



DISTRICT DEPARTMENT OF THE ENVIRONMENT

RESPONSE TO COMMENTS

NOTICE OF PROPOSED RULEMAKING
STORMWATER FEE DISCOUNT PROGRAM
OCTOBER 5, 2012
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PUBLIC REVIEW AND COMMENT PERIOD: OCTOBER 5, 2012 TO NOVEMBER 19, 2012

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COMMONLY USED ACRONYMS AND ABBREVIATIONS

AOBA	Apartment and Office Building Association of Metropolitan Washington
BMP	stormwater Best Management Practice
CWA	Clean Water Act
DC Council	Council of the District of Columbia
DCRA	Department of Consumer and Regulatory Affairs
DC Water	District of Columbia Water and Sewer Authority
DDOE	District Department of the Environment
EPA	U.S. Environmental Protection Agency
ERU	Equivalent Residential Unit
GIS	Geographic Information System
ISA	Impervious Surface Area
MS4	Municipal Separate Storm Sewer System
NPDES	National Pollutant Discharge Elimination System permit program
ODAI	Office of Documents and Issuances
SRC	Stormwater Retention Credit
SWFDP	Stormwater Fee Discount Program
SWMG	<i>draft</i> Stormwater Management Guidebook
SWPCAA	Storm Water Permit Compliance Amendment Act of 2000
SW Regs	Proposed Rulemaking on the Stormwater Management, Soil Erosion, and Sediment Control

INTRODUCTION

Background: The District Department of the Environment (Department or DDOE) initially proposed rules to establish a stormwater fee discount program in the *D.C. Register* at 58 DCR 6428 (July 29, 2011). The Department received detailed comments from eleven (11) stakeholder organizations and individuals. In response to comments, the Department changed the rules and proposed them for comment a second time in the *D.C. Register* at 59 DCR 11569 (Oct. 5, 2012). For the second proposed rules, the Department extended the comment period, upon request, until November 19, 2012 (59 DCR 12895 (Nov. 9, 2012)).

In response to the second proposed rulemaking, the Department received comments from seven (7) stakeholder organizations and individuals. The Department reviewed and carefully considered all of the submitted comments.

The Department has made no substantial changes to the second proposed rulemaking. However, based on the comments received, the Department has made seven (7) clarifying changes. In addition to the clarifying changes, the Department has made typographical edits to the rulemaking to conform to the style of the District of Columbia's publisher of the *D.C. Register*, the Office of Documents and Administrative Issuances (ODAI). This includes defining terms in each section and adding and removing commas. The Department has determined to adopt the rules, including the changes discussed in this Response to Comments document, as final without a further comment period.

Purpose of this Document: In this Response to Comments document, the Department first includes an explanation of each of the clarifying changes. Then, the Department summarizes each of the comment letters and provides the Department's response. Each comment letter is identified by a unique comment number (#1-7), 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, the Department references each proposal as follows:

- The July 29, 2011 proposal is referred to as the “original proposal” or “original rules;”
- The October 5, 2012 proposal is referred to as the “second proposal” or “second rules;”
and
- The final rules are referred to as “final rules.”

LIST OF COMMENTERS

1. Apartment and Office Building Association of Metropolitan Washington (November 19, 2012)
2. Mary Blakeslee (November 6, 2012)
3. Peter Carlson (October 24, 2012)
4. U.S. Department of Agriculture, National Arboretum, Cary Coppock (November 19, 2012)
5. National Park Service, Tammy Stidham (November 20, 2012)
6. Christopher B. Turner, Esq. (November 19, 2012)
7. Washington Metropolitan Area Transit Authority (WMATA), Elizabeth Weber (November 19, 2012)

CLARIFYING CHANGES IN THE FINAL RULES

Change 1 [Adds 558.7(a)] – This change eliminates an ambiguity. DDOE thought that the regulatory scheme presented was logically obvious – a person would seek approval for a discount, and then, if the compliant Best Management Practice (BMP) had been in place before these rules became effective, the person could also seek a discount for the period of time the BMP had been in place (retroactive discount). DDOE had placed the retroactivity section before the general compliance section because it seemed to make sense from a chronological perspective.

However, DDOE received a comment which reads the two provisions as potentially independent of each other – that a person might establish retroactive eligibility without showing that a BMP was, in general, the type of BMP eligible for a discount. This interpretation would read the rule as grandfathering otherwise ineligible installations. Such grandfathering is not uncommon in rulemaking.

But, such grandfathering was not DDOE’s intent. Rather, DDOE’s intent, and the careful reading of the rules, requires any BMP to first demonstrate eligibility for a discount. Only upon such a demonstration can retroactivity be assessed. The change simply clarifies this issue.

Therefore, DDOE has added a phrase to clarify that, in order to receive a *retroactive* discount, a customer must have been eligible for a discount pursuant to subsection 558.9. DDOE’s intent has always been that a person must show eligibility for a discount and, only thereafter, eligibility to secure the discount retroactively.

The change is indicated by underlining for additions:

- 558.7 To receive a Retroactive Discount, the customer must:
- (a) Be otherwise eligible to receive a discount;
 - (b) Provide documentation verifying the date of installation;
 - (c) Prove that the practice installed is still functional;
 - (d) Allow the Department to inspect each BMP identified on the application;
and
 - (e) Apply no later than one (1) year from the date on which the customer has the right to apply.

