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**Department of
Land Use, Planning & Development**
Carroll County Government
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September 29, 2014

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

Re: Draft Carroll County NPDES MS4 Stormwater Permit (No. 11-DP-MD0068331)

Brian
Dear Mr. Clevenger:

We appreciate the opportunity to review the draft National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Permit owned and operated by Carroll County (11-DP-MD0068331 dated 06/27/2014) (the "Draft Permit") and to share our comments and significant concerns. We respectfully request that MDE revise the Draft Permit as described herein prior to reissuing it.

Due to the specific concerns documented in these comments, the County generally objects to the Draft Permit in that its various provisions, alone and in combination, exceed the applicable legal standard, namely "maximum extent practicable" ("MEP"), in terms of impossibility / infeasibility, improper sequence of required actions, inadequate deadlines for required actions, and overall level-of-effort. The County requests that the Draft Permit must be revised in the manner stated in these comments for this general reason and the further reasons provided below.

The controlling standard for every requirement in the permit is one of "practicability" as established in CWA § 402(p)(3)(B)(iii) and Maryland's EPA-authorized NPDES permit program, which MDE has also extensively documented in various filings with State courts in connection with activist groups that have challenged various recent MS4 permits issued by MDE to other governmental entities.

DEPARTMENT OF LAND USE, PLANNING & DEVELOPMENT
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Part III. Water Quality:

Part III.1. – This subsection would require that Carroll County “effectively prohibit pollutants in stormwater discharges...” The County cannot “effectively” prohibit pollutants; they can either be prohibited or not prohibited. In other words, as with any prohibitory law or regulation adopted by a legislative or regulatory body, effectiveness is beyond the control of the government because compliance with the prohibition is determined by third parties. The County can adopt a prohibition on pollutant discharges by third parties, but adopting a law or regulation does not ensure effectiveness, even when coupled with a committed effort to monitoring third party compliance and enforcing known violations by such parties.

On a related point, Part III.1 seems to imply that the County can and must control **all** stormwater to whatever extent is needed to meet state water quality standards (WQS). As MDE is well aware, this is simply not possible within the five-year permit, or possibly not at all, unreasonably burdens the County, and puts the County at risk of noncompliance.

For the above reasons, the County requests that the text be changed to instead require that the County “effectively minimize” pollutants. This is an appropriate and feasible requirement as compared to MDE’s proposal. MDE should only impose reasonable steps to minimize or prevent pollutant discharges (i.e., expressly qualifying the Part III.1 as applicable “to the maximum extent practicable (MEP),” as was provided in an earlier draft).

Part III.2. – The Draft Permit would make the County responsible for attaining wasteload allocations (WLAs) and total maximum daily loads (TMDLs) for each receiving water body. Again, this would set up the County for failure from the beginning. As just one example, MDE has indicated in bacterial TMDL documents that the reduction necessary to meet water quality standards cannot be achieved by implementing point source effluent limitations and cost-effective, reasonable best management practices (BMPs) for nonpoint sources. The County can only work toward attainment and demonstrate its progress. In addition, even if all TMDLs were attainable, requiring the County to meet them within this permit period would be unrealistic in terms of the time required to plan, obtain real property rights and access for, finance, obtain permits for, and construct, all of the associated projects. For the Chesapeake Bay TMDLs, even the State of Maryland’s own Watershed Implementation Plan (WIP) sets a target for having best management practices (BMPs) that would achieve the applicable standards, TMDLs, and WLAs in place by 2025.

For the above reasons, the County requests that the Part III.2 be changed to instead require that the County “Make progress to the MEP toward attaining” WLAs.

Part III, Last Paragraph – Subject to the County’s comments on Parts IV through VII themselves, the County supports the determination and statement that compliance with Parts IV through VII would constitute “adequate progress toward compliance” with water quality standards

(WQS) and any EPA-approved stormwater WLAs during the permit term. *To more clearly make the connection between this paragraph and Part III.1 and Part III.2, which it qualifies, the County requests the following minor clarification (i.e., the insertion of the parenthetical references shown here): “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 (**PART III.1 above**) and any EPA approved stormwater WLAs (**PART III.2 above**) for this permit term.”*

Part IV.C. Source Identification:

There is a significant deficiency in the nomenclature used in the Draft Permit when applied in the context of a county rather than a municipality. This provision addresses “countywide” sources. The problem in the Draft Permit stems from the fact that Carroll County includes eight municipalities: the Town of Hampstead, the Town of Manchester, the Town of Mount Airy, the Town of New Windsor, the Town of Sykesville, the City of Taneytown, the Town of Union Bridge, and the City of Westminster, and well as State and federal properties. While the municipalities are part of the County, they are incorporated places, governed by separate local elected councils, are not served by the County’s MS4, have their own MS4 permit coverage, as does the State, and are not part of the County MS4’s “service area” or “permit area” and should, therefore, not be referenced anywhere in the draft permit, even indirectly by terms such as “countywide.” *The language should be changed from “countywide” to “permit area” to avoid confusion and misinterpretation by third parties as to the County (i.e., non-municipal) area to which the permit applies.*

