DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOCIATION

November 8, 2012

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

Attention: Stormwater Rules

Submitted electronically via email to: swrule@dc.gov

Dear Mr. Van Wye:

On behalf of the District of Columbia Building Industry Association (DCBIA) and its members, we write to comment upon the Proposed Rules issued by the District Department of the Environment (DDOE) on August 10, 2012 regarding stormwater management and soil erosion and sediment control, as well as upon the accompanying Stormwater Management Guidebook.[1] We appreciate the opportunity to submit these comments and we hope that you will consider them closely as you work to revise these proposed rules. DCBIA also commends the substantial outreach and communication efforts put forth by DDOE's Natural Resources and Stormwater Division staff since the rule's publication. While we have a great number of concerns on a wide variety of subjects within the proposal in question, we are pleased to enjoy effective working relationships with the primary authors and implementers of these regulations.

The DCBIA is a professional association that represents both the commercial and residential real estate industries in Washington, DC. Our membership includes nearly 500 companies and organizations, developers, general contractors, architects and engineers, lenders, attorneys, and other industry members, all of whom care greatly about environmental issues associated with development activity in the District. In particular, DCBIA's Committee on the Environment convenes between 30 and 40 individuals on a monthly basis to discuss environmental matters, including the topics addressed in this rulemaking. To review the Proposed Rules, this Committee has convened a Stormwater Task Force, comprising more than 20 practitioners in the areas of civil engineering, law, development management, general contracting, permitting and approvals and sustainable development.

The Stormwater Management Rules are therefore of central concern to DCBIA's members, and the comments that we provide below represent our best efforts to help DDOE promulgate stormwater management regulations that are as effective and practical as possible, and also promote the City's sustainability goals.

[1] *See* Notice of Proposed Rulemaking, Stormwater Management, and Soil Erosion and Sediment Control (proposed Aug. 10, 2012) (hereinafter Proposed Rules); DDOE, Stormwater Management Guidebook (Aug. 2012). Both are available at http://green.dc.gov/node/164302.

GENERAL RECOMMENDATIONS

In general, our specific comments fall within three broad categories. First, many of the requirements contained in the Proposed Rules are overly and unnecessarily inflexible in the specific approaches that they adopt to achieve their objectives. This inflexibility will increase the cost and complexity of development and delay construction schedules without providing any corresponding improvement in environmental protection. However, stormwater management practices have improved dramatically in recent years and developers should be free to identify and implement effective management strategies that are ideally suited for each regulated site. Therefore, in instances where more flexible alternatives are available, we encourage DDOE to provide regulated sites greater leeway to achieve its environmental objectives as efficiently as possible.

Second, many aspects of the Proposed Rules are unclear and confusing. Some are confusingly phrased, while we believe others do not accurately represent DDOE's underlying intent. As a result, we expect that determining compliance with these rules will add review time and costs for many regulated sites. The explanatory guidance that DDOE has provided since the Proposed Rules were issued has resolved some of this confusion.[2] However, we recommend that DDOE incorporate those explanations into the text of the rules. If the design teams of regulated sites cannot understand the rules, then there is no way that they will be able to ensure their compliance, despite their best efforts to do so.

Third, we request that DDOE take care to administer the Stormwater Management Rules as transparently and efficiently as possible. These rules will significantly expand DDOE's regulatory responsibilities, including the need for additional field inspections and oversight of the Stormwater Retention Credit Program (SRC Program). The efficiency with which DDOE administers these requirements will ultimately determine their sustainability and overall success.

Finally, we encourage DDOE to continue to promulgate these rules in an equally transparent and efficient fashion. DDOE should be aware that although this document addresses what we feel are the most pressing aspects of the Proposed Rules, there are many issues that we have not yet been able to fully explore, including the feasibility and cost implications of the Proposed Rules, maintenance of stormwater retention facilities, and implications for the property owner community, which includes lenders, equity owners, title experts, and others. We therefore submit these comments already looking forward to the next public comment period, which we assume will immediately follow the re-issuance of the Proposed Rules in early 2013. We are well aware of the limited time that DDOE has in which to finalize these Rules. However, this second opportunity to submit comments will give stakeholders additional time to more fully understand the broad impact of this new regulatory regime and therefore will be a crucial step in DDOE's efforts to successfully promulgate effective and sustainable Stormwater Management Rules. We strongly believe that the only way to promulgate effective regulations is in an open and inclusive manner, and in that spirit we look forward to continued collaboration with DDOE staff and other stakeholders in the coming months to investigate and explore areas which we have not yet had time or resources to fully investigate.

[2] *See* DDOE, Memorandum regarding Initial Response to DCBIA Questions (Oct. 12, 2012) (hereinafter, October 12 Memo); DDOE, Memorandum regarding Responses to Additional DCBIA Questions (Oct. 26, 2012) (hereinafter, October 26 Memo). Both documents are available at http://ddoe.dc.gov/node/367152.

SPECIFIC COMMENTS

We have grouped our specific comments into five general categories: (1) technical issues, (2) process and interagency coordination, (3) sediment and erosion control, (4) general contracting and cost estimation, and (5) the proposed stormwater retention credit program.

Technical Issues

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

The Proposed Stormwater Rules require regulated sites to achieve at least half of their required stormwater retention volume (SWRv) through the use of approved Best Management Practices (BMPs).[3] The Guidebook outlines thirteen approved types of BMPs, including green roofs, permeable pavers, bioretention facilities, wetlands, ponds, and tree planting.[4] By allowing regulated sites to achieve their required SWRv using any one or more of these BMPs on-site, or by sharing BMPs with neighboring regulated sites, the Proposed Rules seek to provide regulated sites with some degree of freedom in how they meet their SWRv requirements. Indeed, as DDOE states, "rather than forcing a certain technology, DDOE has opted for a meaningful performance standard that will allow the market and technical community to innovate in providing the most cost-effective solutions."[5] However, the options available to regulated sites do not provide the flexibility that DDOE anticipates.

First, the Proposed Stormwater Rules fail to account for the fact that not all BMPs are created equal. Some of the approved BMPs are based on mature technologies that planners, architects, and builders are very comfortable incorporating into their plans. Others remain relatively untested and therefore untrusted among members of the development community. As a result, the broad selection of BMPs that the Proposed Rules provide actually offers a narrow choice of just a few technologies that have already proven their durability and cost-effectiveness. For example, although developers in the District are familiar with a number of BMPs, including green roofs, infiltration trenching, filtering systems, and bioretention are all common in the District, other BMPs such as permeable pavers remain uncommon and generally disfavored based on numerous outstanding concerns regarding their functionality and durability, as well as concerns about excessive maintenance requirements. Developers and engineers are simply not comfortable relying on unproven technologies and in general will prefer BMPs that they know and trust. Unfortunately, the approved BMPs do not accommodate for these clear preferences. To better reflect existing building practices, the Proposed Rules should be revised to allow for more extensive utilization of favored BMP technologies.

