NATURAL RESOURCES DEFENSE COUNCIL

together with

ANACOSTIA WATERSHED CITIZENS ADVISORY COUNCIL
AUDUBON NATURALIST SOCIETY · CHESAPEAKE BAY FOUNDATION
CLEAN WATER ACTION · DC ENVIRONMENTAL NETWORK
EARTHJUSTICE · GLOBAL GREEN USA · POTOMAC RIVERKEEPER

April 30, 2013

District Department of the Environment
Attn: Brian Van Wye, Natural Resources Administration
1200 First Street, NE, 5th Floor
Washington, DC 20002
Brian.VanWye@dc.gov

Re: Revised Stormwater Rule Comments

Dear Mr. Van Wye:

The Natural Resources Defense Council (NRDC) appreciates this opportunity to provide comment to the District Department of the Environment (DDOE) on its revised stormwater rulemaking proposal. NRDC is a national non-profit environmental organization that has long advocated for improved stormwater management in the Washington, DC region and nationwide. These comments are additionally joined by Anacostia Watershed Citizens Advisory Council, Audubon Naturalist Society, Chesapeake Bay Foundation, Clean Water Action, DC Environmental Network, Earthjustice, Global Green USA, and Potomac Riverkeeper.

NRDC continues to support the District's efforts to develop a cost-effective method to implement citywide green stormwater controls. However, we are troubled by the fact that DDOE has not addressed the vast majority of the concerns that we raised in our first set of comments. We are additionally dismayed to learn that the District does not intend to fully implement the on-site retention standard for 18 months after the regulations are finalized – a proposal that would violate requirements in the District's federal stormwater pollution permit and delay the District's pollution clean-up efforts.

Certain Positive Changes To The Draft Regulations Should Be Retained In The Final Regulations

DDOE Has Appropriately Incorporated The AWDZ Standards Into The Regulations, But The Requirements Should Be Clarified

We appreciate that DDOE has incorporated the Council-mandated stormwater control standards for the Anacostia Waterfront Development Zone ("AWDZ") into the regulations, as we urged in our first set of comments. These standards will not only improve water quality in the Anacostia River but also provide other environmental benefits along with green jobs and livable neighborhoods.

However, the provisions governing major land-disturbing activity within the AWDZ should be amended to clarify that the requirement to treat the rainfall from the 1.7-inch storm event is *additional* to the District-wide requirement to retain the rainfall from the 1.2-inch storm event. The current text of the draft regulations indicates that this is DDOE's intention, as it requires AWDZ sites to treat the volume equal to the difference between the 1.2-inch SWRv and the runoff from the 1.7-inch rainfall event. However, the regulations should also clearly confirm the applicability of the 1.2-inch retention requirement so that there is no confusion on this point. This amendment to the text could take a format similar to the provisions of section 524.4, governing major land-disturbing activities, which set a retention baseline in addition to imposing the additional AWDZ treatment requirement.

In-Lieu Fee Payments Should Be Deposited Into A Special Purpose Revenue Fund

We understand that the establishment of a special purpose revenue fund for in-lieu fee (ILF) payments depends upon action by the Council. Despite the uncertainty regarding when and in what form the Council will create this fund, we support DDOE's efforts to plan ahead by incorporating a regulatory provision specifying that ILF payments will ultimately be deposited into it. As we stated in our first set of comments, placing ILF funds into a separate fund guarantees that the money will be used only for the construction of retention BMPs, and not diverted for use in other unrelated programs.

However, DDOE Has Failed To Address The Remainder Of Our Concerns, Many Of Which Implicate The District's Ability To Comply With Its Federal MS4 Permit

Other than the two positive changes described above, DDOE has failed to address the rest of the concerns we raised in our first set of comments. We attach those earlier comments to this submission and reincorporate them again by reference. To review, the specific concerns that have not been resolved in this draft of the regulations are:

- The formula used to calculate stormwater retention volume underestimates the amount of runoff from natural areas.

