

**2018 DC MS4 Permit**  
**EPA Responses to Public Comments Received on the Draft Permits**

On November 17, 2016, EPA made the draft DC MS4 permit available for public notice and comment for an initial period of 45 days. Upon request from DOEE, DC Water and a group of environmental organizations, EPA extended the public notice and comment period by 15 days, for a total of 60 days. The public notice and comment period on the November 2016 draft of the DC MS4 Permit closed on January 17, 2017.

EPA made numerous revisions to the draft DC MS4 Permit in response to the public comments received. On August 25, 2017, EPA made the revised draft DC MS4 permit available for public notice and comment for an initial period of 30 days. Upon request from NRDC, CBF, and Earthjustice, EPA extended the public notice and comment period by 30 days, for a total of 60 days. The public notice and comment period on the August 25, 2017 draft of the DC MS4 Permit closed on October 24, 2017.

This document provides EPA’s responses to the public comments received on the two drafts of the MS4 Permit made available for public notice and comment. Each comment is reproduced verbatim, followed by the response to that comment. As some of the numbering changed between the November 2016 and August 2017 drafts of the DC MS4 Permit, for ease of review and reference, this document organizes the comments according to the section of the permit as numbered at the time of comment and keeps the public comments on the two drafts separate, providing cross-references where appropriate.

**Comments Received on November 2016 Draft**

**Draft Permit Part 1: Discharges Authorized Under This Permit**  
**Comments on Draft Permit Section 1.1: MS4 Permit Area**

1. Comment, DC Water (footnotes removed):

The Draft Permit describes the “MS4 Permit Area,” in part, as follows:

This permit covers all areas within the jurisdictional boundary of the District of Columbia (DC, District or Permittee) served by or contributing to discharges from the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. . . .

The use of the term “Permittee” is incorrect when referring to the geographic description of the District of Columbia because “Permittee” as currently defined includes departments and other instrumentalities of the District of Columbia. Such instrumentalities do not have traditional jurisdictional boundaries in the same sense as does the political entity that is the District and, thus, are not proper points of reference for a geographic definition of this kind.

The definition of the “MS4 Permit Area” should thus be revised to read, “This permit covers all areas within the jurisdictional boundary of the District of Columbia (DC, or District) served by or contributing to discharges from the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia.”

EPA Response to Comment 1:

EPA agrees with this comment and has modified the language in the permit per the suggestion.

2. Comment, David Bardin:

Thank you for all the work by EPA Region 3 and its partners that goes into the MS4 program generally and the draft renewal NPDES permit specifically. Even though DC and EPA do much, you can do more.

Please keep in mind that every sub-watershed, every stream segment in each neighborhood must count if we are to build, hold, and deepen popular support for environmental programs. Public servants, firmly committed to protecting the sum total of DC waterways, might overlook local aspects.

- It is not enough to build up algorithms, models, and statistical data for all of DC, or for just the three Major Basins (Anacostia, Potomac, and Rock Creek).
- Nor is it enough to provide data and options which only experts can understand.

EPA should require DC to disclose every MS4 watershed, by listing and mapping. Strangely, DC's 2015 MS4 Annual Report mapped only the *combined* sewersheds (Figure 5 at page 38).

EPA Response to Comment 2:

Because DOEE has already done this mapping, EPA does not need to require it in this permit. For examples of more detailed watershed and sewershed delineations, take a look at the presentations at the end of some of the District’s Project Update meeting minutes (<http://dcstormwaterplan.org/project-updates/>). The District has robust GIS and modeling capabilities, and has and can create a variety of geospatial products including maps of the subwatersheds and sewersheds in the District. See for example Figure 4-5 (Tributary Delineations) in the 2015 *Comprehensive Baseline Analysis* ([http://dcstormwaterplan.org/wp-content/uploads/Final\\_Comp\\_Baseline\\_Analysis\\_2015-with-Appendices.pdf](http://dcstormwaterplan.org/wp-content/uploads/Final_Comp_Baseline_Analysis_2015-with-Appendices.pdf)).

Also, see the Fact Sheet discussion regarding Subsection 5.3.2 of the Final Permit, which that describes the new web-based graphical interface for the District’s stormwater program that will include many of the features requested by the commenter in a user-friendly, publicly accessible format.

## Comments on Draft Permit Section 1.2: Permittee

### 3. Comment, DOEE:

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.

### EPA Response to Comment 3:

EPA notes that, as a *definition*, the commenter's requested language was already included in the 2016 draft permit; this definition is also included in the 2018 Final Permit. See "Definitions", located in Part 8. Subsection 2.3.1 of the 2012 Final Revised Permit, following the settlement, continued to include a lengthy description of the District departments, agencies and authorities with obligations under the permit. EPA emphasizes, for the record, that those departments, agencies and authorities are not relieved of those obligations because of a simplified definition, only that EPA considers that the District will manage collaborations of local units of government. Consistent with the underlying basis for simplifying the definition of "Permittee" in the 2012 Revised Final Permit, EPA removed as no longer necessary Section 2.3 (Stormwater Management Program Administration/Permittee Responsibilities) of the 2012 Final Revised Permit, and greatly simplified the description of Permittee. However, in order not to lose some basic context, the Final Permit now reads as follows:

*The "Permittee" is the Government of the District of Columbia. The Permittee has designated the District Department of Energy and Environment (DOEE) as the agency responsible for managing the MS4 Stormwater Management Program (SWMP). If the permittee designates a different responsible agency, it must notify EPA in writing within one week.*

### 4. Comment, DC Water (footnotes removed):

The Draft Permit defines the "Permittee" as the "Government of the District of Columbia, including all departments, agencies and authorities."

In November 2011, DC Water filed a Petition to Review the MS4 NPDES Permit, dated October 7, 2011 (2011 Permit), issued to the Government of District of Columbia, which defined the "Permittee" as follows.

"Permittee" refers to the Government of the District of Columbia and all subordinate District and independent agencies, such as the District of Columbia

Water and Sewer Authority, directly accountable and responsible to the City Council and Mayor as authorized under the Stormwater Permit Compliance Amendment Act of 2000 and any subsequent amendments for administering, coordinating, implementing, and managing stormwater for MS4 activities within the boundaries of the District of Columbia.

DC Water and the Wet Weather Partnership argued that the 2011 Permit failed to accurately identify DC Water's responsibilities for storm water management under the Permit and requested EPA to revise the 2011 Permit to clarify DC Water's responsibilities under the Permit to avoid any confusion over which entity is responsible for Permit implementation. In the permit modification that followed, the definition of "Permittee" was changed to read "'Permittee' refers to the Government of the District of Columbia." The Fact Sheet supporting that modification stated that the modification "provides clarity that the Government of the District of Columbia is the sole permittee."

While the Draft Permit does not explicitly enumerate DC Water as a permittee, or assign obligations directly to DC Water that could be interpreted to make DC Water a *de facto* permittee, the draft definition of "Permittee" has been changed since the 2012 Final Revised Permit to include ". . . all departments, agencies and authorities." This added language could be mistakenly read to suggest that DC Water is one such department, agency or authority and, thus, is a named permittee under the Draft Permit. Disturbingly, an example of the potential for such confusion appears in the Fact Sheet for the Draft Permit which includes DC Water among the class of "District agencies."

An additional reason for removal of this section of the permit is that sufficient coordination among District agencies is currently occurring as expected at the time of the 2011 permit; see e.g., Memoranda of Understanding between DOEE and the following other District agencies DDOT (as amended, Sept. 28, 2014), Dept. of Public Works (Sept. 14, 2015), Dept. of General Services (May 12, 2014), and DC Water (Sept. 10, 2014).

We assume that EPA Region 3 does not intend to reverse its position of 2012 and now name, directly or indirectly, DC Water as a permittee in this renewal. In order to clarify this, DC Water requests that EPA revise Section 1.2 of the Draft Permit to read, "[t]he "permittee" is the Government of the District of Columbia."

EPA Response to Comment 4:

See Response to Comment 3. See also the discussion in the Fact Sheet regarding Section 1.2 of the 2018 Final Permit.

## Comments on Draft Permit Section 1.3: Authorized Discharges

### 5. Comment, DOEE:

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.

### EPA Response to Comment 5:

EPA maintains that the three conditions specified in the original language of the 2016 draft permit provide clarity and certainty. However, EPA agrees that inclusion of wash water as a discharge authorized under this permit is inappropriate given the requirement of Subsection 3.3.2.4, and has removed it from Section 1.3 in the 2018 Final Permit.

EPA also notes that specific types of groundwater discharges *may* eventually be required to obtain coverage under the *General Permit for Uncontaminated Discharges from Dewatering Activities within the District of Columbia* (current status pre-public notice), which EPA Region 3 expects to issue during the term of the DC MS4 permit. That dewatering general permit is still being developed and therefore has not yet been made available for public notice and comment. Until that permit is finalized, the groundwater discharges specified in Section 1.3 are authorized if the conditions in Part 3 of the 2018 Final Permit are met.

6. Comment, DC Water:

The draft Permit uses the phrase “to, from, and through the DC MS4” which appears to imply that discharges to the MS4 system are somehow altered by the stormwater piping system and as a consequence focuses compliance to include contaminants added by the stormwater piping system. DC Water notes that the stormwater piping system does not add contaminants to the discharges that enter the system, and requests EPA to set the point of compliance for pollution prevention measure as the point where discharges enter the DC MS4 system and, for compliance with any end-of-pipe water quality-based effluent limitations, at the point where the DC MS4 system discharges to its respective receiving waters. It is at these locations that those standards are properly applied. DC Water therefore requests that the word “through” should be deleted from this phrase in each instance in which it is used in the permit, changing the phrase to “to and from the DC MS4.”

EPA Response to Comment 6:

EPA declines to make the requested change in the draft permit. The federal regulations specifically use the term “through” when describing large and medium MS4 discharges. See 40 C.F.R. § 122.26(a)(4). Also, and more practically, “through” is a relevant concept in the context of pollutant contributions. The system does have the potential to contribute pollutants, not only from breakdown of the system materials themselves, but also due to the system’s ability to sequester pollutants for long periods of time. For example, ongoing discharges of legacy pollutants from the MS4 may be the result of deposits or reservoirs of these pollutants in the system, even though their uses have long since been discontinued. EPA also notes, in response to points made by the commenter, that MS4 permit conditions are based on a multifaceted foundation of not just end-of-pipe limits, but also a variety of “up-stream” sources and activities, because the quality of discharges into the system governs the quality of discharges from the system.

7. Comment, DC Water:

Section 1.3 authorizes the discharge of certain non-storm waters, including “wash water” where “where: (1) appropriate stormwater activities and controls required by this permit have been applied; (2) such discharges are managed so that water quality is not further impaired; and (3) 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.” Section 3.3.2.4 prohibits the discharge of wash water from “District-owned and operated facilities.” DC Water requests clarification of these sections and their effect when read together. We also request confirmation that this permit will constitute the NPDES permit required for discharges of wash water (and other listed non-storm waters) in satisfaction of Section 1.3(3). In the absence of that confirmation, the section would be rendered nugatory and, thus,

arbitrary and capricious.

EPA Response to Comment 7:

See Response to Comment 5.

**Comments on Draft Permit Section 1.5: Discharge Limits**

8. Comment, DC Water (footnotes removed):

Section 1.5.3 of the Draft Permit requires that the permittee “Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body . . .” This language is ambiguous and potentially misleading to the extent that “established” TMDLs that have not been “approved” are not effective for purposes of NPDES permitting.

EPA Response to Comment 8:

TMDLs that have been developed by the District must be *approved* or disapproved by EPA. In addition, EPA may *establish* TMDLs, as it has done for nitrogen, phosphorus and sediment in the Chesapeake Bay Watershed. Therefore, both terms are appropriate and necessary to cover all of the TMDLs in effect for District waters. However, in order to clarify the language, EPA has revised Section 1.5.3 to read as follows in the 2018 Final Permit: “Attain applicable wasteload allocations (WLAs) for each Total Maximum Daily Load (TMDL) established or approved by EPA for each receiving water body consistent with...”.

9. Comment, DOEE (footnotes removed):

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 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.

In addition to being consistent with the approach used in developing the TMDL IP, 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.

EPA Response to Comment 9:

EPA understands the Permittee's concerns about the uncertainty associated with specific locations of development in the District over the next five years and has made changes to the permit to account for that uncertainty as described below, but has not made the exact change proposed.

Following receipt of this comment, EPA requested additional analysis from the District to inform how some flexibility could be provided without compromising on the overall 1,038 acres managed milestone, and also ensuring that substantive progress was made in each of the three major basins. The Districted undertook additional assessment and provided EPA, in spreadsheet form, *TMDL IP Milestone Analyses FINAL*. This analysis identifies and tallies potential/expected development projects and opportunities throughout the MS4 Permit Area in each of the three major basins, and is included in the Administrative Record for the Final Permit.

Informed by the District's analysis, EPA modified the 5-year milestones, expressed as limits in the Final Permit, for the 3 major sub-basins in DC in order



to account for the uncertainty about specific locations of future development. Table 1 of the Final Permit reads as follows:

<b>Major Basin</b>	<b>5-Year Limits (Acres Managed)</b>
Anacostia River	307
Potomac River	116
Rock Creek	96
Anywhere in the MS4 Permit Area	519
<b>Total</b>	<b>1,038</b>

The total of 1,038 acres remains unchanged, and the revised scheme ensures that substantive implementation of control measures will occur in all watersheds. Specifically, EPA has included limits that allow the Permittee to achieve half of the 1,038 total (519 acres managed) in any major basin in the MS4 Permit Area. The remaining 519 acres managed must be achieved in specific major basins. This framework should provide the District some flexibility to take advantage of opportunities as they arise.

See additional explanation in the Fact Sheet discussion for Subsection 1.5.3.1 of the Final Permit.

10. Comment, DOEE:

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 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.

EPA Response to Comment 10:

EPA understands that opportunities for implementation of stormwater controls depend somewhat on where and how much development occurs. However, the District has provided reasonable projections for development in the next several years (*TMDL IP Milestone Analyses FINAL*), and has a number of other programs and incentives to supplement stormwater control measure implementation associated with development activities. The District will also be undertaking additional assessment and planning in order to inform and refine requirements in the next permit term. These estimates have all been included in EPA's assessment of what constitutes the maximum extent practicable (MEP) for this permit term (see Fact Sheet discussions for Subsection 1.5.3.1 and 2.1). EPA will reassess these milestones, in the context of MEP, with each permit reissuance.

11. Comment, DC Water:

The Draft Permit sets Numeric Milestones in Acres, but it is not clear if the number of acres assigned applies District wide or just within the DC MS4 area. DC Water requests EPA to revise the Draft permit to read,

1.5.3.1 To be attained by the end of this five-year permit term in the DC MS4 area, a collective reduction in all TMDL pollutants of concern other than trash, 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), in any balance of watersheds across the District in the DC MS4 area.

EPA Response to Comment 11:

This permit only applies to the MS4 Permit Area of the District as stipulated in Section 1.1 of the Final Permit. EPA has made the suggested modification given that this is a pivotal provision of the Final Permit.

EPA also notes that the requirement for PROW implementation is now 62 acres managed (see Fact Sheet discussion for Subsection 1.5.3.1).

12. Comment, National Association of Home Builders:

EPA must clarify whether the scope of their proposed new "acres managed" discharge limit includes voluntary projects.

NAHB asks EPA to clarify expectations behind the proposed *Numeric Milestones in Acres Managed* discharge limit (Proposed Permit, Part 1.5.3.1). EPA's definition provided below does not specify whether reductions measured

in this performance metric may include projects not governed by the District's existing retention standard:

*“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 1.2” 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. - (Proposed Permit, Page 47)*

NAHB is interested in the ability of such a metric to encourage or incentivize voluntary or low-cost stormwater control projects. In many cases, opportunities for high-value projects exist outside traditionally permitted activities (e.g., new or redevelopment). We request that voluntary activities such as street sweeping, voluntary retrofits, fertilizer reduction, regional flood control projects, and vacant lot restoration be counted in the “acres managed” metric.

#### EPA Response to Comment 12:

EPA agrees with the commenter that there are a variety of opportunities for implementing effective stormwater pollutant reduction projects. EPA encourages voluntary efforts and absolutely expects those types of projects to be included in permit implementation tallies, including in the “acres managed” totals, to the extent the Permittee has a method to convert those projects to “acres managed”, can document implementation of those projects, and can account for ongoing performance/function of those measures. The permit has been structured specifically to allow the Permittee to include voluntary projects in the tallies for acres managed, e.g., RiverSmart Programs (Subsection 3.2.10). When the Permittee can develop reliable estimations for other types of pollutant reductions required by the permit (Subsection 2.5.2), such as stream, buffer and floodplain restoration; tree plantings; catch basin clean outs; or street sweeping, those reductions may and should also be included in the tallies. EPA has also structured the permit to allow for inclusion of preventive measures (Section 3.7) such as the District's coal tar ban and restrictions on phosphorus in lawn fertilizers. EPA plans to work with the Permittee over the next few years to ensure that calculation methodologies for pollutant reductions and/or conversions to “acres managed” (if appropriate), are logical and defensible. In short, the definition of “acres managed” is intended to be inclusive, and does not restrict the types of projects that may be counted. EPA has provided reporting elements for voluntary and other types of projects in the Annual Report Template, and the Permittee has also included these types of projects in its draft on-line “story map” that it will use to

fulfill annual reporting requirements for the public (see Fact Sheet discussion for Subsection 5.3.1 of the Final Permit).

13. Comment, David Bardin:

EPA should require increased DC efforts in the Public Right-of-Way (PROW).

- Although the PROW accounts for almost half of all DC impervious surface, the draft permit would require that only four percent of the effort be in the PROW. (See 1.5.3.1 and 3.2.1 Retrofits of Impervious Surfaces.)
- The draft permit would not even require analyses by DC of costs and benefits of greater PROW efforts. (See 2.4 Public Right-of-Way Retrofit Planning.)
- The draft would defer analysis of other options until 2019 (2.2.4 Stormwater Fee Options Evaluation).

EPA Response to Comment 13:

EPA agrees that public rights-of-way (PROWs) provide excellent opportunities for implementing stormwater controls during road or sidewalk reconstruction, or for targeted implementation of stormwater measures. EPA also notes that implementing on-site retention or other controls on roads and sidewalks in highly urbanized areas, while presenting many opportunities, also presents many challenges, e.g., buried utilities, public safety, public access.

As part of its MEP assessment for the 2016 draft permit, EPA evaluated implementation rates from PROW projects from 2013 (when the District's current stormwater regulations went into effect) and 2015 (based on the last Annual Report received prior to drafting the permit) and some preliminary data provided by the DC Department of Transportation (DDOT). EPA also considered the maturity and resources of DDOT's stormwater program, e.g., designs, and protocols for design reviews.

After EPA proposed the 2016 draft permit, the Permittee submitted its 2016 Annual Report (January 23, 2017). Based on progress reported through the 2016 reporting year, DDOT has successfully implemented stormwater projects for 31 acres managed, with another 31 under construction. Considering that the Permittee has demonstrated the feasibility of implementing 62 acres of PROW projects in this period (4-5 years from effective date of the stormwater regulations to completion), EPA has re-evaluated MEP for projects in PROWs, and has revised this milestone from 46 acres in the 2016 draft permit to 62 acres managed in the Final Permit. However, EPA did not modify the overall total of 1,038 acres in the MS4 Permit Area.

EPA also notes that the Final Permit requires the Permittee to assess all opportunities in the District for additional cost-effective implementation

(Subsection 2.2.4) and also requires the Permittee to develop targeted designs for PROWs to enhance opportunities for better stormwater management in these areas. See Final Fact Sheet for additional discussion.

14. Comment, NRDC et al:

Water Quality Standards & TMDL Implementation. Many of the Draft Permit's proposed requirements are based on elements of DOEE's draft TMDL Implementation Plan, but that plan has not yet been approved by EPA because it falls short of legal requirements in various respects. (We incorporate and attach our comments on the first draft of the plan for reference; although DOEE has released a revised draft of the plan, it does not fully address our concerns, some of which we discuss below.) EPA may not incorporate elements of the plan wholesale into this Draft Permit if they do not meet the standards for MS4 permits.

The proposed 1,038-acre milestone, a core piece of the TMDL Implementation Plan and one of the most important conditions of this Draft Permit, is not sufficiently aggressive to satisfy the requirements applicable to MS4 permits and compliance schedules, and it must be increased. Other requirements incorporated from the TMDL plan delegate too much discretion to the permittee and invite impermissible self-regulation, so the Draft Permit must contain additional details and provide for adequate oversight by EPA and the public. We note that many of the proposed planning requirements in the Draft Permit's TMDL implementation section are exercises that DOEE should have done in the first place when it was developing the TMDL plan, and EPA is essentially giving DOEE an extension on the planning deadline established under the previous 2011 MS4 permit. With this context in mind, we urge EPA to impose more specific and ambitious permit conditions than what this draft contains.

EPA Response to Comment 14:

EPA acknowledges that these commenters have concerns about elements of the 2016 draft permit and addresses those specific concerns, as relevant, in subsequent comments.

Regarding the issue of self-regulation, EPA does not consider strategies, schedules and plans developed and proposed by the permittee to be self-regulation. It is a standard and viable approach (especially in NPDES MS4 programs) for the Permittee to propose to EPA a strategy that will meet water quality objectives within the context of other considerations, e.g., staffing, policies, funding. In fact, this is contemplated by the federal regulations, which stipulate that MS4 permittees shall submit proposed management programs to the permitting authority and that those programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable (MEP). See 40 C.F.R. § 122.26(d)(2)(iv). To that

effect, EPA incorporates relevant measures into the permit either as proposed by the permittee or with modifications to ensure that the MEP framework is realized. As the permitting authority, EPA makes the final decisions, but the Permittee's assessments are crucial to making informed decisions.

With respect to the portion of the comment that discusses the timing of specific permit provisions, EPA agrees that some of the Permittee's strategies submitted with the 2016 TMDL IP were inadequate and need to be revisited. However, EPA does not consider this an "extension on the planning deadline" because planning is an ongoing element of the MS4 program and strategies are regularly refined. The original TMDL IP contained adequate information for EPA to issue the new permit, with both: 1) original provisions as proposed by the Permittee and 2) provisions modified or developed by EPA, where the original provisions were inadequate.

15. Comment, NRDC et al:

The 1,038-Acre Milestone. The Draft Permit's core water quality-based effluent limitation is a so-called "5-year milestone" of 1,038 "acres managed," with acreage sub-targets for each of the three major watersheds in the District. (§ 1.5.3.1, Table 1.) According to the Draft Permit, compliance with this requirement would constitute "adequate progress" toward compliance with WLAs for this permit term. (§§ 1.5.3, 1.6.)

As an initial matter, the text of this proposed requirement is so vague that it would be impossible to measure compliance with it or to enforce it. Most fundamentally, the draft text does not even clearly state that the requirement pertains to management of *stormwater runoff*, although we presume that this is what EPA intended.

EPA Response to Comment 15:

EPA agrees that additional specificity is warranted and has added more specificity to Subsection 1.5.3.1 in response to this comment. See discussion in the Fact Sheet for this Subsection of the Final Permit.

16. Comment, NRDC et al:

The proposed language also does not specify: (a) who is responsible for managing runoff from this land area, i.e., whether the District must implement runoff controls or whether it can take credit for controls implemented by third parties; (b) whether "1,038 acres" refers to total land area, or only land area that is covered by impervious surface, or something else; (c) whether the acreage total can be met anywhere in the District of Columbia or only within the MS4 service area; or (d) the standard to which runoff from this area must be managed (i.e., the 1.2-inch retention standard applicable to new and redevelopment, or some other

standard). Further, the language in the requirement's introductory paragraph (§ 1.5.3.1) is confusing because it describes the milestone as "a collective reduction in all TMDL pollutants of concern other than trash," but the milestone itself is framed only in terms of "acres managed," which, as EPA notes in the Draft Permit's fact sheet, "is *not* a direct measure of pollutant reduction." EPA must revise the proposed language to resolve these ambiguities in order for this requirement to be clear and enforceable.

EPA Response to Comment 16:

EPA responds to each of the comment's subparts in turn:

- (a) This framework has not changed since the last permit in which reduction measures on both public and private lands provide water quality benefits, and thus should all be included in "acres managed" tallies. The permit continues to include provisions for the District to oversee and track both categories of projects (Sections 3.1 and 3.2). In fact, the on-site retention requirement, projects earning SRCs, and a variety of other on-site retention implementation measures such as RiverSmart projects and green roofs are intended to be mostly, though not entirely, implemented by third parties. It may be cost prohibitive and infeasible for the District to meet water quality objectives otherwise.
- (b) EPA is uncertain what the commenter is asking. If the commenter is asking whether an "acre managed" is an actual acre, then EPA clarifies that 1 acre managed = 1 acre treated to the appropriate standard, e.g., 1.2" retention for projects over 5,000 square feet; 0.8" retention for Substantial Improvement Projects; etc. For a more in-depth discussion, as well as several examples, please see the Fact Sheet discussion for Subsection 1.5.3.1.

If the commenter is asking whether land with some existing level of treatment could be included in the tallies, or whether only effectively impervious surfaces are eligible for inclusion in the total, EPA clarifies that the permit does not specifically exclude any area or type of area in the MS4 Permit Area from consideration for on-site retention (or other stormwater controls). EPA notes that most land in the District is already impervious to one degree or another, and most – even with some older stormwater controls - is sub-optimally treated, and thus would benefit from more effective controls. The District's database effectively tracks location, type, retention capacity and other data on stormwater controls throughout the District (a system that will be on-line shortly so that the public can also have access to these data – see Fact Sheet discussion for Section 5.3). The District's stormwater retention credit database also tracks implementation of on-site retention controls. EPA is satisfied that these systems are adequately robust and that adequately treated areas will not receive unnecessary controls, nor will the District be able to double count pollutant reductions or "acres managed".

- (c) For purposes of this permit, the 1,038 acres managed requirement must be met in the MS4 Permit Area, as that is the area regulated by the permit.
- (d) The requirement in the permit is that 1,038 acres be managed. As stated in (b) above, EPA reiterates that 1 acre managed = 1 acre treated to the appropriate retention standard.

With respect to the part of the comment regarding the introductory paragraph, EPA agrees that not all pollutant reductions are best characterized by the “acres managed” metric. Some, such as trash, will or may continue to be more effectively tracked in pounds or some other direct measure of a specific pollutant, especially where the management practice is specifically targeting only that pollutant. Since retention, and certain other measures, effectively remove multiple pollutants, “acres managed” for purposes of this permit, constitutes a compliance metric, i.e., a set of milestones/limits, for the permit.

The “acres managed” metric is consistent with the modeling framework the District established through a 2-1/2-year public stakeholder process during development of the Consolidated TMDL Implementation Plan for estimating and tracking pollutant reductions. During this process, no stakeholders expressed any notable concerns with this planning element. The District’s models will be able to account for progress for each pollutant towards achieving all applicable wasteload allocations. In addition, EPA has retained a number of other metrics in this permit (e.g., net number of trees planted, square feet of green roofs installed, miles of street sweeping, number of outfalls repaired) to support and verify, or to supplement, the acres managed metric.

To ensure that the “acres managed” metric is not employed indiscriminately for pollutant reduction activities not already accounted for in the model, EPA has added a new provision (Subsection 2.5.2) that specifically requires the District to submit to EPA for review any new methods for estimating pollutant reductions, including methods that may include an equivalency translation to “acres managed”.

17. Comment, NRDC et al:

However, beyond the vagueness of the proposed text, the 1,038-acre milestone itself falls short of the maximum extent practicable standard for MS4 permits, does not meet the “as soon as possible” standard for compliance schedules, and violates the anti-backsliding provisions of federal regulations.

(In light of the ambiguities discussed above, for purposes of the following discussion, we assume—based on the discussion in the Draft Permit’s fact sheet and information contained in the District’s draft TMDL Implementation Plan—



that the proposed requirement means stormwater controls must be implemented in the MS4 area that, when standardized by drainage area, land cover, and retention capacity, achieve the equivalent of retaining 1.2 inches of rainfall from 1,038 acres of land. We further assume that under the proposed requirement, it would not matter for purposes of compliance whether the acres are undertaken or managed by the District itself or by third parties, i.e., private entities that install runoff controls voluntarily or to comply with the District's development regulations.)

EPA Response to Comment 17:

EPA concurs with most of the assumptions posed in the second paragraph of this comment, though see the discussion of "acres managed" in the Fact Sheet for Subsection 1.5.3.1.

In the MS4 context, EPA considers the "as soon as possible" issue to be part of the MEP determination, which is intended to be an iterative process. Regarding MEP determination, see discussion in the Fact Sheet for Section 1.5, ("*The MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or TMDL compliance*") as well as the explanation for Subsection 1.5.3.1 describing determination of specific limits.

Regarding anti-backsliding, EPA provides a full explanation, including numbers comparing retention implementation requirements of the 2012 Final Revised Permit and this Final Permit in the Fact Sheet under the heading *The 1,038 Acres Managed Permit Limit*, within the discussion for Subsection 1.5.3.1. That discussion demonstrates that the required number of Acres Managed in the Final Permit is easily double those in the 2012 Final Revised Permit. EPA refers readers to that explanation.

18. Comment, NRDC et al (footnotes removed):

The Origins of the Proposed 1,038-Acre Milestone. The 1,038-acre milestone was initially proposed by the District Department of Energy and Environment (DOEE) in its draft Consolidated TMDL Implementation Plan, which it developed as a condition of its previous 2011 MS4 permit. The 2012 Final Revised Permit required DOEE to develop a consolidated plan for implementing all applicable TMDLs, containing a "schedule for attainment of WLAs that include[d] final attainment dates and, where applicable, interim milestones and numeric benchmarks." The permit further required DOEE to demonstrate, using modeling, "how each applicable WLA w[ould] be attained using the chosen controls, by the date for ultimate attainment," and to include "[a]n associated narrative providing an explanation for the schedules and controls included in the Plan." DOEE submitted a draft plan to EPA in May 2015, as well as a revised version of the plan in August 2016, but the plan still has not been approved.

The plan's schedule for attainment of wasteload allocations was developed by projecting the date by which each individual WLA would be attained based on the District's current level of effort under its existing stormwater programs. As the draft plan states, "these components [of the implementation strategy] represent the District's current level of effort for stormwater management," and "[t]he three components are expected to continue into the future, assuming that current level of funding for BMP implementation and stormwater management remains unchanged." The existing programs on which the plan's timeframes were based are the District's regulations for stormwater management on private property and, to a lesser extent, ongoing efforts to retrofit already-developed areas with stormwater controls (including voluntary incentive programs for private landowners and installation of retrofits by DOEE). The latter makes up a small fraction of the total: about 21 acres per year. The plan acknowledges that DOEE intends to achieve most reductions through enforcement of the development regulations: "stormwater volume reductions in the MS4 area from the BMP implementation expected from development and redevelopment activities . . . make up almost 90 percent of the total stormwater volume reduction achieved through the [plan]."

EPA Response to Comment 18:

EPA does not perceive the commenters' description of the Plan to be a comment on the proposed MS4 permit and therefore no response is needed. However, EPA notes that it did determine that portions of the District's Consolidated TMDL Implementation Plan were useful in informing reissuance of the Final Permit, including the 1,038 acres managed. See further discussion in Response to Comment 19.

19. Comment, NRDC et al (footnotes removed):

While the revised version of the plan includes a discussion of how the timeframe could be accelerated by taking additional actions, these additional actions are not reflected in the proposed attainment schedule, which is based only on the pace of stormwater management achieved through existing programs. As a result, the proposed attainment schedule stretches out over a century. The plan projects attainment of 43 WLAs by 2040, 115 WLAs by 2127, and all 204 WLAs by 2154. These projections are extremely problematic for obvious reasons, not the least of which is that they fail to comply with the timeframe and regulatory framework put in place for the Chesapeake Bay TMDL, which requires that all programs and practices needed to meet the TMDL's wasteload allocations be in place by 2025.

