

Summary of 2019 Proposed Amendments to the District's Stormwater Management Regulations (21 DCMR Chapter 5)

In the five and a half years since the finalization of the 2013 Rule on Stormwater Management and Soil Erosion and Sediment Control (2013 Stormwater Rule), the Department of Energy and Environment (DOEE) has learned from its implementation of the regulations. The 2013 Stormwater Rule is achieving its intended objectives, setting the District on a long-term path to reducing stormwater runoff so District streams and rivers can once again become fishable and swimmable without inhibiting the development that provides valuable benefits to the District. Over 700 projects have been successfully designed in compliance with the regulations, designing runoff-reducing green infrastructure that will capture stormwater from more than 770 acres of the District, while the annual average number of development projects increased by approximately 20%.

Though the regulations have generally achieved DOEE's intent, compliance has been a disproportionate burden for certain types of projects. DOEE's primary regulatory focus in developing the 2013 Stormwater Rule was on development, meaning relatively large new and renovated buildings and parking lots. For these projects, the cost to design and install runoff-reducing green infrastructure is small relative to the total project cost. However, for projects with a relatively low total project cost, the cost to achieve stormwater compliance can be relatively high. This includes affordable housing projects building single- and two-family houses, as well as projects to install or maintain playing fields, trails for walking and biking, and landscaping maintenance. DOEE recognizes that many of these projects primarily consist of pervious area that produces less runoff than impervious surfaces, and that stormwater management is enhanced by the maintenance of healthy vegetation. DOEE also recognizes that these projects provide a public benefit and does not want to create disincentives to completing them. The proposed rulemaking provides compliance flexibility and exemptions to these projects for which compliance with the 2013 Stormwater Rule is a disproportionate burden.

The proposed rulemaking also includes amendments to the Stormwater Retention Credit (SRC) program. DOEE proposes changes to encourage more SRC generation in the Municipal Separate Storm Sewer System (MS4), which maximizes benefits to the District. DOEE proposes that projects in certain locations served by the combined sewer system may use MS4-generated SRCs for more than 50% of the regulatory requirement. DOEE also proposes that in certain circumstances, the use of SRCs be limited to MS4-generated SRCs. Additionally, as required by the District's Municipal Separate Storm Sewer System (MS4) Permit issued on May 23, 2018, DOEE proposes to limit SRC eligibility for projects that were built prior to July 1, 2013.

The proposed rulemaking also includes annual inflation adjustments to fees, updates to reflect current Department processes, and other changes.

Compliance flexibility for single-family and two-family affordable housing

Projects to deliver multiple single-family and two-family houses may disturb 5,000 square feet or more of land and thereby trigger the requirements of the 2013 Stormwater Rule. These provisions apply to these projects when they are affordable housing projects being sold to a buyer whose income is less than 80% of the Area Median Income (AMI), it is common for the sites to be relatively constrained with challenging utility access and limited outdoor space. For these sites, achieving stormwater compliance can become a significant challenge. If these projects are unable to comply with the stormwater management performance requirements fully on-site, the property incurs a permanent obligation to retain stormwater runoff off-site, called an Off-Site Retention Volume (Offv). This may be cost-prohibitive and reduce the viability of these projects that provide community benefit by selling homes at below-market rates. This is not a desirable outcome. DOEE therefore proposes to amend § 517 so that single-family and two-family affordable housing projects that maximize their efforts to comply on-site will not be required to achieve remaining stormwater retention volumes off-site. Additionally, DOEE may eliminate Offv for existing projects that would not have had an Offv if reviewed under the proposed amendment to § 517. This change has been added to § 528. A project can demonstrate to DOEE that it has been sold to a buyer whose income is below the 80% AMI threshold by providing applicable documentation from the entity charged with verifying income eligibility by the affordable housing government agency involved in the project.

Exemptions from 2013 Stormwater Rule for projects that consist primarily of landscaping maintenance and that provide community benefits

Since implementing the 2013 Stormwater Rule, DOEE has regulated several projects that consist primarily of athletic playing fields, permeable tracks, play areas, and landscaping. For many of these projects, compliance with the 2013 Stormwater Rule is technically difficult or cost-prohibitive, and regulatory compliance has had the unintended consequence of making it difficult or expensive to build or improve parks and athletic facilities and to conduct landscaping maintenance. DOEE is proposing several amendments to the 2013 Stormwater Rule to address these unintended consequences in a way that does not have adverse environmental impact.

