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January 16, 2017

Elizabeth Ottinger
NPDES Permits Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

**RE: PROPOSED DISTRICT OF COLUMBIA NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM (NPDES) MUNICIPAL SEPARATE STORM
SEWER SYSTEM (MS4) PERMIT #: NPDES DC0000221**

Dear Ms. Ottinger,

The National Association of Home Builders ("NAHB") appreciates the opportunity to comment on the District of Columbia's proposed National Pollutant Discharge Elimination System ("NPDES") Municipal Separate Storm Sewer System ("MS4") Permit (Permit #: NPDES DC0000221).

NAHB is a federation representing more than 700 state and local home builder associations across the United States. Our membership includes over 140,000 firms engaged in land development, single and multifamily residential construction, remodeling, building material trades, building products manufacturing, and commercial and light industrial construction projects. NAHB members will construct four out of every five new homes built in the U.S. this year.

Because the very nature of home building includes earth moving activities, NAHB's members must comply with federal, state and local stormwater regulations. EPA's proposed permit will directly affect regulations for which NAHB members building in the District are the ultimate "end users". Specifically, NAHB members are directly affected by two MS4 permit conditions; EPA's minimum control measures for active construction (minimum measure #4) and post-construction stormwater control (minimum measure #5). We also acknowledge that the District's MS4 permit serves as a national model.

General Comments on this Proposal

NAHB is concerned that EPA's proposal will add numerous new enforceable stormwater milestones and management benchmarks to the District's MS4 permit, many of which will directly affect land development. The comments below provide feedback on specific proposals we see as problematic to local flexibility and best judgement, representing federal overreach into areas that should be left up to municipal discretion.

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The District already has a robust local stormwater regulatory program, including an innovative Stormwater Retention Credit (SRC) system which is just beginning to be implemented and refined.¹ While we acknowledge that NPDES permits must seek to improve municipal program performance to meet water quality standards, we believe that there must be some limit to the scope and reach of “clear, specific and measurable” permit terms dictated to local communities.

Specific Comments:

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

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

Section 302 of the Clean Water Act makes it unlawful for a person to add pollutants to waters of the United States from a point source unless done in compliance with other sections of the Act.² Relevant in this case is section 402, which allows the EPA to issue permits for the discharge of pollutants. More specifically, section 402(p) provides that EPA’s NPDES permitting authority over MS4s is limited to controlling the *discharge of pollutants from* the MS4 system to the maximum extent practicable (MEP).³

While section 402 does give EPA authority to regulate pollutants that are discharged, it does not provide the Agency with unbridled control over the discharger—here Washington D.C. Rather, the CWA “authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants.”⁴ As the D.C. Circuit has explained, “[t]he statute is clear” and contains no language that “undercuts the plain meaning of the statutory text;” EPA may not “meddl[e] inside a facility” because it only has authority over the discharge of pollutants from a point source, and “Congress clearly intended to allow the permittee to choose its own control strategy.”⁵ In short, EPA “is powerless to impose conditions unrelated to the discharge itself.”⁶

¹ The District’s 2015 annual MS4 report to EPA shows that developers have not had much experience as of yet with new retention requirements. See page 16, *District of Columbia 2015 MS4 Annual Report*, “Finally, as the first full fiscal year with retention requirements in place and applicable to all regulated sites, FY 2015 resulted in larger numbers of engineers and developers becoming aware of the stormwater rule. DOEE’s efforts at training, providing

² 33 U.S.C. § 301, 502.

³ 33 U.S.C. § 1342(p)(3)(B)(iii)

⁴ *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added).

⁵ *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997).

⁶ *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th

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

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

NAHB asks EPA to clarify expectations behind the proposed *Numeric Milestones in Acres Managed* discharge limit (Proposed Permit, Part 1.5.3.1). EPA’s definition provided below does not specify whether reductions measured in this performance metric may include projects not governed by the District’s existing retention standard:

“Acres Managed” refers to any area that is treated (or managed) by stormwater control measures above and beyond what is already implemented in the MS4 area on the effective date of this permit. Acres managed is not a direct measure of pollutant reduction, but stands as a collective indicator of reductions in multiple pollutants in stormwater as would be realized from on-site retention of 1.2” of stormwater as applied to the relevant drainage area and standardized by acres. Not all stormwater control measures will be retention measures; for those that are not, ‘acres managed’ will be estimated based on a pollutant reduction equivalent. - (Proposed Permit, Page 47)

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

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

Cir 2009) (“the Clean Water Act gives EPA jurisdiction to regulate . . . only actual discharges—not potential discharges, and certainly not point sources themselves.”) (emphasis in original).

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

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

We request that EPA revise this provision to come into line with similar nationally cited NPDES MS4 permit conditions directing municipalities to conduct “studies and reviews”. For example, some provisions currently in use require municipalities to conduct code and ordinance reviews on barriers to implementing green infrastructure. Such provisions direct permittees to use their own discretion to complete assessments, and do not set specific numeric study parameters for how and in what manner a permittee must conduct their analyses. EPA should not require the District to conduct a cost benefit analysis on the specific numeric shift from a 1.2 – 2 inch retention standard. The District should be allowed discretion to choose the parameters of such a study, if required.

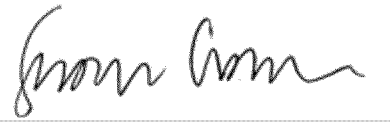
4. Provisions concerning PCBs and DDT within this permit need further detail and explanation.

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

Thank you for the opportunity to comment on this proposal. Please do not hesitate to contact Eva Birk at ebirk@nahb.org or (202) 564-3164 if you have additional questions or would like to discuss NAHB’s comments further.

Sincerely,

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A handwritten signature in black ink, appearing to read "Susan Asmus", enclosed within a thin black rectangular border.

Susan Asmus
Senior Vice President
Housing Finance and Regulatory Affairs
National Association of Home Builders