EPA Response to Comment 19:

This comment takes issue with the District's Consolidated TMDL Implementation Plan, which is outside the scope of this permit action. However, to the extent that

the comment could be applicable to elements of the plan incorporated into the permit, EPA responds as follows:

EPA agrees that the ultimate attainment date of 2154 is not reasonable, and specifically stated so in its September 22, 2016 letter to DOEE, declining to approve the plan until this and several other short-comings were remedied. As EPA explained in the Fact Sheet for the proposed 2012 modification of the 2011 permit ([https://www3.epa.gov/reg3wapd/pdf/pdf\\_npdes/stormwater/DCMS4/MS4DraftModComments/DC%20MS4%20Draft%20Fact%20Sheet%20Mod\\_1%2011Jul12.pdf](https://www3.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4DraftModComments/DC%20MS4%20Draft%20Fact%20Sheet%20Mod_1%2011Jul12.pdf)), if the District failed to complete an approvable TMDL Implementation Plan, EPA would set appropriate milestones and final dates for WLA attainment. EPA found many elements of the District's Consolidated TMDL Implementation Plan to be reasonable and has incorporated those elements as provisions in this permit. However, EPA has also included other provisions, as explained in the Fact Sheet for this permit, designed to accelerate implementation. A final date of attainment for all wasteload allocations has yet to be determined. The Clean Water Act and implementing regulations require EPA to ensure that the provisions of this permit meet the MEP framework for the next five years. It is EPA's intent that some of the assessments required by this permit will provide additional information to facilitate the development of more reasonable time frames for attainment of all applicable wasteload allocations.

With respect to attainment of Chesapeake Bay TMDL phosphorus, nitrogen and sediment WLAs, the Final Permit is consistent with the District's Phase I and Phase II Watershed Implementation Plans. The far distant WLA attainment dates in the Permittee's TMDL IP are for other WLAs, such as PCBs, pesticides and *E.coli*, rather than the Chesapeake Bay TMDL.

20. Comment, NRDC et al (footnotes removed):

Finally, EPA notes that the Chesapeake Bay TMDL incorporates as an assumption the Bay Program Partnership goal that all controls be in place by 2025 to meet the TMDL's allocations but the TMDL does not require anything – it is an informational tool. Furthermore, the Chesapeake Bay TMDL addresses only nitrogen, phosphorus, and sediment; the Plan is much more comprehensive, addressing all pollutants for which a TMDL has been approved or established by EPA.

The plan breaks down this overall attainment schedule into five-year interim milestones, each representing an equal amount of effort; in other words, the plan does not account for any escalation of effort over time through the ramping up of direct investment or the tightening of regulatory standards. The milestones between now and 2040 are framed as “acres managed,” based mostly on projections of private land development that will be subject to the District's development regulations over the next 25 years, along with the much smaller

amount of stormwater management that DOEE is projected to achieve through other ongoing programs. Because the total effort is divided equally between each permit term, the plan proposes that 1,038 acres will be managed each permit term between now and 2040. (Thereafter, because development projections are not available after 2040, the milestones are framed as pollutant load reductions extrapolated from the rate of reductions achieved between now and 2040.)

EPA Response to Comment 20:

EPA concurs with this summary of the District's Consolidated TMDL Implementation Plan. Also, EPA understands the commenters' description of the Plan to provide no specific comment on the proposed MS4 permit, and therefore no response is needed.

21. Comment, NRDC et al (footnotes removed):

The Proposed 1,038-Acre Milestone Falls Short of the MEP Standard. Neither the draft Consolidated TMDL Implementation Plan nor the current Draft Permit has been accompanied by any demonstration that this proposed pace of stormwater pollutant reductions is compliant with the Clean Water Act's maximum extent practicable standard. DOEE has attempted to justify the overall attainment timeframe by arguing that it is all it can achieve with "known public resources" (current funding) and the present regulatory requirements for development, but that is not what constitutes reducing pollution to the MEP.

Courts have held that the phrase "'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." While the term "practicable" is not defined in the municipal stormwater context, "practicable" as used in a different section of the Clean Water Act has been defined as meaning that technology is required unless the costs are "wholly disproportionate" to pollution reduction benefits. State hearing boards have applied this interpretation to the stormwater context as well. Neither courts nor EPA have taken the position that practicability is defined exclusively by what a permittee can achieve with its current level of funding.

EPA's explanation why the 1,038-acre milestone satisfies the maximum extent practicable standard also fails as a factual matter. In the fact sheet, EPA states that this requirement represents a "significant increase" over the retrofit requirements of the previous permit, which is not true.

On its face, it does appear that the Draft Permit's requirement to manage runoff from 1,038 acres represents an increase from the 2011 MS4 permit's requirement to retrofit 413 acres. However, these two requirements are not analogous. The 2011 MS4 permit required DOEE to enforce its stormwater retention regulations on new and redevelopment sites *and* implement 18 million square feet (413 acres)

of retrofits on previously developed land. These were two separate requirements, evidenced by the fact that they were housed in different sections of the permit and treated as two distinct, individual obligations. The current Draft Permit, on the other hand, abandons that distinction and simply requires a total number of acres to be managed with stormwater controls, regardless of whether that target is achieved through new and redevelopment or through retrofits.

That would not be a problem if the acreage milestone were set at a level high enough to require both the enforcement of the development regulations *and* the implementation of retrofits on already developed land, as the 2011 MS4 permit did. But the 1,038-acre milestone amounts to an obligation to enforce the development regulations, with little to no retrofitting required. This is because, according to the TMDL Implementation Plan's projections of future private development, the pace of development over the coming permit term will be higher than the 1,038-acre average that is expected over the long term. In fact, the plan projects that over the next five years, significantly more than 1,038 acres will be managed through private development and redevelopment alone.

Consequently, the 1,038-acre milestone is projected to be met over the next five years without any effort on DOEE's part beyond simply enforcing the development rules against regulated parties. DOEE would not be required to retrofit any existing developed land in order to hit the target. As a result, the 1,038-acre milestone is *less* stringent than what the 2011 MS4 permit required. This comparison thus yields no basis for concluding that the Draft Permit meets the MEP standard. In fact, the opposite is true, as the 2012 Final Revised Permit concluded that enforcement of the development regulations *and* retrofitting 413 acres were practicable in combination.

EPA has not explained why circumstances have changed in the last five years to justify a lower level of effort under the current Draft Permit. As the agency recently stated in its preamble to the updates of the small MS4 permitting regulations:

“If a permit ... contained a less stringent requirement or less specific language than had been included in the previous permit this would require an explanation, backed by empirical evidence or other objective rationale that the requirement was no longer practicable or that another approach is more effective, and that making this requirement less stringent would not result in greater levels of pollutant discharges. This would be especially true where the MS4 is discharging pollutants to an impaired water due to an excess of those pollutants.”

While this statement was made in the context of the small MS4 permitting regulations, it is generally applicable to any MS4 permit, including this Draft Permit. Because the 1,038-acre milestone is less stringent than the requirements of the 2011 MS4 permit, and because the District of Columbia MS4 discharges

into impaired waters, the Draft Permit would need to be supported by the type of explanation described in the above quote, but it is not.

Critically, it is EPA's job to determine what the maximum extent practicable standard means for *this* permit term, which may differ from the average pace of implementation needed to meet long-term deadlines. For *this* permit term, an acreage requirement that can be achieved exclusively through the efforts of third parties patently fails to satisfy the MEP standard.

Another piece of evidence that the 1,038-acre milestone falls short of the maximum extent practicable standard is that it does not reflect any of the additional activities that DOEE has already committed to undertake in the revised TMDL Implementation Plan, many of which—like the Stormwater Retention Credit Purchase Program—have been incorporated into the Draft Permit as mandatory requirements. As discussed above, the WLA attainment timeframes in the TMDL plan, including the 1,038-acre five-year interim milestones, were calculated based only on DOEE's current level of effort. But separately in the plan, DOEE committed to undertake additional actions that are not reflected in the attainment schedule (because they have not been integrated into the District's TMDL modeling tool). If DOEE has committed to undertake these efforts, and EPA is proposing to require them as permit conditions, then that is *prima facie* evidence that DOEE can practicably manage more than 1,038 acres. For example, DOEE estimates that the Stormwater Retention Credit (SRC) Purchase Program will result in an additional 154 to 673 acres managed, beyond the 1,038 (or more) acres that are projected to be managed by regulated parties under the stormwater regulations. It would be absurd for EPA to conclude that it is practicable for DOEE to implement the SRC Purchase Program but not practicable for DOEE to be held accountable for managing any additional acres through that program. This provides clear confirmation that the 1,038-acre target is too low.

#### EPA Response to Comment 21:

EPA acknowledges that the manner in which the requirement to manage stormwater runoff was calculated in the 2012 Final Revised Permit was confusing and could have been misinterpreted.

Nevertheless, taken as a whole, the collective planning and implementation provisions in this permit are a notable increase over those in the 2012 Final Revised Permit. EPA points out that MEP is a collective evaluation of multiple permit provisions. Not only have the requirements for retention (expressed as acres managed limits in the Final Permit) increased (see discussion for Subsection 1.5.3.1 in the Fact Sheet), other requirements have also become more stringent. Among other things, net tree planting requirements have increased from 4,150 to 6,705 annual average; the exception for grandfathering of existing projects for SRC credits is being eliminated; all municipal industrial operations must now develop and implement stormwater pollution prevention plans; there are

numerous new assessment and planning elements; and the Permittee must now implement a new multi-faceted monitoring program.

In addition, the commenter minimizes the importance of funding levels when determining appropriate permit conditions. Public resources are, and always have been, an important element of these determinations. EPA generally weighs the necessary resources for all elements of the program, including what it will take to maximize outcomes short- and long-term by building strong foundations for all elements. This means the stringency of some elements may advance more rapidly than others. For example, in this permit term EPA considers it vitally important that the Permittee solidly establish the new multi-faceted monitoring and assessment program and expects notable resources to be directed to these efforts. This means that in areas that are reasonably well established and effective, e.g., dry weather screening for illicit discharges or construction inspections, EPA considers the *status quo* to be appropriate for this permit term as part of the MEP determination for the permit as a whole.

22. Comment, NRDC et al (footnotes removed):

The proposed 1,038-acre milestone falls short of the MEP standard in one additional way. The Draft Permit states that 46 of the total acres must come from the public right-of-way. (§ 1.5.3.1.) However, the Scenario Analysis used to develop the TMDL Implementation Plan projects that, based on the District's current level of effort, 667 acres of public right-of-way in the MS4 area will be managed with stormwater controls between now and 2040, i.e., over the next five permit cycles. That equates to 133.4 acres per permit term. Requiring the District to manage 46 acres in the public right-of-way over five years simply cannot be considered MEP when the District itself says that it can accomplish 133 acres in the same time period.

EPA Response to Comment 22:

This comment raises two issues: 1) the long-term expectations for implementation of stormwater controls in public rights-of-way (PROWs), and 2) specific PROW implementation requirements for this Final Permit. Regarding the first issue: the commenters seem to assume that implementation of stormwater measures in PROWs will be linear over the long term, i.e., 133.4 acres per permit term across 5 permit terms. As explained in the District's Consolidated TMDL Implementation Plan and also consistent with the MEP framework, implementation is expected to escalate across permit terms. Regarding the second issue: EPA has reassessed MEP in PROWs and has increased the acres managed requirement for PROWs from 46 to 62 (see Fact Sheet discussion for Subsection 1.5.3.1).

23. Comment, NRDC et al (footnotes removed):

The Proposed 1,038-Acre Milestone Violates the “As Soon As Possible” Standard for Compliance Schedules. In addition to falling short of the MEP standard, the 1,038-acre milestone also violates the “as soon as possible” standard for compliance schedules. The acreage milestone is based on implementation of actions that EPA has found insufficiently aggressive, and it would put the District on track for attaining applicable wasteload allocations by the year 2154, a deadline which EPA agrees in the fact sheet is not acceptable; both of these are stated reasons why EPA has not approved the draft TMDL Implementation Plan. EPA’s rejection of the plan undergirding the proposed milestone confirms that a 1,038-acre obligation is not consistent with the requirement to achieve compliance with TMDL wasteload allocations as soon as possible.

EPA Response to Comment 23:

In the MS4 context, EPA considers the timeframe and rate of implementation to be part of the MEP determination or adaptive management framework, not a separate issue. In addition, the commenter’s conclusion conflates two different issues: final dates of attainment and rates of implementation. EPA has already identified the 2154 date of attainment as too protracted, and therefore agrees that an ongoing and linear implementation rate, i.e., over multiple permit terms, of 1,038 acres managed, would be insufficiently aggressive. EPA intends for this implementation rate to become more aggressive with each permit term, consistent with the MEP framework, as described in EPA’s regulations, preambles, and guidance, not to remain linear. However, the 1,038 acres managed milestone for *this* permit term, as explained in the Fact Sheet (Subsection 1.5.3.1), is appropriate, i.e., represents MEP.

24. Comment, Wentworth Green Strategies:

The requirement to manage 1,038 acres sounds like a lot but is actually less than what we would achieve through requirements on new development. In order to really begin to achieve our clean water goals, we need go beyond business as usual and begin to retrofit at least an additional 413 acres of existing development.

EPA Response to Comment 24:

EPA provides a full explanation, including numbers comparing retention implementation requirements of the 2012 Final Revised Permit and this Final Permit in the Fact Sheet under the heading *The 1,038 Acres Managed Permit Limit*, within the discussion for Subsection 1.5.3.1. This explanation also discusses an analysis undertaken by the District (*TMDL IP Milestone Analyses FINAL*, which is included in the Administrative Record) regarding development projections over the next five years that will provide the opportunity to implement



stormwater controls per the District's stormwater requirements. That discussion demonstrates that the requirements of the Final Permit are easily double those of the 2012 Final Revised Permit. EPA refers the reader to that explanation.

25. Comment, Wentworth Green Strategies:

The comments from NRDC and associated groups detail why this milestone is inadequate perhaps illegal, and may constitute backsliding and I will not repeat them here. But in effect, the DOEE milestone for progress in this five-year permit tacitly relies on the increased level of stormwater retention required of new development. But many believe that the magnitude of development now impacting District neighborhoods is not in any stretch of the imagination sustainable. Moreover, the level of retention - 1.2 inches - is not enough to reduce the impact in many of our watersheds. Clearly, at the very least the retention level should be increased to 2.0 inches with appropriate rule making and public comment as discussed below.

EPA Response to Comment 25:

Regarding the legality of the 1,038 acres managed milestone, EPA cited both statutory and regulatory authorities for the provisions in Subsection 1.5.3 of the permit, i.e., permit limits, and disagrees that there is anything illegal about this.

Regarding anti-backsliding, EPA provides a full explanation, including numbers comparing retention implementation requirements of the 2012 Final Revised Permit and this Final Permit in the Fact Sheet under the heading *The 1,038 Acres Managed Permit Limit*, within the discussion for Subsection 1.5.3.1. That discussion demonstrates that the requirements of the Final Permit are easily double those of the 2012 Final Revised Permit. EPA refers readers to that explanation.

Whether current and projected levels of development in the District will continue to provide adequate opportunities for implementation of stormwater controls is outside the scope of this particular permit issuance. The Permittee has provided projections for this permit term that support EPA's MEP determination for this Final Permit. EPA undertakes new MEP determinations with each permit reissuance.

EPA does not disagree with the commenter that a 2" retention requirement would no doubt increase the amount of overall retention in the MS4 Permit Area. However, without significant additional analyses (as required in Subsection 2.2.4 of the Final Permit, Analysis of Updating Stormwater Management Regulations), EPA believes that imposing a new across-the-board retention requirement would be premature. The objective of the analysis is to decide how to optimally achieve the best water quality outcomes. For example, perhaps targeted increases would provide the best balance of water quality outcomes and costs. EPA also notes that

a revision in the District's stormwater regulations is a major investment of public resources in regulations that have only been in effect for four years. They will be revised at least once in this permit term, and it is EPA's expectation that it be done very thoughtfully. See Response to Comment 57.

26. Comment, Wentworth Green Strategies:

Ironically, DOEE itself in their 2010 Rock Creek Watershed Implementation Study described a plan wherein the Department could undertake managing 2,000 acres -just in the Rock Creek watershed. This might indicate that even more acres than the permit goal of 1,038 acres could be managed throughout the rest of the city.

EPA Response to Comment 26:

The 2010 Rock Creek Watershed Implementation Plan (WIP) was developed by the District in an effort to address the pollutants impairing the waterbody and ultimately remove Rock Creek from the District's list of impaired waters. The 2,000 acres of total treatment area resulting from the stormwater management measures proposed in the Rock Creek WIP is part of a long-term strategy with a 30-year implementation schedule that also includes the combined sewer portion of the watershed. It would be infeasible and cost prohibitive for the District to attempt to realize the projects listed in the WIP in a five-year permit term for the Rock Creek basin and to do so exclusively in the MS4 Permit Area, as opposed to also including the combined sewer portion of the watershed. EPA has determined that the permit goal for acres managed is appropriate for this permit term. See also Fact Sheet discussion for Subsection 1.5.3.1.

27. Comment, Wentworth Green Strategies:

Data from DOEE regarding reductions in *E. coli* levels from various management techniques indicates that by far the most effective method of reduction lies in bio-retention projects, probably along public right of ways (PROW). Therefore, we urge DOEE to continue their work with DOT to continue to expand the work of siting these important projects in our streets and alleys. The opportunity for doing more to clean up our creeks and streams is before us and EPA should increase the requirement to spur further action from the Department.

EPA Response to Comment 27:

See Fact Sheet discussions for Subsection 1.5.3.1 (Limits), Subsection 2.2.2.1 (Bacteria Milestones and Benchmarks for the Next Permit Term), Section 2.4 (Public Right-of-Way Optimal Design) and Subsection 4.4.2 (Bacteria Source Tracking). EPA is not aware of data demonstrating that the most effective solution to *E. coli* contamination is bioretention, though it should certainly be one component of the solution. In fact, the Permittee's TMDL IP analyses, which

relied very heavily on implementation of retention measures, demonstrated that *E. coli* WLAs would take a very long time to achieve (more than a century in many cases) using only this approach. Thus, EPA is requiring a Bacteria Source Tracking Study and the development of new milestones.

28. Comment, Robin Broder (this identical comment was received from 122 commenters – list attached at the end of this document):

The residents of the Potomac River watershed deserve a clean, healthy river that's safe for our families to enjoy. But polluted runoff from urban areas in the District of Columbia continues to foul the river every time it rains.

I strongly support efforts to curb dirty runoff by capturing rain where it falls, using green infrastructure and other beneficial practices – but the schedule that D.C. has proposed for implementing these controls and reducing stormwater pollution is unacceptable. My community deserves clean waterways in our lifetime, not sometime in the next century.

I ask EPA to include stronger requirements in D.C.'s stormwater permit that will speed up the schedule and clean up the Potomac in a more reasonable timeframe, instead of including requirements in the permit that would keep D.C. on the slow track for clean rivers in 2154. Specifically, EPA should require D.C. to control polluted runoff from more than the proposed 1,038 acres, which is only 5% of the total area that needs to be controlled to achieve clean water. D.C. can and must do better.

EPA Response to Comment 28:

EPA agrees that the 2154 target date is not timely. For a description of EPA's determination of appropriate permit requirements for this permit term, including the 1,038 acres managed requirement, see the Fact Sheet discussions for Subsection 1.5.3.1, under *The 1,038 Acres Managed Permit Limit* and Section 2.2, Total Maximum Daily Load Planning of the Final Permit.

29. Comment, NRDC et al (footnotes removed):

The Proposed 1,038-Acre milestone Violates the Prohibition Against Backsliding. Finally, the 1,038-acre milestone violates federal prohibitions against backsliding because, as discussed above, it is less stringent than the 2011 MS4 permit's requirements to enforce the development regulations *and* implement over 400 acres of retrofits. The Clean Water Act provides that "a permit may not be renewed, reissued or modified ... subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." EPA has previously applied this prohibition against backsliding to other MS4 permits. For example, EPA Region III issued a specific objection to the draft MS4 permit that the Maryland

Department of the Environment wrote for Prince George's County, based in part on backsliding concerns. No new conditions have arisen in the District of Columbia since 2011 that would justify the application of a less stringent stormwater management requirement. As a result, inclusion of the 1,038-acre milestone would constitute prohibited backsliding.

EPA Response to Comment 29:

EPA provides a full explanation, including numbers comparing retention implementation requirements of the 2012 Final Revised Permit and this Final Permit, in the Fact Sheet under the heading *The 1,038 Acres Managed Permit Limit*, within the discussion for Subsection 1.5.3.1. That portion of the Fact Sheet explains EPA's analysis and determination that the Acres Managed requirements of the Final Permit are easily double those of the 2012 Final Revised Permit and, thus, the requirements of the Final Permit do not constitute backsliding. EPA refers readers to that explanation.

30. Comment, NRDC et al (footnotes removed):

The Acreage Milestone Must Be Increased. In conclusion, instead of the current 1,038-acre milestone, DOEE should be required to meet an "acres managed" target that consists of at least (i) the acres projected to be managed by regulated parties in compliance with the District's development regulations, plus (ii) the number of acres that DOEE was required to retrofit during the last permit term (413 acres). This combined requirement was already found practicable by EPA in the 2011 MS4 permit and would avoid backsliding concerns. However, because MS4 permits are generally intended to become more stringent over time, EPA should actually go beyond this combined total and increase the acreage target to spur DOEE on to a higher level of effort.

EPA Response to Comment 30:

The permit requirement of 1,038-acres managed does incorporate (i) and (ii) above, plus other pollutant reductions.

Regarding anti-backsliding, see Response to Comment 29.

31. Comment, NRDC et al (footnotes removed):

EPA Must Also Clarify the Meaning of the Term "Retrofit". Additionally, we ask that EPA refrain from further confusing and diluting the meaning of the term "retrofit." Under the long-accepted definition of the word, a "retrofit" is the implementation of stormwater controls on an existing site that has already been developed and is not in the process of being redeveloped. This is distinct from the process of implementing stormwater controls on a site when it is going through the development or redevelopment process.

EPA has consistently distinguished between retrofitting and redevelopment over the years. For example, the agency spelled out the difference between the two in its 2010 MS4 Permit Improvement Guide:

“It is clear that we cannot protect the nation’s waters without also addressing degradation caused by stormwater discharges from existing developed sites. For that reason, stormwater programs must include substantive retrofit provisions.

It is possible and reasonable to significantly improve water quality in many urban receiving waters. This requires more than just a new development and redeveloped sites program, however, which at best can only hold the line. To actually improve the quality of receiving waters it is necessary to mitigate discharges from existing developed sites, which generally means implementation of measures to bring about the retrofit the stormwater control measures at existing sites to retain most stormwater on site.”

Similarly, EPA discussed the distinction in a 2011 technical support document for retrofits in New England: “While new development is required to manage stormwater on-site, older developments may have been constructed before stormwater management was required or modern criteria were established. Retrofits include new installations or upgrades to existing Best Management Practices (BMPs) in developed areas where there is a lack of adequate stormwater treatment.”

There are important reasons for keeping the two concepts separate. First, as mentioned in the EPA quotes above, the pace of redevelopment in most places is not fast enough to bring about improvements in water quality in the near term. As a result, retrofitting existing developed areas is necessary in addition to redevelopment to accelerate the rate of pollution reductions. And second, the MEP standard for stormwater permits is concerned with the permittee’s level of effort. Redevelopment represents effort undertaken by third parties, whereas retrofits are often implemented or funded by the permittee itself. This division of labor makes a difference when the permitting authority determines which permit conditions are appropriately stringent.

However, EPA has blurred the distinction between redevelopment and retrofit in this Draft Permit. In a section of the Draft Permit labeled “Retrofit Program for Existing Discharges,” EPA writes: “During this permit term, the permittee shall continue to implement retrofits for stormwater discharges to equal the number of managed acres in Table 1, Part 1.5.3.1 herein, i.e., 1,038 acres, with a minimum of 46 of such acres located in the Public Right-of-Way (PROW).” (§ 3.2.1.) Yet as discussed at length above, EPA intends to allow DOEE to meet the 1,038-acre milestone by counting areas where stormwater controls have been implemented

by third parties as part of the redevelopment process. EPA thus seems to be suggesting that stormwater management on redevelopment sites can be considered “retrofits,” contrary to many years of consistent EPA policy holding the two concepts separate.

The fact that DOEE confused its requirements over the last permit term does not change the accepted meaning of the term “retrofit.” DOEE misread the 2011 MS4 permit’s terms as allowing it to count redeveloped areas as “retrofitted” areas, and consequently fell far short of the permit requirement to retrofit 18 million square feet of existing impervious surfaces. (In a recent meeting, DOEE staff indicated that only about 2 million square feet of impervious surfaces were managed through true retrofits, as opposed to through redevelopment.) EPA must not allow this blurring of the two concepts to continue. If it does, the term “retrofit” will become essentially meaningless. Other permittees may also end up mistaking their own obligations. For example, other permittees in Region III, including MS4s in Maryland and Virginia, are currently regulated by permits that require retrofitting existing developed areas in addition to implementing an on-site retention standard for new and redevelopment. If EPA intends to apply one total acreage requirement in this Draft Permit that does not distinguish between acres managed through development and acres managed through retrofits (which, again, should be set higher than the proposed 1,038 acres), we strongly urge the agency to revise the confusing language in § 3.2.1 and elsewhere which implies that a requirement to enforce a redevelopment standard is somehow the same as a requirement to implement retrofits. These two concepts must remain clear and distinct for the sake of the MS4 regulatory program in the District of Columbia and nationwide.

EPA Response to Comment 31:

EPA concurs with the commenter’s contention that “retrofit”, in the permitting context, often refers to stormwater measures specifically implemented for the purpose of water quality improvements, rather than those undertaken in conjunction with development or redevelopment for other purposes. However, both types of projects are essentially ‘retrofits’, employing similar management practices and paradigms to improve water quality over the prior existing condition or against a baseline where water quality measures are not employed or sub-optimally employed. Particularly in a city like DC where nearly all development is redevelopment, implementation of all stormwater measures can also generally be considered ‘retrofitting’. Given the framework of this permit and the District’s stormwater program, EPA does not perceive a need to make a strong distinction between retrofitting and redevelopment in this permit, other than to be clear that development and redevelopment projects exceeding 5,000 square feet must be held to the 1.2” on-site retention standard. In order to eliminate any confusion, EPA has eliminated the term “retrofit” from the permit, and instead uses terms such as implementation of stormwater measures, or more specifically, implementation of retention measures, as appropriate.

EPA also clarifies that the objective of the permit is to maximize the implementation of water quality measures (in particular on-site and off-site retention of stormwater) through all possible mechanisms, i.e., development, redevelopment, incentive programs, voluntary programs, and targeted implementation of stormwater control measures, by all possible combinations of entities, i.e., public, private, institutional, etc. As long as the District has mechanisms to track installation, performance, and maintenance, and is careful not to double-count reductions, EPA is supportive – in fact insistent - of including the broad suite of projects in the acres managed tallies. As a practical matter, as detailed in the District’s TMDL IP, at the current rate of development/ redevelopment it will be 2154 until all wasteload allocations are achieved *if this is the primary implementation mechanism*. To enhance water quality efforts and accelerate this time line, other approaches must be effectively employed. The Permittee is unlikely to achieve the acres managed milestone permit limit for this permit solely from development and redevelopment projects subject to the District’s stormwater regulations, including those that occur in public rights-of-way. As a result, the Permittee will need to significantly increase efforts through incentive programs, voluntary programs and targeted implementation of additional measures, which are all part of the Acres Managed requirement.

32. Comment, NRDC et al (footnotes removed):

Aside from the proposed 1,038-acre milestone, the Draft Permit incorporates other elements of DOEE’s draft TMDL Implementation Plan as proposed permit conditions. In some cases, these conditions require DOEE to undertake various analyses or evaluations that may or may not lead to further action. With regard to this type of requirement, EPA must be mindful of the prohibition against permittee self-regulation.

Under the Clean Water Act, the permitting authority, not the permittee, must make all final determinations about what is needed to satisfy the maximum extent practicable standard and other legal requirements. As the Court of Appeals for the Ninth Circuit has held, “stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.” Further, the public must be given the opportunity to provide input on any determinations about proposed actions, even if they occur after the permit is issued.

EPA Response to Comment 32:

On the issue of self-regulation, see response to Comment 14.

On the issue of public notice, there will be two formal opportunities for the public to comment on all analyses and planning elements required by this Final Permit:

1) prior to the Permittee's submission to EPA of a revised Stormwater Management Program Plan and application for permit reissuance (Section 2.9 of the Final Permit); this is not a regulatory requirement, only a permit requirement intended to provide an additional opportunity for the public to help shape the District's stormwater program, and 2) when EPA proposes the next draft permit; this is a regulatory requirement.

33. Comment, DC Water:

The Draft Permit mandates that the Permittee "Remove 103,188 pounds of trash from the Anacostia River Basin." The Anacostia River Basin comprises both MS4 and Combined Sewer System (CSS) areas. The CSS area is subject to a separate NPDES Permit issued to DC Water. We assume that the removal obligation stated in the Draft Permit relates exclusively to the portion of the MS4 system that discharges to the Anacostia River and thus, request it to be revised to read, "Remove 103,188 pounds of trash from the Anacostia River Basin within the DC MS4 area."

EPA Response to Comment 33:

EPA reiterates that this permit is only applicable to the MS4 Permit Area. Nevertheless, EPA has modified the language of this provision to specify that it applies only to the MS4 Permit Area.

34. Comment, DC Water:

In addition, the permit sets a minimum amount of trash that the Permittee must collect. If, however, all stormwater management programs are successful, it is possible that there will be less than 103,188 pounds of trash to collect. Please discuss what actions EPA will take if there is insufficient trash to collect for the Permittee to meet and comply with this requirement.

EPA Response to Comment 34:

The methods for estimating trash reductions were established by DOEE and approved by EPA during the 2011 permit term, and include preventive measures as well as removal and clean-up measures. The Permittee may take credit for efforts, such as the disposable bag fee, the polystyrene foam food containers ban, and street sweeping, that keep trash out of the MS4. EPA is hopeful that at some point there will no longer be such notable amounts of trash to collect from waterways and streambanks annually because of the success of preventive measures. This exemplifies compliance not non-compliance, as the commenter seems to be concerned about.



## Draft Permit Part 2. STORMWATER MANAGEMENT PROGRAM PLANNING

### Comments on Draft Permit Section 2.1: Elements of the Stormwater Management Program

35. Comment, DOEE:

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.*

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.

EPA Response to Comment 35:

The Permittee has a generally good track record with respect to timely posting of relevant documents. Therefore, EPA agrees with the proposed change, and has modified the permit per the suggestion.

36. Comment, DC Water:

The Draft Permit provides that “[t]he Stormwater Management Program (SWMP) required by this permit has been determined to reduce the discharge of pollutants to the maximum extent practicable for this permit term.” DC Water believes that it is inappropriate to determine the level of management that corresponds with the statutory standard “maximum extent practicable” without first assessing the economic capability of the MS4 community. For lack of that necessary assessment, all elements of the Draft Permit that purport to establish MEP-based obligations are arbitrary and capricious.

EPA Response to Comment 36:

EPA disagrees with the implication that it has not included economic considerations in its MEP determination. There are multiple mechanisms for implementing stormwater control measures, and a straightforward ‘economic capability’ of the stormwater community presumes that all measures are implemented by the Permittee using only stormwater fees and/or general funds

specifically allocated to the stormwater program. Stormwater management measures are implemented in a variety of ways by a variety of entities. For example: a) a notable portion of stormwater measures are implemented by private developers, thus EPA has relied on the Permittee's projections of development and estimates of what is feasible in the next five years per the Consolidated TMDL Implementation Plan and additional discussion; b) stormwater measures are implemented in PROWs, thus EPA met with DDOT and used their projections and expectations for what would be reasonable to achieve during the next five years; c) stormwater measures are implemented through voluntary and incentive programs such as RiverSmart or stream clean-ups, thus EPA used the Permittee's estimates of typical rates and/or performances for these types of programs; d) stormwater measures such as street sweeping may be conducted by other departments with drivers other than or in addition to water quality, and funds other than stormwater funds, thus EPA relied on the Permittee's estimates for street sweeping frequencies that balanced other objectives. For nearly every permit provision, including tree planting, catch basin clean-outs and many other program elements, EPA worked with the Permittee in order to set thresholds that would be realistically achievable within the context of a variety of factors, including funding, but also policies, staffing, priorities, and how certain measures might dovetail with other drivers for which there are separate resources. In addition, EPA took many provisions directly from the Permittee's *Stormwater Management Program Plan*, or *Consolidated TMDL Implementation Plan*, presuming that the Permittee would not propose measures it could not feasibly implement. In many instances data from the Permittee's Annual Reports also confirmed logical implementation thresholds. The Fact Sheet contains discussions of many of those MEP determinations.

