GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

Attachment A:
District of Columbia's Detailed Comments on the Draft MS4 Permit released by EPA Region III on April 20, 2010

Part 1.2 (second paragraph), p.1

The District recommends changing the language in this Part to read as follows:

> *This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage,* ***dechlorinated*** *water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not* ***further*** *impaired and that the requirements of the Clean Water Act and EPA regulations are met to* ***the maximum extent practicable (MEP)****.*

The District feels that all water that is flushed from water lines by WASA should be dechlorinated to the MEP, as chlorinated water from water line flushing may cause fish kills and other adverse effects to the aquatic life. Furthermore, District waterbodies are already impaired, and it is not possible for the discharges listed above to be managed in such a way that they are no longer impaired.

Part 1.4.1-3, p. 2

The District recommends changing the language in this Part to read as follows:

The Permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the ***maximum extent practicable consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3).***

Compliance with all best management practices (BMP) contained in this Permit shall constitute ***overall*** *compliance with the water quality standards (DCWQS).*

DRAFT

These changes reflect the District's views regarding WQS and WLAs discussed in the District's Interim Comments, submitted June 4, 2010 and further elaborated in this document's cover letter.

These changes also reflect the District's objection to the Draft Permit language stating that "*Compliance with all performance standards and provisions contained in the permit shall constitute* ***progress toward*** *compliance with DC WQS."* This language would expose the District to perpetual legal action since, even if the District satisfies all permit requirements, it is ONLY demonstrating progress and not actually considered to be in compliance with WQS. Therefore, the words "progress toward" should be deleted.

In addition, this language clarifies that it is not reasonable or rational to hold the MS4 accountable for WQS for District surface waters, since these are heavily impacted by sources of pollution beyond the control of the MS4 system.

Part 2.1.2, pp.2-3

> 2. *No later than* ***18 months*** *following the effective date of this Permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall* ***be consistent with this Permit****, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.*

The District proposes 18 months for implementation, which would include 12 months to develop and promulgate regulations and 6 months for permitting of grandfathered projects that were designed under the old regulations.

Part 2.1.3, pp.2-3

The District recommends changing the wording in the second sentence of this paragraph to read as follows:

> *3. The Permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System (MS4) in order to prevent or reduce the discharge of pollutants to achieve water quality objectives.* ***Any deficiencies in the legal authority shall be remedied as soon as possible in accordance with the District's legislative and regulatory processes.*** *Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.*

The District appreciates EPA's recognition in this Part concerning time limits on policy changes made via the City's legislative process. New legislation in the District must be voted on twice by the City Council, with 14 days between votes, signed by the Mayor,

and then submitted to Congress for a review period lasting 30 in session/legislative days before becoming municipal law.

However, in the current public draft of the MS4 permit, the language in Part 2.1.3, second sentence, says that the District must remedy deficiencies in legal authority within 120 days. This requirement is simply not feasible for the Executive branch of the District. The District is committed to working as quickly as possible to complete rulemaking revisions; however it is difficult for the District to agree to remedy deficiencies within a limited time period.

Part 2.1.4, p.3

The District recommends changing the wording in this paragraph to read as follows in order to clarify the Permit's intent:

> *4.* ***The Permittee shall ensure that the above legal authority in no way restricts*** *the Permittee's ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this Permit.*

Part 2.2, p.3

The District recommends changing the wording in this Part to read as follows:

> *The Permittee, including all agencies and departments of DC as specified in section 2.3 below, shall provide adequate finances, staff, equipment, and support capabilities to implement the existing Stormwater Management Program (SWMP) dated February 19, 2009 and the provisions of this permit. Each annual report under Part 6 of this Permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this Permit,* ***as described in Section 6.2.1.***

Part 3.3, pp.5-6

The District recommends changing the wording in this Part to read as follows:

> *3.3* *Addressing Potential Pollutant Sources*
>
> *The Permittee shall implement controls to minimize* ***or*** *prevent discharges of pollutants, including but not limited to Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters* ***to the maximum extent practicable.*** *Controls shall be designed to* ***minimize*** *pollutants from coming into contact with stormwater, e.g.,* ***minimizing*** *the use of lawn fertilizers. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in*

> *subsequent Annual Reports and in revisions to the Stormwater Management Plan dated February 19, 2009.*

The District feels that practices implemented to address the pollutants listed in the section above can, at best, minimize the loading of pollutants into our surfaces waters. The District could conduct an education campaign to reduce the use of fertilizers but may not restrict it, as fertilizers are not banned in the District (or elsewhere). In addition, there are several practices put in place by the District and WASA that are end-of-pipe or that are in the rivers to collect and remove trash (e.g. Bandalong litter trap on Watts Branch in the Anacostia River watershed[1], trash booms operated by WASA on the Anacostia River[2]). While in-river practices cannot be counted towards meeting TMDLs, the District feels they are still important for reducing the amount of trash in the rivers, and help in meeting our obligations under the Trash Free Potomac Treaty.

Part 4, (1st paragraph), p.6

The District suggests revising this paragraph as follows to clarify that the pollutant load will be reduced or eliminated to the MEP, as discussed in the cover letter:

> *The Permittee shall continue to implement, assess and upgrade the controls, procedures and management practices, described in Part 4 herein and in the current Upgraded SWMP dated February 19, 2009, all requirements of which are incorporated herein, in order to reduce or eliminate the pollutant load,* ***to the MEP****, and to protect or restore water quality standards and meet the requirements of the Clean Water Act, its implementing regulations, and relevant District of Columbia laws, regulations and ordinances. The Stormwater Management Program is comprised of all requirements in this Permit, including the program elements listed in Table 1 below. The set of BMPs specified in the Permit can be adapted as opportunities change,* ***or to better maximize the use of resources or the advancement of technology****.*

Part 4, Table 1, p. 6

The District notes that the references in this Table to the November 27, 2007 and August 1, 2008 Letters of Agreement are not regulatory references and should not be described as such.

Part 4.1 (1st Paragraph), pp.7-8

As discussed above, the District suggests adding MEP to this paragraph to read:

---

[1] - Detailed information on the Bandalong litter trap installed in Watts Branch can be found at http://ddoe.dc.gov/ddoe/cwp/view.asp?a=1210&q=499768&ddoeNav=|31005|

[2] - See the Anacostia Trash Reduction Plan (Anacostia Watershed Society) for information about trash reduction BMPs currently being implemented by WASA, including trash booms http://ddoe.dc.gov/ddoe/lib/ddoe/2009.01.29_Trash_Report_1.pdf

> *The Permittee shall continue to develop, implement, and enforce a green technology program in accordance with this Permit and the Permittee's Upgraded SWMP (Feb. 19, 2009) that integrates green technology stormwater management practices at the site and neighborhood level through policies, regulations, ordinances and incentive programs in order to protect water quality across the District. The green technology practices shall be designed to mimic pre-development site hydrology through use of on-site stormwater retention measures (e.g., harvesting and using, infiltrating and evapotranspiring runoff)* ***to the MEP.***

Part 4.1.1 (2nd Paragraph), p.8

The District recommends changing the language in this Part to read as follows:

> *The Permittee shall require stormwater entering the MS4 from* ***development*** *that disturbs land greater than or equal to 5,000 sf, thereby triggering requirements for stormwater management plan review and approval as part of the District's permitting process, to be controlled as follows…*

The District feels the term "development" is a more all-encompassing term that more thoroughly addresses land disturbance than "new development and redevelopment".