Further, regulated sites should be free to innovate with already-favored BMPs to achieve the applicable performance standards and should not be forced to comply with strict construction parameters. For example, many developers are generally familiar with bioretention technology, which could be expected to be one of the more commonly utilized BMPs. However, the parameters required by the Proposed Rules, including the 18" ponding requirement and dependency on ponding volume are impractical and will stifle utilization of this BMP. Instead, regulated sites should have more freedom to utilize the technology that they are most familiar with to achieve the required stormwater retention capacity.

Second, and even more importantly, the Proposed Rules significantly undervalue the stormwater retention capacity of many of the BMPs. Specifically, only seven of the thirteen approved BMPs have retention values of 50% or more, and five provide no retention value at all.[6] DDOE has stated that individual BMPs

[3] *See* Proposed Rules, at 7, 15.
[4] *See* Stormwater Management Guidebook, at 18-22.
[5] *See* Proposed Rules, at 14.
[6] 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,

can be scaled up to meet the applicable regulatory obligations;[7] however, scaling is impractical—and in many cases impossible—for densely developed sites with little or no access to adjacent open space. In particular, developments that extend all the way to the lot line will have to fit all on-site retention facilities underneath, inside, or on top of the building, a complex endeavor that will displace valuable square feet of useable space. For example, green roofs will have to cover upwards of 70% of a building's roof area to meet its SWRv. Such extensive coverage will significantly limit the building's use of the roof for any other purpose and, because such green roofs require stronger and thicker roof slabs, these buildings will incur additional vertical constraints within applicable building height codes. Additionally, any BMP requiring infiltration will require sizeable setbacks and a smaller building footprint. As a result, large retention facilities will not be an option and many sites will be forced to either include multiple smaller stormwater retention facilities into their plans or limit their options to only the most efficient BMPs available. For every additional facility, regulated sites will have to grapple with new design requirements, added construction costs, and lost useable capacity—all for relatively little incremental environmental benefit. Alternatively, other sites that are limited for practical reasons to a single stormwater retention facility will be forced to select from the few BMPs with the highest retention values. Further, of the seven BMPs that have retention values of at least 50%, only three have the potential to assist in meeting applicable detention requirements, all of which require appropriate infiltration of in-situ soils, which is rare in the District, and sufficient building setbacks, which may be impractical for many sites. Thus, although DDOE seeks to provide regulated sites with significant flexibility by approving of multiple options to achieve the applicable SWRv requirement, in reality regulated sites will have few feasible options available to them.

To improve their utility, we urge DDOE to reconsider the retention capabilities of the approved BMPs. We believe that the retention values that DDOE currently assigns to many BMPs are unrealistically low and fail to account for technical innovations that could dramatically improve their efficiency. For example, the contributing drainage area for green roofs is too limited. Additionally, the pretreatment credits for rainwater harvesting facilities are excessive and associated building setbacks should be eliminated. Third, for bioretention facilities, the percentage of storage volume required from the ponding depth should be reduced significantly, if not eliminated. These are just a few instances of what we believe to be a general under-valuing of the retention potential for nearly all approved BMPs.

Calculation of Volume Credits for Allowed Best Management Practices

We have reviewed the volume credits for each of the approved BMPs and are very concerned that the credits granted under the Proposed Rules are insufficient for certain "favored/mature" BMP facilities. As a result, a given standard bioretention facility, ponds or other stormwater management facility would not be sufficiently credited for providing the proper storage volume under the Proposed Rules. For example, ponds, wetlands, and open channels are all surface features, meaning that there will be some evaporation taking place; however, the 0% retention value does not take this into account.

Calculation of Detention

We are similarly concerned regarding DDOE's computation of detention values, particularly for the 2-year pre-development conditions.[8] The detention requirement states that a site must detail runoff of the 2-year storm to "pre-development" site conditions. In using the NRCS CN Method, the predevelopment runoff is dependent on the in-situ soil group. In such cases where there is an existing structure on-site and a geotechnical analysis cannot be performed, one would turn to the "Soil Survey of DC" (provided by USDA.) However a majority of DC is "urban soils," which spans multiple soil groups. We recommend

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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.

[7] DDOE, October 12 Memo, at 2.

[8] *See* Stormwater Management Guidebook, at Appendix A.

that DDOE clarify its detention calculations and specifically request that an assumed "predevelopment" curve number be provided for such sites. Providing this clarity will not only help regulated facilities select the optimal stormwater management strategy, but also enable interested stakeholders to provide more insightful comments in the future.

Stormwater Management and the Public Right of Way

We are very concerned about how sites that include both private space and a public right of way (PROW) will be allowed to manage their stormwater. Specifically**,** will such regulated sites be responsible for stormwater that is properly attributable to the PROW portion of the site, or can the PROW be excluded from the site's required SWRv?

For example, DDOT often requires sites to perform improvements to existing street frontanges. These sites should not be required to achieve stormwater retention, either on-site or off-site, for such improvements. Furthermore, in projects such as redevelopment sites, the PROW improvements may push the site over the 5,000 ft^2 threshold, making it a "major land-disturbing activity" as opposed to a "major substantial improvement," thereby increasing its total SWRv from a .8" to a 1.2" requirement.

Will such sites be allowed to utilize the PROW for the construction of stormwater management facilities, such as underground holding tanks, or to route stormwater into the PROW? We note that the Proposed Rules acknowledge that "the District recognizes that achieving the SWRV may be technically infeasible in the PROW on many occasions."[9] This statement also applies to sites impacting the PROW. If regulated sites are to be responsible for the PROW, then those sites should be able to utilize the PROW for added retention capacity. Alternatively, if DDOT does not agree to this, then DDOE should not force regulated sites to compensate for the lack of retention capacity in the PROW.

Finally, we request clarification as to how the DDOE's discounted stormwater fee program will apply to on-site facilities constructed in the PROW.

We understand that DDOE is currently in discussion with DDOT and DC Water regarding these issues and we encourage you to resolve them quickly. However, we request that you include other interested stakeholders in these deliberations immediately. DDOT and DC Water have unique perspectives regarding use of the PROW that are not necessarily representative of the concerns of other interested stakeholders, including regulated sites that include or are adjacent to the PROW. Further, given the looming July 22, 2013 implementation deadline, we will not have time to constructively contribute our useful insights unless we are included in the conversation right away - the tight timeframe in which these rules must be finalized simply does not allow DDOE to engage different groups in sequence. We have many concerns about the shared use of the PROW under these rules and we stand ready to share our constructive insights as soon as possible.

