



CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

Mr. Raymond Bahr
Maryland Department of the Environment
Sediment, Stormwater and Dam Safety Program
1800 Washington Boulevard
Baltimore, MD 21230

June 27, 2013

BY: U.S. mail and e-mail

RE: National Pollution Discharge Elimination System, Tentative Municipal Separate Storm Sewer System Discharge Permit for Prince George's County, 11-DP-3314

Dear Mr. Bahr:

Thank you for the opportunity to present our views on the above-titled tentative Municipal Separate Storm Sewer System ("MS4") permit for Prince George's County ("the tentative permit"). On behalf of our 100,000 Maryland members, including more than 5,450 members in Prince George's County, the Chesapeake Bay Foundation ("CBF") is vitally interested in improving the management of polluted stormwater runoff in Prince George's County. Stormwater pollution is a significant problem in Maryland and across the entire Chesapeake Bay watershed. According to the *Chesapeake Bay Total Maximum Daily Load* ("TMDL"), Maryland stormwater delivers 28 percent of the total nitrogen load, 28 percent of the total phosphorus load, and 32 percent of the total sediment load to the Bay.¹

U.S. Environmental Protection Agency ("EPA") investigators and Chesapeake Bay Program scientists (respectively) estimate that the only pollution sector that is substantially growing is the suburban stormwater sector, while the other major sectors' contributions to water pollution in the Bay (e.g. agriculture or wastewater treatment) are being reduced.² In Prince George's County, stormwater is the largest source of sediment and phosphorus, and the second largest source of nitrogen.³ Not only does stormwater runoff contain nitrogen, phosphorous and sediment, it also washes oil largest source of nitrogen.⁴ Not only does stormwater runoff contain nitrogen, phosphorous and sediment, it also washes oil products, heavy metals and trash into Bay tributaries. All of these pollutants are a problem for Prince George's County, as reflected by the TMDLs in local waters and the Bay.

¹ U.S. Environmental Protection Agency, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (December 29, 2010), §4.3, at 4-5, 4-6 [hereinafter "Bay TMDL"].

² U.S. Environmental Protection Agency, Office of the Inspector General, *Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay*, Evaluation Report No. 2007-P-00031, September 10, 2007, Summary Recommendations, Chesapeake Bay Program, *Bay Barometer*, CBP/TRS 293-09, EPA-903-R-09-001 (March 2009), 8.

³ http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/WIP_P2_County_Strategy_Summaries/WIPII_BMP_Summary_Prince_Georges.pdf

⁴ http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/WIP_P2_County_Strategy_Summaries/WIPII_BMP_Summary_Prince_Georges.pdf

While the following represents the considered views of CBF, please note that, to the extent that the written comments of our colleagues and partners within the Maryland Stormwater Consortium (i.e., specifically the Natural Resources Defense Council, Earthjustice, Blue Water Baltimore/Baltimore Harbor Riverkeeper, Sierra Club, *et al.*) do not conflict with our own, we hereby adopt those comments as our own and incorporate them by reference. If there is a conflict, of course, our own comments and proposals shall be considered CBF's official position.

Summary

- The Permit must include a quantification of the current loading of nitrogen, phosphorus and sediment from all identified sources in order to establish a quantitative baseline from which to assess progress towards either the Baywide or any local TMDLs and WLAs.
- The Permit must require compliance with the Maryland Stormwater Act of 2007 within one year.
- Sections in the Permit Concerning TMDLs/WLAs, Restoration Plans, and Management Programs must be clarified, strengthened, and made enforceable and fully accountable.
- The Permit must include a monitoring and assessment program which is capable of providing accurate, timely, representative, and statistically significant information on water quality countywide.

