

# **DISTRICT DEPARTMENT OF THE ENVIRONMENT**

## **RESPONSE TO COMMENTS**

### **NOTICE OF PROPOSED RULEMAKING STORMWATER FEE DISCOUNT PROGRAM**

**JULY 29, 2011**

**D.C. REGISTER VOLUME 58/30**

**PUBLIC REVIEW AND COMMENT PERIOD: JULY 29, 2011 TO SEPTEMBER 16, 2011**

The District Department of the Environment (the Department or DDOE) published proposed rules for a Stormwater Fee Discount Program on July 29, 2011, for public review and comment. The public review and comment period closed on September 16, 2011. In response to the publication of the proposed rules, the Department received eleven (11) comment letters. Overall, the comments received were very useful and resulted in several revisions to the proposed rule. The rule is being proposed for a second public review and comment period at the same time this Response to Comments document is being posted to DDOE's website.

This Response to Comments document provides a synopsis of the comment letters submitted to the Department during the public review and comment period. It also describes the Department's response to these comments, including whether or not DDOE made changes to the proposed rule to reflect the comment.

In this summary, each comment letter is identified by a unique comment number, the organization or agency on behalf of which the comment was submitted (if any), the name of the person submitting the comment (where provided), and the date of the comment.

Throughout this document, DDOE references each proposal as follows: the July 29, 2011 proposal as the "original proposal" or "original rules" and this re-proposal as the "second proposal" or "second rules." From the original proposal to the second, DDOE has changed section and subsection numbers to accommodate new sections and provisions. Therefore, DDOE will indicate throughout this summary whether or not a section or subsection reference is to the original or second proposal.

Commenters:

1. Advisory Neighborhood Commission 4A08, Gale Black (September 15, 2011)
2. Apartment and Office Building Association of Metropolitan Washington (August 29, 2011)
3. Kathy Bainbridge (September 16, 2011)
4. Peter Carlson (August 12, 2011)
5. DC Appleseed, Walter Smith, Brooke DeRenzis (September 6, 2011)
6. DC Water, George S. Hawkins (September 15, 2011)
7. District of Columbia Building Industry Association, Charles K. Barber (August 31, 2011)
8. The Field School, Nancy Anderson (September 1, 2011)
9. Natural Resources Defense Council, Rebecca Hammer (September 6, 2011)
10. Christopher Turner (September 12, 2011)
11. U. S. National Park Service, Tammy Stidham (September 16, 2011)

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**1. Advisory Neighborhood Commission 4A08, Gale Black (September 15, 2011)**

- a. The Commenter contends that the tiered stormwater fee structure for single family residences results in higher fee assessments than is warranted, because the structure treats partially pervious areas as fully impervious.

DDOE Response: The situation the Commenter describes is the result of a series of decisions to simplify and streamline the administration of the impervious surface-based stormwater fee. Any stormwater fee program must balance the demands of customer equity against those of administrative complexity, and any compromise between those considerations will, by necessity, be imperfect. The proposed stormwater discount program is intended in part to address these types of concerns. If an applicant can demonstrate that a surface or area of their property that has been assessed as “impervious” provides for some amount of stormwater retention due to its permeable nature, DDOE agrees that it should be awarded a discount.

- b. The Commenter states a need to know and understand how discounts will be determined and on what basis.

DDOE Response: The proposed rules describe the basis for determining stormwater discounts and outlines the steps DDOE will use to calculate discounts. Specifically, section 559 of the second proposal describes how discounts will be calculated. In addition, DDOE is in the process of developing supplemental guidance materials and a website for the program. These materials will describe, in detail, the application process, eligibility requirements, other requirements of the program, and key dates or deadlines.

- c. The Commenter inquired how the stormwater fee structure accounts for runoff generated by government property.

DDOE Response: District and Federal government properties pay the stormwater fee, just as any private property does.

- d. The Commenter inquired about the status of a proposal to address the District’s combined sewers.

DDOE Response: The District’s combined sewer is the responsibility of DC Water, as is the Clean Rivers project to address combined sewer pollution. As such, it is beyond the scope of the proposed rules, which focus on a discount program for the stormwater fee administered by DDOE, for the MS4 stormwater program.

**2. Apartment and Office Building Association of Metropolitan Washington (August 29, 2011)**

- a. The Commenter suggests that the rule should specify when an awarded discount will appear on a customer’s water and sewer bill, and specifically suggested applying the

discounts to the billing cycle immediately following DDOE approval of a discount application. Model language from several other jurisdictions was also provided by the Commenter.

DDOE Response: DDOE agrees that the rule needs to be clearer about when the discount will begin to accrue and when it will appear on the customer's DC Water bill. DDOE has revised subsection 558.4 (subsection 557.4 in original proposal) to include language on when the discount will begin to accrue; however DDOE cannot assure a specific timeline for when customers will see the discount reflected on their bills, as billing is a function of DC Water, not DDOE.

- b. The Commenter contends that the maximum stormwater discount possible under the program should be 100% of the stormwater fee, instead of the 55% as provided for in the proposed rules. Examples from several jurisdictions that the Commenter contends offer up to 100% were provided.

DDOE Response: DDOE disagrees and believes that the examples cited by the Commenter do not provide a useful comparison to the District's stormwater fee or its proposed fee discount program.

