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November 8, 2012

Brian Van Wye
Natural Resources Administration
District Department of the Environment
1200 First Street, N.E., 6th Floor
Washington, DC 20002

Via email: SWRule@dc.gov

Re: Stormwater Rule

Dear Mr. Van Wye:

DC Appleseed appreciates this opportunity to provide comment to the District Department of the Environment (DDOE) on its proposed stormwater rule and revised Stormwater Management Guidebook (SWMG). Founded in 1994 by a group of public-spirited lawyers, DC Appleseed is a nonprofit research and advocacy organization dedicated to addressing important public policy questions facing the Washington region, including jobs and economic opportunity, health and environmental concerns, and greater democracy for residents of the District of Columbia. DC Appleseed's comments on the regulations were developed with support from pro bono attorneys from the Washington offices of Covington & Burling LLC and Fried, Frank, Harris, Shriver & Jacobson LLP. DC Appleseed's comments are endorsed by the Anacostia Riverkeeper, Anacostia Watershed Society, Groundwork Anacostia River DC, DC Environmental Network and Global Green USA.

As you are aware, DC Appleseed has long advocated for the District to take steps to improve the health of the Anacostia River. These include policies to reduce one of the river's biggest sources of pollution, stormwater runoff. Stormwater runs off of impervious surfaces like roads, roofs, and sidewalks and into our sewers and waterways—picking up pollutants on the way. Large and fast-moving volumes of stormwater runoff also erode streambanks and increase sediment in our waterways.

To help combat this problem, DC Appleseed issued a report in 1999 calling for the District of Columbia to adopt an impervious area stormwater fee, and we later served on a stormwater task force convened by Councilmember Jim Graham to provide recommendations on such a discount program. In our 2011 report *A New Day for the Anacostia*, we called for the federal and local governments to protect the Anacostia by promoting "green infrastructure" practices that retain or reuse stormwater, such as green roofs, cisterns, and bioretention swales. With these practices, stormwater is collected, retained, or reused—keeping pollution out of our waterways and protecting streambanks. Such practices have been promoted by both the U.S. Environmental Protection Agency (EPA) and the National Research Council.

Affiliations listed only for purposes of identification

Consistent with the requirements of the MS4 Permit¹ issued by the EPA, DDOE has made stormwater retention the cornerstone of its proposed rule. The MS4 Permit requires that the District “shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will... [r]equire the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2” 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 or equal to 5,000 square feet.”²

We believe the rule’s requirement for major development and renovation projects to install practices “through which stormwater is absorbed by the soil, infiltrated into the ground, evapotranspired by plants or stored (“harvested”) for use on site”³ is critical to protecting the Anacostia River and the city’s other waterways from further degradation as development occurs. We are also hopeful that the proposed stormwater retention credit trading program will accelerate retrofits of existing impervious surfaces in the District that currently contribute to stormwater pollution. Retrofitting existing impervious surfaces with green infrastructure is crucial to restoring our waterways since 43 percent of the District is already covered in impervious surfaces, much of which is not likely to be redeveloped soon.

In addition to producing healthier waterways, we believe that the District will reap economic and social benefits from the green infrastructure practices that will become part of its landscape as a result of retention-based stormwater rules. Increased demand for green infrastructure will create new jobs and small business opportunities. The wide-scale implementation of green infrastructure could also make the city more attractive, boost property values, signal the District’s commitment to a high quality of life, and promote the city as a leader in sustainability. Indeed, a retention-based stormwater rule is critical to Mayor Gray’s goal to make the District “the healthiest, greenest, and most livable city in the United States.”⁴ The proposed stormwater rule will help advance the Mayor’s Sustainable DC goal for 75 percent of the city’s landscape to naturally filter or capture rainwater for reuse by the year 2032.⁵ It will also contribute to Sustainable DC’s goals of increasing green jobs and small District-based businesses.⁶

In order to maximize benefits from the proposed stormwater rule, its requirements must be practicable and enforceable, and the program must be easy to administer. Accordingly, our comments within suggest ways to improve the implementation and enforcement of the proposed rule in the following areas:

¹ EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221 (effective Oct. 7, 2011).

² NPDES Permit No. DC0000221 at § 4.1.1.

