Charles County Government
DEPARTMENT OF PLANNING & GROWTH MANAGEMENT

By: Electronic Mail, without Appendices
FedEx Express Services, with Appendices

September 24, 2014

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

Re: Tentative Determination to Reissue Charles County's MS4 Permit

Dear Mr. Clevenger:

On behalf of Charles County ("County"), please find enclosed a comment package pursuant to the Maryland Department of Environment's Tentative Determination to Reissue Charles County's MS4 Permit. As previously conveyed through multiple sets of comments, the County continues to have concerns regarding certain terms of the permit and we reiterate those concerns with this submittal.

We appreciate MDE's willingness to consider these comments as you move forward with the reissuance process. Please feel free to call me if you have any questions regarding this correspondence at (301) 645-0693 or e-mail aluottop@charlescountymd.gov.

Sincerely,

Peter Aluotto, Director
Department of Planning & Growth Management

Enclosures:

Comment Document
Appendices:

A. Charles County 2013 Annual NPDES MS4 Report
B. MDE's Letter on Charles County 2013 Annual NPDES MS4 Report
C. Watershed Protection and Restoration Fund Legislation and Compliance Report
D. Correspondence Between MDE and Charles County Government
E. Charles County Comments on Previous Phase I MS4 Tentative Determinations
F. Court Briefs
G. Analysis of Maximum Extent Practicable
H. Charles County NPDES Program Action Plan
I. Maximum Extent Practicable NPDES MS4 Permit
J. Maximum Extent Practicable NPDES MS4 Fact Sheet
K. Historical Correspondence with MDE
L. Nutrient Credit Trading for the Chesapeake Bay Report

Copy (By Electronic Mail) to:
Mr. Raymond Bahr, MDE
Steven Ball, Charles County
Charles Rice, Charles County
Karen Wiggen, Charles County
Matthew Clagett, Charles County
Lisa M. Ochsenhirt, AquaLaw PLC

Tentative Determination to Reissue Charles County NPDES MS4 Permit

Comments to Maryland Department of the Environment from Charles County Government

9/26/2014

[These comments are submitted for the Public Record on the Maryland Department of Environment Tentative Determination to reissue the Charles County NPDES Municipal Separate Storm Sewer System (MS4) Permit.]

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Appendices

I. INTRODUCTION

Charles County (County) appreciates the opportunity to comment on the Maryland Department of the Environment's (MDE's or Department's) Tentative Determination to issue the County's National Pollutant Discharge Elimination System (NPDES) permit (Draft Permit) for discharges from our municipal separate storm sewer system (MS4). The County thanks the Department in advance for its careful consideration of our concerns and recommendations.

II. COUNTY'S COMMITMENT TO THE ENVIRONMENT AND THE CHESAPEAKE BAY

The County is proud of the work we have done on behalf of the environment and the Chesapeake Bay. Since our last permit was issued in 2002, we have accomplished the following:

- Establishment of $35.7 million capital improvement program to construct stormwater management facilities for existing untreated impervious surface
- BMP Effectiveness Monitoring Study to evaluate the *2000 Maryland Stormwater Design Manual*
- MDE delegation of the Erosion and Sediment Control Program to the County

The accomplishments above are in addition to efforts taken since our permit was first issued in 1997. The following are just a few highlights of our efforts over the last decade and a half:[1]

- Establishment of illicit discharge code and procedure
- GIS mapping of stormwater infrastructure
- Completion of *Mattawoman Creek Nutrient and Sediment Dynamics Report (2000)*, by Smithsonian Environmental Research Center, and *Summary and Interpretation of Discrete and Continuous Water-Quality Monitoring Data, Mattawoman Creek, Charles County, Maryland, 2000-11 (2012)*, by U.S. Department of the Interior and U.S. Geological Survey. These can be found at the following URLs, respectively:

[1] Additional information about the County's program can be found at: http://www.charlescountymd.gov/pgm/planning/npdes-municipal-separate-storm-sewer-system-permit

http://www.charlescountymd.gov/sites/default/files/pgm/planning/mattawoman_sedimentreport.pdf and http://pubs.er.usgs.gov/publication/sir20125265

The County has documented our progress each year with our annual report, and MDE has consistently found our program to be in compliance with the terms of our permit.[2]

In addition to making improvements in our programs, on June 18, 2013, the Charles County Commissioners voted to adopt Bill 2013-11, establishing a separate stormwater remediation fee billed to all improved properties. For Fiscal Year 2014 (FY14), the flat rate is $43 per year. This is a three-fold increase of the $14 stormwater service fee billed in Fiscal Year 2013. As of July 1, 2014, the County has collected approximately $2.155 million from 48,919 properties. The County will, subject to approval by the Commissioners, increase the fee each year over the five-year permit term in order to implement the new and expanded BMPs called for by the permit.[3] A copy of the enabling legislation, along with related information regarding our fund and fee, including a copy of our 2014 compliance report, is attached as Appendix C. Setting the fee at $43 was a significant step, especially in light of the economic challenges our citizens have faced over the past several years. This is clear evidence that the County is committed to improving water quality and addressing TMDLs.

Our environmental commitment to the Chesapeake Bay extends beyond the MS4. The County owns and operates two major wastewater treatment plants (WWTPs), including Mattawoman WWTP and Swan Point WWTP. The County upgraded the Mattawoman and Swan Point WWTPs to enhanced nutrient removal, or ENR, treatment levels in 2007. Thus far, the County has invested $17.724 million to upgrade these facilities including repayment of a $13.915 million State Water Quality Loan, and has received $10 million in State funding. By completing the WWTP upgrades, the County has reduced the annual discharge of nitrogen flowing to the Chesapeake Bay by 331,000 pounds.[4]

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[2] A copy of the County's 2013 Annual Report is attached as Appendix A, and can be found at http://www.charlescountymd.gov/sites/default/files/pgm/planning/npdes_annlrpt_2013.pdf. MDE's letter accepting the 2013 Annual Report and commending the County for its compliance is attached as Appendix B.

[3] However, *see infra* note 39 and its accompanying text.

[4] Pounds of nitrogen reduced is from BayStat Chesapeake Vol 1 No 6, March 2011, which can be found at: http://www.mde.maryland.gov/programs/water/qualityfinancing/documents/waste%20water%20treatments%20march%202011.pdf.

Since the initiation of the State's Bay Restoration Fund (BRF) the County received $216,000 for operation and maintenance of the Mattawoman WWTP and $1.785 million for upgrading on-site septic systems to remove nitrogen. More importantly, the County's citizens have paid $17.743 million into the BRF since 2004.[5] For septics and WWTPs, this is an 11% return on the amount paid.

The County also implements land use programs that target protecting water quality. These include the Chesapeake Bay Critical Area, Forest Conservation, Agricultural Preservation, Resource Protection, and Transfer Development Rights programs that along with state, federal, and private conservation have preserved over 92,057 acres or 31% of the county's land area. This is a significant stride towards the county's 50% overall open space protection goal.

On a daily basis, Charles County's operational programs divert trash, debris and other pollutants from waterways. Charles County has far surpassed the State's 20% required recycling rate by achieving a 49% recycling rate along with a 4% source reduction credit, equaling a total waste diversion rate of 53%. In Fiscal Year 2014, litter crews and volunteers picked up 320 tons of trash, and the street sweeping and inlet cleaning programs removed 287.8 tons of trash and debris. Since 2009, the County has been cleaning its fleet vehicles at its own premiere "green" wash pad that recycles 100% of the wash water, and uses an 'Electro Coagulation Pulse System' to remove any emulsified oils/grease, suspended solids and heavy metals, including chromium, zinc, lead and copper. All water discharged goes to the waste water treatment plant.