Procedural Issues and Interagency Coordination

Grandfathering of Existing Rules to Existing Sites

We encourage DDOE to better accommodate existing projects under these rules. Currently, DDOE proposes that the Stormwater Management Rules will become effective six months after they are finalized, but no later than the July 22, 2013 deadline imposed by the District's MS4 permit, issued by the US Environmental Protection Administration (EPA). As DDOE explains, "the purpose of this transition period is to allow regulated projects, which are often planned, designed, and constructed over multiple years, time to incorporate these new requirements into their design."[10] DDOE is absolutely correct that development projects frequently span many years; however, DDOE must also understand that six months

[9] Proposed Rules, at 23.
[10] Proposed Rules, at 5.

will be insufficient to adapt existing projects to comply with the new requirements, particularly those that are in the final planning stages. Such a short transition period will force builders to revise plans that they have relied upon for months, if not years, delaying development schedules significantly. Further, given the July 22, 2013 deadline imposed by the District's MS4 permit from the EPA,[11] DDOE cannot guarantee how long the transition period will actually last - or whether there will be a transition period at all.

First, in light of the constraints created by this federally-imposed deadline, we recommend that DDOE provide regulated sites with as much time as possible to transition to the new rules, first by finalizing the Rules as quickly as possible, second by setting the implementation date as far back as the EPA's permit will allow, and third by doing everything in its power to negotiate an extension with the EPA. Failing to provide an adequate transition period will jeopardize many potential developments, putting a significant portion of the District's job and tax base at risk, something that neither DDOE nor the development community wants to see.

Additionally, we request that DDOE clarify that the Stormwater Management Rules will not apply to projects that have been in development for extended periods of time and are now in the later stages of planning and construction. DDOE has indicated that the Stormwater Management Rules are to apply to regulated sites upon their submission to the District Department of Consumer and Regulatory Affairs (DCRA) of a stormwater management plan (SMP) or soil erosion and sediment control plan (SESCP) as part of their building permit applications.[12] However, this trigger will only exacerbate the hardship created by the short transition period. Thus, many aspects of a project's core features must be finalized months, if not years, before either the SMP or the SESCP are ready for submission. Tying the application of the Stormwater Management Rules to such a late phase of the development process will therefore force many regulated sites to significantly retrofit their plans, despite the incredible and potentially unbearable costs and delays involved. Instead, we encourage DDOE to decouple the Stormwater Management Rules from the building permit process and instead have them apply to new projects upon their submission of a preliminary SMP directly to DDOE.

Finally, DDOE can dramatically smooth the transition to the new Stormwater Management Rules by delaying the date upon which regulated sites undergoing substantial improvement activities must comply.[13] Incorporating stormwater retention facilities into such improvements is particularly complex. First, these improvements do not alter the building footprint or disturb any new soil, meaning that there are very few locations in which new retention facilities can be installed. Moreover, these improvements are most common among older buildings that 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" during which they will have a reasonable time to prepare for the new Rules. DDOE could provide this learning period by temporarily suspending the Stormwater Management Rules for substantial improvement activities for a reasonable period after the Rules take effect.[14]

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[11] A copy of the District's MS4 permit is available at http://www.epa.gov/reg3wapd/npdes/dcpermits.htm.
[12] *See* DDOE, October 12 Memo, at 3.
[13] A substantial improvement activity is defined as "a repair, alteration, or improvement of a building or structure, the cost of which equals or exceeds fifty percent (50%) of the market value of the structure before the improvement or repair is started." Proposed Rules, at § 599.1.
[14] For example, a trigger date could be included in § 522.1 of the Proposed Rules that would be a reasonable period after July 22, 2013.

Interagency Coordination of Groundwater Regulations

We request that DDOE revise the dewatering requirements contained the Proposed Rules, both to harmonize the requirements with regulations currently overseen by DC Water and in development by DDOE, and to provide greater clarity for regulated sites.[15]

First, we are concerned that the Rules as currently proposed will conflict with similar dewatering pretreatment regulations currently overseen by DC Water. We have reviewed DDOE's clarification that the dewatering requirements in section 542.12 of the Proposed Rules are intended to apply only to water discharged into the District's MS4,[16] and we believe that such a restricted application would resolve any conflict with DC Water's pretreatment requirements for discharges into the District's combined sewer system. However, DDOE must clarify that distinction in its finalized stormwater rules.

Second, we are aware that DDOE is in the process of developing regulations for wells that are not expected to be introduced until after the Stormwater Management Rules are finalized. If DDOE is unwilling to delay implementation of groundwater controls until they are introduced as part of the well regulations, then we request express assurance from DDOE that the Proposed Rules will not conflict with the well regulations once they are introduced. One possibility would be to include a sunset provision in the final Stormwater Management Rules such that the groundwater requirements would automatically lapse upon DDOE's implementation of its well regulations.

Third, we are very concerned about how "contaminated" will be defined under the Stormwater Management Rules. The Proposed Rules refer to "contaminated groundwater" on multiple occasions; however, they do not clearly define the term.[17] We are concerned because "contaminated" can be construed in many different ways and an inappropriate interpretation could have severe consequences for regulated sites. We therefore suggest that DDOE promulgate a clear definition of "contamination" that expressly excludes 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 remediation standards which are far more applicable to groundwater than other standards. Additionally, because this definition could have such a consequential impact on regulated sites, we insist that DDOE proceed in an open and transparent manner and refrain from finalizing any definition without further notice and public comment.

Coordination of Stormwater Pollution Permit Requirements

The Stormwater Management Guidebook indicates that all sites of 5,000 ft^2 or larger will be required to apply to DDOE for a Stormwater Pollution Prevention Permit (SWPPP).[18] We note that this threshold is much smaller than the one-acre trigger for the SWPPP under the EPA's Construction General Permit, but we believe that the EPA's Construction General Permit can be applied to smaller sites. As a result, DDOE's proposed permitting requirement is duplicative.[19] We support DDOE's concern that many smaller sites would benefit from basic "good housekeeping" practices;[20] however, imposing this requirement on sites that are already subject to the EPA's permit is unlikely to achieve any additional environmental protection and will only create further administrative burdens and delays for regulated

[15] *See* Proposed Rules, at Part 542.
[16] *See* DDOE, October 26 Memo, at 3.
[17] *See* Proposed Rules, §§ 542.11, 542.12.
[18] *See* Stormwater Management Guidebook, at Appendix R.
[19] In fact, we do not believe that DDOE has permitting authority pursuant to the Clean Water Act to issue such a permit because it is not a delegated state.
[20] *See* DDOE, October 12 Memo, at 3.

sites. To resolve this potential duplicity, we recommend that DDOE simply accept the EPA's Construction General Permit as proof of compliance.

Field Inspections of Regulated Sites

Field Inspection Capacity

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. In particular, regulated sites will require additional inspection of their stormwater retention facilities and sites that generate stormwater retention credits will require an additional inspection at least every three years. We are concerned that DDOE's existing field inspection staff does not have the capacity to meet this increased demand, such that many regulated sites will suffer lengthy and costly construction delays waiting for inspections to be scheduled. Therefore, we request that DDOE provide express assurances that it will have sufficient inspection capacity *before* the stormwater rules take effect.