Part 4.1.1.a.i, p. 8

The District recommends changing the language in this Part to read as follows, including incorporating language originally proposed by EPA for Part 4.1.1.d of the Draft Permit:

> *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 an enforceable mechanism that will adopt and implement the following performance standard:*
>
> *Require the design, construction and maintenance of stormwater controls to achieve on-site retention of* ***1.0 inch*** *volume of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for* ***development*** *greater than 5,000 square feet in the District,* ***provided however, that public right-of-way projects shall achieve on-site retention to the maximum extent practicable;***
>
> ***The Permittee may allow adjustments to retention standards to promote Smart Growth objectives such as 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 benefit(s).***

Activities that qualify for exemptions from adhering to the retention standard in the DC Stormwater Regulations will also qualify for exemptions under this permit [e.g. utility maintenance, home gardening, etc.].

As discussed in the cover letter, the District reserves the right to challenge the inclusion of a numeric retention performance standard.

The proposed 1.2 inch on-site retention standard contained in the April 20th Draft Permit is based on the volume of the 90th percentile rain event in the District. An update to the District's current stormwater management requirements has been under development by DDOE that would require new and redevelopment projects to meet a 1.0 inch on-site retention standard. This retention volume is based on the volume of the approximate 87th percentile rain event in the District. At the time EPA released the Draft MS4 Permit for public comment, DDOE was ready to formally release updated stormwater regulations for public comment. A considerable amount of effort and analysis informed the District's selection of this proposed retention standard as most appropriate for the highly-urbanized, densely developed conditions in the District of Columbia.

This regulatory proposal has been developed in part to meet the requirements of the Anacostia Waterfront Environmental Standards Act of 2008 (D.C. Law 17-138; D.C. Official Code § 2-1226.36). This Act requires a 1.0 inch retention standard for development projects within the District's Anacostia Waterfront Zone. In developing its proposed update for its stormwater management regulations, the District opted to apply this 1.0 inch retention standard throughout the entire District. As part of the process of developing this proposal, an economic analysis was conducted to determine the incremental costs associated with meeting a 1.0 inch retention standard for various development scenarios when compared to the District's current stormwater management requirements (which lack a retention standard). This analysis determined that the incremental costs associated with complying with a 1.0 inch retention standard would not be overly burdensome as to discourage development in the District.

However, EPA has not provided any analysis to indicate the environmental benefits of the proposed 1.2 inch retention standard to justify its selection for implementation. Instead, EPA bases its selection of a 1.2 inch retention standard on comparisons to other jurisdictions that do not lend themselves to direct comparisons with the District of Columbia. For these reasons, the District objects to the on-site retention standard proposed in the Draft Permit and requests it be replaced with a 1.0 inch standard. Of the seven permits and state requirements referenced by EPA's Draft Fact Sheet, four are for Phase II or Construction General Permits that apply to areas of considerably less dense development than what exists in the District. The stormwater management requirements in these documents are triggered by development projects one acre in size or greater (i.e. 43,560 sf or greater), which is a considerably higher threshold than the 5,000 square feet of land disturbance threshold that triggers the District of Columbia's stormwater management regulations. The New Jersey state requirements cited by EPA also apply at a larger scale than the District's, as they are triggered by major developments over one acre in size or that create at least 0.25 acres of impervious surface. Some, but not all, of

these reference documents cited by EPA contain requirements for on-site retention of the 90th percentile rain event (or similarly strict retention standards). However, the District contends that these requirements are being applied to less dense development projects and are only triggered at significantly larger scales. These two factors mean that development projects subject to these aggressive retention standards will have substantially more space available to dedicate to stormwater management than will ever be available in a highly-urbanized environment such as the District. The District is concerned by EPA's attempt to impose a performance standard for stormwater management that has been developed and applied to jurisdictions with development patterns that are not directly comparable.

The two remaining permits referenced by EPA's Draft Fact Sheet are for Phase I jurisdictions in Anchorage, AK and Ventura County, CA. Although not directly comparable to development patterns in the District, these permits do allow for better comparison as they apply to Phase I jurisdictions. The onsite retention standards in these permits do not conclusively argue in favor of applying a 90th percentile standard to the District, however. While the permit for Anchorage does include a retention standard based on the 90th percentile rain event, Ventura County's is based on the 85th percentile rain event. As noted earlier, while challenging, a standard based on the 87th percentile rain event for the District would equate to a 1.0-inch on-site retention standard. Such a standard was deemed appropriate by DDOE for inclusion in a proposed revision to the District's stormwater management regulations.

In addition, the District suggests revising this section to apply to "development," consistent with the comment above for Part 4.1.1. The District proposes 18 months for implementation, which would include 12 months to develop and promulgate regulations and 6 months for permitting of grandfathered projects that were designed under the old regulations.

Lastly, construction projects in the public right-of-way (ROW) are faced with a multitude of unique site conditions that vary widely across the District. Every road, from the major arterials to residential streets, in commercial, residential, and combined use areas, is a unique situation. It is extremely difficult to generalize how much stormwater can be retained and or treated until the specific conditions of each road are reviewed.

In developing its stormwater management regulations, the District has not intended to promulgate a retention standard that will be technically infeasible on almost all occasions for a large class of projects, as would be the case with DDOT right-of-way (ROW) projects, given their unique and variable nature. Rather than lower the overall District retention requirement to one that ROW projects could typically achieve, the District prefers to keep the more environmentally protective standard and require ROW projects to the maximum extent practicable.

Without such flexibility to be practical in stormwater retention, the costs to implement could be prohibitively high and could severely impact the District's overall capacity to maintain streets, sidewalks, and alleys. Permitting requirements that allow for

application of the MEP standard are necessary to ensure effective stormwater management that benefits the environment and the safety of the public.[3]

Some common constraints that limit the ability to retain stormwater within the ROW include:

- **Limited Space.** There is limited space outside of the roadways to retain stormwater for infiltration and minimal opportunity for reuse of the water. The available non-paved ROW space to implement green technology practices such as bioretention for treatment, retention, and infiltration is often limited to a 4 foot wide tree space parallel to the street. Stormwater management is being demonstrated in the tree space area in several projects in the District. The ROW area between the sidewalk and the property line is generally established and maintained by the adjacent property owner and may not be available for stormwater treatment from the roadway. In many cases, this space is the property owner's front yard. In some cases, structures are located on the property line and stormwater treatment and infiltration in the ROW area could lead to unintended flooding of the subsurface levels of the structures (basements).

- **Structural Integrity of the Pavement.** The retention and infiltration of water under the pavement has the potential to compromise the structural integrity of the pavement. The use of permeable pavement in the ROW must be carefully evaluated to determine where it can be implemented. At this time, there are serious engineering concerns about allowing infiltration of stormwater runoff under the roadway pavement. The water may damage sub-base structure, which compromises structural integrity. However, permeable pavements will be demonstrated in the District in sidewalks and alleys.

- **Utilities**. A significant amount of subsurface space under the roads and sidewalks is occupied by utility lines. Water, sewer, and gas are all located under the roads and sidewalks at depths that can range from 18 inches to 6 feet below the surface. In some areas of the city, electric, telephone, and cable wires are also located under the roads and sidewalks. The introduction of water to the subsurface areas with utilities could cause damage to the utility lines and lead to outages, which may lead to liability issues.

