

MARYLAND DEPARTMENT OF THE ENVIRONMENT

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PUBLIC HEARING ON MODIFICATION :
OF PERMIT NO. 11-DP-3321 :
MD0068357 :
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A public hearing was held on July 29, 2019,
commencing at 4:06 p.m. at Winchester Hall, Winchester Room,
12 East Church Street, Frederick, Maryland.

A P P E A R A N C E S

	<u>Page</u>
Pat Depkin	3
Shannon Moore	7
Benjamin Alexandro	11

P R O C E E D I N G S

1
2 MR. DEPKIN: Good afternoon and welcome. Can you
3 hear me? You got me all right? Today is Monday, July 29th,
4 2019. It's approximately 4:07 p.m. Today's public hearing
5 is regarding the Maryland Department of Environment's (the
6 Department's) tentative determination to modify Frederick
7 County's National Pollutant Discharge Elimination System,
8 (NPDES), municipal separate storm sewer system (MS4) permit
9 and the number of that permit is 11-DP-3321 MD0068357.

10 My name is Pat Depkin, I'm the Frederick County
11 MS4 Permit Administrator with Sediment, Storm Water and Dam
12 Safety Program within the Department's Water and Science
13 Administration. With me today from MDE are Christina
14 Lyerly, sitting in the cheap seats, and Jennifer Smith up
15 here with me.

16 Thank you, folks from MDE, for coming and the
17 public officials from Frederick County who helped getting us
18 to these proceedings.

19 So, in accordance with the Maryland's
20 Administrative Procedures Act, a tentative determination to
21 modify Frederick County's MS4 permit has been advertised in
22 the Maryland Register on July 5, 2019 and July 19, 2019, as
23 well as the Frederick News Post on July 12, 2019 and July
24 16, 2019, sent out to the Department's interested party list
25 for Frederick County via email and publicized on the

1 Department's web page where the proposed permit modification
2 and supporting fact sheet material can be found.

3 Everyone who signed up to speak today or signed
4 the attendance sheet will be added to the Department's
5 interested party list and will receive notice of any actions
6 regarding Frederick County's MS4 permit. If you want to be
7 on the Department's interested party list for this permit
8 and did not sign up on one of these two sheets, please do so
9 before the end of today's hearing.

10 The purpose of today's hearing is to accept public
11 comment on the Department's tentative determination to
12 modify Frederick County's MS4 permit. The Department has
13 some introductory remarks regarding this action and after
14 that I would like to give Frederick County, the permittee,
15 an opportunity to comment, and any local elected officials
16 who so desire an opportunity to speak. After that we will
17 work down the list of speakers who signed up to give
18 testimony today.

19 Today's hearing is scheduled for two hours and we
20 would like to provide everyone who would like to speak an
21 opportunity to do so, so please keep your remarks concise
22 and focused on the proposed permit modification.

23 For background, Maryland has been delegated
24 authority by the United States Environmental Protection
25 Agency, or EPA, to administer the NPDES program for the

1 State. Final stormwater regulations were adopted by EPA in
2 November 1990 according to Section 402(p) of the Clean Water
3 Act. These regulations require in part that owners or
4 operators of storm drain systems serving populations of
5 greater than 100,000, including Frederick County, apply for
6 a Phase I NPDES municipal stormwater permit.

7 To improve local water quality at Chesapeake Bay,
8 Frederick County's most recently issued MS4 permit on
9 December 30, 2014 included a requirement for the restoration
10 of 20 percent of the impervious surface area within the
11 County that was not already managed for storm water to the
12 maximum extent practicable. On June 20, 2019, Frederick
13 County formally requested an NPDES MS4 permit modification
14 from the Department to use Maryland's newly authorized
15 nutrient trading program as an option to help meet its 20
16 percent impervious surface area restoration requirement.

