

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

MARYLAND DEPARTMENT OF THE ENVIRONMENT

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Plaintiff,

*

v.

*

CASE NO.: _____

MONTGOMERY COUNTY, MARYLAND

*

Defendant.

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* * * * *

CONSENT DECREE

Plaintiff, the Maryland Department of the Environment (hereinafter “MDE” or “the Department”), and Defendant, Montgomery County, Maryland (the “County”), hereby represent and acknowledge that they agree to enter into this Consent Decree regarding certain alleged violations of State environmental laws arising out of the County’s failure to comply with the terms of a permit authorizing the discharge of pollutants from the County’s municipal separate storm sewer system (“MS4”) to waters of the State.

FACTUAL BACKGROUND

WHEREAS, the County has constructed an MS4 comprised of approximately 11,000 miles of pipes and 900 major outfalls covering an area of 499 square miles;

WHEREAS, the County’s MS4 channels stormwater that has collected pollutants as it washes over lawns, roadways, roofs, and other surfaces, and discharges that stormwater to waters of the State;

WHEREAS, sections 9-322 and 9-323 of the Environment Article, Annotated Code of Maryland, prohibit the discharge of any pollutant into the waters of the State unless authorized by a discharge permit issued by the Department. The term “discharge” includes the placement of a pollutant in a position where it is likely to pollute waters of the State;

WHEREAS, sections 9-323 and 9-324 of the Environment Article authorize the Department to issue permits to persons for the discharge of pollutants, but only in compliance with any effluent limitations, or conditions the Department considers necessary to prevent water pollution;

WHEREAS, the County successfully fulfilled its obligations under the 1996 MS4 Permit completing watershed studies for 40% of the County’s total acreage, and completing 26 stormwater retrofit projects and 51 restoration projects on 29.2 miles of impaired streams.

WHEREAS, the County successfully fulfilled its obligations under the 2001 MS4 Permit, restoring 10% (2,146 acres) of the impervious acreage not already treated to the maximum extent practicable and initiated the Water Quality Protection Charge as a line item on residential and certain non-residential property owner tax bills.

MONTGOMERY COUNTY’S MS4 PERMIT

WHEREAS, on February 16, 2010, the Department issued the County a permit authorizing the discharge of pollutants from the County’s MS4, Permit No. 06-DP-3320/MD0068349 (the “Permit”), under conditions set forth in the Permit;

WHEREAS, Part III.C of the Permit requires the County to identify sources of pollutants in stormwater runoff, assess the impacts of those sources, and submit to the Department a report in a geographic information system (“GIS”) format that identifies the storm drain system, the location and type of best management practices (“BMPs”) implemented to control stormwater, impervious surfaces, monitoring locations, and proposed areas of restoration;

WHEREAS, a “best management practice (BMP)” is defined by regulation to mean a structural device or nonstructural practice designed to temporarily store or treat stormwater runoff in order to mitigate flooding, reduce pollution, and provide other amenities, Code of Maryland Regulations (“COMAR”) 26.17.02.02B(5);

WHEREAS, Part III.E of the Permit further requires the County to establish management programs to address stormwater management, erosion and sediment control, illicit discharges to the MS4, trash and litter, management of County property, road maintenance, and public education that meet articulated minimum standards;

WHEREAS, Part III.E.3 of the Permit requires the County to field screen at least 150 outfalls annually, and conduct routine surveys of commercial and industrial areas as minimum activities required for an illicit discharge detection and elimination program;

WHEREAS, under Part III.E.1.a of the Permit, the County is required to inspect all BMPs in the county every three years, and keep the subject BMPs maintained;

WHEREAS, Part III.G.2 of the Permit requires the County to restore, by the end of the permit term, twenty percent of its impervious surface area that had not already been managed to the maximum extent practicable prior to this permit term (the “Impervious Surface Restoration Plan” requirement). In practice, the restoration is conducted through the implementation of BMPs that treat stormwater from twenty percent of the County’s impervious acreage that is not constructed in accordance with stormwater standards established by the Department in 2000, and through the performance of alternate stormwater treatment practices established in accordance with Department standards;

WHEREAS, individuals and environmental groups challenged the permit and filed a petition for judicial review, challenging, among other things, the Impervious Surface Restoration Plan requirement.