Part IV.D. Management Programs:

Parts IV.D.1. and IV.D.2. – These parts mandate that the County continue to perform a regulatory role over land development activities through stormwater management program and an Erosion and Sediment Control program “in accordance with the Environment Article...” Each of these programs is a major undertaking with many associated activities and details. In this role as MDE’s co-regulator over development activities, we are aware that EPA Region III is routinely conducting audits and flagging minor State program items as federal violations (*e.g.*, a missing date on an inspection report, a misfiled inspection report, or performing an inspection) due to the fact that these State programs are incorporated into the MS4 permit. What MDE and the County may view as improvement opportunities, EPA or other third parties may view and enforce as deficiencies and violations. MDE should not structure the permit so as to extend the federal liability scheme (\$37,500 per day per violation) to use by third parties against a political subdivision of the State over minor details of State programs, which are obviously more appropriately addressed by and between the State and the County. For these reasons, *the County requests Department to change the text to make it clear that for MS4 compliance purposes the compliance standard is “general consistency” with each referenced State law.*

Note that this revision would not 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.

IV.D.2.b. (Erosion and Sediment Control) – All courses are now available online. Therefore, it is no longer necessary for the County to conduct its own classes for construction site operators. *The County requests that the requirement for the County to conduct personnel certification classes be eliminated and replaced with "Provide access online to responsible personnel certification classes to educate construction site operators regarding erosion and sediment control compliance."*

Part IV.D.3 (Illicit Discharge and Elimination) – For reasons similar to those set forth above regarding the Draft Permit's proposed "effectively prohibit pollutant" provision (Part III.1), the County cannot "ensure" that "all" discharges are either "permitted by MDE" (the County cannot require MDE to issue that permit) or "eliminated" by the third party discharger. This issue occurs in multiple provisions in the Draft Permit and all have the same practical and legal deficiency. As MDE is aware from its own experience as a regulatory agency, it is impossible for the government to "ensure" that third parties do exactly what the law requires. Accordingly, it is unreasonable for the permit to essentially place the County government in the position of an insurer of third party conduct and at the risk of EPA, CWA citizen suit, and State enforcement. *The County requests that all absolute references to ensuring or eliminating third party action be deleted and, with respect to Part IV.D.3 specifically, that this provision be revised as follows: "Carroll County shall continue to implement an inspection and enforcement program to appropriately address discharges to and from the MS4 that are not composed entirely of stormwater or other authorized or allowed non-stormwater discharges under Part VII.A."*

Part IV.D.4. (Litter and Floatables) – The County vehemently disagrees with this section. Carroll County does not have a Clean Water Act (CWA) 303d listing for litter and/or floatables, nor does it have a TMDL for litter and/or floatables. No significant sources of trash have been found when stream walks were completed. This provision would misdirect limited County resources to a non-priority issue when other efforts contemplated by this Draft Permit would yield better environmental results. Therefore, there is no rational basis to include this requirement in the permit. *The County requests that this section be removed in its entirety.*

Without waiving or limiting the County's request for removal of this entire provision, we note the following secondary concerns. First, the County disagrees with the characterization that water quality is being "ignored" in the County. More specifically, the Draft Permit's odd, non-regulatory characterization that "Increases in litter discharges to receiving waters have become a growing concern nationally and within Maryland and cannot be ignored" has no place in a discharge permit. *Accordingly, the County requests that it be deleted.*

Second, similar to our comment above regarding "ensuring" elimination of illicit discharges by third parties, the Part IV.D.4.b public education and outreach program "to reduce littering and increase recycling" must be revised to be clearer on the fact that the County is not

guaranteeing those outcomes relative to third party actions, which are obviously beyond the government's complete control. *The County requests that the phrase be revised to "designed to promote reduced littering and increased recycling."*

Part IV.D.5. (Property Management and Maintenance) – This section requires several clarifications. First, depending on current practices, facility needs, and public safety, further reductions may not be appropriate in some cases (e.g., item b.iii. for proper weed and pest management; and item b.iv. for deicing for public safety). *The County requests that b.iii. and b.iv be qualified by "where appropriate."*

Second, the County has over 600 employees. It is not feasible, or necessary and appropriate, for "all County staff" to receive training. *The County requests that this requirement be eliminated or changed to apply to "appropriate" County staff.*

Third, with respect to reporting on overall pollutant reductions as required by the last paragraph of this section, we note that some of these listed practices are difficult to quantify. *Unless a quantitative method and thresholds for measuring these pollutants are provided by the State, the County requests this reporting requirement be removed.*

