

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Energy and Environment

VIA E-MAIL AND FIRST CLASS MAIL

Elizabeth Ottinger (3WP41)
NPDES Permits Branch
US EPA Region III
1650 Arch Street
Philadelphia PA 19103-5103

January 17, 2017

Email: ottinger.elizabeth@epa.gov

RE: Comments of the District of Columbia
Draft Phase I MS4 Permit for the District of Columbia (Published 11/17/16)

Dear Ms. Ottinger:

Please find attached the comments of the District of Columbia in response to the above-cited draft reissued permit. On behalf of the District, the Department of Energy and Environment (DOEE) provides these comments, including this letter that highlights key issues and the attachment that includes additional issues and details. We are providing them via first class mail and electronically to your email address.

The District appreciates the opportunity to comment on the draft and welcomes the issuance of a progressive new MS4 permit that will help the District meet its environmental goals. However, the District has significant concerns with some of the proposed provisions as summarized below.

The draft permit improperly addresses requirements that are state functions under the Clean Water Act (subparts 2.2.1, 2.2.3.1, 2.2.3.2, and 4.3).

The establishment of water quality standards and Total Maximum Daily Load (TMDL) requirements, and the procedures used to establish those standards and requirements, are the responsibility of states under the Clean Water Act. The permit as proposed would regulate these as municipal functions (subparts 2.2.1, 2.2.3.1, 2.2.3.2, and 4.3). Further, such permit requirements are beyond the scope of a municipal stormwater program, as the permit mandates impact sources outside of the MS4 permit area. The District has committed to amend TMDL's under its Consolidated TMDL Implementation Plan, and will do so in accordance with the requirements of the Clean Water Act. The improper inclusion of these water quality and TMDL-related requirements in the MS4 permit may also have the unintended consequence of limiting the availability of EPA grants and funds that would otherwise be available to implement these requirements, because such funds may not be available to implement permit requirements.

The draft permit imposes unreasonably burdensome requirements on the District (subparts 2.4.1, 3.1.4.2, 3.3.5 and Part 8 (“Critical Sources”)).

The District’s current stormwater management regulations include retention-based performance standards that are among the most protective in the nation and that are triggered by smaller project sizes, save only one other jurisdiction. The intent of subparts 2.4.1 and 3.1.4.2 that propose to eliminate what exemptions remain under the current District regulations is unclear. If the language remains as proposed, every project in the MS4 area that breaks ground or conducts renovation in an existing structure would be subject to regulation -- this includes utility repair, sidewalk replacement, planting of gardens, and minor interior renovation, like replacing drywall, to name but a few of the types of projects currently not subject to regulation. The District currently issues approximately 1,800 erosion and sediment control permits each year for projects that disturb over 50 square feet. The District also issues thousands of permits for relatively minor interior renovations. Lowering the threshold for requiring stormwater management to all of these projects would impose significant and unwarranted costs on the District and its residents. For some small projects, this would result in stormwater compliance costs that significantly exceed total construction costs for the project.

The District is committed to evaluating options to achieve greater stormwater retention through updates to its stormwater management regulations, but it strongly disagrees with the elimination of all current exemptions from its regulations by a date certain, as required in the draft permit. Such a requirement is arbitrary and capricious, without being preceded by an analysis of the impact of such changes, and goes well beyond the requirements in any other MS4 permit in the country.

Subpart 3.3.5 as proposed is unreasonably burdensome and impractical. As proposed, the subpart requires the District to implement its 2013 Outfall Repair Plan by repairing approximately 10% of outfalls in need of repair each year of the permit term, beginning in the first year of the permit. Ultimately, 50% of all outfalls in need of repair are required to be repaired by the end of the permit term. Because these repair and restoration efforts are capital projects that are time-consuming to plan, design, and construct, a performance requirement that sets annual levels of performance, particularly beginning in the first year of the permit term, is impractical. Instead, the outfall metric should apply to the entire permit term, which will allow the District the necessary flexibility to address the outfalls in need of repair while still meeting the ultimate metric within the permit term. Measurement of outfall repairs based on an absolute number rather than on a percentage is simpler. Furthermore, the requirement as proposed does not allow for the likelihood that necessary third party permitting requirements, principally involving Federal agencies, could delay these projects.

The definition of “Critical Sources” in Part 8 as proposed is overly broad, burdensome, and arbitrary, essentially making every building or facility in the District a critical source. Further, it greatly expands upon the identification of critical sources in the current MS4 permit.

The draft permit improperly impinges upon the sovereignty of the District (subparts 2.2.4, 2.2.5.2, 3.1.2.2 and 3.1.2.3, and Table 2 in subsection 2.8).

Subpart 2.2.4 as proposed requires the District to evaluate options for increasing the District's Stormwater Fee and, if determined by the District to be feasible, requires the District to propose an increase. The funding of the responsibilities and duties of the District is within the discretion of the District as an annual appropriations matter, and is not within the purview of a federal agency. Also, while an increase in fees may be "feasible," it may not be necessary to meet the permit requirements based on an assessment of other fiscal resources available. The District is already required to provide sufficient finances, staff, equipment and support to implement the provisions of the permit per subsection 1.4.3 of the proposed permit.