Alternatively, we request that DDOE allow field inspections to be completed by qualified third parties. Currently, DCRA already utilizes third party inspections and could easily administer these inspections on DDOE's behalf. We are encouraged by DDOE's statement that it is "committed to providing plan review and inspections in a timely manner, and if the demand exceeds DDOE's staff capacity, then DDOE is willing to consider allowing third party inspections."[21] However, DDOE should not wait until its own capacity has already proven inadequate to begin considering whether to allow third party inspections. Instead, we recommend that DDOE revise the Proposed Rules to include a certification process for third party inspectors to ensure that a sufficient inspection capacity is available as soon as possible.

Inspection Requirements During the Construction Process

The Proposed Rules do not clearly indicate when during the construction process DDOE intends to inspect on-site stormwater retention facilities. Will inspections be required only during certain specific stages or will inspections be required throughout the installation process? We note that the Stormwater Guidebook lists the inspection requirements for each type of BMP;[22] however, we remain unclear as to whether DDOE intends to inspect each stormwater retention facility at every stage listed, or only during selected stages. We therefore request that DDOE clarify exactly when regulated sites should expect their on-site stormwater retention facilities to be inspected.

Inspection of Underground BMPs

The Stormwater Rules as currently proposed do not identify which parts of an underground BMP facility must remain exposed for a final stormwater inspection. For example, for an underground detention basin composed of stone and perforated pipe, must the contractor keep the trench open until the inspection is complete? In particular, can DDOE confirm that underground BMP facilities can be approved during final inspection, even though they remain at least partially covered?

Additionally, we are concerned that leaving certain underground BMPs exposed for extended periods could present a serious worker-safety issue and could mitigate the facility's environmental benefit, given the potential for sediment-laden water to enter the facility and significantly hinder its performance. We therefore request that DDOE provide some guidance as to how regulated sites should prepare underground retention facilities for inspection without creating safety issues or hindering their performance.

[21] *See* DDOE, October 26 Memo, at 3.
[22] *See* Stormwater Management Guidebook, at § 5.2.

Establishment and Collection of Stormwater Fees

First, we request greater background information regarding how DDOE established the fees to be assessed under the Proposed Rules.[23] 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. Additionally, we recommend that DDOE revise the Proposed Rules to limit the rate at which fees can be adjusted over time. By providing this information and imposing such a limit, DDOE will greatly help regulated sites better understand how the fees were developed and better anticipate how fees will be adjusted in the future.

Additionally, we request that DDOE clarify how it intends to collect 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?

Erosion and Sediment Control

25' Waterway Buffer

The Proposed Rules require all regulated sites to maintain an undisturbed 25 foot buffer along all waterways.[24] We are aware of similar waterway restrictions in other jurisdictions, and we acknowledge that 25 feet is not substantially greater than what is required elsewhere. However, we note 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. For example, a utility may be required to cross the wetland buffer or a stormwater pipe may need to outfall within the buffer. Therefore, we recommend that DDOE revise the Proposed Rules to allow regulated sites to petition DDOE for a waiver of the 25 foot buffer requirement.

2.5 Acre Limit on Disturbed Land

The Proposed Rules would impose a 2.5 acre limit on the area that any single regulated site can disturb at any one time. We appreciate that DDOE believes that this limit will effectively reduce sediment erosion from large regulated sites, but we are concerned that DDOE is unaware of the costly impact that this limit will have on large development projects, and we urge DDOE to explore alternatives that are more accommodating to large development projects but equally environmentally effective. DDOE has explained that this limit is motivated by the failure of large sites to implement and adequately maintain proper perimeter controls. By reducing the area of undisturbed land, DDOE is therefore seeking to limit the environmental impact of such failures, or as DDOE has stated, "reducing the area that is unstabilized translates into less burden on perimeter controls, which helps reduce the risk of failure, and it also limits the environmental impact when a failure does occur."[25] Reducing the risk and impact of perimeter control failures is a worthy goal; however, alternative approaches exist that could be simultaneously more environmentally protective and less burdensome on regulated sites.

First, we do not believe that DDOE fully appreciates the burden that this limit will impose on many regulated sites, which will be forced to adopt a phased development strategy that will inevitably add complexity, cost, and time to all large projects. For example, during excavation, sites that currently stockpile soil onsite to be backfilled at a later time will no longer have space for that soil and therefore will be forced to transport that soil offsite, arrange for its disposal or storage, and then bring it back onsite or purchase new soil entirely. These added steps alone could add hundreds of thousands of dollars to a large project. Additionally, large sites will effectively be forced to fully develop each 2.5 acre portion of the site before breaking ground on the next. Repeating the construction process from start to finish for

[23] For summary of fees, see Proposed Rules, § 501.
[24] *See* Proposed Rules, § 545.5.
[25] DDOE, October 26 Memo, at 3.

each portion will add time and a degree of complexity to projects that will be incredibly burdensome at best, and we believe could thwart some projects entirely.

Second, we encourage DDOE to consider alternative regulatory strategies to an outright cap on a site's total disturbed land, such as limiting the area of disturbed land for which a given perimeter control would be suitable. Under this approach, some perimeter controls could only be used on smaller sites, while others could be used on all sites. As a result, larger sites would be able to disturb more than 2.5 acres at a time while still effectively preventing the escape of any sediment from the site. For example, sediment traps, sediment basins and larger diameter compost filter socks can be effectively utilized to control sediment from larger sites. Similar to other jurisdictions, specifications for the use of these devices such as limiting drainage area and limiting the slope of land draining to certain types of devices can significantly reduce the potential for a properly installed and maintained device to fail.

Ultimately, we believe that this issue is primarily one of enforcement, not regulation. If the problem is sites' failure to maintain perimeter controls, then the most effective solution would be to reduce the failure rate by increasing the frequency of field inspections, not to further restrict the controls themselves. For example, sediment from up to 2.5 acres could still freely escape from a given non-compliant site under the Proposed Rules, but that same site would be much more likely to prevent all sediment from escaping with more rigorous enforcement of the existing rules. Would DDOE's planned expansion in field inspection capacity provide for more rigorous inspection of perimeter controls around large sites? Nearly all regulated sites are very responsible in this regard and would welcome greater inspection of their sediment and erosion control measures. However, DDOE must avoid punishing responsible developers for specific instances of non-compliance at a minority of regulated sites.

Designation of a Responsible Person

Under § 547 of the Proposed Rules, regulated sites must designate a "Responsible Person" who "shall be on site during land-disturbing activity to ensure that the activity complies with [soil erosion and sediment control regulations],"[26] and who "shall be certified through a training program that the Department approves."[27] However, the rules do not state exactly what the Responsible Person shall be responsible for, what minimum professional qualifications a Responsible Person must have, or which training programs the Department would approve.

