GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

June 21, 2010

Mr. Garrison D. Miller
U.S. EPA Region III (3WP41)
Water Protection Division
Philadelphia, PA 19103-5103

Re: Public Comment on Draft District of Columbia Municipal Separate Storm Sewer System – NPDES Permit No.DC0000221

Dear Mr. ~~Miller~~, Garry

The District Department of the Environment ("DDOE"), on behalf of the Government of the District of Columbia (the "District"), submits this letter and attached comments on the Draft Municipal Separate Storm Sewer System ("MS4") permit to the Government of the District of Columbia, published on April 20, 2010. The Environmental Protection Agency ("EPA") Region III Water Protection Division Director Jon Capacasa, extended the date for the District to provide comments to EPA until June 21, 2010. As these comments serve as DDOE's formal, final comment on EPA's April 20, 2010 draft permit, they supersede, and should replace, the Interim Draft comments DDOE provided on June 4.

The District welcomes the issuance of a new progressive MS4 permit that will help the District meet its environmental goals. The District has strong interests in the development of this new permit. As the permit holder, the District, along with the D.C. Water and Sewer Authority ("WASA"), is responsible for overall compliance with permit requirements. DDOE serves as the Stormwater Administrator, and is responsible for coordination with other District agencies and WASA for meeting the term and conditions under the permit.[1]

This letter will provide some background on the District's MS4 Permit since it was first issued in 2000, and a discussion of some of the District's major issues with the Draft Permit. Other comments and suggested language changes, considered by the District to be equally important, are attached hereto as **Appendix A**.

[1] See the District Department of the Environment Establishment Act, Subchapter II (Stormwater Management), set forth as D.C. Official Code §§ 8-152.01, *et seq*.

DDOE
DISTRICT DEPARTMENT OF THE ENVIRONMENT

1200 First St, NE, 5th Floor, Washington, DC 20002 Tel: (202) 535-2600 Facsimile: (202) 535-2881

I. Background on the District's MS4 Permit

Since renewal of the MS4 permit in 2004, the District has achieved several significant milestones in effectively managing and reducing stormwater pollution. As a result of a 2004 challenge by environmental advocates, EPA Region III and the District entered into an agreement to develop and implement an enhancement of the District's MS4 permit. The enhancement package was approved by EPA Region III on November 27, 2007 and included implementation of a specific number of activities, including structural and nonstructural best management practices ("BMPs") to reduce stormwater pollution from entering surface waters in the District. Since that time the District has worked hard to meet all of the requirements of this enhancement package and in some instances has surpassed these requirements.

In addition, since 2007, the District has worked to implement several programs and enact several new policies to assist in meeting its commitments under the MS4 permit. In 2009, the District enacted the Comprehensive Stormwater Enhancement Amendment Act ("Stormwater Act") which expanded the authority of the Stormwater Administration within DDOE. Since that time, the administration has been shaped into an entire division that focuses on coordinating activities within DDOE and with other District agencies and WASA to make sure that permit commitments are fulfilled. The Stormwater Act also expanded the District's Stormwater Advisory Panel ("SWAP"), chaired by the DDOE Director, to include the heads of all District agencies that have responsibilities designated by the permit and the General Manager of WASA. The SWAP meets twice per year and is charged with working to solve policy issues that inhibit meeting permit requirements, as well as finding ways to accomplish our combined commitments under the Permit.

The Stormwater Act also institutionalized implementation of progressive stormwater BMPs, such as low impact development ("LID") practices (e.g. permeable pavement, green roofs). The legislation directed DDOE to establish a Stormwater User Fee Discount Program to encourage District property owners to reduce the amount of impervious surface on their properties using stormwater fee discounts as an incentive. To assist with reduction of impervious surface on residential property in the District, DDOE Watershed Protection Division implemented the RiverSmart Homes[2] program in 2008 to offer financial assistance to homeowners to help reduce impervious surface on their properties. Since that time, this program has been expanded to include schools in the District as well. The District feels that implementation of such a program in an educational setting can help inspire environmental stewardship among the District's youth.