³ District Department of the Environment. Notice of Proposed Rulemaking, Stormwater Management, and Soil Erosion and Sediment Control, p. 4

⁴ A Vision for a Sustainable DC, p. 2.

⁵ A Vision for a Sustainable DC, p. 29.

⁶ A Vision for a Sustainable DC aims to increase five-fold the number of jobs associated with green goods and services (p. 12) and triple the number of small District-based businesses, including local retail (p. 31). We believe the proposed stormwater rulemaking will help the District achieve these broad goals.

- I. Administrative Fees and Resources
- II. In-Lieu Fee Program
- III. Stormwater Retention Credit Certification Process
- IV. Stormwater Retention Credit Transfers
- V. Declaration of Covenants for SRC-Certified BMPs and District Properties
- VI. Inspections of Best Management Practices
- VII. Penalties for Violations

An appendix to our comments suggests other, less substantial changes.

I. Administrative Fees and Resources

The proposed regulations contemplate fees to be paid to the Department for plan reviews, certain soil tests, and certain inspections. See Proposed Regulations §§ 501.3–501.7; 501.10. DC Appleseed is concerned about the sufficiency of these fees to cover the costs of administering the array of activities associated with the regulations. The administrative and enforcement-related activities that are contemplated by the regulations are likely to be cost-intensive. Given the importance of this program, it is our view that the Department should not rely on periodic appropriations for funding, but should rather charge fees that consistently cover the actual costs of the activities. We recommend that the Department consider adopting the ability to re-base fees, as well as additional fees for certain administrative services that are part of the Stormwater Retention Credit (SRC) program.

1. Ability to Re-Base Fees

The Department should provide itself with more flexibility in determining its fees. The proposed regulations currently set out fee tables that applicants for Department approval must pay. See, e.g., Proposed Regulations §§ 501.3–501.7; 501.10. The only fee adjustment that the regulations currently authorize is an annual inflation adjustment based on the Engineering News-Record Construction Cost Index or the Urban Consumer Price Index published by the United States Bureau of Labor Statistics. See Proposed Regulations § 501.1. We recommend that the Department amend this regulation to allow fees to be periodically reset to reflect the Department’s actual costs of administering the permitting process, conducting the necessary inspections, administering the SRC process, and taking enforcement actions. Such an approach would be similar to that taken for the in-lieu fee. See Proposed Regulations §§ 530.2–3 (providing for both an annual adjustment to account for inflation and a re-basing of fees at the Department’s discretion). The Department can mitigate market uncertainty that might result from unexpected changes to the fees by providing in the regulations that notice will be provided to the public in advance of the effective date of such fee changes.

2. Additional Fees for SRC Certification and Transfer

The Department should consider charging additional fees to cover the costs of administering the SRC program. Although the proposed regulations set fees for initial, final, and supplemental plan review of SRC projects, there are no fees associated with the certification and transfer of SRCs, both of which may require the Department to incur additional costs. See Proposed Regulations § 501.6. Unless the Department intends to set the currently proposed SRC plan review fees high enough to

subsidize these other services, the Department will have to use other funds to pay for the shortfall. We recommend that the Department charge an additional fee for certification of SRCs and approval of SRC transfers, as well as for any other services for which the Department expects to incur substantial expenses. While we are sympathetic to the Department's attempts to keep fees associated with SRCs low to encourage individuals to produce them, the market price of an SRC should internalize all of the expenses incurred in certifying and transferring an SRC, including transactional costs.⁷ We note that any additional SRC fees should also be considered in relation to the payment in-lieu fee; the latter may need to be raised in order to act as an appropriate price ceiling if additional SRC fees are adopted.

II. In-Lieu Fee Program

The proposed regulations require sites that undergo major land disturbing activities to retain the volume from the 90th percentile (1.2") rainfall event and major substantial improvement projects to retain the volume from the 80th percentile (0.8") rainfall event. See Proposed Regulations §§ 520.3(a), 522.3(a). In both cases, 50 percent of the required stormwater volume must be retained on the regulated project site, but the remaining 50 percent retention can be achieved through: 1) purchase of SRCs; 2) payment of an in-lieu fee to DDOE; or 3) a combination of both. Regulated sites that use the in-lieu fee are essentially paying DDOE to install and maintain—either by itself or by contracting with third parties—stormwater retention projects to meet the site's obligations under the regulations. We recommend three improvements in the areas of fee amount, late fees, and an in-lieu fund. We believe these improvements will help ensure that the fees achieve the intended level of stormwater retention.