- **Trees**. The presence of mature street trees limits the available space for stormwater management. Trees should not be removed to install new stormwater management facilities. Mature trees already serve a valuable stormwater reduction and filtering function and should be given stormwater credit for that function. Where conditions permit, in areas without trees or

[3] - See *Comments Relative to "Preliminary Considerations for Modifying/Supplementing EPA's Stormwater Regulations," Federal Register, Monday, December 28, 2009,* American Association of State and Highway Transportation Officials, February 26, 2010.

with newly planted trees that have not become established, green technology treatment and infiltration areas in the tree space will be considered.

- **Parking**. The need for on-street parking on most city streets limits the opportunities to install green technology practices in the parking lane. In low density residential neighborhoods where street parking is not critical, vegetated treatment areas in the parking lane will be considered as appropriate.

- **Bridges**. Bridges elevated over land or water typically have no areas available for stormwater management using green technology practices.

- **Drainage Provision**. Use of green technology practices to manage stormwater will not eliminate the need for conventional stormwater infrastructure. Green technology can generally help manage runoff from small storms, but will not be able to manage runoff from larger storms. The city must still provide sufficient roadway drainage to prevent roadway flooding and ensure safety during heavy rains.

In addition, the District suggests moving language that appears in the second paragraph of Part 4.1.1.d of the draft Permit. The District contends that this provision, pertaining to adjustments to retention standards in cases of redevelopment, high-density development, transit oriented development, etc., is a better fit in this "Performance Standard" Part than in the "Off-Site Mitigation" Part as originally proposed. This flexibility will allow the District to promote smart growth goals that provide additional environmental benefits.

Lastly, the District clarifies that its Stormwater Management Regulations are not intended to cover certain types of projects and therefore identifies projects such as utility maintenance and home gardening as exempt from the performance standards for non-federal facilities.

Part 4.1.1.a.ii, Part 4.1.1.b, pp.8-9

The District is also concerned about the proposed alternatives to the on-site retention standard described in Part 4.1.1.a (ii) and Part 4.1.1.b (ii). These provisions would require development and redevelopment projects to "achieve the retention of the predevelopment runoff volume" and "ensures maintenance of predevelopment hydrographs (volume, rate and duration) for the 1-, 2-, 10- and 100-year 24 hour storm events." This alternative language appears similar to language from EPA's Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Part 438 of the Energy Independence and Security Act ("EISA"). In EPA's EISA guidance, this language was intended to provide a second option for complying with EISA's requirements, as an alternative to achieving on-site retention of the 95th percentile storm of 1.7 inches.

The District understands the rationale for being consistent with the EISA guidance in requiring federal facilities to achieve either the 1.7 inch retention standard or conduct the alternative site-specific hydrologic analysis described in EISA. However, the District has a number of concerns about how this alternative is applied to both non-federal and federal facilities.

First, the District finds an overarching problem with the conceptual approach of achieving retention of the predevelopment runoff volume. The predevelopment runoff volume is what would occur under natural conditions, and as such should pose no concern to water quality. What is of concern is the difference between the predevelopment and post-development runoff volumes, as this difference is what is directly attributable to development or redevelopment activity. The District contends that these provisions should be revised accordingly to reflect this approach.

Next, the proposed language in 4.1.1.a (ii) appears intended to provide non-federal facilities an alternative to meeting the 1.2 inch retention standard. However, in 4.1.1.b (ii), this same language is also proposed as an alternative to the performance standards for federal projects (i.e. also to the proposed 1.7 inch retention standard for federal projects). Again, the District contends that there is a conceptual problem with specifying different retention standards for non-federal and federal facilities, but then providing the same alternative to those standards to both non-federal and federal facilities. The resulting effect is either an alternative for non-federal facilities that is too stringent, or for federal facilities that is too lax. The District's suggestion to resolve this problem would be to specify that non-federal facilities be held to a lesser standard than federal facilities for achieving pre-development hydrology. The District should have flexibility to identify an alternative option that is less stringent for non-federal facilities, including potential use of a different reference condition for modeled pre-development hydrology for those properties.

Finally, the District suggests that these provisions apply to "all development," consistent with comments made for Part 4.1.1.

As a result, the District requests that for Part 4.1.1.a (ii), this language be revised as follows:

> *Require the design, construction and maintenance of stormwater controls to achieve the retention of the* ***difference between the*** *predevelopment* ***and post-development*** *runoff volume of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotransipration, infiltration and/or stormwater harvesting and use for all development greater than 5,000 square feet in the District. Determination of the predevelopment runoff volume must be based on a full hydrologic and hydraulic analysis of the site that ensures maintenance of predevelopment hydrographs (volume, rate and duration).*

The District requests that for Part 4.1.1.b, this language be revised as follows:

Performance Standard for Federal Facilities

The Permittee shall require stormwater entering the MS4 from federal facilities undertaking development that disturbs land greater than or equal to 5,000 sf, thereby triggering requirements for stormwater management plan review and approval as part of the District's permitting process, to comply with either Part 4.1.1(b)(i) or 4.1.1(b)(ii) below. As requested by the District, EPA shall provide assistance in ensuring federal facility compliance. Failure by Federal facilities to comply with District requirements shall not be construed as a District violation of this permit.

i. Adopt the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.7" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all new development and redevelopment greater than 5,000 sf in the District; or

ii. Require the design, construction and maintenance of stormwater controls to achieve the retention of the ***difference between the*** *predevelopment* ***and post-development*** *runoff volume of stormwater from a 24- hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than 5,000 square feet in the District. Determination of the predevelopment runoff volume must be based on a full hydrologic and hydraulic analysis of the site that ensures maintenance of predevelopment hydrographs (volume, rate and duration). The modeled predevelopment condition must be meadow.*

The District has general concerns regarding EPA's proposed approach to have separate performance standards for federal and non-federal facilities. It is the District's understanding that federal agencies are not in agreement regarding this approach, as it may potentially impose a discriminatory standard on federal facilities[4]. Until resolution is achieved, inclusion of these split standards in the Permit could entangle the District in legal proceedings that would detract from the District's efforts to control stormwater pollution, while simultaneously exposing the District to possible noncompliance.

The District will issue permits to federal facilities for stormwater management and erosion and sediment control in compliance with District stormwater management regulations. However, in instances where federal facilities will not allow District inspectors on to their sites or otherwise don't comply with these requirements, EPA, as requested by DDOE, should take responsibility for ensuring compliance. In instances where DDOE makes that request of EPA and the federal facility still does not comply, the District should not be considered to be in violation of the MS4 permit.

[4] See Department of Defense's May 27, 2010 letter to EPA on the Draft Permit for the District of Columbia.

Finally, the District suggests deleting the last two paragraphs in Part 4.1.1.b. The second to the last paragraph is intended to define an equivalency between implementation of the performance standards in Part 4.1.1 and compliance with applicable TMDL WLAs and District WQS. The paragraph begins by specifying that discharges controlled in accordance with the performance standards "shall be considered as stringent as necessary to ensure that the discharges do not cause or contribute to an excursion above any (1) applicable TMDL WLAs; or (2) DC WQS, whichever is more stringent…". This equivalency concept has been included in previous iterations of the District's MS4 Permit, clarifying that implementation of the Stormwater Management Program and BMPs as described in the Permit shall be considered by EPA as consistent with TMDL WLAs and WQSs. However, in this Draft MS4 Permit, EPA has added additional language that continues: "*…so long as the Permittee can demonstrate quantitatively that the Permit conditions meet the WLA.*" The District contends that this additional language is counter to the purpose and spirit of the equivalency language, as it would still require the District to quantitatively demonstrate that WLAs will be met.

