



DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOCIATION

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VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Ottinger.elizabeth@epa.gov

Elizabeth Ottinger (3WP41)
NPDES Permits Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Re: Comments on DC Draft NPDES Permit # DC000221

Dear Ms. Ottinger:

The District of Columbia Building Industry Association (“DCBIA”) appreciates the opportunity to offer comments on EPA’s proposed changes to the draft municipal separate storm sewer (“MS4”) permit for the District of Columbia (NPDES Permit # DC000221).

DCBIA is a professional association that represents both commercial and residential real estate industries in Washington, DC. Our membership includes nearly 500 organizations, including developers, general contractors, architects, engineers, lenders, attorneys, and other industry members, all of whom care greatly about environmental issues associated with development activities in the District. Because our members design, finance, and develop buildings throughout the District, they are directly impacted by the requirements of the District’s MS4 permit.

DCBIA submitted comments on EPA’s original draft MS4 permit on January 17, 2017. Many of DCBIA’s prior comments were directed at sections of the draft MS4 permit that EPA now proposes to leave unchanged. EPA has neither responded to those comments nor articulated any basis for declining to accept further comments on those sections of the draft permit. DCBIA members feel strongly that these provisions in the draft permit continue to be inappropriate. Accordingly, our members reiterate their prior comments and request that the agency re-evaluate these comments. At a minimum, the Agency needs to provide a reasoned basis for discounting these important concerns. Specifically:

Section 2.2.3 A Requirement to Study Stormwater Fee Increases Now Would be Wasteful and Redundant

The proposed permit condition in Section 2.2.3 that would require the District to submit, as part of its 2019 Annual Report, an evaluation of an increase in its stormwater fees would be a waste of resources, as the District has already summarized its analysis of stormwater fee increases in its Consolidated TMDL Implementation Plan just a year ago. The District found that taking the radical step of doubling the stormwater fee would produce “only minimal impact on the timeline for achieving [wasteload allocations].”¹

District residents already pay very high fees related to stormwater and wastewater management. This burden will increase significantly beginning January 1, 2018, when developments in the District will be subject to a new System Availability Fee (“SAF”) that could cost as much as \$800,000 for many new or modified projects.² Any further increases in the stormwater fees will simply have the counterproductive effect of incentivizing residents and developers to leave the District for neighboring jurisdictions that do not have these hefty fees, thereby significantly slowing the pace of redevelopment and stormwater improvements in the District.

Section 2.2.4 Any Requirement to Study Potential Updates to the District’s Stringent Stormwater Regulations is Likewise Premature

The District’s stormwater retention standards for major land-disturbing projects and major substantial improvement projects do not need to be studied or re-evaluated at this time. The current retention standards are among the most aggressive in the country and have only been in place since 2013, a period during which the District experienced a historic rate of large redevelopment projects. The existing stormwater regulations significantly increase the cost of redevelopment projects due to the additional design and construction costs that they impose. Fortunately, from 2013 to the present, the local development market has been strong enough to allow many of DCBIA’s members to bring projects to fruition despite these additional costs. The impact of these costs during a market downturn, however, is unknown, and therefore a study conducted on the limited and atypical data set of the past few years would inevitably underestimate the impact of stormwater retention requirements on new development.

Rather than dedicating resources to studying the impact of stormwater retention requirements that are still in their infancy, the District would be better served by dedicating resources to enforcing the existing regulations, planting more trees, or completing more stormwater retention projects in public rights-of-way (PROW).

¹ DOEE, Consolidated TMDL Implementation Plan-Revised Draft, August 2016, Pg. 101, (https://dcstormwaterplan.org/wp-content/uploads/0_TMDL_IP_080316_Draft_updated.pdf).

² 21 DCMR § 112.11 (multi-family and non-residential customers that utilize water and sewer meters six inches or larger in diameter will pay a System Availability Fee of \$796,654.)