1. Fee Amount

Section 501.8 of the proposed regulations sets the in-lieu fee at \$3.50 per year for each gallon of Off-Site Retention Volume (OSRv). We appreciate that the fee is meant to represent the full life-cycle cost for the Department to retain one gallon of stormwater for one year. See Proposed Regulations § 530.1. It is critical for the fee to cover the costs of planning, installing, and maintaining retention projects, as well as the costs of administering the in-lieu fee program. However, although Section 530.1 lists the components included in the cost of the in-lieu fee, the proposed regulations do not provide a numerical explanation of how the \$3.50 per gallon per year fee was derived. We recommend that the Department provide such a numerical explanation. Doing so will give stakeholders assurance that the fee is adequate to cover the full array of costs associated with the administration, implementation, and maintenance of in-lieu retention projects. It is also critical that the in-lieu fee be able to be re-based if its underlying cost components change; we therefore support Section 530.3, which allows for such re-basing.

⁷ If DDOE adopts fees for SRC certification and transfer, it will need to determine whether to charge the SRC buyer or seller for such fees. We do not believe that assigning payment of such fees to either party will harm the market; the parties are free to negotiate the price of an SRC and any transactional costs carried by one party or another will be accounted for in the negotiated price.

2. Late Fees

In order to efficiently plan and implement in-lieu fee retention projects, the Department must receive in-lieu fee payments in a timely and predictable fashion. Section 501.9 of the proposed regulations states that “[t]he administrative late fee for an in-lieu fee payment shall be ten percent (10%) of the late payment.” To encourage prompt payment and compliance, we recommend that the Department consider adopting a mechanism by which the administrative late fee increases if an in-lieu fee payment is delayed. Failure to make a payment by a predetermined period could trigger an increase in the late fee, which could be done on an additive or compounded basis.

3. In-Lieu Fee Special-Purpose Revenue Fund

Section 530.5 of the proposed regulations states that “an in-lieu fee payment shall: (a) Be used solely to achieve increased retention in the District of Columbia; (b) Be deposited in the Stormwater Permit Compliance Enterprise Fund, established by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 (D.C. Law 17-371; D.C. Official Code § 8-152.02 et seq. (2008 Repl. & 2011 Supp.)), as amended.”

An in-lieu fee payment, however, should not only be used to increase retention in the District per Section 530.5(a), but should specifically be used to achieve the volume of off-site stormwater retention required to be retained by the regulated site. In short, the purchase of one gallon of stormwater retention through payment of an in-lieu fee should result in retention of at least one gallon of stormwater. Otherwise, there is no way to ensure that in-lieu fees are used to retain the volume of stormwater required by the regulations and by the MS4 Permit’s volume retention requirement. Accordingly, we have three recommended improvements, explained below.

First, we do not believe that in-lieu fee payments should be deposited in the Stormwater Permit Compliance Enterprise Fund because that fund is used to pay for a variety of administrative activities and projects associated with meeting MS4 Permit obligations. Instead, we recommend that there be a separate special-purpose revenue fund or “other type” (O-Type) fund created solely for in-lieu fee payments. The District’s budget explains that O-Type funds are “generated from fees, fines, assessments, or reimbursements that are dedicated to the District agency that collects the revenues to cover the cost of performing the function.”⁸ Creating a special-purpose revenue fund solely for in-lieu fees would help ensure that the fees are used for off-site retention projects, rather than for other stormwater administration or project expenses, thereby achieving the amount of stormwater retention volume required by the regulations and ensuring compliance with the MS4 Permit. Legislation would be required to establish such a fund.