In conclusion, the County has dedicated itself to environmental protection and restoration for many years.[6] We take our responsibilities seriously, and our goal is full compliance with the MS4 permit during the next five-year term.

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[5] The amount paid is from the report titled, "Comptroller of Maryland, Revenue Administration Division, Bay Restoration Fee – By County Program to Date Through April 30, 2014." http://www.mde.state.md.us/programs/Water/BayRestorationFund/Documents/09%20BRF%20Report%2004-30-2014%20Final%20TY2014%20(1)%20(1).pdf

[6] Indeed, the County's $188 Million annual tourism economy depends largely on the health of the Bay to support national bass fishing tournaments. See the report titled, "*The Economic Impact of Tourism in Maryland, Tourism Satellite Account Calendar Year 2012*," by Tourism Economics An Oxford Economics Company, https://rural.maryland.gov/wp-content/uploads/sites/4/2014/03/Upper-Shore-Visitor-Economic-Impact-2012-report-FINAL.pdf

III. PERMIT SCOPE AND PROCESS

The County is willing to accept and move forward with the Draft Permit if it (1) adequately incorporates the proposed revisions set forth in these comments and in the attached Maximum Extent Practicable Permit (MEP Permit) (explained below) and (2) is not otherwise altered after the public comment period without our concurrence.

As proposed, the Draft Permit is a significant step-up from current requirements. As the County explains in its attached Final Analysis of Maximum Extent Practicable for the Draft NPDES MS4 Permit Requirements (MEP Analysis) (explained below), a number of these terms are not achievable either because of scheduling or cost or because they are impossible to accomplish even with unlimited funding and time.

With regard to cost, there are limits to how much the County can increase the stormwater fee each year without causing rate shock for our families and businesses.

With regard to scheduling, the County's staff is willing to ramp-up implementation of our program. However, some aspects of scheduling, like obtaining State and federal permits for installation of BMPs, are beyond our control.

Likewise, parts of the Draft Permit cannot be accomplished even with an unlimited budget and schedule. Attempting to develop a program that sets a goal of "elimination" of litter and floatables is an example of a permit requirement that cannot be achieved regardless of our considerable efforts.

Given the amount of work and the level of cost the County is facing, the Draft Permit is simply not achievable as written.[7] Further, based upon the experiences of other MS4s who have recently gone through a permit reissuance, we are concerned that third parties may seek in their comments to impose even more stringent and more expensive permit requirements.[8] The County would find any such recommendations to be unacceptable given the overall scope and level of burden associated with the Draft Permit.

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[7] Since Charles County's first draft permit was received in September 2010, the County has provided comments to MDE on each version. These are included as Appendix D.

[8] The County submitted comments in every Phase I MS4 permit reissuance since 2012. We have repeatedly raised concerns regarding MDE's approach to issuing Phase I permits using a "template"

For these reasons, the County requests that MDE not add any additional requirements to the Draft Permit, either on its own or in response to public comments. The County specifically reserves the right to challenge any or all requirements of the final permit if they exceed MDE's statutory authority, are not required by law, or conflict with state or federal law or applicable regulations. The County also reserves the right to request appropriate modifications to the permit if the Department changes permit terms in future MS4 permits due to litigation or as the County gains experience with the permit over time.

IV. MAXIMUM EXTENT PRACTICABLE (MEP) COMPLIANCE STANDARD

MEP is the legal compliance standard for MS4s.[9] The County supports the MEP references in Parts III, IV.D, IV.E, and VII of the Draft Permit, as they appropriately reflect this standard.[10]

The Clean Water Act (CWA) establishes MEP as the legal compliance standard for MS4 permits, and requires that they "include controls to reduce the discharge of pollutants to the ***maximum extent practicable***, including management practices, control techniques, and system, design, and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants" (emphasis added).[11] MS4 permits should not include any reference to strict compliance with WQS or TMDL WLAs (which are water quality standards in a different form) unless they are qualified with appropriate MEP language.

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and without consideration of individual community goals and capabilities. A copy of each set of comments is attached as Appendix E hereto.

[9] The County objects to any permit requirement that is beyond that which is practicable for the County and concurs with and adopts as its own the general position of the Maryland Association of Counties ("MACo") and the Maryland Municipal Stormwater Association ("MAMSA") as set forth in their amicus brief, attached as Appendix F hereto, filed in *Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al.*, No. 02199 (Md. Ct. Spec. App., September Term, 2013).

[10] For consistency, the County suggests that the text at Part VII.A (Discharge Prohibitions and Receiving Water Limitations) include a cross-reference to Part III.

[11] 33 U.S.C. § 1342(p)(3)(B)(iii).

In 1987, Congress deliberately amended the CWA to change the standard for municipal stormwater dischargers to one focused on "practicability." Before the 1987 amendments to the CWA, municipal and industrial stormwater dischargers were both subject to strict compliance with water quality standards. In amending the statute in 1987, "Congress retained the existing, stricter controls for industrial storm water dischargers[12] but prescribed new controls for municipal storm water discharge," i.e., the less-stringent "maximum extent practicable standard."[13]

Congress' 1987 decision to adopt MEP for MS4 permits appropriately recognized the different abilities of a traditional point source (wastewater treatment plants, manufacturing facilities) versus an MS4 to treat pollutants before they are discharged from the system.

MS4s manage precipitation, which fluctuates on an hourly, daily, monthly, and yearly basis and on a waterbody-to-waterbody basis. Additionally, many MS4s have hundreds of outfalls associated with the system. The MEP compliance standard acknowledges these inherent challenges relating to "[t]he magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow."[14] EPA structured its stormwater rules to focus on installing best management practices (BMPs) to the MEP, with BMPs used in lieu of effluent limitations because compliance with end-of-pipe numeric limits is infeasible.

Several courts have affirmed the applicability of the MEP standard to MS4 permits and the lack of any legal mandate to require strict compliance with water quality standards or total maximum daily load ("TMDL") wasteload allocations (which are based on water quality standards).[15]

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[12] Unlike MS4 discharges, industrial discharges must "meet all applicable provisions of . . . section 1311," including the requirement that permits for these discharges achieve water quality standards compliance. 33 U.S.C. §§ 1311(b)(1)(C), 1342(p)(3)(A).

[13] *Defenders of Wildlife*, 191 F.3d 1159 at 1165 (9th Cir. 1999) (*quoting Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992)).

[14] Phase I Rule, 55 Fed. Reg. 47,990, 48,038 (Nov. 16, 1990).

[15] *See NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992); *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); *Tualatin Riverkeepers v. Oregon Department of Environmental Quality*, 230 P.3d 559, 564 n.10 (2010).

The County submits that there is no legal requirement that an MS4 permit include ***any*** references to water quality standards (WQS) or TMDL wasteload allocations (WLAs). However, we can support the language in Part III that equates implementation of Parts IV through VII of the permit with adequate progress towards WQS compliance as a reasonable compromise that has been used elsewhere in Region III (for example, in the 2012 MS4 permit issued to the District of Columbia).[16]

V. DESCRIPTION OF MEP ANALYSIS

Background information on EPA's view of MEP, as well as information on the development of our own individual MEP Analysis is provided below. However, MDE should reference the MEP Analysis and MEP Permit, which includes the necessary edits to address the MEP Analysis, for additional details on how to structure an achievable MS4 permit for the County.