WHEREAS, the legal challenges led to protracted litigation that resulted in the Circuit Court for Montgomery County remanding the Permit to the Department for further proceedings and revision on December 4, 2013 and leaving in its place the MS4 permit that the Department had issued to the County in 2001;

WHEREAS, on April 2, 2015, the Maryland Court of Special Appeals affirmed the Circuit Court’s decision to remand the Permit to the Department;

WHEREAS, the County continued to implement the requirements of the Permit in good faith notwithstanding the remand;

WHEREAS, on March 11, 2016, the Court of Appeals of Maryland ruled that the Permit was valid;

WHEREAS, by its terms, the Permit expired on February 15, 2015, but the terms and conditions of the Permit continue in effect until the Department issues a new permit pursuant to COMAR 26.08.04.06A(3);

ALLEGED VIOLATIONS

WHEREAS, the Department approved an Impervious Surface Restoration Plan baseline for the restoration of 3,778 acres of impervious surfaces that have not been restored to the maximum extent practicable based upon documentation found in *Montgomery County's 2010-2015 Watershed Restoration Achievements* (August 2015) and in the October 11, 2016 letter from MDE to the County.

WHEREAS, The Department understands that the County is continuing to refine its BMP data base in accordance with Department guidelines and will provide any proposed changes to the data base in the County's Fiscal Year 2017, 2018, 2019, and 2020 Annual Reports for Department review and approval.

WHEREAS, pursuant to Part III.G.2 of the Permit, the County submitted its fiscal year 2015 annual report to the Department on March 17, 2016, and indicated that it had restored 1,774 acres of impervious surfaces, resulting in a deficit of 2,004 impervious acres that have not been restored to the maximum extent practical.

WHEREAS, pursuant to Part III.G.2 of the Permit, the County submitted its fiscal year 2016 annual report to the Department on February 15, 2017, and indicated that it had restored 1,917.5 acres of impervious surfaces, resulting in a deficit of 1,860.5 impervious acres that have not been restored to the maximum extent practicable;

WHEREAS the Department recognizes the County has continued to work toward completion of its required impervious area restoration throughout this Consent Decree negotiation process.

WHEREAS, pursuant to Part III.C. of the Permit, the County submitted Urban BMP Database source identification data, which included data on 8,740 BMPs that had been implemented by the County. The BMP data, however, failed to include built dates for 452 of the BMPs, 2704 of the BMPs did not have drainage area information, and no impervious area BMP drainage area information was provided.

WHEREAS, pursuant to Part III.C. of the Permit, the County has continued to refine its Urban BMP Database source identification data during the course of these negotiations. This effort has reduced the number of BMPs that do not have drainage area information to 71 and 1,130 BMPs do not have impervious area information provided in the Urban BMP Database submitted in the Fiscal Year 2016 annual report;

WHEREAS, under Part III.E.1.a. of the Permit, the County is required to inspect all BMPs in the County every three years, but the County had failed to provide the last inspection date for 3,430 BMPs.

WHEREAS, under Part III.E.1.a. of the Permit, the County has continued to conduct triennial inspections of its BMPs during the course of these negotiations. As a result of this effort, the County provided a last inspection date for all BMPs with its Fiscal Year 2016 annual report.

WHEREAS, pursuant to Part III.E. of the Permit, the County maintained a program to address illegal discharges; however, the County did not report on commercial and industrial area surveys, and failed to provide requested information describing how the County's procedure for sampling underground piped streams is an effective means to discover and eliminate illicit discharges.

WHEREAS, under Part III.E. of the Permit, the County provided MDE with updated illicit discharge detection and elimination procedures that included appropriate procedures for surveying commercial and industrial areas, and adequate sampling protocols for underground piped streams.

