Charles County Commissioners

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September 17, 2012

Mr. Brian Clevenger
Program Manager
Sediment, Stormwater and Dam Safety Program
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard, Suite 440
Baltimore, Maryland 21230-1708

Re: Tentative Determination to Issue NPDES Permit for Baltimore City MS4

Dear Mr. Clevenger:

On behalf of Charles County, I have attached comments regarding the Tentative Determination referenced above. Thank you for providing the opportunity to comment on this important issue.

If you have any questions or need additional information, please contact Mr. Charles Rice, Environmental Programs Manager, at 301-645-0651 or e-mail: ricec@charlescounty.org.

Very Truly Yours,

CHARLES COUNTY COMMISSIONERS

Candice Quinn Kelly

Candice Quinn Kelly, President

Attachment

Cc: Matthew Clagett, County Attorney's Office
Charles Rice, Planning Division

Comments of Charles County on MDE's Tentative Determination to Reissue the City of Baltimore's MS4 NPDES Permit

September 17, 2012

I. Introduction

Pursuant to the Maryland Department of the Environment's (MDE) Tentative Determination to Issue the City of Baltimore, Maryland (City) Phase I MS4 permit (Draft Permit) and Fact Sheet (Draft Fact Sheet), Charles County (County) provides the following comments.

Preliminarily, the County notes that it would ordinarily not file comments on the Draft Permit of a fellow locality. However, MDE has stated its intention to use a template to issue permits for all remaining Phase I communities in Maryland, including the County. Thus, the County feels compelled to express its concerns regarding the City's Draft Permit, before these critical issues are incorporated into a final permit that may be viewed by MDE and other stakeholders, correctly or not, as establishing a precedent for other communities.

In addition, MDE's issuance of Phase I MS4 permits, each of which will include a very costly twenty percent restoration requirement, raises a major policy question for all MS4s across the State. We know that more is being asked of MS4s-- the newest round of permits represents a major increase in regulatory requirements and in management costs. However, as of yet, we have not discussed the role the federal and State government will play as partners united with localities to meet common clean water goals. In our view, in order to be successful in implementing these permits, EPA and the State will be integral in ensuring that these BMPs and management programs are funded. It is unfair to expect MS4 localities to shoulder this responsibility alone. Moreover, we can unequivocally say on behalf of our citizens, many of whom are still feeling the impacts of the recent recession, that they cannot afford to carry these costs alone. We respectfully request that MDE consider these financial realities, and how it will work with the federal government to address them, before it moves forward with reissuance of the Phase I (and Phase II) MS4 permits.

Again, the County cautions that it does not intend in these comments to express a view on the City's MS4 program or on the City's ability to comply with the permit terms. The County's sole purpose is to explain why it views certain requirements as problematic from an operational, financial and/or legal perspective so that these requirements are not copied verbatim into the County's permit when it is noticed for public comment. Just because the City is able to comply with a particular permit term does not mean that it is appropriate for other Phase I permittees or that other permittees could comply with an identical requirement. As MDE is well aware, the Phase I MS4 permittees in Maryland vary widely with regard to size and capabilities.

We appreciate the opportunity to comment on the City's permit, and thank MDE for considering the comments below.

II. Comments

MDE Has Incorrectly Defined the Regulated Permit Area

In the Draft Fact Sheet, MDE explains its decision to define the regulated permit area as the entire geographic area of the City of Baltimore. (Draft Fact Sheet, pages 2-3.) MDE references the preamble to the original Phase I stormwater regulations (November 16, 1990) as allowing a state or EPA region to establish the boundaries of the regulated MS4. Further, MDE justifies its historical decision to include the entire jurisdiction in the MS4 permit by noting the fact that several State programs, like erosion and sediment control, and stormwater management are applied jurisdiction-wide, and that EPA suggested in the preamble that "permit coverage may include areas where jurisdictions have control over land use decisions."

The County objects to MDE's decision to expand the regulated permit area beyond the area served by the MS4 itself. As MDE has acknowledged, MS4 is a defined term found in federal regulations at 40 C.F.R. 122.26(b)(8). When it limited the MS4 to "…a conveyance or system of conveyances," EPA deliberately set the boundaries of the regulated area –the area governed by an NPDES permit--- to include only those areas with stormwater facilities in place. The City is densely populated and may be largely comprised of urbanized areas served by the City's separate storm sewers (although, notably, parts of the City are likely served by the combined sewer system). However, other Phase I MS4s in the State have urban areas and rural areas, the latter of which may have no stormwater facilities or systems that feed into the municipally-owned MS4. It is inappropriate and contrary to federal law to apply federal requirements for stormwater management to these rural areas simply because there are State law requirements that apply across the entire jurisdiction.