First, several of the jurisdictions cited by the Commenter do not actually offer 100% discounts. Portland, OR, offers a discount of "100% of the *on-site stormwater charge*" (emphasis added), which accounts for only 35% of the total stormwater charge imposed by the city. As a result, the true maximum discount a customer in Portland can receive is 35% of the total stormwater fee. The example of Philadelphia, PA, is a similar case. The stormwater fee in Philadelphia differs considerably from the District's, as it is split between a Gross Area Charge and an Impervious Area Charge. Philadelphia's stormwater fee regulations allow for up to 100% discount from each component of the charge. However, those same regulations also stipulate that "A property that receives a maximum [Gross Area] and/or [Impervious Area] credit is still subject to the monthly minimum charge." In other words, a property receiving 100% discount in Philadelphia still must pay a monthly fee. For these examples, DDOE can conclude only that the claim that they provide 100% discount or credit is inaccurate.

Next, many of the remaining jurisdictions cited by the Commenter require meeting an extremely aggressive performance standard to qualify for a 100% discount. Specifically, these jurisdictions require a property to manage the 100-year storm event. Based on conversations with staff in Dekalb County, GA, and Minneapolis, MN, however, this performance standard is so stringent that no customers have demonstrated that they are able to meet it, or have even attempted to qualify for the maximum allowable discount. As a result, it appears that while a 100% discount is, in theory, available from these jurisdictions, in practice this maximum discount has not proven practical.

DDOE's preferred approach is to offer a more modest maximum discount award, tied to a lower performance standard that is achievable. DDOE contends that such an approach will allow for a greater number of properties to qualify for more meaningful discounts, therefore encouraging improved stormwater management practices throughout the entire District. Further, even properties which install substantial stormwater retention practices will often have some stormwater run-off during exceptionally large storm events. The District is required to implement programmatic controls per the EPA issued Municipal Separate Storm Sewer (MS4) Permit that, in part, includes managing the impacts from large storm events. Therefore it is reasonable and necessary to charge all properties with impervious surfaces a portion of the MS4 programmatic costs and capital costs.

A number of considerations support capping discounts at less than 100%. First, the occasional occurrence of extremely large rain events make it unlikely, if not impossible, that any District property, even one that has implemented stormwater BMPs, will prevent all stormwater runoff from leaving its property and entering the District's storm sewer infrastructure. Second, as a consequence of its status as an NPDES permittee, the District has numerous obligations relating to its administration and implementation of the MS4 permit. These obligations would remain and require funding support even if every property in the District were to retain all of their stormwater runoff.

Using the Center for Watershed Protection's Runoff Equation, DDOE conducted an analysis of the amount of stormwater runoff produced by 1,000 square feet of impervious surface (a single ERU) for the precipitation data from 2009. A similar analysis was then conducted assuming that same ERU had been retrofitted with a BMP capable of retaining the 1.2" runoff volume. This analysis determined that properties retrofitted with such practices may fail to retain approximately 22% of the runoff generated by an ERU in a given year.

This 22% value was then applied to the District's costs for stormwater management and mitigation projects. To this amount were added DDOE's internal costs that the stormwater fee revenue supports, including staff and such other administrative costs as billing and collection of the stormwater fee. These can be considered fixed costs that remain regardless of how much (or little) runoff is managed on a site-by-site basis. The combined total of this amount and the 22% of District costs for stormwater management and mitigation projects represents 42.2% of the annual revenue collected by the stormwater fee. This represents an estimate of the combined cost to manage/mitigate unmanaged runoff from individual properties and DDOE's fixed stormwater administrative costs.

Based on this analysis it is reasonable for a property that has been retrofitted to retain 1.2" of stormwater runoff to be discounted 57.8% but continue paying 42.2% of the stormwater fee. DDOE ultimately proposed an appropriate and justifiable discount cap

that was rounded to 55% as (1) these fixed cost vary slightly (i.e. escalation in monitoring contracts and salary), and (2) there exists a need to simplify the discount administrative process.

- c. The Commenter provided numerous specific language suggestions for section 559 (section 560 in the second proposal), with the intent of providing more detail and clarity regarding the inspection process for the discount program.

DDOE Response: DDOE disagrees with the provided language suggestions and believes them to be overly prescriptive and unnecessary, particularly in light of DDOE's established and successful inspection protocols for compliance with the District's existing stormwater management regulations.

- d. The Commenter strongly encouraged DDOE to allow applicants to submit application and recertification/reapproval materials electronically.

DDOE Response: DDOE agrees and has revised subsection 561.4 (subsection 560.4 in original proposal) accordingly.

- e. The Commenter suggested changes to the recertification/reapproval process, including allowing self-certifications, relying on certification from a professional engineer to verify that Best Management Practice (BMP) described on an original application remain functional.

DDOE Response: DDOE's intent for the reapproval process was for it to function as a self-certification. However, DDOE believes that the specific language suggestions provided by the Commenter are more burdensome for applicants than what was originally proposed. In particular, the suggested requirement for a professional engineer certification adds a layer above and beyond DDOE's conceptual approach for the recertification process. As a result, DDOE has not made any changes to section 561 (section 560 in original proposal) in response to this comment.

- f. The Commenter suggests that any notice to reduce or revoke a discount should clearly outline corrective actions necessary to receive or continue to receive a discount.