WHEREAS, the Department alleges that the County failed to restore twenty percent of its impervious surface area that is not restored to the maximum extent practicable by February 15, 2015 under Part III.G.2 of the Permit;

WHEREAS, Section 9-342(a) of the Environment Article provides that any person who violates any provision of Title 9, Subtitle 3 of the Environment Article or any rule, regulation, order, or permit adopted or issued by the Department thereunder, is liable to a civil penalty of up to \$10,000 per violation, with each day a violation occurs constituting a separate violation;

WHEREAS, to avoid protracted litigation of the alleged violations and the corrective actions required, the parties have reached agreement on the terms of a Consent Decree;

WHEREAS, the upgrade of wastewater treatment plants in Maryland to enhanced nutrient removal has improved water quality and the Department has recognized that the rapid progress in the wastewater sector towards meeting the goals of the Chesapeake Bay Total Maximum Daily Load will balance slower progress in other sectors, including urban stormwater;

WHEREAS, it is the mutual objective of the County and the Department, by entering into this Consent Decree, to provide for and achieve compliance with the environmental laws addressed by this Consent Decree in an expeditious manner to protect public health and the environment;

WHEREAS, the Department has provided a thirty (30) day opportunity for public comment on the terms and conditions of this Consent Decree;

WHEREAS, it is the Department's position that this Consent Decree is in the best interests of and will benefit the citizens of the State of Maryland;

WHEREAS, it is expressly understood that this Consent Decree pertains to the specific violations of the State's environmental laws and regulations described herein, and that the Department has made no promises or representations other than those contained in this Consent Decree and that no other promises or representations will be made unless in writing. The Department makes no representations with regard to any criminal liability for the above-referenced violations, and has no authority over any criminal prosecutions; and

WHEREAS, the above recitals form the basis of and the consideration for this Consent Decree.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

I. JUDGMENT

1. A judgment is entered in favor of the Maryland Department of the Environment, against the County, in the amount of \$300,000, which shall be due on December 31, 2020. If, by December 31, 2020, the County designs, permits, and constructs Supplemental Environmental Projects (SEPs), approved by the Department in accordance with this Consent Decree, the Department shall file a Satisfaction of Judgment with the Court. These SEPs shall be impervious surface area restoration projects that will demonstrably treat stormwater runoff, located in the County with a minimum cost of \$300,000. The County may not count the impervious acres treated to the maximum extent practicable by the SEPs as part of the Impervious Surface Restoration Plan requirement set forth in Part III G.2. of the Permit.

2. If by December 31, 2020, the County has failed to complete the SEPs required by the Department as set forth in paragraph 1, the Department shall assess a civil penalty of \$300,000 against the County. Payment of any financial penalty shall be by check payable to the Maryland Department of the Environment and mailed to the following address: Maryland Department of the Environment, Fiscal Services Division, Cash Receipts/Advance Unit, P.O. Box 2057, Baltimore,

Maryland 21203. An invoice for payment of any penalty will be mailed by MDE to the County. The lack of receipt of an invoice has no effect on the County's obligation to make timely payment to the Department.

II. CORRECTIVE ACTIONS

3. Within 90 days of the execution of this Consent Decree by the County and the Department, the County shall submit to the Department for review and approval, a detailed annual milestone schedule for completion by December 31, 2020, of the Impervious Surface Restoration Plan requirement set forth in Part III.G.2 of the Permit. The schedule will establish how many acres of impervious surface will be treated by the County by the end of Calendar Year 2018 and then by the end of Calendar Year 2019 (collectively, "the Annual Restoration Goals"), in addition to meeting the entire requirement of 3,778 acres of Impervious Surface restoration by December 31, 2020 ("the Final Restoration Goal"). The County may replace individual scheduled projects as necessary, as long as the restoration goals are fulfilled.

4. Within 90 days after the execution of this Consent Decree by the County and the Department, the County shall submit to the Department for its review and approval a detailed description and annual milestone schedule for completion of the SEPs by December 31, 2020.

5. The County must adhere to the following reporting schedule:

a. By February 15, 2019, the County must submit to the Department the MS4 Annual Report for Fiscal Year 2018. This annual

report will include the County's reapplication for NPDES stormwater discharge permit coverage.

b. By February 15, 2020, the County must submit to the Department the MS4 Annual Report for Fiscal Year 2019.

c. By February 15, 2021, the County shall submit to the Department the MS4 Annual Report for Fiscal Year 2020 and Final Consent Decree Completion Report. These reports must demonstrate that the County has inspected the completion of all projects needed to restore 3,778 acres of impervious surfaces to the maximum extent practicable and has inspected the completion of the required SEPs. If the County does not meet the Final Restoration Goal, it must specify in the Final Report the amount of acreage by which the County has failed to satisfy the 3,778-acre restoration goal.