A. To Allow for Local Permitting Flexibility, EPA Has Not Defined MEP

EPA views MEP as highly flexible and dependent on individual community factors, and has steadfastly refused to define MEP. In its 1999 Phase II Rule, commenters "argued that…EPA needs to further clarify the MEP standards by providing a regulatory definition that includes recognition of cost considerations and technical feasibility."[17] EPA rejected

[16] MDE has included this language in the Phase I permit reissuances for the City of Baltimore, Baltimore County, Prince George's County, and Anne Arundel County. See for example, Part III of the Anne Arundel MS4 Permit (effective date Feb. 12, 2014): "Compliance with all the conditions contained in PARTs IV through VII of this permit shall constitute compliance with §402(p)(3)(B)(iii) of the CWA and adequate progress toward compliance with Maryland's receiving water quality standards and any EPA approved stormwater WLAs for this permit term." Furthermore, at MDE's public hearing on the Draft Permit, a suggestion was made by a member of the public that the monitoring requirements should be expanded. The County supports the monitoring requirements in the Draft Permit as consistent with the MEP standard. As we have previously discussed, each community is unique. Monitoring programs should be tailored to local circumstances and MDE should reject any comments to the contrary.

[17] Phase II Rule, 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999). EPA has clearly stated that MEP applies to both Phase I and Phase II MS4s.

this request: "EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting."[18]

EPA understood in 1999 that not all communities have identical capacities to reduce pollutants from stormwater discharges, and even directed small MS4s to "determine [their own] appropriate BMPs" based on the six minimum control measures in the Phase II rule. EPA also listed a number of factors that can be considered when determining MEP for a particular locality including: MS4 size; climate; implementation schedules; current ability to finance the program; beneficial uses of receiving water; hydrology; geology; and capacity to perform operation and maintenance.

When it issues an individual MS4 permit, therefore, MDE should develop permit terms/BMPs that are consistent with the federal regulatory requirements for Phase I MS4s, but should tailor the specific requirements to match the ability of each community to reduce pollutants to the MEP.[19]

The County is deeply concerned that the extraordinary scope of work in MDE's proposed permit is technically and physically impossible to accomplish in five years. This is confirmed by the fact that even Montgomery County, whose permit was issued in 2010, is finding it impossible to meet the 20% restoration requirement. The County wants to be clear. We hold Montgomery County's program in high regard. It has what is likely the most well-funded stormwater pollution reduction effort of any county in the state, and has done nothing but work hard to improve water quality for years. Yet, Montgomery County has publicly stated that it will likely not meet the ambitious 20 percent impervious area restoration requirement by the February 2015 permit deadline.[20]

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[18] *Id.*

[19] *See supra* note 8.

[20] *See* FY15 Operating Budget: Department of Environmental Protection 12 & Att. 33 (May 9, 2014). Available at: http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=100&clip_id=7232&meta_id=64905 (projecting that only "3,634 acres of impervious out of the 3,976 impervious acres restoration goal" will be completed, "***under construction***," or "***in design***" through the FY2015, which ends June 30, 2015) (emphasis added).

B. Development of the County's MEP Analysis and Permit

Based upon the factors provided in the Phase II Rule, the County developed an MEP Analysis for MDE's review prior to issuance of the Tentative Determination on the MS4 permit.[21]

First, the County identified new or expanded parts of the Draft Permit that exceed MEP because of impossibility (cannot be done no matter the budget or schedule), implementation schedules (cannot be accomplished in the timeframe provided), capacity to perform Operation and Maintenance (cannot be done due to County's large rural area), and cost (would require more than a maximum annual fee increase of 15%).[22]

Once the County analyzed the Draft Permit line-by-line for achievability using the MEP factors, the County redlined the Draft Permit in order to create its MEP Permit. In some cases, the County revised an MDE permit requirement to make it achievable based upon a reasonable level of funding and under reasonable scheduling requirements. In other cases, the County deleted the permit term entirely.

The County based all permit revisions on a set of carefully considered inputs and assumptions regarding future costs, etc. For example, with regard to the restoration requirement, the County estimates an average cost per acre for restoration at $59,931.[23] Based upon this estimate, we anticipate it would cost $34 million for the five year permit term to meet the 20% restoration goal in the Development District alone. This level of cost would likely drive an annual 15% increase in the stormwater fee for the foreseeable future, an extraordinary increase based on the history of fee increases (for example, for

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[21] The County submitted a *Preliminary Analysis of Maximum Extent Practicable for the Draft NPDES MS4 Permit Requirements* on June 9, 2014. The preliminary analysis was based upon a draft permit dated June 22, 2012. Now that MDE has issued the Draft Permit, the County has revised and finalized its MEP Analysis, which is attached as Appendix G.

[22] Further explanation of the 15% threshold is in the MEP Analysis, Part IV.

[23] This estimate is from the 2014 NPDES Program Action Plan, which is attached hereto, as Appendix H. The County's Capital Services Division estimated the cost per acre for various projects in an effort to give the County Commissioners some idea of what restoration under the next permit might cost. By using this cost, the County is not binding the Commission or any future Commissions to undertaking a particular approach. The County's $59,931 estimate is a conservative estimate. It is possible that once the County begins work on actual prioritized restoration projects the cost will be more on a per acre basis than we anticipated.

sewer and water usage) in the County. This is the basis for our decision that restoring 20% county-wide, which would cost $42 million over the five year permit term, exceeds MEP.[24]

We reiterate that the County is willing to expand our current program in smart ways that will improve the quality of life for our citizens. However, this must be tempered by the reality that the County is limited by financial and operational realities. These realities are reflected in the MEP Analysis and MEP Permit. We request that the Department adopt our MEP Analysis and issue our next permit under the terms provided in the MEP Permit.

VI. DETAILED COMMENTS AND REVISION REQUESTS (DRAFT PERMIT AND FACT SHEET)

The County's MEP Analysis and MEP Permit provide our basis for any recommended changes in individual permit requirements. However, additional support, based upon our review of federal and state legal requirements, is provided below. The County submits these legal arguments for the purpose of complying with COMAR 26.08.04.01-3 should a Circuit Court appeal be necessary.

A. MDE Has Incorrectly Defined the Regulated Area Covered by the Permit

1. Federal Law Regulates the MS4, Not the Jurisdiction

Part I.B of the Draft Permit correctly defines the Permit Area as covering "all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Charles County, Maryland." Part IV.D correctly states that the management programs "shall be implemented in areas served by Charles County's MS4."

In contrast, Part IV.E.2.a of the Draft Permit imposes restoration requirements across the entire jurisdiction consistent with MDE's *Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits* (hereinafter, *Stormwater Accounting Guidance*). Also, in the Draft Fact Sheet, MDE explains "Since the inception of the NPDES municipal stormwater program, MDE has considered permit coverage to be jurisdiction-wide." MDE justifies its

[24] *See* MEP Analysis, Part IV.

position on the Phase I Rule, the application of several state programs (for example, erosion and sediment (E&S) control) jurisdiction-wide, and the fact that most jurisdictions have a road system that extends jurisdiction-wide and "generates stormwater discharges."[25]

The County objects to expanding the permit beyond areas regulated by federal law.[26] There is no basis for doing so under federal law, and MDE has provided no citation to any section of the Maryland Code that authorizes it to expand its regulatory authority to encompass the entire County.

