



DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOCIATION

April 30, 2013

Mr. Brian Van Wye
Ms. Rebecca Stack
District Department of the Environment
Natural Resources Administration
1200 First Street NE, 5th Floor
Washington, DC 20002

Attention: Revised Stormwater Rule and Guidebook Comments

Submitted electronically via email to: Brian.VanWye@dc.gov and Rebecca.Stack@dc.gov

Dear Mr. Van Wye and Ms. Stack:

On behalf of the District of Columbia Building Industry Association (DCBIA) and its members, I write to comment upon the Request for Input on Revisions to the Proposed Rulemaking on Stormwater Management, and Soil Erosion and Sediment Control (Revised Rules) informally issued by the District Department of the Environment (DDOE) on March 29, 2013,¹ as well as upon the Revised Stormwater Management Guidebook (Revised Guidebook) informally issued by DDOE on April 3, 2013.² On November 8, 2012, DCBIA submitted extensive comments (Initial Comments) to these Rules and Guidebook as they were initially proposed on August 10, 2012 (Initially Proposed Rules and Initially Proposed Guidebook, respectively),³ and we greatly appreciate the opportunity to submit these additional comments for DDOE's consideration. Throughout the past nine months, DDOE's Stormwater Management Division has made substantial efforts to reach out to and communicate with interested stakeholders regarding these Rules, and DCBIA has greatly appreciated such proactive engagement. We have sought to provide our perspectives and constructive feedback at every step of this rulemaking process, and it is in that spirit that we submit these comments. Although we still have a number of concerns about the Revised Rules - some of which are quite substantial - we greatly enjoy the effective working relationships that we have developed with the primary authors and implementers of these Rules, and look forward to building on that foundation in the future.

DCBIA is a professional association that represents both commercial and residential real estate industries in Washington, DC. Our membership includes nearly 500 organizations, including developers, general contractors, architects and engineers, lenders, attorneys, and other industry members, all of whom care

¹ See District Department of the Environment, Request for Input on Revisions to Proposed Rulemaking on Stormwater Management, and Soil Erosion and Sediment Control (revised and issued for informal comment Mar. 29, 2013) (hereinafter Revised Rules), *available at* <http://ddoe.dc.gov/node/470482>.

² See District Department of the Environment, Stormwater Management Guidebook (revised and issued for informal comment on Apr. 3, 2013) (hereinafter Revised Guidebook), *available at* <http://green.dc.gov/node/471742>.

³ See District Department of the Environment, Notice of Proposed Rulemaking on Stormwater Management, and Soil Erosion and Sediment Control (proposed Aug. 10, 2012) (hereinafter Initially Proposed Rules), *available at* <http://ddoe.dc.gov/node/224592>.

greatly about environmental issues associated with development activities in the District. In particular, DCBIA's Committee on the Environment convenes up to 40 members on a monthly basis to discuss noteworthy environmental matters, including stormwater management and soil erosion and sediment control practices. Indeed, because this Rulemaking is of such central concern to its members, DCBIA has convened a Stormwater Task Force, comprising more than 20 practitioners in the areas of civil engineering, development management, general contracting, permitting and approvals, law, and sustainable development. The Stormwater Task Force has diligently reviewed the Revised Rules and Guidebook, and the comments that we provide below represent our best effort to help DDOE promulgate regulations that are as effective and practical as possible and further the District's sustainability goals.

PRELIMINARY COMMENTS

As an initial matter, we note that, because so many issues related to the Revised Guidebook also require consideration of the Revised Rules, we have found it impractical to submit completely separate sets of comments in response to each of the two documents. However, to facilitate your review of our comments, we have made every effort to clearly identify the pertinent document at issue in each specific comment and have provided a listing of the specific comments, below, in which we reference the Revised Guidebook.

Second, we recognize that the Revised Rules and Guidebook reflect many of the recommendations and suggestions that DCBIA provided in its Initial Comments, and we greatly appreciate DDOE's responsiveness to those comments. However, a number of the most pressing concerns that DCBIA raised in its Initial Comments remain unaddressed in the Revised Rules. In these comments, we therefore again include those unaddressed comments that are of greatest concern to us. Although DDOE may not have responded to these comments initially, we hope that, with a better understanding of their importance, DDOE will reconsider them from a fresh perspective.

In particular, we urge DDOE to give particular attention to the following issues, all of which are discussed in greater detail in our specific comments, below:

Innovation in Achieving Required Stormwater Retention Volumes--Although DDOE allows facilities subject to the Stormwater Management Rules to achieve required stormwater retention volumes using any combination of thirteen allowed Best Management Practices, in practice, few of these options are available to any given facility, and some, including high-density developments and older structures, have very limited options. Moreover, the design criteria for each BMP restricts planners' ability to achieve the applicable performance requirements using new and innovative retention technologies.

Phased Transition to Full Implementation of the Stormwater Management Rules--Although we consider the phased transition that DDOE has proposed to be a significant improvement over its initial implementation plan, we provide multiple specific ways in which this transition can be sensibly improved to provide regulated projects with a realistic ability to adapt to the new Stormwater Management Rules.

DDOE's Capacity to Timely Conduct All Required Inspections and Reviews--Although DDOE has proposed multiple additional inspection and review requirements, it has not provided any indication that its staff will have the capacity to conduct these inspections and reviews in a timely manner. In our specific comments, we urge DDOE to confirm that it is increasing its administrative capacity to conduct these inspections and reviews, and again urge DDOE to provide a crucial safety valve by allowing inspections to be conducted by certified third parties.

Maximum Extent Practicable and Relief from Extraordinarily Difficult Site Conditions--We appreciate that DDOE has provided these options for certain regulated projects that are unable to fully achieve the applicable required stormwater retention volume, and we anticipate that these alternatives will prove to be immensely important for certain regulated projects. In order to improve the utility of these standards, our specific comments include a number of recommendations on how to improve their clarity and availability to regulated projects that will need them the most.

Stormwater Retention Credits and Trading Program--We still believe that the creation of a Stormwater Credit Trading Program is a critical element in the District's stormwater management efforts. However, we are growing ever-more distressed by DDOE's continued failure to provide specific and concrete information about the Credits and the associated Trading Program. We insist that DDOE address our initial comments on these issues as part of a comprehensive guidebook pertaining specifically to the Credits and the Trading Program's structure and operation. In order to provide interested stakeholders with a reasonable degree of transparency, DDOE must issue this guidebook and make it available for formal public comment before the Stormwater Management Rules are finalized.

COMMENTS PERTAINING TO THE REVISED GUIDEBOOK

The following sections of our specific comments pertain to the Revised Guidebook, either in whole or in part:

- Technical Issues
 - Utility of Approved Best Management Practices for On-Site Stormwater Retention
 - Anacostia Waterfront Development Zone
 - Missing Documentation
 - Additional Technical Comments to the Revised Guidebook
- Procedural Issues and Interagency Coordination
 - Field Inspections of Regulated Sites
 - *Inspection Requirements During the Construction Process*
- General Contracting and Cost Estimation
 - Protection of Areas for Future On-Site BMP Facilities

In your review of our comments on the Revised Guidebook, we suggest as a convenience that DDOE may want to focus on these sections. However, we note that our comments on both documents are submitted as a whole and should be reviewed as such.

SPECIFIC COMMENTS

Like our Initial Comments, these comments are organized in five general categories: (1) technical issues, (2) procedural issues and interagency coordination, (3) sediment and erosion control, (4) general contracting and cost estimation, and (5) in-lieu fees, stormwater retention credits, and the credit trading market. In each category we include comments pertaining to the specific revisions that DDOE has informally proposed in the Revised Rules, as well as to issues that we addressed in DCBIA's Initial Comments that DDOE has not fully adopted in the Revised Rules, but which remain of particular concern to us.

Technical Issues

Utility of Approved Best Management Practices for On-Site Stormwater Retention

The Revised Rules preserve the requirement that regulated sites must achieve at least half of their stormwater retention volume (SWRv) through the on-site use of approved Best Management Practices (BMPs).⁴ Consistent with the Proposed Rules, the Revised Guidebook continues to identify thirteen approved BMPs, including green roofs, permeable pavers, bioretention facilities, wetlands, ponds, and tree planting.⁵

First, we remain concerned that these options do not provide regulated sites with the flexibility that DDOE anticipates. As we stated in our Initial Comments, not all BMPs are created equal, and we again stress that, although some BMPs are based on mature technologies that planners, architects, and builders are very comfortable incorporating into their plans, others remain relatively untested and untrusted among members of the development community. For example, although developers in the District are familiar with green roofs, infiltration trenching, filtering systems, and bioretention systems, other BMPs such as permeable pavers remain uncommon and generally disfavored based on concerns regarding their functionality, durability, and long-term maintenance requirements. As a result, of the broad selection of approved BMPs outlined in the Revised Guidebook, regulated projects will as a practical matter have a narrow choice of just a few technologies that have already proven their durability and cost-effectiveness. This is particularly true for high-density projects that seek to develop an entire site from lot line to lot line. Such projects face strict space and cost constraints and cannot utilize BMPs that require significant open areas, take up substantial volumes of valuable interior space, or that are unproven and may require extensive maintenance or replacement over time.