Detailed Commentary

- 1. The Permit must include a quantification of the current loading of nitrogen, phosphorus and sediment from all identified sources in order to establish a quantitative baseline from which to assess progress towards applicable WLAs for each established TMDL for each receiving water body.**

Under the terms of this Permit, the County must attain applicable WLAs for each TMDL for each receiving water body. However, under the Permit's current draft, there is no way to determine whether the practices considered or implemented are reducing pollutant loads down to the WLAs. Because this new permit round seeks to tie the MS4 implementation to meeting the Watershed Implementation Plan (WIP) goals, these sources should apply Chesapeake Bay Model values or monitored Event Mean Concentrations to quantify the current loading of nitrogen, phosphorus and sediment from the existing stormwater infrastructure. This quantification is necessary to establish a baseline for meeting either the Baywide or any local TMDLs.

The tentative draft permit's reference to the MDE document "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollution Discharge Elimination System Stormwater Permits" is not sufficient for the purpose of assessing a pollutant baseline. That guidance excludes all post-2002 surfaces in calculating impervious surface, which is inadequate for calculating pollutant load. The post-2002 surfaces need to be included in the pollution load baseline.

Proposed Language – Part E.2.b

b. Within one year of permit issuance, Prince George's County shall submit to MDE for approval a restoration plan for each stormwater WLA approved by EPA prior to the effective date of the permit. The County shall submit restoration plans for subsequent TMDL WLAs within one year of EPA approval. Upon approval by MDE, these restoration plans will be enforceable under this permit. As part of the restoration plans, Prince George's County shall:

i. Establish a quantitative assessment of the County's current pollutant loadings using the information collected during the source identification process required by Part IV.C of this Permit. This assessment of current loadings shall serve as the baseline from which the pollutant load reductions called for in the County's compliance schedule shall be calculated.

2. The Permit must require compliance with the Maryland Stormwater Act of 2007 within one year.

In order for the County to achieve the Permit's requirement to comply with the Stormwater Management Act of 2007, the County must finish reviewing and harmonizing its ordinances and code to ensure that there are no impediments to the implementation of ESD to the MEP. The Stormwater Management Act, which mandated changes in local ordinances and codes, is already six years old;⁵ its implementing regulations requiring local ordinance modifications are now four years old.⁶ Compliance should reasonably already have been accomplished. However, the Permit only requires annual reporting of the modifications that *need* to be made to ordinances, regulations, and processes to comply with state law. The Permit must include language requiring Prince George's County to comply within a set period of time. Given that the state law is already six years old, the deadline to comply must be no more than one year. In order to make ESD effective, there are zoning, right-of-way, transportation, housing, and many other codes that need to be changed. Prince George's County's previous MS4 permit required the County to complete necessary revisions to its County Code, and to delete this requirement from the next permit would violate the CWA's anti-backsliding provisions.⁷

3. Section IV in the Permit Concerning Management Programs, TMDLs, and Restoration Plans must be clarified, strengthened, and made enforceable and fully accountable.

MANAGEMENT PROGRAMS

The section on stormwater management (Part IV.D.1.b) must require a programmatic assessment of the impact, and a full documentation of all stormwater exemptions and waivers. Since the MDE Guidelines⁸ for impervious assessment calculations incorporated in the permit assume certain loads

⁵ Md. Env't Code Ann. §4-201.2 et seq. (2007).

⁶ COMAR 26.17.02.

⁷ 44 CFR 122.44(l)(1) (“(l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)”).

⁸ Maryland Department of the Environment, *Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated: Guidance for National Pollutant Discharge Elimination System Stormwater Permits*, June 2011. Available at:

http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/NPDES%20Draft%20Guidance%206_14.pdf (last visited 5/31/2013).

based on the era of the development (i.e. assuming ESD for post-2007 development), development that did not comply with all existing stormwater laws and regulations must be recorded and accounted for in any reduction calculations. Further, Maryland law requires that waivers and exemptions to stormwater management requirements granted by a county must ensure that development will not adversely impact stream quality and that the cumulative effects of the waivers are evaluated.⁹ Therefore, the permit must require the county to not only document the waivers and exemptions, but also to evaluate the impacts to ensure that they will not adversely impact stream quality. Allowing exemptions and waivers without evaluating the impact to ensure there are no adverse effects would be contrary to law.