Similarly, subpart 3.1.2.3 requires the District to establish a Stormwater Retention Credit (SRC) Purchase Agreement Program, and requires the District to commit \$12.75 million to this program. The District is already establishing such a program, but it is improper as a matter of District sovereignty for the MS4 permit to specify the amount of funding for this or any program. The amount of funds to be allocated to the District's SRC program is appropriately based on available funding, and should not be the subject of an EPA requirement.

Relatedly, several of the requirements in the permit ignore District laws and legally-mandated procedures for the publication of regulations and other government information. For example, the second footnote to Table 2 in subpart 2.8 as proposed requires the District to make all of the items included in the table available on its website, and then to "consider any input received." In essence, this requirement makes everything subject to public notice and comment, regardless of whether public notice and comment is required by the District's Administrative Procedure Act and other applicable laws. Similarly, subpart 3.1.2.2 requires the District to amend its stormwater management regulations to change the eligibility criteria for projects to generate SRCs, but imposes a deadline for implementation that is impractical under the District's established rulemaking process.

Finally, subpart 2.2.5.2 requires the District to take certain implementation actions if, after conducting an analysis of potential changes to existing stormwater management regulations, potential changes are determined to be feasible and warranted. But under the subpart as proposed, it is unclear who would make the determination as to whether the changes are feasible and warranted. The determination of what changes to the District regulations are feasible and warranted is a District function, and should not be determined by EPA.

The draft permit misinterprets elements of the District's Consolidated TMDL Implementation Plan resulting in unreasonable implementation requirements (subpart 1.5.3.1 and Part 8 ("Acres Managed")).

Subpart 1.5.3.1 as proposed establishes specific metrics that must be achieved by the end of the permit term, including "acres managed." These metrics are based on the analysis and projections

that informed the District's Consolidated Total Maximum Daily Load Implementation Plan (TMDL IP), developed during the current permit cycle. Acres managed is a new metric that refers to any area in which stormwater management measures are implemented over and above what is already implemented on the effective date of the permit. The draft permit sets a 5-year milestone of 1,038 total acres managed within the MS4 area, with portions of this total to be achieved in the Anacostia, Potomac, and Rock Creek watersheds (552, 335, and 151 acres, respectively). However, the TMDL IP submitted by the District intended the acres managed requirement to be an MS4-wide metric, as explained in detail in the attachment.

The draft permit's proposed definition of "acres managed" would apply a 1.2" stormwater retention volume to this area, which is also inconsistent with the Consolidated TMDL IP. The types of implementation projects the District should be allowed to track toward "acres managed" include major land disturbing projects complying with the 1.2" stormwater retention standard, major substantial improvement projects complying with the 0.8" stormwater retention standard, projects in the existing PROW complying with the MEP process, voluntary retention projects, and nonstructural practices.

CONCLUSION

The District welcomes the issuance of a progressive new MS4 permit. However, the draft permit does contain some provisions that, if required in the final permit, will be problematic for the District both in terms of implementation and compliance. Some of these problematic provisions are summarized in this letter, but other comments and concise statements of issues that are considered by the District to be equally important are in the attachment to this letter. For the reasons stated in this letter and in the attachment, the draft permit should be revised to either eliminate or amend the language, as requested by the District in the attachment.

We value the working relationship that we have with EPA in reducing pollution in the water bodies of the District and look forward to our continued collaboration under a new MS4 Permit. If you have any questions regarding the District's comments, please contact the DOEE Stormwater Administrator Jeffrey Seltzer at 202-535-1603, or at Jeffrey.Seltzer@dc.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Hamid Karimi", with a long horizontal flourish extending to the right.

Hamid Karimi, PhD
Deputy Director

ATTACHMENT

The following comments, concise statements of issues and recommendations are provided by the District of Columbia on the Draft District of Columbia Municipal Separate Storm Sewer System – NPDES Permit No. DC0000221 published November 17, 2016

PART 1

Subpart 1.2

The District requests the language in Subpart 1.2 be amended as follows:

The “permittee” is the Government of the District of Columbia.

This definition was agreed to while settling an appeal of the 2010 permit. The draft permit’s definition of “permittee” should remain the definition negotiated, which is the definition in Modification 1 of the current permit.

Subpart 1.3, Paragraph 3

The District requests the language in paragraph 3 of Part 1.3 be amended as follows:

This permit authorizes the following non-stormwater discharges to the MS4 but only when the appropriate controls required through this permit have been applied: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, emergency firefighting activities; or (2) discharges that are managed so that water quality is not further impaired and the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. (CWA or Clean Water Act), and EPA regulations are met.

The paragraph as amended provides greater clarity regarding requirements for non-stormwater discharges. It also avoids contradictions between Subpart 1.3 and other parts of the draft permit. For example, Subpart 3.3.2.4, which prohibits discharges of wash water from municipal facilities (see comment further below), appears to contradict Subpart 1.3, which authorizes wash water discharges provided MS4 permit requirements are met.

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Subpart 1.5.3.1

The District requests that Table 1 be removed and the language in Subpart 1.5.3.1 be amended as follows:

Attain by the end of this five-year permit term, a collective reduction in all TMDL pollutants of concern other than trash, of 1,038 acres managed across the MS4 area of the District, per all requirements of Part 3 herein. At a minimum, 46 of the total acres managed shall come from retrofits in the Public Right of Way (PROW). The District shall provide detailed reporting on the number of acres managed from major land disturbing projects complying with the 1.2" stormwater retention standard; major substantial improvement projects complying with the 0.8" stormwater retention standard; projects in the existing PROW complying with the MEP process; voluntary retention projects; and nonstructural practices. The District will also report on modeled pollutant load reductions realized by these acres managed.

