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July 9, 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 Baltimore County's MS4

Dear Mr. Clevenger:

On behalf of Frederick County, attached please find comments regarding the Tentative Determination referenced above. Frederick, Charles and Harford Counties have jointly reviewed the proposed Baltimore County permit, and, together, have identified issues of concern. Frederick County respectfully requests that MDE consider its views before the Department moves forward with the next round of permits. As always, the County is concerned that its permit, when issued, is reasonable, clear and achievable.

Frederick County appreciates MDE's willingness to consider these comments as you move forward with Baltimore 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 Baltimore County's MS4 NPDES Permit

I. Introduction

Pursuant to the Maryland Department of the Environment's ("MDE" or "Department") Tentative Determination to Issue Baltimore County, Maryland's ("Baltimore 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 reviewing and commenting on each of the Phase I MS4 draft permits, as they are issued, in order to alert MDE to concerns regarding problematic terms. The County believes this is necessary because of MDE's position that it will use prior permits as "templates" for later permits. The County's goal throughout this process is to ensure that unclear and/or unachievable permit terms from various "templates" are not included in the County's permit.

As with the City of Baltimore and Prince George's County, the County lauds Baltimore County for its well-run and successful stormwater program. Our comments are not meant, in any way, to question Baltimore County's efforts to improve its program or positively impact water quality, nor are they meant to offer an opinion whether Baltimore County can comply with the terms of the Draft Permit. The purpose for these comments is to reiterate our view that MDE should not adopt a one-size-fits-all approach to Phase I MS4 permitting, especially given the vast differences in funding, staffing, and operations among the Phase I permittees, which include very large municipalities with highly-developed stormwater programs and much smaller counties that face unique implementation challenges. To the extent the County has raised a concern regarding a particular permit term, we ask that MDE consider revising it before issuing future Phase I permits.

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.[1]

In June, the County submitted comments on the Tentative Determination to issue Prince George's County's MS4 permit. In those comments, the County requested that MDE strike text from Part IV.E.2.a of the Prince George's County draft permit. The County noted three significant problems with the text: (i) the reference to both the *2000 Maryland Stormwater Design Manual* and to *MDE's Accounting Guidance, Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits* creates an inconsistency regarding the need to treat full WQ_v with restoration projects; (ii) the implication that restoration must be accomplished using ESD techniques is legally inappropriate and is likely unachievable based on available funding; and (iii) the final sentence of the text is unclear (no definition of "alternate BMPs") and appears to overwrite sections of the *Accounting Guidance* that link the amount of credit for "alternate BMPs" to factors other than pollutant loads from forested cover.

In addition to comments on the restoration portion of the draft permit, the County suggested possible edits to Part V.A.2 relating to the submittal of data "in a format consistent with Attachment A." The County expressed our willingness to work with MDE to develop its new "geodatabase," which is meant to improve reporting of progress on the Chesapeake Bay TMDL to EPA, but questioned the fairness of locking a permittee into a reporting requirement that could change in the future with changes to the geodatabase.

For the sake of brevity, the County will not repeat these comments. However, we commend them to MDE's review and ask that to the extent MDE has not addressed these comments, MDE do so in future Phase I MS4 drafts. The following comments will focus instead on one new issue we believe merits comment:

Trash and Litter

Baltimore County's Draft Permit mandates that: "Within one year of the Environmental Protection Agency's (EPA) approval of a trash TMDL for the Middle Branch and Northwest Branch of the Patapsco River, implement those program improvements

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[1] Similarly, both the Prince George's County Draft Permit and the Baltimore County Draft Permit appropriately state that compliance with Parts IV through VII of the permit constitutes adequate progress toward water quality standards and TMDL WLA compliance (Part III, Water Quality), and both correctly reference MEP (Part VII.A, Discharge Prohibitions and Receiving Water Limitations). However, for consistency, the County suggests that the text at Part VII.A of the Draft Permit cross-reference Part III: "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..."

identified in Part IV.D.4.a above and any additional programs needed to address the TMDL."[2] The County has three concerns regarding this requirement.

First, the County opposes creating a future obligation in an enforceable permit if the permittee cannot assess what will be required for compliance. The meaning of the mandate that Baltimore County implement "any additional programs needed to address the TMDL" for trash on the Patapsco will not be clear until the TMDL is finalized. The term, therefore, puts a permittee at risk for future enforcement by EPA, the state, or citizens if the TMDL is ultimately written in a way that is disadvantageous for the permittee or if it is based on questionable assumptions and modeling. As we noted above, the County is not passing any judgment on Baltimore County's ability to comply. Baltimore County may be prepared to begin work on Patapsco trash TMDL implementation as soon as the TMDL is finalized, and, if so, we commend the County for their preparedness. However, for other MS4 permittees, we believe it is fundamentally unfair to ask a permittee to sign-off on such an obligation without having a final, non-appealable, approved TMDL in place.

Second, another risk created by this type of permit term is that an MS4 may not be able to fully comply during the 5-year permit term. Again, this either results in potential enforcement if compliance expectations are not fully met, or it creates a permit term that will be carried-over into the following 5-year permit cycle. Federal and state laws establish a 5-year permit term; MS4 permit terms should be written consistent with this timeframe.

Third, it is impossible for any member of the public, including a permittee, to provide meaningful comments on a provision that hinges on the Department taking future actions in a separate document. This is contrary to state law (ex., MD Code, ENV §1-604), which encourages public participation in the permitting process by providing 30 days of public comment on a Tentative Determination to issue a permit. This is also at odds with a permittee's procedural due process rights to be heard before MDE issues a final determination on their permit.

Respectfully, the County sees no reason why a TMDL, like the Patapsco trash TMDL, cannot be finalized and then addressed during the next MS4 5-year permit cycle.

For these reasons, the County objects to the inclusion of a similar term, whether it be for trash and litter or another aspect of the stormwater management program, in any future Phase I MS4 draft permit.

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[2] Baltimore County's Draft Permit at Part IV.D.4.d.