Proposed Language:

IV.D.1.b.iii. Number of stormwater exemptions issued, including the justification for the exemption and associated pollutant load; and

IV.D.1.b.iv. Number and type of waivers received and issued, including those for quantity control, quality control, or both. Multiple requests for waivers may be received for a single project and each should be counted separately, whether part of the same project or plan. The total number of waivers requested and granted for qualitative and quantitative control shall be documented, along with the justification for the waivers and associated pollutant load.

DEADLINES AND MILESTONES FOR TMDLs/WLAs

Prince George's County is currently subject to over 40 TMDLs, including that for the Chesapeake Bay.¹⁰ Total maximum daily loads are pollution limits scientifically developed for water bodies that do not meet current water quality standards and have been designated as "impaired" under §303(d), 33 U.S.C. §1313(d) of the Clean Water Act. TMDLs express the maximum amount of a particular pollutant or pollutants which can be discharged into a water body, while allowing the water to meet water quality standards. The sources of pollution are provided "allocations:" waste load allocations ("WLAs") for point sources of pollution (e.g. industrial discharge pipes or municipal systems and outfalls), and load allocations ("LAs") for non-point sources of pollution (e.g. farmland). The allocations are set at a level calculated to permit the water body to recover and thereafter be maintained.

While the Prince George's County draft MS4 does require that the BMPs and restoration programs implemented under the permit "be consistent" with the applicable WLAs, it does *not* provide a method of assessment of whether the chosen implementation strategies are actually obtaining the WLAs. The draft permit fails to require the numeric benchmarks or interim standards or milestones in the implementation plan to be quantified as defined in Maryland law.¹¹ Maryland law specifically states that where a schedule of compliance is required as a permit condition (which is the case here), "then quantitative limits shall be set for the interim period and following the final compliance date."¹² The restoration plan requirements outlined in Part IV. E. 2. of the draft permit clearly trigger this requirement under Maryland law for quantitative benchmarks.

⁹ See COMAR 26.17.02.05(C)(1).

¹⁰ See Attachment B, Maryland Department of the Environment, *National Pollution Discharge Elimination System, Tentative Municipal Separate Storm Sewer System Discharge Permit for Prince George's County*, 11-DP-3314 MD0068284.

¹¹ See Md. Code Regs. 26.08.04.02-1(A)(3).

¹² Md. Code Regs 26.08.04.02.1.

While Maryland regulations allow MDE to include a compliance schedule as a condition of a permit for “existing discharges which do not comply with permit conditions, effluent limits, or water quality standards,” the regulations also require the permittee to “achieve compliance within...the shortest reasonable time consistent with the requirements of the Federal Act and State law or regulation.”¹³ The permit should clearly specify that the County must use the watershed assessment and restoration plans required under Part IV. E. to articulate specific annual pollution loading reductions and enforceable interim numeric milestones that will be achieved by certain deadlines, necessary to meet the MS4’s share of the WLAs. These should at the least and in their outermost margins be consistent with the deadlines associated with the Chesapeake Bay TMDL and the Watershed Implementation Plan, but because some of these deadlines and milestones are multi-year in nature, enforceable interim benchmarks are also required. Benchmarks and milestones for actual pollution reductions are also essential to determining whether the implementation strategy and chosen practices are sufficient to meet the final WLAs, as is required by PART III of the draft permit. They are essential for “adaptive management,” a tool which should be used not only to change a system, but also to learn about the system. If the County does not have any milestones by which to gauge the efficiency of the implementation programs, the County is putting itself at risk for violating the requirement to reach WLAs by the end of the permit term or a specific following permit term. In the end, the only way to ensure compliance with water quality standards is to insist upon enforceable interim waypoints so that corrections or course can be made. Considering the clear requirements under Maryland and federal law for deadlines and quantified interim standards, it would be arbitrary, capricious and otherwise contrary to law for MDE to issue a final permit to Prince George’s County that does not address these legal deficiencies.