The requested amendment clarifies that the permit will require 1,038 acres to be managed throughout the MS4 area, without specific acreage requirements for the Anacostia, Potomac, or Rock Creek.

Subpart 1.5.3.1 as proposed establishes specific metrics that must be achieved by the end of the permit term, including "acres managed." These metrics are based on the analysis and projections that informed the District's Consolidated Total Maximum Daily Load (TMDL) Implementation Plan (TMDL IP), which was developed during the current permit cycle. Acres managed is a new proposed metric that refers to any area in which stormwater management measures are implemented over and above what is already implemented on the effective date of the permit. The draft permit sets a 5-year milestone of 1,038 total acres managed within the MS4 area, with portions of this total to be achieved in the Anacostia, Potomac, and Rock Creek watersheds (552, 335, and 151 acres, respectively).

However, the TMDL IP submitted by the District utilized the acres managed requirement as an MS4-wide metric, as explained in the TMDL IP.¹

¹ Section 6.6.2.a states: "For the purposes of the IP, numeric milestones were developed and set for the entire MS4 area, with estimates of expected implementation at the major basin level (i.e. for the Anacostia, Potomac, and Rock Creek basins). Setting numeric milestones for the entire MS4 meets several goals of the IP. First, setting milestones for the entire MS4 is consistent with the consolidated nature of the IP. The Consolidated TMDL IP consists of a plan to meet 518 individual MS4 WLAs (annual, seasonal, monthly, daily) for 22 different pollutants in 44 different waterbody segments, but setting and reporting on enforceable milestones for each of these WLAs is impractical. Instead, developing and evaluating milestones that show consolidated progress in meeting all WLAs is easier to track, present, and understand. In addition, the inherent uncertainties in the spatial and temporal projections of development and re-development (which are the main drivers of BMP implementation) limit the ability to set meaningful milestones at the watershed or subwatershed level. Setting milestones at these smaller levels, with the inherent uncertainty of when and where BMP implementation will occur, would require such a degree of conservatism that any milestones set at these levels would not be reflective of what was needed to meet

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In addition to being consistent with the approach used in developing the Consolidated TMDLIP, with the requested amendment, the paragraph would then be consistent with Subpart 3.2.1 of the draft permit, which accurately represents the 1,038 acre milestone as an MS4-wide requirement.

The suggested reporting language would clarify the range of project types for which the District will report on progress.

Finally, the District notes that the TMDL IP's projections for retrofits are largely dependent on development implemented in accordance with the District's stormwater management regulations. While the District is committed to using its available funding for stormwater retrofits and to exploring options to increase that funding, the reality is that the ability to increase funding is limited. District stormwater fee ratepayers are already paying for approximately \$2.6 billion in capital improvements to reduce combined sewer overflows. While DOEE will be exploring options to increase stormwater fees under its Consolidated TMDL IP, the District cannot realistically implement a fee increase sufficient to fund the billions of dollars of retrofits that would be required to achieve MS4 Waste Load Allocations; the massive fee increase would be unreasonable. Therefore, the District must depend upon development under its stormwater management regulations to achieve the vast majority of this requirement to manage 1,038 acres. Should the scale and pace of development significantly decrease, the District likely will be unable to achieve this requirement through publicly funded efforts. As development cycles are outside of the District's control, a shortfall in meeting this metric due to a downturn in the typical development cycle should not be grounds for enforcement action under the permit.

PART 2

Subpart 2.1

The District requests the language in the second paragraph of this subpart be amended to read as follows:

The permittee shall continue to implement, assess and upgrade all of the controls, procedures and control measures required by this permit and in the plans that comprise the SWMP. The permittee shall ensure that updates to plans and strategies are consistent with all compliance requirements and deadlines contained in this permit. The permittee shall post current versions of all plans that comprise the SWMP on its website at an easily identifiable location.

WLAs by the dates projected by the modeling. Estimates have been developed for each of the major basins to illustrate where DOEE anticipates implementation to occur while still providing flexibility to account for the temporal and spatial uncertainty involved in these forecasts.”

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By removing "at all times," this change would allow for reasonable delays in posting documents to the District website and temporary disruptions to DOEE's website.

Subpart 2.2

Subpart 2.2 of the draft permit includes a number of provisions that are inappropriate for an MS4 permit and should be either removed or amended as requested below, as they either pertain to state (not municipal) responsibilities under the Clean Water Act, or would override the District's sovereignty. The District reserves the right to challenge the MS4 permit on these grounds.

Notwithstanding the above concerns, other subparts of Subpart 2.2 contain requirements that are impractical, contradictory, or otherwise present programmatic challenges to implementation, as presented below.

Subpart 2.2.1

The District requests Subpart 2.2.1 be removed from the proposed Permit.

This subpart as proposed requires the District to develop a list of TMDLs in need of revision, along with a schedule for revisions, which are to be submitted to EPA. Once submitted to EPA, the District is required to then begin implementation of the revisions. However, TMDL development is a state function under the Clean Water Act, and is not an appropriate requirement for an MS4 permit. Inclusion of this requirement places responsibility for TMDL development at a municipal level. Such responsibility includes determining baseline loadings from all sources, even for sources outside the District's MS4, and setting corresponding wasteload and load allocations (WLAs and LAs, respectively). This is beyond the scope of a municipal stormwater program, and inappropriate for MS4 permit coverage.