DDOE Response: DDOE agrees. Providing an explanation of corrective action for a customer to implement will make it more likely that issues related to the performance or function of stormwater BMPs are successfully resolved. Accordingly, DDOE has revised subsection 562.2 (subsection 561.3 of original proposal).

- g. The Commenter suggests that DDOE should revise the proposed rules to provide flexibility to allow for more than 30 days to complete necessary corrective or remedial action, if the customer provides sufficient information to demonstrate that more time is required.

DDOE Response: DDOE agrees. As in the case of the preceding comment, providing this flexibility will improve the likelihood that identified performance issues with BMPs are properly addressed. And so, DDOE adds a new subsection 562.3.

- h. The Commenter suggested changes to DDOE's procedures for denying or adjusting discounts based on the results of inspections. Specifically, the Commenter suggested that the language in the proposed rules did not account for all scenarios in which an initial discount application may be denied.

DDOE Response: DDOE agrees. Any notice of a decision issued by DDOE should address both issues resulting in the denial of an initial application and issues identified during inspections of practices for which a discount has already been awarded. Section 563 Administrative Appeals and Judicial Review in the second proposal now describes this process.

- i. The Commenter suggests providing more detail and clarity for the dispute resolution process described in section 562 (section 563 in second proposal), specifically with regard to DDOE's proposed approach of incorporating DC Water's existing dispute resolution process by reference.

DDOE Response: DDOE agrees and has revised section 563 (section 562 in original proposal) to describe the dispute resolution process. The District's Office of Administrative Hearings (OAH) will provide a forum for review of a stormwater fee discount determination by DDOE. A customer may request a hearing from OAH within 15 days of the Director's decision by following the procedures listed in Section 2808 of Title 1, Chapter 28 of the D.C. Municipal Regulations.

### **3. Kathy Bainbridge (September 16, 2011)**

- a. The Commenter suggests that the discount program should provide for discounts greater than 55% of the stormwater fee for properties that manage all of the stormwater runoff generated from the property.

DDOE Response: DDOE disagrees and contends that capping discount awards at less than 100% of the stormwater fee is justifiable and appropriate. See DDOE's response to Comment 2b.

### **4. Peter Carlson (August 12, 2011)**

- a. The Commenter asks if DDOE considers a snowfall event to be a storm event in relation to this rulemaking.

DDOE response: Yes, DDOE does consider a snowfall event to be a storm event.



- b. The Commenter states that the 55% maximum discount set by the proposed rule is actually a penalty and is insufficiently supported.

DDOE Response: DDOE disagrees with the Commenter's first contention that the 55% maximum discount award is a penalty. Rather, DDOE contends that a 55% maximum represents an equitable stormwater charge for a property meeting the performance standards described in the proposed rules. However, the Commenter's second contention, that this maximum discount award was insufficiently supported, had merit. Therefore, DDOE is providing the detailed explanation of how the 55% maximum discount award was determined in this comment response summary, in the response to Comment 2b above.

- c. The Commenter suggested additional language for the provisions pertaining to retroactive credit, expanding on ways applicants can demonstrate a BMP had been installed prior to the effective date of the discount program.

DDOE Response: DDOE agrees and believes that the language provided in 558.7(a) of the second proposal allows flexibility in what documents DDOE accepts with a retroactive credit, now termed "retroactive discount", request.

- d. The Commenter stated that the impervious billing system used for the stormwater fee, and that assesses the amount of impervious surface on a property, is unfair to individuals with concerns or issues related to the Americans with Disabilities Act.

DDOE Response: DDOE staff looked at this matter carefully, and consulted with legal counsel. The issue the comment presents is not whether the proposed rule would require something special of disabled people, which would disproportionately disadvantage them. Rather, the comment suggests that a subset of this group be given a reduction, or pass, on the generally applicable monthly fee because, incidental to the impervious surface fee, a ramp may cover more ground than a sidewalk. (Ground-entry handicap-access sites would not have constructed ramps.)

It is important to put the suggestion in its financial context. The difference in the fee between the ramp and a charge for the sidewalk or plaza that might otherwise be placed there, or even no pavement, is significantly less than \$2.67 per month. This is because the fee for one ERU is \$2.67 per month and a three-foot-wide ramp would take up less than 1,000 square feet. For a three-foot-wide ramp, assuming it constitutes entirely new/additional impervious surface, the additional cost per month works out to be eight cents per ten linear feet (or just under a dollar per year).

On the other hand, the cost to handle exemption requests for such ramps could be substantial, with technical reviews of ramp construction plans or special site visits. We must also consider the purpose of the fee program – protecting the waters of the District

from the stormwater pollution which comes from impervious surfaces. After considering each of these factors, DDOE has concluded that the no changes to the proposed rules are necessary in response to the comment.

- e. The Commenter believes that the implementation schedule for the discount program, which, in the original proposal, began with non-residential properties first and then phases single family residences in at a later date, is unfair and unsupported. Specifically, the Commenter raises concerns that by the time the program expands to single family residences, funding for discounts will no longer be available.

DDOE Response: The present version of the rules fully addresses the concerns. Between the original and second proposal, DDOE has determined that the program will be phased by small and large projects, not property type. But, regardless of the application period, a person qualified for a discount will receive the discount backdated to a common date for both sets of applicants.