Section 1.3 Authorizing the District to Clarify What Constitutes Authorized Non-Stormwater Discharges into the MS4

There has been far too much regulatory uncertainty for far too long regarding what constitutes “authorized” non-stormwater discharges into the MS4 (including, without limitation, discharges of “uncontaminated” ground water infiltration, discharges from foundation drains, and discharges from footing drains); what “specified conditions” must be met; who will determine whether the specified conditions have been met; and what standards will be used in making those determinations. Obtaining authorization to discharge non-stormwater from these types of sources into the MS4 in the District has frequently taken multiple rounds of sampling, conducted over a year or more, without any clear regulatory standards or procedures. There is a substantial need for much greater regulatory certainty in this area. DCBIA supports providing the District with the authority to develop regulations that will describe the process for determining whether the “specified conditions” have been met and therefore the circumstances under which non-stormwater discharges may be sent into the MS4.

As development has moved from the city’s urban core (which is largely serviced by the combined sewer overflow (“CSO”) system), this type of regulatory certainty has become critical if development is going to continue to grow in the portions of the District that are on the MS4 system. Without regulatory certainty, redevelopment will be impaired in the portions of the District on the MS4, and stormwater retention will not improve.

Developers in the District, especially those building subterranean structures such as underground parking garages, often face the challenge of controlling groundwater infiltration. Constructing “bathtubs” around building foundations to prevent groundwater infiltration or perpetually discarding groundwater through “pump and truck” methods are prohibitively expensive. Nevertheless, the development community in the District has frequently felt the need to resort to those techniques in the past because of the absence of a clear, transparent and streamlined permitting process. We understand that the District Department of Energy and Environment (“DOEE”) is now beginning to develop clearer and more transparent procedures, and we support those efforts.

DCBIA encourages EPA to include clear language in Section 1.3 of the final MS4 permit authorizing the District to develop regulations that will (i) clarify how and when non-stormwater discharges (including pumped groundwater and water from foundations and footers) can be characterized as “uncontaminated” and discharged into the MS4, and (ii) provide clear, transparent and streamlined permitting procedures for these discharges.

With regard to the other sections of the draft permit upon which EPA has expressed a willingness to accept comments, DCBIA offers the following comments:

Section 1.5.3.1 The Acres Managed Mandate is Overly Aggressive, Beyond the District's Control, and Therefore Unlawful under the Clean Water Act ("CWA")

DCBIA supports EPA's proposed change to reduce the number of "Acres Managed" that must be achieved in specific basins within the MS4 Permit Area. This change will provide the District greater flexibility to implement stormwater retention projects where they are most cost effective or logistically easier.

EPA continues, however, to ignore the fact that the District is already heavily developed and that additional stormwater retention goals and waste load allocations (WLAs) cannot be achieved if the MS4 permit places too many economic and regulatory burdens on redevelopment projects. Stricter stormwater retention requirements would produce the unintended consequence of slowing down redevelopment and, in turn, slowing down the District's progress toward achieving its stormwater retention goals and WLAs. The District's stormwater discharges are not improved if its regulations become so onerous and costly as to force redevelopment projects to move to the surrounding jurisdictions.

EPA's draft permit is dependent upon the rate and location of private development, yet EPA has disregarded to date DCBIA's and the District's concerns that the proposed 1,038 Acres Managed mandate may be difficult to attain due to uncertainty in the rate and location of private development. The two primary mechanisms by which the District can achieve the Acres Managed mandate are (i) PROW projects implemented by the District and (ii) development on privately owned property (including green roofs and voluntary improvements to generate stormwater retention credits). From 2011 to 2016, the District only completed or started work on 62 acres of PROW projects. The draft MS4 permit expects the District to repeat this performance during the next permit term, accounting for *barely five percent (5%)* of the total Acres Managed mandate. Therefore, the vast majority of EPA's proposed Acres Managed mandate would need to come from private property development over which neither the District nor EPA has direct control.