Part IV.E. Restoration Plans and Total Maximum Daily Loads:

Part IV.E., First Paragraph – The County concurs with the first sentence of this paragraph. The second sentence, however, requires clarification. It is inconsistent with MDE's representations in Maryland State courts as to applicable regulatory requirements. According to MDE's legal brief filed with the Montgomery County Circuit Court:

The regulations [40 C.F.R. §§ 122.4(d) and 122.44(d) concerning water quality standards, TMDLs and WLAs] are not applicable to municipal stormwater. These regulations require permit conditions sufficient to satisfy water quality standards where compliance with water quality standards is required or where the permit is developing water quality based effluent limitations. In the case of municipal stormwater, however, the permit is required to impose controls to reduce pollutants to the MEP. The 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. It requires a stormwater permit to include conditions that "control or abate the discharge of pollutants when: (2) authorized under section 402(p) of the CWA for the control of stormwater discharges."

Maryland Rule 7-207 Memorandum of the Maryland Department of the Environment at 13-14 (July 26, 2013). *For the same reasons, the County requests that the second sentence be revised as follows: "By regulation at 40 CFR §122.44(k), the following*

conditions require BMPs and programs as follows to minimize pollutants to the maximum extent practicable.”

Without waiving the County’s broader comments on the applicable compliance standard (MEP rather than WQs and related TMDLs and WLAs), the County makes the following further comments and requests concerning Part IV.E.:

Part IV.E., Second Paragraph, First Sentence (Duplicative Annual Plan Preparation & Submittal) – Restoration plans do not need to be prepared and submitted, each year, for each watershed. Once a plan is complete, it can be maintained and implemented. Otherwise, work is duplicated unnecessarily. *The County requests that this sentence be revised as follows: “Carroll County shall provide a status report on watershed assessments, restoration plans, opportunities for public participation, and TMDL compliance status to MDE; such report shall include a copy of all such plans not previously submitted to the Department.”*

Part IV.E., Second Paragraph, Second Sentence – The second paragraph under this section needs additional language to clarify that restoration plans are required not “for all watersheds within Carroll County” (which exceeds the jurisdictional scope of applicable law) but for “all watersheds that have WLAs applicable to the County’s MS4 under EPA-approved TMDLs.” The County requests this revision for consistency with applicable legal requirements and the rest of the permit.

Part IV.E., Second Paragraph, Third Sentence – This sentence requires that watershed assessments and restoration plans “include a thorough water quality analysis.” It is also unclear as to what might be included in a “thorough water quality analysis.” *The County requests deletion of this phrase or, at a minimum, deletion of “water quality analysis” in this context. Alternatively, the County would consider a reasonable definition of “water quality analysis.”*

Part IV.E.2.b. (Sequence and Deadlines for Assessing and Planning Activities) – Taken together, the Watershed Assessments (IV.E.1.) and Restoration Plans (IV.E.2.b) activities are established in an illogical order with an impossible timeline. A watershed assessment must first be completed before a restoration plan can be developed to address the problems and opportunities identified through the assessment. The permit reasonably sets the deadline for completing watershed assessments as the end of this permit term. However, the permit also sets the deadline for completing restoration plans (the second step) as within one year of permit issuance – four years **prior to** completion of watershed assessments (the first step). As matter of sound logic and management, this work should be phased over the term of the permit, with restoration plans completed for each watershed following the completion of the assessment for that watershed. Therefore, the requirement should be to complete all restoration plans by the end of the permit period. *The County requests revision of the requirement to submit to MDE a restoration plan for each stormwater WLA “within one year of permit issuance” to “by the end of this permit term” for the reasons stated above.*

Part IV.E.2.b.i (Final Date and Detailed Cost Estimates for Meeting WLAs) – It is completely impracticable within one year to identify “all structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives necessary for meeting applicable WLAs” and to pick a “final deadline for meeting applicable WLAs” for the following reasons.

First, this constitutes a major, time-consuming, expensive scientific, engineering, land use/access, and financial exercise for each WLA. It will entail the authorization of significant expenditures for the required professional services in these disciplines and associated public procurement processes.

Second, once the needed resources are assembled, the technical complexity is very high. The permit provision does not state, but necessarily implies, a significant modeling exercise to demonstrate the environmental response of the various improvement projects and management programs.

Third, the provision also assumes that meeting the WLAs is technically feasible, financially affordable, and generally practicable. This is a false assumption that is borne out by MDE’s own experience with the Chesapeake Bay TMDL, just to name one example, where MDE determined that water quality standards could not be met in a portion of the Bay, even with an extremely expensive level of control, and, therefore, MDE adopted and EPA approved a variance. That required years of modeling and public process, yet this provision assumed the County can undertake similar analyses in just one year.