6. Within 90 days after the execution of this Consent Decree by the County and the Department, the County shall submit to the Department a proposal and schedule for review and approval, pursuant to Part III.E.1.a of the Permit, for the submission of inspection data regarding the 71 BMPs that do not have current or future inspection information. The County shall comply with terms of the approved schedule. Depending on the type of facility and year of installation, the County may remove some facilities from the County's inventory. The County shall ensure that facilities removed from its urban BMP inventory are not being used as credit toward restoration impervious area treatment. If a removed facility

has been counted toward its baseline, the County must remove the acreage managed by this facility from the County's baseline. Such removal from the inventory shall not constitute a violation of this Consent Decree or the Permit if undertaken in accordance with the approved plan.

III. STIPULATED PENALTIES

7. If the County fails to meet any date or deadline under this Consent Decree, or any date or deadline set forth in a plan or schedule submitted under paragraphs 3 through 5 of this Consent Decree, other than for the Annual Restoration Goals, Final Restoration Goal, and SEPs, the County shall pay \$250 per day of noncompliance for the first 30 days, \$500 per day of noncompliance between 31 and 90 days, and \$1,000 per day of noncompliance thereafter until the requirement is met. Failure to meet more than one date shall subject the County to cumulative penalties for each day that each separate requirement is not met by its due date.

8. If the County fails to meet the Annual Restoration Goals or Final Restoration Goal the Department may demand a stipulated penalty of \$2,000 per acre per day not completed by these deadlines.

9. Payment of any stipulated penalties shall be made by check payable to the Maryland Department of the Environment and directed to the Maryland Department of the Environment, Fiscal Services Division, Cash Receipts/Advance Unit, P.O. Box 2057, Baltimore, Maryland 21203. All stipulated penalties due

under this Consent Decree shall be paid within 30 days of a written demand and invoice by the Department.

10. All stipulated penalties shall begin to accrue on the date that complete performance was due or a violation occurs and shall continue to accrue through the final day of noncompliance. The County has the obligation to document to the Department's satisfaction that compliance has been achieved. Nothing herein shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree.

11. Except as otherwise expressly set forth in this Consent Decree, none of the stipulated penalties in this Consent Decree shall be construed as an election of remedy or other limitation on the Department's discretion to seek in lieu of stipulated penalties any other remedy or sanction available to it for violations of this Consent Decree or any other violation of State law or regulation not expressly made the subject of this Consent Decree. The Department's failure to demand any or all of a stipulated penalty under this Consent Decree does not constitute a waiver of the Department's right to make such a demand.

12. Except as otherwise expressly set forth in this Consent Decree, payment of any stipulated penalty shall not relieve the County from the obligations imposed by this Consent Decree, any permit that may be issued to the County, or any other statute or regulation, nor shall such payment limit the right of the Department to seek enforcement of the terms of this Consent Decree or any other statute or regulation.

13. The Department, may, in its discretion, reduce or waive any stipulated penalty if it determines that noncompliance is due to an event of force majeure as set forth in Section VII of this Consent Decree, or for any other reason deemed appropriate by the Department.

IV. MODIFICATION

14. This Consent Decree contains the entire agreement of the parties and shall not be modified by any prior oral or written agreement, representation, or understanding. Any modification of this Consent Decree shall be made in writing, signed by the parties, and approved by the Court.

15. No informal advice, guidance, suggestion, or comment by the Department regarding reports, plans, specifications, schedules, or any other writing submitted by the County shall relieve the County of its obligation to obtain such formal approval as may be required by this Consent Decree, and to comply with all requirements of this Consent Decree unless it is formally modified.

16. Any deliverables, plans, technical memoranda, reports, specifications, schedules and attachments required by this Consent Decree are, upon approval by the Department, incorporated into and enforceable under this Consent Decree.