We note that in the Revised Guidebook, DDOE has provided some degree of additional flexibility for a few BMPs, such as the increased potential contributing drainage area to green roofs, reduced dependency of ponding volume for certain bioretention facilities, and clarification of building setbacks, but we urge DDOE to go further in a number of ways. First, the Revised Guidebook should allow for more extensive utilization of proven BMP technologies. Second, regulated sites should be free to innovate with proven BMPs to achieve the applicable performance standards and should not be forced to comply with strict construction parameters. For example, many developers are familiar with bioretention systems, which could prove to be one of the more commonly utilized BMPs. However, the parameters required by the Revised Guidebook, including the dependency of stormwater retention volume on ponding volume, which would result in up to 18" of ponding,⁶ are impractical and will stifle utilization of this BMP. Many other BMPs are similarly subject to unnecessary technical constraints. Instead, regulated sites should have more freedom to utilize the technology with which they are most familiar to achieve the required stormwater retention capacity. Developers are unlikely to adopt new and untested technologies without some type of incentives or assurances, which these Rules do not provide. Third, DDOE needs to provide

⁴ See DDOE, Revised Rules, §§ 520.4, 521.2, 522.5.

⁵ See DDOE, Revised Guidebook, Ch. 2.7 at 23-27.

⁶ See DDOE, Revised Guidebook, Ch. 3.8.4 at 177.

specific examples of how high-density projects will be able to comply with applicable SWRv requirements. We note that **all** of the examples included in the Revised Guidebook utilize some amount of open space for stormwater retention purposes,⁷ which is not representative of most downtown developments. We therefore request that DDOE provide examples that feature developments built lot line to lot line and up to the applicable height requirement.

Second, the Revised Guidebook has not corrected the undervalued stormwater retention capacities of many BMPs. In our Initial Comments, we noted that only seven of the thirteen approved BMPs have retention values of 50% or more, and five provide **no retention value at all**.⁸ We believe that these retention values are too low. For example, ponds, wetlands, and open channels are all surface features that would include some retention via evaporation and evapotranspiration, which is not accounted for in the 0% retention value assigned to them. Furthermore, the reduced retention values for certain standard BMPs compared to their enhanced counterparts (compare 100% to 45% for enhanced and standard permeable pavers or 100% to 60% for enhanced and standard bioretention facilities) will effectively double the necessary surface area requirements for these practices. Given that the necessity to utilize standard rather than enhanced BMPs is typically based on poor in-situ soils, this credit reduction may discourage the development of certain areas of the District that are most in need of remediation. We therefore request that DDOE provide detailed explanations for how it has arrived at the retention values for every approved BMP.

Anacostia Waterfront Development Zone

In the Revised Rules, DDOE has provided new performance requirements that are uniquely applicable to certain projects located in the Anacostia Waterfront Development Zone (AWDZ).⁹ DCBIA understands that the AWDZ is an ecologically unique area of the District that may warrant its own performance requirements; however, multiple provisions of these new Rules require clarification or substantive revision.

First, we are unclear as to exactly which projects in the AWDZ are to be subject to these performance requirements. After close inspection of the Revised Rules, we believe that these requirements apply only to those Major Regulated Projects located in the AWDZ *that are publicly-owned or publicly-financed*. However, this qualification is only discernable from close analysis of multiple definitions listed elsewhere in the Rules, and is not clearly provided in the performance requirements themselves.¹⁰ Indeed, it is not even clear from the performance requirements that "Anacostia Waterfront Development Zone Site" is a defined term.¹¹ DCBIA therefore requests that DDOE clarify the applicability of these performance requirements by prominently including the "publicly-owned or publicly-financed" qualification in Part 524 rather than burying it among the definitions in Part 599. For example, Part 524 could include a provision stating "This part shall apply to a site within the Anacostia Waterfront Development Zone (AWDZ) that undergoes a major regulated project that is publicly owned or publicly financed." Although such a provision merely reiterates the "Anacostia Waterfront Development Zone Site" definition, its inclusion in Part 524 would greatly improve the Rules' overall clarity and accessibility.

⁷ See DDOE, Revised Guidebook, Appendix A at A-12 to A-31.

⁸ As proposed, only BMPs consisting of green roofs, enhanced permeable pavers, enhanced and standard bioretention, infiltration, rainwater harvesting, and dry swales are given retention values >50%. By contrast, filters, wet swales, ponds, wetlands, and storage BMPs have 0% retention value. Chapter 3 of the Stormwater Management Guidebook contains the retention values of each BMP.

⁹ See DDOE, Revised Rules, Part 524.

¹⁰ See DDOE, Revised Rules, Part 599.

¹¹ In Part 524, the Revised Rules abbreviate "Anacostia Waterfront Development Zone" when referencing an "AWDZ Site" which hides the fact that "Anacostia Waterfront Development Zone Site" is a defined term of art.

Second, we note that the Revised Guidebook does not include a map of the AWDZ. Given the lengthy and detailed manner by which the AWDZ is defined in the Revised Rules,¹² such a map would be a very helpful resource, and we believe could be easily added to the Guidebook.

Third, we recommend that DDOE allow AWDZ Sites to utilize off-site retention to achieve their Water Quality Treatment Volume (WQTV) and Stormwater Retention Volume (SWRV) under the Maximum Extent Practical (MEP) Standard rather than the extraordinarily difficult site conditions standard.¹³ Given the poor soil quality and high water table throughout the AWDZ, we expect that it will be impracticable to fully meet the required SWRV onsite, even though DDOE may not consider such site conditions to be "extremely difficult" by District-wide standards. In the alternative, if DDOE ultimately decides not to apply the MEP standard to AWDZ Sites, then we request at the least clarification on exactly what constitutes extraordinarily difficult site conditions in the AWDZ. The Revised Rules state that such sites "may achieve part of the WQTV by using off-site retention if (a) site conditions make compliance technically infeasible, environmentally harmful, or of limited appropriateness . . . and (b) the Department approves an application for relief from extraordinarily difficult site conditions."¹⁴ However, the Revised Rules do not explain how the "technically infeasible or environmentally harmful" and "limited appropriateness" standards are distinguishable.¹⁵

Fourth, DDOE should clarify that AWDZ Sites can still use off-site retention to achieve 50% of the applicable SWRV, like all other Major Regulated Projects, without having to apply for relief from extraordinarily difficult site conditions.¹⁶

Fifth, we note that when an AWDZ Site is permitted to utilize off-site retention to achieve its SWRV, it must obtain 1.25 Stormwater Retention Credits (Credits) to achieve one gallon of off-site retention when the off-site retention is located outside the AWDZ.¹⁷ However, the Revised Rules are not clear as to how many Credits an AWDZ Site will have to obtain if its off-site retention volume is not divisible by four gallons, such that the project will be required to submit a fraction of a Credit for compliance purposes. Will DDOE round the required number of Credits to the nearest whole number? If not, will AWDZ Sites (or any other participants in the Credit trading market) be able to transact for fractions of Credits? Will DDOE have the capacity to track the ownership of fractions of Credits? DDOE must resolve these questions before it can reasonably impose the 1.25 Credit per gallon requirement on AWDZ Sites.

Finally, we note that the Revised Rules and Revised Guidebook are in conflict with regard to the required SWRV for Major Land Disturbing Activities located in the AWDZ. In the Revised Rules, the stated SWRV is 1.2 inches, based on a 95th percentile rainfall event.¹⁸ By contrast, in the Revised Guidebook, the comparable requirement is 1.0 inches, based on an 85th percentile rainfall event.¹⁹ We believe that the correct SWRV is 1.2 inches, but DDOE must resolve these conflicting provisions.

Application of the "Maximum Extent Practicable" and "Extraordinarily Difficult Conditions" Standards

In the Revised Rules, DDOE provides standards by which certain Major Regulated Projects may be exempted from the applicable on-site stormwater retention requirements, including the Maximum Extent

¹² See DDOE, Revised Rules, § 599.1.

¹³ Compare DDOE, Revised Guidebook, App. B with DDOE, Revised Rules, Part 526.

¹⁴ See DDOE, Revised Rules, § 524.6.

