To: Mr. Garrison Miller, Mr. Jon Capacasa, Ms. Diana Esher, Mr. J. Charles Fox

From: Dana Minerva

Re: Comments of Dana Minerva on the draft District of Columbia MS4 Permit

Date: June 4, 2010

Please note that in providing these comments I am not representing any particular member of the Anacostia Watershed Restoration Partnership but acting in my capacity as an advocate for the watershed.

I congratulate you heartily for developing a permit that hits all the major themes that are needed. I believe that you have taken some of the best ideas from existing MS4 permits from around the country and included them in the proposed permit. I appreciate the hard work and thoughtful, detailed approach that is represented by this proposal. I began my career as a drafter of state environmental laws and I also found the proposal to be very well drafted.

The permit already touches the bases, and I believe there are only a few areas that need "tightening up" to bring it to home plate. I also urge USEPA to not take a position in what is already an unproductive debate over smart growth. I believe the agency, probably at the headquarters level, should instead conduct the research needed for a resolution of the issue.

Thank you for the opportunity to comment and I hope you will forgive me for focusing on what I think is still needed and not on the many good things in the proposal.

Fact Sheet

Page 8: "In requiring these programs (off-site mitigation and fee in lieu), it is USEPA's express intent, to encourage more brownfields development and to avoid suburban sprawl" implies that USEPA believes that strong onsite stormwater requirements promote sprawl. My suggestion is that you reword this, and the regulation itself, to say that these programs allow development of any type of land, including infill and brownfield lands, when full implementation is not practicable because of site conditions.

Regarding the hypothesis that strong stormwater controls might contribute to sprawl, I have yet to see a single study that suggests that it is true, or an example of a single redevelopment that did not occur because of strong stormwater regulations, in part because the ordinances generally all specify that the standards only apply "to the maximum extent practicable," thereby providing an "off ramp" where really needed. USEPA, probably at the headquarters level, should conduct the studies needed to prove or disprove the hypothesis, *before* basing Clean Water Act policy on it. It is difficult to do such studies, but it is not impossible. In 1997, the USEPA/HUD Brownfields program confronted a similar issue and conducted a study with interesting results: environmental remediation costs did not deter redevelopment of Brownfields. http://www.huduser.org/Publications/pdf/bfield.pdf

My own theory is that developers choose their sites based on their calculations of the profitability of developing and redeveloping land—weighing the cost to develop against the likely sale or lease value. Stormwater costs would seem to play a very marginal role in this calculation.

Our experience in the Anacostia watershed is quite telling: until the recent economic downturn, infill redevelopment in Montgomery County was very strong—where stormwater standards are strongest. In Prince George's County, which has somewhat weaker standards, infill redevelopment lagged. Many factors played more important roles in this outcome than stormwater regulations. The representative of a community development organization in the inner Washington suburbs, once said to me: developers check the census data on the income of existing residents and decide that they cannot afford to buy their product—the problems attracting redevelopment have nothing to do with the costs of stormwater controls. More is needed to promote redevelopment in these areas than weak stormwater regulations

It is also worth pointing out that despite the recent controversy regarding the Maryland Stormwater Act of 2007 regulations, *new* development standards in Maryland remain quite strong. New development will be required to implement "channel protection" using ESD: a 2.6 inch standard in Montgomery County and 2.7 inch standard in Prince George's County. These are relatively tougher standards than the 1.2 inch requirement proposed for the District. There will be, by virtue of the two jurisdictions' different standards, a relative disincentive in the Maryland suburbs for new development, if, despite a lack of scientific evidence to support the hypothesis, USEPA continued to put forward the possibility that strong stormwater regulations are, in fact, a disincentive to redevelopment.

Statements such as: "Minimizing land disturbance and impervious cover is critical to maintaining watershed health," and "Typically, there is little or no increase in net runoff when redeveloping underused properties such as vacant properties, brownfield sites, or greyfield sites, since new impervious surface replaces existing impervious cover" also appear to not take into account the degree of existing development of DC watersheds, such as the Anacostia, and that they are also already greatly impaired by existing stormwater flows. Only by instituting strong redevelopment and retrofit requirements can we hope to make the big steps needed to improve them. Small "net improvements," cited in the discussion in the Fact Sheet, are not enough.