Furthermore, the last paragraph in Part 4.1.1.b specifies that:

…pollutants in the discharge must be controlled to meet the standards contained in section 1.4 herein, unless such discharges are fully compensated for by a program for implementing in-lieu or off-site mitigation credits.

Given the DC WQS compliance language in Part 1.4, this Part appears to require, among other things, that discharges from a development site be controlled sufficiently to comply with DC WQS, unless fully compensated for by in-lieu or off-site mitigation credits. The District is unclear as to EPA's intent. At most, in-lieu and off-site mitigation credits can be employed to compensate for a single non-exempt site's failure to comply with the performance standards for new development and redevelopment in Part 4.1.1, an objective that is served adequately by Part 4.1.1.d. As a result, the District requests this last paragraph be removed, as it imposes an unclear and possibly unachievable standard for development projects. If EPA's intent is to make a single development site responsible for attainment of WQS generally, the District must point out that even a very large development site is only one small contributor to overall watershed or waterbody pollution, to which there are many other contributors. It is nonsensical to think that discharges from a single development site can be controlled sufficiently that in-stream WQS would be achieved. In order for this to be achieved, the development site would not only have to produce no discharge, but moreover, it would have to effectively remove other sources of pollution from District waters, presumably by requiring the developer to carry out or pay for in-lieu or off-site mitigation credits. It is inconceivable that any single development site would be able to purchase adequate in-lieu or off-site mitigation credits for District waterways to be in compliance with DC WQSs.

Part 4.1.1.d, pp. 9-10

The District suggests re-designating this section "**Off-Site Mitigation and Fee-in-Lieu Program,**" and revising the first paragraph to read:

> *Within **18 months** of the effective date of this Permit, the District shall implement an off-site mitigation and Fee-in-Lieu program to be utilized when projects cannot meet stormwater management standards as defined in Sections 4.1.1.a and 4.1.1.b. The program shall include at a minimum: establishment of baseline requirements to be applied for mitigation projects **and** specific criteria for determining when full compliance with the performance standard cannot technically be met based on physical site constraints, **zoning requirements or restrictions, and other specific considerations** for evaluating when an off-site mitigation is not feasible and in-lieu credits must be substituted to satisfy this requirement. The requirements for off-site mitigation and in-lieu payments shall be sufficient to encourage on-site stormwater management as a first option, **off-site mitigation as a second option, and in-lieu payments as a third option** for meeting stormwater performance. Further, the requirements for off-site mitigation shall be established to meet or exceed the stormwater performance requirements for each project. **The permittee may exempt public right-of-way projects from the off-site mitigation and Fee-in-Lieu program.***

The District contends it will be overly burdensome for the District to analyze every proposed project that cannot meet on-site retention standards to determine when off-site mitigation is not feasible. Rather, it will be more practical to structure this program with economic incentives for on-site management as a first option, off-site mitigation as a second option, and fee-in-lieu payment as a third option. Such an approach will provide the District and developers the flexibility to choose the most appropriate option for each project, while still incentivizing implementation of stormwater management practices.

Furthermore, the District suggests deleting the language in the second paragraph of this Part and redrafting and reorganizing it to appear in Part 4.1.1.a (see comments on p. 4).

Lastly, public ROW projects face unique challenges in stormwater management which may restrict the District's ability to insure that these projects will be able to meet the 1.2 inch retention standard. Because of this ROW projects could be subject to the off-site mitigation or fee-in lieu requirements of Part 4.1.1.d. It would not make sense to make contributions to the Stormwater Enterprise Fund because DDOT relies on those funds to implement stormwater management practices in the ROW.

Part 4.1.2.1, p. 10

The District recommends changing the language in this Part to read as follows:

> *1. Performance Standard. Within one year of the effective date of this permit, establish performance metrics for retrofit projects. The starting point for the*

> *performance metrics shall be the standard in 4.1.1.a and may include metrics: to count square footage proportionate to the percentage of the retention standard achieved for projects that retain less than that standard; to partially count a proportion of square footage for projects that provide stormwater treatment benefits other than retention for specific TMDL pollutants of concern; and to count removal of impervious surface. Specific site conditions (soils, depth to groundwater, site contamination, the presence of buried utilities, etc.) may constitute justifications for setting a performance standard at something less than the standard in 4.1.1.a. Specific site analysis to make this determination shall be required. As with new and redevelopment, the District may apply off-site mitigation or payment-in-lieu options. The DC Retrofit Program shall manage runoff from 18,000,000 square feet of impervious surfaces over the Permit term.* ***A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way, and 100% of the ROW treatment area shall be counted toward this minimum requirement, even if specific site analysis determines that a retention standard less than that in 4.1.1.a is necessary.***

The city will implement stormwater management retrofits in transportation rights-of-way to the MEP through road reconstruction projects, repaving, redevelopment, and stand-alone retrofit projects. Based on an assessment of DDOT's anticipated annual capital construction activity (which is constrained by available funding), the District has estimated the amount of right-of-way area that can be retrofitted over the next five years to be 1,500,000 square feet. Due to limited space and specific site conditions in the ROW, these retrofit projects may not be able to meet the performance standard in 4.1.1.a and will need to meet a lesser performance standard. However, the total area where stormwater management retrofits are implemented should apply toward this requirement.

Further, per this Permit's definition, it is the District's understanding that transportation right-of-way (ROW) projects are retrofits, as they effectively improve existing stormwater conveyance systems. Transportation projects within the District typically constitute reconstruction of existing roads and stormwater infrastructure.

Part 4.1.2.4, p.11

The District recommends changing language in this Part to read as follows:

> *The District, with facilitation assistance from EPA Region III, will also target major Federal landholders, such as the General Services Administration and the Department of Defense, for outreach and education, with the objective of identifying retrofit opportunities for federal facilities.*

The District's suggestion is to remove the requirement to "establish agreements" with Federal agencies to conduct retrofits. The 2009 Federal Executive Order 13508 on Chesapeake Bay Protection and Restoration requires a Federal strategy to address water quality pollution in the Chesapeake Bay watershed, which will include retrofits of Federal facilities for stormwater management. These retrofits would be applied to

existing facilities, however, and as such may not trigger the District's regulatory process for stormwater management. This regulatory process is the only mechanism the District has for enforcing the performance standards for stormwater management described in Section 4.1.1. As these retrofits might be conducted outside this existing regulatory mechanism, the District contends that its ability to engage Federal facilities on the subject of retrofits is limited to education, outreach, and identification of retrofit opportunities.

Part 4.1.3, p. 11

The District recommends changing the language in this Part to read as follows:

> *4.1.3 Tree Canopy. No later than one year following issuance of this Permit, the Permittee shall develop a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The Permittee shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. This effort shall include, at a minimum:*
>
> *1. Performance Standard. Achieve* ***a minimum annual tree planting rate of at least 4,150 plantings annually throughout the District.*** *Ensure that trees are planted and maintained, including requirements for tree boxes, in the manner that will achieve optimal stormwater retention and tree survival rate within the District of Columbia and that such planting complies with* ***best management practices for tree planting.***

The 2007 MS4 BMP Enhancement Package listed a goal of planting at least 4,150 trees per year to achieve optimal tree canopy and the April 20th Draft Permit specifies that tree planting locations shall be indentified throughout the District. Tree planting practices should follow best management practices, which could come from several sources including the International Society of Arboriculture (ISA), DDOT Urban Forestry Administration (UFA) guidelines, or other professional tree-planting practices.