EPA defines MS4 at 40 C.F.R. 122.26(b)(8) to include "…a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body…having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes…; (ii) Designed or used for collecting or conveying storm water[.]"

When it wrote this regulation, EPA clearly intended to focus federal regulations on stormwater facilities owned by a municipal entity. In 1999, when it issued the Phase II Rule, EPA made this even clearer, and defined the boundaries of the regulated area to include ***only*** those areas with stormwater facilities. EPA designated "all small MS4s located in an urbanized area…as 'regulated' MS4s provided that they were not previously designated…" In response to questions regarding which systems would be covered, EPA explained:

> EPA has revised §122.32(a) to clarify that discharges are regulated under today's rule if they are from a small MS4 that is in an urbanized area and has

[25] Draft Fact Sheet at p. 3. The MEP Permit and MEP Fact sheet are attached as Appendix I and J, respectively.

[26] The County may agree to extend the regulated area of our permit beyond the Development District to areas of the County served by our MS4, for purposes of all the permit conditions except the restoration requirement which would remain in the Development District. This is a significant step for our program. As MDE explains in the Draft Fact Sheet, the County is the only Phase I MS4 with coverage limited to a Development District. Because our MS4 permit has historically not covered the entire County, we will need at least two years to map the stormwater features in these areas. Our recommendation on how to best address this significant expansion is explained below in reference to the restoration requirement.

> not received a waiver or they are designated by the permitting authority. Today's rule does not regulate the county, city, or town. Today's rule regulates the MS4. Therefore even though a county may be listed in Appendix 6, if that county does not own or operate the municipal storm sewer systems, the county does not have to submit an application or develop a storm water management program.[27]

EPA's position was, and is, consistent with the CWA's regulation of point source discharges, which are defined by federal law to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[28]

The County has areas with few or no stormwater facilities. It is legally inappropriate to apply federal MS4 requirements to these areas simply because there are state law requirements that apply across the entire jurisdiction. In addition, there could be very practical negative consequences should MDE decide to issue the County a final permit with coverage across the entire jurisdiction including: (i) subjecting the County to possible federal enforcement and citizens' suits for alleged permit violations in areas that have no stormwater facilities and (ii) exponentially increasing the cost of complying with the restoration requirement.[29]

2. There is No State Law Authority for Regulating the Entire Jurisdiction

As noted above, MDE has no state law authority to apply federal permit terms to the entire jurisdiction. The Maryland General Assembly has given MDE the authority to "adopt

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[27] Phase II Rule at 68,750. *See also* Phase I Rule at 48,040 ("There is no indication in the language of the CWA or the legislative history that Congress intended that the scope of "municipality" and the scope of "municipal separate storm sewer system" to be identical, particularly since the latter term is not defined in the statute.") and at p. 48041 ("EPA recognizes that some of the counties addressed by today's rule have, in addition to areas with high unincorporated urbanized populations, areas that are essentially rural or uninhabited and may not be the subject of planned development. While permits issued for these municipal systems will cover municipal system discharges in unincorporated portions of the county, it is in the intent of EPA that management plans and other components of the programs focus on the urbanized and developing areas of the county. Undeveloped lands of the county are not expected to have many, if any, municipal separate storm sewers.")

[28] 33 U.S.C. § 1362.

[29] *See* MEP Analysis, Part IV.

criteria and procedures for the counties and the local soil conservation districts to implement soil erosion control programs…" and to "conduct periodic inspections and review of the implementation by the counties and the local soil conservation districts of these control plans."[30] The Maryland General Assembly has also given MDE the authority to regulate post-construction stormwater management.[31] Both E&S and post-construction stormwater management laws focus on land development or redevelopment. Neither statute allows MDE to regulate existing development under the terms of an MS4 permit.

3. Regulating the Entire Jurisdiction Ignores the History of the County's Permit

EPA initially published the Phase I Rule in 1990, establishing that unincorporated urbanized areas with populations greater than 100,000 (after subtracting the population of incorporated municipalities) must obtain a Phase I Permit.[32] Based upon this rule, in 1991 MDE asked the County to obtain a permit as a Phase I jurisdiction. The 1990 census indeed established a population of 101,154 for the entire County, yet the incorporated municipalities of Indian Head and La Plata contributed 2,295 and 5,473, respectively, to the County's total population. Therefore, excluding the incorporated areas, in 1990 Charles County only had a population of 93,386.

At the time, MDE acknowledged that the County had not yet reached 100,000 threshold, but based the request upon its estimation that the population in the County's unincorporated areas would soon exceed 100,000.[33] There is no legal authority, in the Phase I Rule or elsewhere, for the State to identify a Phase I permittee based upon future population projections. Nonetheless, the County initially agreed to become a Phase I jurisdiction ***only if*** MDE would agree to limit the permit area to the Development District, where the County's population was concentrated. This led to the County's first MS4 permit in 1997. In 2002, MDE again issued that permit on such terms.

MDE, however, now intends to vastly expand the scope of the County's permit across our entire jurisdiction, enormously increasing the County's responsibilities beyond what could have been anticipated in 1997.[34]

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[30] Md. Code ENV § 4-101.

[31] Md. Code ENV § 4-203.

[32] Phase I Rule at 47,990.

[33] Relevant historical correspondence with MDE is attached as Appendix K.

[34] MDE seeks to regulate the rest of the County because of "rapid growth countywide," but it has provided no support for how such growth has changed the County's rural areas into urbanized

Even though the County has grown since 1997, its current population outside of the Development District, and excluding its incorporated municipalities, does not meet EPA's definition of an urbanized area.[35] The County's population, moreover, is still heavily concentrated in a single place—the Development District (*i.e.*, the unincorporated town of Waldorf)—containing almost half of the County's entire population.[36] In other words, the majority of the County was, and still is, primarily rural in character with the exception of a single urban center.[37] Such a targeted permit is more consistent with MDE's original regulation of the County's MS4 system.[38]

Therefore, for the reasons provided in (1), (2), and (3) above, MDE should revise the Draft Permit to limit all mandates to areas served by County-owned stormwater facilities (the "service area"). Within the service area, certain areas should be excluded from regulatory requirements, including: areas draining to roads owned and operated by SHA, separate storm sewers in very discrete areas (such as individual buildings), areas with direct discharges to local waterways, stormwater systems permitted under other stormwater permits, unpermitted state and federal properties, forests, and rural zoning (properties equal to or greater than 3 acres and with a maximum impervious coverage of 10%).

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areas, as required by the Phase I and II Rules. *See* Draft Fact Sheet, pages 2-3; *See also* MEP Analysis, Part III(4) on page 6.

[35] *See* MEP Analysis, Part III(4) on page 6. The County's incorporated municipalities, La Plata and Indian Head, operate their own MS4 systems.

[36] All relevant census figures can be found at http://www.census.gov.

[37] Thus, limiting the permit to the Development District would allow the County to concentrate its limited resources, such as in its restoration efforts, in the area with the most concentrated population and impervious coverage. *See* MEP Analysis, Part III(4) on pages 5-7.

