

# AQUALAW

LISA M. OCHSENHIRT  
LISA@AQUALAW.COM

PH: 804.716.9021  
FX: 804.716.9022

June 27, 2013

## By Electronic Mail & First Class Mail

Mr. Brian Clevenger  
Maryland Department of the Environment  
Sediment, Stormwater and Dam Safety Program  
1800 Washington Boulevard  
Baltimore, Maryland 21230

### **Re: Tentative Determination to Issue NPDES Permit for Prince George's County's MS4**

Dear Mr. Clevenger:

On behalf of Frederick County, attached please find comments regarding the Tentative Determination referenced above. As you are aware, Frederick, Charles and Harford Counties have been jointly reviewing MDE's Tentative Determinations for Phase I MS4 communities as each has been released. The goal has been to identify issues of common concern and to communicate them to MDE before MDE moves forward with the next round of permits. All three counties share a common goal that each of their MS4 permits must be reasonable, clear and achievable.

Frederick County appreciates MDE's willingness to consider their views as you move forward with Prince George's County's permit, as well as future Phase I permits in the state.

Please feel free to call me if you have any questions regarding the attached document.

Sincerely,



Lisa M. Ochsenhirt

Enclosure

Copy (By Electronic Mail) to:  
Mr. Raymond Bahr, MDE  
Frederick County Staff

## **Comments of Frederick County on MDE's Tentative Determination to Reissue Prince George's County's MS4 NPDES Permit**

### **I. Introduction**

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

As we have previously noted, the County is always hesitant to comment on the Draft Permit of a fellow locality. However, MDE has stated its intention to pattern future permits, including the County's permit, on prior permits. This presumably includes Prince George's County's permit. The County feels obliged to alert MDE to its concerns regarding these prior permits before problematic terms are finalized and incorporated into a template that may be used for other permittees.

The County believes that Prince George's County has a well-run and successful stormwater management program. We ask that our comments not be viewed as an indication to the contrary. That said, Prince George's County's ability to comply with a permit that will require it to significantly expand its current programs does not mean that the remaining Phase I MS4s in the State, including the County, are in the same position. As Prince George's County acknowledged during the public hearing on the Tentative Determination to issue its permit, a one-size-fits-all approach is not necessarily reasonable for all of the state's MS4s. The State's Phase I MS4 permittees vary widely with regard to size and capabilities. The County's goal is full compliance with its current MS4 permit and its future permit. We ask that MDE carefully consider our views regarding parts of the Prince George's County template that would put us at an increased risk of non-compliance given our individual local circumstances, and adjust expectations accordingly.

We appreciate the opportunity to comment, and thank MDE for considering the points made below.

### **II. Comments**

#### **Previous Comments**

Last fall, the County filed comments on the Tentative Determination to Issue the City of Baltimore's MS4 permit, and raised concerns regarding several aspects of the draft permit including: (i) an incorrect definition of the regulated permit area; (ii) vague and unreasonable requirements for restoration planning and impervious area restoration; (iii) inappropriate special programmatic conditions for Chesapeake Bay restoration and comprehensive planning; (iv) federalization of state law provisions; and (v) incorrectly worded text that suggests the permittee is responsible for third party behavior. The County requested changes to the City's draft permit and future Phase I MS4 permits.

The County also expressed support for the proposed Discharge Prohibitions and Receiving Water Limitations section of the City's draft permit, noting with general approval MDE's recognition of maximum extent practicable ("MEP") as the legal compliance standard for MS4s. The County did, however, suggest a minor edit to clarify that the determination of what constitutes MEP lies with the permittee.<sup>1</sup>

The County will not repeat these comments. Instead, we renew our objections to the extent MDE has not addressed our earlier concerns, and ask that MDE reconsider its approach in future Phase I MS4 drafts. The following comments will focus instead on two new issues we believe merit comment:

### **Restoration of pre-2002 BMPs**

The Prince George's County Draft Permit mandates that:

"By the end of the permit term, Prince George's County shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the MDE document cited in PART IV.E.2.a that has not already been restored to the MEP. **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.**"<sup>2</sup>

The bolded text is new; it was not in the City of Baltimore's draft permit. The County has three concerns regarding the newly proposed language.