In addition to implementation of the Stormwater Act and innovative environmental programs, the District has been working to develop new regulatory tools that will help with reduction of stormwater pollutants. Currently, the District is working closely with Maryland to finalize development of a Total Maximum Daily Load ("TMDL") for trash for the Anacostia

---

[2] - More information on the RiverSmart Homes program can be found at http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,497794.asp

River. This is only the second trash TMDL in the nation and the first inter-jurisdictional trash TMDL.[3] This TMDL will greatly assist the District in meeting its commitments under the Treaty for a Trash Free Potomac.[4]

In 2009, the District enacted the Anacostia Clean-Up and Protection Act ("Bag Law"). This legislation was designed to reduce the amount of trash entering the Anacostia River by placing a mandatory fee on disposable bags sold in the District. A mandatory five cent fee is applied to each disposable bag provided to a customer at a District retail establishment that sells food or alcohol. The proceeds of the fee are deposited in the Anacostia River Clean Up and Protection Fund and are used for the purposes of cleaning and protecting the Anacostia River.

As a full partner in the Chesapeake Bay Program ("CBP"), the District has been working with EPA Region III and other CBP partner jurisdictions on the development of a nutrient and sediment TMDL ("Bay TMDL") for District waters (due to be issued by EPA by December 2010). Also considered an innovative regulatory tool, the Bay TMDL will require the District to implement point source and non-point source control practices to help prevent eutrophication of District waterways and Chesapeake Bay by reducing nutrient loadings into Bay tributaries. The District has developed aggressive two-year milestones[5] to meet water quality goals under the program which include many of the activities required under the current MS4 permit and reflect commitments in Anacostia CapStat, Mayor Adrian Fenty's accountability tool for restoration activities in the Anacostia River watershed.[6] All of these efforts have resulted in the District's being considered as a model both regionally and nationally by the EPA.

II. Ongoing permit issues

In 2004, EPA issued the second-round MS4 permit to the District. That permit was challenged by two organizations, Defenders of Wildlife, and Friends of the Earth (collectively "DOW/FOE"), and the District.[7] At issue was whether the District is required to use best management practices ("BMPs") to control municipal stormwater discharges, with "an iterative process requiring reexamination of its stormwater management practices and continued improvements to the respective stormwater management programs while continuing to

---

[3] The Anacostia Trash TMDL is being developed for parts of the watershed found within Maryland and the District of Columbia.

[4] Information on the Treaty for a Trash Free Potomac can be found at http://www.fergusonfoundation.org/trash_initiative/trashtreaty_currentSECURE.pdf

[5] Details on the District's two-year milestones can be found at http://archive.chesapeakebay.net/pressrelease/EC_2009_allmilestones.pdf

[6] More information on Anacostia CapStat can be found at http://track.dc.gov/Agency/KG0

[7] See procedural history in the EPA Draft Fact Sheet, NPDES Permit Number: DC0000221 (Reissuance) ("Draft Fact Sheet"), footnote 1 at page 2.

adequately protect the water quality of the receiving stream."[8] DOW/FOE argued that EPA has the authority to require the MS4 to comply with water quality standards ("WQS"), specifically, the numeric effluent limits in those WQS. The District argued that it is legally obligated to control the discharges of pollutants in the stormwater to the maximum extent practicable ("MEP"). The District has stated and continues to assert that Congress codified the District's position when it amended the Clean Water Act ("CWA")[9], confirming that permits for municipal discharges of stormwater must require controls to reduce the discharges of pollutants to the MEP, using measures that include management practices and such other provisions as EPA deems appropriate.[10] This language differs markedly from that in Section 402(p)(3)(A), which mandates that industrial stormwater discharges meet all applicable provisions of the CWA.[11]

The District, EPA Region III, and DOW/FOE began settlement discussions to resolve the issues. These settlement discussions were unsuccessful. However, the District and EPA agreed on a series of enhancements to the 2004 MS4 permit that were designed to provide additional support for the determination that the system-wide controls required by the Permit would ensure compliance with WQS. Specifically, the District would employ BMPs in an on-going iterative and adaptive management process that would demonstrate quantifiable progress toward achieving applicable WQS.[12] The District issued a Letter of Agreement to EPA Region III on November 27, 2007, which included implementation of a specific number of activities, including structural and nonstructural BMPs, with identifiable milestones that would be added to the District's MS4 stormwater pollution prevention plan. The parties agreed to a series of further enhancements on August 8, 2008.