¹⁵ See DDOE, Revised Rules, § 526.1.

¹⁶ See DDOE, Revised Rules, §§ 524.3, 524.4.

¹⁷ See DDOE, Revised Rules, § 524.7.

¹⁸ See DDOE, Revised Rules, § 524.3(a)(2).

¹⁹ See DDOE, Revised Guidebook, Table 2.1 at 9.

Practicable standard for Major Regulated Projects or portions of such projects located in the PROW,²⁰ as well as the Extraordinarily Difficult Site Conditions standard for other Major Regulated Projects.²¹ However, the Revised Rules do not state exactly when in the development process regulated projects can apply for exemptions under either standard. We interpret the Revised Rules to require projects to submit an SWMP along with or prior applying for the exemption;²² however, we note that it will be impossible for a project to complete its SWMP until it knows whether it is approved for an exemption. To avoid this dilemma, we urge DDOE to allow projects to apply for the applicable exemption as early in the planning process as possible.

Missing Documentation

The Revised Rules require compliance with or make reference to numerous sources of documentation. However, we note that some of these sources have recently been updated, or are not provided in the Revised Guidebook. Specifically, we note the following issues:

First, the Revised Rules state that "new or existing marinas within the Anacostia Waterfront Development Zone shall comply with the program elements outlined in the Clean Marina Guidebook issued by the National Park Service in 2004."²³ However, the National Park Service updated its Clean Marina Guidebook in 2012.²⁴ Can DDOE confirm with which version of the Clean Marina Guidebook marinas in the AWDZ must comply?

Second, the Revised Rules require AWDZ Sites to "obtain Department approval of an integrated pesticide management plan meeting the requirements of the Department's Stormwater Management Guidebook."²⁵ However, the Revised Guidebook does not include such a pesticide management plan. We acknowledge DDOE's note that this plan is currently under development in support of the Anacostia Waterfront Environmental Standards Amendments Act of 2012;²⁶ however, if DDOE is unable to update the Revised Guidebook to include a pesticide management plan before the Rules are finalized, then we request that any reference to such a plan be removed from the Rules.

Third, the Revised Rules require sites disturbing greater than five thousand square feet of land to "adhere to a Stormwater Pollution Prevention Plan (SWPPP) that (1) the Department provides in its Stormwater Management Guidebook, [or] (2) the Department approves as including the minimum measures in the Department provided SWPPP . . ."²⁷ However, the Revised Guidebook does not include an SWPPP. DCBIA therefore requests that DDOE update the Revised Guidebook to include the referenced SWPPP.

Fourth, the Proposed Guidebook originally included a section that provided information regarding the Stormwater Discount Program.²⁸ However, in the Revised Guidebook, this section appears to have been removed without explanation. We felt that this information was quite helpful and therefore request that DDOE either restore that information or provide a detailed justification for its removal.

²⁰ See DDOE, Revised Rules, § 521.2(b).

²¹ See DDOE, Revised Rules, §§ 520.4, 522.6.

²² See DDOE, Revised Rules, § 526.8.

²³ See DDOE, Revised Rules, § 508.5.

²⁴ See National Park Service, Clean Marina Guidebook (Mar. 2012), *available at* http://www.concessions.nps.gov/docs/concessioner%20tools/National_Clean_Marina_Initiative_2012.pdf.

²⁵ See DDOE, Revised Rules, § 524.8.

²⁶ See DDOE, Revised Guidebook, App. S.

²⁷ See DDOE, Revised Rules, § 543.9(a).

²⁸ See DDOE, Proposed Guidebook, App. S.

Finally, DDOE must provide additional documentation regarding the use of proprietary practices. In particular, the Proposed Guidebook originally included a proprietary practices application form,²⁹ which we anticipated would be very helpful when working with stormwater retention facility manufacturers; however, we note that this application form is no longer included in the Revised Guidebook. DCBIA therefore requests that DDOE either restore that information or provide a detailed justification for its removal. Additionally, DCBIA requests that DDOE provide more detailed information regarding the application/review/approval process for proprietary practices. For example, exactly how does a vendor submit an application? What accompanying data must be submitted along with an application? Which agency will review and approve the proposed practice? How long will the review likely take? Exactly how will developers and planners be able to obtain information about already-approved proprietary practices? These are all questions that should be addressed in the finalized Guidebook before the Stormwater Management Rules are finalized.

Additional Technical Comments to the Revised Guidebook

In our review of the Revised Guidebook, we have noted a number of additional technical issues that we call to your attention for resolution:

First, we believe that Figure 3.16 in the Revised Guidebook is mislabeled.³⁰ The "flow barriers, check dams, or soil berms" label should refer to the vertical, not horizontal, elements in the diagram. Additionally, DCBIA requests that this figure also indicate the recommended width between the vertical barriers, or which factors should be assessed to determine the appropriate width between vertical barriers.

Second, the Revised Guidebook states that "multiple underdrains are necessary for permeable pavement wider than 40 feet, and each underdrain must be located 20 feet or less from the next pipe."³¹ Can DDOE clarify what this provision means by "wide"? Does this provision apply to areas of permeable pavement that are more than 40 feet in any single direction, or only areas that are more than 40 feet in all directions? This subtle distinction could make a significant difference for long and narrow areas of permeable pavement, such as a street-front plaza with dimensions of, for example, 20' by 100'.

Third, the Revised Guidebook recommends that "any area of the site intended ultimately to be an infiltration practice should generally not be used as the site of a temporary sediment basin."³² Does this recommendation also apply to soil erosion control traps? If so, the Revised Guidebook should be updated to clarify that issue.

Fourth, in Appendix A of the Revised Guidebook,³³ Design Example 1 improperly fails to account for the 10,000 square feet of impervious area in the driveway and parking area. Combined with the impervious area of the roof, this example actually includes a total of 30,000 square feet of impervious area. The diagrams and accompanying calculations should be revised to correct this error.

Fifth, the Proposed Guidebook allowed for compost requirement amendments; however, we note that these provisions have been removed.³⁴ Can DDOE either restore these provisions or provide some justification for their removal?

²⁹ See DDOE, Initially Proposed Guidebook, App. T.

³⁰ See DDOE, Revised Guidebook, Fig. 3.16 at 84.

³¹ See DDOE, Revised Guidebook, Ch. 3.4 at 85.

³² See DDOE, Revised Guidebook, Ch. 3.7.6 at 164.

³³ See DDOE, Revised Guidebook, App. A at A13.

³⁴ See DDOE, Initially Proposed Guidebook, App. K.

Finally, can DDOE confirm whether compliance with the Stormwater Management Rules will exempt a site from applicable Green Area Ratio (GAR) requirements, or at least partially satisfy those requirements? If so, can DDOE update the Revised Guidebook to provide guidance on how these two programs will be interrelated?

Procedural Issues and Interagency Coordination

Phased Implementation of the Stormwater Management Rules

In our Initial Comments, we stressed that implementing the stormwater management rules immediately would impose unbearable burdens on projects that are currently in the planning process, including substantial redesign costs and development delays, and we noted that even a six month transition period would likely be insufficient to adapt to the new Rules without incurring excessive costs and delays in the process.³⁵ We commend DDOE for crafting a detailed transition plan for the implementation of the Stormwater Management Rules,³⁶ which we consider to be a notable improvement over DDOE's initial implementation plan. In order to ensure that the stormwater management rules are indeed implemented without undue burden on regulated projects currently in the planning process, we offer the following comments to further improve DDOE's phased implementation plan.

First, the exemptions applicable in Phase 3 of the proposed transition should also apply during Phase 2. As proposed in the Revised Rules, projects for which a Stage 2 application has been submitted to the Zoning Commission and multi-phased projects for which all stormwater infrastructure and BMPs are installed during an earlier phase of construction, are exempted from the stormwater rules during Phase 3 of the implementation process, which begins in January 2015.³⁷ Including these exemptions in Phase 3 will greatly smooth the transition to the new stormwater rules for many of the largest and most complex projects in the District; however, the Revised Rules are confusing as to why these projects should be subject to the new Rules during Phase 2, only to be exempted starting in Phase 3. We therefore suggest that DDOE clarify that these exemptions apply to both Phases 2 and 3.

Second, we appreciate DDOE's efforts to "avoid imposing significant re-design costs, delays, the need to re-apply for approval, or the need to go through the construction of stormwater infrastructure multiple times for the same site or portion of a site."³⁸ We agree that both multi-phased projects and projects for which a Consolidated PUD application must be submitted to the District Zoning Commission merit this consideration, and we would also suggest including projects that have submitted an application for (1) a variance or special exception to the Board of Zoning Adjustment, (2) a design review under the Capitol Gateway Overlay District to the Zoning Commission, (3) a concept design approval to the Historic Preservation Review Board or Commission of Fine Arts, or (4) a Large Tract Review to the D.C. Office of Planning. We understand that the D.C. Office of Planning intends to recognize the unique nature of these types of projects in excluding them from its Green Area Ratio Proposed Rulemaking, and we believe that excepting them from the Stormwater Management Rules as part of the phased transition plan furthers DDOE's stated goals of avoiding the imposition of excessive re-design costs, delays, and duplicative approvals.