Specifically, customers that install BMPs to manage an aggregate of greater than 2,000 square feet of impervious surface will be able to apply on the effective date of the rulemaking using a Standard Application. Customers installing BMPs that manage an aggregate of less than 2,000 square feet of impervious surface may apply one year later, using a Simplified Application process. If a customer who qualifies for the Simplified Application process prefers to apply before it is available using the Standard Application process, DDOE will allow this, but the customer will be required to adhere to all requirements of the Standard Application process.

DDOE is phasing the implementation of the discount program because it anticipates the application and review process for larger projects with more impervious surface will be more complicated. As a result, the Department intends to focus on this smaller pool of more complex properties first, before expanding to the District's larger pool of properties utilizing smaller BMPs.

The Commenter's specific concern about funding for discounts appears to be based on a misunderstanding of how DDOE is funding the discount program. Discounts will be provided for by reductions from revenue collected by the stormwater fee, not from any pool of money or funding source already allocated within the District's budget. As a result, funding for the discount program can never "run out;" awarded discounts, even retroactive ones, simply result in the District collecting less stormwater fee revenue from a given property.

- f. The Commenter noted that the proposed rule does not make clear if awarded discounts will be provided as a "one time" credit or as an ongoing reduction. Additionally, the Commenter would like to know how the retroactive credit will be allocated.

DDOE Response: DDOE agrees that the rule language could be more precise on both accounts and has revised subsections 558.4 and 558.6 in the second proposal accordingly.

- g. The Commenter suggested alternate language for the eligibility requirement language in subsection 557.6 (subsection 558.8 in second proposal), to better reflect how eligibility and application requirements could be applied to the example provided by work conducted on his property.

DDOE Response: DDOE's intent is for the requirements for engineering design, technical specifications, calculations of stormwater retention volumes, etc. to apply only to applications for BMPs managing an aggregate of greater than 2,000 square feet of impervious surface. A streamlined, simplified application process will be used for BMPs installed for less than 2,000 square feet of impervious surface managed. DDOE has revised subsection 558.8(c) in the second proposal to make clear that the more detailed process for proving eligibility is required of applicants using a standard application.

- h. The Commenter inquired who will determine if BMPs are properly sized and located, and if such determinations will be made based on drawings or by inspection.

DDOE Response: DDOE will make these determinations based on both. Inspections are addressed in section 560 of the second proposal. Reviewing design documents appears in section 558.8(c).

- i. The Commenter inquired if there is a "sunset" for the discount program that would result in a loss of eligibility for the discount program. In addition, the Commenter asked for clarification on what the procedures are for appeal and reinstatement.

DDOE Response: DDOE addressed each of these subjects in the original proposal in sections 560, 557, and 562. This second proposal addresses these issues in sections 561, 558, and 563.

- j. The Commenter inquired how a retroactive credit will be applied.

DDOE Response: DDOE addresses retroactive credits in the second proposal in subsections 558.5, 558.6, and 558.7.

- k. With respect to subsection 558.3 of the original proposal, the Commenter asks DDOE to consider a pre-calculation for large BMPs where water does not leave the property and suggests that subsection 558.3(b) of the original proposal, providing that BMPs that are common in the green building industry receive a pre-calculated discount, be deleted.

DDOE response: DDOE disagrees with the Commenter that a pre-calculation exists for large BMPs, where water does not leave the property. An explanation of why larger BMPs, managing an aggregate of greater than 2,000 square feet, should be scrutinized to

a higher degree than smaller BMPs is included in DDOE's response to Comment 4e. DDOE agrees with the Commenter that the stipulation of being a common practice in the green building industry does not necessarily mean that the BMP meets DDOE's standards for eligibility for the program. Therefore, subsection 558.3(b) of the original proposal no longer appears in the second proposal.

- l. The Commenter inquired if discounts will be automatically transferred upon sale of a property.

DDOE Response: Multiple sets of comments raised this or a similar concern. DDOE agrees that the rule should address what will occur to awarded discounts upon sale or transfer of the relevant property. DDOE's approach for such situations will be to terminate the discount upon sale of a property. The new owner of the property can then apply for the discount. DDOE's principal concern for such situations is ensuring that the new property owner be aware of the property's BMPs and commit to maintaining each practice in proper working order. Automatic transfer of discounts would not afford DDOE the same level of certainty on these considerations as requiring new owners to apply and affirm their maintenance commitment. As a result, DDOE revised subsection 558.11 (557.9 in the original proposal).

- m. The Commenter stated that the three-year discount period established by section 560 (section 561 in this second proposal) is not justified.

DDOE Response: An important administrative consideration was to harmonize the stormwater discount program's inspection schedule with those of other existing programs. Specifically, DDOE's current inspection program for stormwater management practices inspects practices on a three-year cycle. The inspection component of the discount program will be expanding on this existing program; as a result, DDOE designated the same time period for the duration of an awarded stormwater discount. There are other concerns in such a balancing, including changes in performance due to wear and tear, administrative resources, simplicity, and customer resources.

- n. The Commenter suggested an alternate approach for continuing discounts after the expiration of an initial three-year discount period. This specific suggestion was to automatically renew all discounts unless the customer opts out of the program.