[38] Indeed, as previously discussed it would also then be more consistent with the Phase I and II Rules, as well as state law. A Phase II designation, moreover, may be more appropriate for the County. After MDE issued its Phase I permit to the County in 1997, EPA then published its Phase II Rule in 1999, establishing the Phase II permitting scheme and clarifying the Phase I Rule. In doing so, the Phase II Rule established that jurisdictions would only be required to obtain Phase I permits if they were either 1) listed in Appendix I of the Phase I Rule, or 2) had a population exceeding 100,000, in its unincorporated areas, *based on the 1990 census*. This rule, therefore, specifically linked the Phase I permit requirement to a jurisdiction's 1990 census total. As mentioned above, in 1990 the County had not yet reached the threshold, only having a population in its unincorporated areas of 93,386, and Charles County is not listed in Appendix I of the Phase I Rule. Notably, in the Phase II Rule Howard County was the only county in Maryland added to the Phase I MS4 list. *See* Phase II Rule at 68,722, 68,748-49, 68,849.

Additionally, MDE should limit at least the Permit's restoration requirements to the Development District. Proposed text is included in the MEP Permit.

B. MDE Has No Basis for Concluding that a 20% Restoration Requirement is Achievable

Part IV.E.2.a of the Draft Permit would require that the County "commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the MDE document described in Part IV.E.2.a that has not already restored to the MEP…" The County opposes this requirement for the following reasons.

1. The 20% Restoration Requirement Exceeds an MEP Level of Effort

The Draft Permit imposes a major, unprecedented burden on the County. The County does not oppose implementing affordable management measures on a reasonable schedule taking into account all requirements of the permit. However, based upon a review of operational obstacles and potential costs in Sections III.4 and IV of our MEP Analysis, we believe compliance with this permit provision would be financially and operationally infeasible. We are disappointed by what appears to be MDE's lack of careful consideration of these important operational and financial issues, and question how MDE could conclude that there is sufficient record evidence to issue a final permit in light of our substantial concerns regarding compliance costs.[39]

2. The Draft Permit Restoration Requirement is Inconsistent with the WIP

Part VI.A of the Draft Permit states that the restoration requirement is meant to address the Chesapeake Bay TMDL "as described in Maryland's Watershed Implementation Plan."

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[39] MDE's answer in previous proceedings that the jurisdiction can simply use its stormwater fee to pay for programs is conclusory and fails to recognize the realities of setting utility rates at the local level. For example, in the *Basis for Final Determination to Issue Anne Arundel County's National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit* at p. 20, MDE stated that: "The collection of stormwater fees for this dedicated fund will help alleviate some of the financial burden on local programs and MDE recommends that all permittees continue to develop additional sources of revenue to maintain adequate funding in the future." An explanation of our local concerns regarding implementation cost is provided in the attached MEP Analysis, Part IV. Please *see also supra* note 20 and its accompanying text.

Despite this statement, the Draft Permit is inconsistent with and more onerous than the WIP. The WIP applies the 20% restoration equivalency percentage to "pre-1985 impervious cover."[40] In contrast, the Draft Permit includes a far larger area – all of the untreated impervious area consistent with the methodology in MDE's *Stormwater Accounting Guidance*, which applies the restoration requirement to all pre-2002 development.

The Draft Permit also omits the equivalency concept expressed in the relevant WIP provision. The WIP's "equivalent to retrofitting" provision allows the permittee to use trading as one option for achieving pollutant reductions cost-effectively. By dropping this language in moving from the WIP to the Draft Permit, the Draft Permit appears to eliminate this method of improvement and compliance.

For the reasons provided in (1) and (2) above, the County recommends that MDE mitigate these extreme costs by issuing a permit that requires the County to commence and complete the implementation of restoration efforts for 10% of the impervious area in the Development District that is not already restored to the MEP. We would also be willing to begin work on an additional 10% in the Development District during this permit cycle, but cannot commit to completion of the additional 10% given the realities of financing and managing such a large number of projects. In addition, the County requests that MDE revise the restoration requirement to make it consistent with the concepts embedded in the WIP. Proposed text is included in Part IV.E of the MEP Permit.

C. ESD to the MEP Does Not Apply to MS4 Permits

In addition to mandating 20% restoration, Part IV.E.2.a of the Draft Permit states that: "Equivalent acres restored of impervious surfaces, through new retrofits or the retrofit of pre-2002 structural BMPs, shall be based upon the treatment of the WQv criteria and associated list of practices defined in the *2000 Maryland Stormwater Design Manual*. For alternate BMPs, the basis for calculation of equivalent impervious acres restored is based upon the pollutant loads from forested cover." The County opposes including this language in the final permit for the following reasons.

First, the *2000 Maryland Stormwater Design Manual* only applies to new development or redevelopment. It does not apply to restoration projects, which should be governed by

[40] Final Phase II WIP, App. A at p. A-10. http://www.charlescountymd.gov/sites/default/files/pgm/planning/wipphase2strategy2-28-13.pdf

MDE's *Accounting Guidance*.[41] Adding language to the permit that references the "associated list of practices" in the *Design Manual* is inappropriate for this reason alone. Suggesting that ESD techniques must be used before structural controls would result in a skyrocketing of costs (if ESD measures are even possible), and would incorrectly apply a law written for land development to existing development. The County strongly believes this would be contrary to the General Assembly's intent when it passed the Stormwater Management Act of 2007.

Second, the *Accounting Guidance* and *2000 Maryland Stormwater Design Manual* are inconsistent. If a developer is required to provide stormwater management for a particular development, the *Design Manual* states that the developer must "[a]t a minimum" use ESD techniques to "address both Rev and WQv requirements…"[42] WQv is "the storage needed to capture and treat the runoff from 90% of the average annual rainfall. In numerical terms, it is equivalent to an inch of rainfall multiplied by the volumetric runoff coefficient (Rv) and site area."[43] Thus, developers must manage stormwater based on a 1" rainfall. In contrast, the *Accounting Guidance* allows for stormwater management of less than 1", and applies impervious area treatment credit "based on the proportion of the full WQv treated."[44] Although the *Accounting Guidance* encourages permittees to treat the full 1" WQv, MDE recognizes that this may be impossible in certain scenarios, especially if ESD is chosen ("Numerous constraints inherent to the urban environment, though, make full ESD implementation impracticable. Meeting the design standards for structural BMPs specified in the *Manual* can be difficult as well").[45] Referencing both documents in the Draft Permit is confusing.

Third, the Draft Permit provides no definition of "alternate BMPs." The *Accounting Guidance* links the amount of credit for these types of practices to individual factors that may or may not be related to pollutant loads from forested cover. In contrast, the Draft Permit suggests that all calculations must be based on forested cover. This creates an inconsistency between the second sentence and the previous requirement that the County use the *Accounting Guidance* to calculate credits.

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[41] The quoted text is also confusing in that it references "the methodology described in the MDE document cited in PART IV.E.2.a." There are two different documents cited in this section.

[42] *Design Manual* at 5.2.1.

[43] *Id.* at 2.1.

[44] *Accounting Guidance* at Part III.

[45] *Id.*

For all of these reasons, the County requests that MDE delete this text from the Draft Permit.

D. Watershed Assessment and TMDL Planning Terms Are Impracticable

Part IV.E.1.a of the Draft Permit mandates that the County "complete detailed watershed assessments for the entire County" by the end of the permit term. Part IV.E.2.b of the Draft Permit requires that the County engage in planning within one year of permit issuance. [46] The County objects to these sections of the Draft Permit for the reasons set forth below.