Moreover, although MDE may have historically considered the entire jurisdiction to be the permit area, expectations for municipal stormwater permittees have increased significantly over the last few years. Using the permit to extend federal jurisdiction to areas outside the regulated permit area creates a grave risk that a MS4 permittee may be subject to federal enforcement and citizens' suits in areas without any stormwater facilities. In addition, because the permit requirement for impervious area restoration (Part III.E.2.b in the City's Draft Permit)—the most costly part of the permit--is based upon the entire jurisdiction, versus just the MS4 regulated permit area, expanding this requirement could cost the permittee millions of dollars.

For these reasons, the County asks MDE to appropriately limit the requirements of all future Phase I MS4 draft permits, to those areas served by the MS4.

The Requirements for Restoration Planning and Impervious Area Restoration Should be Revised

The City's Draft Permit mandates that it perform watershed assessments for the entire City, and submit a restoration plan within one year of permit issuance to address approved TMDLs. (Draft Permit, pages 7-8.) The County submits that the overlapping requirements for assessments and planning are duplicative and confusing. Further, the timeframe for preparing the kind of

restoration plan envisioned by MDE is wholly inadequate, and would set Phase I permittees up for failure.

With regard to the first concern, the County recommends that MDE clarify the existing language so that assessment measures are in the assessment section and planning measures are in the planning section. As a specific example, prioritizing "all structural and nonstructural water quality improvement projects" is included in Part III.E.1.b.iv (Watershed Assessments); the very similar "[i]nclude a detailed schedule for implementing all stormwater structural and nonstructural water quality projects..." is included in Part III.E.2.c.i (Restoration Plans). One would normally assume detailed scheduling would come after assessing and prioritizing projects. In this case, a schedule would be laid out at the end of year one, with priorities due by the end of year five, which seems backwards.

As an alternative, MDE could revise the language to require preparation of a draft restoration plan that assesses possible scenarios for improvement projects within one year of permit issuance if the permit clearly establishes a reasonable level of expectations for the plan. As an example, MDE could delete the requirement for a "detailed" schedule and cost estimates for individual projects in Part III.E.2.c.i. and III.E.2.c.ii, while adding language requiring the City to revise the initial plan by the end of the permit term, to add detailed schedules, projects and costs. Parenthetically, the Draft Permit allows the City one year to submit its impervious surface area assessment for MDE's approval. The County questions how the restoration plan can be written without the finalized impervious surface area assessment.

If the text remains as is, the County believes that it will be impossible for any Phase I permittee to complete the type of restoration plan called for by the permit within a year, in particular, including "detailed cost estimates for individual projects, programs, controls, and plan implementation" for each stormwater WLA. There is simply too much work to do over too short a timeframe.

Once the impervious surface area assessment has been completed, the City's Draft Permit requires that the City "commence and complete the implementation of restoration efforts for twenty percent of the City's impervious surface area consistent with the methodology described in the MDE document cited in paragraph a. that is not already restored to the MEP…" (Draft Permit, page 8.)

The County objects to this term for the following reasons. First, the anticipated compliance cost that permittees will be subjected to this same requirement is difficult to ascertain, but could potentially be significant. The State's own figures from the Phase II Watershed Implementation Plan (Phase II WIP) confirm that local governments are facing enormous stormwater management costs under MDE's plan, estimated at $3.36 billion through 2017 and $6.11 billion through 2025. The County cannot agree with a State policy (i.e., requiring all MS4 permittees to comply with a numeric restoration requirement) that would impose an unprecedented financial burden that is orders of magnitude beyond our collective abilities to manage. We urge MDE to consider phasing restoration (i.e., requiring 10% restoration goals as a part of this permit cycle) and coupling improvements with redevelopment as a way to mitigate these extraordinary costs. Phasing is even more important if the actual restoration work will not begin until at least year

two of the permit term. Although the County understands why it was done, adding a year plus MDE review and approval time (with no outside limit on how long MDE will take) for development of the baseline for restoration efforts squeezes the compliance period to less than four years.

Second, the permit condition requiring restoration efforts for 20% of impervious surface area is more stringent and less flexible and efficient than both the State's Phase I and Phase II WIPs. Specifically, the WIP applies the 20% restoration equivalency percentage to "pre-1985 impervious cover," versus to all of "the City's impervious surface area… that is not already restored to the MEP." (Phase II WIP, Appendix A, page A-10; Draft Permit, page 8.) The City's Draft Permit expands the restoration requirement to all development that is not treated to the MEP, regardless of its age.