DDOE Response: The Department's primary concern in defining a limited discount period, inspecting BMPs, and requiring a recertification, is to ensure that BMPs are properly maintained and continue to provide the environmental benefit described on the initial discount application. DDOE has weighed this critical concern with the customers' interests in maximizing their discount and minimizing their time and resources in recertification. DDOE disagrees with the Commenter's suggested approach, primarily because, if adopted, it could potentially harm substantially the integrity of the program,

dramatically overestimating the number of properties deserving of a stormwater fee discount as some practices cease to be maintained.

- o. The Commenter inquired if it would be possible to increase an already-awarded discount by improving or implementing additional BMPs on a property.

DDOE Response: Yes. The Department intends for recipients of stormwater discounts to bring new and/or additional BMPs to its attention for consideration, potentially increasing a discount award. The language in the proposed rule provides DDOE with the necessary flexibility to do so.

- p. The Commenter inquired if the waiver provisions in subsection 528.1 of the original proposal apply to the stormwater fee.

DDOE Response: The waiver provisions in subsection 528.1 of the original proposal do not apply to the stormwater fee. They apply to the stormwater management requirements for new construction and development activity, and were included in the original rules as part of a number of “housekeeping” edits throughout Chapter 5. These “housekeeping” edits have been removed from the revised proposal and will be addressed by a future rulemaking. As a result, this comment is beyond the scope of this rulemaking.

#### **5. DC Appleseed, Walter Smith, Brooke DeRenzis (September 6, 2011)**

- a. The Commenter noted that the proposed rule is not self-implementing and suggested that the final rule incorporate detailed instructions for applications. At a minimum, the Commenter suggested DDOE include instruction on what to include in an application, as well as where and when such applications should be submitted.

DDOE Response: DDOE’s intent has been to provide the requested level of detail in materials supplemental to the regulations themselves, such as a detailed application (with associated instructions) and guidance materials. These materials will be made available on DDOE’s website and in hard copy, upon request.

- b. The Commenter suggested the proposed rule should provide more clarity on which types of BMPs will qualify for a discount before the discount program becomes effective.

DDOE Response: Similarly to the response above, DDOE will provide in supplemental guidance material more details on the types of BMPs that will qualify for discounts. In general, however, DDOE’s preferred approach is not to focus in these rules on specific techniques or technologies, but rather on the stormwater retention achieved by those techniques or technologies.

- c. The Commenter suggested that the application requirements in the proposed rules be revised to simplify applications for users of small BMPs.

DDOE Response: DDOE agrees. The Commenter’s suggestion is consistent with DDOE’s original intent of streamlining and simplifying application requirements for single family residences. DDOE’s subsection 558.8(c) of the second proposal clarifies that information regarding engineering design, technical specifications, and stormwater retention calculations is not required for simplified applications. The simplified applications can be used by customers who have installed BMPs that manage an aggregate of less than 2,000 square feet impervious surface. See response for Comment 4g for text revisions pertaining to this change.

- d. The Commenter suggested that the rules’ provisions regarding small BMPs be clarified. In particular, the Commenter noted that it was unclear if the size threshold for the simplified application process, introduced in subsection 558.3 of the second proposal would be applied to individual practices, or multiple practices serving a combined total area less than the threshold. In addition, the Commenter thought that DDOE did not clearly articulate what would qualify a BMP as “common in the green building industry” (original proposal’s subsection 558.3(b)).

DDOE Response: DDOE’s intent is that the simplified process be applied to the combined total drainage area that one or many BMPs manage. DDOE has revised subsection 559.5 (subsection 558.3 in the original proposal).

With respect to the “common in the green building” provision, DDOE has deleted this language from the second proposal. See DDOE’s response to Comment 4k.

- e. The Commenter suggested that the rules include the predetermined discount rates for small BMPs referenced in sections 558.3 and 558.4 of the original proposal.

DDOE Response: DDOE agrees with the need to provide more information regarding the calculation of stormwater fee discounts for the simplified application process that focuses on smaller BMPs. Therefore DDOE provides in the preamble of this second proposal an explanation of the simplified calculation DDOE will employ. In addition, more detail will be provided with the application and associated materials. DDOE’s intent for this provision is to simplify the application process for customers utilizing small-scale practices. Such small BMP installations typically do not have the stormwater management engineering to meet eligibility requirements of the standard application process described in subsection 558.8 of the second proposal.

The simplified calculation will assume that the applicant’s BMP(s) is adequately sized to retain the volume of stormwater runoff generated by a 1.2” rain event. By making this assumption, the discount calculation can be simplified to the proportion of the applicant’s impervious surface “disconnected” or managed by BMPs, with a small adder for each rain barrel, as follows: Discount =

*{[Surface area managed by BMPs (in ERUs)] ÷ [Total site impervious surface (in ERUs)]} × 55% (the maximum stormwater fee discount percentage) + [0.13 ERUs per rain barrel installed]*

- f. The Commenter suggested that DDOE revise the rules to allow flexibility to initiate the discount program for single-family residences before, but not later than, the one year anniversary of the effective date.

DDOE Response: DDOE rejects this suggestion for two reasons: (1) it would provide less certainty for the customer as to when the Simplified Application (formerly referred to as the single-family residential application) may be available, and (2) it would make the rules much more administratively complex for DDOE to administer. Also, please see the above responses to Comment 4e.

- g. The Commenter urged DDOE to coordinate the stormwater fee discount program closely with DC Water.