4.1.4, pp. 11-12

The District recommends changing the language in this Part to read as follows:

> *4.1.4 Green Roof Projects. As part of the green technology program plan, identify all District-owned locations throughout the District* ***that are slated for new construction or redevelopment*** *and where green roof projects are technically feasible and* ***report on*** *specific schedules for implementing these projects at specific locations, with the highest priority given to projects that offer the greatest stormwater capture and pollutant load reduction potential. The Permittee shall:*

It is overly burdensome to evaluate every District owned property for the feasibility of installing green roofs. It is, however, practical to evaluate properties that are slated for new construction or redevelopment as part of the District's capital program. Additionally, as the District's capital programs vary widely due to budget constraints, it is not practical to commit to a long term schedule for the construction of green roofs. Nevertheless the District is committed to increasing the use of green roofs as is demonstrated by the fact that the District currently contains the second largest square footage of green roofs in the nation.

4.1.4, 1 p.11

The District recommends taking out this section because it appears to be duplicative of the section discussed in the last comment above.

4.1.4,2 p. 11

The District administers innovative programs to incentivize installation of green roofs on private properties and suggests the following language change to clarify that green roofs on private properties will be counted toward the commitment to achieve 350,000 square feet of green roofs:

> *2. Performance Standard. Upon completion of the structural assessment, the Permittee shall commit to installing 350,000 square feet of green roofs over the Permit cycle on properties* ***in the District*** *during the term of the Permit (including schools and school administration buildings) in order to make progress toward the Mayor's goal of achieving 20% green roof coverage in the District in 20 years.*

4.2.1, p. 12

The District recommends that this requirement be one for the District generally, rather than specifically referring to DRES and OPEFM, and adding the following text into the end of the second paragraph:

> *In addition, the Permittee shall ensure that every new building and major renovation/rehabilitation project for District-owned properties within its inventory (e.g administration buildings)* ***that require a stormwater management plan and permit*** *includes on-site stormwater retention measures* ***which may include*** *green roofs, stormwater harvest/re-use, and/or other practices that can achieve the retention performance standard.*

The current draft language suggests that green roofs are required as part of *every* renovation/rehabilitation. In reality, a green roof may not be feasible for every single project and it might be preferable to utilize other (and comparable) stormwater retention measures instead. As currently reads, the draft language commits the District to install a green roof as part of every renovation, and that may not be feasible (both physically,

structurally, and/or economically), and other retention measures could actually provide more retention benefits.

Part 4.2.3.b, p.13

The District suggests adding language so this paragraph reads as follows:

> *The Permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green* ***technology practices*** *contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:*

Part 4.3.1, p. 13

The District suggests adding language to this paragraph to read as follows:

> *The Permittee,* ***through WASA****, shall implement a response plan for overflows of the sanitary sewer system into the MS4. The response plan shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:*

Part 4.3.2, p.14

The District suggests adding language to this Paragraph to read as follows:

> *The Permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all Permittee-owned or operated public construction projects* ***or federal construction projects.***

Part 4.3.4, p.15

The District suggests deleting the words "immediately prior" from Item 5 in this Section, as it is impossible to predict all precipitation events.

Part 4.3.6.3, p. 17

The District recommends changing the language in this Part to read as follows. Please move the third sentence to the beginning of the Part:

3. The Permittee will evaluate the use of porous and permeable surfaces and the possible reduction in use of deicing materials. The Permittee shall continue to evaluate and update the use, application and removal of chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The Permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities.

The Permittee shall evaluate and implement ***as appropriate*** *the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.*

The District will evaluate the use of porous and permeable surfaces and the possible reduction of deicing materials. However, since the majority of deicing materials is applied to the main roadways and since permeable pavements have not been proven to show durability under heavy traffic loads, the District cannot commit to implementing permeable pavements in the roadway travel lanes. Further evaluation is required before any such implementation can occur including analyses of maintenance requirements, safety risks, fiscal impacts and other significant factors.

Part 4.4.3, p.20

The District suggests adding language to this Part to read as follows:

> *At each facility identified as a critical source, the Permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the Permittee determines that existing measures are not adequate to protect water quality, the Permittee shall require additional site-specific controls sufficient to protect water quality* ***to the MEP****.*

Part 4.8.3, p.24

The District suggests deleting the last sentence of this paragraph (pertaining to providing an explanation of how implementation of procedures meets the requirements of the Clean Water Act), as this is a reporting requirement that will be addressed by the District's Annual Reports.

Part 4.9.1, p.26

The District suggests deleting the word "measurable" from this paragraph, as it may not always be possible to measure increased knowledge of target audiences for each of the Education and Outreach program elements.

Part 5.1.1, p. 27

The District recommends changing the language in this Part to read as follows:

> 1. *Make wet weather* ***pollutant*** *loading estimates of the parameters in Table 3 from the MS4 to receiving waters.* ***Pollutant loading estimates may be calculated using the Simple Method (and/or other appropriate modeling tools and data on BMP efficiencies as described in the paragraph preceding Part 8.1(3)(H)) as detailed in the District of Columbia SWMP dated February 2009 and Anacostia and Rock Creek TMDL WLA Implementation Plans.*** *Number of*

> *samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.*

These changes are suggested in order to achieve consistency with the District's Upgraded Stormwater Management Plan submitted in 2009, which designates the Simple Method as the modeling approach for estimating pollutant loads and reductions. Further, the District intends to track pollutant reductions for pollutants that have MS4 WLAs. As cadmium does not have an MS4 WLA, the District recommends adding the following language at the end of Part 5.1.3 as follows:

> ***Cadmium was not listed as a pollutant of concern in either the 2005 Anacostia or Rock Creek TMDL WLA Implementation Plans. An evaluation of the monitoring chemical results for Cadmium will be made in the Discharge Monitoring Reports (DMRs) to determine if it should be listed as a pollutant of concern.***

<u>Part 5.1.3, pp.27-28</u>

The District suggests changing the language in this Part to read as follows:

> *The Permittee must use the information* ***obtained from the chemical analysis as one of the tools*** *to evaluate the* ***effectiveness*** *of the stormwater* ***management*** *program and the health of the receiving waters at a minimum to include:*

As discussed in detail in comments on Part 8 of the Permit, the District will evaluate program effectiveness by using monitoring data as well as data on sediment correlated reductions and data on the effectiveness of structural and non-structural BMPs for pollutant reduction.

<u>Part 5.1.3.2, p. 28</u>

The District suggests changing the language in this Part to read as follows:

> 2. *The Permittee shall perform the following activities* ***no later than the date of submission of the District's application for the renewal of the MS4 Permit, due to EPA six months prior to the expiration of the Permit:***

Identification of water quality improvements is dependent on the monitoring of chemical results. However, chemical monitoring is only conducted during storm events that meet the criteria specified in this section. In the last permit cycle, there was a long period of time during which the District's monitoring was on hold because of drought and because the storm events that occurred did not meet the required monitoring criteria. The District requests additional time to provide more flexibility in order to respond to similar circumstances, or other circumstances that might prevent necessary monitoring.