We are aware that DDOE has taken steps to clarify the duties for which a Responsible Person is intended to be responsible and the qualifications that an individual must attain to serve as a Responsible Person. Specifically, DDOE has clarified that it does not intend for the Responsible Person to be physically present on-site at all times during land disturbance activities. Rather, the Responsible Person would only be responsible for conducting periodic inspections of the site, responding to problems as they arise, and being available to speak with inspectors and other DDOE personnel upon request.[28] We agree that the specific responsibilities that DDOE has outlined are reasonable, but we note that they are not clearly defined in the Stormwater Rules. Therefore, we request that DDOE revise the proposed rules to reflect the responsibilities that it has subsequently identified. Additionally, we request that DDOE clarify that the Responsible Person can be an agent of the regulated site's owner, such as a civil engineer.

Defining "Topsoil Preservation"

Pursuant to § 542 of the Proposed Rules, regulated sites must include in their erosion and sediment control plans "provisions to preserve topsoil and limit disturbance."[29] As an initial matter, the regulation

[26] Proposed Rules, § 547.1.
[27] Proposed Rules, § 547.2.
[28] DDOE, October 26 Memo, at 5.
[29] Proposed Rules, § 542.9(n)(1).

does not clearly define "topsoil." Some individuals might refer to topsoil as only the uppermost layer of organic material, while others would include all inorganic layers of subsoil below. There is a huge disparity between these various interpretations, and we therefore request that DDOE expressly define "topsoil" in its revised rules.

We recommend that DDOE define topsoil to constitute only the uppermost layer of organic material in which vegetation can be grown. However, even if DDOE defines topsoil as narrowly as possible, it will not be practical for many regulated sites to preserve that material in place, since doing so would only exacerbate the space constraints created by the 2.5 acre limit on disturbed land. Further, the topsoil at many sites is of poor quality and contains stones, litter, and other debris that would have to be sifted and filtered - a process that is time consuming and costly.

Alternatively, regulated sites should be allowed to remove the existing topsoil and replace it with fresh organic matter. Doing so would achieve DDOE's desire for sites to have a layer of soil in place that can be seeded and stabilized. And because seeding is already a common erosion control practice, it would be relatively easy to implement among regulated sites. Therefore, we recommend that the Proposed Rules be revised to simply require use of an organic soil that can be seeded for erosion control measures, but not necessarily require reuse of the original topsoil.

Defining "Details of Grading Practices"

Regulated Sites are also required to include in their erosion and sediment control plans "details of grading practices."[30] First, we are confused as to which "details" should be included in the plans. Second, we are confused as to which "grading practices" this requirement refers to. DDOE has indicated that the requirement refers to the grading practices identified in other publications,[31] but if that is the case, then the proposed rules should be revised to state that clearly.

Review of Soil Erosion and Sediment Control Plan

First, pursuant to § 542.14 of the Proposed Rules, regulated sites may be required to "provide additional information that the Department considers necessary."[32] This requirement is unmanageably vague. We accept that the purpose of this requirement was to enable DDOE to "account for site-specific differences that require information not already listed in the preceding sections,"[33] and we agree that DDOE may reasonably require some flexibility to request additional documentation in specific circumstances. However, the requirement as currently proposed is far more expansive than we believe DDOE intends it to be and could enable DDOE to impose burdensome and costly additional reporting requirements on regulated sites without warning. We therefore request that DDOE revise this requirement to clarify the type of additional information that DDOE might request under this provision and the circumstances in which those requests will be made.

Second, and more generally, we recommend that DDOE adopt a time limit for its review of soil erosion and sediment control plans. Based on our experience, we feel that a 30 day limit would both allow DDOE adequate time to conduct a full review of a proposed plan - and to request additional information if necessary - and provide regulated sites with additional certainty regarding the review process. Additionally, we 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.

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[30] Proposed Rules, § 542.9(n)(2).
[31] *See* DDOE, October 26 Memo, at 6. DDOE references its Standards and Specifications for Soil Erosion and Sediment Control.
[32] Proposed Rules, § 542.14.
[33] DDOE, October 26 Memo, at 6.

Defining "Rebuttable Presumption"

Section 543 the Proposed Rules refer to a "rebuttable presumption."[34] We understand that this is a technical legal term that carries a specific meaning; however, we request that DDOE revise the rules to be more accessible to individuals who do not have legal training but who are required to follow them.

Protection of Cut and Fill Slopes

The Proposed Rules require all cut and fill slopes to be protected in vertical increments of exactly five feet.[35] We do not understand why the rules call for such precise specifications, particularly considering the highly variable topology in the District. We acknowledge the need to protect cut and fill slopes to prevent sediment from running onto adjacent properties or into nearby water bodies; however site-specific topological considerations should dictate the vertical increments in which those protections are implemented. Increments of exactly five feet may be impractical and unnecessary in very steep terrain but may not be effective enough in shallower areas of the District. For example, such increments will be tedious and time consuming on large sites with a considerable amount of earthwork, as the excavation contractor would have to stop every 5 vertical feet to place erosion control mats and seed or some type of erosion control BMP. Additionally, this requirement does not seem to make sense for cuts that are temporary in nature, such as the excavation behind a retaining wall that will be backfilled and stabilized as wall construction progresses.

Additionally, the rules as currently proposed are not clear as to whether this requirement will apply to basement excavations where the excavation is laid back and there is no risk of off-site runoff. Because the issue that motivated this requirement does not exist in such sites, we do not believe that the requirement should apply in such circumstances, but even if our belief is accurate, we request that DDOE clarify that point.

Sediment Controls During Demolition Activities

The Stormwater Rules as currently proposed require regulated sites to implement control measures to prevent debris, dust, and sediment from escaping a site during demolition.[36] DDOE has stated that these controls will only apply to sites with 5,000 ft^2 or less of land disturbance that are not required to obtain a Soil Erosion and Sediment Control Plan.[37] However, the proposed rules do not indicate which control measures might be required or the circumstances in which each will have to be used. This uncertainty will make it very difficult to accurately estimate the time and cost necessary to complete a demolition project. Further, when does DDOE intend to instruct regulated sites to implement these control methods? Delaying this guidance until demolition is already underway will create significant uncertainty and result in extensive and costly delays. Rather, we request that DDOE revise the proposed rules to ensure that demolition sites will be made aware of which control measures they will be required to implement before demolition begins.