Part IV.E.2.b.iv. (Enforcement of Adaptive/Iterative Plans) – The beginning of this subsection indicates that the restoration plans are “enforceable” under this permit, and this subsection also indicates that the restoration process is “ongoing” and “iterative.” MDE cannot practicably enforce a restoration plan that is ongoing and iterative. *The language in Part IV.E.2.b. should be revised to indicate that the County will provide an annual progress update. The County requests that language “enforceable under this permit” be revised to “implemented by the County.”*

Part IV.E.4.c. (TMDL Compliance Itemization of Costs) – The expenditures information already included in the NPDES MS4 Annual Report is sufficient to show what the County is spending to implement the program, including TMDL projects. Itemizing costs for completed TMDL projects would be time consuming and difficult to do. The duration of a project also can make it difficult to provide all costs. Carroll County has been providing the information based on the budgeted amount. Adding further accounting exercises for costs already incurred adds no value for the environment. *The County requests that item “c” be deleted.*

Part VI.B. Comprehensive Planning:

This provision is fundamentally flawed and must be deleted. First, as background and as required by State law, the County has already completed and adopted a Water Resources Element in 2010, so there is no question about the County adopting a WRE. The language in the permit should not continue to require the County to complete a WRE when it has already been completed. Further, requirements for updating the WRE are already prescribed by State law; the permit, therefore, also should not specify requirements for updating it.

Second, this requirement is not applicable to the Clean Water Act and MS4 permitting. Injecting this state-only requirement into this federally enforceable permit might be misinterpreted as inviting the federal government and citizen lawsuits under the CWA citizen provision to take a new role in water resources planning at MDE's invitation even though the General Assembly has never provided for these roles and authorities by those third parties.

For all of the above reasons, *the County requests that Part VI.B be deleted in its entirety.*

Part VII.A. Discharge Prohibitions and Receiving Water Limitations (Second Paragraph):

Part VII.A. is misplaced under "Part VII. Enforcement and Penalties" because it is not related to enforcement or penalties except in that it creates enforcement risk to the County through its vagueness. The substantive issue with this provision, particularly the second paragraph, is that it is so vague that it completely fails to provide the County with fair notice of what is required to comply.

On its face, this provision states a requirement that the County "take all reasonable steps to prevent or minimize the alteration" of State waters. Obviously there are many different things that can be done to this general end. The whole point of the permit, however, is to bring clarity to what is required. In that sense, this provision undermines the permit – to the extent it is interpreted as a mandate – because it is vague.

If the provision is not intended to add additional requirements, it serves no purpose and the County requests its deletion, unless it is a limitation on the extent of the County's obligation, i.e., a confirmation in accordance with the CWA that the County is not required to take steps beyond what is reasonable considering its CWA § 402(p)(3)(B)(iii) community-specific maximum extent practicable capability. If a limitation is the intent of this provision, the County requests that it be clarified as follows: "... this permit shall not be interpreted as imposing on the County the requirement to take any unreasonable steps to minimize or prevent..."

Other:

For clarity, the County requests throughout the permit the use of "maintain" rather than "continue to" where a condition was included in current permit, particularly if the requirement was already implemented. "Maintain" is more accurate where the proper practice is in place, whereas "continue to" might be misconstrued as requiring future developmental action rather than ongoing implementation.

It is our understanding that completing the 20 percent restoration requirement in the Draft Permit will satisfy the required progress during this permit term for relevant stormwater WLAs in approved TMDLs, including the Chesapeake Bay TMDL. On this basis we are diligently continuing to plan for and implement projects to meet the requirements of our current permit, as well as the restoration requirements in the draft permit. Making the requested revisions and clarifications requested above will allow us to continue to make progress toward this requirement.

Finally, we are currently in the process of finalizing a memorandum of agreement (MOA) between Carroll County and our incorporated municipalities, of which co-permitting is a part. We would like to request that MDE delay the issuance of the final permit and add the county's incorporated municipalities to the permit should this MOA come to fruition. We anticipate finalization of the MOA by the end of 2014.

Of course, we are available to answer any questions you may have about our comments. To the extent that MDE disagrees with any of our comments or otherwise declines to make any of the requested changes, the County requests the opportunity to meet and confer with MDE officials prior to MDE taking any final action. Similarly, to the extent that MDE intends to make any other changes to the Draft Permit not specifically requested by the County, as the holder of the Permit, the County respectfully requests notice of that intention, the specific changes and the opportunity to meet and confer with MDE prior to MDE taking any final action.

Thank you for your prompt attention and cooperation with this matter. If you have any questions, please feel free to contact Tom Devilbiss (tdevilbiss@ccg.carr.org) or Brenda Dinne (bdinne@ccg.carr.org) at 410-386-2949.

Sincerely,



Tom Devilbiss
Deputy Director, LUPD

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