Second, we recommend that the regulations require that DDOE provide an annual report on the fund’s activities. We recommend that such a report include the following information:

- The amount of in-lieu fees collected to date and the amount of fee funds spent;

⁸ District of Columbia Fiscal Year 2012 Proposed Budget and Financial Plan, Revenue 4-16, available at http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/ocfo_fy_2012_revenue_chapter.pdf

- For each sub-drainage area or watershed, the aggregate Off-Site Retention Volume (OSRv) per year purchased with in-lieu fees (based on the location of regulated projects);
- For regulated projects located in the Anacostia Waterfront Development Zone and subject to the Anacostia Waterfront Environmental Standards Amendment Act of 2012, the aggregate OSRv per year purchased with in-lieu fees;
- For each of the retention projects installed through the in-lieu fund, the type of project, the gallons per year of volume retained by that project, the sub-drainage area or watershed location of that project, and a summary of the capital and maintenance costs of that project.

Such a report would enhance transparency by providing information both on how in-lieu fees are being used to achieve stormwater retention volumes required by the regulations, as well as on whether the fee level requires adjustment to cover program costs. Information on offset volumes for sub-drainage areas or watershed locations would also allow for analysis of the effect of the in-lieu fee program on different watersheds. Such a report should not be burdensome for DDOE to generate since the MS4 Permit requires the in-lieu fee program to include tracking and accounting systems to verify that required off-site stormwater practices are implemented and adequately maintained.⁹

Third, the regulations should explicitly state that projects funded through in-lieu fees are restricted from generating SRCs in order to avoid “double-counting” required off-site retention volumes.

III. SRC Certification Process

The DDOE SRC certification process plays a crucial role in the success of the SRC market, as it is the only way for such credits to enter the marketplace. An SRC review and certification process that is cumbersome or difficult to navigate may dissuade property owners from installing Best Management Practices (BMPs) for credit certification. We suggest two areas of potential improvement to the SRC certification process:

1. The Stormwater Management Plan Review Process

The Stormwater Management Plan Review (SWMP) process is a critical part of SRC certification. In order to be SRC-eligible, a project must be designed, installed, and operated in compliance with a Department-approved SWMP. See Proposed Regulation § 531.3(b). The SWMP review process explained in Section 518 of the proposed regulation is relatively straightforward. However, the chart of the SWMP review process exhibited in Figure 5.1 of the Stormwater Management Guidebook (SWMG) appears to be a different and more complicated process, requiring four pages of flow charts to explain.

We understand that plan review is important to ensure that BMPs are properly designed. However, as noted, if the plan review process is difficult for users to navigate in practice, as the four-page flow chart suggests, it could dissuade the creation of SRC-generating BMPs, particularly by property

⁹ NPDES Permit No. DC0000221 at § 4.1.3.

owners who are not real estate development professionals. DC Appleseed recommends that DDOE consult with members of the regulated community and potential SRC generators to determine whether there are ways to streamline the SWMP review process.

2. SRC Certification Timelines

Page 311 of the draft SWMG helpfully lists key milestones for generation of SRCs, but does not propose timelines for achieving these milestones. It is important that BMP owners looking to generate SRCs have an idea of the timeline associated with the following particular milestones:

- Number of days DDOE will take to review a proposed SRC SWMP upon receipt;
- Number of days DDOE will take to complete a post-construction inspection following request for such inspection; and
- Number of days DDOE will take to review an application for SRC certification upon receipt.

Timelines associated with these milestones will provide the SRC generator with more certainty and will allow such individuals to better plan for the marketing and sale of their SRCs as they become certified. To provide the Department with some level of flexibility, the SWMG could note that while the Department intends to meet provided timelines for reviews and inspections, it reserves the right, either generally or in individual cases, to extend timelines for action where appropriate.

IV. Stormwater Retention Credit Transfers

The SRC market is a fundamental component of the proposed stormwater regulations. To improve its chances of success and provide a mechanism for its accountability, we make three recommendations in the areas of SRC transfer facilitation, reporting, and ownership definitions.

1. SRC Transfer Facilitation

The proposed regulation and guidebook are largely silent on the methods by which potential buyers and sellers of SRCs could share information about eligible SRCs and negotiate transactions. The Department's facilitation of such transactions would result in more accurate prices, which would benefit both buyers and sellers by reducing price volatility, and increasing confidence and liquidity in the market. Although the regulations require that the Department track certain information regarding SRCs, there is no corresponding requirement that the Department provide such information to the public on a regular basis. *See* Proposed Regulations §531.2 (Department shall retain and track information about each SRC). *Cf.* Proposed Regulations §533.7 (Department only has to undertake efforts to publicly share information about each SRC). By providing a medium for transfer of SRCs and/or SRC information, this fundamental component of the stormwater regulations—the SRC market—would be strengthened.