NRDC asked consulting firm CB&I to independently review DDOE's stormwater retention volume formula, and that review confirmed that the formula's runoff coefficient for natural cover is too low. According to CB&I, runoff volume coefficients developed by academic expert Dr. Robert Pitt of the University of Alabama suggest that runoff from natural areas could range from 0.02 for sandy soils to 0.22 for clay soils.[1] While it may be appropriate for DDOE to encourage areas with natural cover, the runoff coefficient of 0.00 provides too much incentive for developers to call an area "natural cover" when the definition of "compacted cover" might better fit the definition of what a developer is proposing. Because of the silty and clayey nature of the soils in the District, CB&I recommends that a runoff coefficient of 0.10 for "natural cover" areas would more appropriately reflect the runoff from these areas.

- Allowing indefinite credit banking may lead to uneven environmental benefits and violates the municipal separate storm sewer system (MS4) permit's 1.2-inch retention requirement.[2]

  CB&I analyzed the impacts of the proposed credit banking system for NRDC and found that banking will affect the year-to-year amount of retention occurring in the District. Without banking, the redevelopment rate for the District would be the primary factor determining the volume of stormwater retention that occurs over time. But with banking, the increase in retention capacity each year will vary from the redevelopment rate by some currently unknowable amount. NRDC believes this unpredictable fluctuation will make it difficult for the District to meet its regulatory obligations.

  CB&I's analysis also shows that banking has the potential to create long-term impacts on retention capacity in the District. Because of allowable credit banking, more retention is likely to be provided at an earlier time than it would be if credits had to be used concurrently with real-world retention. (This is because when a credit is banked, it is by definition used during a later time period than the time when the retention generating the credit was performed.) One result of this arrangement is that less retention will occur, and therefore more pollution will enter surface waters, in later years than should be allowed under the MS4 permit. The significance of this "time shift" will depend on the quantity of SRCs that are actually banked, and whether developers choose to hold them for more than a few years. NRDC believes this potential short-term gain in retention and flexibility is not worth the long-term uncertainty and loss of future retention capacity.

[1] Robert Pitt, *Small Storm Flow and Particulate Washoff Contributions to Outfall Discharges*, Ph.D. dissertation, Department of Civil and Environmental Engineering, University of Wisconsin (1987).
[2] For all subsequent references to the MS4 permit, *see* U.S. EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221 (effective Oct. 7, 2011, modified Nov. 9, 2012), *available at* http://www.epa.gov/reg3wapd/npdes/dcpermits.htm.

Because DDOE has no way of knowing the consequences credit banking could lead to in the future, it should exercise caution and require credits to be used the same year they are generated.

- Certifying new credits for already-implemented retention practices will also fail to achieve retention of the 1.2-inch storm volume beyond baseline conditions, in addition to artificially inflating the supply of SRCs.

  We continue to dispute DDOE's assertion that a supply of SRCs must be available to regulated parties at the very start of the trading program; this is unnecessary because regulated parties have the alternative options of compliance through on-site retention or the payment of a fee in lieu.

  In addition, the potential for adverse environmental consequences from certifying pre-existing retention practices will depend upon the actual number of practices that have been installed, but DDOE has not provided any information as to how many credits they anticipate certifying for such practices. Without that important information, which is necessary in order to know exactly how much retention will deviate from the 1.2-inch requirement in the MS4 permit, NRDC believes that DDOE should not proceed with this proposal. Instead, DDOE should treat pre-existing retention practices like other, newly-installed practices and allow them to generate SRCs going forward only.

- The lack of geographical restrictions on trading between watersheds may lead to uneven environmental benefits, will hinder the District's ability to plan for attaining TMDL wasteload allocations, and may fail to achieve the legally required retention within the MS4 service area.

  CB&I's analysis shows that District-wide trading will likely lead to each individual Ward having a different amount of retention than it would if trading were restricted to more limited geographical areas. In Wards with low redevelopment rates, retention is likely to increase more than it otherwise would if trading were restricted to the same watershed, and vice-versa for Wards with high redevelopment rates. DDOE must carefully consider the benefits and disadvantages of redistributing retention between these areas.