With this understanding, including its understanding that neither Section 402(p)(2) of the CWA nor the case law construing it have changed,[13] the District has reviewed the draft MS4 Permit, and provides the following comments.

---

[8] See Draft Fact Sheet, Proposed Amendment No 1 to NPDES Permit No. DC0000221 at page 2.

[9] See 33 USC §§ 1251, *et. seq*.

[10] See CWA Section 402(p)(3)(B)(iii), 33 U.S.C. 1342(p)(3)(B)(iii). See also 40 CFR §122.44(k)(2)-(3), which specifies that BMPs are a form of an effluent limit which are appropriately incorporated in NPDES permits for municipal stormwater discharges.

[11] See CWA § 301 (33 USC §1311).

[12] See, Draft Fact Sheet, p. 4, citing "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).

[13] Courts construing MS4 permit requirements have consistently held that Best Management Practices ("BMPs") are a form of effluent limit that may be used to satisfy the requirements of 40 C.F.R. § 122.44(d). See Arizona Municipal Storm Water NPDES Permits, 7 E.A.D. 646, 658-59 (EAB 1988); Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999); Tualatin Riverkeepers, *et al.*, v. Oregon Department of Environmental Quality, *et al.*, 2010 Ore. App. LEXIS 465 (May 11, 2010).

III. Objection to Compliance with WQS and TMDL WLA (Parts 1.4, 4.1, 8, 9.4)

Despite the District's understanding to the contrary, and its good faith efforts to provide a suite of aggressive BMPs with quantifiable milestones in its 2007 Letter of Agreement, EPA has included the requirement to meet numeric WQS, as well as TMDL waste load allocation ("WLA") numeric standards, in the draft Permit. While the language in the Draft Fact Sheet indicates EPA's awareness that CWA Section 402(p)(2) requirements for municipal dischargers differ from those for industrial dischargers, the District is concerned that the very clear permit language will make resort to the Fact Sheet superfluous. Further, the District is not aware of any case law indicating that a Fact Sheet should trump very clear permit language. The District, therefore, interprets Part 1.4 of the Draft Permit to mean that even if the District satisfies all permit requirements, it is only demonstrating "progress toward compliance with DC WQS," not actually meeting the WQS or WLA, which it is also required to do in subparts 1. and 2. of Part 1.4. The Permit holds the District accountable for unqualified and immediate compliance with WQS, despite EPA's assertion on page 4 of the Draft Fact Sheet (Reissuance) that the District "will be unable to attain all Water Quality Standards within the first several MS4 permit cycles". Therefore, as written, the permit places the District in violation of WQS and the Permit from the date it becomes effective.

The District requests that EPA change language concerning compliance with WQS under the new permit to reflect that the CWA recognizes the difficulties associated with municipal stormwater discharges, as set forth in CWA Sections 301(b)(1)(C) and 402(p)(3)(B)(iii).[14] These CWA Sections explicitly provide that permit requirements for discharges from the MS4 shall require controls to reduce the discharge of pollutants to the MEP, including BMPs, control techniques and system design and engineering methods, and such other provisions as the Administrator determines appropriate for the control of such pollutants. EPA is required to assess the effectiveness of these controls through "[e]stimated reductions in loadings of pollutants from discharges from MS4s expected as a result of the municipal stormwater quality management program."[15]

As is clear from the preceding text, the parties have engaged in at least ten years of discussion and/or litigation as to whether the MS4 permit must require compliance with WQS. Ultra-urban, highly developed watersheds possess a variety of characteristics which can make management of stormwater very difficult and complicate the attainment of WQS. It is not possible to treat discharges from an MS4 in the same manner as discharges from an industrial facility or wastewater treatment plant. Unlike those facilities, discharge from an MS4 varies due to the nature of the rainfall. Furthermore, the technology for treatment at the end of the each storm sewer is not practicable.