Compliance with the existing stormwater management regulations has been challenging for projects in the following ways:

- Projects consisting of athletic fields, tracks, play areas, landscaping, and trails do not typically require the engineering services that DOEE requires for a Stormwater Management Plan (SWMP). Compliance with the 2013 Stormwater Rule therefore subjects these projects to additional design and permitting costs that are disproportionate to the actual project costs.
- The surface area of an athletic field, track, or play area cannot be used for the implementation of Best Management Practices (BMPs) with the exception of permeable surfaces that are designed as permeable pavement practices. In many cases it is technically difficult to implement BMPs at other locations on these sites to manage stormwater runoff from these surfaces, and many of these projects have had difficulty reaching the 50% on-site requirement. Additionally, these projects may face high Offv

obligations which may be cost-prohibitive for these types of projects that provide significant community recreational and health benefits.

DOEE is proposing the following amendments to the 2013 Stormwater Rule:

- To exempt projects that consist primarily of landscaping, DOEE proposes to update the definitions of Major Land Disturbing and Major Substantial Improvement activities. This amendment will exempt projects from compliance with the regulations that have no pre-project natural land cover and have less than 2,500 square feet of post-project impervious land cover.
- DOEE proposes to add an exemption to § 517 for trails for pedestrians and non-motorized vehicles. To qualify for this exemption the trail cannot be part of a project that reconstructs a roadway or sidewalk. If the trail is part of a project that otherwise constitutes a Major Land Disturbing or Major Substantial Improvement activity, then the trail shall be regulated as part of the Major Land Disturbing or Major Substantial Improvement activity.
- DOEE proposes to add an exemption to § 517 for the surface area of all athletic playing fields, permeable athletic tracks, and permeable playground surfaces. Additionally, DOEE may eliminate an Offv for previous projects that would have been exempt as a result of this proposed amendment to § 517. This change has been added to § 528.
- At publicly accessible parks, DOEE proposes to exempt areas that consist of pavilions, sheds, dugouts, and similar areas that do not typically include building infrastructure to support year-round use. DOEE added this exemption to § 517.

Additional compliance flexibility with the on-site retention requirement for projects that drain to the combined sewer system

The 2013 Stormwater Rule created a first-of-its-kind off-site stormwater management compliance program. The Stormwater Retention Credit (SRC) trading program allows regulated properties to achieve compliance with green infrastructure BMPs installed voluntarily at other locations in the District. One of DOEE's primary goals in implementing the SRC trading program is to increase the amount of green infrastructure located in areas that drain to the Municipal Separate Storm Sewer System (MS4).

While green infrastructure practices provide environmental and community benefits wherever they are installed, they provide a greater water quality benefit when installed in the MS4. This is because combined sewer overflows (CSOs) are being reduced under a court-ordered consent decree, primarily through the implementation of tunnels and diversion facilities that will ensure the majority of these overflows will be treated. By contrast, stormwater in the MS4 area drains directly into the District's waterbodies, often without treatment. Thus, a greater water quality benefit can be achieved when a regulated project in the combined sewer system (CSS) achieves compliance by building green infrastructure in the MS4.

To help incentivize more green infrastructure in the MS4, DOEE proposes to amend §§ 520, 521, 522, and 527.9 to allow projects that drain to the CSS to achieve their entire required Stormwater Retention Volume (SWRV) off-site if they use SRCs generated in the MS4. This amendment is not applicable to areas of the CSS where CSOs will be addressed through green infrastructure mandated pursuant to DC Water's modified consent decree.

Additionally, DOEE proposes to amend § 524 to require that Anacostia Waterfront Development Zone (AWDZ) sites with Offv achieve their Offv with retention capacity installed in the MS4.

Additional requirements for the use of off-site retention for projects that do not drain to the combined sewer system

When the SRC trading program was established, DOEE did not include any trading barriers or trading ratios, except for AWDZ sites. DOEE now proposes to amend § 527.9 to require all projects within the MS4 to comply with Offv with retention achieved in the MS4.

In designing the SRC program, DOEE anticipated that the market would result in projects located in the CSS complying with Offv by using SRCs generated in the MS4. This scenario maximizes water quality benefits in the District by increasing the total retention capacity built in the MS4. DOEE has observed that the vast majority of SRCs that have been used have been generated within the MS4. However, DOEE has also observed projects in the MS4 using SRCs generated in the CSS, as DOEE did not restrict projects in the MS4 from purchasing and using SRCs that were generated by projects in the CSS. When this scenario occurs, retention capacity is built in the CSS instead of the MS4, which achieves a less beneficial outcome for District waterbodies.