37. Comment, NRDC et al (footnotes removed):

In the Draft Permit's fact sheet, EPA states that for the sake of accelerating implementation of permit requirements, it "is proposing to avoid public comment and EPA review for certain MS4 program elements," most notably the requirements carried over from the TMDL Implementation Plan that are discussed in this section. EPA justifies this approach by arguing that "the draft permit is reasonably prescriptive." However, we believe that some of the permit conditions are not in fact sufficiently prescriptive to obviate the need for EPA review and public input. We discuss these proposed conditions in more detail below.

EPA Response to Comment 37:

EPA addresses these individual concerns with the specific comments (below).

## **Comments on Draft Permit Section 2.2: Total Maximum Daily Load (TMDL) Planning**

### 38. Comment, DOEE:

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.

### EPA Response to Comment 38:

Specific comments are addressed under specific sections (below).

### 39. Comment, DOEE:

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 (WLA's and LA's, respectively). This is beyond the scope of a municipal stormwater program, and inappropriate for MS4 permit coverage.

As described in the District's 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.

### EPA Response to Comment 39:

While not fully in agreement with the commenter's reasoning, EPA is removing proposed Subsection 2.2.1 from the final permit.

Because there are other planning and implementation measures already in the permit for all existing wasteload allocations (see table *TMDL Pollutants and*

*Applicable Planning and Implementation Requirements*, in Fact Sheet discussion for Section 1.5), and because those WLAs remain in effect until such time as any TMDL is revised and approved, EPA does not consider this provision crucial to progress, and has not included it in the final permit. EPA also emphasizes that the wasteload allocations for all approved and established TMDLs remain in effect until such a time that they are revised, and the permit includes provisions to address all of them.

40. Comment, DC Water:

This section of the Draft Permit instructs the permittee to submit to EPA, for approval, a list of TMDLs “in need of revision” along with a schedule for such revisions that includes “intensive monitoring” to support the revisions. This mandate to obtain water quality data necessary to develop TMDLs constitutes an impermissible and unauthorized transfer to a permit holder the obligation of the state and, in lieu of state action, of EPA Region 3. Similarly, nowhere in the MS4 permitting regulations or in Section 402(p) of the Act is there authority to make the selection and timing of TMDL development an obligation in an NPDES permit where it already is an obligation under the statute. Perhaps more important, nowhere in the statute is there authority to establish a separate layer of EPA review and approval for a TMDL beyond that which is provided in Section 303(d). The provisions of the Draft Permit that purport to do so are unwarranted arrogations of power through the NPDES permitting program and must be deleted from the final permit.

EPA Response to Comment 40:

See Response to Comment 39.

41. Comment, NRDC et al (footnotes removed):

We support the proposed requirement for DOEE to develop a schedule for revising TMDLs that it suspects are flawed. (§ 2.2.1.) We recognize that potentially unsound TMDLs may be to blame for the excessive length of the District’s proposed TMDL implementation timeline, and that fixing the TMDLs is necessary moving forward. However, the Draft Permit does not establish any sort of objective standard for the TMDL revision schedule, and it directs DOEE to implement the schedule immediately without public input or EPA approval.

This proposed permit language would impermissibly allow permittee self-regulation. Instead of establishing a TMDL revision schedule within the permit itself, EPA has decided to delegate authority to the permittee to come up with its own schedule. Such an approach is acceptable only so long as EPA makes the ultimate decision about the sufficiency of DOEE’s proposed schedule under MEP and other applicable standards. However, the Draft Permit does not provide for this, nor for any public input. This arrangement could allow the permittee to

develop and implement a lengthy schedule that fails to meet the maximum extent practicable standard.

EPA must revise the Draft Permit to provide for agency review of, and public comment on, DOEE's proposed schedule. This is a schedule that will establish commitments extending many years into the future, and as such, it is too important for EPA to skip over the critical oversight procedures of agency review and public input. To the extent that EPA is concerned about implementation of the schedule commencing as soon as possible, the Draft Permit could direct DOEE to start work on the TMDL revisions right away, with the proviso that the schedule may need to be revised before final adoption, depending on the results of EPA review and public input.

EPA Response to Comment 41:

See Response to Comment 39 for an explanation of EPA's revised framework regarding inadequate TMDLs.

**Comments on Draft Permit Section 2.2.2: Milestones and Benchmarks for the Next Permit Term**

42. Comment, DOEE:

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 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 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.

EPA Response to Comment 42:

There are multiple *E. coli* WLAs assigned to the District MS4. EPA is obligated to ensure that there are appropriate measures in the permit to ensure consistency with the assumptions and requirements of TMDLs, including these WLAs. As specifically articulated in both Subsections 1.5.3 and 2.2.5.2 of the permit, all relevant established and approved WLAs are in effect, thus appropriate planning and implementation measures must be implemented. In addition, there are District receiving waters listed as impaired for *E. coli* for which TMDLs have not yet been developed. Per CWA section 402(p)(3)(B)(iii) it is appropriate for EPA to include measures as necessary for compliance with water quality standards for these waters as well. Under both sets of circumstances, incorporation of measures into the permit to reduce *E. coli* in MS4 discharges is necessary and appropriate. EPA appreciates that the District is committed to all actions outlined in its TMDL IP, but emphasizes that this does not obviate EPA's obligation to express the appropriate requirements in the permit. Delaying action for another permit term, or until such time as existing TMDLs are again revised, is unsupportable.

Some reduction measures for *E. coli* are included in the Final Permit, e.g., illicit discharge detection and elimination (Subsection 3.6.1), SSO response (Subsection 3.3.1), and pet waste education and repositories (Subsection 3.10). However, sources are not adequately identified and relative contributions from different sources are not completely understood. Rather than impose additional measures that may or may not be appropriately targeted to significant sources, EPA is requiring the District to gather additional data (i.e., the source tracking study) in order to make informed decisions about allocation of resources to strategies that most effectively reduce *E. coli* in stormwater discharges (i.e., the benchmarks and milestones). If and when the District decides to revise *E. coli* TMDLs, this information could also be used for that purpose. EPA understands that DOEE believes it is necessary to revise some of the existing TMDLs to establish more meaningful WLAs. However, EPA underscores that reduction measures must be implemented regardless, as many District receiving waters are impaired by bacterial contamination.

EPA added an additional year to the timeline for the study, in order that the Permittee may also collect enough data to inform TMDL revisions. Given how close this deadline comes to deadlines for publishing revisions to the Consolidated TMDL Implementation Plan for public notice, i.e., 15 months before the end of the permit term, EPA is charging the Permittee to begin implementation of reduction measures for any high priority bacteria sources that may be identified in the study immediately, as these are potentially public health issues. New milestones and benchmarks shall then be incorporated into the updated Consolidated TMDL Implementation Plan that shall be subject to public notice and comment and EPA approval per the schedule in Subsection 2.2.5.5 of the final permit.

43. Comment, David Bardin:

DC's 2014 Integrated Report disclosed *E. coli* impairment of every Rock Creek tributary (including Broad Branch, Melvin Hazen Run, Soapstone Creek), ranked them "high priority" for TMDL development, but promised TMDLs only in December 2022 (PDF pages 278-279 of 300).

The draft permit seeks intensified DC efforts (2.2.3 Milestones and Benchmarks for the Next Permit Term and 4.4.2 Bacteria Source Tracking study), but would require no public report before June 2019. For years, DC agencies have been investigating at least Soapstone Creek bacteria secretly. EPA should require DC to report what it has actually done and learned at least annually, starting in 2017.

EPA Response to Comment 43:

The impairments noted by the commenter are recent listings, and there has not yet been time for the District to develop relevant TMDLs. The schedules for the development of those TMDLs is outside the scope of this permitting action. Nevertheless, it is appropriate for the permit to include measures to address impairments even when a TMDL has not yet been developed. In addition, there are existing *E. coli* WLAs for the MS4. Relevant measures in this permit, including the bacteria source tracking study, apply to all impaired waters, i.e., TMDL and pre-TMDL. Regarding the 2021 compliance deadline, EPA considers three years a reasonable time frame for completing a bacteria source tracking study for a system as extensive as DC's MS4. The District does provide annual reports and EPA is unaware of any secret investigations on Soapstone Creek. See response to Comment 109 for details of many of the District's activities on Soapstone Creek.

44. Comment, DOEE:

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 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.

EPA Response to Comment 44:

There are MS4 WLAs in effect for these pollutants and discharge data confirm their presence in some MS4 discharges. Therefore, EPA is obligated to ensure that there are appropriate measures in the permit with respect to these WLAs. EPA appreciates that the Permittee is committed to all actions outlined in its TMDL IP, but emphasizes that this does not obviate EPA's obligation to express the appropriate requirements in the permit.

EPA has revised the final permit to keep the requirement to conduct an investigation but has removed the requirement for a separate Legacy Pollutant Minimization Plan because the Permittee has mechanisms other than the Stormwater Program to investigate and mitigate these pollutants. Instead, the Permittee will directly incorporate new milestones and benchmarks to address legacy pollutants into the updated Consolidated TMDL Implementation Plan. The language in the final permit reads as follows:

*The Permittee shall conduct an investigation for the following TMDL pollutants: chlordane, heptachlor epoxide, dieldrin, DDT, DDE, DDD and PCBs. The investigation shall include measures to identify current sources, including a determination of whether or not these toxic contaminants are largely in situ in the sediments of receiving streams rather than in ongoing MS4 discharges. The Permittee shall use data from this investigation, as appropriate, to develop new milestones and benchmarks for implementing controls to attain relevant MS4 WLAs. Consistent with Subsection 2.2.5.4 of this permit, the Permittee shall incorporate any new milestones and benchmarks into the revised Consolidated TMDL Implementation Plan.*

45. Comment, DC Water:

It is unclear what the basis is for the mandate to "eliminate" discharges of the named pollutants in the event that they are identified in ongoing discharges. To the extent there is no such basis, the requirement to completely eliminate discharges of those pollutants must be replaced by appropriate allocations and benchmarks for progress toward achievement of final water quality-based effluent limitations.



EPA Response to Comment 45:

The term “eliminate” has been removed. Also, see Response to Comment 44 for the new language.

46. Comment, National Association of Home Builders:

Provisions concerning PCBs and DDT within this permit need further detail and explanation.

EPA’s proposal directs the District to continue to evaluate sources and plan for control of “legacy” pollutants such as PCBs and DDT. NAHB requests that developers receive specific direction as to which BMPs are considered adequate to address stormwater flow carrying these pollutants. A broad directive to “control for” discharges containing these types of pollutants using “appropriate measures”, for example, would place enormous new liability and risk on individual builders and developers working in the District. We request that EPA define the term “minimization” in permit term in Section 2.2.3.2; “Minimization of Legacy Pollutants” to incorporate economic and technological constraints when determining which level of control is feasible.

EPA Response to Comment 46:

See Response to Comment 44 for the new framework for this provision. EPA expects that milestones and benchmarks to address these toxic legacy pollutants will primarily include elimination of discrete sources as they are identified, e.g., old transformers, or implementation of remedial measures for contaminated soils or sediments. Some of these remedies may not be within the realm of the District’s Stormwater Program.

Implementing controls for legacy pollutants could affect developers who are undertaking redevelopment or revitalization of brownfields, but those activities are separate from this permit and the MS4 program and already have their own established processes. For example, see the District’s Land Remediation and Development information, <https://doee.dc.gov/service/land-remediation-and-development>.

47. Comment, DOEE:

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 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.

EPA Response to Comment 47:

EPA has made the first suggested change, i.e., removed the qualifiers for specific types of milestones and benchmarks.

Regarding the second issue about addressing and incorporating EPA comments "as appropriate", EPA has instead modified this to read "...and shall also address any comments received from EPA." This clarifies that, although EPA understands that comments may not be incorporated verbatim, EPA expects the permittee to address all comments.

48. Comment, DC Water:

The requirement to "incorporate any comments received from EPA" in the required revised Consolidated TMDL Implementation Plan appears to eliminate the opportunity to provide comments on and/or seek the judicial review guaranteed by Section 509(b)(1)(E) of the Act with respect to a product that will become an effluent limitation. Because the Act guarantees those rights, the Draft Permit should be revised to eliminate this requirement.

EPA Response to Comment 48:

EPA emphasizes that nothing in this permit is intended to preclude or compromise due process. However, it is appropriate for EPA to provide comment on a regulatory requirement, and for the permittee to respond to those comments. See Response to Comment 47.

49. Comment, NRDC et al (footnotes removed):

Targeted Implementation Approaches [...]. Finally, we want to express specific support for two requirements related to TMDL implementation. First, we endorse the requirement for DOEE to develop a list of targeted watersheds and targeted implementation approaches to be implemented over the next permit term, and to incorporate them into the TMDL Implementation Plan. (§ 2.2.3.3.) In our

comments on the plan, we urged DOEE to provide additional detail about the differing strategies that are needed in different MS4 subwatersheds. DOEE acknowledges that some watersheds require less retention capacity than others in order to attain WLAs, but that observation is not reflected in the draft plan, which lacks watershed-specific strategies. Each watershed is different, and DOEE's plan must accommodate those differences. Additionally, we agree that the requirement to develop targeted implementation approaches should be made available for public comment and submitted to EPA for review. (However, it appears that EPA mistakenly omitted it from the submittal schedule in Part 2.8 of the Draft Permit, contrary to the intent indicated in the text of § 2.2.3.3.)

EPA Response to Comment 49:

EPA appreciates support for these provisions. EPA clarifies that the targeted watershed strategy is not a separate document, but must be included in the updated Consolidated TMDL Implementation Plan (Subsection 2.2.5), which is included in the schedule (table) in Section 2.8 under *Updated Strategies/Plans*, and which will be subject to public comment and provided to EPA for review.

50. Comment, DOEE:

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.

EPA Response to Comment 50:

EPA incorporated this provision directly from the Permittee's Consolidated TMDL Implementation Plan. The draft permit only included (per the District's Consolidated TMDL Implementation Plan) the provision to *propose* (not implement) an increase *if* the evaluation indicated its feasibility. However, to underscore the fundamental principle of local government autonomy in setting fees, EPA has removed from the final permit the provisional requirement to propose an increase if warranted. EPA has retained the requirement to undertake the evaluation of the adequacy of the fee for achieving the water quality goals of the permit and how the fee works in tandem with other financing options.

51. Comment, NRDC et al (footnotes removed):

We also support the proposed requirement for DOEE to evaluate options for increasing its stormwater fee (§ 2.2.4), but like the requirement to develop a TMDL revision schedule, this proposed condition would similarly allow impermissible self-regulation. The problem is that the language articulating the requirement is extremely vague. It directs DOEE to evaluate “options for increasing the District’s Stormwater Fee,” including “an assessment of how the Stormwater Fee works in tandem with other financing options.” Then, “If *the permittee determines*, per the assessment, that an increase in the District’s Stormwater Fee is feasible, the permittee shall propose an increase” (emphasis added).

This language leaves enormous discretion to the permittee regarding the degree of action required. It would allow DOEE to decide how many “options” to consider; what those “options” should be; which other “financing options” should be included in the assessment; what it means for a fee increase to be “feasible”; and the level of the fee increase to be proposed. Under this language, DOEE’s evaluation could take so many different forms, and the end result could vary so widely in practical effect, that the current Draft Permit could not possibly ensure that DOEE meets the maximum extent practicable standard.

EPA must include more detail in this provision to make it “reasonably prescriptive.” For example, DOEE should be required to evaluate substantial fee increases, not just very small ones (as it did in the revised draft of its TMDL Implementation Plan). DOEE should also be required to assess the effect the fee increase would have on the pace of WLA attainment. Further, the Draft Permit should establish an objective standard for any fee increase that is ultimately proposed. For example, EPA could require the fee increase to be large enough that it reduces the overall length of the TMDL implementation schedule by a certain percentage or number of years. Otherwise, the proposed language would allow DOEE to enact an insignificant fee increase that has little or no impact on the effectiveness of its stormwater programs. Finally, the concept of what it means for a fee increase to be “feasible” must be defined. Does “feasibility” in this context relate to affordability for the payers of the fee, willingness of political leaders to approve the increase, or something else? Absent this additional level of detail, the evaluation and subsequent feasibility decision must be subject to EPA approval and public review.

EPA Response to Comment 51:

See Response to Comment 50. Setting local fees to fund the program should include a local community process. MS4 permittees must demonstrate that they have the funding to implement the program that EPA determines to be maximally practicable, but they have latitude to determine how to balance the various

sources of funding available to them to effectively implement the program. The District's Consolidated TMDL Implementation Plan did not conclude that a fee increase was necessary, only that it was one possible component of a strategy to implement a program to meet the applicable WLAs. Therefore, EPA maintains that the permit should go no further than to reflect the TMDL IP action to undertake the evaluation.

52. Comment, DC Building Industry Association (footnotes removed):  
Requiring the District to study increases in the Stormwater Fee is unnecessary and unrelated to water quality improvement.

Section 2.2.4 of the draft MS4 permit would require the District to submit by 2019 a report evaluating the options for increasing the District's stormwater fee. If such a report concludes that an increase is "feasible," the draft permit would require the District to propose to increase its stormwater fee. This proposed permit condition should be eliminated from the final MS4 permit because it is unnecessary and unrelated to water quality improvements.

The District has already analyzed the impact of increasing the stormwater fee by 25, 50, and even 100 percent and found that "even a doubling of the current stormwater fee has only minimal impact on the timeline for achieving WLAs." Accordingly, the District's resources will be better spent implementing other aspects of the proposed MS4 permit rather than requiring duplication of an existing analysis.

Furthermore, District residents already pay high fees related to stormwater management, and these fees are projected to steeply increase over the coming decade. As part of the mandated \$2.6 billion Combined Sewer Overflow Long Term Control Plan, District residents and property owners are already paying significant fees to reduce stormwater overflows and to improve water quality. These monthly fees started at \$1.24 per equivalent resident unit (ERU) in 2009 and are projected to increase to almost \$37 per ERU by FY 2024. These existing fees already place an incredible financial burden on the District's low-income and elderly populations and make the District less attractive to developers compared to nearby jurisdictions.

While we dispute the need for any further stormwater fee increases, in the unlikely event that the final permit contains any language about fee increases, that language should be tied to clear improvements in water quality. Specifically, we request the following language be added: "If the permittee determines, per the assessment, that an increase in the District's Stormwater Fee is feasible and will achieve significant and cost-effective improvements to water quality, the permittee shall propose an increase." To force the District to double its stormwater fee to achieve miniscule improvements to the WLA attainment timeline ignores the economic reality that it is not possible for the District to pay its way to full WLA compliance on the backs of taxpayers. In fact, an increased

stormwater fee would likely be counterproductive as it would deter new development projects that, unlike the stormwater fee, the District depends on to make significant progress toward complying with its WLAs.

EPA Response to Comment 52:

See Responses to Comments 50, 51 and 53.

53. Comment, Fort Lincoln New Town Corporation (FLNTC):

We recognize the importance of reducing the impact of human activity on the environment, and support the District's efforts to do so. However, we are opposed to a blanket requirement in the draft MS4 Permit language for the District to "***evaluate options to increase the stormwater fee to fund projects to improve water quality***". Such a requirement has to be weighed against the consent decree mandated Anacostia River Tunnel Project which is funded via mandatory impervious surface fees that are significant and that will escalate annually until the project's debt has been retired (i.e., for more than a decade). These escalating fees put DC retail development projects at a competitive disadvantage compared with neighboring jurisdictions. The major retail tenants at the Shops are particularly sensitive to the storm water fees because they paid for extensive deployment of low impact development measures, under the assumption that such expenditures would entitle them to significant credits against impervious surface fees. However, when the system of fees and credits was officially promulgated the credits were limited to no more than 4% of DC Water's impervious surface fees.

We recommend a moratorium on additional storm water fees until the debt for the Anacostia River Tunnel Project has been retired, and/or other relief mechanisms, at least for major retail developments and similar projects.

EPA Response to Comment 53:

EPA shares the concerns of the commenter that raising fees may or may not be economically feasible, and concurs with the need to balance priorities such as CSO Long-Term Control Plan implementation. However, the Permittee committed to undertake the fee analysis in its Consolidated TMDL Implementation Plan. EPA encourages FLNTC, and others, to provide input to the Permittee on this assessment to ensure that all concerns are reasonably considered. See also Responses to Comments 50 and 51.

54. Comment, DOEE:

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

EPA Response to Comment 54:

EPA agrees that the ultimate decision of whether to modify the stormwater regulations is the decision of the District. Therefore, EPA has modified the language as proposed.

55. Comment, DC Water:

This section would require the permittee to develop an Annual Report that will “include and consider projections of how changes to climate will potentially alter precipitation and runoff amounts, intensities and patterns in the District.” Because the Draft Permit is limited to control of the District’s MS4 system, this requirement to consider potential impacts of climate change must be limited to MS4 Permit Area. This same comment applies to Section 2.7.5 of the Draft Permit.

EPA Response to Comment 55:

EPA concurs. Since this is an MS4 permit, the requirement applies only to the MS4 area, though the assessment could provide useful information for the rest of the District as well. As noted in other responses, unless specifically noted otherwise, all provisions of this permit apply only to the MS4 area and therefore it is not necessary to repeatedly add this qualifier.

56. Comment, NRDC et al (footnotes removed):

*Analysis of Updating Stormwater Management Regulations.* We strongly support a requirement for DOEE to analyze potential changes to its existing stormwater regulations (§ 2.2.5), which we urged DOEE to do in connection with the development of the draft TMDL Implementation Plan. As the plan itself

acknowledges, significant increases to the regulations, such as a retention standard of up to 2 inches, will be necessary in order to attain WLAs in some watersheds.

However, as with the requirement to analyze increases to the stormwater fee, the proposed language here is too vague. The “potential changes” it directs DOEE to analyze are fairly well defined (though we urge EPA to include two additional changes to the list: increasing the retention standard for substantial improvement projects, and establishing a minimum pollutant removal efficiency for stormwater controls). However, the Draft Permit says little about what form the analysis itself should take—whether that is a cost-benefit analysis, a technical feasibility analysis, a modeled analysis of the changes’ impact on the pace of WLA attainment, or something else. In addition, the Draft Permit directs DOEE to develop an implementation strategy for carrying out any changes that it determines “are feasible and warranted,” but these terms are not explained or defined.

Without a more objective standard establishing when the development of an implementation strategy is required, the analysis and conclusions about whether to move forward must be reviewed by EPA and the public to avoid permittee self-regulation. Currently, the draft language says that the analysis and strategy shall be submitted with the 2019 Annual Report, but that EPA review and public comment will not occur until the Stormwater Management Program (SWMP) is updated near the end of the permit term (roughly 2020-2021). EPA review and public comment should be carried out at the time when decisions are being made about which regulatory changes to pursue and over what timeframe.

#### EPA Response to Comment 56:

EPA agrees that “increasing the retention standard for substantial improvement projects” is a reasonable option for consideration in the assessment, and is already largely covered by the existing language, i.e., “...increasing the on-site retention volume standard to 2 inches, lowering the threshold for regulated projects...”. EPA has included in the final permit an additional criterion for consideration: “eliminating exemptions for projects that are currently exempt per the District’s stormwater regulations.” In addition, the District’s TMDL Implementation Plan description of this analysis specifically includes “...increasing the retention standards currently applied to major land disturbing activities and/or substantial improvement projects.” (Part 6.7.5 of the TMDL IP, page 102).

The District stormwater regulations already have some allowances for pollutant removal efficiencies, i.e., 520.5(a)(2); 521.6(a)(2); 522.6(a)(2) and 24.6(a). In general, EPA is not in favor of expanding the minimum pollutant removal efficiency framework. Retention is a preferable approach because for every amount of stormwater actually retained, it keeps 100% of the collected pollutants from discharging; a pollutant removal efficiency of something less than 100%



potentially undermines that framework because it is less efficient in controlling and minimizing pollutant discharges through stormwater. Also, pollution efficiency approaches are end-of-pipe approaches. They ignore influent concentrations, thereby dis-incentivizing preventive measures, i.e., it is easy to remove 80% TSS when the influent is heavily sediment laden, but effluent quality may still be quite poor.

In its TMDL IP, the Permittee has described an approach to this assessment that necessarily involves use of the stormwater management model in order to evaluate performance outcomes from various scenarios. The description also includes a “cost/benefit analysis of potential changes to existing stormwater management regulations”. EPA’s interest and authority include only the time it will take to achieve water quality objectives. The Permittee must balance these criteria with other concerns. Therefore, the details of the assessment are appropriately decided by the Permittee because it knows what information is needed to address the concerns of the many stakeholders involved in revision to the stormwater regulations, should that be deemed appropriate.

EPA agrees that Agency review of the proposed strategy is appropriate, and this is included in the provision, i.e., the strategy will be a part of the updated Stormwater Management Program, which is subject to public notice, and must also be submitted to EPA for review. The current time frame for this is appropriate. Changing the stormwater regulations is a very involved process. As noted in prior responses, it should be done very thoughtfully.

57. Comment, DC Building Industry Association (footnotes removed):

A Study of a 2-inch Stormwater Retention Standard is premature and would lack concrete data.

Section 2.2.5.1 of EPA’s draft MS4 permit would require the District to complete a study by 2019 of the feasibility of increasing the on-site stormwater retention requirements to 2 inches from the current standard of 1.2 inches for major land-disturbing projects and 0.8 inches for major substantial improvement projects. The District’s current on-site stormwater retention regulations first went into effect in 2013 and remain among the strictest stormwater management regulations in the nation. Given the short amount of time that the District’s stormwater retention regulations have been in place, a study on the feasibility of nearly doubling those standards would be premature and severely flawed due to a lack of hard data regarding how the existing standards are working.

The District’s draft 2016 TMDL IP explains that existing stormwater-retention best management practices (BMPs) in the District’s MS4 area, including BMPs recently implemented to meet the District’s 2013 stormwater regulations, retain a volume of stormwater equal to 0.003 inches across the MS4 area. This volume of stormwater retention has helped the District achieve 29 of its 204 WLAs that are

impacted by stormwater. The District estimates that achieving an average stormwater retention of 0.8 inches across the MS4 area (an increase by a factor of 266) will achieve 87 WLAs, and that reaching an average retention of 1.2 inches (an increase by a factor of 400) will achieve 113 WLAs. While studies and analysis of the feasibility of increasing the stormwater retention standard may be appropriate once the stormwater retention across the MS4 area approaches 1.2 inches, until that time the District's limited resources should be dedicated to effectively implementing the current stormwater regulations. To achieve substantial progress toward meeting its WLAs, the District does not need a more ambitious stormwater retention standard, but rather needs to achieve widespread implementation of the recently adopted stormwater regulations.

A feasibility study of a 2-inch stormwater retention standard would consist largely of guesswork rather than reliable data. The District's Office of Planning only attempts to project development and redevelopment activity 25 years into the future. The District concedes that "[t]he spatial location of the development and redevelopment beyond 2040 depends on market and regulatory forces and is not predictable." Furthermore, the existing stormwater retention standards have only been in place for three years. Development data from the years 2013-2016, in addition to being limited in size, would also be misleading in that it would only include data from what has generally been a robust period for the development community in the District as measured by the number of development projects. The impact that the existing retention standards will have on development during an inevitable market downturn is, thankfully, still unknown. Therefore, it would be a waste of the District's resources to require it to conduct a study on the feasibility of a 2-inch retention standard when the long-term impacts of the current stormwater retention standards have yet to be fully studied.

Additionally, before pursuing an increase to the District's stormwater retention standard, EPA should allow the District to further develop the stormwater retention credit (SRC) trading program that is still in its infancy. This program has the potential to incentivize the use of stormwater BMPs at properties for which no BMPs are required, such as residential parcels or existing commercial properties that are not undergoing renovations. An increase in the stormwater retention requirements, by contrast, would have the perverse result of serving as a disincentive to new development and redevelopment projects, which would slow the District's progress toward higher stormwater retention and compliance with WLAs.

EPA Response to Comment 57:

EPA clarifies that this assessment is not just to evaluate the efficacy of implementing a 2-inch on-site retention standard. In fact, the Permittee already undertook that evaluation as part of the modeling efforts for development of the Consolidated TMDL Implementation Plan, and demonstrated that there would be noteworthy water quality benefits if this approach were implemented. This

assessment picks up where that one left off because jumping straight to that option with the presumption that it is the optimal solution *would* be premature. The assessment will look at other options and combinations of options, such as keeping 1.2” as the standard, but eliminating certain exemptions, or targeting only certain priority watersheds or areas for additional on-site retention. The evaluation will also look at logistical issues such as how proposed changes could be timed or phased with other efforts (such as CSO storage implementation), and how to best optimize water quality benefits, incentives, and costs. The Permittee’s current data and models are sophisticated enough to provide reasonable inputs for an assessment of a wide variety of scenarios and the trade-offs associated with each.

EPA agrees with the basic premise stated by the commenter that any changes to stormwater regulations or policies should be based on a thorough and thoughtful assessment of the most feasible framework to meet water quality objectives. This includes avoiding requirements that may function as disincentives to further progress. The development community in DC now has several years of experience with some of the most innovative stormwater regulations in the country, in a community with some of the most significant water quality challenges in the country. EPA encourages the development community to bring that practical expertise to the table, and suggest options or combinations of options for this evaluation that neither the Permittee nor EPA may have considered. All ideas that expedite water quality outcomes in the most feasible ways possible are welcome.

58. Comment, Wentworth Green Solutions:

Tighten the Existing Retention Standard for New Development

DOEE should move promptly to expand the present retention standard of 1.2 inches to 2 inches. It is difficult to see how we will achieve our clean water goals by relying on this present weak standard. Increasing the standard for new development would be one of the quickest ways to improve the stormwater program and begin to achieve our clean water goals. Increasing the retention level on new development is needed because it may be the quickest and most effective way to get substantial reductions. There are indications that other methods of reducing stormwater flows, such as green roofs, drain disconnects and rain barrels, retention in public rights of way (PROW), etc. may not yield the reductions needed quick enough. Some studies have indicated that drain disconnects and rain barrels may not be popular and be of questionable effectiveness, particularly over the long term. Stormwater in PROW may tend to impact local neighborhoods and lead to backlash against the program unless handled with a detailed plan of public participation, but, according to the DOEE, bio-retention could yield close to a 50 percent reduction in E. coli levels in our creeks and streams.

EPA Response to Comment 58:

The Permittee's analysis (*see* Consolidated TMDL Implementation Plan, Part 5.2.3c and Figure 5-4) acknowledges the effectiveness of increasing the on-site retention depth to two inches. However, the analysis also demonstrates that there are a number of ways to optimize various factors to achieve water quality goals, e.g., lowering the size thresholds or types of development projects to which the stormwater regulations apply or targeting certain watersheds. Because the costs of changing the stormwater regulations, both to the Permittee and to the development community, are notable, it makes sense to structure changes in a way that achieves water quality objectives but does it with an efficient use of resources. Additional analyses, as well as consultation with affected stakeholders, are warranted. The Permittee's stormwater program has been evolving very rapidly with the implementation of the on-site retention program and the SRC program in just the last four years. EPA agrees that increasing the on-site retention standard to two inches may be a viable solution, but also concludes that it should be done thoughtfully and in a way that optimizes outcomes and expended resources. See Response to Comment 57.

59. Comment, National Association of Home Builders (footnotes removed):

EPA's proposal to mandate that the city conduct a cost benefit analysis on the question of increasing their retention standard from 1.2 to 2 inches is both illegal and overly prescriptive.