Change 2 [Edits to 558.9(c)] – This change eliminates a misunderstanding. A comment asked what evidence DDOE will require of property owners to demonstrate construction code approval. It seemed, said a comment, that DDOE was setting itself up as building code enforcer

in addition to the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).

This was not DDOE's intent. Rather, DDOE simply wanted to communicate that construction work required for a BMP should comply with the construction code. There are many ways for the agency administratively to determine this. One option, presently under consideration, is simply to ask the applicant to verify compliance with the construction code by signing a form.

DDOE's intent has always been to streamline the process; not to add layers of certifications.

Therefore, DDOE has reworded subparagraph "(c)" to require a BMP to meet construction codes. This clarifies that DDOE is not *requiring* a person to apply for construction permits and submit them to DDOE. A person can obtain a construction permit at DCRA's Permit Center. The reason for the change is to avoid confusion in the discount process that would come from repeated and potentially unnecessary DCRA applications.

Change 3 [Edits to 558.9(f)(2)] – This change clarifies the word "guidelines." A commenter asked DDOE what set of guidelines it had in mind as the reference for BMP construction. Because there is only one such set of Department guidelines specifically for stormwater management, DDOE has clarified the term by substituting the name of the guidelines that it originally intended to reference, the Department's Stormwater Management Guidebook (Guidebook). The Guidebook can be found at DDOE's website, <http://ddoe.dc.gov> by typing the term "Stormwater Guidebook" into the search box. DDOE's proposed update of the Guidebook, addressed in another rulemaking, is found at <http://ddoe.dc.gov/draftstormwaterguidebook>.

Changes 2 and 3 are shown by strikethrough for deletions and underlining for additions:

558.9 A BMP shall, in order to be eligible for the discount:

- (a) Be fully installed and functioning;
- (b) Retain or infiltrate stormwater runoff;
- (c) ~~Have received required construction codes approval~~ Comply with all applicable construction codes;
- (d) Be properly sized and located;
- (e) Be designed and functioning in accordance with:
 - (1) Applicable industry and professional standards and specifications in effect at the time of installation; and
 - (2) ~~Department guidelines~~ The Department's Stormwater Management Guidebook; and

- (f) Be subject to inspection by the Department.

Change 4 [Edits to 558.11(c)] – This change corrects confusing language. A commenter proposed that DDOE strike the line “The property is sold or transferred to a new owner” and asked what was meant by “transferred.” On reflection, DDOE has determined that the sentence is confusing, because a sale is but one means to transfer property. DDOE’s intent was to address transfers in general and, because the bulk of them are sales, refer to sales specifically.

Therefore, DDOE has inserted the word “otherwise” as a clarification of the sentence’s original wording. Now the phrase recognizes that a sale is but one method of a transfer to a new owner.

Change 5 [Edits to 558.11(c)] – This change affirms DDOE’s intent for a streamlined new property owner application process. The same commenter that initiated Change 4 also suggested that DDOE change the subsection so that new owners could automatically continue to use the earlier owner’s discount. The commenter offered that DDOE’s inspection rights allowed it to ensure that a new owner would understand and maintain a BMP in such a way as to continue to qualify for the discount.

While, per Change 4, DDOE is clarifying the transfer/sale wording, DDOE has declined to remove the proposed rules’ new application requirement for the new owner. DDOE’s intent was to put the burden on the new owner to promise compliance and show the compliance; not to put the burden on DDOE inspectors to learn of the transfer, find the new owner or management staff, and inspect. On the other hand, DDOE did not intend the new application to be cumbersome.

DDOE intended to make relatively simple the process for securing a new owner’s discount. The change, which embodies that intent, explains that the new owner may incorporate by reference documents already in DDOE’s files and direct the Department to use the technical information from the earlier approved application in support of the new discount.

Changes 4 and 5 are indicated by underlining for the additions:

558.11 An approved discount shall expire on the first of:

- (a) The end of the stormwater fee discount period provided in this chapter;
- (b) The property or BMP is no longer eligible for the discount; or
- (c) The property is sold or otherwise transferred to a new owner, except that the new owner may direct the Department to use the technical information from the earlier approved application in support of the new discount.

Change 6 [Deleted 559.7] – This change eliminates surplus wording. In its proofreading, DDOE found that subsection 559.7 required the same thing as had an earlier subsection, 559.6 – that the simplified application calculation be consistent with the more rigorous standard application calculation of subsection 559.2. But, this is clear from reading the steps to be taken for

subsection 559.6, which details the simplified calculation. The subsection 559.6 wording makes section 559.7 redundant. Therefore, DDOE has deleted as redundant subsection 559.7.

Change 7 [Edits to 560.2] – This change clarifies a vague term and formats it properly. A commenter proposed that DDOE remove from subsection 560.2 the terms “customer”, “tenant”, and “manager” from the list of people who can provide an inspector access to the property. This change, if adopted, could present substantial uncertainty, confusion, and unnecessary friction when inspecting BMPs. DDOE is not accepting the commenter’s proposal, but it is clarifying what was intended in the proposed rules – that persons onsite who have authority in fact to allow entry, or whose position provides a reasonable appearance of that authority, could allow entry.