First, there is a fundamental inconsistency between the *2000 Maryland Stormwater Design Manual* ("*Design Manual*") and *MDE's Accounting Guidance, Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits* ("*Accounting Guidance*"), which is referenced in the preceding paragraph.<sup>3</sup> If a developer is

---

<sup>1</sup> Similarly, the Prince George's County Draft Permit appropriately states that compliance with Parts IV through VII of the permit with adequate progress toward water quality standards (Water Quality) and TMDL WLA compliance and references MEP (Discharge Prohibitions and Receiving Water Limitations). However, for consistency, the County suggests that the text at Part VII(A) (Discharge Prohibitions and Receiving Water Limitations) of the Draft Permit cross-reference Part III (Water Quality): "Consistent with Part III above and §402(p)(3)(B)(iii) of the CWA, the County shall take all reasonable steps to minimize or prevent..."

<sup>2</sup> Prince George's County's Draft Permit at IV.E.2.a (emphasis added).

<sup>3</sup> The quoted text is confusing in that it references "the methodology described in the MDE document cited in PART IV.E.2.a." PART IV.E.2.a cites two different documents. From context it appears MDE is referencing the *Accounting Guidance* from the first paragraph, and not the *Design Manual* from the second paragraph, but this is unclear on the face of the Draft Permit.

required to provide stormwater management for a particular development, the *2000 Maryland Stormwater Design Manual* states that the developer must “[a]t a minimum” use ESD techniques to “address both  $R_v$  and  $WQ_v$  requirements...”<sup>4</sup>  $WQ_v$  is defined as “the storage needed to capture and treat the runoff from 90% of the average annual rainfall. In numerical terms, it is equal to an inch of rainfall multiplied by the volumetric runoff coefficient ( $R_v$ ) and site area.”<sup>5</sup> Thus, developers must manage stormwater based on a 1” rainfall.

In contrast, the *Accounting Guidance* allows for stormwater management of less than 1.” A permittee may receive partial credit for addressing less than the full  $WQ_v$  when restoring a pre-2002 BMP:

“a. Individual Project Credit: Retrofits shall be credited according to the following criteria:

- An acre for acre impervious credit will be given when a structural BMP is specifically designed to provide treatment for the full  $WQ_v$  (one inch), or
- A proportional acreage of credit will be given when less than the  $WQ_v$  is provided: (percent of the  $WQ_v$  achieved) x (drainage area impervious acres)”<sup>6</sup>

Although the *Accounting Guidance* encourages permittees to treat the full 1”  $WQ_v$ , 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.”)<sup>7</sup>

The County has previously stated its view that the 20% restoration requirement may not be achievable; any possibility for achieving this goal is greatly diminished if MDE requires that each retrofit project treat the full  $WQ_v$ .

Second, the requirement that retrofits be based on the “associated list of practices” in the *Design Manual* is unclear. The permit could be read to mean that a permittee must use ESD techniques before structural controls. Not only would this result in a skyrocketing of retrofit costs (if implementation of ESD measures is even possible), but this would apply a law written for land development to now apply to restoration of existing development. This would be inconsistent with the terms of state law and

---

<sup>4</sup> *Design Manual* at 5.2.1.

<sup>5</sup> *Design Manual* at 2.1.

<sup>6</sup> *Accounting Guidance* at 8.

<sup>7</sup> *Accounting Guidance* at 8.

contrary to the General Assembly's intent when it passed the *Stormwater Management Act of 2007*.

Third, the second sentence of the new text is problematic for several reasons. To begin with, there is no definition of "alternate BMPs." Perhaps MDE means alternate BMPs as they are defined in the *Accounting Guidance*, but this is not apparent on the face of the permit. Moreover, 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 requirement in the prior paragraph that Prince George's County use the *Accounting Guidance* to calculate credits.

For all of these reasons, the County requests that MDE delete the bolded text from future Phase I MS4 draft permits.

### **Attachment A**

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

MDE is currently creating a new "geodatabase" with a goal of improving communications with EPA regarding the progress the State is making in implementing its Chesapeake Bay Watershed Implementation Plan. The County generally supports this work, and is willing to work with MDE to develop the new database.

That said, the geodatabase is a work in process. If MDE makes future changes that create a mismatch with Attachment A, a permittee will be at increased risk that EPA, the State, or a third-party could inappropriately argue that the permittee is not in compliance with its permit. In addition, it will take a permittee time to convert existing data to a format consistent with database changes. It is only fair that MDE give each Phase I MS4 permittee adequate time (a phase-in) to adjust to any new requirements.

For these reasons, the County requests that MDE make the following changes to Part V.A.2 in future Phase I MS4 permits:

2. To enable MDE to evaluate the effectiveness of permit requirements, the following information listed below shall be submitted in a format generally consistent with Attachment A. To the extent MDE revises components of the databases listed in Attachment A during the permit term, the County shall report the information required by the newest version of each database if MDE provides adequate notice of the revisions to the County in a manner that allows for conversion of existing data to the newer format.