EPA proposes that the District must perform a cost-benefit analysis on increasing their on-site stormwater retention standard from 1.2 inches to 2 inches. While EPA certainly may conduct such a study, it may not demand such specific parameters for a study conducted by the permittee.

We acknowledge that numerous NPDES permits have required permittees to conduct studies/reviews of existing barriers to reaching water quality standards, and do not disregard this as an important tool to qualify costs and benefits of different control measures. However, due to its narrow scope, we believe this specific mandate will severely limit the way the District uses public funds to study urban stormwater issues.

We request that EPA revise this provision to come into line with similar nationally cited NPDES MS4 permit conditions directing municipalities to conduct "studies and reviews". For example, some provisions currently in use require municipalities to conduct code and ordinance reviews on barriers to implementing green infrastructure. Such provisions direct permittees to use their own discretion to complete assessments, and do not set specific numeric study parameters for how and in what manner a permittee must conduct their analyses. EPA should not require the District to conduct a cost benefit analysis on the

specific numeric shift from a 1.2 – 2-inch retention standard. The District should be allowed discretion to choose the parameters of such a study, if required.

EPA Response to Comment 59:

The specific requirement (Subsection 2.2.4 of the Final Permit) is to conduct an analysis of updating stormwater management regulations. EPA has also corrected the title inconsistencies between this provision, Table 2 and the Table of Contents.

EPA has clear legal authority to require permittees to conduct studies and assessments in order to more effectively develop appropriate limits and controls (see Response to Comment 14). As the commenter acknowledges by outlining studies often found in NPDES permits and which the Permittee could undertake, assessments are a common element of NPDES permits.

With respect to assessment of codes and ordinances for barriers to green infrastructure, the Permittee's stormwater program has progressed beyond these particular types of assessments. The 1.2" on-site retention requirement is essentially the implementation of green infrastructure; its incorporation into the District's stormwater regulation is the solution to overcoming those barriers. Per implementing MEP and meeting water quality objectives, the assessments included in this permit are appropriate for this stage of the Permittee's stormwater program maturation.

EPA has not set specific parameters for the assessment, but has left most of the details to the discretion of the permittee. This provision is a commitment of the Permittee as proposed in its TMDL IP (see Part 6.7.5, page 102 of the plan). Language in Subsection 2.2.4 of the Final Permit is a shortened version of the description of this assessment from the TMDL IP.

See also Responses to Comments 57 and 58.

60. Comment, Maryland Building Industry Association:

MBIA urges you to give considerable attention to the issues identified by the Association, and by the National Association of Home Builders and the District of Columbia Building Industry Association in their separate letters to EPA. We believe that these concerns warrant serious consideration before the permit is finalized.

It is worth noting that the District has clearly established itself as a community at the forefront of sustainable development given the District's early entry into green building and installation of green roofs, the current MS4 permit, updated Stormwater Regulations and other environmental requirements.

We support the flexibility provided by the current MS4 permit and the 2013

Stormwater Rule, which includes Stormwater Retention Credits and an in-lieu fee. However, these requirements were phased in, with the last transition period ending in July 2015. Now sites have to achieve half of their Stormwater Retention Volume onsite before becoming eligible to meet the remainder offsite.

This has been too short a period to ascertain how well the requirements of the MS4 permit and the 2013 Stormwater Rule have been working for the District and for private development. When enough data is available an assessment should be done before considering any change to the on-site retention standard or lowering the threshold in order to regulate smaller sites. It is certainly premature to study a 2-inch Stormwater retention standard.

Development is already expensive in the District. The Draft Permit's proposed enhancements and suggestions may result in more requirements and uncertainties for development. Since development in the District is presently highly regulated, the ability of additional requirements to contribute a significant environmental benefit should be examined thoroughly. If more requirements are imposed without justification, it is likely that development will move to nearby jurisdictions.

EPA Response to Comment 60:

EPA agrees with many of the points made by the commenter, including that changes to the stormwater regulations should not be rushed, but rather undertaken with careful deliberation. A great deal of additional effort is needed to reach water quality objectives in the District; it is EPA's intent that these efforts are undertaken thoughtfully, with consideration of many of the issues raised by the commenter. See Responses to Comments 56, 57 and 58.

61. Comment, DOEE:

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 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 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.

EPA Response to Comment 61:

Pertaining to the original draft permit (November 2016) EPA agrees that there are some slight redundancies and logistical inconsistencies between plan update requirements in Subsections 2.2.6.1, 2.2.7 and 2.2.8. Thus, EPA has combined the requirements of Subsections 2.2.6, 2.2.7 and 2.2.8 of that draft permit into a new Subsection 2.2.5 of the Final Permit, *Updating the Consolidated TMDL Implementation Plan*. The rewrite accommodates issues addressed in both Comments 61 and 62.

62. Comment, DOEE:

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. 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.

EPA Response to Comment 62:

EPA agrees, and has accommodated this suggestion. See Response to Comment 61.

**Comments on Draft Permit Section 2.4: Public Right-of-Way Optimal Design**

63. Comment, DOEE:

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 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.

EPA Response to Comment 63:

EPA has eliminated 2.4.1 (of the November draft permit) as a separate permit provision, but has included these small projects as specific types of development to be considered in the assessment of updating the stormwater regulations (Subsection 2.2.4 of the Final Permit). Considering all types of projects in tandem should allow for a balanced strategy.

64. Comment, DC Water:

These sections require the District to “submit a description of a program that provides requirements for projects currently exempt from the District on-site retention standards” and to implement “water quality design elements or provisions for projects currently exempt from on-site retention requirements” and to begin implementing those requirements no later than January 1, 2019. One of the land disturbing activities exempt from the requirements of Stormwater Management provided in the District’s Stormwater Regulations apply to projects that “reduce Combined Sewer Overflows (CSOs) in compliance with a court-approved consent decree.”

DC Water strongly asserts that the exemption that applies to CSO activities must be retained and that no additional or alternative requirements be imposed on such work. CSO activities are physically outside the DC MS4 Permit Area and thus are beyond the purview of the Draft Permit. Such activities will not have an impact on MS4 performance or the achievement of effluent limitations applicable to any discharge from the MS4 system. In addition, these activities are being conducted under a federal consent decree, often on schedules negotiated with the United States, and cannot be delayed or otherwise rendered more complex without

contemporaneous federal commitment to a consent decree modification.

EPA Response to Comment 64:

See Response to Comment 63.

EPA reiterates that this provision, like the rest of the Final Permit, applies only to the MS4 Permit Area, which should practically exclude most if not all CSO-related activity. However, there is no specific exemption for CSO activities in the MS4 permit. If a CSO-related activity occurs in the MS4 Permit Area or results in discharges to or from the MS4, it is subject to the requirements of this permit, notwithstanding a consent decree. EPA understands that the District's stormwater regulations provide exemptions for CSO projects from the on-site retention requirements. EPA clarifies that this does not exempt CSO-related activities in the MS4 Permit Area from basic requirements such as soil erosion control during construction activities or ongoing operation and maintenance requirements.

65. Comment, DC Building Industry Association (footnotes removed):

The exemption for small projects should not be eliminated without the benefit of a thorough analysis and participation by the development community.

Section 2.4.1 of the draft MS4 permit would require the District to develop and submit by 2018 a program that would apply some level of stormwater requirements to land disturbing activities of less than 5,000 square feet, which are currently exempt from such requirements. The draft permit would also require the District to implement such a program by 2019.

The District has made clear that any regulatory changes to its stormwater regulations "require a thorough cost/benefit analysis and [must] be subject to public input." Without having the benefit of such an analysis, it is improper for EPA, through its draft MS4 permit, to dictate regulatory actions to the District.

Additionally, Section 2.4.1 as written appears to leave no room for the District to exempt any land disturbing activity, no matter how small, from stormwater retention requirements. Such a program would be impossible to administer and would require the District to dedicate significant resources to oversee minor projects that will likely do little to help the District comply with additional WLAs.

As mentioned above, rather than forcing the District to administer a strict command-and-control oversight system for small land disturbance projects that will serve as a disincentive to small-scale development, EPA should allow the District to further develop its SRC trading program. This program will incentivize properties that are currently exempt from stormwater retention requirements to nevertheless implement BMPs without serving as a disincentive to new small-scale development in the District.

EPA Response to Comment 65:

EPA agrees that Subsection 2.4.1 (of the November draft permit) should be eliminated as a separate requirement and instead, has included this scenario for consideration in the District's stormwater regulation assessment in Subsection 2.2.4 of the Final Permit. See additional discussion in Responses to Comments 57, 58, 59, 60 and 63.

66. Comment, NRDC et al (footnotes removed):

Expanding Retention Requirements to Additional Sites. Under DOEE's current stormwater management regulations, the requirement to retain stormwater on-site applies only to projects that disturb, or are part of a common plan of development that disturbs, five thousand square feet or greater of land area. EPA established this size threshold in the 2011 MS4 permit. The Draft Permit now contains a proposed provision, titled "Eliminating Exemptions for Certain Small Projects," that requires the District to "submit a description of a program that provides requirements for projects currently exempt from the District on-site retention standards." (§ 2.4.1.)

We strongly support the notion of expanding the rules' applicability to smaller projects, which actually make up a significant majority of the development activity taking place in any given year. After all, the District's draft TMDL Implementation Plan acknowledges that applying the retention standard to every site in the District, including smaller sites, will be necessary—though not sufficient—to achieve wasteload allocations. It thus makes perfect sense to begin the process now of expanding coverage to these sites, thereby accelerating TMDL implementation.

However, the scope of the proposed provision in the Draft Permit is not clear. It is housed within section 2.4, titled "Public Right-of-Way Retrofit Planning," which implies that EPA intends for DOEE to provide requirements only for PROW projects that are currently exempt from standards (i.e., under 5,000 square feet). Yet the text of the proposed provision nowhere restricts the requirements to PROW projects, and the title of subsection 2.4.1 refers only to "certain small projects" without limitation. Separately, another section of the Draft Permit requires the District to begin implementing the requirements it has developed for "projects currently exempt from on-site retention requirements" under section 2.4.1—but this provision is housed within a section titled "Implementing the Standard for Substantial Improvement Projects." (§ 3.1.4.2.) It is thus unclear whether the Draft Permit is directing DOEE to establish requirements for (a) all projects under 5,000 square feet, (b) PROW projects under 5,000 square feet, and/or (c) substantial improvement projects under 5,000 square feet. This confusion is compounded by the fact that the Draft Permit does not explain how the requirement in section 2.4.1 to establish requirements for exempt (small) projects relates to the provision that separately requires DOEE to explore options

for updating the stormwater regulations by, for example, “lowering the threshold for regulated projects.” (§ 2.2.5.1.) The Draft Permit’s fact sheet does not provide any additional explanation that could resolve these ambiguities, as it says only that the goal is to minimize exemptions “for smaller projects.”

EPA must revise the Draft Permit to clearly describe the types of projects to which section 2.4.1 applies. In clarifying the scope of the provision, we urge EPA to apply it as broadly as possible, so that the District must provide requirements for *all* projects under 5,000 square feet, or at least set a much smaller threshold which captures all the development activity necessary to achieve the District’s wasteload allocations on a reasonable time schedule.

As for the substance of those requirements, the Draft Permit does not provide any standards for what the new “requirements” for small projects should be, and it would allow them to go into effect without any EPA approval or public review. This violates the Clean Water Act prohibition against permittee self-regulation. The permit must either specify the requirements that apply to small sites (whether the full 1.2-inch retention standard, the 0.6-inch standard for substantial improvement projects, or something else), or it must require that the new requirements that DOEE develops will be reviewed by EPA and made available for public notice and comment. The Clean Water Act demands that the permitting authority, not the permittee, must ultimately decide what is necessary to meet legal requirements. In the words of the U.S. Court of Appeals for the Ninth Circuit, “stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.”

(Note: the fact sheet appears to have a typo on page 12; it says that the Draft Permit would require “a strategy to phase out or eliminate the on-site retention requirements for small projects,” but the Draft Permit actually would require the permittee to phase out or eliminate *exemptions* to such requirements.)

#### EPA Response to Comment 66:

EPA agrees that the draft permit was not clear on the scope of proposed Subsection 2.4.1. Based on Comments 63 and 65, Subsection 2.4.1 from the November draft permit, as a separate requirement, has been eliminated. The substance of that proposed provision has been practically incorporated in Subsection 2.2.4 of the Final Permit, and does apply to all small projects, not just public right-of-way projects. Per the requirements of Subsection 2.2.4 of the Final Permit the District will consider a variety of options for updating the stormwater regulations.

Regarding the issue of self-regulation, EPA does not consider strategies, schedules and plans developed and proposed by the permittee to be self-

regulation. It is a standard and viable approach (especially in NPDES MS4 programs) for the Permittee to propose to EPA a strategy that will meet water quality objectives within the context of other considerations, e.g., staffing, policies, funding. In fact, this is contemplated by the federal regulations, which stipulate that MS4 permittees shall submit proposed management programs to the permitting authority and that those programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable (MEP). See 40 C.F.R. § 122.26(d)(2)(iv). To that effect, EPA incorporates relevant measures into the permit either as proposed by the permittee or with modifications to ensure that both the MEP and water quality frameworks are realized. As the permitting authority, EPA makes the final decisions, but the Permittee's assessments are crucial to making informed decisions.

Finally, the commenter's parenthetical note is correct. The Fact Sheet accompanying the draft Permit incorrectly noted phasing out the on-site retention requirements for small projects rather than the current *exemption*.

67. Comment, DOEE:

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.

EPA Response to Comment 67:

EPA included this provision in the permit at the suggestion of DDOT after discussions about the most effective way to ensure maximum and efficient implementation of on-site retention measures in PROWs. However, EPA sees no significant difference in outcomes between EPA's proposed language and DOEE's requested language, so EPA has made the suggested change in Section

2.4 of the final permit but changed the submittal date to 2021, and included climate change as an additional factor to consider per Comment 68.

EPA further clarifies that at this juncture EPA is not considering eliminating the District's MEP process, which is distinct from the federal MS4 MEP process.

68. Comment, NRDC et al (footnotes removed):

Public Right-of-Way Design: The Draft Permit should require the permittee to take climate change into account when establishing its "optimal design options" for public rights-of-way. (§ 2.4.2.) As the fact sheet notes, the Climate Ready DC plan recommended that the District update its design standards for roads and transit infrastructure to account for extreme precipitation events, but the Draft Permit does not currently require climate change to be considered when establishing PROW project design standards.

EPA Response to Comment 68:

EPA has incorporated climate resilience as one of several factors into the final permit. This is consistent with Section 2.7, and should provide additional clarity while not adding additional work.

**Comments on Draft Permit Section 2.5: Evaluation of Pollutant Reductions from Other Activities**

69. Comment, NRDC et al (footnotes removed):

Evaluation of Pollutant Reductions from Programmatic Activities. We support the requirement for DOEE to establish a method for quantifying pollution reductions from programmatic activities (as opposed to structural stormwater controls). However, we urge the requirement to be expanded beyond catch basin cleaning, as the Draft Permit currently proposes. (§ 2.5.) The draft TMDL Implementation Plan notes that DOEE lacks the ability to quantify and track reductions from other programmatic activities beyond this one. For example, load reductions could be calculated for illicit discharge detection and elimination (IDDE) activities if DOEE were collecting the appropriate information. In addition, load reduction methodologies have not yet been developed for source control, public outreach and education, or pollution prevention activities; DOEE could work to develop methodologies on its own or adopt methodologies based on research that other government entities or academic institutions have done. Once DOEE gains the ability to quantify the impacts of these practices, it will be able to better assess their effectiveness and evaluate their contribution toward WLA attainment.

Once complete, this evaluation should be presented to EPA and made available to the public for review and comment. The agency should then use the information to specify the appropriate nature and level of effort required of the District under

these programs moving forward.

EPA Response to Comment 69:

EPA agrees with this suggestion and has incorporated a new provision (Subsection 2.5.2 of the Final Permit) that will allow the Permittee to take pollutant reduction credit for activities provided they have calculation methodologies approved by EPA.

**Comments on Draft Permit Section 2.7: Flood and Climate Management Assessment**

70. Comment, DOEE:

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.

EPA Response to Comment 70:

From EPA's perspective, DOEE's modified language "to provide input during..." is very similar in expected outcomes to EPA's proposed language to "collaborate with stakeholders in...". EPA does not expect the District to always be the lead on implementing flood management projects within its jurisdiction. Therefore, EPA has made the suggested change.

71. Comment, NRDC et al:

As the Draft Permit's fact sheet notes, the District will face significant changes in precipitation patterns in the coming years due to climate change. These shifts in precipitation, including more frequent intense rain events, will pose challenges for the District's stormwater management efforts and necessitate adjustments to its pollution and flood control programs. In general, we strongly support all proposed

requirements in the Draft Permit that would enhance the resilience of the District's stormwater systems to changes in climate.

EPA Response to Comment 71:

EPA appreciates the support of the commenter. EPA agrees that it will be important to take changing precipitation patterns into account in future program planning.

72. Comment, NRDC et al:

Evaluation of the Need for Revised Stormwater Standards: The Draft Permit requires the permittee to use future climate condition estimates to evaluate the need for revised standards in stormwater management. (§ 2.7.5.) This requirement is important and should be included in the final permit. EPA should clarify within this provision that the requirement is a sub-component of the obligation in section 2.2.5.1 to analyze potential changes to the stormwater regulations more generally, and that it should be completed on the same timeframe.

EPA Response to Comment 72:

EPA appreciates the support of the commenter. EPA does not view this provision as a subcomponent of Subsection 2.2.5.1 in the draft permit (2.2.4.1 of the Final Permit), but rather that it applies to all provisions in the permit, as relevant. Subsection 2.2.4.1 of the Final Permit already specifies that the assessment shall also include and consider the requirements identified in Section 2.7, which includes considering factors such as sea level rise, extreme weather, and changing precipitation patterns when evaluating the need for revising stormwater management standards.

73. Comment, NRDC et al:

Enhanced Resilience for Infrastructure: As part of the Draft Permit's proposed requirement to determine which stormwater infrastructure and/or assets need enhanced resilience measures to ensure optimum performance despite changes in climate (§ 2.7.5), DOEE should be required to map specific outfalls and inlets that could be inundated by sea level rise, and to map where the MS4 system is undersized and potentially at risk of flooding or backing up during heavier precipitation events. The permit should then require DOEE to take action based on the results of this mapping exercise; the current Draft Permit language does not include any mandate to follow up on the evaluation by implementing the enhanced resilience measures that were found necessary.



EPA Response to Comment 73:

The District's plan for adapting to climate change, *Climate Ready DC*, already includes these types of assessments, i.e., identifying at risk utility infrastructure assets and developing adaptation/resilience measures for them. EPA's goal in including climate-related objectives in this permit is not to impose additional burdens on the District, but to ensure that NPDES stormwater requirements complement and support planning and implementation of resilience measures. As such, given that the requirements of both the plan and the permit dovetail on this issue, it is not necessary to include additional specificity.

**Comments on Draft Permit Section 2.8: Submittals to EPA**

74. Comment, DOEE:

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.

EPA Response to Comment 74:

EPA concurs and has made the suggested change. This provision is Subsection 2.2.4 of the Final Permit.

75. Comment, DOEE:

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.

EPA Response to Comment 75:

EPA clarifies that public notice and comment is only required for the elements for which it is specified. EPA has made the suggested change.

76. Comment, DOEE:

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.

EPA Response to Comment 76:

EPA has responded to those requests individually.

**Comments on Draft Permit Part 3: STORMWATER MANAGEMENT PROGRAM IMPLEMENTATION**

77. Comment, DOEE:

The District requests the language in subpart 3.1.1.2 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.

EPA Response to Comment 77:

EPA agrees that “required to comply with” more accurately describes the universe of projects than “complying with”, and has made the change to Subsection 3.2.1.1 of the Final Permit.

78. Comment, NRDC et al (footnotes removed):

We support the effort DOEE has made over the past five years to adopt and implement new regulations for stormwater management on development and redevelopment sites, as required by the previous 2011 MS4 permit. The stormwater retention credit (SRC) trading program that makes up an important

component of these regulations is an innovative approach that could yield additional pollution reduction benefits, but only if it is properly structured. We raised concerns about certain aspects of the program that undermine environmental performance when we commented on the draft regulations in 2012 and 2013, and the reissuance of the MS4 permit is a good opportunity to close some of the loopholes we identified. At the same time, the retention standards in the stormwater regulations should begin to apply to more projects.

We support EPA's decision to eliminate one of the SRC trading program's loopholes: the ability of older (pre-2013) stormwater management practices to generate credits. We opposed this grandfathering provision when the trading program was being developed, and are glad to see the Draft Permit prohibit these older practices from generating credits after a six-month phase-out period. (§ 3.1.2.2.) Allowing a regulated site to purchase SRCs generated by a pre-existing practice provides no additional pollutant reductions. In addition, certifying credits for such practices has the effect of artificially inflating the supply of SRCs, as well as depressing their price. There is simply no need for these credits as part of the regulatory program because even in the event of an SRC shortage, regulated parties have the alternative options of compliance through on-site retention or the payment of a fee in lieu.

EPA Response to Comment 78:

EPA appreciates support for this provision. EPA has modified the compliance date for this provision in Subsection 3.2.3.2 of the Final Permit. See response to comment 80.

79. Comment, NRDC et al (footnotes removed):

While we support that change, however, two other loopholes in the regulatory program are also undermining environmental outcomes and should be eliminated: the lack of a requirement for public right-of-way projects to make up off-site the volume they do not retain on-site, and the ability to indefinitely "bank" stormwater retention credits.

Off-Site Mitigation for Public Right-of-Way Projects. The Draft Permit proposes to continue applying the same stormwater management requirement to public right-of-way (PROW) projects as the 2011 MS4 permit: such projects must retain stormwater volume on-site to the maximum extent feasible, but they are not required to make up the remainder off-site or purchase SRCs if the on-site retention volume is less than 1.2 inches.

When this exception was made in the 2011 MS4 permit, EPA made clear that the special treatment for PROW projects was only intended to be temporary: "District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but *for the*

*duration of this permit term* need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.” EPA now proposes to backtrack from this promise and allow the loophole to extend through at least another permit term. (§ 3.1.3.)

Excusing PROW projects from making up their stormwater retention volume shortfall off-site fails to meet the maximum extent practicable standard for MS4 permits. While we concede that PROW projects may face special technical constraints that sometimes preclude them from achieving the full 1.2-inch retention volume on-site, neither EPA nor the District has made any showing why it is not practicable for the District agencies undertaking PROW projects to make up the remaining volume through either off-site mitigation projects or the purchase of SRCs from other entities who install retention practices.

In the Draft Permit’s fact sheet, EPA offers three justifications for maintaining this loophole, but none of them make sense. First, EPA argues that requiring off-site mitigation would “dis-incentivize full utilization of on-site retention capacity at those sites that can achieve significantly more than 1.2 inches.” The loophole pertains only to sites that *cannot* achieve the full 1.2 inches on-site, so it is unclear why EPA believes this statement is relevant. In addition, it ignores the fact that the Draft Permit already requires PROW projects to achieve the maximum feasible on-site retention volume, potentially beyond 1.2 inches if applicable. Requiring off-site mitigation for projects whose maximum feasible on-site retention volume is less than 1.2 inches does not alter this pre-existing requirement.

Second, EPA argues that requiring off-site mitigation “could divert District resources from retrofit projects with greater pollutant reduction potential.” It is not clear why EPA believes that any stormwater management projects the District might choose to pursue in compliance with an off-site mitigation requirement would achieve lower pollutant reductions than some other undefined set of projects. To the contrary, it seems more than likely that the District would choose off-site mitigation projects—or buy SRCs from projects—that achieve the greatest possible pollutant reductions, to help accelerate the TMDL implementation schedule.

EPA’s argument thus presents a false choice. There is no need to release the District from a requirement to retain stormwater under one set of obligations so that it can be freed up to retain stormwater under a different set of obligations. The end result either way is stormwater retention, to the benefit of local water bodies.

Third, EPA argues against requiring off-site mitigation because “the overall on-site retention totals would not necessarily be enhanced since the District already has fixed annual milestones, which must be achieved regardless.” As discussed above, the proposed 1,038-acre milestone will likely be achieved by development

and redevelopment sites implementing the stormwater regulations, without any action needed on the District's part. It will therefore not function as a driver for the District to implement any significant number of stormwater practices. Under these circumstances, a requirement for PROW projects to use off-site mitigation would in fact enhance overall retention totals. But even if the acreage target were increased enough to require the District to implement additional stormwater controls, as we advocate, a mandate for PROW projects to perform off-site mitigation would work in tandem with that overall target. Regardless, this argument still does not explain why it is not *practicable* for a PROW project's volume shortfall to be made up off-site.

EPA attempts to compensate for the loophole by requiring PROW projects to achieve more than 1.2 inches of retention on-site if feasible. While we disagree that it makes up for the failure to require off-site mitigation on sites that fall short of 1.2 inches, we agree that sites that *can* go beyond 1.2 inches should be required to do so. However, the proposed language in the Draft Permit does not clearly require PROW projects to do this. The proposed text merely states that "these projects are subject to design and site plan review requirements to ensure maximum feasible combinations of on-site retention volume, water quality treatment and design options, *including in some situations* stormwater management of more than the 1.2" retention volume." (§ 3.1.3, emphasis added.) If EPA intends to mandate that PROW projects retain more than 1.2 inches when feasible, it must clearly say so, including by defining the "situations" in which it is required. As it stands, the Draft Permit language is impermissibly vague on this point. However, even if the proposed condition were clarified, it is still irrelevant to any findings about the practicability of off-site mitigation and cannot make up for the existence of the loophole that EPA previously promised to eliminate.

We want to specifically emphasize the importance of the language pertaining to the District Department of Transportation's stormwater management requirements. We have noticed a tendency in District government to single out DOEE as the exclusive entity implementing this permit, and a reluctance to enforce the permit's requirements against District agencies other than DOEE. But this is a permit issued to the District of Columbia, not DOEE, and all of the District's executive agencies and authorities must comply with permit requirements.

Response to Comment 79:

The commenter is correct that EPA, in the 2012 Final Revised Permit, provided the exception to off-site mitigation for projects in the public right-of-way and was clear that the exception only applied to that permit term. EPA recognized the challenges associated with on-site retention in transportation rights-of-way, which have many buried utilities, subgrades that often necessarily cannot be permeable in order to maintain roadway integrity and sometimes contain very complicated legacy infrastructure. EPA explicitly provided the District that permit term to

develop “new stormwater management design, construction, and operation and maintenance processes, protocols, requirements and specifications for transportation systems and public rights of way” (Final Fact Sheet, 2011). While EPA certainly considered at that time that PROW projects might not continue to be exempt from off-site mitigation, the Agency was open to the possibility that the District might demonstrate a reasonable approach for stormwater management in PROWs. EPA did not “promise” to terminate the exception, as that would have been inconsistent with providing the District a permit term to demonstrate feasibility of designs, processes, and protocols. Neither did EPA promise to extend the exception as that would have been inconsistent with MEP had the District not developed a reasonable alternate approach.

As EPA explained in the Fact Sheet that accompanied the proposed permit (2016), the Permittee did develop and implement an approach that it has termed “maximum extent practicable” (not to be confused with the federal MS4 MEP framework). It also provided on-site retention volume data from the projects that have been built consistent with this process, which in some cases exceeded the 1.2” standard. Though the totals do not average to 1.2” retention across all projects, EPA has determined that this retention requirement, combined with all of the other requirements in the Final Permit, constitutes MEP for this permit term. EPA refers the reader to the Fact Sheet for the November 2016 draft permit and Subsection 3.2.4 of the Final Permit for additional discussion.

In discussions with the District Department of Transportation about its District MEP process it became clear that the real missed opportunity for stormwater management in PROWs was with the many smaller projects (less than 5,000 square feet in size) not subject to the District’s stormwater regulations, as there are many more of those than there are larger projects. Therefore, this permit includes a requirement (Section 2.4 of the Final Permit) to develop optimal designs for PROW projects that currently do not have to undergo the District’s MEP design process. EPA expects better overall benefits from this approach rather than performing off-site mitigation for fewer larger projects, because there are many more smaller projects than large ones. It is also a notable improvement over the prior permit, and consistent with adaptive management principles for developing permit terms and conditions.

EPA notes that off-site mitigation for PROW projects has not been ruled out for future permit terms. However, consistent with the requirement in Subsection 2.2.4 for the District to conduct a thorough analysis of how the stormwater regulations may be modified to target the most cost-effective advances, EPA will wait to see where the improvements should be targeted for the most effective water quality benefits. This information can then be used to inform future permit conditions.

## Comments on Draft Permit Subsection 3.2.3: Stormwater Retention Credit Program

### 80. Comment, DOEE:

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.

### EPA Response to Comment 80:

In acknowledgement that the District will need additional time to revise the stormwater regulations to implement this provision, EPA is modifying the language in Subsection 3.2.3.2 of the Final Permit to read:

*In order to maximize water quality benefits, if a retention practice was installed prior to July 1, 2013, it will only be eligible to generate SRCs if an application has been submitted within six (6) months after the effective date of the appropriate revisions to the District's stormwater regulations. The District shall initiate appropriate revisions to the regulations within twelve (12) months of the effective date of this permit unless an alternate schedule is approved by EPA.*

### 81. Comment, DOEE:

The District requests the language in 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.

### EPA Response to Comment 81:

Since the District has already placed the necessary funds in escrow for the SRC Purchase Agreement Program, EPA is agreeable to the proposed change to

remove the specific dollar amount, and has made it in Subsection 3.2.3.3 of the Final Permit.

82. Comment, DC Water:

The apparent sunseting of credits dating farther back than July 1, 2013 should be reconsidered because it will limit the availability of Stormwater Retention Credits and will drive up the price of credits without a rational basis. At a minimum, only those portions of pre-July 1, 2013 credits now covered by the 1.2” retention requirement can be justified. DC Water requests EPA Region 3 to reconsider the categorical elimination of these early installations.

EPA Response to Comment 82:

In discussions between EPA and DOEE, it was confirmed that there appear to be few existing potential credits implemented prior to July 2013. However, because they are being phased out, this does provide owners of projects that qualify an opportunity to apply for certification of their credits. Additionally, there is no basis for the assumption that eliminating older projects from consideration will affect the price of credits.

83. Comment, NRDC et al (footnotes removed):

[...]SRC Purchase Program. [Second], we support the proposed requirement for DOEE to commit \$12.75 million to establish the SRC Purchase Program. (§ 3.1.2.3.) Purchasing and retiring credits from the market is an effective means of speeding up the pace of TMDL implementation in the District, as the stormwater controls generating the credits will generate a benefit that is separate from and additional to the benefits achieved through the trading of credits done to satisfy the development regulations.

EPA Response to Comment 83:

EPA appreciates the commenters’ support for this provision. However, see Response to Comment 81.

84. Comment, NRDC et al:

Indefinite Banking of SRCs. The other loophole that EPA should take this opportunity to close is the indefinite “banking” of SRCs. Credit banking, allowed under DOEE’s SRC trading program, occurs when credits are not used immediately after they are generated, but rather are stored for later use (either by the credit generator, credit purchaser, or a third party).

Banking credits can be problematic because it generates a risk of creating disparate “real world” and “on paper” compliance pictures at the moment of credit



retirement. If a property owner buys many credits over a period of years and then uses them all at once, in the real world, incremental retention has occurred over a longer period of time. On paper, however, because that owner then retired or “used” a large number of credits at once, it appears that a large amount of retention has occurred in a short time. This problem also comes into play when a large stormwater practice quickly generates a lot of credits, but those credits are used gradually over a long period of time. In that case, according to the District’s credit trading records, it would look as if a smaller amount of retention occurred over many years when in reality a large amount of retention occurred over a short period.

Disparate “on paper” and “real world” pictures caused by credit banking make it difficult for the District to know exactly how much retention is accomplished in its watersheds at any given time and therefore inhibits its ability to plan for meeting wasteload allocations. It can also potentially cause the District to fall short of compliance with the MS4 permit requirement for regulated developments to retain 1.2 inches of rainfall during any given 24-hour storm.

