DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOCIATION

June 4, 2010

VIA EMAIL
miller.garrison@epa.gov

Mr. Garrison Miller
U.S. Environmental Protection Agency
Region III (3WP41)
1650 Arch Street
Philadelphia, PA 19103-2029

Re: Draft NPDES (MS4) Permit No. DC0000221 for the District of Columbia

Dear Mr. Miller:

The District of Columbia Building Industry Association (DCBIA) appreciates the opportunity to submit comments on behalf of its members, who represent both the commercial and residential real estate industries in Washington, DC. DCBIA has serious concerns about the proposed MS4 Permit for the District of Columbia that was released on April 21, 2010, and urges you to give serious attention to the issues identified below, which we feel warrant substantial re-consideration of the Permit before it is finalized.

Our membership includes nearly 500 companies and organizations, developers, general contractors, architects and engineers, lenders, and attorneys. Our Committee on the Environment convenes between 30 and 40 individuals on a monthly basis to discuss environmental issues such as stormwater management and regulation, green buildings, and energy efficiency technologies.

We feel it is worth noting that the District has clearly established itself as a community at the forefront of sustainable development, given its early enactment of a Green Building Act mandating green standards for both public and private buildings and the impressive number of buildings that have already been LEED certified and/or have installed green roofs. *See* U.S. Green Building Council, http://www.usgbc.org/Default.aspx (last visited May 27, 2010). Press Release, Green Roof Industry Grows 16.1 per cent in 2009 Despite Economic Downturn (May 26, 2010) *available at* http://greenroofs.org/index.php/mediaresource/grhc-news-releases/3022-green-roof-industry-grows-16.1-per-cent-in-2009-despite-economic-downturn-press-release.

We recognize that the Obama Administration, pursuant to Executive Order 13508, has made cleanup of the Chesapeake Bay one of its highest priorities. It is a demanding challenge, with a watershed covering 64,000 square miles over seven jurisdictions. We also recognize that recent studies have suggested that agricultural operations and stormwater runoff are some of the last remaining unregulated sources of pollution to the Bay. However, any effort to regulate these sources must be undertaken with a full understanding of the likely direct and indirect consequences that may occur.

5100 Wisconsin Avenue, NW • Suite 301 • Washington, DC 20016-4162 • (202) 966-8665 • FAX (202) 966-3222

Our primary concern is that the feasibility and associated cost impacts of proposed storm-water retention standards will not have been adequately established prior to their implementation.

Before compliance with stringent new requirements is initiated, EPA should conduct further analyses, including pilot programs, to identify current regulatory obstacles, best management practices and associated costs. It needs to acknowledge the fact that public and private cooperation will be *critical* to achieve the reductions proposed in the draft Permit. EPA also should identify the financial and technical assistance, such as Section 319 grants that would be made available to the District given its unique characteristics. Likewise, EPA needs to acknowledge that the District may adopt sufficient *regulatory flexibility* in its new stormwater regulations to ensure that reduction goals can be achieved feasibly and cost effectively. The proposed Permit as written does not incorporate or acknowledge any of these critical elements.

Specifically, we disagree with some of the premises set forth in the draft Permit. For example, the proposed Permit seeks to compare post-development flow against its pre-development condition, and proceeds to describe the pre-development condition as being "meadow." "Meadow" is an inappropriate standard upon which to base the pre-development condition. The District has not had meadow-like conditions for hundreds of years.

The proposed 90-95% retention, as required by the Permit, is also infeasible, imprudent, or both, as many sites in the City contain clayey soils, which cannot retain significant volumes of stormwater, or contain contaminated soils, where it would be imprudent to require on-site retention and percolation.

The new Permit also calls into question the appropriate NPDES general permits for discharges of sump water or groundwater commingled with stormwater flows into the MS4. The Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity, *see* Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Industrial Activities, 73 *Fed. Reg*. 56,572 (Sept. 29, 2008), the permit currently being used, is an ill-fit. A more appropriate General Permit needs to be developed for these types of discharges.

Need for Public-Private Cooperation and Neighborhood or Watershed Approach

The proposed Permit takes a "one size fits all" approach to stormwater regulation. This approach is uncommon among agencies and unworkable in practice. In fact, the Chesapeake Bay Initiative itself recognizes the need for the coordinated implementation of a differentiated strategy among the six watershed states and the District of Columbia. There are more than 100 Federal, state and local agencies, academic institutions, non-

profits, and interstate commissions involved in this initiative, along with thousands of private property owners who will be impacted. Accordingly,

the Permit needs to promote a neighborhood-by-neighborhood or watershed-by-watershed approach. Applying the same, strict, requirements to a property on the Georgetown waterfront as one would apply to a site on K Street, is unwise. The greatest good will come from identifying the unique features of each neighborhood (*e.g.*, presence of tree canopy, amount of impervious surfaces, floodplain, etc.). Numerous other regulators in the District, such as the D.C. Office of Planning, already take this approach.

Another important condition that this Permit should address is cooperation at the local level. Cooperation is critical between Federal and local agencies and agencies and private property owners to achieve stormwater management goals.