17 The Department has determined that Frederick
18 County's MS4 permit may be modified to allow the use of
19 nutrient trading for the following reasons:

20 In accordance with the Code of Federal Regulations
21 (CFR), Section 40, Section 122.62, the Department may
22 receive new information which justifies applying conditions
23 different from those in the permit if the information was
24 not available at the time of the permit issuance.

25 In accordance with 40 CFR Section 122.62, the

1 Department may modify an existing permit when proposed
2 standards and regulations covering the permitted activity
3 may have changed since issuance of the permit.

4 A new phase of Maryland's nutrient trading program
5 with authorizing regulations in the Code of Maryland
6 Regulations or COMAR 26.08.11, were formally adopted for use
7 on July 16, 2018. The EPA reviewed and did not object to
8 Maryland's trading policy updates and draft MS4 permit
9 modification language.

10 The new trading policy allowing MS4s to acquire
11 nutrient credits was not in place at the time Frederick
12 County's NPDES MS4 permit was issued. Frederick County has
13 documented that while the capital and operational funds
14 necessary to meet the 20 percent impervious surface
15 restoration requirement are available, the physical capacity
16 for implementing structural BMPs within the permit timeframe
17 is a limiting factor.

18 The EPA, the Department and Maryland's Court of
19 Appeals have determined that the 20 percent imperious
20 surface restoration requirement is an approved effluent
21 limit consistent with and satisfactory for addressing both
22 the Chesapeake Bay and other applicable total maximum daily
23 load (TMDL) wasteload allocations (WLAs) and trading for
24 amounts of total nitrogen (TN, total phosphorus (TP), or
25 total suspended solids (TSS), that would have been reduced

1 through the 20 percent impervious surface area restoration
2 requirement, will have a similar net effect on local and
3 Chesapeake Bay water quality.

4 I would like to now ask if anyone from Frederick
5 County government is here and would like to add comments to
6 the public record at this time? Shannon?

7 MS. MOORE: Thank you, Pat. I'm Shannon Moore.
8 I'm from Frederick County government. And I manage our
9 Office of Sustainability and Environmental Resources. And
10 Ben it's good to see you in the audience today.

11 So, we are really happy to be working with MDE on
12 this trading component to add it to the permit. However, we
13 don't intend to rely on it very heavily. Our hope is to try
14 to get as close to meeting the restoration requirement in
15 its entirety without it. As you know, we have a 20 percent
16 restoration requirement. And the memo that we sent to our
17 county executive suggesting that we would like to do trades
18 did a couple of different things internally before we made
19 the application to MDE.

20 So, one, it solidified a relationship between
21 ourselves and the Division of Utilities and Solid Base
22 Management. For the basic agreement and structure of how we
23 would do trades, although it didn't formalize any particular
24 trades, and then it also gave us permission to apply for the
25 major permit modification and suggested to the county

1 executive that we didn't see a need to use more than about
2 140 impervious acres worth of crediting.

3 That's probably going to end up being smaller than
4 that and it really at this point depends on a couple of key
5 things: one, how many of our tree planting projects we can
6 get in this fall; and also, of our previous tree planting
7 projects which ones were able to count? Because there are
8 some limitations as far as the number of trees at a certain
9 diameter at breast height that you have to meet in order to
10 count the acres as being treated.

11 So, they'll either get treated this permit cycle
12 or the next. And I think it's important to note that we're
13 only intending to trade for as long as we need to meet the
14 requirements of this permit cycle. So, for example, if
15 we're able to complete the up to 140 acres worth of trades
16 by the end of -- or the first year of the next permit cycle,
17 we won't need to continue to use credits. It's really just
18 trading temporarily so that we can meet this permit cycle.

19 Other reasons why we may not be able to meet the,
20 the 20 percent at this time could also have something to do
21 with pond projects. As we go through with them, sometimes
22 we find field issues, or they get delayed. We, we've had to
23 kick out a couple of projects that were smaller because of
24 land ownership issues where the County's records showed that
25 we owned a property, but we didn't actually. Or, actually,

1 vice versa. We've had some where we thought we didn't own
2 them that we did that came in handy.