The Draft Permit should specify that indefinite credit banking is prohibited, and that SRCs must be used during the same year that they are generated. At the very least, a SRC should not be eligible for use after the conclusion of the three-year period when the credit- generating practice is obligated to be maintained.

EPA Response to Comment 84:

EPA addressed these issues in the Fact Sheet that accompanied the proposed Permit and the Fact Sheet discussion for Subsection 3.2.3 of the Final Permit, and refers to that discussion. EPA has found no evidence to suggest that there would be any negative impacts to water quality from indefinite banking of credits, though there is potential for positive impacts, i.e., realizing water quality benefits earlier than when a credit is actually used. In addition, the District has adequate tracking mechanisms to determine both when retention projects are actually installed, as well as when any credits generated by those projects are utilized.

85. Comment, National Association of Home Builders (footnotes removed):

EPA’s proposed permit inappropriately seeks to mandate specific funding targets for individual projects.

EPA’s authority is over discharge of pollutants; not funding. The draft permit proposes that the District *shall commit* \$12.75 million to establish a Stormwater Retention Credit (SRC) purchase agreement program and to provide technical support to identify sites with potential to generate SRCs.

Section 302 of the Clean Water Act makes it unlawful for a person to add pollutants to waters of the United States from a point source unless done in

compliance with other sections of the Act. Relevant in this case is section 402, which allows the EPA to issue permits for the discharge of pollutants. More specifically, section 402(p) provides that EPA’s NPDES permitting authority over MS4s is limited to controlling the *discharge of pollutants from* the MS4 system to the maximum extent practicable (MEP).

While section 402 does give EPA authority to regulate pollutants that are discharged, it does not provide the Agency with unbridled control over the discharger—here Washington D.C. Rather, the CWA “authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants.” As the D.C. Circuit has explained, “[t]he statute is clear” and contains no language that “undercuts the plain meaning of the statutory text;” EPA may not “meddl[e] inside a facility” because it only has authority over the discharge of pollutants from a point source, and “Congress clearly intended to allow the permittee to choose its own control strategy.” In short, EPA “is powerless to impose conditions unrelated to the discharge itself.”

By mandating that the District of Columbia expend a specific amount of dollars on a Stormwater Retention Credit (SRC) purchase agreement program, the EPA is acting well beyond its authority over the discharge of pollutants from the MS4. There is no illustrated correlation between spending \$12.75 million and a quantity of pollutants. What if D.C. could meet the MEP standard by committing only \$10 million, would it be in violation of its permit? By mandating spending amounts, the EPA is clearly not allowing the permittee to determine its own control technology. We request that the District be allowed discretion to choose the parameters of such a study if it decides to conduct one.

EPA Response to Comment 85:

See Response to Comment 81.

**Comments on Draft Permit Subsection 3.2.4: Implementing the Standard for Projects in the Public Right-of-Way**

86. Comment, DOEE:

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.

EPA Response to Comment 86:

EPA confirms this interpretation. See Response to Comment 79.

87. Comment, DC Water:

Revise to clarify that this requirement applies to the DC MS4 Permit Area, to read as follows.

The Permittee shall continue to implement a methodical analysis and decision process for projects in public rights-of-way (PROW) in the DC MS4 Permit Area in order to ensure that the project has exhausted every opportunity to achieve maximum feasible on-site stormwater retention volume (SWRv).

Further, this section requires controls of stormwater in the public right of way to the "maximum feasible". The stormwater regulations require it to the "maximum extent practical or MEP". DC Water request EPA Region 3 to revise the Draft Permit to comply with the stormwater regulations by changing this language to MEP so there is no implication of a higher unauthorized standard being applied.

EPA Response to Comment 87:

As noted in prior responses, this permit applies only to the MS4 area, thus those types of qualifications are not necessary. EPA has made the second suggested change to Subsection 3.2.4 of the Final Permit to reflect the District paradigm for PROW projects.

**Comments on Draft Permit Subsection 3.1.4: Implementing the Standard for Substantial Improvement Projects**

88. Comment, DOEE:

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 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.

EPA Response to Comment 88:

Because EPA has removed Subsection 2.4.1 of the draft permit from the Final Permit (see Responses to Comments 63 and 65), that necessarily renders Subsection 3.1.4.2 of the draft permit (implementation of that planning element) moot. EPA has removed this provision from the Final Permit.

**Comments on Draft Permit Subsection 3.2.1: Retrofits of Impervious Surfaces**

89. Comment, DOEE:

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

*Retrofits for Existing Discharges*

The 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.

EPA Response to Comment 89:

Per comment and Response to Comment 31, EPA recognizes that there is confusion between projects that are termed "retrofits" and those that are associated with new or redevelopment. Given that nearly all development activities in the District are redevelopment projects, the stormwater control measures associated with them are essentially 'retrofits'. To reduce confusion, EPA has eliminated the term 'retrofit' from the final permit and has instead used terms such as implementation of stormwater management measures or, as appropriate, implementation of on-site retention measures.

Therefore, EPA has also reorganized this part of the permit by eliminating the proposed Section 3.2, *Retrofit Program for Existing Discharges*. The “acres managed” metrics noted in the proposed Subsection 3.2.1 are already stipulated in Subsection 1.5.3.1 of the Final Permit, which makes them redundant in Part 3. Therefore, EPA has removed them from this section. All retention implementation requirements are included in Section 3.2 of the Final Permit, *Achievement of the Acres Managed Numeric Limit*.

### **Comments on Draft Permit Subsection 3.2.3: Green Roofs**

90. Comment, DC Building Industry Association (footnotes removed):

The draft MS4 permit’s green roof mandate is unenforceable and would interfere with other environmental priorities.

Section 3.2.3 of the draft MS4 permit requires the District to “ensure the installation of a minimum of 350,000 square feet of new green roofs in the District” over the next five years. The draft permit fails to recognize that the District has no authority to require private property owners to install green roofs on development and redevelopment projects that achieve applicable stormwater retention requirements in other ways. Additionally, the green roof requirement assumes that development in the District will significantly outpace the District’s own projections, which expect only 20,499 square feet of green roof to be added annually. While DCBIA hopes that the pace of development projects in the District remain robust, the MS4 permit should not contain requirements that are based on metrics that are heavily dependent on market forces and are beyond the District’s control.

While DCBIA acknowledges the many benefits of green roofs, they are not without their drawbacks. Green roofs can limit rooftop amenities that are attractive to tenants and are often necessary for development projects in the District to compete with comparable projects in nearby jurisdictions. Green roofs can also limit the installation of rooftop solar panels. Recently, the District updated its renewable portfolio standard to require that 50 percent of its electricity come from renewable energy sources by 2032—including 5 percent from locally based solar—one of the most aggressive standards in the country. Given its small geographic footprint, it will be a challenge for the District to supply enough locally-based solar power to achieve this standard. As of July 2016, local solar projects supplied only 0.3 percent of the District’s current solar energy target. The draft permit’s arbitrary call for the installation of a set quantity of green roofs will hinder the District’s ability to meet its local solar goals.

Since the green roof mandate cannot be enforced by the District, may serve as a disincentive to development, and may conflict with rooftop solar initiatives, this requirement should be eliminated from the final MS4 permit.

EPA Response to Comment 90:

EPA agrees with DCBIA that green roofs are not the appropriate application in many situations. However, they continue to be an effective stormwater management option in certain situations. The 350,000 square foot requirement is being brought forward from the 2012 Final Revised Permit and is consistent with District goals for green roofs. DOEE's 2016 Annual Report documents that the District exceeded this number during the 2011 permit term (1,463,615 ft<sup>2</sup>), which demonstrates feasibility. EPA did not increase the permit limit specifically for green roofs in the Final Permit, however the overall acres managed limit for implementation of infiltration measures does include the capacity of the District to implement green roofs. The District implements this provision primarily through incentives rather than requirements, and continues to consider this a realistic and desirable component of their stormwater management program. The number that the commenter references above is *only* those green roofs that the District will directly fund through its incentive program, not the overall annual square footage that the District anticipates will be installed through development incentives or voluntary implementation. To the extent that green roofs provide water quality benefits, EPA will continue to include them in the suite of options that the District can credit towards 'acres managed' and/or pollutant reductions.

91. Comment, DC Water:

This section requires the installation of at least 350,000 square feet of green roofs. There are already permit requirements to manage a certain number of acres in the sewersheds. The permit should not prescribe a specific technology (i.e. green roofs) since it will depend on the degree and nature of development in the MS4 area.

EPA Response to Comment 91:

The Permittee may include these 350,000 square feet in the overall tally for acres managed. This was a provision in the last permit and is carried forward. The Permittee included this commitment in its Consolidated TMDL Implementation Plan, and it is therefore included in the permit as a feasible measure. Furthermore, EPA considers it appropriate to maintain diversity in the types of stormwater control measures for optimum water quality outcomes. See also Response to Comment 90.

**Comments on Draft Permit Subsection 3.2.4: Tree Canopy**

92. Comment, DOEE:

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 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.

EPA Response to Comment 92:

During the drafting of the permit, the Permittee provided information to EPA for an annual net number of tree plantings, which EPA mistakenly interpreted to apply only to the MS4 Permit Area. As clarified in the comment, the Permittee intended the information to apply District-wide. EPA acknowledges our error, and concludes that our original MEP assessment of 8,000 trees for the MS4 Permit Area was flawed, based on a misunderstanding of the information provided by the Permittee.

EPA also reiterates the point made several times in comment responses, that this permit applies only to the MS4 Permit Area. EPA may consider District-wide perspectives in MEP assessments and calculations, but the permit will specify metrics and requirements only for the MS4 Permit Area.

Regardless, EPA does not consider 8,000 net trees per year District-wide as suggested by the commenter to be a fair representation of MEP for several reasons: 1) the Permittee's Urban Tree Canopy Plan calls for 10,800 trees per year

District-wide, which necessarily makes *that* the baseline rather than 8,000, and 2) over the past 5 years District-wide totals have averaged 11,128 net trees per year.

<b>Net Tree Plantings in DC During 2011 Permit Term</b>			
<b>Year</b>	<b>MS4 Area</b>	<b>Non-MS4 Area</b>	<b>District-Wide Total</b>
2012	8,259	3,469	11,728
2013	4,319	4,747	9,066
2014	6,413	4,600	11,013
2015	8,451	5,983	14,434
2016	6,085	3,313	9,398
Numbers from the District's annual reports for the years noted.			

Based on this information, EPA is making two changes to the requirements in Subsections 1.5.3.1 and 3.2.8 of the Final Permit:

- a) EPA is establishing the net annual MS4 tree planting requirement for this permit at 6,705 for the following reasons: 1) over the 5 years of the 2011 permit term, the Permittee averaged 6,705 net trees per year in the MS4 Permit Area; 2) EPA has no information to suggest that the past five years have been an anomaly, and that the current rate of tree planting cannot be sustained; 3) MEP is not automatically determined to be the maximum number *ever* achieved, but must still be practicable; and 4) 6,705 represents a notable increase over the 4,150 annual net tree planting required in the 2012 Final Revised Permit, and one that the Permittee can be reasonably expected to achieve based on past performance, and
- b) EPA is establishing these numbers as annual averages rather than annual minimums. This will provide the Permittee some flexibility in years in which, funding, contracts, weather or other variables delay tree plantings, but will still ensure that the overall objective is achieved. The 5-year averaging period will begin with the first year the Final Permit is in effect.

A net increase of 6,705 trees per year as an annual average is established as a benchmark for this permit term, and a net increase of 33,525 trees as a total over five years is established as a milestone for this permit term (or for the first five years of this permit term should the permit term be extended beyond five years). Should the permit be extended beyond five years, net tree plantings should continue to accrue at this rate and totals will increase commensurately.

93. Comment, NRDC et al (footnotes removed):

Tree Planting: We strongly support the Draft Permit's proposed requirement for the District to achieve a minimum net annual tree planting rate of 8,000 plantings. (§ 3.2.4.) This proposed requirement represents an appropriate increase in level of effort from the 2012 Final Revised Permit's requirement to plant 4,150 trees



annually, especially given that the District actually exceeded 8,000 annual tree plantings in some years of the previous permit term.

EPA Response to Comment 93:

See Response to Comment 92.

**Comments on Draft Permit Subsection 3.3.1: Response to Sanitary Sewer Overflow to the MS4**

94. Comment, DC Water:

The Draft Permit requires responding to SSO with containment within 2 hours of notification. First, it should be revised to say “with containment equipment.” Second, the provision just prior requires investigation of an SSO complaint within 24 hours. Because it is unreasonable to require that a response be conducted before investigation of a report, a more appropriate framing of the response requirement would be to mark it from the *confirmation* of an SSO event. In that way, the aggressive 2-hour window for response would not be triggered by unconfirmed reports, nor would it become the exception that renders the 24-hour investigation requirement for 3rd party complaints a nullity.

DC Water therefore requests that this section be modified to read as follows.

3.3.1 Response to Sanitary Sewer Overflow to the MS4

The permittee shall continue to implement an effective response protocol for overflows of the sanitary sewer system to, or from ~~and through~~ the MS4. The response protocol shall clearly identify District agencies, departments and authorities responsible for implementing each element of the protocol, and appropriate contact information. The response protocol shall contain, at a minimum, procedures for:

1. Investigating any complaints of a sanitary sewer overflow (SSO) within 24 hours of the incident report.
2. Mobilize to ~~Responding~~-respond to SSOs with containment equipment within two hours of confirmation of a SSO event.
3. Notifying appropriate sewer and public health agencies within 24 hours when the sanitary sewer overflows to the MS4.
4. Notifying the public in a timely and effective manner when SSO discharges to, from and through the MS4 may adversely affect public health.

This provision in no way authorizes SSO discharges to or, from ~~or through~~ the MS4.

EPA Response to Comment 94:

EPA has made the following changes to Subsection 3.3.1 of the Final Permit, such that #2 now reads:

“Respond to SSOs with containment or other appropriate measures within two hours of the permittee discovering or confirming an SSO event to, from or through the MS4.”

EPA does not consider preparing to respond the same as responding. Deploying equipment to a site is not the same thing as achieving containment (or other appropriate measure), so EPA has not made these suggested edits. However, EPA believes it is reasonable to anchor the response time to the time that the permittee discovers or confirms the event. Also, in situations where containment cannot be achieved within 2 hours it is likely that another type or combination of responses is more appropriate, e.g., diversion, or in the case of a small overflow, perhaps just immediate clean-up. As such, EPA has provided some flexibility for how the immediate response is handled. With respect to the suggested deletions of the word “through”, see Response to Comment 6.

**Comments on Draft Permit Subsection 3.3.2: Industrial Activities at Municipal Operations**

95. Comment, DOEE:

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.

EPA Response to Comment 95:

This comment was received during the first public comment period and EPA made the requested changes. However, the Permittee made additional comments during the second public comment period (see comment 162) that resulted in additional changes. See discussion under Response to Comment 162 for an

explanation of the final resolution of the language in Subsection 3.3.2.1 of the Final Permit.

96. Comment, DC Water:

The Draft Permit requires all District-owned or leased facilities and job sites to comply with stormwater pollution prevention measures in the MS4 Permit or MSGP. However, this provision can create duplicative oversight for facilities that are subject to an individual NPDES permit. DC Water requests EPA to revise this section to read,

3.3.2.1 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.

EPA Response to Comment 96:

EPA has made the suggested changes. See also Responses to Comments 95 and 162.

97. Comment, DOEE:

The District requests the language in this subpart [3.3.2.4] 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 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.

EPA Response to Comment 97:

EPA has modified the language in the final permit to allow for discharges of pre-treated washwaters while also considering the change suggested by DC Water (see Comment 98). Subsection 3.3.2.4 of the Final Permit now reads:

*For wash water at District-owned and operated facilities the Permittee shall eliminate discharges of pollutants to, from, and through the MS4 by implementing any of the following measures: 1) collect and haul off-site for disposal; 2) equip with a pre-treatment device; or 3) redirect to the sanitary sewer in accordance with District regulations and requirements. 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.*

EPA also refers to Response to Comment 5, where EPA notes that the authorization of wash waters has been removed from Section 1.3 of the Final Permit.

98. Comment, DC Water:

Revise to include requirement to comply with DC Water's requirements for discharges to sanitary sewer.

3.3.2.4 Wash water at District-owned and operated facilities is prohibited from being discharged to, or from ~~and through~~ the MS4 or directly into District waterways. 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. Within this permit term, the permittee shall implement measures to eliminate the discharge of wash waters into the MS4 by requiring wash water to be collected and hauled off-site for disposal or redirected to the sanitary sewer in accordance with DC Water requirements. Alternative pre-treatment methods shall be considered on a case-by-case basis and approved by DOEE plan reviewers prior to implementation.

EPA Response to Comment 98:

EPA declines to eliminate “and through” from the language of this provision. See Response to Comment 6 for discussion of that issue. However, EPA has included the qualifier “in accordance with District regulations and requirements” to Subsection 3.3.2.4 of the Final Permit. See also Response to Comment 97.

**Comments on Permit Subsection 3.3.4: Catch Basin Operation and Maintenance**

99. Comment, DC Water:

An effective catch basin cleaning program needs a measure for compliance. There are, however, impediments that need to be recognized before establishing a compliance measure that may be unrealistic and unnecessary to achieve.

There are approximately 14,000 catch basins in the MS4 area and notwithstanding, "allowances within a reasonable margin of error for logistical obstacles," achieving a perfect score of 100 percent compliance annually is unrealistic and unnecessary to obtain an effective level of performance.

In fact, there is likely a 100 percent certainty that a condition outside the "reasonable margin of error for logistical obstacles" will occur and result in noncompliance. Such an occurrence could be a simple human error where a substitute supervisor misinterprets a cleaning schedule and one or two catch basins don't get cleaned in a particular year. Moreover, developing a system for documenting “logistical obstacles” encountered in each and every instance – as when a car is parked in a way that blocks a truck’s access to a catch basin; or a bike share rack is installed on top of a catch basin manhole; a bike lane is designated adjacent to a catch basin; or construction barrier blocks a catch basin – would be costly and itself burdensome, although arguably necessary to demonstrate compliance with what is an unnecessarily inflexible standard of performance.

The concerns related to a perfect performance standard were evaluated as part of development of DC Water's NPDES permit. As a result of those evaluations a rational yet effective catch basin cleaning condition was established. The catch basin cleaning condition for the Combined Sewer Area (CSS) is part of the Nine Minimum Controls which is a component of the CSO Policy in the Clean Water Act.

The catch basin cleaning condition in DC Water’s NPDES permit for the CSS recognizes the myriad of situations beyond reasonable control that could result in some catch basins not being cleaned annually but provides a contingency provision to assure effective performance.

The catch basin cleaning condition for the CSS is as follows:

"Clean 85 percent of the 8200 catch basins in the combined sewer area at least annually. Inspect catch basins in CSO areas tributary to the Anacostia River at least 2 times per year and clean more frequently as identified by inspections."

In view of the above circumstances and to provide uniformity between the NPDES and MS4 permits, DC Water requests that the CSS catch basin cleaning condition of 85% be adopted for the MS4 area.

EPA Response to Comment 99:

EPA does recognize that there will be logistical barriers to achieving 100% catch basin cleaning every year, hence the allowance for a reasonable margin of error (see Subsection 3.3.4.1 of the Final Permit). However, 15% of 14,000 is 2,100, which is notably more than the 1 or 2 suggested in the commenters' example. In addition, the District's combined sewer system drains to a wastewater treatment facility, which means that more often than not, pollutants that are not removed through catch basin cleaning will be treated at the Blue Plains wastewater treatment plant. The MS4 discharges directly to surface waters, which means that all catch basin pollutants will be discharged to District waterways untreated if they are not removed. Therefore, because there is a safety net for one but not the other, EPA rejects the suggestion that the CSS and the MS4 should be given the same thresholds. EPA is retaining the proposed language with the understanding that in some years there may be ample justification, e.g., extreme flooding, for failing to clean *many* catch basins (perhaps more than 15%), while in other years there may be no justification for failing to clean out even 3 or 4%.

EPA agrees that some catch basins likely will not need annual cleaning while others will need clean-out more frequently. EPA contends that the Permittee's plan to utilize mobile field applications to gather information on each catch basin and modify cleaning frequencies based on accumulation rates and other data is an effective way to target resources. This standard operating procedure will be implemented during this permit term (see Subsections 3.3.4.2 and 3.3.4.3 of the Final Permit).

100. Comment, NRDC et al:

Catch Basin Operation and Maintenance: The Draft Permit states that the permittee shall clean each catch basin within the MS4 area at least once annually, "with allowances within a reasonable margin of error for logistical obstacles." (§ 3.3.4.1.) EPA should specify what exactly constitutes a "reasonable margin of error." Would a shortfall of five percent be reasonable? Ten percent? The Draft Permit should provide a more objective, quantitative margin of error that EPA considers acceptable, and the permittee should be required to explain any shortfalls with reference to the specific "logistical obstacles" that it encountered.

EPA Response to Comment 100:

See Response to Comment 99. A reasonable margin of error will be highly dependent upon the reason for a shortfall. While EPA is highly in favor of being as quantifiable as possible in a permit, a judgment of this kind falls within the realm of enforcement discretion and must be based on the specifics of the situation.

**Comments on Draft Permit Subsection 3.3.5: Storm Drain Outfall Operation and Maintenance**

101. Comment, DOEE:

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 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.

EPA Response to Comment 101:

EPA concurs with most of this assessment and rationale, and has adjusted the language in Subsection 3.3.5 of the Final Permit to read:

*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. The Permittee may substitute a portion of outfall repairs with stream restoration with a demonstration (i.e., pollutant reduction estimates) that the in-stream water quality benefits of restoration exceed those derived from outfall repairs.*

EPA acknowledges that some outfall repairs may be delayed by third parties despite due diligence by the Permittee. However, it is not appropriate to count outfalls as repaired if they have not yet been repaired. The permittee will have the entire five-year permit term to repair the outfalls, so if it is anticipated that a third party will be involved in the process, the permittee may want to commence the process of outfall repair for those outfalls sooner rather than later in the permit term. Given that this outfall repair schedule is now nearly 10 years old, it is reasonable to expect that the appropriate permits, easements, etc. should be anticipated and well underway far ahead of the expiration date of the Final Permit.

102. Comment, DC Water:

Many of the MS4 outfalls are located on land managed by third parties, principally Federal agencies. These agencies have a history of requiring complex and time-consuming conditions for permitting access and construction conditions and limitations for repair projects. Such permitting has, 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 result in adding to the time required to obtain a repair permit. EPA is familiar with local situations faced by the utility agencies in the region and the delays and costs incurred, in spite of diligent efforts by the utility to obtain the approvals needed for repair or



improvement of pollution control facilities located on third party property.

In view of the third party permitting requirements, it will be virtually impossible for the permittee to comply, without exception, with the 10% and 50% repair standards.

Because of the third party permitting situation, DC Water requests that the outfall repair condition be revised 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 ~~approximately 10% of outfalls in need of repair each year, such that~~ 50% of all outfalls in need of repair have been repaired 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 was diligently pursuing obtaining the third-party permit, the schedules for those projects shall be exempted from the ~~10% and 50%~~ standard and proceed on the schedules established by the third party permits. Fifty (50) percent of the repair projects remaining after separation of third party related projects shall be completed by the end of the permit term. 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."

EPA Response to Comment 102:

See Response to Comment 101.

**Comments on Draft Permit Subsection 3.3.6: Street Sweeping**

103. Comment, DOEE:

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.

EPA Response to Comment 103:

The numbers in the proposed permit were based on estimates of street sweeping miles provided by the Permittee. Based on the comment, the Permittee intended them to represent District-wide sweeping efforts. However, Permittee did not specify that when it provided the numbers to EPA, so EPA assumed they were intended to apply to the MS4 Permit Area since this is an MS4 permit. Following further discussions with the Permittee, EPA is revising this number from 44,000 to 8,000 within the MS4 Permit Area. This number was based upon estimates using the currently available DPW information, which is only tracked District-wide. The reissued permit will also require the Permittee to perform a GIS analysis during this permit term to determine a more accurate metric for street sweeping within the MS4 Permit Area as opposed to this estimation. The results of this analysis will be used to inform the next permit.

The language in Subsection 3.3.6 of the Final Permit now reads:

*The Permittee shall conduct street sweeping on a minimum of 8,000 road miles annually within the MS4 Permit Area. Within 18 months of the effective date of this permit, the Permittee shall implement a georeferencing-based street sweeping system and provide GIS analysis to EPA with a more accurate estimate of street miles swept annually.*

EPA has established 8,000 road miles as the minimum requirement for this permit term. EPA notes that this is an increase of the 2012 Final Revised Permit. See Fact Sheet discussion for Subsection 3.3.6 of the Final Permit.

104. Comment, NRDC et al (footnotes removed):

Street Sweeping: The Draft Permit's street sweeping requirement should be more specific. The proposed requirement directs the permittee to conduct street sweeping on at least 44,000 road miles annually within the MS4 area, with sub-targets for different types of roadway. (§ 3.3.6.) This requirement is not prescriptive enough to ensure that the District's street sweeping efforts will in fact reduce pollution to the maximum extent practicable. The Draft Permit should require the permittee to focus its efforts on high-priority locations, at specified minimum time intervals (utilizing the Chesapeake Bay Program's accepted set of BMP crediting standards for this practice), using high-efficiency vacuum equipment.

EPA Response to Comment 104:

EPA supports street sweeping as part of a suite of municipal pollution prevention efforts in MS4 permits and programs. While EPA agrees that studies generally support the improved efficacy of vacuum sweeping over mechanical sweeping, in general the current pollution reduction potential of street sweeping is limited, regardless of the method used, and does not appear to warrant the investment in the equipment, *compared to other types of pollution reduction activities*. Therefore, EPA chooses not to impose additional resource demands of purchasing and implementing vacuum sweepers on the Permittee for street sweeping for this permit term. At some point in the future, if other methods of pollutant reductions have been employed to the MEP and additional reductions are still required to meet water quality objectives, this issue can be revisited. See also Response to Comment 103 regarding road miles swept.

**Comments on Draft Permit Subsection 3.3.7 : Transportation and Utility Construction Activities**

105. Comment, DC Water:

In this section, the Draft Permit requires that “[t]he Permittee shall ensure that standard and emergency utility/road repair projects limit the amount of soil disturbance to the immediate area under repair” or required to repair additional areas on moratorium roads. This limitation, without more flexibility, is inappropriate because there are cases in which more extensive soil disturbance is necessary in order to locate or properly access an “immediate area under repair.” Flatly forbidding such necessary exploratory excavation or additional areas of excavation necessary to ensure safe and efficient repairs even though that work is not in the “immediate are under repair” is both unwise and arbitrary and capricious.

EPA Response to Comment 105:

EPA understands the commenter’s concern, and has modified this first sentence of Subsection 3.3.7 of the Final Permit to read “The Permittee shall ensure that standard and emergency utility/road repair projects limit the amount of soil disturbance to only what is necessary to effect the repair.”

**Comments on Draft Permit Section 3.9: Stormwater Training**

106. Comment, DC Water:

This table includes “Municipal water treatment and wastewater treatment” in the list municipal sites where stormwater training is required. First, these facilities are located within the CSS area of the District are not within the scope of this permit. Second, the NPDES permit for Blue Plains already includes SWPPP requirement

including training requirements. The municipal water treatment facilities and wastewater treatment facilities in the District are subject to an individual NPDES permit. Therefore, DC Water requests EPA to delete these facilities from the Table.

EPA Response to Comment 106:

Wastewater and water employees and contractors undertake activities in the MS4 Permit Area (e.g., construction, maintenance and emergency response efforts on sanitary sewer lines or water lines), and to the extent those activities may impact stormwater and the MS4 system, those people should have some basic knowledge of the MS4 and the potential impacts to stormwater. The permit is clear that stormwater training may be combined with other types of training. If DC Water or other entities are already providing training that covers the relevant training areas outlined in Table 3 of the Final Permit, then that fulfills this requirement for employees with municipal water treatment and wastewater treatment duties. No change to the permit is necessary.

**Comments on Draft Permit Subsection 3.10.1: Website**

107. Comment, David Bardin:

EPA should require DC to make local information readily available and user-friendly for citizens. That includes at minimum

- Identifying each current MS4 watershed;
- Providing a citywide map showing boundaries of all MS4 watersheds (compare outdated 2010 Rock Creek Watershed Implementation Plan, Figure 3 at page 21);
- Publishing detailed maps of all MS4 watersheds comparable to the handful appended in DC's 2015 MS4 Annual Report Attachments, Appendix I. Wet Weather Monitoring Data (for example, excellent map of Anacostia High School monitoring site and sewershed at PDF page 132 of 142, <http://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/Attachments%20FY%202015%20Annual%20Report%203pdf.pdf> )\

Otherwise neighborhood support for MS4 program will falter.

EPA Response to Comment 107:

Because of comments like this one received during the first public comment period, EPA and the Permittee discussed ways in which some of these needs could be met for District stakeholders.

See Response to Comment 121 and the Fact Sheet discussion on Subsection 5.3.2 of the Final Permit, which describe the new web-based graphical interface for the

District's stormwater program that will include many of the features requested by the commenter.

## **Draft Permit Part 4: WATER QUALITY ASSESSMENT**

### **Comments on Draft Permit Subsection 4.1.1: Assessment Program Objectives**

108. Comment, DOEE:

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

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

EPA Response to Comment 108:

EPA contends that it is not reasonably possible to evaluate the impact of the District's MS4 on the overall health of the receiving waters without first having a basic understanding of the status of the receiving waters themselves. However, EPA also agrees that the permittee's basic objective is the former. Therefore, EPA has modified the language of Subsection 4.1.1.2 of the Final Permit as follows: "Evaluate the health of receiving waters within the context of assessing the impacts of District MS4 discharges."

### **Comments on Draft Permit Subsection 4.2.3: Sampling Locations**

109. Comment, David Bardin:

EPA should restore Soapstone Creek to Table 9.

- Broad Branch is a welcome addition, but not a substitute for Soapstone Creek.
- EPA should not tolerate interruption of Soapstone Creek data set at least until it solves mystery of past high *E. coli* readings. (Soapstone was one of only six locations in recent past.)

EPA Response to Comment 109:

Several commenters expressed interest in Soapstone Creek, both 1) the need for additional efforts to be undertaken in this waterbody, and 2) concern that this is not a primary monitoring location under the revised monitoring strategy.

On the first issue, EPA notes that the MS4 permit and program are designed to address stormwater issues in the entire MS4. Though there are a few targeted actions, such as implementing specific remedies to meet specific wasteload allocations (WLAs), most permit requirements apply to the entire MS4 area. There are no TMDLs specific to Soapstone Creek, thus the permit does not

include targeted provisions for this location. Regardless, the District stormwater program has and continues to focus notable efforts in stream restoration and stormwater implementation projects in the Soapstone creek watershed, including:

- Daylighting a tributary to Broad Branch;
- Completing a stream restoration project in Linnean Park;
- Stabilizing a degraded outfall from Linnean Avenue NW into Soapstone Valley;
- Funding vegetated rooftops, impervious surface removal, and other stormwater measures on the University of the District of Columbia (UDC) campus;
- Developing 30% designs for a “green street” on Everett Street NW and providing them to DDOT;
- Funding LID implementation at Wilson High School as a part of its modernization;
- Funding an investigation of illicit discharges in the Soapstone watershed;
- Providing incentives for dozens of public and private property stormwater controls through its RiverSmart programs;
- DC Water lined the sewer lines in Linnean and Broad Branch;
- DC Water has conducted stream restoration in Soapstone Creek as part of a sewer line rehabilitation project; and
- UDC included a large amount of green infrastructure as part of their new student center along Connecticut Ave NE. The green infrastructure captures runoff from approx. 11,000 square feet of impervious surface, and includes bioretention cells, green roof, permeable pavement and a rainwater harvesting system.

EPA expects that water quality-related efforts in the Soapstone Creek watershed will continue at about the same pace as in every other District watershed.