Further, offsite mitigation should not be promoted unless necessary because of onsite conditions, because in very developed watershed like the Anacostia, it is not clear at all that there is much space available for offsite mitigation.

Some might advocate a differential standard for development and redevelopment based on a theory about smart growth, but adoption of differential standards and extensive waivers for redevelopment insures a very real outcome: less affluent and diverse populations within the city will experience continued devastating water pollution, and they will experience redevelopment which is less "green" than those who can afford to live in new developments in the District or in Maryland. If USEPA is going to consider policy matters other than the practicability of implementation, it should address another

critical policy issue: environmental justice. USEPA is barred implementing permitting programs that have the effect of discriminating.

Finally, I can't speak for developers, but my interactions with them indicate that they are focused on whether the redevelopment standards are practicable rather than policy debates about whether the standards promote smart growth. I would request that USEPA headquarters take the advice of the more progressive developers, like Akridge, and focus resources on more clearly showing that the standards proposed are practicable for various types of redevelopment.

Page 10-

". . . updating of the current TMDL implementation plans for the Anacostia River. . ."

It is difficult, even for the initiated, to figure out which plans this refers to. Presumably it refers to the Anacostia River TMDL Waste Load Allocation Implementation Plan Report and the Rock Creek TMDL Waste Load Allocation Implementation Plan, as opposed to the 2002 through 2007 annual implementation plans and reports. It would be good in the fact sheet to describe what the two types of existing reports and plans do, especially since the Anacostia River TMDL Waste Load Allocation Implementation Plan Report and the Rock Creek TMDL Waste Load Allocation Implementation Plan are not on the web and therefore are pretty unavailable to the public. The permit should also require all plans and reports to put on the DDOE website.

Regulation

Page 2- 2.1

Subsections 1, 2, 3, and 5 all have different descriptions of *when* they are required: "as soon as possible," "not later than one year after the effective date," "as expeditiously as possible." I am particularly concerned that 5. (also referenced in 4.1.1.c.) appears to have no particular deadline. A similar provision of the Montgomery County permit has a one year deadline.

Page 4- 2.3 2. e.

DDOE will "Review and process requests from the MS4 Task Force agencies for reimbursement from the Stormwater Enterprise Fund for Permit related tasks." This implies that the Task Force agencies do not have to use other funds for implementation. Should the fee pay for everything permit-related, such as the retrofitting of DC streets by DDOT? Or retrofitting Park parking lots by the Parks Department? Generally, the permit seems to simply say that the District needs to present a funding plan to USEPA and to fund permit implementation. Suggest that the permit not get into which revenue sources.

Page 6- 4.

Reference to interim compliance deadlines for wasteload allocations. A cross reference to under what section of the permit this are established and a restatement of what they are would be helpful, given that the plans are not on the web. It is hard to understand the significance of the deadlines otherwise.

Page 9- 4.1.1.d.

Editorial: In this paragraph, "fee in lieu," "in-lieu credits," and "in-lieu payments" are all different terms that, I believe, are intended to mean the same thing. Confused me at first.

Page 10- 4.1.1.a.ii.

"The Permittee mitigation program may allow adjustments to retention standards for redevelopment, *high density* development, transit-oriented development *and other development patterns* in non-federal facility areas for which the District can quantify water quality, *water quantity, climate change adaptation or other environmental benefits."*

Most redevelopment in the District probably could be considered "high density."

What does "other development patterns" mean?

"Climate adaptation" is not a defined term. Presumably, you don't mean slightly smaller production of greenhouse gases, which strikes me as "climate mitigation" but it is not clear.

While I appreciate the requirement that adjustments are allowed only when benefits can be quantified, my sense is that this could result in a huge loophole and opens a probably futile debate on an issue that USEPA could quite reasonably refuse to engage in.