Third, we note that because each phase of a multi-phased project may pertain to a standalone structure or set of structures, it may not be possible to install sufficient stormwater retention infrastructure for the entire project exclusively during the initial phase of development. For example, a green roof or area of permeable pavement installed as part of the first phase may not provide sufficient retention capacity to

³⁵ See DCBIA, Initial Comments, at 5-6.

³⁶ See DDOE, Revised Rules, at 5-8.

³⁷ See DDOE, Revised Rules, at 7.

³⁸ See DDOE, Revised Rules, at 7-8.

account for the retention requirements of all subsequent phases. Further, if the structures developed in each phase are physically disconnected, then it may not be possible to connect other BMPs installed during the initial phase, such as bioretention areas or ponding, to areas developed during subsequent phases. Therefore, we request that the exception apply to all multi-phase projects for which stormwater infrastructure *for at least the initial phase of development* is installed in compliance with a DDOE-approved SWMP.

Fourth, we request that DDOE revise the point during the development process that triggers application of each phase of the transition. As proposed in the Revised Rules, application of each phase will be triggered upon a project's submission of a stormwater management plan as part of a complete Building Permit Application.³⁹ In our Initial Comments, we stressed that tying the application of the Stormwater Management Rules to such a late phase of the development process will force many regulated sites to significantly retrofit their plans, despite the incredible and potentially unbearable costs and delays involved.⁴⁰ We therefore again encourage DDOE to decouple the Stormwater Management Rules from the building permit process and instead apply the Rules to projects upon their submission of a preliminary SWMP directly to DDOE.

Fourth, we request that DDOE exempt Major Substantial Improvement Activities during Phase 2. As we noted in our Initial Comments, incorporating stormwater retention facilities into existing structures that undergo such improvements can be extraordinarily complex, particularly for high-density facilities that are built lot line to lot line and up to applicable height restrictions.⁴¹ Such structures will be unable to incorporate surface features, such as bioretention, wetlands, or ponding, and may be unable to install green roofs without surpassing applicable height restrictions or exceeding load limitations. Stormwater retention options for such structures will be extremely limited, and projects involving Major Substantial Improvement Activities will require additional time to adapt to the new Rules. Additionally, Major Substantial Improvement Activities are common among older buildings, which are least capable of supporting on-site stormwater retention facilities, even if space is available. Given the number of these projects and the relative difficulty of bringing them into compliance with the new Stormwater Management Rules, we strongly feel that they would greatly benefit from an extended "learning period" in Phase 2, during which they will have a reasonable time to prepare for the new Rules.⁴²

Relief From Extraordinarily Difficult Site Conditions for Certain Major Substantial Improvement Activities

As we discuss above, Major Substantial Improvement Activities in high-density properties in which buildings extend out to the lot lines and up to the applicable height restrictions face strict constraints that make achievement of applicable on-site SWRV requirements particularly difficult, if not technically infeasible. Similar constraints are also common on properties containing designated historic structures or located in historic districts; properties containing structures with highly-specialized uses, such as museums, hospitals, scientific laboratory space, or embassies; and properties that are already outfitted with specialized infrastructure in compliance with advanced environmental standards, including solar, wind, or geothermal power sources or extensive energy efficiency infrastructure. We therefore request that DDOE clarify the circumstances under which such projects can obtain relief from extraordinarily difficult site conditions to recognize these frequently-insurmountable difficulties. In particular we recommend that DDOE include a new provision in Part 526 stating: "With respect to a Major Substantial Improvement Activity, compliance with the minimum on-site retention requirement may be technically

³⁹ See DDOE, Revised Rules, at 7.

⁴⁰ See DCBIA, Initial Comments, at 6.

⁴¹ See DCBIA, Initial Comments, at 6.

⁴² This "learning period" is particularly important if DDOE declines to move the trigger upon which the new Rules are to be applied to an earlier point in the development process, as we have suggested it consider.

infeasible if the structure to be improved cannot accommodate the necessary Best Management Facilities without significant alteration of the structure because of lack of available interior or exterior space or limited load-bearing capacity." We note that such a provision would not substantively alter the standard required to merit relief from extraordinarily difficult site conditions. Instead, this provision merely recognizes that extraordinarily difficult site conditions can be created by the structures that already exist on-site.

Additionally, we recommend that DDOE consider providing relief for properties undertaking Major Substantial Improvement Activities that already experience extremely difficult economic circumstances, including those owned by non-profit organizations and properties occupied by low-income housing. These properties face unique economic constraints that will make compliance with applicable SWRV requirements particularly difficult. Although DDOE may not have conceived "site conditions" to include economic hardship, we emphasize that both economic and site-specific factors can make compliance with applicable SWRV requirements extremely difficult, if not effectively impossible. Thus, we request that DDOE update Part 522 of the Revised Rules to exclude such properties from applicable SWRV requirements upon completion of Major Substantial Improvement Activities.

Coordination with Well Regulations

In our Initial Comments, we noted that DDOE was in the process of developing regulations for wells that were not expected to be introduced until after the Stormwater Management Rules have been finalized. Since then, DDOE has not provided any indication of what requirements the well regulations might contain. In light of this frustrating lack of transparency, we again urge DDOE to provide express assurance that the Stormwater Management Rules will not conflict with the well regulations once they are introduced. We again recommend updating the Revised Rules to include a sunset provision such that the groundwater requirements would automatically lapse upon DDOE's implementation of its well regulations, and we again request that DDOE seriously consider this option.

Definition of "Contaminated"

In our Initial Comments, we noted our particular concern that, although the Initially Proposed Rules referred to "contaminated groundwater" or "contaminated runoff" on multiple occasions, they did not clearly define the term.⁴³ As we stated, "contaminated" can be construed in many different ways and an inappropriate interpretation could have severe consequences for regulated sites. We are thus alarmed that DDOE has not made any effort to even propose a definition of "contamination" in the Revised Rules.⁴⁴ As a result, we again insist that DDOE promulgate a clear definition of "contamination" that expressly excludes background concentrations of all naturally occurring substances, which regulated sites have no ability to control and which do not properly constitute contamination within any reasonable meaning of the term. Instead, we recommend that DDOE consider adopting an existing definition with which developers of regulated sites are already familiar, such as existing UST risk-based remediation standards which are far more applicable to groundwater than other standards.

Field Inspections of Regulated Sites

Field Inspection Capacity

As we noted in our Initial Comments, once the Stormwater Rules are fully implemented, we expect that the demand for field inspections of both regulated sites and off-site stormwater retention facilities will increase significantly.⁴⁵ Since then, our concern that DDOE's existing field inspection staff does not have the capacity to meet this increased demand has only heightened. Our growing concern is only exacerbated by DDOE's proposed additional requirement that BMPs and associated land cover may be

⁴³ See DCBIA, Initial Comments, at 7.

⁴⁴ See DDOE, Revised Rules, §§ 523.3, 542.11, 542.12.

⁴⁵ See DCBIA, Initial Comments, at 8.

inspected to ensure that sufficient maintenance is performed.⁴⁶ We are deeply worried that regulated sites will suffer lengthy and costly construction delays while waiting for inspections to be scheduled and completed. In anticipation of these additional inspection requirements, has DDOE begun the process of hiring additional inspectors? Have DDOE's existing inspectors begun training for their new responsibilities? DDOE cannot reasonably expect to wait until these Rules are finalized before substantially increasing its inspection capacity - it must begin doing so now, if it has not started already. Therefore, we again insist that DDOE provide express assurance that it will have sufficient inspection capacity *before* the Rules take effect.

Additionally, we again request that DDOE update the Revised Rules to allow qualified third parties to conduct field inspections on its behalf. We are aware that other interested stakeholders have also made this same recommendation,⁴⁷ and together we urge DDOE to not wait until its own capacity has already proven inadequate to begin considering whether to allow third party inspections. Therefore, we again recommend that DDOE include a certification process for third party inspectors to ensure that a sufficient inspection capacity is available as soon as possible. If DDOE's inspection capacity proves to be adequate, then third party inspections would not be necessary and these provisions would have no impact whatsoever. However, if DDOE proves unable to keep up with the additional demand created by these Rules, the option of third party inspections would serve as an incredibly valuable safety valve until DDOE can recruit additional inspection personnel.