As described in the District's Consolidated TMDL IP, the District is committed to revising its TMDLs where necessary, and is in the process of doing so. Therefore, this provision is also unnecessary.

Subpart 2.2.3.1

The District requests Subpart 2.2.3.1 be removed from the proposed Permit.

This subpart as proposed requires the District to conduct a bacteria source tracking study to identify sources of bacteria in the MS4 area and then use the results of this study to develop new milestones and benchmarks for implementing controls to achieve bacteria WLAs. The subpart also requires that the results of the study, along with any new

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milestones and benchmarks, be made available for public comment and submitted to EPA for approval. However, it is not clear how the draft permit provision would accelerate implementation to address bacteria WLAs, since the requirement as written omits the critical step of revising bacteria TMDLs based on the results of the study, and is therefore erroneous. Further, as discussed above, TMDL development and revision are state functions under the Clean Water Act, and including such requirements is therefore inappropriate in an MS4 Permit because it is contrary to existing law.

The District is already committed, through the Consolidated TMDL IP, to performing this type of analysis in order to inform TMDL revisions as well as the TMDL IP's overarching adaptive management process, and therefore, this provision is also unnecessary.

Subpart 2.2.3.2

The District requests that Subpart 2.2.3.2 be removed from the proposed Permit.

This subpart as proposed requires the District to develop a Legacy Pollutant Minimization Plan for chlordane, heptachlor epoxide, dieldrin, DDT, DDE, DDD and PCBs. The intent of this section is to confirm if these pollutants are present in ongoing MS4 discharges or are instead largely present in the sediments of receiving waters. Similar to Section 2.2.3.1, the section would require development of new milestones and benchmarks for implementation based on the results of the study. However, as with the requirements of subpart 2.2.3.1, this requirement again omits the critical step of revising these toxics TMDLs. If monitoring suggests toxic contamination in the District is largely or in part due to legacy sediment contamination, then the existing MS4 WLAs are incorrect and in need of revision. Such revisions would need to be complete before milestones and benchmarks could be meaningfully updated. As discussed previously, TMDL development and revision are state functions under the Clean Water Act and are inappropriate for inclusion in an MS4 Permit because it is contrary to existing law.

As with the proposed requirements of subpart 2.2.3.1, however, the District is already committed, through the Consolidated TMDL IP, to performing an analysis of legacy pollutants in order to inform TMDL revisions as well as the TMDL IP's overarching adaptive management process, and therefore, this provision is also unnecessary.

Subpart 2.2.3.3

The District requests the language of this subpart be amended to read as follows:

During this permit term, the permittee shall develop a list of targeted watersheds and targeted implementation approaches to be implemented in the following permit term, and incorporate them, into the Consolidated TMDL Implementation Plan, which shall be made available for public notice and comment and submitted to EPA per the schedule in Part 2.8 herein. The revised Consolidated TMDL

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Implementation Plan shall include new milestones and benchmarks for TMDLs, as relevant, and shall also address and incorporate any comments received from EPA, as appropriate.

As revisions to the TMDL IP will include new milestones and benchmarks for all updated TMDLs, it is not necessary to specify modifications for E. Coli and legacy pollutants. Further, by including "as appropriate," this change clarifies that the District shall consider all EPA comments and will modify the Plan to incorporate them appropriately but not necessarily verbatim.

Subpart 2.2.4

The District requests that subpart 2.2.4 be removed from the proposed permit.

This subpart as proposed requires the District to evaluate options for increasing the District's Stormwater Fee and, if determined by the District to be feasible, requires the District to propose an increase. However, the District is already required to provide sufficient finances, staff, equipment and support to implement the provisions of the permit per subsection 1.4.3 of the proposed permit, and a specific requirement of this nature is therefore unnecessary. The requirement also impinges on the sovereignty of the District because funding of the responsibilities and duties of the District as required in the permit is within the discretion of the District, not a federal agency, and while the increase in fees may be "feasible," it may not be necessary to meet the permit requirements based on other fiscal resources. For these reasons, this requirement is inappropriate for the MS4 permit.

Subpart 2.2.5.2

The District requests the language in this subpart be amended to read as follows:

Should the permittee determine that changes to the stormwater management regulations are feasible and warranted, the permittee shall develop the following: an implementation strategy, which includes public outreach; schedules that may include phasing; and other variables. This analysis and the strategy, if applicable, must be included as a component of the updated Stormwater Management Program that is made available for public notice and comment and submitted to EPA per the schedule in Part 2.8 herein.

This subpart as proposed requires the District to develop an implementation strategy to effect whatever regulatory changes are deemed feasible and warranted. However, the determination as to whether changes to the stormwater management regulations are feasible and warranted must be made by the District. As currently worded, this responsibility is unclear in Part 2.2.5.2, and the language must be amended as requested

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to clearly assign responsibility for the determination as to whether changes are feasible and warranted to the District.