1. MS4s Are Not Required to Address TMDL WLAs or Provide a Final Date for Meeting WLAs

Requiring that the County include in its TMDL plan a "final date for meeting applicable TMDLs" is legally inconsistent with the MEP compliance standard. There is no legal requirement that MS4 permits include terms to address applicable TMDLs. Other commenters may argue that 40 CFR 122.44(d)(vii)(B) requires that effluent limits in NPDES permits are "consistent with the assumptions and requirements of any applicable wasteload allocation for the discharge prepared by the State and approved by EPA." However, the introductory paragraph to 122.44 applies the requirements in the section, including (d)(vii)(B), only ***when applicable***. Subsection (d) references water-quality based effluent limits, which are not applicable to MS4s given the unique MEP standard in federal law. Subsection (k) is the only part which arguably applies to MS4s. It authorizes the use of BMPs for stormwater discharges or when numeric effluent limitations are infeasible. MDE agreed that subsection (d) does not apply to MS4 permits in its arguments regarding the Montgomery County MS4 permit before the Montgomery County Circuit Court: "The

[46] Consistent with our understanding of MDE's response (dated June 4, 2014, and included as Appendix D) to an earlier e-mail question, the County assumes that its TMDL planning document need not include the Bay TMDL. The restoration requirement, which is clearly meant to serve as the way the MS4 will address the Bay TMDL, is included in a separate section than the general planning section. In addition, there is no applicable WLA in the Bay TMDL to include in the plan, as all Maryland MS4s were reflected in aggregated regulated stormwater load. To make this clear, we have suggested edits in the MEP Permit.

regulations applicable to municipal stormwater therefore are not 122.4 or 122.44(d), but is 122.44(k), the regulation authorizing the use of BMPs to control stormwater."[47]

It is the County's legal position, therefore, that the MS4 permit should not include ***any*** TMDL provisions, much less provisions that mandate compliance with a WLA by a date certain.

From a practical perspective, it is hard to imagine writing a TMDL plan with a "final date for meeting applicable WLAs and a detailed schedule for implementing" projects. A reasonable implementation plan may involve BMP installations over decades. Under such a scenario, it is very difficult to establish a "final date." Additionally, unknown factors could affect the implementation schedule, making any "detailed schedule" of questionable use. Adaptive management is a critical component of the County's MS4 program. We question MDE's interest in forcing the County to take a contrary approach, to the detriment of our citizens and water quality.

The provision also assumes that meeting the WLAs is technically feasible, financially affordable, and generally practicable. This is a false assumption as evidenced by MDE's own experience with the Bay TMDL, where MDE determined that WQS could not be met in a portion of the Bay, even with an extremely expensive level of control. MDE adopted and EPA approved a variance in response.[48] That required years of modeling and public process, yet the Draft Permit assumes the County can undertake this kind of analysis in just one year.

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[47] *See* Brief for MDE at 14, *Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al.*, No. 02199 (Md. Ct. Spec. App., September Term, 2013), attached in Appendix F. The County also adopts and incorporates by reference any arguments in that case that are aligned with our own in this permit determination.

[48] Before the TMDL was even written, Maryland adopted restoration variances for the deep-water and deep-channel designated uses in Maryland's portion of the middle Bay (CB4MH). In 2010, Maryland adopted a restoration variance for the Lower Chester River's deep-water designated use. In 2012, to address continued issues with attainment, Maryland increased the Lower Chester variance from 14% to 16% nonattainment and adopted a new variance for the Eastern Bay mesohaline segment. A copy of the January 13, 2012 *Maryland Register* proposing the 2012 update and explaining the history of the variances in an attached Technical Document is attached to these comments. In addition, current restoration variances can be found in the State's WQS at COMAR 26.08.02.03-3.

That said, the County is willing to voluntarily install BMPs to the MEP to address applicable TMDLs if the permit is clear and is achievable. Our recommendations for changes that must be made in order to clarify the permit terms and make them practicable follow in (2) through (7) below. They are also reflected in Part IV.E of the MEP Permit attached as Appendix I.

2. Watershed Assessments Should Be Limited to the Development District

Requiring County-wide watershed assessments is overly broad. As explained above, MDE has no legal authority to order action outside of County's service area. Further, the County will concentrate restoration efforts in the Development District, making an assessment of other areas unnecessary and a waste of limited resources.

3. The Assessment and Planning Sections are Duplicative and Confusing

The County submits it makes sense to break assessment and planning down into three distinct sequential steps—assessment, planning, and implementation. However, if MDE leaves the structure as-is, the existing language should be revised 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 IV.E.1.a (Watershed Assessments); the very similar "[i]nclude…a detailed schedule for implementing all stormwater structural and nonstructural water quality improvement projects..." is included in Part IV.E.2.b (Restoration Plans). Detailed scheduling should come ***after*** 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 is backwards.

4. The County Should Be Given a Reasonable Amount of Time to Complete Plans

It is not possible to complete the type of restoration plan called for by the permit in the time given. In particular, the Draft Permit requires that the County include "detailed cost estimates for individual projects, programs, controls, and plan implementation" with the restoration plan for each stormwater WLA. One year is not enough time to assess each individual watershed, much less to use that information to develop plans with specific BMPs and associated cost estimates. To develop this type of a plan, the County will have to assess the future availability of sites for BMP installation, to estimate the time needed to obtain permits for a particular BMP, and to ballpark a budget for each BMP. The County cannot accomplish this work in one year and have any level of comfort that its estimates are well-founded and reasonable. In reality, any budgeting for a particular BMP is as best

an estimate. Particular projects may be more costly, requiring a locality to scale back on another BMP. Also, conceptually, mandating a complete, enforceable plan within one year is contrary to the concept of adaptive management. We have long relied on adaptive management to allow us to learn from past actions and make improvements to our programs over the years.

5. Local Planning Efforts Should Not Be Federally Enforceable

The County objects to making restoration plans an enforceable part of the permit.[49] The County will work very hard to develop a reasonable approach to addressing applicable WLAs. Respectfully, however, this is the County's program, and we question MDE's authority to micro-manage it through a planning document. We believe that the State's authority to oversee MS4 efforts does not extend to regulating local decision-making on specific aspects of our approach.

MDE recently argued for a limited State role in implementation efforts in litigation involving the Industrial Stormwater General Permit.[50] In the appeal of that GP, environmentalists argued that the GP should have allowed for public notice and comment on the Stormwater Pollution Prevention Plans (SWPPPs) each permittee must prepare. MDE explained SWPPPs are not effluent limitations under either state or federal law, but are merely "implementation plans that contain information to assist both facilities in meeting their permit obligations, and the Department in its compliance responsibilities…." Further: "SWPPPs do not contain restrictions or prohibitions on anything, but merely document control measures and procedures." Only permits and permit limits are subject to public participation requirements.[51] MDE stated that:

> The Permit gives permittees discretion in how they meet an effluent limitation, but imposes penalties under both the CWA and Maryland law for a violation of the limitation. [footnote 7: This is consistent with the approach used for individual NPDES permits, where the Department would set numeric effluent limits on a discharge, but would not dictate how a facility meets

[49] Part IV.E.2.b states that: "Upon approval by MDE, these restoration plans will be enforceable under this permit."

[50] *Environmental Integrity Project, et al. v. MDE*, Case No. 24-C-13-007219 (Circuit Court for Baltimore City).

[51] *Id.*, Answering Memorandum of the Maryland Department of the Environment at 17 ("Although facilities are required to prepare a SWPPP as a condition of the Permit, the practices set forth in a SWPPP are not enforceable conditions and thus, cannot be categorized as permit limits.").