Further, quantitative goals and dates certain for their attainment are necessary for enforcement under federal law to create an “enforceable framework” when compliance is going to extend beyond a single permit term. The need for clear, measurable benchmarks is reinforced in EPA’s *Permit Improvement Guide*:

“Finally, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary.”¹⁴

Finally, the restoration plans, compliance schedules, and numeric benchmarks should be incorporated into the permit through a major modification, which also requires a public notice and comment. As the current tentative draft permit provides for public participation during the development of watershed assessments and restoration plans, including the TMDL process, this change would not introduce any new burden on the County and would be consistent with the process outlined in the tentative permit. An assessment of these milestones and numeric benchmarks would also need to be including in the annual reporting requirements under Part V.A.1 and 2, which provide the status of implementing restoration plans, TMDL compliance and assessment of controls.

¹³ Md. Code Regs. 26.08.04.02.

¹⁴ U.S. EPA, *MS4 Permit Improvement Guide*, EPA 833-R-10-001 (April 2010), 5-6.

Proposed Language:

PART IV.E.2.b Within one year of permit issuance, Prince George's County shall submit to MDE for approval a restoration plan for each stormwater WLA approved by EPA prior to the effective date of the permit. The County shall submit restoration plans for subsequent TMDL WLAs within one year of EPA approval. Upon approval by MDE, these restoration plans will be incorporated into, and be made enforceable under, this permit via a major modification to the permit, which shall include milestones, benchmarks, and final dates for attainment of applicable WLAs. The County shall fully implement the plan upon MDE approval.

If the County cannot demonstrate that its selected projects, programs, and controls will achieve WLAs, MDE will revise this permit to include additional controls and/or additional numeric effluent limitations sufficient to ensure that all applicable WLAs will be met. The County shall post the most current version of the plan on the County's website.

As part of the restoration plans, Prince George's County shall:

i. Include a compliance schedule containing the final date for meeting applicable WLAs and interim milestones and numeric benchmarks. Final attainment dates shall be set as the soonest possible date by which each WLA can be attained and shall be consistent with the deadlines associated with the Chesapeake Bay TMDL and associated Watershed Implementation Plans.

a. Numeric benchmarks will specify annual pollutant load reductions and will be used to assess progress toward attainment of milestones and ultimate WLA attainment;

b. Interim milestones will be expressed as a pollutant load reduction, with associated deadlines for attainment, will be enforceable upon incorporation into the permit, and will be included where final attainment of applicable WLAs requires more than five (5) years. Milestone intervals will be as frequent as possible but will in no case be less frequent than every five(5) years;

ii. Include a detailed schedule for implementing all structural and nonstructural water quality projects, enhanced stormwater management programs, illicit discharge detection and elimination program, erosion and sediment control program, and alternative stormwater control initiatives necessary for meeting applicable WLAs, along with provision of the basis for the chosen approach, through demonstration with modeling of how each applicable WLA (and associated benchmarks and milestones) will be attained using the chosen projects, programs, and controls, by the date for ultimate attainment;

iii. Establish a quantitative assessment of the County's current pollutant loadings using the information collected during the source identification process required by Part IV.C of this Permit. This assessment of current loadings shall serve as the baseline from which the pollutant load reductions called for in the County's compliance schedule shall be calculated;

ii. iv. Provide detailed cost estimates for individual projects, programs, controls, and plan implementation and maintenance;

iii. v. Evaluate and track the implementation of restoration plans through monitoring or and modeling to document the progress toward meeting established benchmarks, deadlines, and stormwater WLAs; and

iv. vi. Develop an ongoing, iterative process that continuously implements structural and nonstructural restoration projects, program enhancements, new and additional programs, and alternative BMPs where EPA approved TMDL stormwater WLAs are not being met according to the benchmarks and deadlines established as part of the County's watershed assessments. *If data indicate failure to meet any applicable WLA, including failure to attain any interim milestone or benchmark, the County shall make appropriate adjustments to its programs and controls within (6) months to address these failures.*

OBJECTIVE CRITERIA FOR RESTORATION PLANS

The current permit requires compliance with state stormwater regulations. This is, of course, the standard, fall-back approach for the general application of standards under an NPDES permit. In this instance, however – given the exigencies and challenges of meeting the deadlines set under the Chesapeake Bay TMDL, the continuing impairment of many of the County's waters as evidenced by local TMDLs, and the continuing difficulties of meeting water quality standards in Prince George's County under Maryland law – it is neither a sufficient nor a reasonable approach, nor is it the only lawful one that may be taken. Perhaps most importantly, clear and objective performance standards are also desired by the County government, so that the permittee has specific criteria by which to evaluate proper practices and projects.

