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District Department of Environment  
Attn: Brian Van Wye, Natural Resources Administration  
1200 First Street, NE, 5<sup>th</sup> Floor  
Washington, D.C. 20002  
[Brian.VanWye@dc.gov](mailto:Brian.VanWye@dc.gov)

**Re: Revised Stormwater Rule Comments**

Dear Mr. Van Wye:

DC Appleseed appreciates this opportunity to provide comment to the District Department of Environment (DDOE) on its Proposed Revised Stormwater Rule (Revised Rule). Founded in 1994 by a group of public-spirited lawyers, DC Appleseed is a nonprofit research and advocacy organization dedicated to addressing important public policy questions facing the Washington region. As you are aware, DC Appleseed has long advocated for the District to take steps to improve the health of the Anacostia River, including policies to reduce one of the river's biggest sources of pollution – stormwater runoff. DC Appleseed's comments on the Revised Rule were developed with support from pro bono attorneys from the Washington offices of Covington & Burling LLC; Fried, Frank, Harris, Shriver & Jacobson LLP; and Weil Gotshal & Manges LLP.

DC Appleseed continues to support the Revised Rule's requirement for major development and renovation projects to retain stormwater, as we believe such retention is critical to protecting the Anacostia River and the District's other waterways from further degradation as development occurs. Our public comments on the first draft of the Proposed Stormwater Rule, submitted to DDOE on November 8, 2012, made several suggestions for improving the implementation and enforcement of the Rule. Many of our suggestions were not addressed in this Revised Rule. We do not reiterate all of our initial suggestions in this letter. However, we urge DDOE to respond to those suggestions so we can better understand why they were not adopted.

Our comments within address the following three issues that we believe are critical to the success of the Revised Rule:

1. A method for DDOE to be notified when ownership changes on properties generating Stormwater Retention Credits (SRCs);
2. The need for a publicly available annual report on the SRC program; and
3. A revision of DDOE's proposal to transition the Rule to full effectiveness.

**1. Notifying DDOE When Ownership Changes on an SRC-Generating Property**

Currently, the Revised Rule and the Draft District of Columbia Stormwater Management Guidebook (Guidebook) provide that SRC owners have an obligation to maintain certified SRCs during the 3-year period for which the SRCs are certified; upon failure to do so, the SRC owner may have the SRC forfeited, may have to purchase SRCs in the amount of the failure (which the Department will then retire), or may

have to pay an in-lieu fee to make up for the failure. See Revised Rule § 532.3, Guidebook Section 7.4. We believe that these are important measures to ensure that owners of SRC-generating properties are meeting their obligations during the three-year period for which SRCs are certified. However, we are concerned that ownership transfers of SRC-generating properties during the three-year certification period may result in failures to properly maintain the retention capacity on the property. For example, SRC owners have no obligation to record land covenants to reflect their ongoing maintenance obligations, and a subsequent purchaser of the property may be unaware of these maintenance obligations.

A simple solution that would significantly mitigate this concern would be to require the owners of SRC-generating properties to notify DDOE in the event of a transfer of the property. This would allow the Department to take measures under its current authority to ensure that the SRC-generating retention capacity is properly maintained on an ongoing basis — for example by sending a letter to the new property owner confirming the ongoing maintenance obligation or by inspecting the property. Such a reporting requirement would also create an incentive for property sellers to inform purchasers of any ongoing maintenance requirements imposed on the property.

Accordingly, we propose revising § 531.9 of the regulations to include a new paragraph (g), as follows:

531.9 A complete application for SRC certification shall include: . . .

(g) A commitment by the owner of the retention capacity to notify the Department upon any transfer of the property on which such retention capacity is situated during the period for which SRCs are certified pursuant to the application.

## **2. Issuing a Publicly-Available Annual Report on the SRC Program**

In our November 8, 2012 comment letter, we recommended that the Proposed Rule be amended to require the Department to provide an annual report on the SRC program. We also listed certain information that we thought would be particularly important to include in such a report, such as the aggregate number of Off-Site Retention Volume (Offv) gallons per year required to be fulfilled through the purchase of SRCs and the aggregate number of gallons of retention actually achieved. Unfortunately, the Revised Rule and Guidebook do not include this recommendation. We would like to reiterate our belief that such a report would serve a critical role in the success, transparency, and continuation of the stormwater retention program.