Inspection Requirements During the Construction Process

The Revised Rules have not been updated to clearly indicate when during the construction process DDOE intends to conduct require inspections of on-site stormwater retention facilities.⁴⁸ We noted this issue in our Initial Comments,⁴⁹ and we again request that DDOE clarify exactly when regulated sites should expect their on-site stormwater retention facilities to be inspected.

Inspection of Underground BMPs

In our Initial Comments, we noted the potentially dangerous issues created by the need to leave underground BMPs exposed for the final stormwater inspection.⁵⁰ As we stated, we are concerned that leaving certain underground BMPs exposed for extended periods could present serious worker-safety issues and could mitigate the BMP's environmental benefit, given the potential for sediment-laden water to enter the facility and significantly hinder its performance. We see nothing in the Revised Rules that addresses this issue, and we therefore again request that DDOE provide meaningful guidance as to how regulated sites should prepare underground retention facilities for inspection without creating safety issues or hindering their performance.

Administrative Fees

In our Initial Comments, we requested that DDOE provide background information pertaining to how it established the administrative fees to be assessed under the Initially Proposed Rules.⁵¹ We note that DDOE has not provided any such information, even though it has taken the greatly appreciated effort to provide similar data for the in-lieu fee.⁵² Therefore, we again request this background information.

⁴⁶ See DDOE, Revised Rules, § 503.10.

⁴⁷ For example, in its initial comments, DC Appleseed recommended that DDOE "permit the use of third-party, non-governmental inspectors to complete periodic inspections of regulated sites." DC Appleseed, Comments to Proposed Rules, at 12 (Nov. 8, 2012), *available at* <http://ddoe.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/DC%20Appleseed.pdf>.

⁴⁸ For inspection requirements of individual BMPs, see DDOE, Revised Guidebook, § 5.2.2.

⁴⁹ See DCBIA, Initial Comments, at 8.

⁵⁰ See DCBIA, Initial Comments, at 8.

⁵¹ See DCBIA, Initial Comments, at 8.

⁵² See, DDOE, Revised Rules, at 9-10.

Specifically, if fees are based on comparable fees in other jurisdictions, we would appreciate DDOE's sharing that data. Alternatively, if these fees are based on DDOE's costs, then we request DDOE's estimates of those costs.

Second, we again request that DDOE clarify how it intends to collect the various fees. Will fees be added to the building permit fee that is due upon submission of the building plan to DCRA, or will fees be collected following DCRA's review of the plan? If the fees will be collected by DCRA, then has DDOE coordinated with DCRA regarding how the fees are to be calculated and collected?

Finally, over the course of this rulemaking, DDOE has emphasized that the submission of a Stormwater Pollution Prevention Plan (SWPPP) is a relatively minor requirement that should not be expected to pose an onerous burden on Major Regulated Projects. If that is the case, then why does DDOE's review of the SWPPP incur a fee of \$1,100?⁵³ On its face, this fee appears to be disproportionately high relative to how DDOE has characterized this compliance obligation. We note that had DDOE provided the background information on administrative fees that we requested in our Initial Comments and that we have again requested above, we would likely understand the basis for this fee and not need to raise this issue in these comments.

General Contracting and Cost Estimation

Protection of Areas for Future On-Site BMP Facilities

In multiple parts of the Proposed Guidebook, DDOE stated that the footprint of on-site stormwater retention facilities "should remain outside the limit of disturbance during construction to prevent soil compaction by heavy equipment."⁵⁴ In our Initial Comments, we noted that this requirement would restrict builders from compacting potentially large areas of a site, even temporarily.⁵⁵ We appreciate that DDOE has revised these provisions; however, we note that the new requirement that where compaction is unavoidable, the impacted area cannot be excavated below two feet above the final design elevation would also impose significant space constraints that could prove infeasible.⁵⁶ Therefore, we request that DDOE further revise these provisions in two ways. First, we request that the word "unavoidable" be replaced with "infeasible," which better reflects the nature of the problem that this restriction creates. Second, we request that DDOE reconsider the two foot excavation limit since, as long as projects are required to till to 12" below grade, excavation to the final design elevation should not pose a problem. In other words, that tilling requirement obviates the excavation limitation, which we request be removed.

Non-Compaction Requirements and the Use of Underground BMPs

In our Initial Comments, we noted that although final compaction must occur during the final backfill around the perimeter of a building, this will be impossible if these areas are to be used as BMP facilities, such as stormwater disconnection areas or permeable pavement.⁵⁷ DDOE appears to have not addressed this dilemma, and so we therefore again request that DDOE offer a feasible resolution. We continue to suggest that DDOE do this by clearly allowing non-compaction of areas that are to be used for specified BMP facilities.

Calculating the Cost of a Major Substantial Improvement

As originally defined in the Initially Proposed Rules, a substantial improvement is defined to mean "a repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds

⁵³ See DDOE, Revised Rules, § 501.5.

⁵⁴ See DDOE, Initially Proposed Guidebook, Chs. 3.4.6, 3.5.6, 3.7.6.

⁵⁵ See DCBIA, Initial Comments, at 12.

⁵⁶ See DDOE, Revised Guidebook, Chs. 3.4.6, 3.5.6, 3.7.6.

⁵⁷ See DCBIA, Initial Comments, at 13.

fifty percent (50%) of the market value of the structure before the improvement or repair is started."⁵⁸ In the Revised Rules, DDOE allows projects to exclude certain expenses for the purpose of calculating the cost of a major substantial improvement, including the costs of manufacturing and industrial equipment, pumps, valve chambers, and wastewater treatment facilities.⁵⁹ We commend this effort to reduce excessive regulatory burdens for sites undergoing certain improvements, and we urge DDOE to consider the following suggestions on how to further improve this provision.

First, we recommend excluding the costs of replacing HVAC systems and associated components, including boilers, furnaces, and associated plumbing and ductwork. Such systems account for a large portion of any given building's total energy consumption, and including them in the cost calculations of a major substantial improvement will likely deter property owners from upgrading them to operate more efficiently. As the Mayor's recently released Sustainability Plan recognizes, both stormwater management and energy conservation are laudable environmental goals,⁶⁰ which would be ideally balanced by excluding the costs associated with replacing components of HVAC systems from the calculation of the cost of a major substantial improvement.

Second, all costs of tenant improvements should be excluded. The Stormwater Management Rules impose significant compliance obligations on property owners, who should have the sole discretion whether any given improvement should or should not constitute a major substantial improvement. Although it is unlikely that tenant improvements alone could surpass the 50% of market value threshold, they could substantially contribute toward that threshold, such that a combination of tenant and property owner improvements could foreseeably be considered a Major Substantial Improvement Activity. With this in mind, including tenant improvements in this calculation strips property owners of control over their properties and will severely deter them from making necessary capital improvements.

Third, and more generally, we encourage DDOE to seriously consider imposing the Stormwater Management Rules only on existing structures that fully redevelop the existing structure, including replacement of all interior finishes, roofing covers, and building skin materials. Incorporating sufficient stormwater retention capacity into an existing structure requires significant planning and design work, which only such complete renovations can feasibly absorb. It simply does not make sense to require properties to incur months of planning and development in order to comply with the Stormwater Management Rules as a result of discrete, albeit expensive renovations that might have only required a few weeks to complete. Moreover, only in such complete renovations are all necessary parts of the structure accessible for the installation of required BMP facilities. For example, under the Revised Rules, a property owner that makes necessary renovations limited to areas of the building's interior could be required to install a new green roof in order to comply with applicable stormwater retention requirements. Doing so, however, would effectively require the property owner to remove the perfectly functioning existing roof structure - a wasteful and expensive activity. In sum, we do not believe that property owners should have to incur the expense of making major renovations in certain areas of the structure solely in order to comply with regulations that become applicable due to necessary improvements in other areas of the structure. Instead, only when the entire structure is already accessible should property owners be required to install the required stormwater retention capacity.

Finally, we note that many non-profit and religious organizations may have difficulty determining whether various improvements constitute a major substantial improvement activity because they may not be able to obtain reliable information on the proper market value for their properties. In the Revised

⁵⁸ See DDOE, Revised Rules, § 599.1.

⁵⁹ See DDOE, Revised Rules, § 522.2.

⁶⁰ See Sustainability DC: Sustainable DC Plan, 58, 100 (Feb. 20, 2013), *available at* <http://sustainable.dc.gov/finalplan>.

Rules, a property's market value is based on its assessed value for the most recent year.⁶¹ However, because non-profit and religious organizations are tax-exempt, they may not regularly audit the assessed values as recorded in the District's real property assessment database. To avoid the unfair imposition of the substantial compliance obligations, we encourage DDOE to provide non-profit and religious organizations with the opportunity to review, and if necessary correct, the assessed values of their properties before determining that they have performed Major Substantial Improvement Activities and are thus subject to the Stormwater Management Rules.