As a result, DOEE has determined that to achieve the intended environmental objectives of the 2013 Stormwater Rule and SRC trading program, it is necessary to restrict projects in the MS4 from using SRCs generated in the CSS. In order to ensure a stable, long-term supply of SRCs generated within the MS4 available for purchase, DOEE created the SRC Price Lock Program, which was launched with \$11.5 million to support new, voluntary green infrastructure projects in the MS4.

DOEE understands that projects may have been approved with Offv in the past based on the site owner's plan to self-generate SRCs from sites in the CSS. In order to avoid changing program rules for these projects, DOEE's proposed amendment provides that if a project in the MS4 is approved with an Offv prior to the final rulemaking, the project may use self-generated SRCs from a site in the CSS that was built prior to the final rulemaking. DOEE's proposed amendment also allows SRC buyers who have already entered a contract to purchase SRCs generated in the CSS to use those SRCs in the MS4.

SRC Eligibility Cutoff Date

The 2013 Stormwater Rule allows any project installed after May 1, 2009 to generate SRCs, assuming that all other eligibility criteria are met. DOEE is proposing to end SRC eligibility for projects that were installed prior to July 1, 2013 by amending § 534. DOEE also proposes to

amend § 531 to implement a 3-year application window for SRC certification following project completion.

For example, a project built in 2012 that had not previously applied for SRC certification would be unable to generate SRCs. Additionally, a project that did not apply for SRCs would lose the ability to generate SRCs 3 years after the project was built.

These changes will be waived for the first 6 months following the final rulemaking. As long as a project starts generating SRCs and does not lapse in SRC certification for more than 6 months, the project will be able to continue generating SRCs. DOEE expects that cutoff dates will provide ample time for projects that have a desire to generate SRCs to submit the necessary application.

For background, the District's current MS4 permit requires that DOEE adjust the SRC eligibility cutoff date to July 1, 2013. DOEE expects that without also implementing the 3-year application window following project completion, future MS4 permits would require regular changes to this cutoff date. DOEE expects that the proposed 3-year application window following construction will reduce the likelihood that the District will be required to update cutoff dates in the future.

This change will also encourage the installation of voluntary GI in the District. Specifically, the change decreases the risks associated with voluntarily investing in SRC-generating GI. Selling SRCs is critical for the financial viability of these voluntary projects that protect the District's waterbodies. However, certainty about being able to sell SRCs is undermined by the potential for already-built GI projects with sunk costs to start generating and selling SRCs at below-market prices. Already-built GI with sunk costs includes many projects that were vested under the District's pre-2013 regulations or exceeded the requirements of the 2013 Stormwater Rule. It is possible that these SRCs could be brought onto the market at relatively low cost since the design, permitting, and construction have been completed. While many of these already-built projects have not elected to get SRCs certified, the potential for this has had the effect of disincentivizing voluntary SRC-generating infrastructure. DOEE expects this change will incentivize the creation of SRC-generating businesses, which will help to ensure a stable long-term supply of SRCs for use by regulated development.

Furthermore, it is worth noting that an important part of the reason for allowing already-built GI to generate SRCs under the 2013 rule was due to the fact that there was uncertainty as to whether the SRC market would provide sufficient SRCs to meaningfully enable off-site compliance by regulated development. Over the last five and half years, there have been 46 SRC trades, with the number of SRCs for sale increasing over time. New, voluntary GI projects are currently occurring at a large enough scale to meet the total demand for SRCs from regulated developers.

Extension of relief from extraordinarily difficult site conditions to include site drainage area and vehicular access area requirements

The 2013 Stormwater Rule created a process by which properties can request relief from the minimum 50% on-site retention requirement. To qualify, a project must demonstrate that it is technically infeasible or environmentally harmful to meet the 50% threshold.

In addition to the 50% on-site minimum retention requirement, the 2013 Stormwater Rule requires that projects that do not drain to the CSS also:

- Retain or treat 50% of the SWRv from each Site Drainage Area (SDA); and
- Retain or treat 50% of the SWRv from the entire vehicular access area (VAA).

Many projects have difficulty in complying with this requirement when they have one or more small SDAs or a VAA in which it is extraordinarily difficult to install a BMP. DOEE proposes to amend §§ 520, 521, 522, and 526 to allow these projects to request relief from the SDA and VAA requirements. When DOEE reviews these requests, DOEE will continue to apply rigorous standards in determining whether it is truly technically infeasible or environmentally harmful to install the BMPs.

DOEE also proposes to amend these sections to clarify the requirements to retain and treat runoff in each SDA and for the VAA.