Regarding selection of monitoring locations in the revised monitoring strategy, EPA notes that:

1. The purpose of a long-term monitoring program is to evaluate the effectiveness of the program and the health of receiving waters *generally* through the use of multiple water quality-related indicators. Identifying specific sources so that they can be remedied is undertaken by more focused efforts such as the illicit discharge detection program (Subsection 3.6.1 of the Final Permit) or specific source identification projects, such as the bacteria source tracking study (Subsection 4.4.2 of the Final Permit); and
2. The federal municipal stormwater regulations, and thus the initial permits, required notable focus on outfall monitoring in order to characterize stormwater discharges from municipal separate storm sewer systems. Following more than a decade of this type of monitoring, the Permittee had achieved this objective. Thus, in the 2012 Final Revised Permit EPA required

the Permittee to develop a new monitoring strategy that would broaden the scope to include not just end-of-pipe chemical constituent monitoring, but also in-stream water quality, biological and geomorphological monitoring. The purpose of a more multi-faceted monitoring program is to determine if the Permittee's stormwater program is effectively meeting Clean Water Act objectives to restore and protect the physical, chemical and biological health of the District's receiving waters. In order to implement this more comprehensive monitoring program, the Permittee must reallocate resources from only outfall monitoring, to a mix of all of these types of monitoring approaches. It follows therefore, that not all of the former outfalls will continue to be monitored. Current monitoring locations were selected based on objective study design criteria and included in the revised monitoring program consistent with standard study design protocols, which means that sites were selected randomly within categories based on outfall diameter, subwatershed and other criteria. These objective criteria do not allow preferences to be made for prior monitoring locations. In the new study design, Soapstone Creek was originally randomly selected as an "oversample" site, i.e., a back-up location in the event another sampling location becomes non-viable. In scouting outfall locations during spring and summer of 2017, the Permittee subsequently designated the Soapstone Creek outfall at Connecticut Avenue and Albemarle Street NW, as a continuous record site (see Table 8 in the Final Permit). Until the end of the first year of sampling, sampling locations may be further revised based on logistical considerations such as safe access to the site for sampling personnel and adequate flow for sampling. The new program, with a broader array of water quality indicators, will be much more useful in assessing the effectiveness of the stormwater program and the health of the District's receiving waters.

Regarding the issue of elevated *E. coli* in discharge samples from this outfall, EPA notes that the Permittee is now tasked with undertaking a bacteria source tracking study (Subsection 4.4.2 of the Final Permit) to identify ongoing sources of *E. coli*, and will then develop measures to eliminate or control those sources (Subsection 2.2.2.1 of the Final Permit). Targeting the specific pollutant and its sources will be a much more effective way to address this issue than continued outfall monitoring.

110. Comment, Kate Yonkers:

I am a DC native and a resident of Forest Hills now for 8 years. This is to state my opposition to the new proposed regulation for monitoring storm drains flowing into Rock Creek Park. While I welcome a new monitoring station at Broad Branch, I do NOT support closing the Soapstone Creek station. I walk many times a week with my children and dog into Soapstone creek. When they were small, my boys splashed in the water; the dog still likes to take a sip of the water as we cross over the creek back and forth. I know my family is not alone in its regular use of the park, and in fact, the new Park Van Ness building practically assures

more use of the path through the forest. It is only right that citizens know about the water quality, and that they are able to comment and perhaps influence how storm water is being managed in our neighborhood. As you know, the water is almost always disclosed and smelling rankly now as it is!

We need to reinforcing protection of water quality, not ignoring the challenges in maintaining a forest ecosystem within a city.

EPA Response to Comment 110:

See Response to Comment 109.

111. Comment, Liz Steinglass:

I regularly walk in Soapstone Park. Most of the time I consider it an oasis in the city. Unfortunately, sometimes the stench from the creek is so overwhelming, I don't want to walk near it or hop from stone to stone to cross it. This park is a vital artery in our neighborhood. It needs more monitoring, not less. Please don't eliminate from the list of places that will be monitored, and please don't monitor it with a simple checklist that has no narrative description of what's been happening in and to the creek.

We need clean parks and clean streams. The animals do too.

Thank you for your consideration.

EPA Response to Comment 111:

See Response to Comment 109.

**Comments on Draft Permit Section 4.3: Receiving Water Assessments**

112. Comment, DOEE:

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 wadable 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.

#### EPA Response to Comment 112:

EPA was initially concerned by this comment as it seemed to be a request to back track on a significant number of the elements contained in the District's *Revised Monitoring Program*, which EPA had approved in 2016 with the understanding that it would be incorporated into the new permit. In follow-up conversations, the Permittee clarified a narrower scope of concerns. EPA understands the Permittee's primary concern to be a desire to utilize in-stream water quality data collected by other District programs to fulfill the requirements of Subsection 4.3.2 of the Final Permit. EPA is cognizant of the resources needed to sustain a robust monitoring program, and is supportive of monitoring programs that fulfill multiple objectives. However, in order to assess the effectiveness of the stormwater program in protecting and restoring the health of District receiving waters, it is critical to develop a continuous data set based on a balanced combination of long-term water quality indicators. This can only be achieved by establishing a monitoring program with ongoing and consistent sampling methods, locations, frequencies and parameters; utilizing consistent analytical methods; and ensuring careful data management and synthesis. Relying on other programs, whose priorities, objectives and resources will undoubtedly change over many years, provides significant risk that the long-term record will be interrupted, its integrity compromised and the investment value lost. Therefore,

EPA is insistent that the permit include enough specificity to safeguard against this risk.

EPA and the Permittee have agreed to the following modified language to Subsection 4.3.2 of the Final Permit:

*The Permittee shall sample receiving waters for the indicator parameters in Table 10 at the frequency identified in the QAPP. Frequency generally is targeted to at least one time every month per the overview provided in Table 5. However, sampling frequencies for specific parameters shall be refined during the first monitoring season, and will be specifically documented and explained in the QAPP. Thereafter, sampling frequencies shall be consistent for the remainder of the permit term. Sampling and analysis procedures shall be performed according to the QAPP required by Subsection 4.3.1.1 of this permit.*

More significantly, the list of sampling parameters has been narrowed in scope to a suite of parameters that can serve as a robust suite of in-stream water quality indicators. Although the methodologies of the monitoring program may be refined during the permit term, the overall permit requirements in the Final Permit will not change. See the Fact Sheet discussion for Subsection 4.3.2 of the Final Permit. See also Response to Comment 113.

### **Comments on Draft Permit Subsection 4.3.2: Water Quality**

#### 113. Comment, DC Water:

The list of contaminants monitored in the receiving water should include the contaminants monitored in the wet weather discharges as shown in Section 4.2.1, Table 8. DC Water recommends adding E. coli and Lead to Table 11.

#### EPA Response to Comment 113:

EPA underscores that this particular element of the monitoring program (Subsection 4.3.2, *Water Quality Sampling* of the Final Permit) is not for the purpose of tracking specific pollutants (see Sections 4.2, 4.4, and 4.5 of the Final Permit for those objectives), but to characterize the general health of the receiving waters as efficiently as possible. These parameters are intended to be indicator pollutants, and will not be used for estimates of loading or to identify specific types or sources of discharges. As such, this needs to be a tight set of indicators that generally provides a picture of the overall health of receiving waters rather than the status of specific pollutants. Also, because the Permittee will be required to implement this program long-term, it is extremely important that cost of following this suite of indicators over multiple permit terms not be cost prohibitive. *E. coli* has been included in this suite of indicators because of its indicator value for the presence of pathogens in receiving waters. Lead has not

because it has little value as in in-stream indicator. See Table 10 of the Final Permit and the Fact Sheet discussion for Subsection 4.3.2 of the Final Permit.

114. Comment, Wentworth Green Solutions:

Three government offices now conduct water quality monitoring in the District. Each of these offices has slightly different missions. DOEE's Stormwater Program looks at stormwater outfalls in both wet and dry weather and the effect of stormwater events. DOEE's Water Quality Monitoring Division concerns itself with water quality more generally and maintains the most extensive monitoring network including the important indicators E. coli and dissolved oxygen. These data form the basis for water quality assessment sent to the EPA every two years. Lastly, the US Geological Survey maintains two continuous monitoring sites in Rock Creek and other sites around the city that concern themselves primarily with stream flow and water resource issues. Of particular interest is the USGS site on Rock Creek adjacent to the Joyce Road Bridge that undertakes a sophisticated electronic monitoring of over a dozen water quality parameters including dissolved oxygen which is actually made available in real time on line.

Despite the work of all three of these monitoring offices, there continues to be a real need for timely data -particularly for E. coli -for areas that are likely to be frequently used by the public. For example, on any given Sunday during the summer, it is not unusual to have families with children wading in Rock Creek at Milkhouse Ford, near the Rapids Bridge, or around Peirce Mill. Unfortunately, under the present stormwater proposal, streams would be monitored during rainstorms only three times a year. More frequent water quality monitoring, particularly for such key indicators as dissolved oxygen (DO) and bacteria levels, all could give us some early warning as to the presence of gross sewage pollution and provide more ability to find the source of the contamination. More importantly, these data can inform the public of the risks they undergo by even casual contact with the waters of Rock Creek and its tributaries.

Not only should the frequency of the sampling be increased, but also more locations should be sampled. On Rock Creek, for example, while some of the tributaries such as Soapstone, Fenwick, and Broad Branch are sampled by the stormwater division, it is unclear whether the main stem of Rock Creek, particularly around areas of known human contact like around the fords and bridges are being looked at frequently during the summer months. We need more data on water quality for the main stem of the Rock Creek. Additional sampling in these areas would supplement this data, particularly with E. coli levels and provide valuable data at this area of probable human contact. Currently, the Water Quality Division conducts samples of E. coli and other water quality criteria at Boundary Bridge and in the vicinity of the Connecticut Ave bridge roughly on a monthly basis. The Stormwater Division should work closely with them to ensure there is adequate coverage, particularly of storm events, where there are probable areas of human contact.

EPA Response to Comment 114:

EPA appreciates the points made by this commenter, but points out that the monitoring paradigms for an MS4 program and the monitoring done to implement recreational water quality criteria are very different. Monitoring for *E. coli* or other human pathogens at beaches or other locations where the public accesses surface waters for recreational purposes follows very specific standard sampling, analytical and statistical methods. During the swimming (or other full body contact activities) season, monitoring will typically occur several times a week to ensure that the water quality meets recreational water quality criteria.

Monitoring for an MS4 program follows a very different set of procedures and methods because the purposes are very different. In order to collect the wide array of data needed to evaluate long-term water quality trends and the effectiveness of the program - and do so affordably - sampling locations and frequencies must be optimized. The Permittee's monitoring program has been evaluated and established to incorporate a robust set of indicators; the sampling frequencies provide data that can be appropriately utilized to identify short-term issues as well as long-term trends.

EPA agrees that *E. coli* in District receiving waters may be indicative of serious problems and requires a targeted effort to identify and mitigate sources. The Permittee is now tasked with undertaking a bacteria source tracking study (Subsection 4.4.2 of the Final Permit) to identify ongoing sources, and will then develop measures to eliminate or control those sources (Subsection 2.2.2.1 of the Final Permit). Identifying and targeting the specific sources of fecal pathogens will be a much more effective way to address this issue than continued outfall or in-stream monitoring.

**Comments on Draft Permit Subsection 4.4.2: Bacteria Source Tracking**

115. Comment, DOEE:

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

EPA Response to Comment 115:

EPA declines to remove this provision from the permit. See Response to Comment 42.

116. Comment, DC Water:

The scope and magnitude of this study are unclear. In order to provide clarity, DC Water recommends that EPA clarify the scope and magnitude of this study.

EPA Response to Comment 116:

EPA is uncertain about how to provide additional clarity on the scope and magnitude of this study without stipulating specific sampling and analytical procedures, and would prefer to leave these details to the Permittee. EPA has added language in Subsection 4.4.2 of the Final Permit to enhance clarity about the objective of the study, i.e., “The sampling design must be sufficient to ensure that adequate data will be available to develop an effective strategy to prioritize and target sources and causes in order to eliminate or reduce E. coli in stormwater discharges to District surface waters. This includes having enough information to inform the development of milestones and benchmarks per Subsection 2.2.2.1 of this permit.”

117. Comment, Wentworth Green Solutions:

Speed up the Bacteria Study

Under the proposed plan, DOEE is to undertake a detailed study of bacteria levels in our stream but not make it available to the public until June 2019. While the study is welcome and long overdue, we fear that this timeline leaves us with at least two summers where kids continue to innocent frolic in our creek without knowing the risks. We should speed up this timeline.

A number of studies over the years have indicated that bacteria levels in many of our watercourses already pose serious health hazards upon human contact. The origin of these astronomical levels are less than clear. For example, the 2015 Annual MS4 report revealed that the bacteria levels in Soapstone Creek were in excess of 16,000 colonies per 100 ml. This is 8 times the raw water standard and thousands of times more than the standard for human contact. Illegal cross connections, failing sanitary lines, and waste from wildlife and pets all play a role. Solving the problem from the last two sources may be difficult, but unless we conduct the studies, taking targeted action is difficult. Still, there should be no implication in this timeline that DOEE should delay action under the end of the study.

We urge DOEE to work with DC Water and other agencies to do the studies needed to identify the sources of contamination as soon as possible. DC Water, in its Capital Improvement Program (CIP) has indicated at least three projects aimed at rehabilitating sewer lines in and around creek beds. This study should be coordinated with this work to establish baseline and milestones that may indicate progress that these projects may have in reducing the level of E. coli in our creeks and streams.

EPA Response to Comment 117:

EPA shares the commenter’s concerns re: bacterial contamination of waterways

within the District's jurisdictional boundaries. However, meaningful source tracking of the many possible sources of *E. coli* is not feasibly done in a single season. The amount of time allotted is reasonable, and perhaps even a little aggressive, if the Permittee is to be able to actually identify specific sources (rather than just categories) and therefore be able to effectively target remedies.

During development of this permit, the Permittee and EPA's Office of Research and Development initiated a cooperative partnership to use Microbial Source Tracking methods to identify sources of bacteria in the MS4 Permit Area. The method is designed to collect, isolate, identify and measure a host-associated identifier from a water sample, and should provide much more useful results than other existing standard methods. However, since this collaboration is – in part – a methods development and field testing project, the study may not conclude by the July 1, 2021 deadline stipulated in Subsection 4.4.2 of the Final Permit. Thus EPA has provided an option in the Final Permit for the Permittee to request an alternate schedule, if necessary. EPA underscores that microbial source tracking is a superior approach to identify sources, as it identifies genetic material in samples and can thus link to specific animals, i.e., birds, dogs, people. EPA considers it worth the delay of a year or two if sources can be this specifically identified.

EPA notes that the revised milestones and benchmarks for bacterial contamination mitigation will be public noticed with the Permittee's updated Consolidated TMDL Implementation Plan (Subsection 2.2.5 of the Final Permit) no later than 15 months prior to expiration of the Final Permit (see schedule in Section 2.8 of the Final Permit).

118. Comment, David Bardin:

EPA should require DC to complete and share publicly in 2017 the welcome new tracking study that the draft permit would require, at least for Soapstone Creek (which DC agencies claim they have been investigating - secretly - for years).

EPA Response to Comment 118:

Subsection 2.2.1 of the Final Permit does require the Permittee to make available for public notice and comment the new proposed milestones and benchmarks for *E. coli* based on the results of the Bacteria Source Tracking Study. All District citizens, including those in the Soapstone Creek watershed, will have an opportunity to provide comment on the Permittee's plan to target sources of bacteria. Per Subsection 5.3.2 of the permit, the study will also be available on the Permittee's website. See also Response to Comment 117.

With respect to Soapstone Creek efforts and investigations, please see Responses to Comments 43 and 109.

## Comments on Draft Permit Subsection 4.5.1: Trash Trap Monitoring

### 119. Comment, DC Water:

This provision requires the District to sample all trash traps located in the District's waterbodies and all outfalls at least 4 times per year. The provision may also be misinterpreted to require the District to install trash traps at all outfalls. Since the MS4 permit is only applicable to the DC MS4 Permit Area, DC Water requests EPA to revise to read as follows.

4.5.1.1 The permittee shall continue to sample all existing and new trash traps located in the DC MS4 Permit Area of the District's waterbodies and at outfalls at least 4 times per year for weight and counts of different types of trash.

4.5.1.2 Existing or new trash traps shall be stationary control measures installed as necessary at outfalls and within the District's waterbodies. Each trap installed shall be maintained on a weekly basis and after a major storm event.

### EPA Response to Comment 119:

EPA has made the requested changes to Subsections 4.5.1.1 and 4.5.1.2 of the Final Permit.

## Draft Permit Part 5: REPORTING REQUIREMENTS

### Comments on Draft Permit Section 5.1: Keeping Information Publicly Available

#### 120. Comment, Wentworth Green Solutions:

Improved access to data

Finding needed water quality data and the plans to improve it seems hard to find in the present DOEE website. DOEE should consider supplying water quality data (after appropriate quality analysis) stream by stream in a timely fashion to enable citizens to readily understand the progress (on lack thereof) in their local stream clean up. As mentioned previously, data sets should be accompanied by explanatory footnotes explaining the terms used. DOEE should consider conducting workshops with concerned citizens and Advisory Neighborhood Commissions to review the rudiments of how to review water quality data. The Department's Water Quality Assessment report is a start, but quickly outdated. Ideally, water quality data, reported by water body will increase the connection citizens must have with their local creeks and streams in order to establish the constituency for change. For example, DOEE might consider publishing a ranking of area creeks and streams as to their bacteria and dissolved oxygen

levels. This might help citizens put the water quality of their local stream in context and begin to evaluate why it might be higher or lower than streams in their neighbors back yard.

Our sense is that the DOEE, not unlike many other government agencies, views public outreach as just creating more work for an already beleaguered agency. Instead, they should view public participation as a mechanism to bolster the political constituency that will be needed in the coming years to support the program.

EPA Response to Comment 120:

EPA agrees that public participation and education is a vital part of the DC MS4 program, and contends that these goals will be furthered with new story map annual reporting supplement, which will provide water quality and monitoring data associated with maps. See also Response to Comment 121, which further describes this public engagement process.

**Comments on Draft Permit Subsection 5.3.2: Annual Report Template**

121. Comment, David Bardin:

EPA should require expanded annual *narrative* reports.

- If EPA *also* wants DC to fill out a perfunctory, “check-the box” formulaic template, fine (see Appendix to proposed permit).
- But EPA should not substitute its template for narrative reports in which committed DC public servants try to explain to experts, elected officials, the public at large what DC has tried to do and whether it seems to be working.
- EPA should call for *more* explanations and assessments rather than eliminate sentences, paragraphs, charts, and maps that DC has published up to now.
- EPA's algorithmic approaches to stormwater management and waterway protection are problematic enough without smothering or suppressing narrative attempts to get at the real world.

EPA Response to Comment 121:

EPA heard from several commenters about the importance of narrative reports, including features such as maps and data presented in easily comprehensible formats for the general public. EPA agrees with the importance of having information reasonably accessible and understandable to District residents and other stakeholders. In follow-up conversations, the Permittee agreed to establish a web-based “story map” that could provide stormwater program data in an interactive format. Prior to finalization of this permit the Permittee provided EPA



a draft version of this ArcGIS-based system for review, and EPA was suitably impressed with the potential of the system to provide interactive maps with:

- locations of all stormwater control measures in the District, sortable by type (e.g., bioretention, permeable pavement, proprietary devices, etc.), drainage area, storage volume, and installation date,
- data on stormwater retention credits certified in the District,
- statistics on implementation of specific types of management practices such as green roofs and trees,
- TMDL wasteload allocations by stream segment and by pollutant, and
- monitoring locations linked to monitoring data.

In addition, the story map includes other visual aids such as videos and graphs, external links to other relevant materials, and has the potential to include a great deal of additional useful information.

As a result, EPA is modifying the annual reporting requirements in the final permit to retain the annual reporting template (Subsection 5.2.2 of the Final Permit), but to also include the on-line story map as the mechanism to provide the general public these data in a more user-friendly, accessible and informative format (Subsection 5.3.1 of the Final Permit). The final permit requires the Permittee to establish this web-based system no later than the due date of the first Annual Report.

See also Fact Sheet discussion for Section 5.3 of the Final Permit, including Subsections 5.3.1, 5.3.2 and 5.3.3.

122. Comment, NRDC et al (footnotes removed):

Citizens have been actively engaged in monitoring and participating in local stormwater programs ever since EPA issued the District its first MS4 permit in 2000. This engagement has led to stronger stormwater implementation efforts and robust public support for the District's programs, but continued participation is only possible if information is made publicly available.

The Draft Permit proposes to eliminate narrative annual reports and replace them with a simplistic form. (§ 5.3.2, Appendix A). We strongly oppose this proposal because reducing the amount of information available to members of the public will undermine oversight of the District's stormwater programs and hinder citizens' ability to stay involved in pollution reduction efforts. Annual reports are the only comprehensive source of information the public has about implementation of MS4 permit requirements. If narrative annual reports are no longer produced, citizens will not have any means of finding out what the District is doing to comply with its permit.

The proposed template is a poor substitute for a full narrative Annual Report. It consists of yes-or-no checkboxes and fill-in-the-blank questions that provide no

details or context for the results being reported. For example, under the template provided in Appendix A, the District would have to report how many acres were managed with stormwater controls during the previous year, with no explanation required. It would have to check yes or no to the question “Are TMDL revisions underway?” with no elaboration on the status of revision efforts or the progress that has been made over the last year. The template form does not even ask what requirements have been implemented for previously exempt projects, as long as the District checks yes or no to the question whether any requirements have been implemented at all.

By dramatically reducing the amount of information available to citizens, the proposed Annual Report template approach would severely damage public accountability. It would also hurt EPA’s ability to enforce the permit’s requirements, as the form does not provide enough information to allow EPA to make a reasoned decision about whether a permit violation merits enforcement follow-up. Critically, it would also violate established EPA policy. EPA’s MS4 Permit Improvement Guide states that permits can require a summary report form similar to what is being proposed here, but only in addition to a more detailed narrative report. In EPA’s own words, “In addition to the summary annual report template, permittees *must* also submit a more detailed annual report.” The Guide justifies this requirement in part based on the importance of providing a “summary document” to the public in addition to scattered reports.

The Draft Permit’s piecemeal requirements to make certain information available to the public, such as the requirement to post plans and studies on the District’s website (§ 5.1.1), cannot substitute for a true narrative Annual Report, because they do not provide details on implementation successes or failures and are not consolidated into one all-inclusive document. While we recognize that DOEE faces many demands on its time, a desire for administrative convenience cannot outweigh the right of the public to know how public funds are being spent on efforts to provide them with clean water, or whether a critical federal permit’s requirements are being met. A narrative Annual Report must continue to be required under the new permit.

#### EPA Response to Comment 122:

See Response to Comment 121 with respect to information available to the public. EPA agrees that posting relevant documents on the website is not entirely satisfactory or fully informative for the general public, and expects the new ArcGIS story map to overcome this short-coming.

EPA does not agree that the Annual Reporting Template will provide insufficient compliance data. In fact, EPA developed the template specifically to enhance the Agency’s ability to make compliance determinations from straightforward and quantitative information rather than attempting to draw conclusions from narratives. Further, there is no established policy on the format of annual reports.

In fact, the *MS4 Permit Improvement Guide* referenced by the commenter specifically recommends the inclusion of quantitative data rather than just narratives. EPA emphasizes that the Annual Reporting Template provided with this permit is not merely a summary document, but requires specific, quantitative data on every single requirement in the permit, as well as syntheses of all monitoring conducted during the permit term and comparisons to longer-term data sets.

EPA also notes that implementation of new e-reporting requirements for MS4s may result in some modifications during this permit term. See Electronic Reporting Rule, 80 Fed. Reg. 64064 (Oct. 22, 2015); see also 40 C.F.R. 122.22(e).

123. Comment, Wentworth Green Solutions:

Retain Narrative Annual Reports

The public needs adequate information to participate and support our stormwater program. Yet, incredibly enough, EPA is proposing to eliminate the requirement for a narrative report and in its stead, supply a perfunctory "check-the box" formulaic template that will do little to inform the public. Eliminating the narrative report would be a huge mistake. The narrative reports and their appendices provide a comprehensive picture of a complex problem and the rationale for possible solutions. DOEE needs to continue to provide the needed information to build a constituency for this program -not hamper its expansion. DOEE might consider retaining the narrative reports -in addition to the "short form," if DOEE review revealed that it might be an effective way of telling their story to the public.

EPA Response to Comment 123:

See Responses to Comment 121 and 122.

124. Comment, Wentworth Green Solutions:

The annual reports could be better organized. For example, important watershed by watershed water quality data should be more accessible to citizens who often fervently care about their local stream but the information to evaluate its status, what the pollution levels are and where it may be coming from. The annual report should, as clearly as possible, help citizens answer these questions. Data sets need explanatory footnotes with water quality standards to help citizen put water quality data in perspective.

EPA Response to Comment 124:

See Responses to Comments 121 and 122. EPA expects the Permittee's new story map, which will provide a public facing user interface for District data, to fulfill many of the needs the commenter is expressing. EPA believes that the Permittee is very interested in serving the needs of citizens by making water quality related data easily accessible to the extent possible. EPA encourages the commenter to discuss specific needs with the Permittee so that it can tailor its user interfaces to meet those needs.

**Draft Permit Part 6: STANDARD PERMIT CONDITIONS FOR NPDES PERMITS**

**Comments on Draft Permit Subsection 6.12.4: Twenty-four Hour Reporting**

125. Comment, DC Water:

This provision includes combined sewer overflows (CSO) within the scope of noncompliance events under the MS4 permit, when such systems and events are outside the jurisdiction of this permit and are already redundant to and covered by the NPDES Permit issued for Blue Plains and the CSO system. Therefore, DC Water requests EPA to delete references to combined sewer overflows.

Further, this section requires the reporting of noncompliance within 24 hours from the time the permittee becomes aware of the circumstance. However, this is inconsistent with the requirements in Section 3.3.1, which requires the permittee to investigate complaints within 24 hours. It is not clear whether the receipt of a SSO complaint initiates the reporting time or confirmation of a SSO that results after the SSO has been investigated.

EPA Response to Comment 125:

All provisions in Part 6, *Standard Permit Conditions for NPDES Permits*, come directly from 40 C.F.R. § 122.41(l)(6), which stipulates conditions applicable to all permits. These provisions are generally inserted *verbatim* into all NPDES permits, even though for certain types of discharges they may not be directly applicable. They are usually only modified if they are in direct conflict with another permit provision.

EPA does not see any inconsistency between beginning an investigation of a complaint within 24 hours and reporting noncompliance within the same time frame.

## Draft Permit Part 8: PERMIT DEFINITIONS

### 126. Comment, DOEE (footnote removed):

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 efforts

### EPA Response to Comment 126:

EPA and the Permittee held lengthy discussions following the first public comment period about the definition of Acres Managed based on concerns expressed not only by the Permittee, but also because of confusion expressed by other commenters. The following definition was included in the second draft permit that was provided for public comment in August 2017, and has been included in the Final Permit. See discussion in the Fact Sheet for Subsection 1.5.3.1, *The Acres Managed Limit*.

*"Acres Managed" is the metric established for this permit to measure and track implementation of stormwater control measures. One Acre Managed is one acre of land treated by stormwater control measures to the applicable standard established in the Permittee's stormwater regulations or consistent with the relevant voluntary program. The basis for this metric is established for measures that provide on-site retention for a given drainage area, standardized by acres. However, not all stormwater control measures provide on-site retention; therefore, where equivalencies can be established for other types of stormwater control measures, those*

outcomes may be converted to Acres Managed, per Subsection 2.5.2 of this permit.

*Example 1: A development project required to meet the 1.2-inch retention standard for Development and Redevelopment  $\geq 5,000$  square feet (Subsection 3.2.2) implements 1.2 inches of retention across 5 acres, through any combination of on-site and/or off-site retention controls = five (5) Acres Managed.*

*Example 2: A Public Right-of-Way Project subject to the District's "MEP" process (Subsection 3.2.4) implements 1.8 inches of on-site retention across 2 acres = two (2) Acres Managed.*

*Example 3: A Public Right-of-Way Project subject to the District's "MEP" process (Subsection 3.2.4) implements 0.9 inches of on-site retention across 2 acres = two (2) Acres Managed.*

*Example 4: A redevelopment project required to meet the 0.8-inch on-site retention standard for Substantial Improvement Projects (Subsection 3.2.5) across one half-acre, through any combination of on-site and off-site retention controls = one half (0.5) Acre Managed.*

*Example 5: A homeowner voluntarily implementing porous pavement through the District's RiverSmart Homes Program (Subsection 3.2.10) achieves 0.6 inches of on-site retention across one quarter acre = one quarter (1/4) Acre Managed.*

127. Comment, DOEE:

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)(J 4); 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 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.*
- j. 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.

EPA Response to Comment 127:

EPA included a definition of “Critical Sources” in the draft permit in response to a concern expressed by the Permittee regarding a requirement of the 2012 Final Revised Permit. That provision required the implementation of stormwater pollution prevention measures at all District-owned facilities, including places such as schools and libraries even though those types of facilities rarely undertake activities or utilize materials that pose notable risk of stormwater pollution. In response, EPA removed that list of facilities from Subsection 3.3.2.1 of the draft permit and instead left it to the discretion of the Permittee to identify which facilities were “Critical Sources” requiring stormwater pollution prevention measures. In order to implement this new framework EPA necessarily included a definition of “Critical Sources”.

EPA understands the concern the Permittee has articulated regarding how this will affect the requirements of Section 3.4 of the Final Permit, which is a requirement to maintain some oversight of all facilities in the District (not just those that are District owned or operated) that may be “Critical Sources”.

EPA has modified the definition in the Final Permit to read as follows:

*“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, specifically:*

- a. Commercial vehicular service activities, e.g., washing, maintenance and fueling, including mobile operations.*
- b. Dry cleaners.*
- c. Aircraft or ship/boat maintenance and fueling activities.*
- d. Facilities conducting industrial activities, as defined at 40 C.F.R. § 122.26(b)(14), except for 40 C.F.R. § 122.26(b)(14)(x).*
- e. Facilities utilizing any material designated as a Hazardous Substance pursuant to 40 C.F.R. Part 116, in quantities exposed to stormwater that could cause or contribute to an exceedance of water quality standards or a water quality impairment.*

The list from Subsection 3.4.1.1 in the draft permit included a number of redundancies that EPA has removed:

1. The description of industrial stormwater facilities included unnecessarily redundant language regarding individual and general permits, and excerpted specific language from the regulation. Neither of those inclusions modifies the basic requirement, and they are thus unnecessary.
2. Construction activities are already covered under Section 3.5 of the permit.
3. Salvage and recycling operations are included in the definition of industrial stormwater facilities.

EPA has also replaced “other facilities”, which provided unnecessary uncertainty, with a more specific criterion for facilities utilizing hazardous substances as defined at 40 C.F.R. § 116. EPA is also limiting inclusion of those facilities to those that utilize hazardous substances in such a way that they could be exposed to stormwater in quantities that could threaten water quality.

See also Response to Comment 127, re: comments received on this definition following the second public comment period.

128. Comment, DC Water:

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to - discharges to, or from ~~or through~~ the Municipal Separate Storm Sewer System (MS4).

EPA Response to Comment 128:

EPA has not made the requested change. See Response to Comment 6.

**General Comments on the 2016 Draft Permit – i.e., comments that are not specific to any section of the Permit:**

129. Comment, Advisory Neighborhood Commission (ANC) 3F:

Please accept as a comment on the draft permit and factsheet both this email and the attached Resolution which was unanimously adopted on December 20, 2016, by Advisory Neighborhood Commission (ANC) 3F.