Soil Erosion and Sediment Control

25' Waterway Buffer

In our Initial Comments, we noted that "the Proposed Rules do not provide any mechanism by which DDOE could permit certain exceptions to this requirement on a case-by-case basis."⁶² We appreciate that DDOE has responded to this comment in the Revised Rules and in general we support the criteria by which DDOE proposes to offer such an exception.⁶³ However, a few of these criteria are confusing and we therefore request that DDOE clarify this standard in greater detail. First, a project is eligible for the exception only if it "employs each Department-approved practice to provide comparable protection against erosion during construction."⁶⁴ Can DDOE clarify exactly which "Department-approved practices" this provision refers to? We recommend including these standards, or at least a reference to other DDOE documentation in which they can be found, in the Guidebook for easy and convenient referral.

Second, we are confused by the provision stating that "if the Department determines to grant relief for a portion of the 1.7 inch SWRV for the project, but on-site treatment is not feasible, the Department may approve alternative measures to protect or restore the waterbody for which the buffer is intended."⁶⁵ What is the applicable standard for "not feasible," and how does it differ from the standard for showing extraordinarily difficult site conditions? After all, if on-site treatment for a portion of the SWRV is not feasible, then shouldn't that portion be granted relief based on extraordinarily difficult site conditions? As we interpret this provision, DDOE appears to be offering a secondary, less stringent avenue for relief when on-site retention is not reasonably possible, but if that is the case, then we recommend application of the MEP standard instead.

Finally, we urge DDOE to reconsider the requirement that a project demonstrate that maintaining a buffer "would make the proposed project unviable" if the area would be of an area that was impervious prior to the project,⁶⁶ or "would prevent development of the rest of the site in a manner that is similar to the proposed project" if the land disturbance would be of an area that was natural or compacted prior to the proposed project.⁶⁷ We do not understand why different standards are necessary based on the nature of the area prior to the proposed land disturbance, and we note that including multiple standards adds unnecessary complexity to the Rules. Therefore, we suggest that DDOE combine these provisions, such that a proposed project needs to show that establishing a buffer would prevent development of the rest of the site in a manner that is similar to the proposed project, regardless of whether the area was previously impervious, compacted, or natural.

⁶¹ See DDOE, Revised Rules, § 599.1.

⁶² See DCBIA, Initial Comments, at 9.

⁶³ See DDOE, Revised Rules, § 545.6.

⁶⁴ See DDOE, Revised Rules, § 545.6(a).

⁶⁵ See DDOE, Revised Rules, § 545.6(a)(3).

⁶⁶ DDOE, Revised Rules, § 545.6(b)(2).

⁶⁷ DDOE, Revised Rules, § 545.6(b)(3)

Certification of a Responsible Person

Under the Revised Rules, "a responsible person shall be certified through a training program that the Department approves, including a course on erosion control provided by another jurisdiction or professional association."⁶⁸ We understand that a Responsible Person must be qualified to identify and oversee the remedy of potential or actual erosion problems. However, we question whether such additional certification is necessary, or even possible. First, we are aware of just one such program offered in a neighboring jurisdiction, the Virginia Responsible Land Disturber (RLD) Certificate of Competence Program,⁶⁹ but given our focus on development in the District, not Virginia, we are unfamiliar with the substance of this Program and cannot comment as to whether it might satisfy DDOE's objectives. We do note, however, that not even this Program has been approved by DDOE for the purpose of certifying Responsible Personnel. We therefore request that DDOE include a list of specific approved training programs, either in the Rules or the Guidebook, before the Rules are finalized. If DDOE cannot identify and approve specific certification programs, then we urge DDOE to remove this requirement.

Moreover, we note that many construction personnel already have sufficient experience with erosion control, despite not having obtained certification, and we suggest that DDOE provide an exception to the certification requirement for these individuals. For example, Virginia's RLD Program automatically considers licensed civil engineers to be responsible land disturbers based on their existing professional experience. We believe that DDOE could similarly designate certain specific types of professionals who would be competent to serve as Responsible Personnel without any additional specialized training, and we request that DDOE update Part 547 of the Revised Rules to clearly identify these professionals.

Defining "Details of Grading Practices"

The Revised Rules retain the requirement that Regulated Projects include in their erosion and sediment control plans "details of grading practices."⁷⁰ In our Initial Comments, we noted our confusion as to which details should be included in the plans and to which grading practices this requirement refers.⁷¹ Since DDOE did not address either of these questions in the Revised Rules, we again request that DDOE clarify this provision.

Review of Soil Erosion and Sediment Control Plans

First, we appreciate that DDOE has sought to clarify and narrow the scope of § 542.14, which we had noted in our Initial Comments was "unmanageably vague,"⁷² by requiring only "technical information that the Department considers necessary to demonstrate compliance with erosion and sediment control requirements in this chapter."⁷³ We comment again on this provision only to alert DDOE that not all sediment and erosion control practices include "technical" information for DDOE to review. As an alternative revision, we suggest that DDOE consider updating § 542.14 further to require "available information that demonstrates compliance with erosion and sediment control requirements in this chapter" for specific types of control measures.

⁶⁸ DDOE, Revised Rules, § 547.3.

⁶⁹ Additional information about Virginia's Responsible Land Disturber Program is available at http://www.dcr.virginia.gov/stormwater_management/es_rld.shtml.

⁷⁰ DDOE, Revised Rules, § 542.9(n)(2).

⁷¹ See DCBIA, Initial Comments, at 11.

⁷² DCBIA, Initial Comments, at 11.

⁷³ See DDOE, Revised Rules, § 542.14.

Second, in our Initial Comments, we recommended that DDOE commit to reviewing soil erosion and sediment control plans within 30 days.⁷⁴ We note that the Revised Rules do not include any specific timeframe for these reviews, and so we again urge DDOE to commit to reviewing soil erosion and sediment control plans within a stated period of time. We still believe that 30 days is sufficient for DDOE to fully review a proposed plan, but at the least, DDOE must commit to some specific timeframe that developers can rely on. We also encourage DDOE to consider offering regulated sites the option of an expedited option, whereby a regulated sites could request a review of its plan in no more than 10 days in exchange for a premium fee sufficient to cover DDOE's additional costs. As DDOE is aware, certainty and predictability are valuable commodities in the planning process, and both of these steps would significantly improve developers' ability to plan for the soil erosion and sediment control process.

Waterway Crossings and Stream Bank Protections

In our Initial Comments, we objected to use of the term "rebuttable presumption,"⁷⁵ which we felt was too legalistic and would be confusing for many individuals who lack formal legal training.⁷⁶ We appreciate that this phrase has been removed in the Revised Rules, but we note that in revising this provision, DDOE has substantively altered its impact on regulated sites. Under the Revised Rules, waterway crossings and stream bank protections that are designed and installed in compliance with the Department's Standards and Specifications for Soil Erosion and Sediment Control are no longer assumed to be in compliance with the Revised Rules.⁷⁷ Instead, such features are automatically subject to DDOE approval. This revision goes far beyond our original recommendation, and we therefore urge DDOE to restore § 543.4 as it was originally proposed with the minor revision that the phrase "a rebuttable presumption" be replaced with the phrase "an assumption."

Protection of Cut and Fill Slopes

We commend DDOE for updating its requirements for the protection of cut and fill slopes to require structural diversions "in a frequency and manner that a geotechnical engineer licensed in the District of Columbia has determine, based on site conditions is sufficient to prevent erosion."⁷⁸ We raise this provision again only to note that geotechnical engineers may not always be available to evaluate site conditions at this stage of development and that civil engineers are equally capable of determining the appropriate spacing of structural diversions. Therefore, we recommend that DDOE consider allowing either geotechnical or civil engineers to make this determination.

Sediment Controls During Demolition Activities

Under the Initially Proposed Rules, any "person who engages in a demolition project that results in debris, dust, or sediment leaving the site shall apply each necessary control measure, upon receiving instruction to do so by the Department."⁷⁹ In our Initial Comments, we noted that this provision did not indicate which control measures might be required or the circumstances in which each will have to be used.⁸⁰ We also requested clarification as to when and how DDOE intended to instruct regulated sites to implement these control methods. Because the Revised Rules maintain this provision, we again request that DDOE address these questions and urge DDOE to ensure that demolition sites will be made aware of which control measures they will be required to implement before demolition begins.

⁷⁴ See DCBIA, Initial Comments, at 11.

⁷⁵ DDOE, Initially Proposed Rules, § 543.4.