DDOE Response: DDOE recognizes the need for close coordination with DC Water and has consulted DC Water extensively while developing the stormwater fee discount. DDOE intends to continue this coordination as the discount program is implemented, with the ultimate goal of assisting DC Water in extending the discount program to DC Water's Clean Rivers impervious area charge.

## **6. DC Water, George S. Hawkins (September 15, 2011)**

- a. The Commenter noted that the preamble for the proposed rule uses a definition of the term “impervious surface” that differs from the statutory definition in the District.

DDOE Response: In its comment, DC Water references D.C. Law 17-371 (D.C. Official Code 8-151.01(7) (2011 Suppl.) as the statutory definition of “impervious surface” that should be used in this rulemaking. For reference, this statutory definition reads:

“ ‘Impervious surface’ means a surface area that either prevents or retards the entry of water into the ground as occurring under natural conditions, or that causes water to run off the surface in greater quantities or at an increased rate of flow, relative to the flow present under natural conditions.”

DDOE's definition of “impervious surface” in the preamble of the original proposal reads, as follows:

“An impervious surface is a hardened surface, such as asphalt, concrete, or roof area that prevents or substantially impedes the penetration of water into the ground.”

DDOE's definition in the original proposal was for illustrative purposes only. Further, this section of the preamble is not incorporated into the second proposal. DDOE will make sure to use the statutory definition of "impervious surface" in supplemental guidance documents for the program.

- b. The Commenter stated that the discount calculation described in section 558 of the original proposal is not applicable to the tiered fee structure for single-family residences and suggested alternate language to correct this.

DDOE Response: DDOE agrees, and added language that clarifies that those applying using the simplified application (primarily, single-family residences and small businesses) may use a simplified calculation and application process. Applicants whose properties have larger BMPs (those that do not likely fall under DC Water's tiered fee structure) are required to use the calculation set out in section 559 (section 558 of the original proposal). The simplified calculation is described in the preamble of the second proposal. Additional information on this can be found in the response to Comment 5e.

- c. The Commenter stated that the proposed rule's 1,000 square foot size threshold for small BMPs (subsection 558.3(a) in the original rule) is unsupported and suggested revising the threshold to 2,000 square feet.

DDOE Response: DDOE agrees and has revised subsection 559.5 in the second proposal accordingly. The overwhelming majority of single-family residences in the District have 2,000 square feet of impervious surface or less. Defining small BMPs as within that size threshold is consistent with DDOE's intent to simplify discount applications for single-family residential properties.

- d. The Commenter suggested including language in the rulemaking clearly stating that the amount of a discount applied to a customer's bill shall not exceed the monthly stormwater fee.

DDOE Response: DDOE disagrees with this comment, as it is unnecessary. Elsewhere the rules state that the maximum discount available to customers is 55% of the stormwater fee.

- e. The Commenter suggested providing additional clarity on the manner in which retroactive credits will be granted, and made specific language suggestions on how to do so.

DDOE Response: DDOE agrees, and has revised and added language in subsections 558.5, 558.6, and 558.7 to provide greater clarity for the "retroactive discount".

- f. The Commenter noted that the rule does not address what occurs to properties for which discounts have been granted, but the properties are subsequently sold or transferred.



DDOE Response: DDOE agrees that the rules should address such circumstances and, per the response to Comment 4l, has revised the rules.

- g. The Commenter noted the 10-day period proposed in subsection 562.5 of the original proposal is inconsistent with other subsections in Chapter 5, specifically subsection 507.2.

DDOE Response: DDOE agrees and has revised subsection 563.4 of the second proposal.

- h. The Commenter raised concerns regarding the proposed rules' incorporation of DC Water's existing appeals process, and suggested addressing such appeals through the District's Office of Administrative Hearings.

DDOE Response: DDOE agrees, and has revised subsection 563 of the second proposal to reflect this.

- i. The Commenter identified a reference to the Department of Public Works in subsection 506.2 of the original rules, for a provision that may be intended for DDOE's responsibility.

DDOE Response: DDOE agrees, and intends to update this in a later rulemaking. But, for now, DDOE has deleted all "housekeeping" revisions, including edits to 506.2 in the original proposal, from the second proposal.

- j. The Commenter suggested including reference to BMPs in the existing appeals language in subsection 507.2.

DDOE Response: DDOE has removed all "housekeeping" items in the original proposal from the second proposal. DDOE will address these in a future rulemaking.

**7. District of Columbia Building Industry Association (DC BIA), Charles K. Barber (August 31, 2011)**

- a. The Commenter expressed support for the rulemaking, the 55% maximum allowable discount, and the Department's intention to coordinate its program with DC Water's anticipated program.

DDOE response: DDOE appreciates DC BIA's support.

- b. The Commenter endorses Apartment and Office Building Association of Metropolitan Washington's (AOBA) comments, which seek greater definition for inspection requirements and procedures.

DDOE response: DDOE addresses AOBA's comments on greater definition of inspection requirements and procedures under Comment 2c of this summary.

**8. The Field School, Nancy Anderson (September 1, 2011)**

- a. The Commenter requests that DDOE revise the proposed rulemaking to take into consideration non-profit organizations for reduction to the stormwater fee.

DDOE response: DDOE contends that the rulemaking takes into consideration all customers, including non-profits, by providing them with a 55% maximum discount off their stormwater fee when they install eligible BMPs, thereby reducing the stormwater fee on the DC Water bill. However, a property owner's legal or tax status is not relevant to eligibility for the stormwater fee discount program or to broader applicability of the stormwater fee, which is charged to all properties in the District (because it is a fee and not a tax).