§402(p), 33 U.S.C. §1342(p) of the CWA mandates that municipal permits must require controls that reduce pollutant discharges to the maximum extent practicable. According to case law, the term "maximum extent practicable" imposes a duty to fulfill the statutory command to the extent that it is at all technologically feasible¹⁵ or physically possible.¹⁶ Furthermore, §402(p)(3)(B)(iii), 33 U.S.C. §1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers...shall require...such other provision as the Administrator...determines appropriate for the control of such pollutants." With the County's continuing problems meeting water quality standards, particularly in the Anacostia, together with the necessity of meeting WLAs, this permit must institute or impose *all* the controls and the *highest* levels of management and treatment that are *capable of being put into practice* – most decidedly not standard practices.¹⁷ Under such challenging circumstances, findings or convincing evidence that the simple application of the state's basic standards will produce the results necessary for meeting WLAs and water quality standards under this permit should be provided.¹⁸ No such supporting evidence, however, has been adduced by MDE.

Clearly, a set of performance standards which go above and beyond the regular state stormwater standards that might ordinarily apply in the County are required – and are fully permitted by law to be imposed. This was the judgment of the U.S. EPA when it promulgated the MS4 permit for the District of Columbia recently: the then-current stormwater management requirements under District regulation were not deemed strong enough to effect the sea-change in pollution loading reductions demanded by

¹⁵ *NC Wildlife Federation v. NC Division of Water Quality*, 5 E.H.R. 2055, 6 E.H.R. 0164, at 21 (Oct. 2006) (citing to several 9th Cir. Cases). [hereinafter *NC Wildlife*].

¹⁶ *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995).

¹⁷ *NC Wildlife*, at 21-22.

¹⁸ *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323 at 324, 343, 2002 WL 257698 (EPA) ("...there is nothing in the record, apart from the District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards. Without such record support, the Board cannot conclude that the approach selected by the Region is rational...").

the Chesapeake Bay and other TMDLs, and by the City's on-going failures to meet water quality standards.

This permit should impose a higher performance standard in Prince George's County, similar to that chosen for the District of Columbia's permit and similar to that used in numerous states and local jurisdictions around the county: i.e. the on-site retention and treatment of at least the full 90th percentile, 24-hour storm event from a 72-hour antecedent dry period (about 1 inch of treatment). This approach has many benefits, such as flexibility as it responds to "real time" changes in precipitation patterns over the next several years, its ability to accommodate any differences in precipitation across a permit area, and its alignment with the level of performance required for federal construction projects. This performance-based approach should be done primarily through Environmental Site Design (ESD) or "green infrastructure," as recommended in many EPA guidance documents.¹⁹

Environmental site design (ESD) represents the "MEP technology" for stormwater pollutant reduction in most circumstances. ESD is defined by the Maryland Stormwater Management Act of 2007 as "using small-scale stormwater management practices, nonstructural techniques, and better site planning to mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources."²⁰ ESD techniques include engineered technologies like green roofs and rain gardens, along with nonstructural techniques like conservation of natural landscapes and minimization of impervious surfaces. Maryland regulations state that stormwater management programs should "implement[] environmental site design to the maximum extent practicable and us[e] the appropriate structural best management practices only when necessary."²¹ To be consistent with this state mandate, the language below proposed below specifies that ESD must be used unless impracticable.