Subpart 2.2.6

The District requests the language in Subpart 2.2.6.1 be amended to read as follows:

The permittee shall update the Consolidated TMDL Implementation Plan to address any new or revised TMDL as required in Subpart 2.2.8, to include:

Subparts 2.2.6 and 2.2.8 both address requirements for updating the Consolidated TMDL Implementation Plan, but do so in a confusing and conflicting manner. Subpart 2.2.6 requires the TMDL IP to be updated within six months of EPA approval of any new or revised TMDL. On the other hand, Subpart 2.2.8 requires an updated Consolidated TMDL IP to be published for public comment 15 months prior to the expiration of the permit, and for this updated IP to be submitted to EPA alongside the District's permit reapplication 9 months prior to the permit's expiration. Multiple TMDLs likely will be established or revised during the permit term. As drafted, the combined effect of Subparts 2.2.6 and 2.2.8 would be that the Consolidated TMDL IP would be in a constant and needlessly duplicative state of revision for much of the permit term.

The requested amendment would require the District to only do a single update of the TMDL IP on the timeline required by Subpart 2.2.8. and would accordingly account for all new and revised TMDLs, as well as any new assessments and strategies for implementation.

Subpart 2.2.7

The District requests the language in Subpart 2.2.7 be amended to read as follows:

Should implementation fall short of any milestone stipulated in this permit, the permittee shall make appropriate adjustments to the Consolidated TMDL Implementation Plan and commence revised implementation within 6 months, unless EPA approves a written request from the permittee for a different schedule. The Plan modification shall include a description and implementation schedule for the additional controls to achieve the incorporated milestones.

Subpart 2.2.7 as proposed states "Should implementation fall short of any milestone or benchmark stipulated in this permit, the permittee shall make appropriate adjustments to the Consolidated TMDL Implementation Plan and commence revised implementation within 6 months, unless EPA approves a written request from the permittee for a different schedule." This type of adaptive management adjustment is appropriate in cases where implementation falls short of a milestone, but is not appropriate for an annual benchmark.

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Benchmarks are an adaptive management aid, and DOEE will report on annual performance relative to benchmarks in each Annual Report. This reporting will include context and explanation of any annual shortfall relative to a benchmark, along with projections of future performance and options for the District to accelerate implementation. However, missing individual benchmarks does not mean that milestones necessarily will also be missed. Ultimately, it is the milestone that matters.

Subpart 2.4.1

The District requests that Subpart 2.4.1 be removed from the proposed permit.

While the District has committed to evaluating options to achieve greater stormwater retention through updates to its stormwater management regulations, it strongly disagrees with the elimination of current exemptions from its regulations by a date certain. The District's current stormwater management regulations include retention-based performance standards that are among the most protective in the nation and that are triggered by smaller project sizes save only one other jurisdiction. The elimination of exemptions permitted under the current regulations without any support through study or analysis of the impact this would cause is arbitrary and capricious, and goes well beyond any requirements in any other MS4 permit in the country. Furthermore, it is inconsistent with the requirements in Subpart 2.2.5, which requires an analysis for the District to determine if any changes to the stormwater management regulations are warranted and feasible.

The January 1, 2019 deadline for any new requirements to go into effect also is unfeasible and inconsistent internally with other requirements of the proposed permit. Subpart 2.2.5 requires the District to report on options for updating its stormwater management regulations in its 2019 Annual Report, which is due in December 2019. Subpart 2.4.1 requires a description of a program to implement updated stormwater management regulations in the 2018 Annual Report, which is due in December 2018. It is unreasonable to require the description of an implementation program before the analysis to explore options for that program has been completed. Furthermore, once this analysis and reporting is complete, it would take at least two years to implement any changes identified as feasible in accordance with the District's rulemaking process.

The requirement as proposed also is extremely burdensome, arbitrary, and capricious. If kept as proposed, every project in the MS4 area that breaks ground or conducts renovation in an existing structure would be subject to regulation. This would include utility repair, sidewalk replacement, planting of gardens, and minor interior renovations such as replacing drywall, to name but a few of the types of projects currently not subject to regulation. The District currently issues approximately 1,800 erosion and sediment control permits each year for projects that disturb over 50 square feet. The District also issues thousands of permits for relatively minor interior renovations. Lowering the threshold for requiring stormwater management to all of these projects would impose significant and unwarranted costs on the District and its residents. For some small

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projects, this would result in stormwater compliance costs that significantly exceed total construction costs for the project.

In addition, the District notes that the heading for Part 2.4 is "Public Right-of-Way Retrofit Planning," but the requirements of Subpart 2.4.1 impact projects beyond the PROW.

Subpart 2.4.2

The District requests that Subpart 2.4.2 be amended as follows:

With the 2020 Annual Report, for public right-of-way projects that do not include a design process, the permittee shall submit a determination of standardized designs that optimize cost, performance, community palatability and other relevant factors.

The language as proposed is unclear and overly broad. Projects that involve site-specific design are already achieving maximum retention practicable through the District's regulatory MEP process. For those projects that do not involve site-specific design, the development of standardized optimal designs would be useful for achieving stormwater retention without the need to incur site-specific design costs.

In addition, if EPA's intent with this provision is as a stepping stone to eliminating the MEP standard for PROW projects under future permits, the District opposes such a change.

Subpart 2.7.4

The District requests that Subpart 2.7.4 be amended as follows:

The permittee shall provide input during regulatory reviews to stakeholders developing and implementing flood management projects in areas of known flood hazard, including to promote the implementation of green infrastructure measures along with other control measures and to coordinate with neighboring jurisdictions to explore a watershed-wide approach in stormwater and flood management within the MS4 Permit Area.