  Like DDOE, CB&I concludes that, due to average land values, it is likely that more retention will be directed into the Anacostia watershed, and away from the other two major watersheds (Potomac and Rock Creek). If DDOE believes there is a benefit to this situation – with the Anacostia receiving greater benefits from retention at the expense of the District's other water bodies – then it should provide the information underlying this belief. But if DDOE lacks the information to know whether this redistribution of

retention capacity would be a net benefit to the District's waters, we do not believe it is appropriate for DDOE to allow it to occur.

Furthermore, it is impossible for either DDOE, the regulated community, or stakeholders to know where retention will occur throughout the District under DDOE's proposal. We are concerned that this uncertainty will make it difficult, if not impossible, for the District to achieve its independent legal obligations.

- The lack of recordation requirements for retrofit practices creates the possibility that BMPs at retrofit sites which change hands during the 3-year certification period are not maintained.

- The rule's failure to specify that DDOE will use in-lieu fees to achieve the specific amount of retention corresponding to the regulated site's retention deficit, contemporaneous with the project triggering the retention obligation, does not provide certainty that the full 1.2-inch storm volume will be retained.

- Certifying credits for retention capacity beyond the 1.2-inch storm will create SRCs for capacity that will not be used frequently, and that is thus not environmentally equivalent to capacity generated for retaining smaller storms.

  According to CB&I, allowing a site to meet its off-site retention obligations by purchasing credits generated by retention capacity used only during storms between 1.2 and 1.7 inches will not achieve the retention required by the MS4 permit. If a regulated site retains 0.6 inches on-site, and purchases SRCs from a site which has constructed excess retention volume for a 1.7-inch event, the environmental benefit of this off-site storage is not equivalent to providing on-site retention of 1.2 inches. Retaining all of the 1.2-inch storm on-site would retain 90% of storm events. However, retaining 0.6 inches on-site would retain 69% of storm events, while the off-site difference between the 1.2-inch and 1.7-inch capacity would retain only 5% of storm events. Because this scenario leads to less retention than the 1.2-inch on-site scenario, NRDC believes it violates the requirement in section 4.1.3 of the MS4 permit that on-site volume plus off-site volume must equal no less than the 1.2-inch on-site volume.

- Exempting projects in the public right-of-way from off-site requirements (once they have achieved on-site retention to the MEP) represents a missed opportunity to require the management of large amounts of runoff.

- The rule's failure to provide for public dissemination of information about SRC generation, transfer, and use decreases needed transparency and accountability.

- Finally, while not directly addressed in the regulations, we object to the District's stated willingness to allow retention BMPs to be "double counted" toward both the 1.2-inch retention standard obligation and the MS4 permit's retrofit requirement.

  The importance of not allowing double counting has recently been echoed by the Chesapeake Bay Program in its report setting out recommendations regarding retrofit practices.[3]

Because DDOE has not provided any public responses to our first set of comments, it is impossible for us to know or understand why these legal and practical concerns have not been addressed. Consequently, the lack of response frustrates our ability to provide further comment on the same problems that exist in the revised draft of the regulations.

In Addition, DDOE's Proposed Delay In Implementing The Requirements Is Unlawful And Will Delay Attainment Of Chesapeake Bay TMDL Milestone Deadlines

We have serious concerns about the delay period that DDOE has proposed for the first 18 months after the regulations have been finalized. We recognize that some transition period may be necessary to allow for projects that have already been fully designed prior to the finalization of the new requirements. However, the duration of this phase-in period and the compliance obligations that apply during the transition are not details left entirely to DDOE's discretion.

The MS4 permit's provisions governing the District's establishment of the regulatory retention standard impose limits on DDOE's ability to give developers a "free pass" after the permit deadline expires. Both Phase 1 and Phase 2 of the proposed delay period run afoul of these MS4 permit requirements.

Section 4.1.1 of the MS4 permit states: "No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, *implement* one or more enforceable mechanism(s) that will *adopt and implement* the following performance standard. . ." (emphasis added). In other words, by July 22, 2013, DDOE must *implement* the 1.2-inch retention standard for all regulated projects. Yet during Phase 1 of the proposed delay period, DDOE would not require *any* regulated sites to retain *any* stormwater for an entire six months, either on-site or via off-site mechanisms.