Proposed Language

Section IV.E.2.a

By the end of this permit term, Prince George's County shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area that has not already been restored to the MEP, *in addition to any impervious surface area which the County is under a previous obligation to restore. Such restoration efforts shall be designed to retain on-site at least 1 inch of stormwater from a 24-hour storm through evapotranspiration, infiltration, and/or reuse using Environmental Site Design retrofit techniques, unless the County demonstrates that:*

- (i) *Sole use of such techniques to meet the requirements of this section is impracticable and the County has exhausted all reasonable opportunities to use ESD to meet this requirement, and*
- (ii) *That other types of restoration techniques will, in combination with ESD techniques, be adequate to achieve all applicable benchmarks, milestones, and final deadlines for*

¹⁹ See, e.g., Protecting Water Quality with Green Infrastructure in EPA Water Permitting and Enforcement Programs, signed by Nancy Stoner, Acting Assistant Administrator, Office of Water, and Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance Assurance, April 20, 2011.

²⁰ Md. Code Ann., Env'r. § 4-201.1(b).

²¹ COMAR 26.17.02.01(A).

attainment of WLAs and protect or restore the physical and biological integrity of the County's streams and rivers.

MAINTENANCE OF STORMWATER MANAGEMENT PRACTICES

Some failing infrastructure is easy to see, such as potholes and rotting bridges. Failing stormwater systems are not. Stormwater facilities can become clogged by trash, debris, sediments, or other stormwater pollutants. The facilities themselves can develop structural cracks and leaks over time. Unmaintained stormwater management structures lose effectiveness and provide little to no water quality benefits.²² Stormwater management systems require regular maintenance, which varies depending on the facility but usually involves removing debris, dredging accumulated sediments, ensuring native plants are healthy, and removing invasive species. A facility that is neglected too long often requires time- and money-intensive repairs.

What's more, Maryland law requires that all county and municipal ordinances provide for inspection and maintenance of all completed ESD treatment practices and structural stormwater management measures.²³ Inspections must be done during the first year of operation and then at least once every three years thereafter.²⁴

Proposed Language

In a new section titled "Maintenance of Stormwater Management Practices" – this can replace Section IV.D.1.d (regarding inspections):

d. Maintenance of Stormwater Management Practices

i. County Owned and Operated Practices

Within 18 months of the effective date of this permit, the County shall develop and implement a maintenance plan for all County-owned and operated stormwater management practices. This plan shall be designed to ensure that these practices are properly maintained so that they operate as designed, are safe, and are free from trash. The plan shall provide for the inspection of all practices at least once every three years and shall identify the means by which the County will keep the practices properly maintained. The County shall submit documentation in its annual reports identifying the practices inspected, the number of maintenance inspections performed, the County's inspection schedules, the actions used to ensure compliance, and any other relevant information.

ii. Non-County Owned and Operated Practices

In conjunction with updating of relevant ordinances and policies, as required by COMAR 26.17.02, the County shall develop accountability mechanisms to ensure maintenance of stormwater control measures on non-County property. Those mechanisms may include combinations of deed restrictions,

²² See, e.g., Watershed Management Institute, Inc., US EPA, *Operation, Maintenance, and Management of Stormwater Management Systems*, August 1997.

²³ COMAR 26.17.02.11

²⁴ *Id.*

ordinances, maintenance agreements, or other policies deemed appropriate by the permittee. The County must also include a long-term maintenance verification process, which may include County inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the permittee, and/or other mechanisms.

4. The Permit must include a monitoring and assessment program which is capable of providing accurate, timely, representative, and statistically significant information on water quality countywide.

The only way that the County and MDE can determine whether, or the extent to which, this MS4 permit for the County is working and accomplishing the difficult task of reducing stormwater pollution to the County's streams and rivers, is to carefully and effectively monitor various streams and outfalls for those impacts. This is especially true since the permit contemplates an iterative or adaptive process that regularly reviews the performance of restoration activities and management practices and makes adjustments as necessary to better accomplish the objective of meeting waste load allocations and attaining water quality standards. The monitoring and assessment program presented in this permit towards that end falls woefully short of providing such utility.