Part 5.2.3, p.29

The District suggests adding language to Paragraph 2 of this Part to read as follows:

> *2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event.* ***Grab or composite samples may be taken in accordance with the pollutant specific requirements of 40 C.F.R. § 122.21(g)(7).***

Part 5.7.2, p.31

We are unable to find information about Method 1613 for analysis of mercury. There is a method known as 1631. The District suggests revising this Part accordingly.

Part 6.2.1.d, p.34

The District suggests revising this language to read as follows:

> *An assessment of the projected cost of the February 19, 2009 SWMP and a description of the Permittee's budget for existing stormwater programs, including: (i) an overview of the Permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this Permit,* ***subject to*** *the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;*

Part 8.1.1, p.38

Consistent with the District's previous comments regarding Part 1.4, the District suggests revising this paragraph to read as follows:

> *1. The Permit includes* ***compliance to the maximum extent practicable with*** *all TMDL WLAs applicable to the District MS4 approved or established as of the effective date of this Permit.*

Part 8.1.2, first two sentences, p. 38

The District recommends the following changes to this sentence in this paragraph:

> *No later than* ***18 months*** *from the effective date of this Permit, the Permittee shall submit to the permitting authority updates to the Anacostia and Rock Creek Implementation Plans* ***and submit a Potomac River TMDL Implementation***

> ***Plan***. *This does not pertain to the schedule identified in Table 5 for submission of an Anacostia River Trash TMDL Implementation Plan.* ***In the event that currently approved TMDLs are vacated or no longer in effect, the District will be allowed an additional 18 months to update required TMDL Implementation Plans from the new date of TMDL establishment.***

The one-year deadline for the District to develop/update TMDL Implementation Plans is extremely aggressive. The District believes that it will be able to meet that deadline for the Anacostia River Trash TMDL Implementation Plan (see also Part 8.1.2 and Table 5). However, with respect to the combined TMDL Implementation Plans for Rock Creek, the Anacostia River, and the Potomac Rivers (see also Parts 8.1 and 8.1.1 and Table 5), the amount of analysis and field work required to develop and/or update these plans with compliance schedules for roughly 300 TMDLs will be daunting. Moreover, incorporating time into that process to allow for meaningful public involvement will consume additional time and resources (see Part 8.1.3.F). Recognizing this and the fact that pollutant-control activities are already being implemented in fulfillment of existing combined TMDL Implementation Plans for Rock Creek and the Anacostia River, the District believes that the Permit should allow at least 18 months, instead of just one year, for the development/update of TMDL Implementation Plans other than the Trash TMDL Implementation Plan for the Anacostia River.

Furthermore, as you are aware the Federal District Court for the District of Columbia recently remanded most of the District's TMDLs[5] and staggered the duration of their vacatures. Accordingly, the District is concerned that it would be inappropriate for the Permit to require the updates to existing TMDL implementation plans, creation of a new TMDL Implementation Plan, and development of interim milestones (and the like) as these existing TMDLs will be modified. As you will recall conversion of the two TMDLs from annual to daily requirements, which were the subject of the previous challenge by DOW/FOE, required approximately eighteen (18) months.

<u>Part 8.1.2, p. 38</u>

We recommend the following changes to this sentence in this paragraph:

> *The sediment TMDLs and their implementation plans are incorporated by reference****, and may be used*** *as the implementation plans for achieving the metals, nutrients, and other toxic****, conventional****, and non-conventional pollutants that are naturally present in soils as the loading reduction specified in several TMDLs.*

In addition to using sediment implementation plans, the District may opt to use more direct methods such as BMP efficiencies and/or monitoring for demonstrating specific pollutant wasteload reductions. The District should be permitted to use reductions in sediments to plan for and track reductions in appropriate pollutants for which that correlation has been demonstrated in the literature, including conventional pollutants.

[5] Anacostia Riverkeeper, Inc. and Friends of the Earth, v. Environmental Protection Agency, Civil Action No. 09-0098 (JDB)

Part 8.1.3.A, p38

The District suggests revising this paragraph to read as follows:

> *A.* ***An estimated*** *ultimate date for final compliance with the WLA.*

Part 8.1.3.B pp.38

The District suggests making the following language changes to this Part:

> *B. A set of controls for achieving the MS4 WLA* ***to the MEP****, which may include stormwater pollution reduction and elimination laws and regulations, LID Implementation as set forth in Section 4.1.1 herein, municipal operations to reduce the discharge of pollutants in stormwater as set forth in Section 4.2 herein, and other management practices. The set of controls may be adapted as opportunities change, as long as* ***the alternative set of controls is projected to*** *achieve interim deadlines for WLAs.*

Flexibility is essential for implementation of BMPs identified in TMDL Implementation Plans, which may encounter obstacles that make it necessary to substitute an alternative BMP. This will help ensure that the BMPs ultimately selected for implementation are tailored to existing land uses and opportunities in each sewershed and take advantage of the most cost effective BMPs available. Therefore, the District must be able to change the set of controls it is implementing to achieve pollutant reductions, as long as the changes are projected to achieve pollutant reductions required in interim compliance deadlines. In the event that a change in the set of controls does not actually achieve pollutant reductions required by interim compliance deadlines, the District should not be in violation of this permit as long as the District is taking corrective action to get back on track toward compliance.

Part 8.1.3.C, p. 38

The District recommends the following changes to this sentence in this paragraph:

> *Numeric benchmarks which specify annual pollutant load* ***reduction goals*** *and the extent of control actions for achieving these annual benchmarks.*

Many of the controls that will be implemented to achieve pollutant load reductions will be large capital projects that may take several years from conceptual design to planning to completion. Some of these projects will encounter obstacles along the way that lead to the substitution of an alternative project. Given these realities, year-to-year progress will likely be uneven, and though the District can strive to meet annual goals, it is not reasonable to commit to them as permit deadlines. The Permit contains end-of-permit-

term interim compliance deadlines (see Part 8.1.3.D), which is sufficient to ensure accountability for progress. Therefore, these annual targets should be goals, not deadlines.

Part 8.1.3.D, p. 38

The District suggests revising this paragraph to read as follows:

> *An **estimated** pollutant load reductions **as defined by best management practices** specified in the implementation plan for that WLA by, at the latest, the end of the Permit term.*

Part 8.1.3.E, p.39

The District recommends substituting "five-year" for "annual" and deleting the word "monitoring" so that the third sentence would read as follows:

> ***If a five-year evaluation of** data indicates that these practices are insufficient progress towards meeting the WLA, the Permittee shall adjust its management towards meeting the water quality standards and appropriate TMDLs.*

Though the District will annually report on its progress, monitoring and other data from a one-year period is insufficient to judge progress being made on reducing stormwater pollution to local surface waters. The District fully supports an adaptive management approach to implementing stormwater management controls and believes that changes to its management approach for achieving WLAs should be done on a five-year basis as part of the development and submittal of the District's Stormwater Management Plan, due 6 months prior to the expiration of the permit (see Table 5). This would be consistent with the approach taken in the Chesapeake Bay TMDL, which EPA projects will be completed in 2011 and will undergo review in 2017 for possible corrective action through an adaptive management approach.