[3] Chesapeake Bay Program, *Recommendations of the Expert Panel to Define Removal Rates for Urban Stormwater Retrofit Projects* at 3 (2012), *available at* http://www.chesapeakebay.net/documents/Final_CBP_Approved_Expert_Panel_Report_on_Stormwater_Retrofits--_long.pdf ("To prevent double counting, removal rates cannot be granted if the retrofit project is built to offset, compensate or otherwise mitigate for a lack of compliance with new development stormwater performance standards elsewhere in the jurisdiction.").

This proposal contravenes the clear meaning of the term "implement," which Merriam-Webster defines to mean "carry out, accomplish; especially: to give practical effect to and ensure actual fulfillment by concrete measures."[4] The fact that regulations have been finalized does not mean that they have been "implemented." Federal courts have repeatedly noted the difference between finalizing or promulgating regulations, on the one hand, and implementing them, on the other; they consistently use the word "implementation" to mean a requirement that regulated parties must comply with regulatory provisions.[5] Clearly, if no one is required to comply with the District's stormwater management performance requirements during Phase 1 – *i.e.*, to carry them out in practice – the regulations are not being "implemented."

DDOE itself recognized the meaning of "implement" in the preamble to the first draft of these regulations. In that preamble, DDOE admitted that July 22, 2013 was the latest allowable effective date, and explained that the Department could only provide a transition period for developers if it finalized the regulations far enough in advance of that deadline. In DDOE's own words: "DDOE intends for these amendments to become effective six (6) months after their final publication in the D.C. Register or on July 22, 2013, whichever occurs first. … Though DDOE's intention has been to allow a full six (6) month transition period, the MS4 permit issued to the District by the United States Environmental Protection Agency (EPA) requires that these amendments be effective no later than eighteen (18) months after the effective date of the permit, which makes July 22, 2013, the latest allowable effective date."[6]

DDOE has not explained why it has decided to ignore its own previously articulated understanding of its legal obligations in the revised draft of the regulations. Regardless of the Department's reasons for doing so, its initial interpretation was correct: the MS4 permit's retention standard must be implemented – and regulated projects must comply with it – by July 22, 2013. As a result, Phase 1 violates the plain terms of the MS4 permit and must be eliminated from the transition period.

We further note that Phase 1 of the delay period would cause the District to miss at least one of its Chesapeake Bay TMDL two-year milestones. As described by EPA, these milestones are a critical part of an accountability framework agreed upon by EPA and the jurisdictions to assure progress toward meeting the TMDL's targets.[7] One of the milestones contained in the

---

[4] Merriam-Webster, "Implement," http://www.merriam-webster.com/dictionary/implement.

[5] *See, e.g.*, *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1322 (11th Cir. 2008) (describing a delay in "the effective date for implementation" of a requirement as providing "additional time to comply" with the requirement); *American Lung Ass'n of N.J. v. Kean*, 670 F.Supp. 1285, 1288-89 (D.N.J. 1987) (evaluating compliance with three distinct requirements to "propose regulations, promulgate final regulations, and implement those final regulations through proper enforcement"); *State of Illinois v. Gorsuch*, 530 F.Supp. 337, 339 (D.D.C. 1981) (recognizing the difference between a requirement that an agency "promulgate the regulations" and a requirement that it "implement the regulations").

[6] District Department of the Environment, *Notice of Proposed Rulemaking: Stormwater Management, and Soil Erosion and Sediment Control* at Preamble p. 5 (Aug. 17, 2012), *available at* http://ddoe.dc.gov/node/224592.

[7] EPA, "How Does It Work? Ensuring Results – Two-Year Milestones," http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/EnsuringResults.html.

District's plan is that by December 31, 2013, "214 acres of development will have been required to meet the 1.2 inch retention standard."[8] The importance of this milestone was emphasized by EPA in its evaluation of the first draft of these milestones, when it noted that the agency expected the District to: "Add milestone with commitment and schedule to revise, adopt and implement stormwater regulations by 2013."[9] However, under the current proposal, no developments – much less 214 acres of development – will be required to meet the retention standard until after Phase 1 expires in January 2014. This six-month delay will set back the District's efforts to meet its Bay TMDL obligations. If the District fails to meet its two-year milestones, the federal government has stated that it will take corrective actions which may include increased federal enforcement, prohibition of new or expanded discharges, redirection of EPA grants, and/or discounting the District's overall pollution reduction progress.[10]