17. Any request to modify the work shall not excuse, toll, or suspend any compliance obligation or deadline required pursuant to this Consent Decree

during the pendency of the Department's consideration of the request, nor shall it stay the accrual of stipulated penalties.

V. REVIEW AND APPROVAL PROCEDURES

18. The County shall submit to the Department for review and approval, all plans, schedules, reports, or other documents that are required to be submitted in accordance with the terms and conditions of the work to be performed pursuant to this Consent Decree. The Department may approve any submittal, in whole or in part, or decline to approve it and provide written comments. The Department may also request additional information.

19. All work plans, reports, schedules, procedures, or other documents that are required to be submitted in accordance with the terms and conditions of the work to be performed pursuant to this Consent Decree, upon approval by the Department, are incorporated into this Consent Decree. Any failure to comply with such approved documents, including any deadlines therein, shall be deemed noncompliance with this Consent Decree.

20. In the event of the Department's disapproval, in whole or in part, of any work plans, reports, or other documents that are required to be submitted in accordance with the terms and conditions of the work to be performed pursuant to this Consent Decree, the Department shall specify any deficiencies in writing to the County. The County shall correct the deficiencies within 30 days from receipt

of disapproval by the Department and submit the corrected document to the Department for review.

21. If the County takes exception to all or part of the Department's disapproval of any work plans, reports, or other documents that are required to be submitted in accordance with the terms and conditions of the work to be performed pursuant to this Consent Decree, the County shall submit within 30 days, a written statement of the grounds for the exception to the Department. Representatives of the Department and the County may confer in person or by telephone in an attempt to resolve any disagreement. If a resolution is reached, that resolution shall be documented in writing and signed by representatives of each party. In the event that resolution is not reached within 15 calendar days, the County shall modify the work plans, reports, or other documents as required by the Department in response to the Department's expressed deficiencies.

VI. RIGHT TO ENTER

22. The County shall allow authorized representatives of the Department to enter upon any County property or rights-of-way at all reasonable hours for the purpose of collecting samples, information, and/or photographs, and any other activity necessary to ascertain and evaluate whether the County is in compliance with this Consent Decree, its Permit, and State law. Upon request by the Department, the County shall provide the Department with access to any records or information that may be related to the County's MS4, this Consent Decree, or the County's compliance with State law.

VII. FORCE MAJEURE

23. The County shall perform all requirements under this Consent Decree in the manner and within the time limits established herein, unless performance is delayed or prevented by a force majeure. For purposes of this Consent Decree, a force majeure is defined as any event arising from causes not reasonably foreseeable and beyond the control of the County, or any entity controlled by the County or the County's contractors, which delays or prevents performance of any obligation under this Consent Decree despite due diligence and best efforts to fulfill the obligation. Circumstances beyond the control of the County include earthquake, flood or other act of God, war, riot, fire, or freight embargo. Force majeure does not include normal inclement weather, financial inability to complete the work, increased cost of performance, changes in the County's economic circumstances, or the failure to obtain federal, State, or local permits and authorizations.

24. The County shall notify the Department in writing within ten (10) work days of its knowledge of the event that causes or may cause delay. The notification shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by the County to prevent or minimize the delay, and a timetable by which those measures will be implemented. The County shall adopt all reasonable measures to avoid or minimize any such delay.

25. Failure by the County to comply with the notice requirements set forth in the preceding paragraph constitutes a waiver of the County's right to request an extension of the applicable deadline associated with the work at issue.

26. The County shall have the burden of proving that any delay is caused by circumstances beyond the control of the County.

VIII. PERSONS BOUND BY THIS CONSENT DECREE

27. This Consent Decree shall apply to and be binding upon the Department, the County, and the County's respective officers, employees, agents, trustees, receivers, and upon all persons acting on behalf of the County.

28. The County shall ensure that their contractors, subcontractors, laboratories, and consultants comply with this Consent Decree.