General Contracting and Cost Estimation

Protection of Areas for Future On-Site BMP Facilities

The Guidebook states 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."[38] This restriction effectively prohibits builders from compacting potentially large areas of a regulated site, even temporarily. As a result, builders' operations will be further constrained in already tight working

[34] *See, e.g.*, Proposed Rules, §§ 543.4, 543.11.
[35] *See* Proposed Rules, § 543.17.
[36] *See* Proposed Rules, § 540.2.
[37] DDOE, October 26 Memo, at 7.
[38] *See* Stormwater Management Guidebook, § 3.4.6; see also, §§ 3.5.6, 3.7.6.

conditions, which will inevitably increase construction costs, lengthen construction schedules, and could compromise worker safety. Given the immense impact that this restriction will impose on regulated sites, we question whether DDOE's intent is really to protect these areas *during* the initial construction process, or for future use *after* the initial construction is complete. If DDOE's intention is indeed the latter, then we recommend that regulated sites be allowed to utilize the entire site during construction as long as they take care to restore areas for future BMP facilities once construction is complete. For example, areas that are compacted during construction could easily be de-compacted upon completion and effectively returned to their original condition. This alternative approach would provide much more flexibility for regulated sites and achieve DDOE's goals for the restriction just as effectively.

Stabilization of Stockpiles

The Proposed Rules appear to us to provide conflicting guidance regarding the stabilization of stockpiled material. It is already common practice to cover inactive stockpiles using straw mulch and temporary vegetation, as would be required by the proposed § 543.18(c); however, we do not understand why additional stabilization measures are necessary. Specifically, we expect that covering stockpiles at the end of each workday will provide little environmental benefit when the piles are being used or added to on a regular if not continuous basis. Further, covering stockpiles on a daily basis will be a costly and time consuming process. Therefore, we recommend that DDOE remove proposed §§ 543.18(a) and (b) in the final Stormwater Management Rules.

Advance Purchase of Green Roof Plantings

The Stormwater Management Guidebook states that regulated sites should purchase plantings for green roofs between six and twelve months prior to installation.[39] We are not clear whether this provision is a requirement or a suggestion. If DDOE intends this to be a requirement, then we request its complete removal from the Guidebook. Green roof plantings may be available immediately prior to their installation or a builder may be able to contract for plantings more than twelve months in advance. In either case, we do not understand why builders should only be able to purchase green roof plantings within this narrow timeframe. Alternatively, if DDOE intends this provision to be merely a suggestion, then we request that the Guidebook be revised to clearly indicate that fact.

Non-Compaction Requirements and the Use of Underground BMPs

Currently, final compaction must occur during the final backfill around the perimeter of a building. However, if these areas are to be used as BMP facilities, such as stormwater disconnection areas or permeable pavement, it will be impossible to comply with these compaction requirements. Thus, there is a direct conflict between compaction and BMP installation requirements. We therefore request that DDOE consider options to resolve this conflict, and we suggest that DDOE clearly allow non-compaction of areas to be used for specified BMP facilities.

Required Coverage of Pervious Pavement

The Stormwater Guidebook states that permeable pavement installations should be covered with plastic sheeting for at least seven days after installation.[40] We understand that DDOE's intention is merely to reinforce common manufacturer specifications,[41] however, doing so with such specificity unnecessarily prevents builders from tailoring individual installations to unique site conditions or the parameters of innovative pavement products. For example, pervious pavement may be installed in a primary entrance to the site such that covering it for seven days could significantly impact site operations. Additionally, new pavement products could foreseeably come to market that do not need to be covered for seven days.

[39] Stormwater Management Guidebook, at 34.
[40] Stormwater Management Guidebook, at 89.
[41] DDOE, October 26 Memo, at 7.

Therefore, we suggest that DDOE revise this guideline to merely suggest that builders follow manufacturer specifications to the extent allowed by on-site conditions.

Approved Suppliers of Bioretention Area Soil Media

The Stormwater Guidebook states that soil media to be used for bio-retention purposes should be purchased from an approved supplier.[42] However, the Guidebook does not identify any approved suppliers or indicate the criteria that a supplier would have to satisfy in order to become approved. More generally, we do not understand why individual suppliers, as opposed to types of soil media, should be subject to DDOE approval. We therefore request that DDOE revise this guideline to identify specific approved types of soil media, or at least the specific performance standards that a given type of soil media should satisfy.

Off-Site Stormwater Retention and the Stormwater Retention Credit Program

The Proposed Rules allow regulated sites to achieve up to half of their SWRv through off-site retention, which they can account for either by submitting Stormwater Retention Credits (SRCs) to DDOE or by paying DDOE an in-lieu fee.[43] In order to determine whether to participate in the SRC Program or to simply pay the in-lieu fee for their off-site retention, regulated sites will need as much information as possible about both options, particularly the SRCs' core characteristics and how the market in which they will be traded will function. This is particularly important because, although trading markets exist for other types of natural resource credits,[44] we know of no precedent for the stormwater retention credit market that DDOE seeks to implement. In principle, we applaud DDOE for its willingness to approach stormwater management in such a creative and innovative fashion, and we have every hope that the SRC program will achieve its goal of providing regulated facilities with a flexible and cost-effective means of retaining stormwater. However, we have many practical concerns, and *we cannot emphasize strongly enough that without a clear understanding of the SRCs 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.* We therefore consider DDOE's responses to the specific issues we raise below to be crucial to many regulated sites' participation in the SRC program.

In-Lieu Fees

The Proposed Rules enable regulated sites to achieve off-site stormwater retention via payment of an in-lieu fee, which "shall represent the full life-cycle cost for the Department to retain one gallon of stormwater for one year."[45] However, many aspects of this fee remain unclear.

First, DDOE has indicated in the Stormwater guidelines that the in-lieu fee will initially be set at $3.50/gallon/year.[46] However, DDOE has not indicated how it established this value. To help us better understand its reasoning, we request that DDOE make public the cost estimations and assumptions that it relied upon to determine the initial $3.50 in-lieu fee.

Second, to help explain exactly how the in-lieu fee will be calculated for a given regulated site, we request that DDOE provide a clear explanation of the necessary computation, including specific illustrative examples.

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[42] Stormwater Management Guidebook, at 119.
[43] *See* Proposed Rules, § 527.
[44] For example, the Regional Greenhouse Gas Initiative auctions credits for carbon emissions, and multiple states in the Chesapeake Bay Watershed, including Maryland, Virginia, and Pennsylvania, have established nutrient credit programs for nitrogen, phosphorous, and sediment runoff.
[45] Proposed Rules, § 530.1.
[46] Proposed Rules, § 501.8.

Third, although payment of the in-lieu fee is intended to enable regulated sites to achieve additional stormwater retention off-site, we note that the Proposed Rules do not specify how the collected fees are to be spent. Can DDOE provide some assurance that the collected fees will be used exclusively for the installation, operation, and maintenance of stormwater retention facilities? Does DDOE know the types of stormwater retention technologies it intends to utilize? Are these technologies available for $3.50 per gallon of annual retention? To provide the public with the most transparent accounting possible, we recommend that DDOE deposit the in-lieu fees into a separate special-purpose fund that can be easily monitored, and issue annual reports that summarize the fund's activities and highlight how the funds are being used to effectively retain stormwater in the District.