⁷⁶ See DCBIA, Initial Comments, at 12.

⁷⁷ See DDOE, Revised Rules, § 543.1.

⁷⁸ DDOE, Revised Rules, § 543.14.

⁷⁹ DDOE, Initially Proposed Rules, § 540.2.

⁸⁰ See DCBIA, Initial Comments, at 12.

In-Lieu Fees, Stormwater Retention Credits, and the Credit Trading Market

In-Lieu Fees

First, we greatly appreciate the effort that DDOE has made to provide additional transparency with regard to its calculation of the \$3.50 per gallon per year in-lieu fee. As DDOE is aware, this unique fee has little precedent in other jurisdictions, and when it was initially proposed, we had little basis to evaluate it. The information that DDOE has provided in the Revised Rules has significantly clarified our understanding, and at this time, we have no objections to any aspect of its calculations.

Second, we are also encouraged by DDOE's stated support for the creation of a special fund for in-lieu fees.⁸¹ In our Initial Comments, we recommended that all in-lieu fees be deposited into a separate special-purpose fund that can be easily monitored, and that DDOE issue annual reports summarizing the fund's activities and highlighting how the funds are being used to effectively retain stormwater in the District.⁸² We understand that creation of this fund is ultimately subject to approval by the Council, but we appreciate DDOE's support for its creation and we look forward to DDOE's continued efforts toward ensuring that the fund is administered as transparently as possible. Besides the actual development and maintenance of stormwater retention facilities, in-lieu fees should only be spent on necessary expenses associated with implementation of this rulemaking, such as development of an online public information system, advance procurement of an initial supply of Credits, and administrative costs to ensure that Credits are certified and transactions are reviewed quickly and efficiently.

Third, adjusting the in-lieu fee based solely on the Urban Consumer Price Index will provide welcome additional certainty to the administration of these fees,⁸³ and we thank DDOE for adopting our Initial Comment on that issue.⁸⁴ However, we continue to believe that DDOE can easily provide additional long-term certainty about these adjustments by reducing the frequency by which adjustments are made and by updating the Revised Rules to include an absolute cap on the possible adjustment rates. Although we did not suggest a specific rate for the adjustment cap in our Initial Comments, we continue to believe that the in-lieu fee need not reasonably be adjusted any more frequently than every five years.

Stormwater Retention Credits and the Credit Trading Program

In our Initial Comments, we requested clarification regarding multiple aspects of the Stormwater Retention Credits. Since then, we have become quite concerned that nearly all of our questions remain unaddressed. We cannot emphasize enough how much uncertainty and confusion continues to surround these Credits and the associated trading program, and we again *emphasize that without a clear understanding of the Credits and the market in which they will be bought and sold, regulated sites will simply turn to the in-lieu fee as a possibly-more-expensive, but definitely-more-predictable alternative.* In the spirit of making this option for off-site retention as attractive as possible to regulated sites and other interested stakeholders, we urge DDOE to reconsider and respond to our original requests for clarification in a written guidance document that interested stakeholders will be able to inspect and formally comment upon before the Rules are finalized and the Credit Trading Program commences. To be absolutely clear, we request that DDOE prepare a consolidated guidance document, analogous to the Stormwater Management Guidebook, that details the key characteristics of the Credits as well as the structure, operation, and administration of the Credit Trading Program.

Initial Availability of Credits

We remain particularly concerned about the lack of information regarding DDOE's efforts to ensure a sufficient initial supply of Credits. In our Initial Comments, we requested that DDOE initiate efforts

⁸¹ See DDOE, Revised Rules, at 11, § 530.6(c).

⁸² See DCBIA, Initial Comments, at 15.

⁸³ See DDOE, Revised Rules, §§ 501.1, 530.2

⁸⁴ See DCBIA, Initial Comments, at 15.

immediately to certify a reasonable supply of Credits to be available when the Stormwater Management Rules are finalized.⁸⁵ At the time, we were informed that various outreach efforts to potential Credit generators were being planned, but to date, we have seen no indication of any such efforts and are not aware that any Credits have been certified so far. Has DDOE taken any initial steps to recruit potential sources of Credits, or even promoted the program among such potential Credit generators? Can DDOE estimate how many Credits will likely be certified by the time the Stormwater Management Rules are finalized? Can DDOE even identify certain types of property owners who are likely candidates to generate Credits, if only so that those who will likely need to purchase Credits can focus their own outreach? Again, this issue remains one of our most pressing concerns regarding the proposed Credit Trading Program, and one that DDOE must address now, before the Stormwater Management Rules are finalized.

Ultimately if DDOE cannot guarantee a reasonable supply of Credits before the Stormwater Management Rules are finalized, then we recommend updating the proposed phased transition schedule to trigger the beginning of Phase 2 only upon DDOE's certification of a sufficient supply of Credits.

Certification of Newly Generated Credits

Another uncertainty that clouds our understanding of the expected initial supply of Credits but that is equally applicable once the Credit Trading Program gets underway is the process by which Credits are to be certified. Can market participants expect DDOE to certify Credits within one week of receiving an application? Two weeks? Three? We again insist that DDOE provide some definite timeframe for this certification process and continue to believe that a maximum 21-day review period would provide DDOE with sufficient to thoroughly conduct all necessary reviews and inspections.

Retroactive Certification of Credits for Existing Stormwater Retention Facilities

In the Revised Rules, DDOE has retained the provision that it may certify Credits for existing retention that was installed as early as May 1, 2009.⁸⁶ In principle, this inclusion of existing retention capacity could significantly boost the initial supply of Credits. However, DDOE has not clarified whether it will retroactively certify Credits for the existing retention capacity. For example, will a green roof that was installed in 2010 and that would otherwise qualify as an SRC-generating facility be able to generate SRCs for its 2010 and 2011 retention capacity, or will it only be able to start generating SRCs attributable to its 2012 capacity upon implementation of the Stormwater Management Rules? As we stated in our Initial Comments, allowing such retroactive certification would substantially improve liquidity in the new SRC Trading Program without mitigating its environmental integrity.⁸⁷ We therefore again request that DDOE update the Revised Rules to include clear authorization for the certification of Credits for retention capacity that has been in place since May 1, 2009.

Calculation of the Likely Market Price for Credits

Has DDOE made any progress in preparing an econometric analysis of the likely costs of Credits? We agree with DDOE's prediction that "SRCs will be less expensive than the in-lieu fee,"⁸⁸ but we remain wanting for any reliable information about how much less expensive Credits are likely to be. We are unable to predict whether Credits should be expected to be \$1 or 1¢ lower than the in-lieu fee, or whether market participants should be prepared for significant fluctuations over time. We of course understand that no market is entirely predictable, particularly one as novel as this one; however, any additional information that would help regulated facilities better balance the risks and rewards of participating in the market rather than paying the in-lieu fee would be immensely helpful to prospective market participants.

⁸⁵ See DCBIA, Initial Comments, at 15.

⁸⁶ See DDOE, Revised Rules, § 534.2.

⁸⁷ See DCBIA, Initial Comments, at 16.

⁸⁸ DDOE, Initially Proposed Rules, at 18.

Banking and Retirement of Credits

The Revised Rules retain the provision that Credits shall be bankable indefinitely,⁸⁹ a feature that we consider crucial to the performance of the SRC Program and that we wholeheartedly support. However, we also note that the Revised Rules still empower DDOE to retire Credits if "a final determination to retire a SRC is made."⁹⁰ We therefore remain concerned that the Rules still allow DDOE to retire credits at its own discretion, even if the owners of those Credits have fully complied with all other applicable regulations, and we again request that DDOE remove § 532.2(b) from the Revised Rules.

Creation of a Secondary Trading Market

To our great concern, the secondary trading market - probably the most novel and innovative aspect of the SRC Program - remains clouded in uncertainty. Since issuing the Initially Proposed Rules, DDOE has without doubt given the structure and operation of this market considerable thought. However, it has not shared any of those thoughts in writing with interested stakeholders, who remain effectively in the dark about how this market will function. In our best effort to shed some light on this market, we reiterate our initial questions from our Initial Comments,⁹¹ which we urge DDOE to address in writing:

First, who will be able to participate in the market? Specifically, will DDOE restrict participation in the secondary market to SRC-generating facilities and regulated sites, or will third party traders be allowed to participate as well? If third parties will be allowed to participate, will they be able to purchase SRCs directly from SRC-generating facilities or only from regulated sites? In the interest of providing as much liquidity as possible, we recommend that DDOE allow third parties to participate in the secondary market.