The District has already put in place aggressive stormwater retention requirements for new development and substantial improvement projects. While the District can take steps to facilitate and promote new development projects, there is only so much that it can do in the event that strong economic headwinds emerge during the next permit term. DCBIA is hopeful that development in the District will continue at healthy levels, but the reality is that an economic downturn similar to the one experienced in the late 2000's would quickly render the draft permit's Acres Managed mandate unrealistic and unachievable. Therefore, DCBIA urges EPA to abandon the portion of the Acres Managed mandate that relies on development on private property and instead replace it with a requirement that the District do everything within its authority to facilitate the continued development of private property within the MS4 permit area and ensure that existing stormwater retention standards are enforced. MS4 mandates that require private development on

privately owned property fall far outside the “maximum extent practicable” limitations imposed by the CWA.

Sections 1.5.3.1/3.2.9 The Green Roof Requirements are Likewise Unlawful

EPA continues to propose in the draft MS4 Permit that the Numeric Milestone of 1,038 Acres Managed include a requirement that the District “ensure the installation of a minimum of 350,000 square feet of new green roofs in the MS4 Permit Area” over the next five years.

The District does not own enough public buildings to single-handedly meet EPA’s proposed green roof requirement. Rather, the installation of 350,000 square feet of green roofs is only possible if sufficient amounts of new private development and redevelopment projects occur. Neither EPA nor the District possess the legal authority to require that owners of non-public buildings retroactively install green roofs or mandate construction of new buildings. While Congress empowered EPA, through 33 U.S.C. §1342(p)(B)(iii) of the CWA, to require municipalities to reduce the discharge of stormwater pollutants through “management practices, control techniques, and system design and engineering methods, and other such provisions as the Administrator . . . determines appropriate for the control of such pollutants,” Congress did not empower EPA with the authority to require municipalities to mandate changes to existing buildings.

The District has taken multiple proactive steps, through its Green Building Act and stormwater retention regulations, to ensure that the majority of new or significantly renovated buildings include green roof features. If private development continues as it has the last several years, the District will easily meet the 350,000 square foot goal. If private development were to dramatically slow, as happened following the financial crisis of 2007-09, then the District would be left with a 350,000 square foot mandate that it has no ability or legal authority to meet.³ DCBIA respectfully suggests changing the green roof mandate to a highly recommended goal.

Section 2.4.1 Retention of Stormwater Exemption for Small Projects

DCBIA supports EPA’s proposed decision to strike Section 2.4.1 from the original draft permit. As originally proposed, Section 2.4.1 would have eliminated the current exemption for development projects under 5,000 square feet from complying with the District’s stormwater retention requirements. DCBIA advocated for the continuation of this

³ See DOEE, Green Roofs in the District of Columbia, <https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/GREEN%20ROOFS%20IN%20THE%20DISTRICT%20OF%20COLUMBIA.PDF> (Showing that while the District has averaged over 200,000 square feet of annual green roof installation over the past five years, only approximately 50,000 square feet of green roofs were installed from 2007-2009 following the financial crisis.)

exemption in its January 17, 2017 comments. DCBIA renews its previous comments in support of EPA's recent proposal to maintain this exemption.

Section 2.5.2 Other Controls or Management Measures

DCBIA supports the addition of Section 2.5.2, which allows the District to submit to EPA proposed methods to estimate pollutant reductions from any activity that prevents or reduces stormwater pollutant discharges. DCBIA believes that providing the District the flexibility to utilize its local knowledge to pursue innovative and cost-effective pollutant reduction ideas as well as the ability to get credit for those innovations under the MS4 Permit will help achieve pollutant reductions more effectively than the inclusion of additional federal command-and-control conditions in the District's MS4 Permit.

Sincerely,

DC BUILDING INDUSTRY ASSOCIATION



Lisa María Mallory
Chief Executive Officer

cc: DCBIA/DOEE Agency Working Group

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