Finally, we request that DDOE revise how the in-lieu fee will be adjusted in the future to provide greater long-term certainty to regulated sites. Under the Proposed Rules, annual adjustments to the in-lieu fee will be based on either the Construction Cost Index or the Urban Consumer Price Index.[47] However, to provide greater long-term predictability, we request that DDOE revise this adjustment method in three ways. First, we request that DDOE limit adjustments to no more than once every five years rather than on an annual basis. Second, in the interest of simplicity, we recommend that DDOE look to the Urban Consumer Price Index as the exclusive benchmark upon which adjustments shall be based. Third, we request that DDOE impose an absolute cap on the rate of adjustment to guarantee that the fee will never increase faster than a predetermined rate, despite the chance of significant fluctuations in inflation rates. Collectively, these three revisions will enable regulated sites to accurately predict their long-term fee obligations without compromising DDOE's ability to collect sufficient fees to retain the necessary volume of stormwater.

<u>Stormwater Retention Credits</u>

Initial Availability of Credits

The issue about which we are perhaps most concerned is whether there will be an adequate supply of credits available by the time that the stormwater rules take effect. To date, our understanding is that DDOE has not yet certified any SRCs and does not intend to do so until the rules are finalized. This is a critical omission in the Program; the SRCs need to be available on day one, as soon as the rules are implemented. Has DDOE taken any initial steps to recruit potential sources of SRCs, or even promoted the program among such potential sources? We are aware that "DDOE expects that SRCs will be available on or close to the effective date of the new rule;"[48] however, that is simply not sufficient assurance for regulated sites. We therefore request that DDOE initiate efforts now to certify SRCs and create an inventory of them to be available when the Stormwater Management Rules take effect.

Calculation of the Likely Market Prices for Credits

Has DDOE made any effort to estimate how much SRCs are likely to cost? We assume that the cost of an SRC will not rise above the in-lieu fee for any given SWRv, but we would appreciate a more accurate estimate if at all possible and therefore request that DDOE make public any cost estimates that it has prepared, as well as all information and assumptions that it relied upon to arrive at those estimates.

Certification of Credits

First, we request that DDOE provide some indication of how long it expects the process of certifying newly generated SRCs will take. We fear that without a speedy, predictable certification process, regulated sites will have to plan for extended periods of SRC scarcity and cause SRC-generating facilities to avoid participation altogether, hindering the Program's overall success. Therefore, we request that DDOE revise the stormwater rules to include a maximum certification period of twenty-one days.

[47] Proposed Rules, § 530.2.
[48] DDOE, October 12 Memo, at 5.

Second, as part of its certification of SRCs, DDOE reserves the right to demand from SRC generators any "documentation that the Department requires to determine that the eligibility requirements are satisfied."[49] This provision is incredibly broad and potentially enables the certification process to become overly burdensome and thus unattractive to prospective SRC-generating facilities. We understand that DDOE may require some additional information in certain limited situations; however, it must also give prospective facilities confidence that the certification process will be straightforward and manageable. Therefore, in order to encourage the creation of as many SRCs as possible, we request that DDOE significantly narrow the scope of this provision.

Retroactive Certification of Credits for Existing Stormwater Retention Facilities

DDOE has indicated that it will certify SRCs for stormwater retention capacity at existing facilities that have been installed since May 1, 2009.[50] However, the Proposed Rules do not clarify whether such facilities will be able to generate SRCs for the retention capacity that they have maintained since that date.[51] 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? Allowing such retroactive certification would go a long way toward ensuring that an adequate supply of SRCs will be available by the time that the final Stormwater Management Rules take effect. Further, doing so would not mitigate the SRC Program's environmental integrity because the Program is already considering such facilities to be newly installed retention capacity simply by allowing such facilities to generate credits at all. We therefore request that DDOE revise the proposed rules to certify SRCs for retention capacity installed since May 1, 2009. We note that, in the event that DDOE does adopt this recommendation, it will also have to consider who shall be the proper owner of the retroactively awarded credits, particularly if the facility had been sold during this period. We have not yet developed a formal recommendation for how this issue could be resolved, but look forward to working with DDOE to come to a resolution in the months ahead.

Banking and Retirement of Credits

We are confused regarding the banking and retirement of SRCs. As currently proposed, the stormwater rules would allow participants in the SRC Program to bank SRCs indefinitely, but the rules also empower DDOE to retire SRCs if "a final determination to retire a SRC is made."[52] To provide additional liquidity in the market and increase their value, we support making SRCs indefinitely bankable. However we are concerned that the rules do not sufficiently limit DDOE's ability to retire credits at its own discretion, even if the owners of those credits have fully complied with all other applicable regulations. We therefore request that DDOE clarify that it will have authority to retire credits only upon their redemption by a regulated entity for the associated stormwater retention capacity by eliminating § 532.2(b) in the finalized Rules.

<u>Relief from the Limit on Useable Credits in Special Circumstances</u>

In general, regulated facilities cannot achieve more than half of their SWRv off-site.[53] The Proposed Rules do allow regulated facilities to exceed this limit in instances where the on-site retention requirement is "technically infeasible or environmentally harmful."[54] In addition, we recommend that DDOE provide relief from this limit where the on-site retention requirement is excessively expensive. In most cases, a

[49] Proposed Rules, § 531.9(f).
[50] *See* Proposed Rules, § 534.2(a).
[51] Section 531.11 merely states that "the Department shall not certify an SRC . . . (b) for a period that begins earlier than the date of the submittal of a complete application."
[52] Proposed Rules, § 532.2(b).
[53] *See* Proposed Rules, §§ 520.4, 521.2.
[54] *See* Proposed Rules, §526.2

given volume of retention capacity is equally environmentally beneficial, whether on-site or off-site. Therefore, regulated sites for which achieving half of its SWRv on-site would be excessively expensive should be allowed to retain as much as reasonably possible on-site and make up the difference with additional off-site retention.

Administration of Credit Trading

Without doubt DDOE's administration of the SRC Program will be particularly crucial to its overall success. With that fact in mind, we submit below a number of questions for DDOE's clarification specifically regarding how it intends to administer the SRC Program.

Creation of a Secondary Trading Market

A key feature of many natural resource credit trading programs is the operation of a secondary market in which credits that have already been issued are freely traded. DDOE has indicated that it intends to administer such a market,[55] but the Stormwater Rules as proposed provide very little detail about how this market is to be administered.

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.[56] 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 prospective buyers and sellers can review each others' bids, offers and completed transactions.[57] We believe that DDOE could host such an exchange via its website without much difficulty, and we request that DDOE seriously consider this option.

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[55] DDOE, October 12 Memo, at 5.

[56] 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.

[57] 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.

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.[58] 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 before, regulated sites are already extremely wary of the utility of the SRC 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. Finally, we recommend that DDOE specify the market's structure and reporting system in the finalized Stormwater Management Rules, rather than via informal guidance.