3 We're also in the process of researching outfall
4 stabilizations and stream stabilizations from past work done
5 by our Highway Operations Division and others. MDE gave us
6 access to their old permit database so we could look through
7 those. And so, we're figuring out which ones of those are
8 creditable that would have been completed after the end of
9 the last permit cycle March 11, 2007.

10 So, we're still in the process of kind of
11 estimating what our, our numbers are going to be and as we
12 get closer and closer towards the end of the permit, we'll
13 have a much clearer idea. But we do have our outside
14 number. We are really enthusiastic about getting really
15 close to the, to the 20 percent number.

16 And MDE recently gave us our annual report review
17 from 2018 and I'm very pleased to say that it looks like on
18 all of the other permit elements we're looking at full
19 compliance. There are a few things that were noted in the
20 annual report review that were like missing data that we
21 need to fill in and things like that. But fundamentally I
22 think the, the permit compliance is very solid and it's
23 something that Frederick County takes very seriously in
24 addition to water quality.

25 So, I kind of wanted to give you that update just

1 so you can kind of get a sense for where we're at. We're
2 happy to have the opportunity to trade. But we're also not
3 planning to rely on it very heavily.

4 So, with that I have one comment that I wanted to
5 make on the, on the trades themselves. And that's not
6 something that's going to get written in the permit but has
7 to do with delivery ratios from the generation of the
8 obligation versus the generation of credits. We just want
9 to make sure that they're used -- that same basis is used
10 for both. Because the way that it's currently written in
11 the accounting for stormwater manual and also in the trading
12 guidance is inconsistent and would, would not use the same
13 delivery ratios for generating your liability for the credit
14 versus the actual credit from a practice. So, we want that
15 to be one to one for what we're using them for. And we have
16 had conversations with MDE, but nothing's been formalized on
17 that. So, I just wanted to note that in, in this process.

18 Other than that, I'm happy to turn over the floor
19 to Ben Alexandro if you want to come up and give your
20 comments?

21 MR. ALEXANDRO: Sure.

22 MR. DEPKIN: Yes, you are the one and only.

23 MR. ALEXANDRO: Okay.

24 MR. DEPKIN: So, please you have the floor, sir.

25 MR. ALEXANDRO: Is there -- are these working?

1 MR. DEPKIN: Any, any one is fine.

2 MR. ALEXANDRO: Okay.

3 MR. DEPKIN: As far as we know.

4 MR. ALEXANDRO: All right. Should I push this
5 button or --

6 MS. MOORE: You don't need to, actually --

7 MR. ALEXANDRO: Okay.

8 MS. MOORE: -- we're using a different microphone
9 system.

10 MR. ALEXANDRO: Oh, okay.

11 MS. MOORE: It will take up right there.

12 MR. ALEXANDRO: Nevermind then. So, thank you so
13 much for the opportunity to comment on this proposal. My
14 name is Benjamin Alexandro and I'm commenting on behalf of
15 Maryland League of Conservation Voters representing 20,000
16 supporters here in Maryland. I'm also with the Choose Clean
17 Water Coalition as the State lead and also before this, I
18 was with the Environmental Finance Center and actually
19 worked on -- I'm one of the authors of the 2015 Maryland
20 Chesapeake Bay Restoration Financing Report. So, I feel
21 that I'm pretty familiar with how to make a good trading
22 system and what can make and break a nutrient system to
23 actually incentivize what we need to have done here in, in
24 Maryland.

25 And we feel that trading should just not be

1 injected last minute into a permit that's about to expire.
2 And, you know, in the fact sheet it does look like they're
3 not going to be using trading as much as some of the other
4 counties, thankfully, but we're worried about the precedent
5 this can set for these other counties if it's, if it's
6 allowed. And according to the Financial Insurance Plan, now
7 that was a little while back, but they did say that they
8 might be able to take advantage to meet up to 50 percent of
9 impervious service requirement and we're hoping that's not
10 the case.