In addition, as the preceding sentence in the Permit states, *"an annual evaluation can be based upon either presumed pollutant reductions from management practices implementation or actual monitoring data."* Presumed pollutant reductions may range from pollutant removal efficiencies explicitly identified for a stormwater control device to a removal efficiency correlated with sediment removal to estimated pollutant removal associated with a policy (e.g. Bag Law) or targeted outreach. The District should able to take into consideration all of these practices as well as monitoring data when evaluating annual progress and determining the necessity to change management strategies. This is especially true given that monitoring results may not lend themselves to straightforward interpretation on an annual basis given annual fluctuations in rainfall amounts, the types of activities occurring in a sewershed, and other variables.

Part 8.1.3.G, p. 39

The District suggests the following language changes:

> *Sufficient monitoring for chemical constituents listed in Table 3* ***and any other constituents selected by the Permittee*** *in each TMDL watershed to enable timely, iterative evaluation of the implementation plan* ***(no later than as part of the Permittee's submittal of the revised SWMP)****, and require management responses if monitoring reveals insufficient progress toward meeting the WLA within the specified timeframe. For TMDL pollutants not included in Table 3, pollutant load reductions will be estimated annually using* ***monitoring data, sediment correlations, and/or presumed pollutant reductions from structural and non-structural BMP efficiencies (including data on pollutant reductions associated with non-structural controls such as street sweeping, leaf collection, and outreach and education)*** *. The monitoring elements, and pollutant load reductions shall at a minimum, describe…*

The District should have the flexibility to track progress using monitoring data for pollutants in addition to those listed in Table 3. Moreover, the District should be able to take into consideration all relevant data, not just monitoring data, when reporting progress and evaluating implementation effectiveness and possible changes in management strategy. Pollutant reductions should be calculated using monitoring data, sediment correlations, or presumed pollutant reductions from structural and non-structural BMPs based on BMP efficiencies and other data on BMP effectiveness found in scientific literature.

Part 8.1.3.H, p. 39

The District recommends the following language change:

> *The TMDL Implementation Plan elements required in this section****, including the interim and final WLA achievement dates,*** *will become enforceable permit terms upon* ***EPA*** *approval of such Plans****, requiring compliance to the MEP, in accordance with 33 U.S.C. §1342(p)(3)(B)(iii) and 40 C.F.R. §122.44(k)(2)&(3). In the event that the Permittee fails to achieve an interim or final WLA achievement date, the Permittee shall be deemed to be in compliance if it is taking corrective action using an adaptive management approach. If EPA exceeds a 30 day timeframe for approval of TMDL Implementation Plans, the Permittee shall have the right to extend final WLA achievement dates by a corresponding amount of time and to proportionately reduce the amount of pollutant reduction required by end-of-permit-term interim compliance deadlines.***

As discussed above and in the District's letter, the Clean Water Act provides that permit requirements for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants to the MEP. Moreover, as consistent with *Tualatin*

Riverkeepers vs. Oregon Department of Environmental Quality, failure to meet an approved benchmark should not be considered a Permit violation, unless the Permittee has also failed to follow the adaptive management process to improve the stormwater management plan.

Further, the District is concerned that EPA has not developed a clear process and timeline for approval of TMDL Implementation Plans. Compliance schedules in TMDL Implementation Plans are inherently time sensitive, and failure by EPA to approve TMDL Implementation Plans in a timely manner (e.g. 30 days) would delay implementation activities by the District, thereby exposing the District to permit violations given that these schedules and other Implementation Plan elements become enforceable permit terms upon approval by EPA. A thirty-day timeframe for EPA to approve TMDL Implementation Plans is consistent with the CWA requirement for EPA to approve submitted TMDLs within 30 days.

Extending final WLA achievement dates by an amount of time that corresponds to EPA's exceedance of the 30-day approval timeframe will allow the District to make up for time it loses on implementation if EPA's deliberations are prolonged. Additionally, since the Permit stipulates that interim compliance deadlines can not be extended past the end of the permit term, a delay by EPA would result in the Permittee having to achieve the same amount of pollutant reduction in less time. Therefore, the amount of pollutant reduction required by end-of-permit-term interim compliance deadlines should be reduced proportionate to the length of time by which EPA exceeded the 30-day approval timeframe. For example, if DDOE has 5 years to achieve an interim compliance deadline of 100 units of pollutant reduction and EPA exceeds a 30 day timeframe by one year, then DDOE would have only 4 years to achieve the interim compliance deadline, which should be proportionately re-established at 80 units of pollutant reduction.

Part 8.1.3 H, 4th paragraph, p. 39

The District recommends deleting "For the pollutants listed in Table 3" in the first sentence and the following changes:

> *Demonstration of compliance will be calculated using the procedures (i.e., Simple Method) identified in the SWMP dated February 19, 2009, approved Anacostia River TMDL Implementation Plan dated February 19, 2005, and/or other appropriate modeling tools**, sediment-correlation data, and/or presumed reductions based on structural and non-structural BMP efficiencies and data**. The Permittee will report such information by comparing the monitoring data, **sediment-correlations, and/or other BMP efficiencies and data** for that pollutant to the approved pollutant **wasteload** according to the procedures required by the Permit herein, specific WLAs and its associated stormwater **waste**load reductions for the receiving water body.*

The District should retain the ability to use monitoring data for tracking and compliance calculations for MS4 WLA pollutants in addition to those listed in Table 3, as well as the

ability to track and report on progress using other appropriate methods, including data on sediment-correlated reductions for appropriate pollutants and data on the effectiveness of structural and non-structural BMPs for pollutant reduction. BMP efficiencies may be calculated using Chesapeake Bay Program pollutant removal efficiencies or other independent sources for BMP efficiency data. As appropriate, BMP efficiencies may also be calculated based on scientific data, findings in the literature, and similar sources. Non-structural BMPs include, among others, street sweeping, leaf collection, stormwater pollution prevention plans, training, and outreach and education.

Part 8.1.3 H, 4th - 6th paragraphs, pp. 40

The District will report on pollutant load reductions as part of the annual report. However, the draft Permit appears to require the District, through its annual reports, to evaluate and change management plans for achieving wasteload reductions on an annual basis if monitoring or other data indicate that pollutant wasteload reductions are insufficient progress toward meeting the WLA (see especially 5th paragraph of 8.1.3.H and 8.1.3.E, commented on above). Part 8.1.3.H, 6th paragraph further requires the District, as part of its Stormwater Management Plan submitted to EPA six months before the expiration of the permit, to assess each TMDL Implementation Plan and its program elements and to demonstrate an overall pollutant reduction. The District objects to the requirement to conduct evaluation and make potential changes to management plans on an annual basis. Instead, the District proposes that its evaluation and potential modification of its management approach should be conducted as part of the larger assessment of each TMDL Implementation Plan as part of the District's Stormwater Management Plan submittal.

Evaluation and potential modification of management plans should be done a five-year basis for a number of reasons. First, as noted above, many of the controls that will be implemented to achieve pollutant load reductions will be large capital projects that may take several years from conceptual design to planning to completion. Some of these projects will encounter obstacles along the way that lead to the substitution of an alternative project. Given these realities, year-to-year progress will likely be uneven, with some years yielding higher than expected pollutant reductions and some years yielding lower than expected pollutant reductions. Second, as also noted above, monitoring results may not lend themselves to straightforward interpretation on an annual basis given annual fluctuations in rainfall amounts, the types of activities occurring in a sewershed, problems with collecting samples, and other variables. Accordingly, it is the District's view that going through an evaluation of its management plans for roughly 300 MS4 WLAs on annual basis would not be an effective expenditure of resources. Moreover, conducting an evaluation and potential modification of these implementation plans would be consistent with the approach taken in the Chesapeake Bay TMDL, which EPA projects will be completed in 2011 and will undergo review in 2017 for possible corrective action through an adaptive management approach.