DC Appleseed recommends that the Department consistently and regularly publish online in publicly accessible database(s) information on certified SRCs that are available for purchase and on SRCs that

have already been purchased. We do not believe that there is any reason to hold confidential the basic information listed in points *a* and *b* below.¹⁰

a. Database information on certified SRCs available for purchase

In order for regulated sites and other entities to find SRCs available for purchase, there must be a publicly accessible listing of SRCs. At a minimum, we believe that listings should include the following information for *each* certified and available SRC:

- The SRC's unique serial number;
- Address of site with eligible SRC;
- The name and contact information of the SRC owner or his/her agent;
- The listed sales price of the SRC (included at the discretion of the SRC owner).

DDOE is already proposing to collect the first three pieces of information on the above list per its "Application for Certification of Stormwater Retention Credits" included on p. D-3 of the SWMG. To accommodate the fourth point, a simple checkbox could be added to this form giving DDOE permission to publish the information in a publicly accessible database with a space where the SRC owner has the option to list the desired sales price for the SRC. To keep the database current, the available SRC should be added to the publicly-available database upon its certification by DDOE. For the same reason, the SRC should be delisted on the database when it is purchased or retired.

b. Database information on purchased SRCs

In order for SRC buyers and sellers to negotiate prices, it is critical that they have basic information on the SRC market. We believe there should be a publicly accessible database that includes the following information for *each* SRC that has been purchased:

- The SRC serial number;
- The date the application for transfer was received;
- The date of transfer;
- The name of the SRC seller;

¹⁰ Proposed Regulations §533.7 state that the "Department shall undertake efforts to publicly share information of the price, purchase, sale, value, time, certification, and use of an SRC that is not personal, proprietary, a trade secret, or otherwise confidential." We do not believe that the information we have recommended be published should be confidential. The District of Columbia's Taxpayer Service Center provides online public information regarding the transfer of real properties, including the property address, owner's name, sales price, and recordation date. Since this information is available publicly for real property, we think it should be similarly available for SRCs.

- The name of the SRC buyer;
- The final sales price.

Again, DDOE is already planning to collect this information through its "Application for Transfer of Stormwater Retention Credit Ownership," provided on p. D-5 of the SWMG.

If the Department decides to establish such a database, it can look to the South Coast Air Quality Management District¹¹, a regional air-quality regulatory body in California, as a guide. On their website, there is a section dedicated to information relating to trades of RECLAIM Trading Credits (RTCs). This section includes an excel database listing information regarding trade registrations submitted to and processed within the previous 90 days, including the registration number, Seller ID and name, Buyer ID and name, the quantity covered by the credits, the price, the trade status, the trade status date, and the date received. There are numerous benefits to this approach. The cost and labor required to maintain this system is relatively low. Additionally, it has worked for other credit trading systems; indeed, the South Coast Air Quality Management District has been maintaining this information for several years. Like the South Coast Air Quality Management District, the Department should provide a set timeline for publishing this information following the approval of an SRC transfer. Another resource provided on the South Coast Air Quality Management District's website is a twelve-month rolling average price of RTCs. A similar resource for SRCs would be extremely helpful for buyers and sellers in determining a fair price for an SRC at any given point in time.

2. SRC Transfer Reporting

In describing the benefits of the SRC market, the preamble to the proposed regulations states that "[t]he Department believes that off-site options present a win-win approach that, compared to strict on-site retention, will maximize the overall benefit for District waterbodies..."¹² While we agree with this theory, there are three issues that could limit benefits to the District's waterbodies.

First and most obviously, benefits of off-site retention will be achieved only if the off-site retention occurs at required volumes. This is why administration and enforcement of the SRC market is so critical.