The SRC program is a central component of the Revised Rule. While an in-lieu fee option is available, it is our understanding that ideally, most, if not all, of the Offv would be accomplished through SRCs. Yet the SRC program will be an entirely new option, and to our knowledge, would be the first SRC trading program in the nation. We believe an annual report on the SRC program is critical given the central role that SRCs are anticipated to play in meeting the 1.2-inch retention requirement – and the novelty and complexity of the program.

Such a report would allow regulators and a variety of stakeholders to:

- Confirm that SRCs are achieving the amount of retention required; and

- Track the environmental impacts of the SRC program on the District’s different waterbodies.

In addition to achieving the desirable goal of transparency, an annual report would provide a streamlined process for DDOE to issue information on its SRC program to interested parties, including the U.S. Environmental Protection Agency (EPA), other jurisdictions that may want to replicate the program, and local stakeholders. Issuing an annual report, instead of having to produce identical or substantially similar information at the request of multiple stakeholders throughout the year, could reduce DDOE’s workload. While the benefits of the report would thus be substantial, we believe that the burden such a report would place on the Department would be negligible. Since DDOE will maintain records of all of the reported information, we do not expect the proposed report to require much time or expense to generate.

Therefore, we propose adding § 527.17 to the regulations as follows:

The Department shall make available to the public annually a report on the SRC program. Each such report shall include the following information for each sub-drainage area or watershed:

- (a) For each year since the program’s implementation, the aggregate number of Offv gallons per year required to be fulfilled by regulated projects located in that sub-drainage area or watershed through the purchase of SRCs;
- (b) For each year since the program’s implementation, the aggregate number of gallons of retention achieved through SRC projects located in that sub-drainage area or watershed; and
- (c) Any other information the Department believes is pertinent to disclose to the public.

### **3. Revising the Proposal to Transition the Revised Rule to Full Effectiveness**

The preamble to the Revised Rule proposes an 18-month period to transition the stormwater management performance requirements to full effectiveness in three phases:

- Phase 1 (months 1-6 following Finalized Rule) allows regulated projects to comply with existing regulations;
- Phase 2 (months 7-18 following Finalized Rule) allows regulated projects to achieve the entire 1.2-inch retention standard off-site; and
- Phase 3 (month 19 on following Finalized Rule) requires regulated projects to meet the full performance standard.

We are particularly concerned with Phase 1 of the proposed transition period, as it does not seem to comply with D.C.’s municipal separate storm sewer system (MS4) permit requirements. As we stated in our November 8, 2012 comments, we believe it is critical for the Final Rule to be effective by July 22, 2013, as required by the District’s MS4 permit. Section 4.1.1 of the permit requires that “[n]o later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the [1.2-inch retention] performance standard...”. Phase 1 of DDOE’s proposed transition plan would allow projects to comply with existing regulations, which do

not require any on-site or off-site stormwater retention, for six months following publication of the final rule. Since DDOE anticipates publishing the final rule in July 2013, there will be no implementation of a 1.2" retention standard until 6 months *after* the MS4 permit deadline. We are very concerned that Phase 1 could be considered a violation of the District's MS4 permit and that the District could suffer the serious penalties associated with such a violation.

At the same time, from a practical perspective, we understand the need for a transition period to provide flexibility to projects that have already conducted significant stormwater design work prior to the finalization of the new Rule. In fact, we sent a joint letter with the DC Building Industry Association (DCBIA) and seven environmental organizations to the former DDOE Director and the Mayor's Office in May 2012 advocating for immediate promulgation of the Proposed Rule to "provide time to allow project designers to adjust to the new requirements" given the MS4 implementation deadline of July 2013.

We believe there is a solution that would provide projects already in design with maximum flexibility while still meeting the MS4 permit's 1.2-inch retention standard. Specifically, we propose that DDOE eliminate Phase 1 and make Phase 2 effective for 18 months, starting at the date the rule is finalized. The Rule would then become fully effective in month 19.

Under this proposed transition, project developers who have not designed to the 1.2-inch standard can continue to move forward with their designs and meet the 1.2-inch requirement by purchasing SRCs or paying the in-lieu fee. We do not think this proposal would be cost-prohibitive, as we would expect many major regulated projects currently in design to have incorporated some on-site retention. After all, even though DDOE has not finalized its rule, the MS4 permit with the 1.2-inch retention requirement and deadline was initially issued in October 2011.

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Thank you again for providing us the opportunity to submit informal comments on the Revised Rule. We believe the three issues addressed in our letter are critical to developing a transparent and successful Rule that complies with EPA requirements and improves the health of the District's water bodies.

Sincerely,



Walter Smith  
Executive Director



Brooke DeRenzis  
Project Director