Therefore, DDOE has clarified the list of persons who can permit an inspector to enter the site by rewriting a phrase and structuring it into the outline format that ODAI urges as more readable. The reason for the change is that (1) the structure of the relevant phrase, in a single, non-outlined sentence, was confusing, and (2) the term “appropriate person” was vague and confusing, inadequately communicating the intended concept of an owner or owner’s agent who could give permission to enter.

The change is shown by strikethrough for deletions and underlining for additions:

- 560.2 In order to secure access to a property to inspect a BMP, the Department shall seek permission from ~~an appropriate person, including the owner, a customer, a tenant, or a manager~~ the owner, or the owner’s agent, including:
- (a) The customer identified in the District of Columbia Water and Sewer Authority’s records;
 - (b) A tenant; or
 - (c) The property manager.

RESPONSE TO COMMENTS

1. Apartment and Office Building Association of Metropolitan Washington (November 19, 2012)

- a. The commenter proposes that the Department strike subsection 558.7(d), which puts a time limit of one year to apply for retroactive discounts, questioning the Department's statutory authority to restrict the application period.

Department Response: The Department is not deleting subsection 558.7(d), as the commenter proposed. The Department determined that a limitation of this sort is appropriate and within its authority, given the administrative burden of processing, verifying, and administering Retroactive Discounts. If there were no time limit, the Department could conceivably be accepting applications for Retroactive Discounts as long as the program exists. As time goes by, it would become increasingly burdensome to track and apply the Retroactive Discount for a DC Water customer requesting a Retroactive Discount. For example, if a limit to apply were not in place, a DC Water customer could submit an application for a Retroactive Discount in January 2020 for BMPs that were installed in January 2009 (11 years prior). Say, the customer normally pays \$53.40 (20 ERUs) and is awarded a \$21.63 regular monthly discount (8.1 ERUs). The Department determines that the same discount should also be applied retroactively. Therefore, the customer is owed a total Retroactive Discount of \$2,855.16 (132 months x \$21.63). Retroactive Discounts are applied to the balance of the stormwater fee after the regular monthly discount is applied over time until the Retroactive Discount balance is zero. In order for the Department to pay back the customer, the Department would have to apply a Retroactive Discount to the customer's stormwater fee for 90 months (during this time, the stormwater fee will be \$0). At the end of the 90 months (7.5 years), the Department will apply just the regular monthly discount to the customer's stormwater fee (\$21.63). A Retroactive Discount of this sort would be difficult to track and administrative apply for the following reasons: 1) DDOE's discounts are awarded for a period of three year. DDOE requires submittal of renewal applications every three years in order to prove that the BMPs are functioning as designed. This application of an 11 year Retroactive Discount assumes that the BMP was fully functioning for all 11 years; however, the Department was not given the opportunity to inspect the BMP regularly during that period of time. 2) It would also be difficult to take into account rate changes that occurred during that time and accurately calculate a Retroactive Discount, considering the way in which the discount is calculated.

Further, the Department has the implicit power to manage its affairs in order to achieve the goals which the Council of the District of Columbia (DC Council) has set for it in an efficient, effective, and reasonable manner, including putting time limits on applying for

the discount. In this case, a one year limitation to apply for retroactive discounts is also consistent with implementation by other jurisdictions, including Portland, Oregon.

- b. In response to subsection 558.9(c), which states that “A BMP shall, in order to be eligible for a discount: ...*(c) Have received required construction codes approval;*” the commenter recommends that the Department incorporate the language from the original proposal. The original proposal’s language read: “Comply with all applicable building and plumbing codes.” The commenter asks "what evidence will be required to demonstrate that an owner "received [the] required construction codes approval?"

Department Response: See explanation of changes made to this subsection under Change 2 above.

- c. The commenter proposes that the Department remove subsection 558.11(c), which states "The property is sold or transferred to a new owner" and asks the Department what it means by “transferred.” AOBA contends that the credit should remain with the property as long as the property owner demonstrates compliance with subsection 558.10 (i.e. continued eligibility requirements). Further, AOBA states that terminating the credit based on a sale or transfer is not appropriate and would put an unnecessary burden on the new owner to reapply and on the Department since it would have to review additional applications. The commenter further states that if DDOE is concerned with continued eligibility, then it can exercise its inspection rights under Subsection 560 and require evidence of continued eligibility from the new owner.

Department Response: See explanation of changes made to this subsection under Change 4 and Change 5 above.

- d. The commenter proposes removing "appropriate person, including a customer, a tenant, or a manager" from this list of people who can provide a Department inspector with access to the property. The commenter proposes using the language "the owner or their authorized representative."

Department Response: See explanation of changes made to this subsection under Change 7 above.

2. Mary Blakeslee (November 6, 2012)

- a. The commenter states that the discount of 55% is not enough to incentivize property owners to invest in BMPs.