> those limits. For example, the Department may establish a total nitrogen concentration of 4 mg/l for a sanitary sewage discharge. This limit would inherently require some form treatment, but the Department would not opine on the design of the wastewater treatment plan. The Permit would merely require that the discharge meet the 4 mg/l limit.] … The prohibitions and restrictions established by the State in the Permit are the controlling effluent limits. [footnote 8: To expand on the prior example, where the Department has established a total nitrogen concentration of 4 mg/l for a sanitary sewage discharge, the effluent limit is the 4 mg/l standard. The wastewater treatment plant is not an effluent limitation. Accordingly, the design of the wastewater treatment plant is not subject to public participation requirements.][52]

In the context of the Draft Permit, the development of a TMDL restoration plan is no different than the development of a SWPPP by an industrial permittee. BMPs serve as the effluent limits for the permittee. One of the BMPs in the Draft Permit requires that the County develop restoration plans to address EPA approved TMDLs. How the County chooses to address this mandate is the County's decision. The County is willing to consider MDE and public input on our restoration plans, and even to accept MDE approval or disapproval of their terms, but we not believe we should be put at risk for federal enforcement for failing to meet the terms of a local planning document.

6. MDE's Stormwater Accounting Guidance is Flawed and Should Not Be Referenced in the Permit

Referencing MDE's *Stormwater Accounting Guidance* in the Draft Permit is inappropriate for following reasons.

First, the County also objects to having such a major part of the permit determined by an unpromulgated guidance document that is subject to MDE's unilateral revision.

Second, the County is highly concerned that the "value" of various BMPs (i.e., the efficiencies associated with each) may change over time. We assume MDE will reflect those changes in future versions of the *Stormwater Accounting Guidance*. If BMP efficiency updates result in "downgrading" of certain BMPs, these changes should not be

[52] *Id.*

held against the County, as we will have invested years and millions of dollars in their installation.

For these reasons, the County submits that the *Stormwater Accounting Guidance* should remain guidance and not be incorporated as a term in the MS4 permit. This will allow MDE the flexibility to change the document over time as necessary, and to apply or not apply it to particular situations in its discretion.

7. The Permit Should Authorize Trading

As noted above, the Draft Permit does not include the equivalency concept included in the WIP. This is a mistake. MS4s would benefit greatly from an open and transparent state trading program. According to a study performed by the Chesapeake Bay Commission, allowing significant point sources and urban stormwater sources to trade could potentially reduce compliance costs "by as much as 79% to 82%."[53] In addition, the State has espoused the potential use of trading to address growth issues as a part of developing its Accounting for Growth (AfG) policy. On its AfG website, MDE notes: "To ensure that there are sufficient credits available, the State is designing its AfG policy to induce a **robust nutrient trading market** in Maryland, which would, in turn, lower pollution reduction costs, especially for local government, developers, tax and rate payers, and accelerate the Bay's restoration"[54] (emphasis in original).

Given that this is the State's position, the County can think of no reason why MDE would not add authorization for trading, when the State policy is in place, to the MS4 permit.

E. MDE Is Overreaching With the Special Programmatic Conditions

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

> Charles County will be required to comply with the Chesapeake Bay TMDL. The County 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

[53] *See* Chesapeake Bay Commission's *Nutrient Credit Trading for the Chesapeake Bay*, *An Economic Study* (May 2012) at p. 47. A copy of the study is attached as Appendix L.

[54] Available at the following URL: http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Pages/Accounting_For_Growth.aspx

> of Maryland). The projects and programs proposed under this draft permit, as well those implemented during the County's previous stormwater permits and as part of the other State and local regulations, all work toward meeting both of these conditions.[55]

The first sentence of this explanation implies that the County itself must comply with the Bay TMDL. This is inappropriate for several reasons.

First, Charles County, as a governmental entity, does not have a WLA or a load allocation (LA) in the Bay TMDL. There is nothing to comply ***with*** in this regard. EPA's only authority at the local level is over NPDES permitted entities (for ex., the County's wastewater plant). Likewise, MDE has no state law authority to force the County as a whole to comply with the Bay TMDL.

Second, when it issued guidance to the Bay jurisdictions on developing Phase II WIPs, EPA acknowledged that the Bay TMDL models are not as reliable at such a fine scale.[56] EPA allowed the State to submit input decks for the Phase II WIP on a basin level because of these shortcomings. Although EPA views localities as partners, it has not sought to bind the states, much less individual localities, to particular implementation approaches.[57]

Lastly, even a narrower reading—that the MS4 must comply with the Bay TMDL—is unacceptable because it forces the MS4 to comply with a TMDL WLA. This is contrary to the MEP compliance standard, as explained above.

In the Draft Permit, the County objects to including what could be viewed by some as an end date for Bay restoration. Part VI.A of the Draft Permit is titled "Chesapeake Bay Restoration by 2025." Further, the last sentence states that the County's MS4 permit will

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[55] Draft Fact Sheet at p. 11.

[56] Letter from EPA Regional Administrator Shawn M. Garvin to Maryland Secretary of the Environment, Robert M. Summers, Oct. 5, 2011 (available at: http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/Binder/Garvin_to_Summers_Oct05_2011.pdf)

[57] EPA clarified in federal court that: "TMDL allocations are not enforceable or unlawfully "binding," and do not require any particular implementation action—indeed, as numerous courts have held, states have flexibility to implement a TMDL as they deem appropriate." EPA's Memorandum in Support of EPA's Cross Motion for Summary Judgment (filed June 20, 2012) at 5, *Am. Farm Bureau Fed'n v. United States EPA*, 984 F.Supp.2d 289 (2013).

require coordination with the State's WIP and become the "regulatory backbone" for "controlling urban pollutants toward meeting the Chesapeake Bay TMDL by 2025." EPA has acknowledged in federal court that the TMDL does not mandate a federal timeline for implementation.[58] 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 the County's MS4 permit.

Additionally, MDE has no factual basis for concluding that the County is capable of implementing the kinds of substantial clean-up measures included in the Phase I and Phase II WIPs by 2025.

Likewise, Part VI.B (Comprehensive Planning) would mandate that the County "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)."[59] This cooperation "shall entail all reasonable actions authorized by law and shall not be restricted by the responsibilities attributed to other entities by separate State statute, including but not limited to reviewing and approving plans and appropriating funds."

This permit term is highly objectionable. The County already is required to comply with WRE planning under state law. However, the WRE requirements are far beyond the requirements of the CWA, and could subject the County to enforcement or citizens suites for an alleged failure to "cooperate." Worse, this provision usurps local legislative discretion by mandating that the governing body take "all reasonable actions" thereby allowing MDE, EPA, and citizens to second guess local decisions. This text should be deleted from the Draft Permit, as shown in Part VI.A of the MEP Permit.

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[58] *Id.* at 15; *see also Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 329 ("In short the court concludes that, because the 2025 implementation target was established jointly by the Bay Partnership, and because the states retain sufficient flexibility to change the allocations, the TMDL does not violate the CWA by impermissibly "locking in" the TMDL allocations").

[59] We note that the County already completed, adopted, and submitted its WRE to the MD Dept. of Planning on June 24, 2011 (available at: http://www.charlescountymd.gov/sites/default/files/pgm/rim/wre2006.pdf)

F. MDE Should Not Federalize State Law Requirements

The Draft Permit inappropriately incorporates State law requirements, and thereby, federalizes them. Federalization triggers federal enforceability and penalties, typically different and far beyond what was contemplated when the State requirement was established, including federal citizen suit enforcement in federal court rather than state court.