11 But the real piece of this is that the trading
12 should never be used as a paper exercise to, to give the
13 counties a free pass of walking away from commitments to
14 water quality. We're very concerned that introducing
15 nutrient trading as the mechanism to do this at, you know,
16 at the very end of the permit weakens the permit and sets
17 this dangerous precedent for others and also potentially
18 damages the validity of the trading market itself to
19 actually incentivize those things we want to have done.

20 So, we feel that nutrient trading should really be
21 used only to finance real new projects. That's the most
22 important component that we find on nutrient trading is that
23 you have to ensure additionality with trading. So, it
24 should really be used to fund projects that would not have
25 been done otherwise.

1 So, I remember years ago, actually, before when I
2 was with Cavan Institute and the first touring around in
3 Frederick County with the idea of trading, looking at some
4 of these things is this idea of like with the study with the
5 nature conservancy and looking at natural filters, ecology
6 hydroelectric areas. Looking at how you could finance the
7 actual filters upstream or recurring buffers of the MS4
8 areas, preferably leading the County to spend real money to
9 finance new practices, permits practices such as paying
10 farmers, you know, to plant or maintain or preparing buffers
11 for us and such.

12 So, we're seeing several fantastic projects in
13 Frederick County like the Relief Program and a number of
14 others that we're seeing. But that's without trading.
15 Right, that's, that's on their own. So, unfortunately, we
16 don't see additional funds in trading like being allocated
17 in the financial assurance plans through trading to do
18 things like that.

19 So, you know, and according to the FAP, the
20 Financial Assurance Plan, they're budgeting to get 255.8
21 acres work with zero dollars by trading with wastewater
22 treatment plants. So, this shows that no real projects, no
23 new real projects would be incentivized, so therefore it's
24 really a paper exercise and we don't think that that's
25 appropriate.

1 So, even more telling, unfortunately, we're seeing
2 that the County budgeting for their capital improvement
3 projects was actually 2 million dollars less than what they
4 had promised the MDE just a few months before and we think
5 it's very, very important that Shannon and your Department
6 gets the money that she needs to do the great actual
7 projects on the ground. So, we're very worried that this is
8 very, a very dangerous signal to these counties and
9 especially elected officials that putting money aside to
10 fund real improvements to water quality is not as important
11 as it once was.

12 So, you know, the free trade of wastewater
13 treatment credits is the problem for our nutrient trading
14 system as a whole. I did some calculations and if MDE
15 doesn't prohibit it wastewater treatment plants operating
16 throughout the States under three parts per million baseline
17 could generate thousands or even hundreds of thousands of
18 credits and they could still very cheaply, with nothing
19 preventing them from giving away for free, that could
20 potentially flood the market in which you're trying to
21 incentivize new cost effective projects. Farmers going you,
22 you know, planting things in their lines on their properties
23 et cetera. And, you know, trading should create this new
24 pollution protection that's not already happening through
25 market forces. Not things that are already being

1 accomplished by another program like our BRF funding.

2 So, we think it's inappropriate to trade with the
3 wastewater treatment plants if they've already been upgraded
4 to get to that level through State, State funding such as
5 the BRF funding. So, doing so finances new projects and
6 represents -- no new projects and represents zero investment
7 by the counties.

8 There are some other -- so like that's the biggest
9 thing. But putting that aside, there are some other
10 concerns that we've highlighted in the past to primarily --
11 for things like hotspots and other concerns. You know,
12 Frederick County has several impaired waterways. Still a
13 long way to go on meeting local TDL. So, MDE assured the
14 Water Quality Trading Advisory Committee that nutrient
15 trading regulations are intended to restrict trading
16 upstream of impaired segments, which is, which is good, but
17 however, this permit fails to address the issue where you
18 have the County as a whole in several different and multiple
19 water sheds. So, how will they, you know, how, how does the
20 State intend to adhere to those, to those concerns and those
21 problems?