The requirement to implement flood management projects as proposed is beyond the scope of the MS4 permit program. The requirement should be limited to providing input to other stakeholders who are actively implementing flood management projects to ensure that any such project incorporates elements to improve stormwater management and implement green infrastructure, to the extent possible.

Subpart 2.8, Table 2

The District requests that the sixth item in Table 2, "Cost Benefit Analysis...", be amended as follows:

"Analysis of Updating the Stormwater Regulations (2.2.5),"

This change is necessary to ensure consistency with the language in Subpart 2.2.5.

The District also requests the second footnote to Table 2 in Subpart 2.8 be amended as follows:

*** The District shall make all of these plans and assessments available on the District's website.*

Subpart 2.8 and Table 2 summarize the deliverables, plans, and SWMP elements that must be submitted to EPA during the permit term including which of these are subject to EPA approval and/or must be published for a formal public notice and comment period. However, the second footnote on Table 2 as proposed requires the District to make all of the items included in the table available on its website, and then to "consider any input received." In essence, this requirement makes everything subject to public notice and comment, whether required by District rules and procedures or not. Furthermore, the requirement to "consider" any input received is ambiguous. It is unclear how the District will be able to demonstrate it considered whatever input is received, and the requirement is therefore unreasonable and capricious.. The requested change would clarify that any public input, and subsequent consideration of public input, is limited to the elements of Table 2 that specifically require formal notice and comment.

In addition, in other of these comments, the District has requested a number of changes to the nature and timelines for many of these submittal requirements. Table 2 should be updated accordingly to reflect these changes in the final permit.

PART 3

Subpart 3.1.1.2

The District requests the language in this subpart be amended as follows:

The permittee shall annually post on its website the status of all projects required to comply with the stormwater management regulations, including the 1.2" total performance volume calculated for the project, the amount of stormwater retention volume achieved on-site, the amount of stormwater retention volume achieved off-site, and the compliance status of each project with an off-site retention volume.

These changes are requested to clarify the requirement.

Subpart 3.1.2.2

This requirement as proposed is unreasonable in that the requirement cannot be implemented without revising the stormwater regulations. The District's process for revising regulations, which include a public comment period, would require a minimum of two years to finalize. The District requests that this subpart be revised to recognize this reality.

Subpart 3.1.2.3

The District requests the language in this part be amended as follows:

The permittee shall establish a Stormwater Retention Credit Purchase Agreement Program and establish a program to provide technical and outreach support for green infrastructure site identification for the purposes of SRC generation. All SRCs purchased by the District shall be retired to achieve additional benefit to District water bodies.

This SRC Purchase Agreement Program has been established, with \$12.75 million set aside to implement the program. However, specifying the amount of funding for this or any program in the MS4 permit improperly impinges on the District's sovereignty. The amount of funds to be allocated to the District's SRC program is a sovereign issue that is legally within District's discretion, and subject to available funding and District financing laws, not EPA requirements.

Subpart 3.1.3

The District interprets this requirement to implement projects in the PROW to achieve the maximum feasible on-site stormwater retention, to be consistent with the current stormwater regulations and to recognize that compliance is to the maximum extent practicable.

Subpart 3.1.4.2

The District requests that Subpart 3.1.4.2 be removed from the proposed permit, for the same reasons articulated for the removal of Subpart 2.4.1.

While the District has committed to evaluating options to achieve greater stormwater retention through updates to its stormwater management regulations, it strongly disagrees with the elimination of current exemptions from its regulations by a date certain. The District's current stormwater management regulations include retention-based performance standards that are among the most protective in the nation and that are

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triggered by smaller project sizes save only one other jurisdiction. The elimination of exemptions permitted under the current regulations without any support through study or analysis of the impact this would cause is arbitrary and capricious, and goes well beyond any requirements in any other MS4 permit in the country. Furthermore, it is inconsistent with the requirements in Subpart 2.2.5, which requires an analysis for the District to determine if any changes to the stormwater management regulations are warranted and feasible.

The requirement as proposed is extremely burdensome, arbitrary, and capricious. If kept as proposed, every project in the MS4 area that breaks ground or conducts renovation in an existing structure would be subject to regulation. This would include utility repairs, sidewalk replacement, planting of gardens, and minor interior renovations such as replacing drywall, to name but a few of the types of projects currently not subject to regulation. The District currently issues approximately 1,800 erosion and sediment control permits each year for projects that disturb over 50 square feet. The District also issues thousands of permits for relatively minor interior renovations. Lowering the threshold for requiring stormwater management to all of these projects would impose significant and unwarranted costs on the District and its residents. For some small projects, this would result in stormwater compliance costs that significantly exceed total construction costs for the project.

Subpart 3.2.1

The District requests the heading in this subpart be amended to read as follows:

Retrofits for Existing Discharges

The e heading for this subpart "Retrofits of Impervious Surfaces," as proposed excludes compacted cover that is retrofitted to increase retention. However, this is not consistent with the District's retrofit plan that does allow these areas of retrofit to be included. In a highly developed urban area, such as the District, compacted areas often perform similarly to impervious surfaces in producing stormwater runoff.