Department Response: This comment is noted; however, DDOE feels that a 55% discount is a reasonable discount based on an analysis that relied upon technical

calculations developed by the Center for Watershed Protection. For further discussion on the Department's rationale for a 55% maximum allowable discount, see DDOE's response to Comment 2a in the Response to Comments for the original proposal, found here:

http://ddoe.dc.gov/sites/default/files/dc/sites/ddoe/page_content/attachments/0%20Response%20to%20Comments%20Summary.pdf.

- b. The commenter states that if the District of Columbia Water and Sewer Authority (DC Water) were to adopt the program described in this proposal, then there would be a financial incentive for BMP investment.

Department Response: DDOE agrees and understands that DC Water intends to develop a discount program similar to and intended to complement that of DDOE; however, the development of such a program is outside the authority of this rulemaking and DDOE. DDOE is working closely with DC Water staff in the development of DDOE's SWFDP.

- c. The commenter asks DDOE to define the terms "eligible BMP" and "approved BMP".

Department Response: Subsection 558.9 defines the requirements of an "eligible BMP," and DDOE feels this is an appropriate definition for the term. The term "approved BMP" was originally used in the preamble of the second proposal and was meant as an interchangeable word for "eligible BMP." There are no references to an "approved BMP" in the final rulemaking.

- d. The commenter asks DDOE to identify the "Department guidelines" referenced in Subsection 558.9(e)(2).

Department Response: See explanation of changes made to this subsection under Change 3 above.

- e. The commenter asks the Department to describe if and how the installation of a BMP under the SWFDP could qualify for Stormwater Retention Credits (SRC) under the proposed Stormwater Management, Soil Erosion, and Sediment Control rulemaking (SW Regs).

Department Response: The SWFDP and the SRC trading program are independent programs within DDOE and have separate eligibility requirements. While there are several overlapping eligibility requirements shared by the two programs, the biggest difference is that BMPs installed at both regulated and unregulated sites are eligible for discounts under the Stormwater Fee Discount Program; whereas, in order for the

Department to certify a SRC, the BMP must achieve retention volume in excess of regulatory requirements or existing retention, but less than the SRC ceiling (i.e. retention volume from the 1.7” storm). For more information on SRC certification eligibility requirements, see Chapter 7 of the draft SWMG, found at <http://ddoe.dc.gov/draftstormwaterguidebook>. BMP eligibility requirements for the SWFDP are found in section 558 of the second proposal.

In short, all BMPs that deemed certifiable by the Department for SRC generation would be eligible for a stormwater fee discount; however, not all BMPs eligible for a stormwater fee discount would meet the SRC eligibility requirements.

- f. The commenter asks how the SWMG will be used under the SWFDP.

Department Response: DDOE has clarified this by changing language in subsection 558.9(e)(2). See further explanation of this under Change 3 above.

- g. The commenter asks DDOE to make sure to synch definition language in both the proposed SW Regs and the final adopted rule on the SWFDP.

Department Response: DDOE has ensured that the definitions in subsection 599 in both rulemakings have corresponding language.

3. Peter Carlson (October 24, 2012)

- a. The commenter says that his property contributes zero runoff and states that the Geographic Information System (GIS) analysis does not account for landscaping actions taken by property owner to mitigate runoff.

Department Response: It is very unlikely that a property in the District, even one that has employed several BMPs, does not produce any runoff. What the commenter suggests may be the case during small rain events, but during the larger events, like the one District residents experienced when “Superstorm” Sandy hit the East Coast in October 2012, runoff is expected from each and every property in the District.

With respect to the comment that DC Water’s GIS analysis does not accurately represent the commenter’s attempts to mitigate stormwater runoff, this is outside the scope of this rulemaking. The commenter is encouraged to contact DC Water to appeal his property’s Equivalent Residential Unit (ERU) assessment. In the case of an appeal, DC Water utilizes the most recent orthoimagery combined with a site visit.

Finally, it is the stated purpose of the SWFDP to provide DC Water customers with a discount for BMPs employed to mitigate stormwater runoff. If impervious surface is not

removed, but treated instead, the commenter is encouraged to apply for a stormwater fee discount once the program is available.

- b. The commenter requests an exemption for wheelchair ramps and their access points.

Department Response: This rulemaking is not the appropriate venue to request an exemption to the stormwater fee, established under Storm Water Permit Compliance Amendment Act of 2000 (SWPCAA), effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512). DDOE does not have authority under this rulemaking to provide exemptions to the fee. Exemptions would require an act of DC Council to amend DDOE's authority to enable the agency to provide exemptions.

For reference, the SWPCAA authorizes DDOE to charge the stormwater fee. The Comprehensive Stormwater Management Enhancement Act of 2008, effective March 25, 2009 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 et seq. (2010 Supp.)) modified the way in which the District calculated the stormwater fee from a flat fee charged to single family residences, and a fee calculated as a percentage of water consumption for multi-family residences and commercial properties to a fee based on square footage of impervious area.

- c. The commenter asks why DDOE included sections 562 and 563 when nowhere in the response to previous comments was the issue of legal challenges raised. The commenter asks, "why should anyone, at any time, for any reason, be denied due process?" The commenter further contends that DDOE is taking the approach that "we're going to be sued anyway." The commenter suggests language that puts an emphasis on "inspection-upon-demand" option that would enable a property owner to demonstrate the unique characteristics of his/her property.