In order to reflect the comments above, the District suggests revising paragraphs 4-6 of 8.1.3.H by moving the first sentence of paragraph 5 to the end of paragraph 4 and

incorporating the remainder of paragraph 5 into paragraph 6, as well as making other language changes consistent with the above comments. The District also suggests deleting the word "monitoring" from paragraph 5 to be consistent with the District's intention to track individual pollutant reductions using a mix of monitoring data, sediment correlations, and other pollutant reductions achieved through structural and non-structural BMP efficiencies and pollutant reductions. The District also proposes clarifying that assessments of TMDL Implementation Plans should cover any program elements for which the District plans pollutant reductions.

Below is the District's proposed language for this section, also including changes proposed elsewhere:

> *Demonstration of compliance will be calculated using the procedures (i.e. Simple Method) identified in the SWMP dated February 19, 2009, approved Anacostia River TMDL Implementation Plan dated February 19, 2005, and/or other appropriate modeling tools**, sediment-correlation data, and/or presumed reductions based on structural and non-structural BMP efficiencies and data**. The Permittee will report such information by comparing the monitoring data, **sediment-correlations, and/or other BMP efficiencies and data** for that pollutant to the approved pollutant **wasteload** according to the procedures required by the Permit herein, specific WLAs and its associated stormwater **waste**load reductions for the receiving water body. **The Permittee shall report to EPA the results of this analysis through Annual Reports in accordance with the compliance schedule in this Permit.***
>
> *The Permittee shall perform an assessment of each TMDL Implementation Plan, including an assessment of each of the **program elements planned for pollutant reductions, which may include** street sweeping; inspection and enforcement; public outreach; constructed green technology practices and other management practices; and evaluation of load reductions. The Permittee shall submit this assessment to EPA as part of the Stormwater Management Plan for review and approval. The assessment methodology for each Plan approved shall demonstrate at least an overall stormwater pollutant reduction percentage from the baseline monitoring program for each watershed during the Permit term, for purposes of achieving TMDL WLAs **to the MEP. If the analysis concludes that the MS4 discharge for a pollutant is not meeting interim compliance deadlines toward achievement of pollutant-specific WLAs, the Permittee shall develop, through its Upgraded Stormwater Management Plan, recommendations for correction of the non-attainment of interim compliance deadlines. The Upgraded SWMP shall consist of documenting all previous and on-going efforts at achieving the specific pollutant reductions identified in the TMDL WLA and further demonstrating additional controls sufficient to achieve those reductions through an established performance based benchmark. This benchmark shall be applied against annual projected performance standards for purposes of revising the final implementation plan when determining measurable progress to achieve adequate reduction.** EPA reserves the right after*

> *a review and approval of each plan modification/**Stormwater Management Plan** to modify this permit for purposes of requiring additional **management practices to control** the discharge of pollutants from the MS4. EPA shall make the results of any such determination(s) in writing available to the Permittee and other interested persons including, but not limited to members of the District of Columbia MS4 Task Force. Currently, TMDLs are under development for the Potomac River and for the Anacostia River (Refer to Potomac River Summit for a "Trash Free" River by 2013 and Potomac River Watershed Trash Treaty executed in 2005). Upon approval by EPA, the TMDL implementation plan(s) shall be incorporated into the SWMP in accordance with the compliance schedule in Part III.A and Table 4 of this Permit.*

Part 8.1.3 H, last paragraph, p. 41

The District points out that this paragraph is almost identical to language in paragraph 5 of this part and suggests that it be deleted. As discussed above, the District suggested that evaluation and possible modification to WLA management plans/TMDL Implementation plans should be conducted as part of the District's revising and submitting of its Stormwater Management Plan six months before the expiration of this Permit.

Part 8.1.1 Potomac River TMDL Implementation Plan, pp. 41

The District recommends that the compliance schedule in Table 5, which is referred to in this section and appears on page 34, should be revised to require the Potomac River TMDL Implementation Plan ***eighteen months*** after EPA approval of the Potomac River TMDLs.

As discussed above, the one-year deadline for the District to develop/update TMDL Implementation Plans is extremely aggressive. The District believes that it will be able to meet that deadline for the Anacostia River Trash TMDL Implementation Plan (see also Part 8.1.2 and Table 5). However, with respect to the combined TMDL Implementation Plans for Rock Creek, the Anacostia River, and the Potomac Rivers (see also Parts 8.1 and 8.1.1 and Table 5), the amount of analysis and field work required to develop and/or update these plans with compliance schedules for roughly 300 WLAs will be daunting. Moreover, incorporating time into that process to allow for meaningful public involvement will consume additional time and resources (see Part 8.1 (3 – F)). Recognizing this, the District believes that the Permit should allow at least 18 months, instead of just one year, for the development/update of TMDL Implementation Plans other than the Trash TMDL Implementation Plan for the Anacostia River.

Part 8.3 Hickey Run, pp. 42

The District recommends the following changes to paragraph 2 of this Part to allow the District to identify appropriate monitoring locations as part of the Revised Monitoring

Plan (Part 5.1). The District will choose locations to evaluate the effectiveness of the Hickey Run Strategy.

> **The Permittee shall identify in its Revised Monitoring Plan (Part 5) specific monitoring stations to evaluate progress with the Hickey Run Strategy.**

Part 9.4, 2nd paragraph p.43

The District recommends the following deletions and language changes so that the second paragraph of Part 9.4 reads as follows:

> *In the event that the Permittee or permitting authority* ***identifies non-compliance with this permit,*** *the Permittee shall take corrective action as soon as possible* ***to achieve compliance, using an adaptive management approach as appropriate. This action will constitute compliance with applicable WQS and WLAs. The methods used to adaptively manage the stormwater management program will be documented in subsequent annual reports or in revisions to the Stormwater Management Plan, as appropriate.***

The District feels that this language change request is aligned with the Oregon State Court of Appeals ruling in *Tualatin Riverkeepers vs. Oregon Department of Environmental Quality*.[6] The District will commit to meeting approved benchmarks for pollutant load reductions (i.e. implementation of BMPS) to the MEP, and will implement an adaptive management approach if benchmarks are not being met.

Part 9.17, p. 48

The District suggests deleting this Part, consistent with earlier comments regarding compliance with District Water Quality Standards.

Part 10, p. 51

The District suggests deleting the definition for the term "Internal Sampling Station."

Part 10, p.52

The District recommends the following language change:

"Retrofit" means either of the following:

1. ***when a stormwater control measure is installed and/or created at an existing or redevelopment location where there was no existing stormwater control measure; or***
2. ***when an existing stormwater control measure is modified, altered or replaced to improve its performance.***

[6]- Anacostia Riverkeeper, Inc. and Friends of the Earth, v. Environmental Protection Agency, Civil Action No. 09-0098 (JDB)

The District feels that the definition of “retrofit” should not just include modifications of the stormwater conveyance systems, but also new BMPs being constructed on development sites. This definition will also allow the District to replace traditional BMPs with non-traditional BMPs (e.g. bioretention cells).

Part 10, p.53

The District recommends deleting the definition for “Severe property damage” if the “Bypass” language in Part 9.17 is also deleted.

Part 10, p.53

The District recommends deleting the definition “Significant Materials,” as the term does not appear in the Permit.