Second, the environmental impact of the temporal disconnect created by allowing SRCs to be indefinitely banked is unclear. For example, a regulated site required to achieve 900 gallons of OSRv annually can meet this requirement by buying three years worth of SRCs from a BMP that retains 300 gallons of stormwater a year. Alternatively, the same regulated site could meet its requirement for five consecutive years by purchasing 4,500 SRCs from BMPs that are all retaining that volume in the same year.

¹¹ The South Coast Air Quality Management District Credit Trade databases are available at http://www.aqmd.gov/reclaim/rtc_main.html

¹² See p. 16.

Finally, there may also be an environmental impact associated with allowing SRCs to be purchased without regard to the project's location. As currently contemplated, the regulations allow a regulated site to purchase SRCs from BMPs located anywhere in the city (rather than being restricted to the watershed in which the regulated project is located). For example, if a regulated project located in the Anacostia watershed purchases an SRC from a BMP located in the Potomac watershed, the Anacostia River does not reap the pollution reduction benefits of that off-site mitigation. Thus, the differential impact of the SRC program on each of the District's major waterbodies is unclear.

We understand that the SRC program is novel and complex, and we appreciate the fact that it will be easier to start the program if there are fewer restrictions on the market. However, if the program is not producing environmental benefits as intended, or is limiting the District's ability to meet its MS4 Permit requirements, it is worth rethinking. In order to help the Department, other District officials, and stakeholders understand the impacts of the SRC program, we recommend the regulations require that DDOE produce an annual report on the program. At a minimum, the report should include the following pieces of information for each sub-drainage area or watershed:

- For each year since the program's implementation, the aggregate number of OSRv gallons per year required to be fulfilled by regulated projects located in that sub-drainage area or watershed through the purchase of SRCs; and
- For each year since the program's implementation, the aggregate number of gallons of retention achieved through SRC projects located in that sub-drainage area or watershed.

If this specific information will be included in the District's annual report on its MS4 Permit, then a separate annual report need not be generated.

3. Ownership Definitions

We recommend that the regulations and guidebook define "SRC seller" and "SRC owner" in a way that explains clearly when an entity can properly be considered the owner of an SRC. This definition should also set forth any terms or responsibilities for ownership or transfer of an SRC. See Proposed Regulations § 533 (referencing transfer of "SRC ownership," but not setting out what it is or what steps need to be taken to achieve such status). The term "SRC owner" should also be differentiated from the "owner" of a BMP, who presumably remains owner of the actual BMP even after it has sold credits generated by that BMP. Similarly, once defined, these terms should be consistently used throughout the regulations to reduce any confusion in interpreting the regulations. In particular, a clear statement of the circumstances in which an entity can be considered to be an "SRC owner" would be instructive in navigating the regulations and guidebook.

V. Declaration of Covenants for SRC-Certified BMPs and District Properties

The best way to record and ultimately enforce stormwater retention obligations made under these regulations is by recording the obligation in a Declaration of Covenants that is filed with the District's Recorder of Deeds. While the proposed regulations require regulated sites to record their stormwater obligation in this way, they do not require sites generating SRCs to record a Declaration of Covenants.

This leaves the system open to fraud and manipulation in cases where a property with a BMP earning SRCs is transferred to a new owner during its 3-year certification cycle.

We therefore recommend that the Department require BMPs earning SRCs to be recorded through a Declaration of Covenants for the years for which it is active. It can then be re-recorded at time of re-certification. To reduce any challenges associated with recording a Declaration of Covenants every three years, the Department should provide a short Declaration of Covenants template form that can be used for this purpose.

Additionally, Section 529.2 exempts an agency of the District of Columbia from the requirement to make or record a Declaration of Covenants unless it is sold to a private owner or leased for more than three years. Without a recorded declaration, however, there is no way for the property's stormwater obligations to be acknowledged and transferred at the time of sale to a private owner. We therefore recommend that regulated properties owned by the District of Columbia be required to record the same Declaration of Covenants as other regulated sites.

VI. Inspections of BMPs

The proposed regulations provide some mechanisms to ensure maintenance of both major regulated projects and BMPs generating SRCs, including, for example, inclusion of a maintenance plan and schedule with a project's SWMP application. See Proposed Regulations § 519.2(i). Additional requirements apply solely to sites of major regulated projects, including the requirement that the owner record with the Recorder of Deeds a declaration of covenants that includes the owner's maintenance responsibilities mandated under the SWMP and an easement that allows the Department access to inspect any BMPs on the site.