Department Response: Topics covered under the second proposal's Sections 562 and 563 are revised and expanded upon Sections 561 and 562 in the original proposal. The commenter's statement that no commenter, during the first round of review, commented on the appeals process is inaccurate. There were several comments that touched on elements of these sections, which spawned discussion and eventual changes to the sections that describe the District's responsibility to the DC Water customer when it denies, revokes, or changes a discount and the customer's rights to and process for appealing a Department decision. The Department has a statutory requirement to lay out the appeals process in this rulemaking (*See* Comprehensive Stormwater Management Enhancement Amendment Act of 2008, Sec. 153(f)) and has attempted to provide as much detail and transparency regarding this appeals process as possible in both the second proposal and final rules.

- d. The commenter states that his neighbor's downspouts empty into his yard and asks if property owners can get a credit for managing stormwater from another site.

Department Response: Since the stormwater fee is assessed based on the impervious area on an individual property, the stormwater fee discount is calculated based on stormwater retention volume on that property, not on stormwater managed from any neighboring properties. Off-site retention and retention of stormwater running from neighboring sites are not eligible for a discount.

- e. The commenter states that his property falls under the Standard Application and not the Simplified Application process, despite being a residential property in the 3.8 ERUs tier or 3,100 to 7,000 square feet of impervious surface.

Department Response: The Simplified Application process is not a process reserved for all single family residences; rather, it is linked to the amount of impervious surface being managed by BMPs. The threshold is stated in subsection 559.5 (“A customer shall have the right to apply with a Simplified Application for a property with a BMP, or multiple BMPs, that manages a cumulative impervious area of two thousand square feet (2,000 square feet) or less”). The threshold is not based on total amount of impervious surface, so it is conceivable that this commenter may be able to utilize the Department’s Simplified Application.

DDOE determined this threshold through an assessment that determined that an 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 that have undertaken small retention practices.

- f. The commenter makes a suggestion that the Department include a provision in the rulemaking that requires DDOE to list annually: 1) the number of properties given an ERU assessment, 2) the total revenue generated from the program [by program, DDOE assumes the commenter means, the amount of revenue collected under the stormwater fee], 3) the number of discount requests granted, and 4) the of discount requests denied. The commenter further asserts that oversight of this nature will make the program more transparent and will let the public know if the program is worth keeping.

Department Response: DDOE understands this commenter’s concern for transparency as it relates to the stormwater fee and the SWFDP; however, including a provision in this rulemaking is not necessary since the Department is already required to report on such

data in the Municipal Separate Storm Sewer System (MS4) Annual Report. In past reports, the Department has reported on the total amount of revenue collected from the stormwater fee. DDOE intends to include other information, such as the data requested by the commenter, in future MS4 Annual Reports under the section “Stormwater Program Implementation.”

- g. The commenter asks what DDOE's intentions are for rate increases in the next ten (10) years.

Department Response: DDOE is beginning to evaluate the need to raise rates to meet the regulatory obligations and requirements of the federally issued MS4 Stormwater Permit over the coming years. However, DDOE does not anticipate that the fees on ratepayers' water bills would increase before FY 2015.

- h. The commenter recommends that DDOE to continue to “pressure DC Water to adopt a similar discount on their fee.”

Department Response: DDOE understands that DC Water intends to adopt a discount program of similar nature; however, it is outside DDOE's authority to address such a program for DC Water in this rulemaking process. DDOE is working directly with DC Water staff in the development of the SWFDP to ensure close coordination once DC Water's discount program is available.

- i. The commenter would like a list of other programs, documents, meetings, and people consulted that have similar programs.

Department Response: DDOE staff consulted a number of programs from around the country in order to understand how different programs are implemented and identify discount amounts offered by different jurisdictions. Below is a list of municipalities researched by Department staff. If a person or document was consulted, the name of the person or document is indicated by a bulleted description.

Burlington, VT

- *Stormwater Credit Manual*, City of Burlington, Vermont, Department of Public Works, Approved May 13, 2009
- *Chapter 26, Wastewater, Stormwater and Pollution Control* regulations, Adopted December 15, 2008, Effective April 1, 2009

Chesapeake, VA

- *Departmental Directive -- Stormwater Utility Credit Criteria*, Director of Public Works, Effective Date January 1, 2007

Chicago, IL

- *Stormwater Management Ordinance Manual*, City of Chicago, January 2010

Germantown, TN

- *Article VIII. Stormwater User Fee*

Greensboro, NC

- *Stormwater Credit Policy*, City of Greensboro, Water Resources Department, January 1996, Revised December 2005

Henry County, GA

- *Service Fee Credit Manual*, Stormwater Management Utility, Henry County, Georgia, Revised on December 10, 2007
- *A Resolution Accepting the Stormwater Management Service Fee Credit Manual for Henry County, Georgia, Resolution No. 06-366*
- *Executive Summary – Service Fee Credit Manual*, December 2006

High Point, NC

- *Stormwater Fee Credit Manual*, City of High Point, Public Services Department, Stormwater Services Division

Kansas City, MO

- *Application for Detention Basin Credit*, KCMO Water Services Department, Stormwater Utility Division
- *Ration Credit Application Form*
- *Stormwater Ordinance No. 100200*