Limitation of the exemption from soil erosion and sediment control for agricultural activities

The 2013 Stormwater Rule included an exemption from soil erosion and sediment control requirements for all tilling, planting, or harvesting of agricultural or horticultural crops. DOEE proposes to amend § 541 to limit this exemption to gardening and landscaping at houses, townhouses, and rowhouses.

Phase-out of the transition period to the 2013 Stormwater Rule

The 2013 Stormwater Rule included a transition period during which major regulated projects could comply with the District's prior stormwater management regulations. DOEE's intent in creating a transition period was to allow projects that were already substantially designed to be able to comply with the requirements in effect at the time that the majority of the design planning occurred. DOEE also intended that there would eventually be a complete end to the transition period so that all regulated projects coming through permitting would comply with the 2013 Stormwater Rule rather than the District's previous stormwater management regulations. DOEE continues to receive requests from projects to comply with the requirements in the District's earlier stormwater management regulations. It can be time consuming for DOEE to evaluate these requests and often they are not eligible for vested status. Recognizing that the 2013 Stormwater Rule has been in effect for five years, DOEE proposes to establish an end date for the transition period and amend § 552 to state that all plans submitted after 6 months of the final rulemaking must comply with the 2013 Stormwater Rule.

Issuance of a certificate of occupancy for swing space trailers at schools

School projects often use swing space trailers for classrooms while the school building is under construction or renovation. For these projects, the trailers are temporary. While DOEE will still require BMP implementation for areas that are disturbed for swing space trailers at schools, DOEE proposes to amend § 504 to allow these projects to receive a Certificate of Occupancy for

the trailers before the BMPs are implemented. In these cases the required BMPs will be installed prior to the completion of the larger school project.

Minor clarifications and updates

The following proposed amendments do not substantively change the implementation of the District's stormwater management regulations but are being implemented to clarify the regulations or to reflect or update DOEE's current business process.

- These amendments inflation adjust the DOEE's plan review fees, in-lieu fee, and fees for other resources. DOEE adjusts these values for inflation using the Urban Consumer Price Index (CPI) published by the United States Bureau of Labor Statistics, as required by 21 DCMR § 501.1. An inflation adjustment for 2017 was not completed, so these amendments adjust the fees for inflation according to the CPI from 2016 to 2018. These amendments also update the total project cost beneath which a single- or two-family house, townhouse, or rowhouse is exempt from complying with the soil erosion and sediment control provisions of this chapter. In addition, these amendments add the cost to obtain a paper copy of DOEE's recently published Erosion and Sediment Control Manual and Erosion and Sediment Control Handbook in § 501.13. All values are rounded to the nearest cent except the exemption from soil erosion and sediment control provisions, which is rounded to the nearest dollar. Adjustments in future years will be applied to the adjusted value of the prior year rather than to the rounded value.
- DOEE proposes to amend § 517.2 to clarify DOEE's intent. Section 517.2 was intended to exempt voluntary SRC-eligible BMPs from the stormwater management requirements of this chapter even if the project does not intend to pursue SRC certification. The exemption is also updated to include substantial improvement activities.
- Several sections make reference to paper and mylar submittal requirements. In 2014, DOEE began transitioning to electronic formats. DOEE now receives all submittals electronically through a submittal database, along with a courtesy paper copy, if requested by a DOEE reviewer. This database is referenced multiple times throughout the proposed amendments. The Department's submittal database is available at <http://doee.dc.gov/swdb> from any device with an internet connection. Computers are also available for use by the public at the Department of Consumer and Regulatory Affairs. Amendments are being proposed where appropriate throughout this chapter to reflect DOEE's current submittal process.

- DOEE proposes added language in § 521.2, which clarifies the applicability of the Maximum Extent Practicable Process for PROW projects. This language is consistent with DOEE's implementation of §521 since publication and reflects DOEE's original intent. The existing §§ 521.2 through 521.8 are renumbered accordingly.
- Section 519 required that a SWMP be consistent with other submittals for soil erosion and sediment control and floodplain management. DOEE proposes to amend this section to clarify that the submittal shall be consistent with all permit submittals.
- Mathematically, the SWRv and Water Quality Treatment Volume (WQTV) formulas used in this chapter can be simplified without changing the result. Amendments to §§ 520, 522, and 524 are proposed to include the simplified SWRv and WQTV formulas.
- Amendments proposed to § 547 clarify that the responsible person present for soil erosion and sediment control may be an environmental engineer.
- Amendments proposed to § 543 clarify that a Stormwater Pollution Prevention Plan (SWPPP) is required for all projects that disturb five thousand square feet or greater.
- Amendments are also proposed to correct minor typos that were identified in this chapter.