Regular BMP maintenance is essential to achieve the volume of stormwater retention required by the proposed regulations, and the accompanying environmental benefits. Although the regulations have provided for some mechanisms to ensure the ongoing maintenance of all sites, DC Applesseed believes that more rigorous inspection requirements will ensure a higher level of accountability for all regulated parties. Accordingly, we make two recommendations for improvements:

1. Annual inspections of BMPs

The Department should amend the proposed regulations to provide for inspection of all major regulated projects and SRC-generating sites on an annual basis at a minimum. The proposed regulations do not contemplate any preventive maintenance schedules for major regulated activities, and contemplate only a 3-year inspection cycle for SRCs per the SRC's certification timespan. See Proposed Regulations § 531.10. Section 5.2.4 of the SWMG contemplates more frequent site inspections by DDOE, noting that inspections of preventive maintenance measures "will occur twice a year every year during the first five years of operation and at least once every three years thereafter." We support the proposed twice-yearly inspection cycle contemplated by the SWMG during the first five years of operation of all stormwater BMPs. However, inspections after the first five years should occur annually to ensure regulated sites continue to meet the Department's retention requirements.

2. Third-Party Inspectors

To ease the administrative burden that inspections during construction and post-construction annual inspections could place on DDOE, we recommend that the Department permit the use of third-party, non-governmental inspectors to complete periodic inspections of regulated sites. Currently the Department of Consumer and Regulatory Affairs (DCRA) permits authorized third parties to perform plan reviews and field inspections of work performed pursuant to a building permit and to certify that such work complies with the District of Columbia Construction Codes. See D.C. Official Code, 2001 Ed. § 6-1405.04(a); Title 12A District of Columbia Municipal Regulations § 109.4. The successful use of third-party, non-governmental inspectors by DCRA provides a helpful model as to how the Department may leverage non-governmental inspection resources to effectively and efficiently inspect regulated sites.

VII. Penalties for Violations

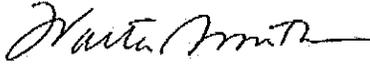
We recommend that the Department provide specific examples of how penalties will be imposed for violations of the regulations, specifically for violating the terms of an “approved plan.” Under Section 502.3 of the proposed regulations, each provision of an approved plan must be complied with “as a distinct provision of this chapter.” As a result of this requirement, we believe that non-compliance with the terms of an approved plan is intended to subject a regulated site owner to the enforcement provisions of the regulations. See, e.g., Proposed Regulations §§ 505.1, 505.2 (providing that each violation of each provision of the regulations is a separate violation, subject to administrative, civil, or criminal penalties). It appears the Department intended to impose penalties for failure to meet the terms of an approved plan. The Department should amend the regulations to make clear that failure to comply with the provisions of an approved plan is subject to the enforcement provisions described in the regulations.

In addition, we believe the purposes of the regulations will be furthered if the penalties paid for violations of the regulations are used to further the stormwater retention goals of the regulations. As currently drafted, the proposed regulations do not specify how fines and penalties collected for violations of the stormwater retention regulations will be used, but instead reference existing enforcement mechanisms. Fines will be imposed only for failure to comply with the stormwater regulations and provisions of an approved plan – a failure that carries with it specific environmental harm to the District’s waterways. To remediate this environmental harm for non-compliance, we believe it would be beneficial to use such fines (in excess of administrative costs) for stormwater remediation. We believe it would be beneficial for DDOE to work in conjunction with the D.C. Council to create the necessary statutory and regulatory provisions so fines could be deposited in the Off-Site Mitigation Special-Purpose Revenue Fund that we’ve proposed.

Thank you again for providing us with the opportunity to comment on the proposed stormwater regulations. We believe their effective implementation and enforcement is critical to improving the health of the Anacostia River and the District’s other waterbodies, and we urge DDOE to consider our recommendations while revising the proposed rule. We also believe it is critical for the final stormwater regulations to be effective by July 22, 2013, as required by the District’s MS4 Permit. We urge the

Department and Mayor Gray's Administration to prioritize the revision of the draft rulemaking so that final stormwater rules are implemented by the EPA-required deadline.