King County, WA

- *Surface Water Management (SWM) Fee Protocols*, January 2004, Amended April 2006 and July 2008

Minneapolis, Minnesota

- Interview with Carl Westermeyer, with Minneapolis Department of Public Works, Division of Surface Water and Sewers
- *Stormwater Quality Credit Application*, Minneapolis Department of Public Works
- *Stormwater Utility Ordinance, Chapter 510*
- *Stormwater Quality Credit*, Minneapolis Stormwater Utility
- *Resolution setting Stormwater Rate*, effective January 1, 2009

Nashville, Tennessee

- *Stormwater User Fee Credit Manual*, Metro Water Services, June 1, 2009

Philadelphia, Pennsylvania

- *Storm Water Management Service Charge, Credits and Adjustments Appeals Manual*, City of Philadelphia, Water Department
- *Philadelphia Water Department Regulations*

Portland, Oregon

- Correspondences with Amber Clayton, Stormwater Retrofit Program Manager, City of Portland Environmental Services
- *Clean River Rewards, Single Family Residential Ratepayers Registration Form*
- *Clean River Rewards, Stormwater Discount Program, Interim Administrative Rules*, City of Portland, Environmental Services, October 30, 2006

Rockville, Maryland

- Stormwater Management Utility Fee – Fee Credit Application

State of Colorado

- *Colorado's Stormwater Program Fact Sheet*, Water Quality Control Division, Stormwater Program, 2/08

U.S. Environmental Protection Agency

- Interview with EPA staff, Abby Hall, 2008

- j. The commenter asks why the Department will not provide a 100% discount to a property owner who is producing no runoff.

Department Response: As discussed in the response to Comment 3a, it is very unlikely that a property in the District, even one that has employed several BMPs, does not produce any runoff. What the commenter suggests may be the case during small rain events, but during the larger events, like the one the District experienced during “Superstorm” Sandy in October 2012, runoff is expected from each and every property in the District.

The 55% maximum discount award is based on the Department’s analysis and the fact that properties with BMPs eligible for stormwater fee discounts will still likely fail to retain some of the runoff resulting from infrequent, but very large, storm events. The remaining fee imposed on such properties, after application of the discount, will support the property’s share of the District’s (1) capital costs for stormwater management, mitigation, and retrofits, as required by the District’s MS4 Permit; and (2) fixed costs for administration and oversight of the MS4 Permit. For further discussion on the Department’s rationale for a 55% maximum allowable discount, see DDOE’s response to Comment 2a in the Response to Comments for the original proposal, found here: http://ddoe.dc.gov/sites/default/files/dc/sites/ddoe/page_content/attachments/0%20Response%20to%20Comments%20Summary.pdf.

4. U.S. Department of Agriculture (USDA), National Arboretum, Cary Coppock (November 19, 2012)

- a. The commenter contends that, in some instances, there is no public stormwater infrastructure that accepts runoff from the National Arboretum. The U.S. Department of Agriculture's (USDA's) concerns are 1) the National Arboretum should not pay fees on infrastructure it does not use, and 2) it is concerned that the DC Water program will be similarly structured. The commenter suggests that DDOE demonstrate the existence and ownership of infrastructure for which customers pay fees so that customers do not have to pay for infrastructure they do not use.

Department Response: This rulemaking establishes a SWFDP for the stormwater fee established under the Storm Water Permit Compliance Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512). The Comprehensive Stormwater Management Enhancement Act of 2008, effective March 25, 2009 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 et seq. (2010 Supp.)) enables the District to assess a fee based on square footage of impervious area. Therefore, it is beyond the scope of this rulemaking to challenge the stormwater fee itself.

For informational purposes, the Department offers this analysis of the laws that enable the District to charge the stormwater fee to all property owners with impervious surface.

The CWA generally prohibits the “discharge of any pollutant” from a “point source” into the navigable waters of the United States. *See* Clean Water Act, section 301 (33 U.S.C § 1311(a)) and section 502 (33 U.S.C. § 1362(12)(A)). The CWA allowed an entity to obtain a permit that allows for the discharge of some pollutants under certain conditions set forth in the permit. *See* Clean Water Act, section 402 (33 U.S.C. § 1342(a)(1)).

In 1987, Congress amended the CWA to add section 402(p) (33 U.S.C. 1342(p), which bars both municipal and industrial storm water discharges without a permit. This amendment did two things – 1) it reflected Congress’ finding that urban stormwater runoff is the leading source of pollution to the nation’s water bodies, and 2) it reflected Congress’ decision on how it would regulate a pollutant generated at potentially every residential, commercial, industrial, and government-owned property in an urban environment. Historically, urban stormwater runoff from these diffuse areas was considered a “non-point” source that was too difficult and costly to regulate. This amendment put the burden on municipal stormwater discharges by imposing permit requirements on the municipal owner of stormwater conveyance systems. The purpose of this shift was out of administrative convenience; it was not the intent of Congress to shift liability for dirty stormwater to municipalities. Therefore, Congress gave the municipality the regulatory burden of reducing the amount of pollution from everyone’s stormwater,

and its collection of a fee from individuals to finance implementation of a program to meet this requirement simply constitutes a “polluter pays” scheme.