---

[14] 33 U.S.C. §§1311(b)(1)(C), 1342(p)(3)(B)(iii).

[15] 40 CFR 122.26(d)(2)(v).

While the parties have not hitherto discussed or litigated whether the permit must also incorporate WLAs as numeric limits, the District points out that compliance with WLAs would effectively constitute compliance with WQS, and therefore the permit should not distinguish between WQS and WLA. Rather, the permit should ensure that pollutant discharges for the parameters listed in the TMDL are reduced to the MEP through the use of BMPs. Such treatment would be consistent with case law to date, see Tualatin, supra, n. 13. See also EPA's November 4, 2009 Letter to the Honorable L. Preston Bryant, Jr., page 4, which notes that Bay states' "...Watershed Implementation Plans [will be required to describe] authorities, actions, and to the extent possible, control measures that will be implemented to achieve TMDL allocations."

Where a TMDL has been approved, National Pollutant Discharge Elimination System ("NPDES") permits must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Effluent limitations to control the discharge of pollutants generally are expressed in numerical form. However, in light of 33 U.S.C. §1342(p)(3)(B)(iii), EPA's own guidance recommends that for NPDES-regulated municipal and small construction stormwater discharges, TMDL WLAs be expressed as BMPs or other similar requirements, rather than as numeric effluent limits.[16]

In Tualatin, supra, n. 13, environmental groups challenged municipal stormwater permits issued by the State of Oregon, complaining that they lacked conditions stating that the stormwater discharges must comply with either state WQS or WLAs in the form of numeric effluent limits. The court upheld the permits, on grounds that the permits required implementation of BMPs, set forth in the stormwater management plans, to make progress toward meeting those WLAs (as well as WQS). 2010 Ore. App. Lexis 465, *28. Further, EPA's "MS4 Evaluation Guidance," EPA-833-R-07-003, page 15, recognizes that there may be multiple smaller program goals in the stormwater management plan (SWMP) which could provide performance standards and goals towards protection or improvement of water quality.

---

[16] EPA's guidance states:

> Under certain circumstances, BMPs are an appropriate form of effluent limits to control pollutants in stormwater. See 40 CFR § 122.44(k)(2) & (3). If it is determined that a BMP approach (including an iterative BMP approach) is appropriate to meet the stormwater component of the TMDL, EPA recommends that the TMDL reflect this.
>
> EPA expects that the NPDES permitting authority will review the information provided by the TMDL, see 40 C.F.R. § 122.44(d)(1)(vii)(B), and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit. Where BMPs are used, EPA recommends that the permit provide a mechanism to require use of expanded or better-tailored BMPs when monitoring demonstrates they are necessary to implement the WLA and protect water quality.

EPA Memorandum: *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.* US EPA November 22, 2002, available at: http://www.epa.gov/reg3wapd/tmdl/pa_tmdl/ChristinaMeetingTMDL/BacSed/Appendix-B.pdf.

Accordingly, the District requests that all language in the Permit sections below, that requires the District to meet numeric standards in order to achieve permit compliance be changed to the requirement for BMPs in an on-going iterative and adaptive management process that would demonstrate quantifiable progress toward achieving applicable WQS, including WLAs:

Part 1.4 (1) and (3) of the draft permit requiring the District to "comply with existing District of Columbia Water Quality Standards (DCWQS), and the accompanying language that provides "compliance with all performance standards and provisions in this Permit shall constitute progress toward compliance with DCWQS";
Part 4.1.1b "discharges do not cause or contribute to an excursion above any (1) applicable TMDL WLAs; or (2) DC WQS, whichever is more stringent";
Part 8.1 (3)(A) – "a specified ultimate date for compliance with the WLA.
Part 8.1 (3)(C) – "Numeric benchmarks" (for the TMDLWLA);
Part 8.1 (3)(D) – "an interim compliance deadline for achieving the *percentage* of pollutant load reductions";
Part 9.17 – Bypass allowed that does not cause effluent limitations to be exceeded.
Part 9.4 "discharges are causing or contributing to a violation of applicable WQS".