Subpart 3.2.4

The District requests the language in this subpart be amended to read as follows:

During this permit term, the permittee shall achieve a minimum net annual tree planting rate of 8,000 plantings annually within the District, with the objective of achieving a District-wide urban tree canopy coverage of 40% by 2032. The annual total tree planting shall be calculated as a net increase, such that annual mortality or other loss is also included in the estimate. The permittee shall ensure that trees are planted and maintained to achieve optimal stormwater retention and tree survival rate, including through requirements for adequately designed and sized tree boxes. Trees

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shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

This change allows the District to achieve this tree planting requirement within the entire District, as opposed to limiting the requirement to the MS4 area. As proposed, Subpart 3.2.4 requires the District to achieve a minimum net annual tree planting rate of 8,000 plantings annually within the MS4 Permit Area, with the objective of achieving a District-wide urban tree canopy coverage of 40% by 2032. For the past several years, the District has exceeded this planting rate across the entire city, putting the District well on track to achieve the 2032 tree canopy goal, which is a city-wide goal. However, limiting this rate of planting entirely to the MS4 area, as in the proposed permit, would represent nearly a 100% increase over the rate required by the current permit, and is therefore unreasonable, arbitrary, and capricious. Such a change would require the District to achieve a planting rate adequate to meet a city-wide goal in a substantially more constrained portion of the city, which would require a substantial reallocation of and increase to the District's funding and resources for tree canopy efforts.

Subpart 3.3.2.1

The District requests that the language in this subpart be amended as follows:

The permittee shall implement stormwater pollution prevention measures at all District-owned or leased facilities and job sites within the MS4 Permit Area where industrial activities occur or are considered critical sources as defined at Part 8 herein. For any operations with coverage under the EPA Multi-Sector General Permit (MSGP) or individual NPDES permit, the provisions of the MSGP or individual NPDES permit supersede the requirements of this provision.

This change would clarify that, for sites operating under an individual NPDES permit or the MSGP permit, the provisions of those permits supersede the pollution prevention requirements of the MS4 permit.

Subpart 3.3.2.4

The District requests the language in this subpart be amended as follows:

Wash water includes water from washing vehicles and equipment, water from washing building exteriors when it contains soap and other pollutants, and the dumping of wash water used in the interior of buildings. *For wash water at municipal facilities the permittee shall*

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eliminate discharges of pollutants into the MS4 by implementing any of the following measures:

1. *Collect for off-site disposal or discharge to the sanitary sewer system; or*
2. *Equip with a pre-treatment device.*

Subpart 3.3.2.4 as proposed prohibits wash water from District-owned and operated facilities being “discharged to, from and through the MS4 or directly to District waterways.” This would preclude discharges of wash water even in cases in which those discharges are first passed through an appropriate pre-treatment device, which is unreasonable, arbitrary, and capricious. Further, “wash water” is among the authorized non-stormwater discharges permitted under Part 1.3, provided such discharges comply with “appropriate stormwater activities and controls.” Subpart 3.3.2.4 as proposed would prohibit the use of any such appropriate pre-treatment prior to discharge of wash water from municipal facilities.

The requested amended language is consistent with the approach for municipal wash water discharges required under the District's current MS4 Permit.

Subpart 3.3.5

The District requests the language in this subpart be amended as follows:

The permittee shall implement the District's outfall repair plan to ensure that outfalls in poor repair do not impair water quality. During this permit term, the permittee shall repair 50 outfalls in need of repair by the end of the permit term. If, however, approval of any repair project requires a permit by a third party and the permittee demonstrates that it is diligently pursuing obtaining the third party permit, projects that are delayed by the third party permitting process shall be counted toward the 50 outfall requirement. The permittee may substitute a portion of outfall repairs with stream restoration with a demonstration that the in-stream water quality benefits of restoration exceed those derived from outfall repairs.

The annual requirement in this subpart is impractical. As proposed, the subpart requires the District to implement its 2013 Outfall Repair Plan by repairing approximately 10% of outfalls in need of repair each year of the permit term, beginning in the first year of the permit. Ultimately, 50% of all outfalls in need of repair are required to be repaired by the end of the permit term. In developing the Outfall Repair Plan, the District undertook a thorough study that identified 101 outfalls in need of repair due to their potential to impact water quality. During the current permit term, the District repaired or restored 51 outfalls. In continuing to implement its Outfall Repair Plan, the District will repair or restore another 50 outfalls by the end of the next permit term. However, because these repair and restoration efforts are capital projects that are time-consuming to plan, design, and construct, a performance requirement that sets annual levels of performance, particularly beginning in the first year of the permit term, is impractical. Instead, the 50

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outfall metric should apply to the entire permit term, which will allow the District the necessary flexibility to address the outfalls in need of repair while still meeting the ultimate metric within the permit term. Measuring outfall repair as an absolute number as requested rather than as a percentage as proposed is simpler.

Further, because of the potential for projects to be delayed by third party permitting requirements despite the District's best efforts, the permit must allow these delayed projects to be counted to the overall requirement for 50 outfalls to be repaired. Many of the MS4 outfalls are located on land managed by third parties, principally Federal agencies. These agencies have a history of requiring the District to meet complex and time consuming conditions for permitting access and construction conditions and limitations before commencing repair projects. Such federal permitting requirements have, in a number of cases, required more than a year, and as much as four years, before a project can be scheduled for construction. Additionally, many permits require environmental studies as part of the approval process. These studies add to the time required to obtain a repair permit.