Consequently, the DC Council enacted legislation – the Storm Water Permit Compliance Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512) – that authorized DC Water to collect a stormwater fee that the District could use to finance the costs of complying with the District’s MS4 permit. The initial MS4 fee consisted of a flat fee charged to single family residences, and a fee calculated as a percentage of water consumption for multi-family residences and commercial properties. However, in 2008, the DC Council passed the Comprehensive Stormwater Management Enhancement Amendment Act of 2008, effective March 25, 2009 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 *et seq.* (2010 Supp.)), which established a fee system based on an impervious surface area (ISA) assessment of property.

As stated in the preamble to the 2008 act, the DC Council’s intent in switching to an ISA-based charge was to more accurately and equitably impose the costs of managing stormwater runoff on only those property owners who generate it. In this system, a higher fee is imposed on owners whose properties have higher amounts of impervious surface area, *i.e.*, those who generate more stormwater runoff, which costs the District more to manage. For example, National Park Service is not charged a fee for discharges from the portions of the Anacostia Park that are undeveloped park land as those portions do not result in contaminated stormwater runoff.

The District’s MS4 Permit has a broad reach – that is, it compels the District to manage water pollutants in locations not tied to particular pipes or even to particular properties. This breadth is consistent with language in the CWA, which allows EPA to issue permits on a “system- or jurisdictional wide basis,” and does not limit a permit’s scope to the geographical area “served,” or a specific set of pipes. *See* Clean Water Act, section 402(p)(3)(B)(i) (33 U.S.C. §1342) and 40 C.F.R. § 122.26(a)(v). *See also* 55 Fed. Reg. at 48038 (explaining that the failure to define “system” was intentional, so that EPA could have flexibility in defining word the “system,” as well as the number of people “served” by a system on a case-by-case basis). EPA did not propose to define the scope of a MS4 in engineering terms, that is, by the physical interconnection of storm sewer pipes, because of the practical problems determining the boundaries of and the populations served by “systems” defined in such a manner.

- b. The commenter contends that, in a hypothetical situation, after deed transfers, federal facilities will surround BMPs from non-renewed SRC covenants. However, federal BMP discounts will be dependent on BMPs remaining in good working order. And federal agencies will have to absorb the cost of maintenance to pass periodic DDOE inspection.

The commenter requests certainty that federal properties will not be responsible for maintaining the source of discounts for properties that do not renew their SRC covenants.

Department Response: SRC generation and use is independent of the SWFDP. While the SRC trading program that DDOE is currently developing is meant to meet regulatory compliance, both regulated and unregulated sites can take advantage of the SWFDP. Further, if SRCs are generated during a stormwater retrofit, only the on-site retention is eligible for a stormwater fee discount. Off-site use of SRCs will not receive a discount. For further explanation of how SRCs work, please see the proposed rulemaking on Stormwater Management and Erosion and Sediment Control, found here: <http://ddoe.dc.gov/proposedstormwaterrule>.

- c. The commenter asks for assurance that federal properties are specifically named as participants along with commercial and residential properties.

Department Response: In January 2011, President Obama signed into law an act to amend the Federal Water Pollution Control Act to clarify federal responsibility for stormwater pollution. *See* Pub. L. No. 111-378, 124 Stat. 4128 (2011). This act is also known as the Cardin Amendment on Federal payment of stormwater fees. Since Federal properties are required to pay the stormwater fee, these properties are eligible for the discount, per subsection 558.1 in the second proposal. Also see response to comment 4a above for further discussion on this topic.

- d. The commenter asks if eligibility requirements in 558.7 apply to 558.8.

Department Response: See explanation of changes made to this subsection under Change 1 above.

5. National Park Service, Tammy Stidham (November 20, 2012)

- a. The commenter makes a suggestion that DDOE incorporate a discount for large tracts of natural areas, which are the recipient of large amounts of runoff from streets and neighborhoods.

Department Response: DDOE bases the stormwater fee on that amount of impervious area found on a property. Therefore, the discount reflects stormwater managed on site. DDOE cannot assess a discount for stormwater managed from neighboring impervious areas because the property's stormwater fee does not reflect any neighboring impervious surface.

- b. The commenter feels that the second proposal is not clear as to how federal properties may participate in the SWFDP.

Department Response: Please see response to Comment 4a and 4c.

- c. The commenter makes the statement that the second proposal “does not address the stormwater fee that rate payers pay to DC Water for the Clean Rivers Project.”

Department Response: As the commenter suggested, there are two separate programs related to treating impervious surface. The stormwater fee is collected on DDOE’s behalf by DC Water to provide funding for MS4 compliance activities. DDOE’s stormwater fee was originally established under Storm Water Permit Compliance Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512). The Comprehensive Stormwater Management Enhancement Act of 2008, effective March 25, 2009 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 et seq. (2010 Supp.)) modified the way in which the District calculated the stormwater fee from a flat fee charged to single family residences, and a fee calculated as a percentage of water consumption for multi-family residences and commercial properties to a fee based on square footage of impervious area.