Second, will the market be structured as an exchange or over-the-counter (OTC) platform? Briefly, the distinction lies in how market participants share pricing information.⁹² In an exchange market, every offer and bid is communicated openly to all market participants. When two parties agree to a sale, the transaction price is also communicated to all participants who may then take that price into consideration when issuing an offer or bid of their own. The result is a level playing field in which all participants can buy and sell based on a transparent market price. By contrast, OTC markets have no centralized pricing communication system. Instead, prospective buyers and sellers communicate offers and bids directly to each other. Prices of completed sales may be made public after the fact, but in general, other market participants are not privy to pricing negotiations and do not have the opportunity to competitively bid against their peers. To our knowledge, DDOE has not indicated how it intends to structure the secondary trading market. At some point, however, DDOE will have to select a basic structure, and given the complexity involved in establishing a new market of either structure, we strongly urge DDOE to begin considering the benefits and difficulties associated with both structures as soon as possible.

If DDOE decides to use an exchange structure, we note that DDOE itself will not have to serve as a broker, or to take any active part in individual transactions beyond the regulatory role that it already envisions. Instead, DDOE will merely need to establish a centralized forum in which

⁸⁹ See DDOE, Revised Rules, § 532.1.

⁹⁰ DDOE, Revised Rules, § 532.2(b).

⁹¹ See DCBIA, Initial Comments, at 17-18.

⁹² The literature on the distinctions between exchange and OTC markets is extensive, but many brief summaries are easily accessible, including Randall Dodd, International Monetary Fund, *Markets: Exchange or Over -The-Counter* (Mar. 28, 2012), available at <http://www.imf.org/external/pubs/ft/fandd/basics/markets.htm>.

prospective buyers and sellers can review each others' bids, offers and completed transactions.⁹³ We believe that DDOE could host such an exchange via its website without much difficulty, and we request that DDOE seriously consider this option.

Alternatively, if DDOE decides to adopt an OTC structure, then it will be particularly important for DDOE to create a tracking system by which it can publicly report transaction prices and volumes in real time. DDOE has indicated that it intends to initially use an internally maintained spreadsheet to track transactions, and if SRC trading volume increases, then it will transition to a more sophisticated database that includes a public interface.⁹⁴ Put simply, we believe that this strategy will prove to be a self-defeating prophecy, since initially withholding transaction information from the public will ensure that trading volumes will never rise to the levels at which DDOE would consider creating a public interface.

As we have indicated numerous times, many interested stakeholder who will likely be subject to the Stormwater Management Rules are already extremely wary of the utility of the Credit Trading Program and though supportive in spirit, will be very reluctant to participate if they remain uncertain about its administration and activity. It is therefore incumbent on DDOE to make the Program as transparent as possible from the start, first by designing a manageable market structure and then by making all relevant information, including volume and pricing data, publicly available in real-time.

Stormwater Credit Sales Contracts

Particularly if the SRC Trading Program is to utilize an OTC market design, DDOE can greatly facilitate the liquidity of the market by preparing standardized sales contract templates that market participants could utilize when conducting a transaction for Credits. We acknowledge that more than one model contract may be necessary and that each would have to provide some flexibility to tailor the transaction to any unique circumstances. However, as we stated in our Initial Comments,⁹⁵ such model contracts would be extremely helpful to market participants and would provide a useful degree of structure in an otherwise amorphous commodity market.

Approval of SRC Transactions

In general, we support DDOE's intention to monitor the Credit Market's day to day activity; however, we remain skeptical of the need or utility of approving every individual transaction. Exactly what issues will DDOE be looking for in its review of individual transactions? On what grounds might a given transaction be denied? We request that the Revised Rules be updated to include a detailed and exclusive list of the exact criteria by which transactions will be evaluated. Additionally, how much time is the review of a typical transaction expected to take? One day? Two? A week? More? Because the Credits to be transferred have already been certified, we expect that the approval process should be relatively straightforward; however, to provide market participants greater assurance on this point, we request that that DDOE update the Revised Rules to include a maximum period in which a proposed transaction must be approved, as well as specific criteria by which a transaction shall be evaluated. We believe that reviews should be limited to verification of the validity and ownership of the Credits to be transacted, which should not take more than 24-48 hours to complete. If DDOE takes no action within that timeframe, then the transaction should be automatically approved.

⁹³ An excellent example is NutrientNet, Pennsylvania's online trading marketplace for water nutrient credits, which is available at <http://pa-demo.nutrientnet.org/>. Alternatively DDOE could consider having SRCs listed on an existing exchange. For example, carbon credits issued by the Regional Greenhouse Gas Initiative are traded on the Chicago Climate Futures Exchange.

⁹⁴ DDOE, October 12, 2012 Memo, at 6.

⁹⁵ See DCBIA, Initial Comments, at 18.

Tracking Ownership and Vestment of Credits

As the SRC Program matures, we fully expect it to attract a wide variety of market participants, including Credit-generating facilities, regulated sites, and non-regulated third party traders. Greater participation will of course facilitate a larger and more liquid market for Credits, but will also make it all the more important that DDOE have the capacity to track the ownership of individual Credits and maintain up-to-date records on how many Credits are vested in every regulated facility. However, to date, we have not been given any indication that DDOE is developing this data infrastructure. Therefore, we again request that DDOE explicitly clarify how it will record the ownership of all outstanding Credits. With specific regard to regulated sites, will there be a separate document to be recorded against the property? We note that the Revised Guidebook includes a sample form by which regulated sites can submit SRCs for compliance purposes,⁹⁶ but how will regulated sites record their balance of outstanding credits and how will Credits owned by non-regulated third party market participants be tracked? Will DDOE make these records publicly available or only upon request? In order to best facilitate a transparent and liquid market, we again urge DDOE to make all ownership data publicly available via a searchable database accessible through its website.

Timing of SRC Program Compliance Obligations

We again request clarification regarding the timing of the Credit Trading Program's compliance milestones. As we asked in our Initial Comments,⁹⁷ at what point in the building or occupancy process will a regulated site be required to submit Credits to DDOE for compliance purposes? Will regulated sites be required to begin submitting Credits for compliance purposes upon receipt of a Building Occupancy Permit, or some other particular point? Once a regulated site is fully developed and occupied, when will it be required to submit Credits to DDOE? Will regulated sites be required to submit Credits at the beginning of every annual regulatory period, or at the end? Because some regulated sites may qualify as net-Credit-generating facilities and therefore will be required to both submit Credits for compliance and certification purposes, we urge DDOE to ensure that the obligations for both types of properties be synchronized to the greatest extent possible. In particular, we recommend that regulated sites not be required to submit Credits for compliance purposes until their receipt of a building occupancy permit and thereafter be required to submit Credits at the end of each of the Program's annual compliance periods. This schedule will give regulated sites sufficient time to determine the ideal balance of Credits and in-lieu fee payments. We also recommend that DDOE allow Credit-generating facilities to bank their own Credits upon certification and sell them at any point within a compliance period. Giving these facilities such flexibility will help reduce the likelihood of either a glut or scarcity of Credits in the Program at any given time

CONCLUSIONS

For quite some time, DCBIA has consistently asserted that a rulemaking of this magnitude requires years, not months of collaboration and deliberation to be effective and practical. We appreciate the efforts that DDOE has taken to solicit and incorporate comments and other feedback from numerous interested stakeholders. However, considering the magnitude of this rulemaking and the immensely consequential impacts that it will have on real estate development in the District, we emphasize that DDOE must do more, and we insist that DDOE redouble its outreach and educational efforts in the few months remaining before the Rules must be finalized. Although extensive, these comments represent only what our industry experts have been able to evaluate in the limited time and with the incomplete information available. DCBIA stands ready and eager to work closely with DDOE to continue crafting rules on stormwater management and soil erosion and sediment control that are both environmentally rigorous and economically realistic. We commit to continue to put forth the greatest effort possible to review, interpret

⁹⁶ See DDOE, Revised Guidebook, App. C.

⁹⁷ See DCBIA, Initial Comments, at 19.

and analyze these rules and subsequent versions so that we can quantify impacts and determine feasibility. However, we are resolute that no stormwater rules should be implemented or become effective until it can be demonstrated that achieving the standards is practical and that the basic building blocks (permitting, inspections, the SRC program, interagency coordination) are sound. Proceeding with new rules prior to this juncture will lead to significant confusion, delays and most important, diminished economic development and growth.

Thank you once again for the opportunity to submit these comments, and we appreciate your consideration.

Sincerely,



David Tuchmann
Chair, Stormwater Task Force
District of Columbia Building Industry Association

Cc: City Administrator Allen Lew
Deputy Mayor Victor Hoskins
Councilmember Mary Cheh
Acting Director Keith Anderson
Mr. Jeffery Seltzer
Mr. Jeff Miller
Mr. Ernest D. Jarvis