"Assessment of controls" is noted in the permit as "critical for determining the effectiveness of the NPDES stormwater management program and progress toward improving water quality."²⁵ This is very true. However, under "Watershed Restoration Assessment," the permit contemplates continuation of monitoring of just *one* small watershed for this purpose, the Bear Branch watershed. More particularly, just "[o]ne outfall and associated in-stream station...shall be monitored."²⁶ At the same time, under "Stormwater Management Assessment," in order to "determin[e] the effectiveness of stormwater management and stream restoration practices for stream channel protection" – again, County-wide in a county of 288,000 acres with thousands of outfalls – just *one* watershed would be monitored, in this case for physical parameters of stream geometry and profile.²⁷

Despite the assertion of MDE that the combination of data from these one or two sites, combined with equally small sets of data from other counties, is sufficient to develop an overall profile of how BMPs are generally working statewide, it is not the "general" but the "specific," in this specific county, that this permit is about. The minimal proposed monitoring is scientifically insufficient to support a complex permit, and to help determine the effectiveness of BMP and retrofit regimes over time – as is crucial for adaptive management. It is also contrary to federal guidance²⁸ and certain federal laws.²⁹ An effective monitoring and assessment program is essential.

²⁵ Maryland Department of the Environment, *National Pollutant Discharge Elimination System [Tentative] Municipal Separate Storm Sewer Discharge Permit* No. 11-DP-3314 MD0068284 (2013) Part IV.F. [hereinafter County Permit].

²⁶ County Permit at Part IV.F.1.

²⁷ County Permit at Part IV.F.2.

²⁸ *E.g.* U.S. Environmental Protection Agency Region 3, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (July 2010), at IV(A)(8), which reads: "Pursuant to 40 C.F.R. §122.48(i), Phase I permits must include relevant, interpretable and statistically significant evaluation and monitoring provisions."

²⁹ *See* 40 C.F.R. §122.44(i), concerning monitoring requirements in all permits as applicable. *See also*, 40 C.F.R. §122.48(b), which specifies that permits shall contain monitoring, "including type, intervals, and frequency sufficient to yield data which are representative of the monitoring activity including, when appropriate, continuous monitoring."

Conclusion

The Chesapeake Bay TMDL asserts, quite appropriately, that NPDES permits (such as the County's tentative MS4 permit under consideration here) "provide the reasonable assurance that the [WLAs] in the TMDL will be achieved."³⁰ As noted previously, such permits form the basic Clean Water Act infrastructure connecting the TMDL's science with the State's Watershed Implementation Plans, and giving the latter the implementation platform necessary for success.

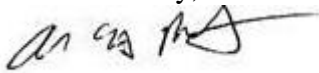
CBF appreciates the Department's careful consideration of the comments and recommendations above, and believes that the success in Prince George's County depends upon the incorporation of the key principles:

1. A quantification of current baseline loadings;
2. A requirement for the County to finally and in a timely manner comply with the state Stormwater Management Act of 2007 by updating its ordinances and codes;
3. A reasonable compliance schedule, with interim numeric benchmarks, for attaining WLAs and measuring progress to be used as enforceable parts of the permit; and
4. A monitoring and assessment program that is capable of returning useful data on water quality, County-wide, as well as on the effects of stormwater management practices and controls under this permit, as required by regulation.

The tentative draft Prince George's County permit under consideration is notably better than previous permit cycles, but as set out above, it does not yet meet the obligations of the law, nor does it meet the administrative law standard of being reasonable rather than arbitrary and capricious in the respects enumerated. The recommended changes and comments are necessary to meet the challenge of the Chesapeake Bay TMDL and the many local TMDLs. We sincerely hope the Department will make the appropriate changes to accomplish these ends, and we pledge to assist in any way we can.

Again, thank you for the opportunity to present these comments.

Yours sincerely,



Alison Prost
Maryland Executive Director

cc: Lee R. Epstein, CBF
Jeff Corbin, U.S. EPA
David B. McGuigan, U.S. EPA

³⁰ U.S. Environmental Protection Agency, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment*, December 29, 2010.