Stormwater Credit Sales Contracts

In order to improve the efficiency of SRC transactions, we recommend that DDOE develop a standardized sales contract template that market participants could utilize. 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. For example, the sales of SRCs by regulated sites might require different terms compared to sales by third party traders, and additional consideration may be necessary for the transfer of SRCs between off-site retention facilities and regulated sites that are commonly owned. However, we believe that such model contract language would be very helpful to market participants and would further encourage prospective participants to join, particularly if DDOE decides to adopt an OTC secondary market structure. We have not developed any specific language to recommend at this time, but we would be very interested in collaborating with DDOE and any other interested stakeholders to develop such language in the future with the goal that a model contract would be available by the time that the Stormwater Management Rules are finalized.

Approval of SRC Transactions

Pursuant to the Proposed Rules, DDOE will have the authority to review and approve of every proposed transaction for SRCs.[59] As an initial matter, we remain unclear as to the purpose of this transactional approval process. Exactly what issues will DDOE be looking for in its review of individual transactions? We suspect that this approval may not be necessary and DDOE may be able to achieve its goals simply by monitoring the market's overall activity. On what grounds might a given transaction be denied? Alternatively, if DDOE ultimately decides to retain its approval authority, we note that the Proposed Rules do not indicate how quickly DDOE will review proposed transactions or the standards that it will use to evaluate them. Because the SRCs to be transferred have already been certified, we expect that the approval process should be relatively straightforward; however, to provide market participants greater assurance, we recommend that DDOE revise the Proposed Rules to include a maximum period in which a proposed transaction must be approved. If DDOE takes no action within that timeframe, then the transaction should be automatically approved. Second, we also recommend that the Proposed Rules be revised to include a detailed and exclusive list of the exact criteria by which transactions will be evaluated. DDOE must not allow its role to impede the Program's efficiency and predictability, either by holding up transactions under indefinite review or by creating uncertainty as to whether transactions will be approved at all.

[58] DDOE, October 12 Memo, at 6.
[59] Proposed Rules, § 533.3.

Vesting of Stormwater Retention Credits
We are unclear as to how SRCs will be vested in SRC-generating facilities and regulated sites, both of which will have to demonstrate to DDOE how many SRCs each has generated or consumed, respectively. How will these sites record their SRC balances? With specific regard to regulated sites, will there be a separate document to be recorded against the property? We note that the Stormwater Guidebook includes a sample form by which regulated sites can submit SRCs for compliance purposes,[60] but how will regulated sites record their balance of outstanding credits? Will DDOE record the ownership of all outstanding credits and make it available to regulated sites upon request, or will it be up to regulated sites to maintain their own records? This issue will be particularly important to owners of regulated sites (and their lenders), and we therefore request that DDOE clarify how outstanding credits will be recorded.

Timing of SRC Program Compliance Obligations
We request clarification regarding the timing of the SRC Program's compliance milestones. First, at what point in the building or occupancy process will a regulated site be required to submit SRCs to DDOE for compliance purposes? Will regulated sites be required to begin submitting SRCs for compliance purposes upon their submission of a Stormwater Management Plan, or at a later time, such as upon receipt of a Building Occupancy Permit? Once a regulated site is fully developed and occupied, when will it be required to submit SRCs to DDOE? Will regulated sites be required to submit SRCs at the beginning of every annual regulatory period, or at the end? Because some regulated sites may qualify as net-SRC-generating facilities and therefore will be required to both submit SRCs for compliance purposes and certify SRCs for generation 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 be required to submit SRCs for compliance purposes only upon their receipt of a building occupancy permit and thereafter be required to submit SRCs at the end of each annual compliance period so that it will have sufficient time to determine the ideal balance of SRCs and in-lieu fee payments. We also recommend that DDOE allow SRC-generating facilities to bank their own SRCs 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 SRCs in the Program at any given time.

<u>Failure to Maintain a Stormwater Retention Facility for Which Credits Have Been Certified</u>
How does DDOE intend to respond when an SRC-generating facility is no longer able to retain stormwater capacity for which SRCs have already been certified? This issue could foreseeably arise, particularly given that DDOE intends to issue credits for up to three years of retention capacity at one time.[61] For example, a given SRC-generating facility for which three years of credits had already been certified and sold might eliminate some or all of its retention capacity after two years. In such a case, would the credits based on the third year of retention capacity be retired by DDOE? We believe that under the Proposed Rules DDOE would not be able to retire SRCs that have already been certified,[62] but we are concerned by DDOE's recent statement that "if the retention capacity is not maintained, [DDOE] does have the authority to require the original SRC owner to purchase replacement SRCs or pay the corresponding amount of in-lieu fee."[63] This position raises two issues. First, it is not clear to us exactly who the "original SRC owner" is. Is this party the SRC-generating facility, or the party that first purchases the SRC from that facility? *We strongly believe that regulated sites that have purchased such credits should not be punished for the failures of others and therefore request that the proposed rules be revised to clarify that this provision refers to the SRC-generating facility.* Second, we note that forcing an SRC-generating facility to compensate for its lost retention capacity is not a suitable solution unless that

[60] Stormwater Management Guidebook, at Appendix C.
[61] *See* Proposed Rules, § 531.10.
[62] *See* Proposed Rules, § 532.3.
[63] DDOE, October 12 Memo, at 8.

facility is also forced to retire those SRCs with DDOE. Under the rules as currently proposed, such a facility would be forced to "replace the SRC with another SRC," but remains free to resell the replacement SRC at its discretion. As long as that replacement SRC remains in circulation, however, it will not compensate for the lost retention capacity. This is a crucial but easily fixable loophole that we suggest DDOE close in the final Stormwater Management Rules.

Coordination of the Credit Program with Public Subsidy Programs

At a recent public presentation on the proposed Stormwater Management Rules, DDOE staff members were unclear as to whether SRCs would be certified for stormwater retention facilities that had already received public subsidy, such as a green roof rebate or other incentive programs, either from DDOE or another public authority. Given the interest in establishing the largest possible supply of SRCs, particularly for the Program's initiation, excluding these facilities would be impractical and would not have any impact on the environmental integrity of the SRC Program. We therefore request that DDOE revise the proposed rules to clarify its intent to allow such facilities to participate in the Program.

Conclusions

For quite some time, DCBIA consistently asserted that a rulemaking of this magnitude requires years, not months of collaboration and deliberation to be effective and practical. Given the brief timeframe allotted for this rulemaking, it is therefore not surprising that the concerns presented above address an expansive and comprehensive set of points. In addition, these comments represent only what our industry experts have been able to evaluate given the limited time and incomplete information available. Therefore, we are in the untenable position where developers, architects, engineers, building owners and lenders and general contractors are unable to fully interpret the cost impacts and feasibility of these rules as proposed.

We commit to continue to put forth the greatest effort possible to review, interpret 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 mass 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
Interim Director Keith Anderson
Mr. Jeffery Seltzer
Mr. Jeff Miller
Mr. Ernest D. Jarvis