Phase 2 of the delay period also conflicts with the terms of the District's MS4 permit. Section 4.1.1 of the permit states:, "The District may allow *a portion* of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3 ['Off-Site Mitigation and/or Fee-in-Lieu']" (emphasis added). Yet during Phase 2 of the proposed delay period, DDOE would allow *all* of the 1.2-inch volume to be compensated for via off-site mitigation. This proposal disregards the clear meaning of the word "portion," which Merriam-Webster defines to mean "an often limited part of a whole."[11] The dictionary further lists "whole," "sum," and "totality" as antonyms of "portion." Indeed, federal courts routinely interpret the term "portion" as meaning something *less* than the whole.[12] By this well-understood, plain-meaning definition, DDOE may not allow *all* of the retention volume to be attained off-site.

Section 4.1.3 of the MS4 permit underscores this point. That section states, with regard to the mandatory elements of an off-site mitigation program: "On-site volume plus off-site volume…must equal no less than the relevant volume in Section 4.1.1." This provision clearly contemplates that there will be at least *some* on-site volume retained.

With regard to the alleged statement by EPA on page 6 of the preamble concerning "the importance of…regulated projects being constructed to the new requirements by the expiration

---

[8] District of Columbia, *Restore Clean Water Action Items – Programmatic Two-Year Milestones*, http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/2yearmilestones/DC2012_13ProgrammaticMilestonesFinalMay2012.pdf.

[9] EPA, *Evaluation of District of Columbia's Draft Phase II WIPs and Final 2012-2013 Milestones* at 2 (Feb. 15, 2012), http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/Phase2WIPEvals/DCWIPMilestoneEvaluation21512_final.pdf.

[10] U.S. EPA, "How Does It Work? Ensuring Results – Federal Steps," http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/EnsuringResults.html.

[11] Merriam-Webster, "Portion," http://www.merriam-webster.com/dictionary/portion.

[12] *See, e.g., Ass'n of Unit Owners of Nestani v. State Farm*, 670 F.Supp.2d 1156, 1164 (D. Ore. 2009) (defining the plain meaning of "portion" as "an often limited part set off or abstracted from a whole," as opposed to the entirety of something); *Rembrandt Technologies, L.P. v. Comcast Corp.*, 512 F.Supp.2d 749, 756 (E.D. Tex. 2007) ("portion" means "less than all"); *Kimberly-Clark Corp. v. Tyco Intern., Inc.*, 1999 WL 33944112 at *13 (W.D. Wis. 1999) ("The ordinary and accustomed meaning of 'portion' is some part less than the whole.").

of the 5-year MS4 permit term on October 7, 2016," we find no support for that extended deadline within the text of the permit, EPA's fact sheet on the permit, or any other official agency statements. As discussed above, the permit's 1.2-inch retention standard must be implemented by July 22, 2013, and any off-the-record conversations between the District and EPA staff cannot override that legal obligation. Because this extended deadline would conflict with the permit, it would require a permit amendment to become effective. NRDC would strongly oppose such an amendment, as it would violate the Clean Water Act's MEP standard and antibacksliding provisions.

Finally, we are concerned about the delay period from a practical perspective because of the lost opportunity that it represents. According to DDOE, roughly 1% of the District's land area, or about 200 projects, will fall subject to the stormwater management regulations each year through new development and redevelopment.[13] And according to the U.S. Department of Energy, the average lifespan of a building is approximately 60 years.[14] Therefore, over the proposed delay period's 18-month duration, 1.5% of the District's land area, or 300 projects, could be built with no retention capacity whatsoever, with no opportunity to require retention at those sites until they are redeveloped in roughly 50-60 years. Even if retention occurs via off-site mitigation during the proposed Phase 2, failing to require it at new developments and redevelopments misses the opportunity to put in retention practices during the development stage, which is often more cost-effective than installing such practices as retrofits later on.

In sum, we urge DDOE to eliminate the planned delay period from the draft regulations or, at the very least, to eliminate Phase 1 and require regulated projects to perform some on-site retention during Phase 2. As currently envisioned, the proposed transition period would violate legal requirements and give up the opportunity to require stormwater controls at developments that will last for decades.