Sincerely,



Walter Smith
Executive Director



Brooke DeRenzis
Project Director

cc: Councilmember Mary Cheh, Chairperson, Committee on Environment, Transportation, and Public Works

Attachment: 1 (Appendix)

Appendix:

1. Changes to or Deviations from the SWMP: The process for seeking changes to a SWMP described in Proposed Regulations Sections 503.2-503.4 is vague. The Department should consider establishing a uniform procedure for all projects seeking changes to the stormwater management plan. This might require submission of proposed changes in writing to be reviewed by Department, followed by either: 1) approval of the proposed changes without further review; or 2) requirement for resubmission of the plan and payment of a supplemental review fee.

The "As-Built" Certification form also appears inconsistent with the regulatory requirement for resubmission of a SWMP, allowing for the engineer to document "substantial deviations" from the original plan. It appears a "substantial deviation" from the original plan would require the submission of a new plan pursuant to Section 503.3(a), and therefore the engineer's certification would not need to document deviations from the original plan. This issue should be reconciled, by changing either the resubmission requirements or the as-built form.

2. Tracking Compliance of Regulated Sites: In order to ensure compliance by regulated projects, DDOE must track regulated site activity in a database with the capability to alert the Department when a regulated project needs to renew SRCs or an in-lieu fee. If DDOE does not have such software, we recommend that it invest in it.

3. Consistent Terminology in Regard to Maintenance: The regulations and SWMG should define and consistently use the terms "maintenance agreement," "maintenance schedule," "maintenance responsibility," and "maintenance standards". If there is no substantive difference among the terms, we recommend that the Department choose a single term and use it consistently.

4. Maintenance Agreement in the Declaration of Covenants: Section 5.3.2 of the SWMG states that DDOE will not approve a SWMP for private parcels until the applicant or owner has executed a Declaration of Covenants that binds current and subsequent owners of land served by the private BMP to an inspection and maintenance agreement. However, Section 5.0.1 of the SWMG and Section 518.9 of the proposed regulations state that the applicant should file an *approved* copy of the SWMP at the Recorder of Deeds with the Declaration of Covenants. It is unclear which comes first—approval of the SWMP or an executed Declaration of Covenants. We recommend that the SWMG reconcile this issue. One way to do that would be to simply require the applicant to provide proof that the maintenance agreement or schedule was filed as part of the Declaration of Covenants with the Recorder of Deeds in order to receive the remaining approved paper copies of the SWMP, per Section 518.10 of the proposed regulations.

5. Posting Notice of Hazard to Public Health or Safety: Proposed regulation Section 507.1 should be revised to explicitly permit a designee of the Mayor and the Department to post a notice of a hazard to public health or safety on the shores of District bodies of water if needed. As currently written, only the Mayor has authority to post notice of a health or safety hazard on the shores of a District body of water. To make this provision administrable, this provision should authorize the Mayor to designate someone to post notice of a health or safety hazard on the shores of a public body of water in the District. The Department has authority to "take action deemed necessary to protect the public health," including the prohibition of recreational activities on waters where it has identified a public health hazard. Section

507.1 should be amended to make explicit that this authority includes the ability to post notices on the shores of waterways, in addition to its authority to notify the public through the media.

6. Public Information and Outreach on SRC Generation and Certification: Currently, DDOE provides information on the SRC generation and certification process in the regulations and Chapter 7 of the SWMG. DDOE may want to consider additionally developing an easy-to-read, stand-alone brochure or short guidance on the SRC Generation and Certification process for BMP owners who may be interested in generating SRCs, but are not familiar with the guidebook. Such a brochure could contain the same content as Chapter 7 of the guidebook, along with information about whom to contact for more information. DDOE may also use this type of document to market the SRC program.

7. Stormwater Management Applicability: Section 531.6 of the regulations state that “[a] person submitting an application for SRC certification shall be the owner of the retention capacity or shall have been assigned the right to a SRC that is certified.” The circumstances under which the owner of a BMP would assign SRC rights to another person are unclear, as is the process by which such rights would be officially transferred. We recommend that DDOE address this issue to avoid fraud and disputes over of SRC ownership.