Subpart 3.3.6

The District requests the language in this subpart be amended as follows:

The permittee shall conduct street sweeping on no less than 44,000 road miles annually in the District in accordance with the following requirements:

Subpart 3.3.6 as proposed requires the District to conduct street sweeping on no less than 44,000 road miles annually solely within the MS4 area rather than District-wide, with 25,000 miles of that total swept on highway and arterial roads, 13,000 miles from signed sweeping routes, and 6,000 miles from Ward sweeping. This represents a significant increase in sweeping operations in the MS4 area over the requirements in the current MS4 Permit, and compliance would require diversion of resources from other District projects and efforts that would ultimately result in greater water quality benefits than this street sweeping requirement. Expanding DPW's operations to ensure that 44,000 miles are swept solely within the MS4 area each year would necessitate the expenditure of significant capital costs for new equipment in addition to increased costs for staff and labor. The requirement as proposed is unreasonable, arbitrary, and capricious.

PART 4

Subpart 4.1.1.2

The District requests the language in Subpart 4.1.1.2 be amended as follows:

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Evaluate the impact of the District's MS4 on the overall health of receiving waters.

Subpart 4.3

The District requests the language in Subpart 4.3 be amended as follows:

In performing the Water Quality Assessment required by Part 4.1, the District shall make use of data and information collected by other District monitoring and sampling efforts, such as its receiving water assessment program, to inform the assessment of the impact the District's MS4 has on the overall health of receiving waters.

Subpart 4.3 as proposed requires the District to establish a Quality Assurance Program Plan (QAPP) for a receiving waters assessment program for 26 Wadeable Stream Sites selected through a random sampling approach and establishes specific parameters for the program. It also requires the District to monitor water quality, and assess benthic macroinvertebrates, geomorphology, and habitat quality in the District's streams. These requirements appear to build upon the monitoring approaches proposed in the District's 2015 Revised Monitoring Program, which was completed as an MS4 permit requirement during the current permit term. However, the provision contains prescriptive language regarding the District's water quality sampling and assessment efforts that are a state function, not a municipal function, and inform other state functions, including determinations of attainment of District water quality standards and development of 303(d) lists. Such state functions should not be incorporated into and defined by an MS4 Permit.

In addition, the receiving waters assessment program and other water quality related efforts are largely funded through EPA grants. The use of these grants to implement these efforts may not be allowed if they are requirements of the District's MS4 Permit.

The language as amended clarifies that the scope of the Permit's monitoring requirements is limited to stream assessments (incorporating macroinvertebrate sampling, geomorphological assessments and habitat assessments) that assess the impact the MS4 is having on the District's streams. These assessments could draw upon available data from other District water quality sampling efforts, but the nature of those water quality sampling efforts themselves should not be dictated by the MS4 permit.

Subpart 4.4.2

The District recommends removing this part from the Permit, for the reasons stated in the comments provided for Subpart 2.2.3.1.

PART 8

"Acres Managed"

The District requests the language in this definition be amended to read:

"Acres Managed" refers to any area that is treated (or managed) by stormwater control measures above and beyond what is already implemented in the MS4 area on the effective date of this permit. Acres managed is not a direct measure of pollutant reduction, but stands as a collective indicator of reductions in multiple pollutants in stormwater as would be realized from on-site retention of stormwater as applied to the relevant drainage area and standardized by acres. Not all stormwater control measures will be retention measures; for those that are not, 'acres managed' will be estimated based on a pollutant reduction equivalent.

The requested revised definition removes the reference to the 1.2" stormwater retention standard. Removing this reference would make the definition consistent with the types of stormwater projects being undertaken in the District. These include major land disturbing projects complying with the 1.2" stormwater retention standard, major substantial improvement projects complying with the 0.8" stormwater retention standard, projects in the existing PROW complying with the MEP process, voluntary retention projects, and nonstructural practices. This approach as presently implemented is consistent with the TMDL IP's projection of acres managed in the District, which drew on the combined impact of these efforts².

"Critical Sources"

The District requests the language in this definition be amended to read:

"Critical Sources" are those activities and operations that make, use, store, transport or dispose of materials or substances that have the potential to become pollutants in stormwater discharges and include the following:

- a. Commercial automotive service facilities, e.g., car wash, service, fueling and salvage facilities, including mobile operations.*
- b. Facilities conducting industrial activities, as defined at 40 C.F.R. §122.26(b)(14); and requiring coverage under: (1) the MSGP for Stormwater Discharges Associated with Industrial Activities; or (2) an individual permit, including but not limited to private solid waste transfer stations, hazardous waste treatment, disposal*

² DOEE estimates that approximately 85% of this projected area will result from projects complying with the 1.2" stormwater retention standard, with the remainder comprised of a combination of the other project types.

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- and/or recovery plants, industrial facilities subject to SARA or EPCRA Title III.*
- c. Aircraft or ship/boat maintenance and fueling activities.*
 - d. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development that is one acre or greater.*
 - e. Dry cleaners.*
 - f. Salvage and recycling operations.*
 - g. Other facilities that the permittee may identify as a critical source.*

The definition in the proposed permit is too broad and overly inclusive, essentially covering every building or facility in the District. It is unreasonable, arbitrary and capricious. The requested revised definition is consistent with, but expands on, the identification of critical sources in the current MS4 Permit at Subpart 4.4.1.1.