DC Water collects the Clean Rivers Impervious Area Charge (IAC) for their Clean Rivers Project (See: <http://www.dcwater.com/workzones/projects/cleanrivers.cfm>). The Water and Sewer Authority Equitable Ratemaking Act of 2008 authorizes DC Water to collect the fee based on impervious surface.

DDOE is collaborating with DC Water in the establishment of the SWFDP and understands that DC Water intends to develop a discount program geared towards the Clean Rivers IAC. However, DDOE does not have the authority to develop a discount program for DC Water’s Clean Rivers IAC. DDOE encourages the commenter to contact DC Water with any questions about a discount program that would affect the Clean Rivers IAC.

6. Christopher B. Turner, Esq. (November 19, 2012)

- a. The commenter asks, "Is it legal to collect money month after month, year after year that is not due?" and "Will DDOE and DC Water pay interest on money that does not belong to DDOE and DC Water?"

Department Response: It is legal for DC Water to collect a stormwater fee on the District’s behalf. The stormwater fee was originally established under Storm Water Permit Compliance Amendment Act of 2000 (“SWPCAA”), effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512). The Comprehensive Stormwater Management Enhancement Act of 2008, effective March 25, 2009 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 et seq. (2010 Supp.)) modified the way in which the District calculated the stormwater fee from a flat fee charged to single family residences, and a fee

calculated as a percentage of water consumption for multi-family residences and commercial properties to a fee based on square footage of impervious area. For a more detailed discussion on the legality of the stormwater fee, see the Department's response to Comment 4a.

- b. The commenter asks, "Is it legal for DDOE to allow an authority (DC Water) to set and implement policy?"

Department Response: In 2000, the DC Council enacted legislation – the Storm Water Permit Compliance Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-813; 48 DCR 3512) – that authorized DC Water to collect a stormwater fee. The law allows the District to use revenue from the stormwater fee to finance the costs of complying with the District's MS4 permit. The Comprehensive Stormwater Management Amendment Act of 2008, in shifting the basis of the fee to impervious surface, also authorizes DC Water to collect the stormwater fee on DDOE's behalf.

- c. The commenter contends that DC Water's definition of impervious is "extremely biased" and benefits DC Water and DDOE. The commenter presents this example – not all water that falls on roofs end up in the sewer, so how can DC Water determine that all roofs are impervious?

Department Response: The Department believes that DC Water's definition of impervious – *an area that impedes the percolation of water into the subsoil and impedes plant growth. Impervious surfaces include but are not limited to the following: roofprints, footprints of patios, driveways, private streets, other paved areas, tennis courts, and swimming pools, and any path or walkway that is covered by impervious material. All surfaces shall be classified as either pervious or impervious* – is a fair definition of impervious and is consistent with other jurisdictions.

In the commenter's example, roofs are, by nature, impervious, and unless a roof has a constructed green roof, water that hits the roof will run off the roof, thereby creating stormwater runoff. It is the stated purpose of the SWFDP to give a discount to properties that manage runoff through BMPs. If a property is found to have removed the impervious surface all together (*i.e.* reverting it back to its predevelopment retention), the property owner can appeal their impervious area assessment through the DC Water appeals process.

See the Department's discussion of the stormwater fee and the District's responsibility to meet the requirements of MS4 permit under Comment 4a.

- d. The commenter contends that tiered system creates inequalities for property owners in the lower part of the tier.

Department Response: The six-tiered rate structure is designed to be both equitable and administratively streamlined. When DDOE first began assessing the stormwater fee based on impervious surface, all single-family residences were assessed one (1) ERU, regardless of their size. Under this structure, very large properties, which presumably have longer driveways, larger roofs, and generally more impervious surface, paid the same rate as very small properties. DDOE, understanding that this fee structure was not a fair way to impose a fee on residential property owners, revised the regulations for the stormwater fee structure, effective October 29, 2010 (57 DCR 10204, 10205).

The new rate structure established a tiered system, grouping properties with similar amounts of impervious surface in the same tier. It was intended to make the fee structure more equitable by linking the amount homes are billed for the stormwater fee to the amount of impervious surface on their property. Under the new structure, a residential property owner with 6,000 square feet of impervious surface would pay a significantly higher rate than one with 1,000 square feet of impervious surface. At the same time, properties that have less than 600 square feet of impervious surface pay a fraction of an ERU (*i.e.* .6 ERUs).

In addition to being more equitable, the tiered system brought more administrative efficiency to the program, since residential properties make up a large number of properties in the District. Assessing the fee based on the actual amount of impervious surface, as done for non-residential properties, would be a heavy administrative burden and a costly way of implementing the stormwater fee.

7. Washington Metropolitan Area Transit Authority (WMATA), Elizabeth Weber (November 19, 2012)

- a. The commenter argues that "ballasted rock" is by nature and design porous and permeable. The commenter suggests that the Department include language stating, "the use of ballasted rock does not create conditions characteristic of 'impervious surface' as defined in governing authority (DC Law 17-371)." In addition, the commenter states, "if this acreage is deemed to be subject to DC Stormwater Fee assessment, the Metrorail system would incur thousands of dollars in additional annual operating cost."

Department Response: This rulemaking is not the appropriate venue to request a stormwater fee exemption for a specific use. Further, this rulemaking will not cause the automatic assessment or reassessment of a property's impervious area coverage.