With regard to Part 8, at a minimum, the Permit must specify that the District will be in compliance as long as it is implementing controls required to achieve TMDL allocations and taking corrective action through an adaptive management process to attain any numeric milestones for which the District does not meet a deadline. The District reserves the right to request a change to any language requiring compliance with numeric standards included in the Permit but not listed above.

IV. Provisions concerning volumetric retention standards for non-federal facilities (Part 4.1.1)

The District is very concerned with the Draft Permit's inclusion of <u>any</u> numeric/performance standard for non-federal facilities. It is worth noting that MS4 permits in neighboring Maryland and Virginia do not include a retention standard. In addition, EPA's Construction General Permit requires only implementation of BMPs in lieu of achieving effluent limits in stormwater discharges. (NPDES General Permit for Stormwater Discharges from Construction Activities, January 8, 2009, p. 9).

The implementation of a stringent retention standard could greatly increase the regulatory "gradient" that is evolving across the mid-Atlantic region. Neither Maryland nor Virginia has retention standards in their current stormwater management regulations. In their new regulations, Maryland is requiring the retention of 1.0 inch to the MEP through environmental site design; however these regulations have been suspended by the Maryland legislature. Implementation of more stringent stormwater standards in the District than in surrounding jurisdictions could create more sprawl by establishing an unlevel playing field that will likely accelerate development and growth in DC's neighboring suburban jurisdictions, rather than concentrating it in the urban, developed District core. This notion is at odds with fundamental and accepted concepts of smart

growth and also puts the District at a competitive disadvantage with other jurisdictions in terms of economic development.

Without waiving the District's right to challenge the permit on the general grounds that it contains a performance standard,[17] the District reserves the right to challenge the specific 1.2 inch performance standard for non-federal facilities. EPA has not demonstrated that such standard can be met, especially in a highly-urbanized setting such as the District of Columbia. The proposed 1.2 inch on-site retention standard contained in EPA's April 20, 2010 Draft Permit is based on the volume of the 90th percentile rain event in the District. DDOE has been developing an update to its current stormwater management requirements and is considering requiring 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.

DDOE's regulatory proposal was 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 so overly burdensome as to discourage development in the District. See the analysis performed by Industrial Economics, Inc., attached hereto as **Appendix B.**

EPA has not provided any analysis to indicate that the environmental benefits of the proposed 1.2 inch retention standard 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. Indeed, not all of the reference documents cited by EPA in its Draft Fact Sheet contain requirements for on-site retention of the 90th percentile rain event (or similarly strict retention standards). Of the six permits and state requirements referenced by EPA, four are for Phase II or Construction General Permits that apply to areas of considerably less dense development than what exists in the District (e.g. Phase II permits in Montana, West Virginia, and North Carolina). Further, the stormwater management requirements in these documents are triggered by development projects

[17] A performance standard with an MEP off-ramp is consistent with Section 402(p)(3) of the Clean Water Act, discussed, supra.

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.[18] These two factors (less dense development projects; projects occurring over a significantly larger scale) 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[19] and Ventura County, CA.[20] 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 has been considered by DDOE for inclusion in a proposed revision to the District's stormwater management regulations.

V. Performance Standards for Specific Types of Projects

As indicated above, the District is reserving the right to challenge the eventual Permit that is issued for inclusion of a numeric retention standard and/or, specifically, for inclusion of a 1.2 inch performance standard for non-federal projects. The District also objects to the limitations on specific types of projects deemed eligible for adjustments from the performance standard as set forth in the Draft Permit. As the CWA Section 402(p)(3)(B)(iii) requires only BMPs to the MEP, the enactment of specific adjustments for specific types of projects would not be less stringent than federal requirements.

A. Transportation Projects

The District has implemented very progressive retrofit programs for incorporating pervious surface into local infrastructure, even though the most challenging area to retrofit is the public right-of-way ("ROW"), due to constraints in space and variable site conditions. However, the majority of the District's transportation projects involve reconstruction in an existing ROW

[18] 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.