Need for Regulatory Flexibility

Currently the Permit does not make it clear that the District of Columbia may use regulatory incentives to achieve its goals. At a minimum, the Permit should explicitly recognize the ability of the District to use trading programs to achieve its goals.

Many projects in the District are built lot line to lot line because of longstanding height restrictions. As a result, there is very little open space to retain stormwater on-site. Accordingly, developers need to have the ability to conduct mitigation off-site. When faced with the choice of remaining in the City or going where there might be more open space for on-site mitigation or less stringent retention requirements, many developers may decide to choose the latter. The Permit must be clear that off-site mitigation will be acceptable.

What is more, there are many competing sustainability goals, and stormwater retention should not be allowed to "trump" all other green attributes of a project. Green roofs, for example, are not appropriate on projects where owners want to install rooftop solar arrays. Developers should be given enough flexibility so that they are able to choose the green attributes that work best for their particular project.

Equity and the Federal Role

The federal government also needs to exercise leadership in this area in accordance with *Executive Order on Federal Leadership in Environmental, Energy, and Economic Performance*, Exec. Order No. 13514, 74 *Fed. Reg*. 52,115 (October 5, 2009). The federal government owns approximately one-fifth of the land in the District of Columbia. Despite the President's Executive Order and despite its large land holdings in the City, the Federal government has sought to exempt itself from many of the stormwater requirements that would be imposed upon private land owners. For example, the U.S.

Government Accountability Office (GAO) has recently advised the DC Water & Sewer Authority that federal agencies will not pay the District's impervious surface fee, on the basis that this fee is really a tax. It appears hypocritical for the Federal government to refuse to pay a share of the cost for necessary stormwater infrastructure improvements in the District, where it occupies a major share of the landscape. The Federal government's refusal to pay will, in effect, turn the requirements under the MS4 permit into an unfunded mandate. Moreover, the GAO's position, if not reversed, will place an additional crushing financial burden upon the private sector and drive development out of the City.

Overly Stringent Requirements Will Undermine Smart Growth/Transit Oriented Development

As is generally understood, many of our current environmental challenges are substantially due to the way our communities and metropolitan areas have been built. People are forced to travel long distances (oftentimes by car) between home and work and home and school. The resulting sprawl has definitely contributed to air pollution, habitat fragmentation, and global warming.

Sprawl is directly related to the treatment of stormwater, because as we "build out" in response to lower costs (including environmental regulation) we replace natural landscapes (*e.g.*, forests, wetlands, grasslands) with parking lots, streets, rooftops, and other impervious surfaces. Rainwater that was previously captured by natural landscapes now gets trapped above impervious surfaces. Although compact development (as in the District) generates higher runoff and pollutant loads within the specific development area, such runoff and pollutant loads are offset by reductions in surrounding undeveloped areas. If development continues to move further to the metropolitan fringe, we lose that "buffer" of natural landscapes. *See generally* Smart Growth Online, http://smartgrowth.org/Default.asp?res=1024 (last visited May 27, 2010). Given the predicted growth in the Washington metropolitan region, any regulatory costs that encourage sprawl undermine smart growth and transit oriented development.

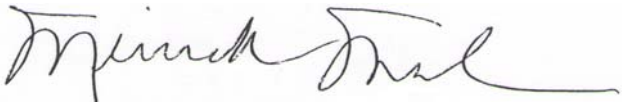
It is projected that, between 2005 and 2030, the region will gain 1.6 million new residents and 1.2 million new jobs. Metropolitan Washington Council of Governments: National Capital Region Climate Change Report (November 2008), *available at* http://www.mwcog.org/uploads/pub-documents/zldXXg20081203113034.pdf. Based on those projections, total greenhouse gas emissions in the region will increase 33 percent by 2030 and 43 percent by 2050. *Id.* In addition to increases in air temperature, the Washington metropolitan region is experiencing the effects of climate change with rising sea levels and a warmer Chesapeake Bay. The District needs statutes and regulations that encourage, not discourage, Smart Growth and TOD.

Conclusion

Our primary concerns regarding the draft Permit center around its questionable feasibility, unclear costs, lack of incentives and lack of regulatory flexibility. Imposing such stringent requirements on the District of Columbia, when other nearby jurisdictions have more open space and less aggressive requirements, will likely result in urban sprawl as developers are encouraged to move elsewhere. If it is too difficult or costly to comply with permitting requirements, the District will lose commercial and residential development that is vital to the District's economy. We strongly encourage the EPA to review the draft Permit with these considerations in mind.

Sincerely,

District of Columbia Building Industry Association



Merrick T. Malone
President

cc: Neil Albert, City Administrator
District of Columbia

Christophe Tulou, Acting Director
District Department of Energy

George Hawkins, General Manager
D.C. Water and Sewer Authority

Valerie Santos, Deputy Mayor for Planning
and Economic Development
District of Columbia

Gabe Klein, Director
District Department of Transportation

Harriet Tregoning, Director
D.C. Office of Planning