As explained above, one problematic section is the WRE requirement. Another is the Draft Permit mandate that the County's stormwater management program "[i]mplement the stormwater design policies, principles, methods, and practices found in the latest version of the *2000 Maryland Stormwater Design Manual*." The County reiterates that if state law mandates are referenced at all, they should be acknowledged but not made a condition of the permit. Mandates that the County comply with state law regarding Erosion & Sediment (E&S) Control and cooperate to develop WREs are both based ***solely*** on state law (federal laws do not address E&S compliance, except to the extent these types of issues are included in a permit for stormwater runoff from a construction site, or local planning issues).

Each of these programs is a major undertaking in its own right with many associated activities and details. The County's concern is that if it is doing a good job at implementing these programs and addressing program improvements required by MDE, the County should not be subjected to EPA or citizen enforcement over what are minor details of program administration. EPA Region III is routinely conducting audits that are designed to flag minor items as Clean Water Act violations (*e.g.*, a missing date on an inspection report, a misfiled inspection report, or performing an inspection). What MDE and the County may view as improvement opportunities, others may characterize as deficiencies and violations. The federal liability scheme ($37,500 per day per violation for each day until the violation is corrected) is too powerful to subject the County to for purely state law matters. Further, the intent of the state law is not to expose the County to such liability risks in carrying out these state laws.

For these reasons, we ask the Department to make the editorial changes recommended in the MEP Permit. Note that the requested revisions in no way diminish the County's

obligation under state law to carry out the program or MDE's ability to insist on corrective action and full compliance by the County. [60]

G. The MS4 Permit Should Not Impose Potential Liability for Third-Party Behavior

The County agrees with the goal of reducing acts or behaviors of third parties that negatively impact water quality. However, just as MDE works to improve water quality but cannot ensure standards are always met by third parties, or as a police department works to stop crime but cannot ensure that all criminal acts are prevented, the County can work toward improving the behavior of third parties but cannot guarantee what those parties will do at all times. Bad acts can be prohibited by local ordinance, for example, making it illegal for others to discharge non-stormwater into the MS4, and enforcement actions can be taken in priority cases, but full compliance by third parties cannot be guaranteed.

On this point, the Draft Permit contains provisions requiring the County to "eliminate" and "ensure" actions or conditions beyond its reasonable control. The County requests appropriate revisions consistent with the County's role as MDE's co-regulator with regard to the acts of third parties as reflected in the MEP Analysis, Section III, 2 and 3 and MEP Permit, Part IV.D.3 and 4. We hope MDE appreciates the serious level of concern over provisions that might be read by third parties or by a court as making the County responsible for the acts or omissions of third parties.

H. Other Comments Regarding the Draft Permit

1. MDE Should Clarify Text Regarding Triennial Inspections

Part IV.D.1.d would require inspections of ESD treatment systems and structural stormwater management facilities on a triennial basis. We recognize that the frequency of inspections is dictated by COMAR 26.17.02.11. Given the expected proliferation of micro-BMPs on private property in accordance with the ESD approach under the Stormwater Management Act of 2007, inspection activity will be labor intensive and, if required to be performed by the County for every parcel of land, including residential lots with micro-BMPs, the cost to the County will be unmanageable. In its MEP Analysis, the

[60] In the alternative, MDE could add a savings clause to the permit that makes clear that although the MS4 permit is a joint federal and state permit, state-law only requirements (for example, E&S, ESD, and WRE) are not federally enforceable.

County estimates we will need to inspect over 1,000 individual properties per year under this permit term. As new residential building permits are approved, this number will increase annually.

To address this issue, the County would like the flexibility to engage property owners (or their maintenance companies or homeowners associations) and request that they report on the status of micro-BMPs, such as in response to a triennial survey by the County. This type of self-reporting is similar to that used in industrial wastewater pretreatment programs to determine the need for further regulatory action at hundreds or thousands of businesses in a locality.

This request is consistent with COMAR 26.17.02.11, which states that a responsible agency shall "ensure preventative maintenance through inspection of all stormwater management systems." The regulation does not require that the County staff personally perform the inspection, and instead would allow for the County to design an efficient inspection program that may include features such as self-inspection and self-reporting for micro-BMPs.

For these reasons, we request that MDE revise the Draft Permit as suggested in Part IV.D.1.d of the MEP Permit to provide flexibility on the design of a triennial inspection program.

2. Litter and Floatables text is Duplicative and Legally Questionable

Part IV.D.4 of the Draft Permit requires that the County "address problems associated with litter and floatables in waterways that adversely affect water quality." Specific requirements include: considering litter issues as a part of watershed assessments; developing a public education program to reduce littering and increase recycling; and annually evaluating and reporting on the status of efforts to implement the public education program. Recycling and litter requirements are already established by existing State laws regarding solid waste management planning.[61]

The County is seriously concerned that other requirements in the Draft Permit, most especially the restoration requirement, would have severe budgetary and operational impacts on our budget and programs. We can see no reason why MDE would layer on a litter and floatables requirement on top of the rest of the permit requirements. MDE

[61] Md. Code, ENV §9-505.

should be prioritizing clean-up goals to allow the County to use its limited resources where there is the highest opportunity for clean water gains.

However, the County is willing to accept a permit with a litter and floatables requirement if the terms are narrowed to make the requirements clear and achievable. We have proposed specific MEP language in Part III.3 of our MEP Analysis, and Part IV.D.4 of our MEP Permit.

3. Good Housekeeping Requirements Are Too Broad

Part IV.D.5.b.v of the Draft Permit would require that the County ensure that "all County staff receive adequate training in pollution prevention and good housekeeping practices."

The County has no objection to training appropriate employees in pollution prevention and good housekeeping. However, we question why ***all*** employees must receive this training. We would prefer to spend our limited resources providing more in-depth training to the appropriate employees. For example, we should not have to provide training to an administrative support professional working at a desk in a County office building, as opposed to a fleet service employee whose job may actually impact the MS4.

For these reasons, the County requests that MDE adopt the textual changes in this section provided in the MEP Permit.

4. Attachment A Should Include a Phase-In Period

The Draft Permit mandates that the County submit certain data "in a format consistent with Attachment A." Attachment A includes examples of various databases the County must complete with its Annual Report.

MDE is currently working on a new "geodatabase" with a goal of improving communications with EPA regarding progress that the State is making in WIP implementation. The geodatabase is a work in progress. If MDE makes future changes that create a mismatch with Attachment A, the County will be at increased risk that EPA, the State, or a third-party could inappropriately argue it is out of compliance with the permit. In addition, it will take the County time to convert its existing data, making it only fair that MDE give the County a phase-in period to adjust to any new requirements.
For these reasons, the County requests that MDE make the textual changes to Part V.A.2 recommended by the MEP Permit.

5. Green Card Training Should Be Deleted

Part IV.D.2.b of the Draft Permit mandates that the County conduct E&S personnel certification classes at least twice a year. MDE is now providing these classes on-line. For this reason, we request that MDE strike this permit requirement.

I. Suggested Revisions to the Draft Fact Sheet

In addition to the requested changes to the Draft Permit reflected in the County's MEP Permit, the County requests that the Department make revisions that are consistent with these edits to the Fact Sheet. For ease of reference, the County has attached a redlined version of the Fact Sheet hereto as Appendix J.

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