[19] EPA Region 10 NPDES Permit No. AKS-052558

[20] State of California NPDES Permit No. CAS004002

(for example, the reconstruction of the 11th Street Bridge), where there is little ability to mitigate constraints on-site, as would be required pursuant to Section 4.1.1.d. of the Draft Permit[21] Accordingly, the District objects to the Draft Permit, to the extent it imposes an impossible condition on most transportation projects (achievement of the 1.2" retention standard), or requires that the District spend significant tax-payer dollars paying itself a likely very expensive Fee-In-Lieu, and/or securing a significant amount of land to effectuate off-site mitigation. Because of these conditions, the District opposes a volumetric standard for retaining runoff from the ROW, and rather, requests that ROW projects be subject to an MEP standard. The District can commit to implement stormwater management retrofits in ROW to the MEP through road reconstruction projects and redevelopment projects that upgrade public ROW, as well as stand-alone retrofit projects. The total area where stormwater management retrofits are implemented should apply toward the minimum ROW retrofit requirement.

B. **Smart Growth**

As indicated above, the District remains highly concerned that Section 4.1.1.d, which allows for an adjustment of the retention standard only after a rigorous case-by-case analysis will deter Smart Growth in the District. Accordingly, the District requests that 4.1.1 be amended so as to permit the District to establish a Smart Growth Retention Standard that reflects the MEP for Smart Growth projects.

VII. Conclusions

The District would like to reiterate the fact that we welcome the issuance of a progressive NPDES permit for the city's MS4. The District's rivers and tributaries provide a tremendous resource to our residents and visitors from around the world. As the restoration continues, this value will only grow. Further, our work to successfully manage stormwater sets an important precedent for not only the Chesapeake region, but for the nation.

Nevertheless, the Draft Permit issued by EPA on April 20, 2010 does contain some provisions that, if required in the final Permit, will be problematic for the District. An iterative and adaptive management process that would demonstrate quantifiable progress toward achieving applicable water quality standards, using best management practices is the most effective way of controlling pollutants in stormwater discharges. The risk of perpetual violation of the Draft Permit, specifically with respect to WQS and TMDL WLAs, is too great for the District, and could lead to costly, drawn out litigation that would greatly limit the amount of time and resources available to implement a progressive stormwater management program.

As you are aware, there have been two developments within the federal family that will affect the District's ability to comply with the Draft Permit. First, GAO has indicated that it may instruct federal agencies not to pay the District's MS4 fee on grounds that it is allegedly an

[21] See Attachment A for a more robust discussion of typical DDOT transportation projects and the nature of the constraints.

illegal tax. If the federal government, which comprises one third of the District's land base, refuses to pay stormwater fees, the District will be unable to comply with the bulk of the draft permit requirements. Additionally, DOD has informed EPA of its view that the provisions of the Draft Permit that apply to federal facilities are discriminatory and illegal. The District objects to the Permit's requirement that the District promulgate regulations that EPA is aware may be challenged by EPA's sister agencies.

The District notes as well that the Draft Permit contains some language that could complicate its enforcement efforts. For example, Section 3.3 indicates that the focus of the Permit pertains to actions required before contaminants enter the pipe. See e.g., Section 3.3, which states: "Controls shall be designed to prevent and restrict pollutants from coming into contact with stormwater, *e.g.*, restricting the use of lawn fertilizers rather than end-of-pipe treatment." We are concerned that such language perhaps inaccurately indicates that EPA does not view MS4 permit obligations as extending to the pipes themselves (e.g. precluding illicit discharges).

The District greatly appreciates the opportunity to provide its comments on the Draft Permit. We value the working relationship we have with EPA in reducing pollution in the water bodies of the nation's capital. If you require further assistance, or have any questions or comments, please contact the DDOE Stormwater Administrator Jeffrey Seltzer at 202-535-1603, or at Jeffrey.Seltzer@dc.gov.

Sincerely,

Hamid Karimi, Ph.D.
Deputy Director
District Department of Environment