- b. The Commenter requested that the rulemaking provide assurance that the stormwater fee discount will be ongoing, as long as the property satisfactorily performs proper verification.

DDOE response: DDOE believes that the language in the original proposal did not preclude applicants from seeking approval for a stormwater fee discount at any time, and reapproval at any time, but has revised the original proposal to clarify that stormwater discounts will be provided as a recurring credit on customer DC Water bills (as discussed in DDOE's response to Comment 4f) on a three-year basis. DDOE addresses approval and reapproval of discounts in section 561 of the second proposal.

- c. The Commenter would like DDOE to consider lessening or removing the 55% cap for BMPs that retain above the 1.2" storm.

DDOE response: DDOE disagrees, primarily due to the inherent challenges posed by designing and constructing BMPs to manage very large storm events. It is extremely unlikely that a property could install BMPs with sufficient capacity and performance to truly achieve "zero discharge" of stormwater runoff; it is reasonable to expect some amount of runoff to result from very large, albeit infrequent, storm events. Considering this in combination with the District's overall stormwater management obligations that remain irrespective of the amount of runoff managed by individual properties, it is reasonable to set a cap on discounts of 55% of the stormwater fee, as discussed in the response to Comment 2b above.

- d. The Commenter would like the rulemaking to include a streamlined process for customers to reduce the number of ERUs billed when they permanently remove impervious surface and restore the area to natural conditions.

DDOE response: DDOE disagrees. This falls under the responsibility of DC Water, which has a process in place for contesting the number of ERUs for which the customer

is being billed. Therefore, this is outside the scope of the rulemaking and does not require changes to the rulemaking.

- e. The Commenter suggests that DDOE make changes to the rulemaking so that the program provides fee reduction consideration based on water quality improvements.

DDOE response: DDOE disagrees. The stormwater fee is based on the amount of impervious surface on a property. A property's impervious surface is directly correlated to the amount of stormwater runoff generated by the property. As a result, impervious surface provides an excellent surrogate measure of stormwater runoff generated. This stormwater runoff causes negative environmental impacts irrespective of the quality of the water in a property's runoff. In other words, the increased stormwater runoff volume can itself be considered a pollutant, causing physical damage to, and erosion and degradation of, receiving stream banks and channels. The proposed discount program focuses on stormwater retention for these reasons. A retention focus most closely mirrors the overall basis for the fee itself and is most consistent with the overall environmental objectives of the District's stormwater management program. These considerations are further supported by the US EPA's emphasis on stormwater retention in DC's latest MS4 Permit.

- f. The Commenter requests that DDOE consider giving discounts to properties that treat off-site impervious surface in private stormwater facilities, like runoff from the public right-of-way.

DDOE response: DDOE does not agree that this should be added to the proposed rule. Customers that manage stormwater from the public right-of-way are not being charged for this impervious surface and therefore cannot be credited for managing the stormwater from this type of property.

- g. The Commenter suggestions that DDOE revise the proposed rule to consider credit for non-structural practices, such as educational and on-site refuse management programs, and on-site stormwater system maintenance and cleaning programs, such as street sweeping and used motor oil recycling programs.

DDOE response: DDOE disagrees. The core of the rules is meeting the MS4 Permit's requirement to reduce the volume and flow of stormwater. Other rules and other programs might address other measures. Please see DDOE's response to Comment 8e.

## **9. Natural Resources Defense Council, Rebecca Hammer (September 6, 2011)**

- a. The Commenter expresses agreement with comments submitted by DC Appleaseed Center for Law and Justice.

DDOE response: There is no response needed here. See DDOE's response under Comment 5.

- b. The Commenter states that the proposed rules do not provide adequate clarity on BMPs that would be deemed "qualifying" and do not state general technical specifications for such practices.

DDOE response: DDOE does provide an explanation of eligibility requirements in section 558 of the second proposal. Further, DDOE will provide guidance materials that apply the principles of the rules to explain the specific BMPs that are eligible for the discount. DDOE does not agree that this more detailed information should be incorporated into the rules themselves.

- c. The Commenter suggested that the proposed rules be amended to allow for (1) third party certification of applications, or (2) guaranteed DDOE inspection of BMPs, or both. Also, the Commenter suggests that (3) DDOE add language to the rules that requires the BMP to be properly maintained and functioning.

DDOE response: DDOE disagrees with the Commenter that third party certification be allowed or to require DDOE to inspect each BMP applying for a discount. DDOE intended for the simplified application process for customers who have installed BMPs that manage less than 2,000 square feet of impervious surface to not be overly burdensome on either the applicant or the Department. DDOE expects that there will be a very large pool of applicants that fall into this category and anticipates that requiring inspection of each practice would delay the approval process for such applicants. However, DDOE agrees that language should be added to the rules that require a BMP to be fully installed and functioning in order to be eligible for a discount. DDOE revised subsection 558.9(a) to include that language.

- d. Commenter stated that the discount calculation is confusing and appears inconsistently described in the preamble and in the rule itself.

DDOE response: This comment appears to be based on an incorrect understanding of the discount calculation. DDOE calculates the discount in both the preamble and the relevant rule itself in the same manner. Partly in response to the comment, DDOE has revised the preamble language.