22 As a voice and comments of MDE we remain very
23 concerned about hotspots of pollution and trading creating
24 potential environmental justice issues where underserved
25 communities suffer the brunt of environment pollution.

1 Right? Several areas in Frederick County are sensitive
2 drinking water areas and trading outside these, these water
3 sheds rather restoring them could create dangerous
4 implications for the water that we drink if we're not
5 careful.

6 We also think if trading's allowed -- if trading
7 is allowed in this permit there really needs to be some set
8 limitations so the County addresses these concerns and
9 knows, and knows that these credits must be replaced with
10 real on the ground projects in the future. Now we've heard
11 some of that verbally, but we really need to see that
12 codified.

13 Also, we feel the MDE needs to provide more
14 information about where the -- how the credits are actually
15 calculated and posting them clearing on line and showing how
16 these trades have, you know, these trades will be on the,
17 you know, Maryland Nutrient and Trading online tool which
18 we've been said is the main driver. But then we've been
19 hearing that there might be different places where things
20 are posted on add credits versus wastewater treatment plant
21 credits and potentially creating two markets which can
22 compound some of the issues that I mentioned before.

23 So, we're -- the other thing I'd love to do is
24 just get some more answers from you. Is it true that, you
25 know, we'd heard in the past that no, there'll just be one

1 market and they will be the same, but then when I was just
2 asking MDE they're saying, oh, well that's MDA versus MDE
3 and we're going to have two different systems. So, I'd like
4 to get to the bottom of that.

5 You know, we really want to know where each credit
6 will come from. You know, and then if, if it's just
7 nutrient credit, nitrogen credits coming from wastewater
8 treatment plants, then what about the other, you know,
9 sediment and phosphorous, is that coming from there too?
10 You know, really this boils down to just the transparency of
11 this. Seeing what's happening is of paramount importance
12 for us.

13 Again, not just for Frederick County, but I'm here
14 because of the precedent that this sets for all of the
15 counties. Many of them are looking to rely on trading a lot
16 more than Frederick is in this case. Right?

17 So, MDE is working -- has been working hard on the
18 nutrient trading regulations for years and there's a
19 feedback from a lot of sectors on how to do it right. So,
20 Maryland LCV as well as dozens of Choose Clean Water
21 Coalition members and organizations that sent multiple
22 letters to MDE and commented several times in the last few
23 years, as well as, remained active in the water quality
24 trading advisory committee. So, we really feel that MDE
25 cannot let this modification go through as it will

1 jeopardize, you know, that progress and that input. As it
2 is this is not trading. This is really a paper exercise on
3 permit obligations which sets a dangerous precedent for
4 other permits. Thank you very much for your time.

5 MR. DEPKIN: Thank you.

6 MR. ALEXANDRO: I'd be happy to answer any
7 questions if you have any.

8 MR. DEPKIN: Did you want to submit any written?

9 MR. ALEXANDRO: We will be submitting written.

10 MR. DEPKIN: Okay.

11 MR. ALEXANDRO: But I believe we have until
12 October 5th?

13 MR. DEPKIN: Yes. Yes.

14 MR. ALEXANDRO: Okay. And I was thinking about
15 that and then I scribbled a bunch of notes for myself on my
16 one here. So, I'd rather submit it at a later date if
17 that's fine?

18 MR. DEPKIN: Very good, yeah. I doped out the 90
19 days from today, it's like -- I think it's October 3rd,
20 but --

21 MR. ALEXANDRO: Oh, October 3rd? Oh, that's good
22 to know.

23 MR. DEPKIN: Now, my math might have been off a
24 day or two. I was working it out quickly on the calendar,
25 but --

1 MS. MOORE: Yeah, you don't want to miss it on the
2 last couple of days. I did that at Prince George's County.

3 MS. SMITH: It's in the announcement though. It's
4 in a public notice.

5 MR. DEPKIN: You have 90 days from the public
6 notice. From, from today.

7 MS. SMITH: But it doesn't have a date? It
8 just --

9 MR. DEPKIN: No, it just says 90 days from -- or
10 it's either 90 days from today or 90 days from when it was
11 published.