Third, the County objects to referencing MDE's Stormwater Accounting Guidance in the permit, as has been done with the City. (Draft Permit, page 8.) Substantively, certain aspects of the guidance are highly problematic. As a concrete example, in the guidance MDE has decided that only those facilities built after 2002 are deemed treated to the MEP for purposes of determining the number of acres that must be restored under the MS4 permit. Not only is this inconsistent with the State's Phase II WIP policy as explained above, but the County disagrees with excluding stormwater facilities approved prior to 2002 that were designed to the MEP standard at that time. It is inappropriate to "re-write history" and require the County to revisit these determinations. In addition, in our view, the guidance fails to give appropriate credit to alternative restoration options, some of which, like tree planting, provide many positive benefits associated with green, infiltration practices. Procedurally, we are also concerned that such a major aspect of the permit's requirements would be determined by and through a binding but not promulgated guidance document subject to MDE's unilateral revision. The City's Draft Permit even goes so far as to reference future, as-of-yet unknown versions of this document ("MDE, June 2011 or subsequent versions"). This type of condition is unacceptable as precedent for Charles County.

Lastly, the Draft Permit also omits the equivalency concept included in the Phase II WIP ("The strategy requires reductions in nutrients and sediment **equivalent** to retrofitting 30% of the pre-1985 impervious cover…"). (Phase II WIP, Appendix A, page A-10.) Permittees must be allowed to comply with the retrofit requirement using an alternative approach; otherwise the State's cost estimates are flatly wrong. According to the Phase II WIP, MS4s will be allowed to plan for implementation using "alternative stormwater management practices that may include street sweeping, catch basin cleaning, storm drain vacuuming, nutrient management, grass/meadow buffers, stream restoration, impervious surface removal, tree planting, shore line erosion control, and impervious area disconnects, when cost effective." (Phase II WIP, Appendix A, page A-11.) Equivalency would also allow for trading verified nutrient reduction credits, but the Draft Permit appears to preclude that compliance method. The concept of equivalency should be specifically referenced in all Phase I MS4 permits.

For these reasons, the County requests that MDE revise the restoration planning and restoration requirements consistent with the comments above.

The Special Programmatic Conditions Are Inappropriate and Should Be Stricken

The Draft Fact Sheet explains the Special Programmatic Conditions in the Draft Permit in the following way:

> *Baltimore City will be required to coordinate with the Chesapeake Bay TMDL. The City will also continue to work toward the completion of the State's Water Resources Element as required by the Maryland Economic Growth, Resource Protection and Planning Act of 1992 (Article 66B, Annotated Code of Maryland). The projects and programs proposed under this draft permit, as well [as] those implemented during the City's previous stormwater permits and as a part of the other State and local regulations all work toward meeting both of these conditions. (Draft Fact Sheet, page 8.)*

The County is concerned that the first sentence of this explanation is overly broad and inappropriately implies that the City itself, and not merely the regulated MS4, must coordinate with the Bay TMDL. As EPA has made clear, local plans developed by the states' counties are only plans with "targets" for compliance, due in large part to the fact that the Bay TMDL models are not reliable at such a fine scale. Local plans do not bind the locality as a whole to implementing the ideas included therein.

Furthermore, in the Draft Permit itself, the County objects to including what could be viewed by some as an end date for Bay restoration. Part V.A of the Draft Permit is called "Chesapeake Bay Restoration by 2025," and the last sentence of the section states that the City's and other MS4 permits "will require coordination with MDE's Watershed Implementation Plan and be used as the regulatory backbone for controlling urban pollutants toward meeting the Chesapeake Bay TMDL by 2025." (Draft Permit, pages 14-15.) EPA has acknowledged in litigation that the TMDL does not mandate a federal timeline for implementation. Rather, members of the Executive Council chose this target date voluntarily, and it can be adjusted if a Bay state so desires. For this reason alone, it does not belong in any of the State's MS4 permits. Additionally, MDE has no basis for concluding that the State's MS4s are capable of actually implementing the kinds of substantial clean-up measures included in the Phase I and Phase II WIPs by 2025. As a matter of principle, an MS4 permittee should not be asked to agree to a permit term unless it believes that it can comply with that term. Lastly, the County highlights the fact that even though urban stormwater is one of the Bay source sectors that must make reductions ("Urban stormwater is defined in the CWA as a point source discharger and will subsequently be part of Maryland's WLA"; Draft Permit, page 15), Maryland's MS4s were not assigned individual WLAs by EPA in the Final TMDL.