That Resolution observes of the MS4 outfall into Soapstone Creek, at the bottom of a 40-foot deep slope south of Albemarle and 32nd Streets:

- "the steep slope down to Soapstone Creek and the outfall basin is filled with litter which cannot be safely reached for cleanup;" and



- "the outfall water frequently emits a powerful and repugnant odor, has an unnatural color and occasionally bubbles and foams;" and
- "DOEE and DC Water have undertaken a study of the water quality in the outfall basin at the Albemarle/32nd Street intersection, and an ongoing assessment and maintenance plan, to ensure that it is free of pollution;" and
- "the sidewalk is collapsing and undermined and has been closed off for 9 months, with no safe way to pass;" and
- "the lack of stormwater management has eroded the soil underlying the sidewalk;" and
- "stormwater ... causes erosion and creates hazardous conditions".

This sidewalk, steep slope, and MS4 outfall are in the ANC Single-Member District (3F03) which I represented during the past four years during which we have seen very limited and piecemeal changes. Citizens need effective, transparent MS4 monitoring, timely solutions, holistic DC agency efforts, and prompt remediation. **Please advise us on your progress toward these goals.**

EPA Response to Comment 129:

EPA appreciates the commenter's input, and notes that many provisions in the MS4 permit will address, directly or indirectly, some of the noted issues. Situations such as sidewalk collapse are outside the scope of the MS4 program and this permit. The Permittee has implemented a number of remedies specifically focused on Soapstone Creek; see Response to Comment 109 for a summary of those actions.

130. Comment, NRDC et al (footnotes removed):

Legal Standards Applicable to the Draft Permit. The federal Clean Water Act states that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable," otherwise known as the MEP standard. Critically, it is the responsibility of the permitting authority to determine whether the permittee is meeting the MEP standard. In addition, all NPDES permits must include conditions adequate to "ensure compliance" with applicable water quality standards. The EPA's Environmental Appeals Board has held that this requirement applies to MS4 permits. Further, all point source discharge permits issued under the Clean Water Act, including MS4 permits, must contain requirements "consistent with the assumptions and requirements of any available wasteload allocation." Federal regulations provide that if water quality standards or wasteload allocation compliance cannot be achieved immediately, a "permit

may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.” The Clean Water Act defines a schedule of compliance as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” Such schedules, including the Consolidated TMDL Implementation Plan, must be designed to achieve compliance “as soon as possible, but not later than the applicable statutory deadline under the CWA.”

EPA Response to Comment 130:

This is a summary interpretation by the commenter, rather than a comment on the draft permit. As such it requires no specific response.

131. Comment, Wentworth Green Strategies:

On behalf of Wentworth Green Strategies, I thank you for the opportunity to comment on the draft MS4 permit for the District of Columbia. These comments are in addition to those submitted by the Natural Resources Defense Council on behalf of a variety of groups including Wentworth Green Strategies and we strongly endorse those comments.

Over the last five years, the District Department of Energy and Environment (DDOEE) have made great strides to implement solutions to stormwater pollution in our rivers, creeks, and streams. Strong regulations, coupled with the innovative approaches to stormwater credit trading, holds the promise of continuing the process of cleaning up our water.

We recognize that through the Memoranda of Understandings between various agencies including DC Water, DC Department of Public Works, and the Department of General Services, and coupled with the coordination of the Technical Working Group, DOEE had created a structure that can make decisions about such questions as public rights of way, the modification of the Long Term Control Plan as well as other issues.

EPA Response to Comment 131:

EPA appreciates the commenter’s input. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

132. Comment, Ruth A. Harris:

Please extend and expand the protection of Washington, DC under the National Pollution Discharge Elimination System. We live on one of the Broad Branch tributaries and see significant changes in the color of water (not mud color) following heavy rain. What is this all about? We need to know.

EPA Response to Comment 132:

A variety of pollutants are present in urban stormwater runoff. High turbidity could reflect any number of suspended solids, such as road and parking lot runoff. If the situation as described in the comment seems more unusual than that, EPA suggests sharing this information with the District Department of Environment and Energy's Inspection and Enforcement Branch within the Watershed Protection Division at (202) 497-8238, which responds to citizen complaints.

133. Comment, Wentworth Green Solutions:

In conclusion, it is clear that DOEE has made great progress in controlling stormwater discharges to our rivers, creeks, and streams. There is no question but that there are those particularly in the uninformed development community that might see the regulations as somehow cumbersome and burdensome. But the fact is that progress towards our clean water goals has actually enabled some of the lucrative development that is occurring around our waterways; development that has brought and will continue to bring huge benefits to District residents, both to those newly arrived and to those who remember the "bad old days" when the water stank too much to get close to.

EPA Response to Comment 133:

EPA appreciates the commenter's input. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

## Comments Received on August 25, 2017 Draft Permit

### **Draft Permit Part 1: Discharges Authorized Under This Permit**

#### **Comments on Draft Permit Section 1.3: Authorized Discharges**

134. Comment, DOEE:

The District requests the first sentence in the third paragraph of Section 1.3 be amended as follows:

*This permit authorizes the following non-stormwater discharges to the DC MS4 but only when the specified conditions have been met: discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation., ornamental fountains, diverted stream flows, rising ground waters, uncontaminated groundwater infiltration to separate storm sewers, uncontaminated pumped groundwater, 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, **pretreated wash water**, and emergency firefighting activities.*

The draft permit language in this section largely reflects comments provided by the District during the comment period for the first draft of this permit. However, in revising this subpart, EPA removed "wash water" from the list of authorized non-stormwater discharges. The District believes including the term "pre-treated wash water" in the list of authorized non-stormwater discharges to be consistent with the permit's intent, as Subpart 3.3.2.4 of the draft permit provides for municipal facilities to treat wash water prior to discharge to the MS4.

In addition, the term "uncontaminated pumped groundwater" is undefined in the Permit. To implement the Permit's requirements, the District may develop regulations to address such discharges of pumped groundwater. In developing such regulations, the District would seek EPA's comment to ensure these regulations would comply with the requirements of the MS4 Permit.

#### EPA Response to Comment 134:

EPA has not made the requested change to include pre-treated wash water generally, i.e., from sources other District owned and operated activities, as an authorized discharge. While EPA is willing to consider this the next time the permit is reissued, this is not a change that the Agency took comment on, and there is no agreed upon definition of "pretreated wash water". Pre-treated wash water discharges from District owned and operated facilities and activities is authorized per Subsection 3.3.2.4 of the Final Permit.

Regarding the issue of uncontaminated groundwater, see Response to Comment 135.

135. Comment, DCBIA:

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

As development has moved from the city’s urban core (which is largely serviced by the combined sewer overflow (“CSO”) system), this type of regulatory certainty has become critical if development is going to continue to grow in the portions of the District that are on the MS4 system. Without regulatory certainty, redevelopment will be impaired in the portions of the District on the MS4, and stormwater retention will not improve. Developers in the District, especially those building subterranean structures such as underground parking garages, often face the challenge of controlling groundwater infiltration. Constructing “bathtubs” around building foundations to prevent groundwater infiltration or perpetually discarding groundwater through “pump and truck” methods are prohibitively expensive. Nevertheless, the development community in the District has frequently felt the need to resort to those techniques in the past because of the absence of a clear, transparent and streamlined permitting process. We understand that the District Department of Energy and Environment (“DOEE”) is now beginning to develop clearer and more transparent procedures, and we support those efforts.

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

EPA Response to Comment 135:

EPA understands the commenter’s concern and notes that the District can develop regulations on its own -- it does not need EPA authorization to do so.

### Comments on Draft Permit Section 1.5.3.1: Discharge Limits

136. Comment, Earthjustice, et al (footnotes removed):

In its Fact Sheet accompanying the 2017 Draft Permit, EPA recognized that the stormwater discharge limit called the “acres managed milestone” in the 2016 Draft Permit was too ambiguous. As a result, EPA made several clarifying edits to the milestone requirement in the 2017 Draft Permit. Unfortunately, these clarifications further weakened the already legally-insufficient requirement.

As we explained in our January 12, 2017 comment letter, the District’s 1,038 “acres managed” requirement is less stringent than the amount of stormwater management required in the 2011 MS4 permit because it implicitly removes any obligation for retrofitting. The 2012 Final Revised Permit required the District to both enforce its stormwater regulations on new development and redevelopment projects *and* implement 413 acres of retrofits on previously developed land, but the separate requirement for retrofitting was removed from the 2016 Draft Permit and replaced by the new “1,038 acres managed” milestone. Because more than 1,038 acres of new development and redevelopment are projected to occur in the District in the next five years, this new requirement could be met without any retrofitting, simply by enforcing the development rules against regulated third parties.

Consequently, even presuming that the proposed milestone would result in 1.2 inches of stormwater retention on 1,038 acres of land (the standard established in the development rules), we cautioned EPA in our comments that it fell short of the Clean Water Act’s maximum extent practicable (“MEP”) standard, 33 U.S.C. § 1342(p)(3)(B)(iii); violated the “as soon as possible” standard for compliance schedules established by federal regulation, 40 C.F.R. § 122.47(a)(1); and flouted the Act’s prohibition against backsliding, 33 U.S.C. § 1342(o). It violated these legal standards because it was weaker than the mandates of the 2012 Final Revised Permit, which EPA previously found to be practicable, without any explanation as to why the previous permit’s level of effort was no longer achievable or appropriate. Moreover, the milestone fell short of the level of effort that the Permittee itself committed to undertake in its proposed total maximum daily load (“TMDL”) implementation plan. Given that MS4 permits are supposed to get more stringent as they are reissued over time, not less, this unexplained and unsupported weakening of the District’s stormwater management requirements was clearly unlawful.

However, EPA’s “clarification” in the new version of the permit exacerbates these legal violations by further decreasing the amount of stormwater retention – and pollution reduction – that the Permittee must achieve to comply with the milestone. The 2017 Draft Permit explains that no performance standard whatsoever will apply to the acreage target. Rather, any amount of retention will receive full acreage credit, even if it is significantly less than the 1.2-inch standard established in the development rules.

In its new examples of how projects will be assigned acreage credit under the 1,038-acre milestone, EPA reveals that *any* amount of retention will be granted full acreage credit

(as long as the project satisfies any independently applicable standard), with no floor for the minimum amount of on-site retention required. In fact, EPA clarified that the standard may be applied to activities that do not fall under any numeric on-site retention standard whatsoever, such as voluntary homeowner installations of stormwater controls. Although the 1.2-inch standard still separately applies to regulated development and redevelopment sites, other types of projects will be given equal acreage credit despite achieving far less volume retention and pollution reduction. EPA makes no showing that this shortfall will be made up by projects that achieve more than 1.2 inches of retention. Moreover, the formerly separate and distinct requirements of the 2012 Final Revised Permit for tree planting and green roofs can now be counted toward the 1,038-acre milestone, diminishing the retention requirement further. The newly explicated “acres managed” milestone is therefore even weaker than what the 2016 Draft Permit seemed to require. As a result, it continues to violate the MEP standard and prohibition against backsliding, and it seriously jeopardizes the Permittee’s efforts to reduce pollution in accordance with applicable TMDLs.

Beyond the fact that the 1,038-acre milestone is weaker than the requirements of both the 2012 Final Revised Permit and the 2016 Draft Permit, the lack of any objective performance standard associated with the milestone itself violates the MEP standard. Because such a wide range of volume retention could be achieved through compliance with this mandate, there is simply no way for EPA to know whether it will result in the maximum practicable pollution reduction by the Permittee. Permitting agencies must “ensure that the measures that any given operator of a[n] MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable.” *Envtl. Defense Center v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003). Without any associated performance metric, the 1,038-acre milestone therefore results in “impermissible self-regulation.”

In sum, the acres managed milestone, as drafted, does not define a minimum standard of management and will not accomplish any increase in stormwater management beyond the District’s current level of effort. In fact, it will allow the District to backslide from its own projections set forth in its TMDL implementation plan and from the requirements of the 2012 Final Revised Permit. This reversal of course—unsupported by any factual evidence or rational basis that explains why present circumstances justify a weaker requirement—is impermissible under federal backsliding prohibitions and under the Clean Water Act’s MEP standard. EPA must at a minimum establish a performance standard that is objective and quantifiable, and that equals or exceeds the mandates of the 2011 MS4 permit by requiring the District to enforce its existing stormwater regulations for all new development and redevelopment and implement at least 413 acres of retrofits. Because MS4 permits should increase stormwater protections over time, though, EPA should require even greater stormwater volume reductions in this new permit.

#### EPA Response to Comment 136:

Regarding anti-backsliding, EPA provides a full explanation, including numbers comparing retention implementation requirements of the 2012 Final Revised Permit and this Final Permit in the Fact Sheet under the heading *The 1,038 Acres*

*Managed Permit Limit*, within the discussion for Subsection 1.5.3.1. That discussion demonstrates that the requirements of the Final Permit are easily double those of the 2012 Final Revised Permit. EPA refers readers to that explanation.

With respect to compliance schedules, see Responses to Comments 14, 17 and 23. With respect to EPA's MEP determination, see Responses to Comments 21 and 36.

137. Comment, DCBIA:

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

EPA continues, however, to ignore the fact that the District is already heavily developed and that additional stormwater retention goals and waste load allocations (WLAs) cannot be achieved if the MS4 permit places too many economic and regulatory burdens on redevelopment projects. Stricter stormwater retention requirements would produce the unintended consequence of slowing down redevelopment and, in turn, slowing down the District's progress toward achieving its stormwater retention goals and WLAs. The District's stormwater discharges are not improved if its regulations become so onerous and costly as to force redevelopment projects to move to the surrounding jurisdictions. EPA's draft permit is dependent upon the rate and location of private development, yet EPA has disregarded to date DCBIA's and the District's concerns that the proposed 1,038 Acres Managed mandate may be difficult to attain due to uncertainty in the rate and location of private development. The two primary mechanisms by which the District can achieve the Acres Managed mandate are (i) PROW projects implemented by the District and (ii) development on privately owned property (including green roofs and voluntary improvements to generate stormwater retention credits). From 2011 to 2016, the District only completed or started work on 62 acres of PROW projects. The draft MS4 permit expects the District to repeat this performance during the next permit term, accounting for *barely five percent* (5%) of the total Acres Managed mandate. Therefore, the vast majority of EPA's proposed Acres Managed mandate would need to come from private property development over which neither the District nor EPA has direct control.

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



the District do everything within its authority to facilitate the continued development of private property within the MS4 permit area and ensure that existing stormwater retention standards are enforced. MS4 mandates that require private development on privately owned property fall far outside the “maximum extent practicable” limitations imposed by the CWA.

EPA Response to Comment 137:

EPA points out that the Permittee has not expressed concerns about the 1,038 acres managed permit limit, and in fact proposed that number in its *Consolidated TMDL Implementation Plan*. EPA also points out that in this plan the Permittee also proposed to undertake an assessment of its regulations to determine if there may be a more effective combination of provisions that would provide greater water quality benefits. The Final Permit does not require the Permittee to change its regulations (other than to eliminate the grandfathering of SRCs prior to 2013), only to follow through on the assessment.

EPA also points out that the Permittee may achieve as many of the 1,038 acres managed in PROWs as it can; 62 acres managed is the minimum. However, as the commenter points out, there are a number of opportunities in PROWs, and if the Permittee can capitalize on these opportunities, it may achieve and take credit for far more than 62 PROW acres managed.

EPA also underscores that the permit does not specify where retention measures must be implemented, i.e, private property, public property – including federal property. *Any and all* implementation in the MS4 Permit Area may and should be counted towards the 1,038 acres managed permit limit. EPA reassesses MEP every five years; should there be an economic downturn that affects development in the District, EPA will include that in the assessment, as appropriate.

138. Comment, Earthjustice et al (footnotes removed):

The 2017 Draft Permit contains one change related to the acres managed milestone that will somewhat increase stormwater protections as compared to the 2011 permit requirements—but not as compared to current practice, or in comparison to the District’s own projections. Namely, the 2017 Draft Permit increases the minimum number of acres managed in public rights-of-way (“PROWs”) from 46 to 62. This increase is modest, and is based on the District Department of Transportation’s report that the District managed 62 acres of PROWs during the 2011 permit term. In other words, EPA increased the minimum number of PROW acres managed by the amount needed to avoid setting the standard below the current level of effort by the District.

While any increase in the requisite number of PROW acres managed is generally a positive change, EPA has not demonstrated that 62 PROW acres represents the maximum practicable level of effort. The most recent amount of PROW-managed acres represents the level of management that has already been achieved, not the level of management that

is practicable to achieve during the coming permit term. As a result, EPA continues to violate the MEP standard, in spite of its increased PROW management requirement.

EPA Response to Comment 138:

EPA agrees that 62 acres managed in the PROW represents a demonstration of what is currently feasible. EPA elected not to set it higher in the Final Permit for the following reasons: 1) EPA did not have adequate information to make additional or different estimates of what could be practical over the next five years, and 2) it did not seem necessary, as the overall acres managed permit limit of 1,038 acres managed is the pivotal requirement. While it is important for the permit to require that subsets of this overall limit be met in a variety of ways (e.g., green roofs, trees, PROWs) in order to ensure a robust program, the 1,038 acres managed limit is the important objective. The Permittee likely will achieve a greater portion of this limit in PROWs over the next permit term. As the Permittee refines its PROW stormwater program requirements, including development of new designs for PROWs (Section 2.4, *Public Right-of-Way Optimal Design* of the Final Permit) the capacity for implementation of retention measures on public rights-of-way should notably increase. This will provide EPA a more solid base of information to evaluate MEP with the next permit reissuance.

139. Comment, DCBIA:

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

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

The District has taken multiple proactive steps, through its Green Building Act and stormwater retention regulations, to ensure that the majority of new or significantly renovated buildings include green roof features. If private development continues as it has the last several years, the District will easily meet the 350,000 square foot goal. If private development were to dramatically slow, as happened following the financial crisis

of 2007-09, then the District would be left with a 350,000 square foot mandate that it has no ability or legal authority to meet. DCBIA respectfully suggests changing the green roof mandate to a highly recommended goal.

EPA Response to Comment 139:

See Responses to Comments 90, 91 and 137. Also, EPA clarifies that NPDES permits are regulatory tools that stipulate enforceable requirements rather than recommended goals.

140. Comment, DOEE:

The District requests the language in the first paragraph of Subpart 1.5.3.1 be amended as follows:

*A total number of 1,038 Acres Managed, per the definition in Part 8, shall be attained by the end of this five-year permit term in the MS4 Permit Area, above and beyond what is already implemented in the MS4 Permit Area, on the effective date of this permit. This metric is designed to achieve a collective reduction in all TMDL pollutants of concern in stormwater other than trash, per the ~~on-site~~ retention requirement of Section 3.1 and 3.2 of this permit.*

The District's Stormwater Management Regulations set performance standards for stormwater retention, but allow regulated sites flexibility in meeting those standards via a combination of on-site retention and off-site approaches (i.e. purchasing Stormwater Retention Credits or paying a Fee-In-Lieu). Referencing only the on-site portion of these performance standards unnecessarily limits the impact of these regulations, as well as the collective pollutant reductions sought by the Acres Managed performance metric.

EPA Response to Comment 140:

EPA agrees that stormwater retention, both on-site and off-site, is the relevant requirement in Subsection 1.5.3.1 of the Final Permit, and has removed the qualifier "on-site" from this provision.

**Comments on Draft Permit Section 2.1: Elements of Stormwater Management Program**

141. Comment, DC Water

The Draft Permit provides that "[t]he SWMP required by this permit has been determined to reduce the discharge of pollutants to the maximum extent practicable for this permit term." DC Water reiterates its comment on the 1st Public Notice that it is inappropriate to determine the level of management that corresponds with the statutory standard "maximum extent practicable" without first assessing the economic capability of the MS4 community. For lack of that necessary assessment, all elements of the Draft Permit that

purport to establish MEP-based obligations are arbitrary and capricious.

EPA Response to Comment 141:

See Response to Comment 36.

**Comments on Draft Permit Subsection 2.2.2: Milestones and Benchmarks for the Next Permit Term**

142. Comment, Earthjustice et al (footnotes removed):

We support EPA's decision to retain the requirement for a Bacteria Source Tracking Study in the 2017 Draft Permit. However, the changes made to section 2.2.2.1 impermissibly allow self-regulation by the permittee because the District would be able to choose how it handles any high priority bacteria sources, without public input or EPA approval. As an initial matter, the District would decide on its own whether there are high priority bacteria sources that need immediate implementation. If the District chooses not to identify any high priority sources, the District's proposed bacteria-related changes to the milestones and benchmarks would be shifted to the consolidated TMDL implementation plan process, where they would not even be proposed to EPA (much less approved) until fifteen months prior to the end of this MS4 permit term. This relegation of the bacteria source reductions to the consolidated TMDL implementation plan significantly delays any mandatory implementation requirements and allows the District to avoid taking action on the study results in the interim.

On the other hand, EPA's revision to section 2.2.2.2 to allow the legacy pollutant reduction mechanisms to be implemented through the consolidated TMDL implementation plan is an acceptable change because it does not allow self-regulation by the permittee and it appropriately recognizes that legacy pollutants are often necessarily mitigated outside of the MS4 program. For these reasons, we do not oppose the shifting of the legacy pollutant plan to the TMDL process.

EPA Response to Comment 142:

EPA clarifies that while public notice and comment as well as EPA oversight and approval is critical in determining overall objectives and schedules in an MS4 program, that does not mean that the public or EPA should be micromanaging every activity. In fact, the Permittee has obligations and the authority, as a government agency, to set certain priorities, especially as they relate to public health and other applicable policies and regulations. Abating sources of bacteria falls squarely into this realm. EPA contends that the sooner these sources are addressed, the better that is for public health and the environment. EPA notes that the longer term schedules for implementing relevant milestones and benchmarks will certainly be subject to public notice and comment as well as to EPA's MEP assessment, per the requirements of Section 2.8 of the Final Permit.

Regarding the issue of self-regulation, see Response to Comment 14.

143. Comment, DC Water:

These sections appear to require the Permittee to establish or modify “Milestones” based on information obtained during the life of the permit. “Milestones” as defined by the draft permit are enforceable obligations of the permit. Such a modification of enforceable terms of the permit is of a kind that “the public, and any other State the waters of which may be affected, receive notice of” along with “an opportunity for public hearing before a ruling on each such application.” See 33 U.S.C. 1342(b)(3) and 40 CFR 122.62.

If, on the other hand, the intent of these sections is to develop a draft Consolidated TMDL Implementation Plan for public notice and submittal to EPA pursuant to Section 2.2.5.4 and 2.2.5.5 but not to develop or modify, during the draft permit’s term, enforceable Milestones not currently contained in the draft permit, then the language of Sections 2.2.2.1 and 2.2.2.2 should be changed to make clear that the new or modified Milestones referenced in those sections are proposed Milestones that are not effective or subject to enforcement until they are incorporated into a modified or reissued permit following required public notice and opportunity for a hearing.

EPA Response to Comment 143:

Milestones expressed as limits and other requirements in the Final Permit, cannot be changed during the term of the permit without a permit modification, which would require public notice and comment. The Final Permit does require the Permittee to undertake a variety of assessments and studies (Part 2, *Stormwater Management Program Planning* and Part 4, *Water Quality Assessment*) in order to inform the development of milestones and benchmarks for future permit terms. Subsection 2.2.2 of the Final Permit is clearly labeled *Milestones and Benchmarks for the Next Permit Term*.

**Comment on Draft Permit Subsection 2.2.3: Stormwater Fee Options Evaluation**

144. Comment, DCBIA:

The proposed permit condition in Section 2.2.3 that would require the District to submit, as part of its 2019 Annual Report, an evaluation of an increase in its stormwater fees would be a waste of resources, as the District has already summarized its analysis of stormwater fee increases in its Consolidated TMDL Implementation Plan just a year ago. The District found that taking the radical step of doubling the stormwater fee would produce “only minimal impact on the timeline for achieving [wasteload allocations].” District residents already pay very high fees related to stormwater and wastewater management. This burden will increase significantly beginning January 1, 2018, when developments in the District will be subject to a new System Availability Fee (“SAF”) that could cost as much as \$800,000 for many new or modified projects.<sup>2</sup> Any further increases in the stormwater fees will simply have the counterproductive effect of

incentivizing residents and developers to leave the District for neighboring jurisdictions that do not have these hefty fees, thereby significantly slowing the pace of redevelopment and stormwater improvements in the District.

EPA Response to Comment 144:

See Responses to Comments 50, 51 and 53.

145. Comment, Earthjustice et al (footnotes removed):

EPA responded to the District's comment about the Fee Options requirements in the 2016 Draft Permit by removing any mention of possible action in response to what the evaluation finds.<sup>11</sup> This is an over-reaction, as EPA recognizes.<sup>12</sup> It makes eminent sense to require the District to perform a full evaluation of options available to it to accelerate progress with this permit, among them collecting and deploying more resources than it currently utilizes. Previously, the District had proposed and projected a level stormwater fee into the future, severely limiting its ability to enhance the District's response to new requirements in this Permit. EPA's requirement in the 2016 Draft Permit (i.e., in the Consolidated TMDL Implementation Plan) was for the District to study this matter and, *if* an honest and full evaluation supported a fee increase, to *propose* it. There was no mandate to *implement* such a recommendation, but still there was some sensitivity to the District somehow being required by EPA to impose new fees. By taking the reference to the results and the *potential* implications of the fee study out of this Permit, EPA has stranded or un-tethered the purpose of the study entirely.

EPA justifies this deletion by arguing that the Permittee has the discretion to decide how to fund its stormwater program. Yet the District's stormwater fee is not merely a funding mechanism. Because property owners pay fees proportionate to the effective impervious surface area on their land, but can receive a discount in exchange for implementing stormwater controls, the fee is also an incentive program that encourages stormwater retrofits. A program that is designed to result in stormwater volume reductions is fair game for inclusion in an MS4 permit, as it directly relates to the core MS4 mandate to reduce stormwater pollution to the maximum extent practicable. EPA's justification for deleting the requirement to propose a stormwater fee increase, if the Permittee's evaluation supported doing so, is therefore faulty because it considers only one purpose of the fee program. EPA should restore the requirement to the permit.

EPA Response to Comment 145:

EPA agrees that a stormwater fee can be structured to also provide stormwater management incentives. See Responses to Comments 50, 51 and 53.

## **Comments on Draft Permit Subsection 2.2.4: Analysis of Updating Stormwater Management Regulations**

### 146. Comment, DCBIA:

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

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

### EPA Response to Comment 146:

See Responses to Comments 57, 58, 59 and 60.

## **Comments on Draft Permit Section 2.4: Public Right-of-Way Optimal Design**

### 147. Comment, DC Water:

The inclusion in this draft of the requirement to optimize certain designs with respect to "climate resilience" is unclear and unenforceable without further specification of the meaning of that term. Moreover, without information (for example, in a draft Fact Sheet) explaining the intended meaning of that phrase, the public is not put on notice of the Agency's intent and is therefore unable to comment meaningfully.

### EPA Response to Comment 147:

EPA does not consider the term "climate resilience" to be unclear in this context, especially given the significant amount of attention given to this issue by the Permittee (see *Climate Ready DC, the District of Columbia's Plan to Adapt to a Changing Climate*, 2016, see Fact Sheet discussion for Section 2.7 of the Final Permit). In the context of Section 2.4 of the Final Permit, this is one of several factors that the permit requires to be balanced in developing optimal designs for PROWs. However, it is left to the discretion of the Permittee to determine how to

optimize these factors; EPA is not dictating how that should be accomplished.

### **Comments on Draft Subsection 2.4.1: Retention of Stormwater Exemption for Small Projects**

148. Comment, DCBIA:

DCBIA supports EPA's proposed decision to strike Section 2.4.1 from the original draft permit. As originally proposed, Section 2.4.1 would have eliminated the current exemption for development projects under 5,000 square feet from complying with the District's stormwater retention requirements. DCBIA advocated for the continuation of this exemption in its January 17, 2017 comments. DCBIA renews its previous comments in support of EPA's recent proposal to maintain this exemption.

#### EPA Response to Comment 148:

EPA acknowledges the commenter's support for this decision.

149. Comment, Earthjustice et al (footnotes removed):

We strongly supported the proposed requirement in the 2016 Draft Permit for the Permittee to eliminate regulatory exemptions for small projects below the size threshold of 5,000 square feet. As we noted, it is critical to abolish these exemptions because the District's draft TMDL implementation plan acknowledges that applying the retention standard to every site in the District, including the smallest sites, will be necessary to achieve wasteload allocations ("WLAs").

The new draft permit deletes this mandate as a standalone requirement, instead listing the elimination of regulatory exemptions as one potential change for the Permittee to consider as part of its analysis of regulatory updates.<sup>13</sup> As a result, the Permittee is no longer *required* to eliminate exemptions for small sites; it is only directed to "analyze" doing so and then only to move forward if it concludes that eliminating exemptions is "feasible and warranted." This new approach inappropriately delegates to the Permittee the discretion not to proceed with implementing this regulatory change. That change is unacceptable because it is undisputed, including by the Permittee itself, that applying the regulatory retention standard to small sites is absolutely essential to achieving WLAs. Moreover, EPA does not explain why removing the small-sites exemption would not be practicable. We urge EPA to restore the requirement for the Permittee to eliminate regulatory exemptions for all development projects under 5,000 square feet.

#### EPA Response to Comment 149:

EPA has not ruled out this exemption as one mechanism to achieve improvements in retention and thus provide water quality benefits. However, EPA contends that there are other improvements that will also likely be beneficial, and all of those options should be considered in conjunction with each other (Subsection 2.2.4 of



the Final Permit, *Analysis of Updating Stormwater Management Regulations*). For this permit term, EPA considered the resources necessary to revise the District's stormwater regulations, which necessitates the expenditure of a great deal of time and money, not only for the District, but also the local community. EPA is requiring that the District's stormwater regulations be revised during this permit term (at a minimum, to eliminate the SRC grandfathering provision in Subsection 3.2.3.2 of the Final Permit). It is in the best interest of the Permittee and the community if changes are proposed as a comprehensive set of revisions that complement each other, rather than disparate provisions that may not maximize water quality outcomes or optimize resources.

EPA also notes that the Permittee may decide not to make additional changes to its stormwater regulations during this permit term. However, the analysis will provide EPA robust information upon which to base MEP decisions for the next permit, and will also provide the community data to inform advocacy decisions.

### **Comments on Draft Permit Subsection 2.5.2: Other Controls or Management Measures**

150. Comment, DCBIA:

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

EPA Response to Comment 150:

EPA acknowledges DCBIA's support for this provision. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

151. Comment, Earthjustice et al (footnotes removed):

We support EPA's addition of section 2.5.2, providing the District the opportunity to submit methods for estimating quantitative pollutant reductions from programmatic activities other than catch basin cleaning (though we would prefer for this submission to be mandatory, rather than voluntary). As we explained in our 2017 Comment Letter, the development of methodologies for estimating load reduction for activities such as illicit discharge detection and elimination, source control, public outreach and education, and pollution prevention programs would allow the District to better assess the efficacy of these activities and evaluate their contribution towards WLA achievement.

However, we disagree with EPA’s draft permit language stating that “[t]he method may include an equivalency translation to ‘Acres Managed’ . . . .” This language suggests that broader programmatic activities that do not involve on-site stormwater retention may count towards satisfaction of the acres managed milestone in the MS4 permit. EPA also confirmed in its 2017 Fact Sheet that any new quantitative methods developed pursuant to section 2.5.2 may be used to count programmatic activities towards the acres managed standard. This interpretation will further water down the acres managed milestone because the more programmatic activities the District can count towards its stormwater management acres, the less stormwater retention will be required in the District.

As clearly indicated in the District’s draft TMDL implementation plan, the District needs to greatly reduce the amount of effective impervious surface in the MS4 permit area, which must be accomplished by implementing retention-based stormwater controls. These needed controls are not functionally comparable to programmatic activities like illicit discharge detection and elimination, source control, and public outreach and education, which are important efforts but do not reduce stormwater volume. These categories of activities are not fungible. The broader programmatic activities will be needed regardless of how many acres are managed with on-site retention, and vice versa. As a result, any quantification of programmatic activity benefits must be used solely to inform their efficacy in contributing to TMDL attainment, and not counted towards “acres managed.”