Finally, The Regulations' New Exemption For CSO Reduction Projects Exceeds DDOE's Authority Under The MS4 Permit

Pursuant to the terms of section 4.1 of the MS4 permit, DDOE must apply the stormwater retention standard to all development projects over a certain size (5,000 square feet). It may be consistent with the intent of the MS4 permit not to require a project to comply with the regulations' performance requirements when the sole purpose of the project is to increase retention capacity (for example, to earn a discount from the property's stormwater fee). After all, expanding stormwater retention is the ultimate goal of these regulations, and DDOE should not discourage private landowners from voluntarily installing stormwater retrofits by requiring them to meet the retention requirements for new development and redevelopment projects.

[13] Email from Brian Van Wye, DDOE Stormwater Management Division, to Rebecca Hammer, NRDC (Oct. 9, 2012) (on file with NRDC).
[14] U.S. Dep't of Energy, *2011 Buildings Energy Data Book* (2011), *available at* http://buildingsdatabook.eren.doe.gov/docs/DataBooks/2011_BEDB.pdf .

However, DDOE clearly does not have the discretion to exempt projects that are not done for stormwater retention purposes.

Consequently, the new exemptions in section 517.2(b) through (d) of the regulations are probably consistent with the spirit of the MS4 permit's retention requirement, as they encourage landowners to voluntarily install new retention capacity. But section 517.2(e) is not consistent with that spirit. It is written so broadly that it would exempt any development project conducted by DC Water under its CSO consent decree, regardless of whether that project increased the amount of stormwater retention capacity in the District.

It seems possible to us that DDOE intended to exempt only the green infrastructure or low impact development (LID) projects that DC Water performs. Those projects, which would capture stormwater runoff, would further the goals of the MS4 permit's retention requirement, and it would be reasonable for DDOE to allow DC Water to take advantage of least-cost opportunities to install retention capacity without triggering the full regulatory requirements. Section 517.2(e) as currently drafted, however, would exempt many other types of projects and is therefore impermissibly broad.

If DDOE actually intends to exempt all of DC Water's CSO reduction projects, it has provided no satisfactory explanation for why it believes the exemption would be reasonable. If DC Water disturbs a land area greater than 5,000 square feet to implement a gray infrastructure project, we can see no good reason why it should not be required to meet the same stormwater management obligations as other types of gray infrastructure development projects. Given that DC Water will be able to take advantage of the maximum extent practicable (MEP) process when its projects are located in the public right-of-way – a loophole that we already believe is too lenient – we further fail to understand why this additional exemption should be provided.

DDOE should thus rewrite section 517.2(e) of the draft regulations to specify that it only includes DC Water's LID stormwater retention projects.

* * *

As these comments indicate, NRDC continues to believe that the proposed stormwater regulations as currently drafted are insufficient to comply with the mandates of the District's MS4 permit, may lead to negative environmental consequences, are confusing, and raise concerns about transparency and administration. These concerns have been exacerbated by the addition of the 18-month-long delay period. We urge DDOE to revise the proposed rule in accordance with the recommendations contained herein before the rule is finalized. Again, as we have emphasized in the past, under no circumstances should the finalization of the rule be delayed beyond the MS4 permit's July 22, 2013, deadline.

Thank you again for the opportunity to provide these comments. We would be glad to further discuss our recommendations with you at your convenience.

Sincerely,

Rebecca Hammer
Project Attorney, Water Program
Natural Resources Defense Council

together with:

Cary Coppock
Chair
Anacostia Watershed Citizens Advisory Council

Diane Cameron
Conservation Director
Audubon Naturalist Society

Lee Epstein
Director, Lands Program
Chesapeake Bay Foundation

Andrew Fellows
Chesapeake Regional Director
Clean Water Action

Chris Weiss
Executive Director
DC Environmental Network

Jennifer Chavez
Staff Attorney
Earthjustice

Paul F. Walker, Ph.D.
Director, Environmental Security and Sustainability
Global Green USA

Robin Broder
Vice President
Potomac Riverkeeper