Likewise, Part V.B (Comprehensive Planning) would mandate that the City "…cooperate with other agencies during the completion of the Water Resources Element (WRE) as required by the Maryland Economic Growth, Resource Development and Planning Act of 1992 (Article 66B, Annotated Code of Maryland)." Cooperation "shall entail all reasonable actions authorized by law…" (Draft Permit, page 15.)

This permit requirement is objectionable. The City and the County are both required by State law to comply with the WRE planning. However, the requirements of this State statute are far beyond the requirements of the federal Clean Water Act, and could subject the City or the County (if this permit term is included in future MS4 permits) to EPA enforcement or citizen suit for any alleged failure to "cooperate" in planning. Worse, this requirement would usurp legislative discretion by mandating that the governing body take "all reasonable actions authorized by law," thereby allowing MDE, EPA and citizens to second guess decisions on local matters.

For the reasons above, we request that MDE delete Part V from all Phase I MS4 permits.

References to State Stormwater and Erosion and Sediment Control (E&S) Programs Should Be Clarified

For many of the same reasons as those stated above, the County objects to MDE incorporating references to the State stormwater and E&S laws in the Phase I permit. (Draft Permit, pages 2, 4.)

Each of these programs is a major undertaking with many associated activities and details. Federalizing these programs by including them in the City's, and eventually the County's, permits creates a risk that the State's MS4 permittees will be subject to enforcement over one of the many miniscule details associated with stormwater management or E&S program implementation, even if the permittee is doing a laudable job of managing these programs and addressing program improvements required by MDE.

For this reason, we ask that MDE consider making relatively minor edits to these sections to Parts III.D.1 and III.D.2 to clarify that the stormwater management and E&S programs be "pursuant to the authority under and generally consistent with" existing law.

MS4 Permittees Cannot be Responsible for Third-Party Behavior

The County asks MDE to revise the Illicit Discharge Detection and Elimination (IDDE), Trash and Litter, and Program Review sections of the Draft Permit to acknowledge the permittee's role as a co-regulator with MDE in regard to third-party acts, and to make it clear that a permittee cannot guarantee that a third party will comply with local laws regarding discharging non-stormwater into the MS4.

Specifically, where the Draft Permit includes the term "ensure," please consider changing the text to "require." Likewise, where the Draft Permit includes the term "eliminate," please consider changing the text to "mandate the elimination of" or "address." For example, in the IDDE section please consider the following revision: "Permittee shall implement an inspection and enforcement program ~~to ensure that all~~ for discharges to and from the municipal separate storm sewer system that are not composed entirely of stormwater ~~are either~~ unless permitted by MDE~~ or eliminated~~…."

MDE Should Consider Minor Revisions to the Discharge Prohibitions and Receiving Water Limitations Section of the Draft Permit

Lastly, the County notes with general approval the last two paragraphs of the Discharge Prohibitions and Receiving Water Limitations section of the Draft Permit. (Draft Permit, page 16.) MEP is the legal compliance standard. Thus, it is appropriate and correct legally to make it plain in the MS4 permit that complying with the permit terms "shall constitute adequate progress toward compliance" with water quality standards. The County would note that a similar term was recently included in the MS4 permit for the District of Columbia, a permit that EPA itself wrote. Furthermore, if this phrase were not included, the section could be viewed as a mandate to comply with water quality standards on day one of the permit term. This would not only be legally improper (inconsistent with the CWA's MEP standard), but pragmatically impossible for any MS4 permittee in the State.

Additionally, the Draft Permit appropriately focuses on management measures to address water quality, not quantity. Water quantity, or the flow or discharge of water itself, is not a regulated "pollutant" under the Federal Clean Water Act (CWA), and is not specifically included as a pollutant in State regulations. EPA itself has conceded that it "does not believe that flow, or lack of flow, is a pollutant as defined by the CWA Section 502(6)." *See Guidance for 2004 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act* at 8 (July 21, 2003).

However, the County believes that the determination of what constitutes MEP lies with the permittee, and is uncomfortable with the suggestion that as a standard that is "continually" adapting to "current conditions and BMP effectiveness," MEP is a moving target subject to MDE's or EPA's views of the County's capabilities. For this reason, the County requests that MDE consider a minor edit to this text as follows:

"~~The application of the MEP standard~~ Decisions regarding which BMPs to install or implement should be ~~is an~~ iterative ~~process~~, and the permittee ~~which~~ should continually adapt its approach to making these decisions to reflect current conditions and BMP effectiveness while striving to attain water quality standards. Compliance with the conditions contained in this permit shall constitute adequate progress toward compliance with Maryland's receiving water quality standards."

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