EPA Response to Comment 151:

EPA agrees with the concern that not all pollutant reduction activities will be appropriately tallied by the acres managed metric. Hence the language in Subsection 2.5.2 of the Final Permit: “The method may include an equivalency translation to “Acres Managed”, if appropriate, or may express the reduction in pounds, colonies per liter, or other appropriate metric.” EPA also stresses that the method must first be approved by EPA before crediting reductions. EPA expects that very few pollutant reductions, other than those that functionally infiltrate, transpire or capture and reuse stormwater, will be translatable to “acres managed”. However, as the commenter notes, non-infiltration measures are still important. Thus, there should be quantifiable metrics for tracking and crediting as many reductions as possible. Those that are developed during this permit term can inform more appropriate quantifiable limits for the next permit term.

EPA also agrees that this accounting system is imperfect. It reflects the current state of information on performance and tracking and will need to be further refined in future permit terms. See discussion in the Fact Sheet for Subsection 1.5.3.1 of the Final Permit.

## **Comments on Draft Permit Section 2.6: Development of Alternatives for Ice and Snow Management**

152. Comment, DOEE:

The District requests this section be amended as follows:

*The Permittee shall include water quality-related requirements for preventive and control measures in the District ~~Snow Response~~ **Snow and Ice Removal** Plan. These measures shall be based on an evaluation of the use, application, and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality, and consideration of: techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities, and the use of porous/permeable surfaces that require less use of deicing materials and activities. Measures included in the District ~~Snow Response~~ **Snow and Ice Removal** Plan shall be included in the 2019 Annual Report. Any changes made to snow and ice management **having the potential to impact stormwater pollution prevention** shall be included in the Updated SWM P per Section 2. 9 of this permit.*

These amendments are suggested to reference the correct title for the District's Snow and Ice Removal Plan. In addition, elements of this plan with no bearing on stormwater or water quality, such as personnel check-in/check-out procedures, materials procurement, etc. are periodically updated. The suggested amendments would ensure that only Plan updates with the potential to impact water quality trigger the requirement to update the District's SWMP.

EPA Response to Comment 152:

EPA has made the requested changes to Section 2.6 of the Final Permit.

## **Comments on Draft Permit Section 3.2: Achievement of the Acres Managed Numeric Milestone**

153. Comment, Earthjustice et al (footnotes removed):

We appreciate that EPA attempted to reduce confusion about whether the 1,038-acre milestone constitutes a retrofit requirement by deleting former section 3.2 of the 2016 Draft Permit. However, the Fact Sheet continues to create confusion and blur definitional lines by stating that redevelopment projects are “essentially retrofits.”<sup>17</sup> As we stated in our previous comments, under the long-accepted definition of the word, a “retrofit” is the implementation of stormwater controls on an existing site that has already been developed and is *not* in the process of being redeveloped. This is distinct from the implementation of stormwater controls on a site as part of the development or redevelopment process.

Keeping the concepts of redevelopment and retrofitting separate is important for two

reasons. First, retrofitting existing developed areas is necessary *in addition to redevelopment* to accelerate the rate of pollution reductions in areas where the pace of redevelopment is too slow to bring about near-term improvements in water quality. And second, the distinction is critical to the determination of the “MEP” level of effort in stormwater permitting because redevelopment is carried out by third parties, while retrofitting is often implemented by the permittee itself. We urge EPA to delete this confusing new language from the Fact Sheet to maintain the important distinction between these two concepts.

EPA Response to Comment 153:

EPA agrees that multiple drivers (development/redevelopment as well as targeted implementation of stormwater control measures specifically for water quality-related purposes) are all important components of an MS4 program. All are, and shall continue to be, considerations in EPA’s determinations of appropriate permit requirements for a given permit term. From an accounting standpoint EPA does not consider it problematic that all of these infiltration control measures are tallied collectively under the Acres Managed metric/permit limit.

This metric was developed by the Permittee over a two-year period in consultation with a stakeholder group that the commenters participated with and therefore are aware, at least generally, of its origins and rationale. EPA and the Permittee have had subsequent lengthy consultations on this metric and agree that it (and other metrics for tracking pollutant reductions) would benefit from further refinement. However, for this permit term, it provides the best foundation for moving forward with implementation of the *Consolidated TMDL Implementation Plan* and other measures in the Final Permit, given the information currently available. See Fact Sheet discussion for Subsection 1.5.3.1 of the Final Permit, under *The Acres Managed Limit*.

**Comments on Draft Permit Subsection 3.2.3.2: Grandfathering of Stormwater Retention Credits**

154. Comment, Earthjustice et al (footnotes removed):

EPA significantly extended the deadline for the District to eliminate the grandfathering provision for stormwater retention credits, from six months from the effective date of the permit to six months after the effective date of any revisions to the District’s stormwater regulations.<sup>18</sup> EPA also gave the District an additional twelve months to initiate the regulatory revision process, meaning the elimination of the grandfathering provision will likely not occur until at least a year and a half from the effective date of the permit, or even longer considering the unknown amount of time needed for the regulatory revisions. This substantial extension of the District’s deadline should be retracted because the grandfathering provision will continue to inflate the supply of stormwater retention credits and depress their price until the provision is eliminated.

EPA Response to Comment 154:

There is not a serious imperative to *immediately* eliminate the grandfathering of SRCs (Subsection 3.2.3.2 of the Final Permit) as the comment suggests. EPA is not aware of a significant number of existing projects that would qualify for credits, and thus a delay of 12 months is unlikely to have negative impacts to water quality.

More importantly, as explained elsewhere, EPA is not going to establish a requirement that could necessitate the revision of the District's stormwater regulations more than one time during the permit term. See Responses to Comments 80, 82 and 149.

**Comments on Draft Permit Subsection 3.2.3.3: Stormwater Retention Credit Program**

155. Comment, Earthjustice et al (footnotes removed):

The removal of the requirement in section 3.2.3.3 for the District to commit \$12.75 million to establish the Stormwater Retention Credit ("SRC") Purchase Program is a significant revision, and it should be reversed.<sup>19</sup> We supported the original requirement for the District to specifically commit \$12.75 million to establish the SRC Purchase Program because it is important for the permit to include a quantifiable metric or performance standard for this program. Otherwise, the permit requirement is impermissibly vague. If the District's objection is based in a disagreement about the correct dollar amount, EPA could express the commitment as a requirement to purchase the equivalent amount of credits. Otherwise, EPA should maintain the requirement for the District to commit \$12.75 million for the program.

EPA Response to Comment 155:

See Response to Comment 81.

156. Comment, DOEE:

Subpart 3.2.3.3 requires the District to establish a program to provide technical and outreach support for green infrastructure site identification for the purpose of Stormwater Retention Credit generation. The District's intent in implementing such a program has been to offer such support in the early stages of the SRC program's operation, and to phase out this support once the SRC market is fully self-sustaining. The District interprets this subpart to allow for such a temporary program, and not a requiring any technical and outreach support program to be permanently established.

EPA Response to Comment 156:

Subsection 3.2.3.3 of the Final Permit requires the Permittee to "establish a

program to provide technical and outreach support for green infrastructure site identification for the purpose of SRC generation.” This requirement is in place for the term of this permit. Should the Permittee propose to scale back or phase out this element of the SRC program for the next permit term, EPA will evaluate the advisability of such an action at that time, including consideration of any public advocacy for or against such an action.

### **Comments on Draft Permit Subsection 3.2.4: Implementing the Standard for Projects in the Public Right-of-Way**

157. Comment, DC Water:

This section is overly broad, and should not require the Permittee to manage projects that are in areas of the District that are not served by or contributing to discharges from the MS4. DC Water reiterates and incorporates its prior comments on this provision. In addition, DC Water requests EPA to revise this requirement to clarify that it applies to the MS4 Permit Area, to read as follows:

*The Permittee shall continue to implement a methodical analysis and decision process for projects in public rights-of-way (PROWs) located within the MS4 Permit Area in order to ensure that the project has exhausted every opportunity to the achieve maximum practicable” (as defined in the District stormwater regulations) on-site stormwater retention volume (SWRv).*

EPA Response to Comment 157:

EPA reiterates that this is an MS4 permit, and thus necessarily applies only to the MS4 Permit Area, as is stated in the very first section of the permit, Section 1.1. It is unnecessarily redundant to caveat every single provision in this permit with “in the MS4 Permit Area.”

### **Comments on Draft Permit Subsection 3.2.5: Implementing the Standard for Substantial Improvement Projects**

158. Comment, DOEE:

The District requests the language in Subpart 3.2.5 be amended as follows:

*The Permittee shall continue to require the design, construction and maintenance of stormwater controls to achieve on-site retention of 0.8" 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 projects where less than 5,000 square feet of soil is disturbed, but where the combined footprint of improved building and land-disturbing activities is greater than or equal to 5,000 square feet and which are undergoing substantial improvement. "Substantial improvement," consistent with District regulations at ~~121 DCMR § 202~~ **21 DCMR § 599** means any repair, alteration,*

*addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is, started. The Permittee may allow a portion of the 0.8" volume to be compensated for in an off-site mitigation program consistent with the requirements of Subsection 3.1.2 of this permit.*

This amendment is suggested to clarify the correct citation in the DC Municipal Regulations for the definition of "substantial improvement."

EPA Response to Comment 158:

EPA has made the requested correction to Subsection 3.2.5 of the Final Permit.

**Comments on Draft Permit Subsection 3.2.7: Green Area Ratio Program**

159. Comment, DOEE:

The District requests the first sentence in Subpart 3.2.7 be amended as follows:

*The Permittee shall continue to implement and refine the Green Area Ratio program to ~~increase the quantity and quality of planted areas~~ **improve stormwater management** in the MS4 Permit area while allowing flexibility for developers and designers to meet development standards.*

This amendment is suggested to clarify the MS4 Permit's intent in addressing the District's Green Area Ratio program is to improve stormwater management, rather than purely focusing on planted areas in the District. This language will also allow the District flexibility to modify this program as needed to achieve these stormwater improvements.

EPA Response to Comment 159:

EPA has made the requested modification to Subsection 3.2.7 of the Final Permit.

**Comments on Draft Permit Subsection 3.2.10: RiverSmart Programs**

160. Comment, DOEE:

Subpart 3.2.10 notes that voluntary on-site retention projects implemented through the District's RiverSmart program may be used to generate Stormwater Retention Credits. In implementing the SRC program, DOEE will continue to apply appropriate limitations on SRC generation by DOEE funded projects, which are summarized at

<https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/Limitations%20on%20SRC%20Generation%20by%20DOEE%20funded%20projects.pdf>.

EPA Response to Comment 160:

EPA acknowledges the comment. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

**Comments on Draft Permit Subsection 3.3.1: Response to Sanitary Sewer Overflow**

161. Comment, DC Water:

Bullet 3 states: “Notifying appropriate sewer and public health agencies within 24 hours of an SSO to, from, or through the MS4.”

The Draft Permit clarified Permittee’s response requirement in bullet 2 to “...within two hours of the Permittee discovering or confirming an SSO...” DC Water requests EPA to apply that same clarification to the notification requirement to read, “Notifying appropriate sewer and public health agencies within 24 hours of the Permittee discovering or confirming an SSO to, from, or through the MS4.”

EPA Response to Comment 161:

EPA is supportive of tying the reporting to “discovering or confirming”, per the request. However, EPA does not agree that is appropriate to then add another 24 hours to the potential timeline for reporting to sewer officials who may have a role in the response or to public health authorities who have a role in protecting public health. Notification of sewer and public health officials should be one of the initial elements of a standard response plan. Therefore, EPA has revised #3 in Part 3.3.1 of the Final Permit to read:

*Notifying appropriate sewer and public health agencies within 2 hours of the Permittee discovering of confirming an SSO to, from, or through the MS4.*

**Comments on Draft Permit Subsection 3.3.2: Industrial Activities at Municipal Operations**

162. Comment, DOEE:

The District requests the first sentence in Subpart 3.3.2.1 be amended as follows:

*The Permittee shall implement stormwater pollution prevention measures at all District-owned or leased facilities and job sites **used for municipal operations**, within the MS4 Permit Area where industrial activities occur or are considered "critical sources," as that term is defined at Part 8 of this permit.*

This amendment is suggested to clarify that these subparts apply to municipal operations consistent with their organization within Section 3.3 ("Municipal Operations") and not to



facilities owned by the District but leased to private entities and used for private purposes.

EPA Response to Comment 162:

EPA declines to make the change as suggested because that would potentially eliminate the implementation of SWPPPs at District-owned facilities that are being leased by third parties for other purposes. However, it is logical that the Permittee would not be the entity to implement a SWPPP at a leased facility, so EPA has modified the language in Subsection 3.3.2.1 of the Final Permit to specify that the District “will ensure” that SWPPPs are developed and implemented. Because, at the time of issuance of this Final Permit, there may be some leased operations without SWPPPs, EPA added a requirement to Subsection 3.3.2.1 of the Final Permit that leased operations with inadequate stormwater pollution prevention measures will have a requirement to implement and maintain them as a lease conditions when a lease is established or renewed.

163. Comment DOEE:

The District also requests the first sentence of Subpart 3.3.2.2 be amended as follows:

*The Permittee shall ensure that Stormwater Pollution Prevention Plans (SWPPPs) are created and/or regularly updated for District-owned, operated, and leased facilities and all job sites **used for municipal operations**, within the MS4 Permit Area where industrial activities occur that could contribute to stormwater pollution, including vehicle maintenance and fueling, storage and washing, or material storage.*

This amendment is suggested to clarify that these subparts apply to municipal operations consistent with their organization within Section 3.3 ("Municipal Operations") and not to facilities owned by the District but leased to private entities and used for private purposes.

EPA Response to Comment 163:

For the same reason as explained in Response to Comment 162, EPA declines to make this change. Because the language in Subsection 3.3.2.2 is already worded as “shall ensure”, there is no need to make any modifications to the language in this provision.

164. Comment, DOEE:

In the interest of clarity, the District suggests reordering the first and second sentences of Subpart 3.3.2.4 to read 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 eliminate discharges of pollutants to, from, and through the MS4 by implementing any of the following measures: 1) collect and haul off-site for disposal; 2) equip with a pre-treatment device; or 3) redirect to the sanitary sewer in accordance with District regulations and requirements.~~  
*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.*

EPA Response to Comment 164:

Because this is simply switching the order of two sentences and does not make any substantive change to the requirements of the permit, EPA has made this edit to Subsection 3.3.2.4 of the Final Permit.

165. Comment, DC Water:

This section requires adherence to inspections schedules contained in “. . . the SWPPPs or other documented standard operating procedures.” The reference to “the SWPPPs” is clear and definitive. The reference to “other documented standard operating procedures” is both unclear and could include inconsistent provisions contained in outdated standard operating procedures or those that have not yet been updated. DC Water requests EPA to delete the language “. . . or other documented standard operating procedures” from the draft permit.

EPA Response to Comment 165:

EPA has removed “or other documented standard operating procedures” from the language in Subsection 3.3.2.5 of the Final Permit.

**Comments on Draft Permit Subsection 3.3.3: Pesticide, Herbicide and Fertilizer Use**

166. Comment, DOEE:

Subpart 3.3.3.1 requires the District to implement control measures to manage pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of toxic substances, and runoff from landscape irrigation according to an integrated pest management (IPM) program. The District's IPM efforts have been and will continue to address District-owned land, which is consistent with this subpart's organization within Section 3.3 (“Municipal Operations”) of the permit.

EPA Response to Comment 166:

EPA acknowledges the comment. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

## **Comments on Draft Permit Subsection 3.3.4: Catch Basin Operation and Maintenance**

### 167. Comment, Earthjustice et al (footnotes removed):

EPA's clarification in section 3.3.4.1 that the requirement to annually clean catch basins is only in place until the District fully implements its GIS-based mobile field application system should be revised because it violates the principles of public participation. Like the expected change to the street sweeping requirement, this permit term anticipates a different, unknown amount of future cleaning. The public cannot comment on that unknown future cleaning frequency. As a result, EPA should require annual catch basin cleaning, at a minimum, for the entire permit term of five years.

### EPA Response to Comment 167:

EPA disagrees that any aspect of this provision violates the principles of public participation as the framework regarding the implementation of a GIS-based mobile field application during the permit term has now been subject to public notice and comment twice, i.e., in the November 2016 draft permit and the August 2017 draft permit. EPA does not consider it reasonable that the specific individual clean-out frequencies for each of the District's hundreds of stormwater catch basins be subject to public notice and comment, as the permit addresses the Permittee's broader system for cleaning catch basins, not the minutiae of whether a particular catch basin on a particular street intersection must be cleaned once, twice, or three times each year. Some catch basins may be cleaned out two or three times per year whereas others may be cleaned out every eighteen months, for example. In addition, those cleaning frequencies could change depending on episodic activities such as construction, flooding, etc. EPA also considers the suggestion to require clean out of every catch basin once per year to be arbitrary, when a customized approach has every indication of removing more pollutants from the MS4 system, while optimizing District resources. See also the Fact Sheet discussion for Subsection 3.3.4 of the Final Permit.

Regarding street sweeping, EPA notes that the requirement to sweep a minimum of 8,000 miles of street annually has also been subject to public notice and comment, per the August 2017 draft permit, and is not an "unknown". Further, the minimum number of miles to be swept is not intended to change; if the Permittee is able to implement an improved method to sweep those miles, that is within the scope of the requirement in the Final Permit. See also the Fact Sheet discussion for Subsection 3.3.6 of the Final Permit.

EPA also emphasizes that it is expected that management systems for many municipal operations will necessarily improve and adapt as technologies, such as georeferencing, are developed and refined. It would be counter-productive if the MS4 permitting process created obstacles or delays in adoption of these improved management systems, especially for activities (such as catch basin clean out and

street sweeping) that have other important drivers besides the MS4 program. MS4 permits should acknowledge and facilitate implementation of improved management systems to the extent possible. Sometimes the changes will come in the middle of a permit term, and the permit requirements need to be nimble enough to allow for that while still providing clear mandates, re: what must be done in order to comply with the permit. EPA contends that the language in both Subsections 3.3.4 and 3.3.6 balances these needs.

168. Comment, DC Water:

This section of the draft permit provides as follows:

*Until such time as the provisions of Subsection 3.3.4.3 are fully implemented, the Permittee shall continue to operate a catch basin maintenance program that ensures that each catch basin within the MS4 Permit Area is cleaned at least once annually during the life of the permit, with allowances within a reasonable margin of error for logistical obstacles.*

DC Water reiterates and incorporates its prior comments on this provision. In addition, the requirement to clean all catch basins annually (including those that do not require cleaning) is in conflict with Subsection 3.3.4.3, which allows the Permittee to implement changes to the catch basin cleaning frequency for specific portions of the MS4 Permit Area. However, compliance with Subsection 3.3.4.3 will effectively cause noncompliance with Subsection 3.3.4.1 because the Permittee is not permitted to change the cleaning frequency in any part of the MS4 until after completing all of the data collection work. To reconcile these inconsistencies, DC Water specifically requests that any annual obligation be modified to require "... to ensure that each catch basin within the MS4 Permit Area is inspected and, if found to require cleaning, cleaned at least once annually ...". The requirement, as written, is inefficient and will waste limited resources cleaning catch basins that do not need cleaning, while delaying the cleaning of other catch basins that need cleaning. It is nonsensical to require cleaning of a catch basin that, upon inspection, is found not to require cleaning. Failure to account for this reality by incorporating the specific language suggested here or by other language materially identical to it, would be an arbitrary and capricious decision on the part of the Agency and would not be expected to survive judicial review.

EPA Response to Comment 168:

EPA agrees with the suggested addition and has made the edit to Subsection 3.3.4.1 of the Final Permit.

169. Comment, DOEE:

The District requests that Subpart 3.3.4.1 be amended as follows:

*Until such time as the provisions of Subsection 3.3.4.3 are fully implemented, the*

*Permittee shall continue to operate a catch basin maintenance program that ensures that each catch basin within the MS4 Permit Area is **inspected and, if found to require cleaning**, cleaned at least once annually during the life of the permit, with allowances within a reasonable margin of error for logistical obstacles.*

This amendment will allow the District to more efficiently implement the catch basin operation and maintenance program and avoid wasting limited resources on cleaning catch basins that have been inspected and determined not to require cleaning.

EPA Response to Comment 169:

EPA has made the requested change to Subsection 3.3.4.1 of the Final Permit. See also Response to Comment 168.

**Comments on Draft Permit Subsection 3.3.5: Storm Drain Outfall Operation and Maintenance**

170. Comment, DC Water:

This section of the draft permit provides 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. The Permittee may substitute a portion of outfall repairs with stream restoration with a demonstration (i.e., pollutant reduction estimates) that the in-stream water quality benefits of restoration exceed those derived from outfall repairs.*

DC Water requests that the phrase “. . . to ensure that outfalls in poor repair do not impair water quality” be stricken from the first sentence. The obligation imposed here is to implement the District’s plan. Addition of the description of the purpose or intended consequence of that plan confuses the nature of the enforceable obligation and renders the permit unclear. If the extraneous phrase is not deleted, the permit will be inherently unclear and unsupported.

Further, DC Water reiterates and incorporates its prior comments on this provision. Specifically, many of the MS4 outfalls are located on land managed by third parties, principally Federal agencies. These agencies have a history of requiring complex and time consuming conditions for permitting access and construction conditions and limitations for repair projects. Such permitting has, 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 result in adding to the time required to obtain an outfall repair or stream restoration permit.

EPA is familiar with local situations faced by the Permittee and utility agencies in the

region and the delays and costs incurred, in spite of diligent efforts by the Permittee or utility to obtain the approvals needed for outfall repairs, stream restoration or improvement of pollution control facilities located on third party property.

In view of the third party permitting requirements, it will be virtually impossible for the permittee to comply, without exception, with the requirement to repair 50 outfalls or stream restoration projects during the permit term.

Because of the third party permitting situation, DC Water requests that the outfall repair or stream restoration condition be revised 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. The Permittee may substitute a portion of outfall repairs with stream restoration with a demonstration (i.e., pollutant reduction estimates) that the in-stream water quality benefits of restoration exceed those derived from outfall repairs. If, however, approval of any repair or stream restoration project requires a permit by a third party and the Permittee demonstrates that it was diligently pursuing obtaining the third party permit, the schedules for those projects shall be exempted from the 50 outfall repair standard and proceed on the schedules established by the third-party permits.*

EPA Response to Comment 170:

Regarding the first request to remove the water quality objective of making outfall repairs, EPA declines to make this change, as it is the purpose of this permit. The Permittee may have other reasons for repairing outfalls that can also be met, and the permit language does not preclude meeting those additional objectives.

Regarding delays that may be caused by third parties, please see Response to Comment 101 and the Fact Sheet discussion for Subsection 3.3.5 of the Final Permit.

171. Comment, DOEE:

The District requests the language in Subpart 3.3.5 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. **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, failure to achieve the 50 outfall requirement due to projects that are delayed by, the third party permitting process shall not be deemed a violation of this permit.** The Permittee may substitute a portion of outfall repairs with stream restoration with a demonstration (i.e., pollutant reduction estimates) that the in-stream water quality*

*benefits of restoration exceed those derived from outfall repairs.*

The District proposed similar language in its comments on the first proposed draft of this permit, which we reiterate here. Because of the potential for projects to be delayed by third party permitting requirements despite the District's best efforts, the permit must not deem failure to achieve this subpart's requirements because of such delayed projects to be a violation of the permit. 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.

EPA Response to Comment 171:

See Response to Comment 101 and the Fact Sheet discussion for Subsection 3.3.5 of the Final Permit.

**Comments on Draft Permit Subsection 3.4.2: Maintenance of Stormwater Management Controls**

172. Comment, DOEE:

The District requests subpart 3.4.2 be removed. The language is repetitive and the operation and maintenance of stormwater control measures is already covered by subpart 3.8.2. To ensure the spill prevention and response measures are captured the District requests the language in subpart 3.4.4 be amended as follows:

*At each Critical Source, the Permittee shall verify that the operator is implementing a control strategy sufficient to protect water quality, including spill prevention and response measures. Where the Permittee determines that existing measures are not adequate to protect water quality, the Permittee shall require and enforce additional site specific controls sufficient to protect water quality.*

EPA Response to Comment 172:

EPA agrees with the suggested modifications. EPA has removed from the Final Permit what was Subsection 3.4.4 in the August 2017 Draft Permit and has moved the maintenance and spill prevention and response requirements to Subsection 3.4.3, *Compliance Assurance*, of the Final Permit.

## **Comments on Draft Permit Subsection 3.5.2: Plan Review and Approval**

### 173. Comment, DOEE:

The District requests that the second sentence of Subpart 3.5.2 be amended as follows:

*Also, the Permittee shall ensure that all construction activities impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale that is one acre or greater, are not authorized until the Permittee receives documentation that the construction activity has received coverage under EPA's NPDES General Permit for Discharges from Construction Activities (CGP).*

This amendment is suggested in the interest of clarity, as a "sale" alone is not a relevant trigger in this review process, and is already captured in the definition for "common plan of development" referred to in this subpart.

### EPA Response to Comment 173:

The comment does not include a compelling reason for removing the language "or sale", nor can EPA perceive how this would improve implementation of this provision. Since this is standard language in the federal regulations at 40 C.F.R. § 122.46(b)(15)(i) EPA declines to remove it from Subsection 3.5.2 the Final Permit.

## **Comments on Draft Permit Subsection 3.8.2: Non-District-Operated Stormwater Control Measures**

### 174. Comment, DOEE:

The District requests that the second sentence of Subpart 3.8.2 be amended as follows:

*Such stormwater control accountability measures may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the Permittee.*

This amendment is suggested to clarify that the measures described in this sentence are not stormwater control measures, but rather accountability measures to ensure that installed stormwater control measures are appropriately operated and maintained.

### EPA Response to Comment 174:

EPA has modified the language in Subsection 3.8.2 of the Final Permit per the request to add the word "accountability".

## **Comments on Draft Permit Section 3.9, Table 3 – Stormwater Training**



175. Comment, DC Water:

DC Water reiterates and incorporates its prior comments on this provision. This table includes stormwater management training requirements for “Municipal water treatment and wastewater treatment” in the list municipal sites where stormwater training is required.

First, there are no “Municipal water treatment” facilities located within the District. Potable water treatment for the water distributed in the District is provided solely by the US Army Corps of Engineers, Washington Aqueduct. Second, “wastewater treatment facilities” is the Blue Plains Advanced Wastewater Treatment Plant (Blue Plains AWWTP) facility and it is located within the CSS area of the District and are not within the operational scope of this permit. Further, the NPDES permit for Blue Plains AWWTP already includes SWPPP requirements, including training requirements. Therefore, DC Water reiterates it request that EPA to delete these facilities from the Table.

EPA Response to Comment 175:

See Response to Comment 106, and the Fact Sheet discussion for Section 3.9 of the Final Permit.

**Comments on Draft Permit Subsection 4.3.4: Geomorphology Assessment**

176. Comment, DOEE:

Subpart 4.3.4 requires the District to conduct geomorphological assessments of streams during the summer index period, from June 1 through September 30. As the District begins to implement this requirement, there is the possibility that the amount of vegetation present at that time of year may impede these assessments. If this is the case, the District will adjust the schedule for these assessments as necessary and update EPA of the proposed program modification.

EPA Response to Comment 176:

EPA acknowledges the comment. EPA does not understand this to be a comment on the draft permit, however; as a result, no response is necessary.

**Comments on Draft Permit Subsection 4.5.1: Trash Trap Monitoring**

177. Comment, DC Water:

This section of the Draft Permit has been modified to imply, perhaps unintentionally, that the only captured trash that will be considered for purposes of assessing compliance with the Anacostia Trash TMDL is that which is captured “at outfalls.” It is DC Water’s understanding that trash captured throughout the MS4 Permit Area, including but not limited to that collected at the outfalls, clean-ups, hotspot sweeping, skimmer boats

activities, will be considered for purposes of assessing compliance. We therefore recommend that the proposed additional phrase “at outfalls” be deleted.

EPA Response to Comment 177:

EPA points out that Subsection 4.5.1 only addresses monitoring requirements at trash traps. Subsection 3.7.1.1 of the Final Permit stipulates that trash capture, prevention and removal mechanism may all be counted toward meeting the permit limit, and item 38 in the Reporting Template provides for reporting on the types of activities noted in the comment.

**Comments on Draft Permit Section 6.1: Incorporation by Reference**

178. Comment, DOEE

The District requests this section be amended as follows:

*All conditions applicable to NPDES permits contained in 40 CFR §§ 122.41 and 122.42(c), which are not expressed in this Permit, are incorporated herein by reference.*

Only section (c) of Part 122.42 applies to MS4 permits. This limitation is clear in EPA’s regulations, but the District suggests clarifying this in the permit’s language.

EPA Response to Comment 178:

EPA has made the requested edit.

**Comments on Draft Permit Sections 6.12 and 6.13: Twenty-four-hour Reporting and Upset**

179. Comment, DC Water

The NPDES Permit issued for discharges from the Blue Plains AWWTP and the wastewater system, includes the operation of the treatment and control systems and related appurtenances, including, but not limited to, sewers, intercepting chambers, interceptors, combined sewer overflows, pumping stations and emergency bypasses, whether located in the CSO or MS4 areas of the District. The NPDES Permit for the Blue Plains AWWTP includes requirements for reporting noncompliance, bypass and upset events involving CSOs and SSOs. The NPDES Permit requires reporting to EPA within 24 hours from the time the permittee becomes aware of the noncompliance. It also requires submittal of a written report within 5 days of the time the permittee becomes aware of the noncompliance.

The Draft Permit here includes combined sewer overflows (CSO) within the scope of noncompliance events under the MS4 permit that requires reporting to EPA. Such CSO systems and events are outside the stated scope and the jurisdiction of this permit.

Moreover, requiring two permittees to report on the same noncompliance event will only create confusion of responsibility and reporting. Therefore, DC Water reiterates its request that EPA delete references to CSO, SSO, bypass, and upset events.

Further, this section requires the reporting of noncompliance within 24 hours from the time the permittee becomes aware of the circumstance. However, this is inconsistent with the requirements in Section 3.3.1, which requires the permittee to investigate complaints within 24 hours. It is not clear whether the receipt of a SSO complaint initiates the reporting time or confirmation of a SSO that results after the SSO has been investigated.

EPA Response to Comment 179:

All provisions in Part 6, *Standard Permit Conditions for NPDES Permits*, come directly from 40 C.F.R. § 122.41(1)(6), which stipulates conditions applicable to all permits. These provisions are generally inserted *verbatim* into all NPDES permits, even though for certain types of discharges they may not be directly applicable. They are usually only modified if they are in direct conflict with another permit provision. Not only is there no direct conflict with another permit provision here, the provision is applicable because it is possible, for example, that sanitary sewers could overflow into the MS4. As a result, EPA declines to remove this provision from the Final Permit.

**Comments on Draft Permit Part 8: Permit Definitions**

180. Comment, DOEE

Definition of Critical Sources

The District requests that subparagraph d. of the definition of critical sources be amended as follows:

*d. Facilities conducting industrial activities, as defined at 40 C.F.R. § 122.26(b)(14)(i)-(ix) and (xi); 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 and/or recovery plants, industrial facilities subject to SARA or EPCRA Title III.*

This language was requested in the District's comments on the first draft permit and is reiterated here to clarify that the definition of Critical Sources is intended to include facilities conducting industrial activities that are required to obtain an NPDES permit for stormwater discharges associated with industrial activity.

EPA Response to Comment 180:

EPA has had additional discussions with the Permittee, and the following definition of Critical Sources has been agreed upon, which is consistent with what

was intended in the 2017 draft permit:

*“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, specifically:*

- a. Commercial vehicular service activities, e.g., washing, maintenance and fueling, including mobile operations.*
- b. Dry cleaners.*
- c. Aircraft or ship/boat maintenance and fueling activities.*
- d. Facilities conducting industrial activities, as defined at 40 C.F.R. § 122.26(b)(14), except for 40 C.F.R. § 122.26(b)(14)(x).*
- e. Facilities utilizing any material designated as a Hazardous Substance pursuant to 40 C.F.R. Part 116, in quantities exposed to stormwater that could cause or contribute to an exceedance of water quality standards or a water quality impairment.*