateness” as a general concept, but rather directs the Department to determine whether “site conditions...limit the feasibility or appropriateness” of on-site retention. In other words, “appropriateness” in this context is tethered to the site-specific conditions of each individual project. Under this language, DDOE does not have the authority to approve the use of off-site mitigation solely on the basis of its belief that off-site retention is generally a good idea.

Further, DDOE provides no factual basis for its assertion that “evidence will very often demonstrate [that] the feasibility or appropriateness of on-site stormwater management is limited.” If DDOE intends to allow an AWDZ project to use off-site mitigation, it must apply the law as written and perform a case-by-case analysis of the feasibility of on-site retention without relying on broad assumptions. It would be inappropriate and misleading for DDOE to give regulated projects within the AWDZ the expectation that they will automatically be granted leave to perform off-site mitigation. No such presumption exists in the law, and DDOE lacks the authority to invent one.

DDOE Must Address Our Fundamental Concerns With The Credit Trading Program To Ensure That The Retention Standard Will Be Met

In our comments on the original proposed rule and again on the revised rule, we set out in detail the ways in which DDOE must strengthen the credit trading program in order to comply with legal requirements. We will not repeat those arguments here, but simply refer DDOE to our previous sets of comments, the contents of which remain applicable in the absence of responsive modifications to the regulations. We emphasize that many of our concerns have been echoed by

⁷ D.C. Code § 2-1226.36(a)(1).

⁸ *Id.*

the U.S. Environmental Protection Agency, Region III, which is the agency responsible for ensuring compliance with the MS4 permit.⁹

Underlying our concerns about each individual program element is the fundamental principle that this trading program must be structured in such a way that DDOE – and the public – can be certain that the 1.2-inch retention standard will be achieved. The current structure of the program does not provide this certainty.

We recognize that a combination of on-site and off-site retention has the potential to achieve environmental benefits beyond what a strict on-site program can provide. However, with a complex trading program like the one DDOE has decided to establish, there must be safeguards in place to ensure that the desired results will be achieved. Thus far, DDOE has rejected our calls for such safeguards because it has chosen to prioritize administrative and economic certainty over environmental certainty. This prioritization is apparent in the response to comments document, which contains many examples of unfounded assertions about how DDOE expects the program to function, along with policy considerations that are irrelevant to permit requirements.¹⁰ These responses do not give us confidence that the credit trading program will achieve its intended environmental outcomes.

DDOE states throughout the response to comments document that it will manage the program adaptively if the loopholes embedded in the trading program, such as indefinite credit banking, create retention shortfalls in the future.¹¹ We urge DDOE to take advantage of the opportunity *now* to structure the program appropriately, rather than forcing itself to adaptively manage after the fact once problems have already arisen. DDOE has both the power and the legal responsibility to avoid such a situation.

⁹ See, e.g., DDOE, *Response to Comments on Notice of Proposed Rulemaking – Stormwater Management, and Soil Erosion and Sediment Control* at 61 ¶ e (summarizing EPA comment suggesting that the MEP provision for right-of-way projects should expire after a period of time), 62 ¶ j (summarizing EPA comment expressing concern that off-site practices were exempt from the requirement to record a declaration of covenants), 62 ¶ k (summarizing EPA comment stating that allowing SRCs to have an indefinite lifespan is inconsistent with the Chesapeake Bay TMDL).

¹⁰ See, e.g., *id.* at 45 (speculating that credit banking may not lead to early retention because of economic incentives), 45 (speculating that early retention and delayed retention may cancel each other out), 46 (arguing that banking should be allowed because imposing time limits would complicate participation and administration), 47 ¶ d (justifying certification of SRCs for pre-existing BMPs based on policy considerations).

¹¹ See, e.g., *id.* at 44 ¶ c (“DDOE intends to track the extent to which SRC trading results in retention time lags, and based on that, DDOE will consider options for adaptively managing the SRC trading program and/or using other programmatic tools to compensate.”).

In conclusion, we urge DDOE to revise the rule in accordance with the recommendations contained herein before the rule is finalized. Thank you for the opportunity to provide these comments. We would be glad to further discuss them with you at your convenience.

Sincerely,



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