- e. Commenter urges DDOE to share its rationale for the 55% discount cap and to set the maximum discount as high as possible to encourage maximum incentive for customer participation.

DDOE response: DDOE has addressed this subject under Comment 2b.

## **10. Christopher Turner (September 12, 2011)**

- a. The Commenter notes that this rulemaking is overdue and past statutory deadline.

DDOE response: DDOE understands the comment. DDOE has been working to finalize this rulemaking process as soon as possible, given the agency's legislatively determined priorities and the realities of staffing levels and budgets. DDOE has addressed the deadline issue in great part by providing in the rules that the discount for an eligible BMP will be provided retroactively, from May 1, 2009, or the date of installation, whichever is later.

- b. The Commenter notes that the impervious billing system overestimates a property's actual amount of impervious surface. The Commenter further states that this is due to arbitrary policy determinations as to what "impervious" means. The Commenter asserts that gravel, classified as impervious, is actually a pervious surface.

DDOE response: DC Water's policy and technical determinations regarding assessment of a property's amount of impervious surface are beyond the scope of this rulemaking. However, as discussed in DDOE's response to Comment 1a, DDOE intends for the Discount Program to apply to areas assessed as "impervious" that actually provide some retention due to their permeable nature, such as gravel.

- c. The Commenter contends that DC Water does not act in the best interest of its customers and notes issues with lead and other contaminants in drinking water.

DDOE response: DDOE notes this comment; however, it is outside of the scope of this rulemaking and does not warrant any changes to this proposal.

## **11. U. S. National Park Service, Tammy Stidham (September 16, 2011)**

- a. The Commenter asks DDOE if there are any proposed plans for creating a discount program that will reduce the DC Water's Clean Rivers impervious area charge (IAC).

DDOE response: Based on close coordination with DC Water, DDOE believes that DC Water intends to address this matter. However, this falls under the purview of DC Water, which administers the Clean Rivers IAC. DDOE's intent is for the two programs to work together. The Stormwater Fee Discount Program is the purview of DDOE; a Clean Rivers IAC discount program would be a separate but closely-related DC Water initiative, requiring DC Water to establish rules and procedures. DDOE will accept, review, and verify discount applications, and DC Water will apply discounts to customer bills based on DDOE's approval and recommendation, for both the Stormwater Fee and the Clean Rivers IAC. DDOE is not aware of DC Water's timeline for implementation of such a program for the Clean Rivers IAC.

- b. Commenter asks if federal properties are considered residential or non-residential properties, in order to clarify if federal properties are eligible for the stormwater fee discount program.

DDOE response: With the presently proposed rules it does not matter. There is no difference between residential and other properties for the purposes of the Stormwater Fee Discount Program. Federal properties that pay the District's stormwater fee are eligible for the stormwater fee discount program. The District's stormwater fee structure considers federal properties to be "non-residential" properties subject to the stormwater fee. While the original proposal indicated a difference in application process and implementation between residential and non-residential properties, DDOE has revised the proposed rule to eliminate the difference. The second proposed rules now reference a "standard" application process and a "simplified" application process. Properties that employ stormwater BMPs that treat an aggregate of less than 2,000 square feet of impervious surface may apply using the simplified application process. A federal property could apply with a Simplified Application if the property qualified – 2,000 square feet or fewer of impervious surface.

- c. The Commenter asks what would prohibit someone from receiving a retroactive credit?

DDOE response: Retroactive discounts are available. DDOE now describes in the second proposed rules how the program will verify and administer retroactive discounts in subsections 558.5, 558.6, and 558.7l. Customers who have installed an eligible BMP(s) before the effective date of this rulemaking are eligible for a retroactive discount that will begin to accrue beginning May 1, 2009, or the BMP's installation date, whichever is later.

The question was what would "prohibit" receipt of a retroactive discount. In short, failure to meet one of the following requirements would prohibit: In order to receive a retroactive credit, a customer must: (1) provide documentation verifying the date of installation; (2) prove that the practice is installed and fully functional; (3) allow DDOE to inspect each BMP on the application; and (4) apply no later than one year from the date on which the customer has the right to apply for the stormwater fee discount program.

- d. The Commenter asks if the customer's discount will be recalculated as the stormwater fee increases over time, or if this will only happen every three years when the BMP is recertified.

DDOE response: The stormwater fee discount, once calculated, is stated as a percentage of the fee. Therefore, during the three-year period for the discount, if DDOE increased the fee, the dollar amount of the discount would increase to represent the same percentage.

- e. The Commenter suggests that DDOE revise the rulemaking to cross-reference eligibility requirements listed in subsection 558.8 (subsection 557.6 in the original proposal) in subsection 558.2 (subsection 557.2 in the original proposal).

DDOE response: DDOE believes this cross-reference is not necessary. Further, DC's Office of Documents and Administrative Issuances (ODAI) requests that, in order to minimize the likelihood of errors as rules change over time, rulemakings limit cross-references as much as possible.

- f. The Commenter asks if DDOE will limit the number of times a BMP gets recertified.

DDOE response: No. A BMP may be recertified for additional discount periods indefinitely, provided the customer continues to demonstrate that the BMP continues to function as intended.

- g. The Commenter asks if the stormwater fee discount is transferred when a property is sold?

DDOE response: No. DDOE received other comments about this and has amended the rules to clarify this.