



August 13, 2012

Dr. Robert Summers, Secretary
Mr. Jay Sakai, Director, Water Management Administration
Maryland Department of the Environment
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Dear Secretary Summers and Mr. Sakai:

The undersigned organizations are members of the Stormwater Workgroup of the Choose Clean Water Coalition, and we urge you to accept the following comments on the tentative Baltimore City municipal separate storm sewer system (MS4) permit, which will likely serve as a template for the Phase I jurisdictions elsewhere in Maryland.

In Maryland, stormwater contributes 22.4 percent of phosphorus, 18.2 percent of nitrogen, and 39.4 percent of sediment loads to the Bay.¹ Consequently, as MDE notes in the “Baltimore City permit, “Maryland’s NPDES stormwater 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.”² However, our groups believe that significant strengthening changes are needed before this draft can ensure that Maryland meets its Chesapeake Bay TMDL obligations and otherwise comply with the Clean Water Act’s requirements for MS4 permits.

- *The Permit Fails to Ensure Compliance with Water Quality Standards and Total Maximum Daily Loads (TMDLs)*

The Baltimore City permit fails to comply with the Clean Water Act requirement that all NPDES permits must contain limitations necessary to ensure that water quality standards will be met (a requirement also imposed by Maryland regulations).³ In fact, the permit specifically excuses the permittee jurisdictions from complying with water quality standards through its “safe harbor” provision, which states that compliance with the permit’s conditions constitutes “adequate progress” toward compliance with water quality standards.⁴

¹ <http://www.baystat.maryland.gov/sources2.html>.

² Permit Part V.A. Because we consider the draft Baltimore City MS4 permit to likely be the most current iteration of a “template,” all references to permit language will refer to specific provisions in the Baltimore City permit.

³ 33 U.S.C. § 1311(b)(1)(C); 44 C.F.R. § 133.4(d); COMAR § 26.08.04.02(A)(1)(b); *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, NPDES Appeal Nos. 00-14 & 01-09 (2002).

⁴ Permit Part VI.A.

Provisions such as this one may be acceptable in certain cases when a permit's conditions set out a clear and enforceable path toward water quality standards compliance by a certain future date, such as through a compliance schedule or implementation plan. However, this permit lacks any such compliance schedule or plan. The permit does not require the permittee to meet its TMDL wasteload allocations (WLAs) either immediately or by any future date – only to “show progress” toward meeting WLAs. This vague and unenforceable standard fails to satisfy Clean Water Act requirements for permit terms that assure compliance with TMDL WLAs and other provisions. While the Baltimore City permit does require the permittee to include certain schedules in their “restoration plans,” this provision could potentially be interpreted to require schedules for the implementation of projects and programs, not for attainment of WLAs or interim pollution reduction targets.⁵ Finally, the permit makes no provision for the attainment of standards in impaired water bodies that lack TMDLs.

To comply with relevant provisions of the Clean Water Act, the Baltimore City permit must be revised to make clear that discharges from the permittee's MS4 that cause or contribute to the violation of water quality standards are prohibited, and to require that the MS4 must attain wasteload allocations by a date certain, in compliance with TMDL implementation plans that permittees will develop and MDE will approve. Such plans should contain enforceable interim milestones so that the permittee is held accountable for staying on track.

- *The Permit and Associated Guidance Documents Allow Permittees to Implement Impervious Surface Area “Restoration” Techniques That Are Ineffective*

This permit requires the permittee to implement “restoration efforts” for twenty percent of the jurisdiction's impervious surface area, consistent with the June 2011 MDE guidance document “Accounting for Stormwater Wasteload Allocations and Impervious Areas Treated.”⁶ However, this guidance document provides restoration credit for the implementation of practices – such as extended detention – that have been shown to be ineffective or only marginally effective at reducing stormwater volume and pollutants. This approach will not lead to attainment of water quality goals, either in local water bodies or the Chesapeake Bay.

We urge MDE to delete this reference to the guidance from the Baltimore City permit. Instead, MDE should require MS4s to use environmental site design (“ESD”) practices that reduce stormwater runoff volume to meet their restoration obligations, in accordance with the recommendations of the National Research Council and EPA Region III.⁷ Such a requirement will ensure that MS4 jurisdictions invest in restoration practices that work.

- *The Permit's Monitoring Requirements Are Insufficient to Track Progress*

While the Baltimore City permit generally requires the MS4s to “use chemical, biological, and physical monitoring to assess watershed restoration efforts, document BMP effectiveness, or calibrate water

⁵ Permit Part III.E.2.c.i.

⁶ Permit Part III.E.2.b.

⁷ EPA Region III, “Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Watershed,” http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf at 3 (July 2010).

quality models for showing progress toward meeting any applicable WLAs,” its specific monitoring requirements directs the MS4s to comprehensively monitor *only one* water body (and, for that water body, only at *one* outfall and associated in-stream station).⁸ This requirement is completely inadequate to track the performance of the permittee’s restoration programs and its consistent attainment of water quality standards and TMDL WLAs.

Clean Water Act regulations require that Phase I permits include relevant, interpretable, and statistically significant evaluation and monitoring provisions.⁹ Consequently, the subject permit should require routine chemical (for all relevant parameters), biological, and flow monitoring of a statistically significant sample of water bodies and routine monitoring of all water bodies subject to TMDLs sufficient to assure continual attainment of WLAs and interim benchmarks and milestones.

- *The Permit as a Whole Lacks Objective, Enforceable Standards*

Throughout the permit, requirements are vague and lack objective standards that MDE can enforce. For example, the permit directs the permittee to use “appropriate” enforcement measures for eliminating illicit discharges without providing criteria for what “appropriate” measures would be;¹⁰ it directs the permittee to “reduc[e]” the use of pesticides, herbicides, fertilizers, and deicing materials without specifying by how much or by which approaches or how to evaluate achievement of this goal.¹¹ It further lacks any numeric requirements similar to the green infrastructure requirements in the District of Columbia’s MS4 permit, which are necessary to ensure objective progress toward water quality goals. MDE should improve the permit’s enforceability by incorporating such numeric requirements where possible and by including specific criteria for the MS4’s management programs.

Our groups urge MDE to revise the Baltimore City permit in order to comply with all applicable legal requirements. Doing so will help ensure that all Phase I MS4 jurisdictions in Maryland do their part to clean up the Chesapeake Bay and other pollution-burdened local water bodies in the Bay watershed.

Thank you for the consideration of our views. If you have any questions, please do not hesitate to contact Peter J. Marx, the Choose Clean Water Coalition’s Federal Affairs Director, at 443-759-3404 or Peter@ChooseCleanWater.org.

Sincerely,

American Rivers
Anacostia Watershed Society
Audubon Naturalist Society
Blue Water Baltimore
Chesapeake Bay Foundation

⁸ Permit Parts F and F.1.

⁹ 40 C.F.R. § 122.44(i).

¹⁰ Permit Part III.D.3.d.

¹¹ Permit Part III.D.5.b.

Citizens for Pennsylvania's Future (PennFuture)
Earth Forum of Howard County
Friends of Lower Beaverdam Creek
Little Falls Watershed Alliance
Maryland Native Plant Society
Mattawoman Watershed Society
National Wildlife Federation, Mid-Atlantic Regional Center
Natural Resources Defense Council
Queen Anne's Conservation Association
Savage River Watershed Association
Sierra Club – Maryland Chapter
Virginia Conservation Network