How will the "benefits" be assessed? I suspect that every housing development in the District can quantify some air quality or climate mitigation benefit compared to a housing development outside the District, if the residents of the proposed community will be commuting to the District for work. Is a slight improvement in air quality a justification for ongoing water pollution? How about small reductions in greenhouse gases? Will health benefits always trump ecological benefits? (Air quality improvements that result in fewer illnesses and deaths often greatly exceed the monetary benefits associated with clean and healthy aquatic ecosystems.) Water quantity is considered—will low flow faucets and xeriscaping trump controlling stormwater? One of the developers at a recent meeting in the District suggested that their company faced a difficult choice: green roof on its condo building or making the valuable space available for recreation for owners? Obviously, outdoor recreation is an important amenity for urban residents. Will it trump clean water? This is a slope that is *truly* slippery.

It seems to me that the role of the USEPA is to implement the Clean Water Act to provide clean water, and there is no exception that says "unless USEPA decides (or more to the point, the permittee decides) that some other societal benefit is more important." My recommendation is that USEPA insist on standards for ALL development and redevelopment insure that water quality is protected and restored, except when not practicable because of site conditions.

While my main suggestion is that USEPA delete this concept from the permit, the District's policy on these "adjustments" should be something that USEPA reviews and approves and on which the public is given an opportunity to review and comment before final.

Page 10- 4.1.2

I'm very pleased to see that you worked to specify a standard for retrofits. Other MS4 permits simply specify "retrofit" without specifying a standard that the retrofits must meet. But what USEPA does is provide a "starting point," and not very clear guidance as to what will ultimately be acceptable. I further suggest that this be one of the things that USEPA reviews and approves, and on which the public is given an opportunity for review and comment before final.

Page 10- 4.1.2.2.

Editorial: "a list <u>of projects</u>"

Page 11- 4.1.4.2

"Upon completion of the structural assessment, the Permittee shall commit to installing 350,000 square feet of green roofs. . ." Worded oddly. Is the District required to commit to installing the green roofs or to install them? Is the requirement contingent on the structural assessment? I hope you will clarify to require the green roofs.

Page 13- 4.2.3.b

Editorial: Appears to be one or two words missing.

Starting on Page 13

The requirements for the many types of stormwater plans, permits and programs in Sections 4.3 through 4.9 (and their implementation) are very strong and detailed. However, for many of those listed below I found myself asking:

- What will be the deadlines the various plans to be prepared, programs to be implemented, and permits to be obtained? I know they can't all be frontloaded to the beginning of the permit term, but then there shouldn't be unreasonable delays.
- When they are to be updated? Statements like "maintain a watershed-based inventory" and "continue to implement a program" doesn't make reasonable update intervals clear.
- Which are subject to USEPA's review and approval before they take effect? Page 37, section 6.2.6 provides that the items in Table 5 are to be submitted for USEPA's approval but oddly, not the items in Table 6. Perhaps this is a drafting error. In any case, the items in Table 6 are broad headings and do not list the individual items required to be submitted.
- Which are subject to review and comment by the public?

Specifying reasonable deadlines in the permit, rather than in the next iteration of the Implementation Plan, and the degree of review and public participation might help in the following ways:

- Somewhat counterintuitively, the District may be more comfortable with the new requirements because a *reasonable* implementable schedule is specified,
- Members of the public will understand the relative importance of the items and when/if they might be asked to review and comment on them, and

- Environmental advocates may be more satisfied if there are permit specified deadlines for completion of the components of the Stormwater Management Plan.

Pages 34-35

Regarding the Annual Report and Implementation Plan, I have to say that it gives me some pause that the Permittee in the first instance decides what is "cost beneficial and affordable" to implement. Can this approach be "tightened" to make sure that give the Permitting Authority a clear role in having the final say on this issue. I'm sure that's how it works in practice, but the language here is a bit surprising.

Thanks again for the opportunity to comment on the draft permit.