12 MS. SMITH: 90 days from when it was published.

13 MR. DEPKIN: Yes. So that would have been the,
14 the --

15 MS. SMITH: The 5th.

16 MR. DEPKIN: The 5th, yeah.

17 MR. ALEXANDRO: Oh, it is?

18 MR. DEPKIN: Yeah, 90 days from the 5th.

19 MS. MOORE: It's 90 days from July 5th.

20 MR. DEPKIN: Yeah, because that's when it went
21 into the register.

22 MS. MOORE: Inclusive of July 5th, right? Or, is
23 it not inclusive?

24 MR. DEPKIN: You're into a level of detail that I
25 can't answer at this point.

1 MS. MOORE: Okay. But anyway it's 90 days from
2 today.

3 MR. DEPKIN: Do we typically deny folks that come
4 in 12 hours late or 24 hours late?

5 MR. ALEXANDRO: Right, maybe I just need to
6 calculate them.

7 MR. DEPKIN: Okay.

8 MS. SMITH: Yeah, we deny them.

9 MR. DEPKIN: Okay.

10 MR. ALEXANDRO: Okay.

11 MR. DEPKIN: So, thank you, sir, for your comments
12 and for representing the folks you're representing and bring
13 your points of view to us today.

14 MR. ALEXANDRO: Okay, of course.

15 MS. MOORE: And thanks for your sustained interest
16 in Frederick County too. I really appreciate it.

17 MR. ALEXANDRO: Yeah.

18 MS. MOORE: And for your, your input during the
19 budget cycle and as you can see, we, we were able to keep
20 the funds in there that we had requested. So, I was very
21 pleased with that. Although there was some challenges to
22 it. So, you're support means a lot thank you.

23 MR. ALEXANDRO: Thank you.

24 MR. DEPKIN: So, it doesn't look like we have any
25 other speakers here this afternoon. So, that being said,

1 this is the final call for additional speakers. If anyone
2 would like to submit written comments, as I said, we have
3 until October 3rd of 2019 to submit written comments to MDE.
4 Written comments should be submitted to Mr. Raymond Bahr, B-
5 A-H-R, Maryland Department of the Environment, Water and
6 Science Administration, Sediment, Stormwater and Dam Safety
7 Program, 1800 Washington Boulevard, Suite 440, Baltimore,
8 Maryland 21230-1708; or email at Raymond.bar@maryland.gov.

9 Additional information on this permit modification
10 can be found on the Department's website,
11 www.mde.maryland.gov. After the comment period has closed
12 on October 3rd, 2019 the Department will develop a response
13 to comments document that will support a final determination
14 to modify Frederick's MS4 permit. Anyone who signed up on
15 our attendance sheet today or gave testimony will be added
16 to the Department's interest party list for Frederick County
17 and will be kept apprised of all permit actions via e-mail
18 announcements.

19 I'd like to thank everyone for attending this
20 afternoons public hearing and for your participation in
21 these matters and with that I believe we can adjourn there
22 being no further comments or questions let's call it closed.

23 (Whereupon, at 4:31 p.m., the hearing was
24 concluded.)

25

Digitally signed by TRESSA CLIFFORD

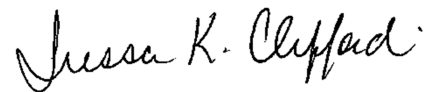
ELECTRONIC CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Maryland Department of the Environment in the matter of:

PUBLIC HEARING ON MODIFICATION OF

PERMIT NO. 11-DP-3321 MD0068357

By:



TRESSA CLIFFORD, Transcriber