IX. NOTIFICATION

29. Unless otherwise specified, reports, correspondence, approvals, disapprovals, notices, or other submissions relating to or required by this Consent Decree shall be in writing and shall be sent to the following:

For MDE:

Lynn Buhl
Assistant Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

For County:

Patricia Bubar, Director (Acting)
Department of Environmental Protection
Montgomery County Government
255 Rockville Pike, Suite 120
Rockville, MD 20850

If the point of contact changes for any party, that party shall provide notification of the new point of contact.

X. RELEASE AND RESERVATION OF RIGHTS

30. Upon the full completion of all of the obligations set forth in this Consent Decree, the Department agrees to refrain from pursuing any civil enforcement action for the violations alleged in this Consent Decree that could have been brought prior to the execution of this Consent Decree against the County. The Department specifically reserves, and this Consent Decree is without prejudice to, all rights against the County with respect to (a) criminal enforcement actions, or (b) violations of any other State law not alleged herein.

31. Nothing in this Consent Decree shall be construed to limit any authority of the Department to issue any order or to take any action it deems necessary to protect public health or the environment, or to limit any authority the Department now has or may hereafter be delegated.

32. The County and the Department intend that nothing in this Consent Decree shall be construed as a release or covenant not to sue any third party not a signatory to this Consent Decree. Nothing contained in this Consent Decree shall affect any right, claim, cause of action, or defense of any party hereto with respect to third parties. The County and the Department specifically reserve any and all

rights, defenses, claims, demands, and causes of action that the County and the Department may have against any third parties relating in any way to the subject matter of this Consent Decree.

XI. THIRD PARTY BENEFICIARIES

33. This Consent Decree does not and is not intended to create any rights, claims, or benefits for any third party. No third party shall have any legally enforceable rights, claims, or benefits under this Consent Decree, nor shall any third party have any rights to enforce the terms of this Consent Decree. No act of performance by the County or the Department, nor forbearance to enforce any term of this Consent Decree by the Department, shall be construed as creating any rights, claims, or benefits for any third party.

34. This Consent Decree does not affect and is not intended to influence any third party's rights to investigate, evaluate and respond independently to any impacts from stormwater pollution.

XII. TERMS OF THIS CONSENT DECREE

35. The effective date of this Consent Decree shall be the date upon which the Consent Decree is entered by the Court.

36. Each person signing this Consent Decree certifies that he or she is duly authorized by the party on behalf of which each signs to execute this Consent Decree and to bind that party to the terms of this Consent Decree.

37. The County agrees to undertake and complete all actions required by the terms and conditions of this Consent Decree. In any action by the Department to enforce the terms of this Consent Decree, the County consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Consent Decree, and agrees not to contest the validity of this Consent Decree or its terms or conditions.

38. This Consent Decree is not intended to be, nor shall it be construed to be a permit or to replace or modify the existing Permit. This Consent Decree is intended to establish penalties for violations that have occurred and plans for implementation of corrective measures. The County acknowledges and agrees that the Department's approval of any plan does not constitute a warranty or representation that the plan will achieve the required compliance or performance standards. Compliance by the County with the terms of this Consent Decree shall not relieve the County of its obligation to comply with any other applicable local, State, or federal laws and regulations.

39. If a court issues an order that invalidates any provision of this Consent Decree or finds that the County has sufficient cause not to comply with one or more provisions of this Consent Decree, the County shall remain bound to comply with all provisions of this Consent Decree not invalidated or determined to be subject to a sufficient cause defense by the court's order.

40. This Consent Decree shall be construed in accordance with the laws of the State of Maryland.

IT IS SO DECREED this ____ day of _____, 2016:

Judge, Circuit Court for Montgomery
County

DRAFT

IT IS SO AGREED AND CONSENTED TO:

ON BEHALF OF MONTGOMERY COUNTY, MARYLAND:

Date

Timothy Firestine
Chief Administrative Officer

Approved as to form and legal sufficiency this _____
day of _____, 2018.

Walter E. Wilson
Associate County Attorney

ON BEHALF OF THE MARYLAND DEPARTMENT OF THE ENVIRONMENT:

Date

Lynn Buhl
Assistant Secretary

Approved as to form and legal sufficiency this _____
day of _____, 2018.

Matthew Clagett
Assistant Attorney General