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Re: Comments on Renewal of the State/NPDES General Permit For Stormwater Associated with Construction Activity - 20CP0000 (20CP).

Dear Mr. Hlavinka,

The Chesapeake Accountability Project (“CAP”) and other stakeholders submit these comments in regards to the Maryland Department of Environment (“MDE” or “the Department”) tentative determination to renew the 14GP General Discharge Permit for Stormwater Associated with Construction Activity, as the 20CP (the “Permit”).

The Chesapeake Bay restoration effort has hit a critical point. At the same time that the seven Bay jurisdictions have submitted their final plans for cleaning their rivers and streams and restoring the Bay, the restoration community faces many obstacles, including funding shortfalls, inadequate enforcement of laws and regulations, and waning government commitments to the Bay’s restoration.

CAP is a coalition of environmental organizations committed to reducing pollution throughout the Bay watershed by eliminating pollution attributable to ineffective Clean Water Act and state water pollution control permits or the lack of enforcement of these permits and laws. The project is a partnership of five nonprofit organizations, including the Center for Progressive Reform, Chesapeake Bay Foundation, Chesapeake Legal Alliance, Choose Clean Water Coalition, and Environmental Integrity Project. Weak permits and lack of enforcement have major implications for water quality and the overall Bay restoration effort because weak permits and reduced enforcement result in millions of pounds of pollution, while strong Clean Water Act implementation and enforcement leads to more efficient and equitable outcomes.

The Clean Water Act relies on permits, such as the 20CP, to achieve and maintain water quality standards. To be effective, permits must contain clear, specific, measurable, and enforceable limits and requirements, and must be subject to strict enforcement when terms are violated. The current permit regime fails on each of these measures. Today, permit conditions are not tied to water-quality results, and permit holders understand that enforcement is unlikely and compliance deadlines are flexible, sending a strong signal to bad actors and negating any incentive for law abiding permit holders to invest in environmental compliance. To reverse this trend, CAP demands greater enforcement and help to keep permit holders accountable.

Please note that all comments in this letter and the references cited herein are submitted for the administrative record with the intent that documents and resources cited in the footnotes be included in the administrative record. Commenters also note that all references in this comment are immediately available to MDE upon request.

Summary of Concerns and Requested Permit Improvements

Below we have summarized some of the specific concerns with the draft permit and requests regarding improvements we urge MDE to adopt within the draft permit. This summary of the full comments is provided for convenience but should not be interpreted as an exhaustive list of concerns and suggested permit improvements, which are described below in full.

I. Lack of Staffing and Meaningful Review of Permits

- MDE's Industrial Stormwater Permit Division lacks the staff, the time, and the resources to adequately implement the terms of this Permit. This results in MDE's failure to provide meaningful review of applications for coverage under this permit.
- To address this, we strongly urge the Department to devote more staff and resources to the administration of this Permit to give effect to some of the significantly improved provisions within it.

II. Vague Language and Unenforceable Conditions

- Another overarching issue pervasive throughout the Permit is the use of vague language and provisions that are unnecessarily subjective, lacking in specificity or any discernible guiding standards, or are otherwise unenforceable statements.
- We urge the Department to take a close look at the entirety of the permit for vague language and unenforceable standards, including the instances detailed below.

III. Inadequate Water Pollution Controls

- Vague language, lack of resources, and ineffective reliance on local review and approval result in a Permit that contains pollution controls that are demonstrably

ineffective at minimizing and eliminating stormwater pollution from construction sites.

- We urge MDE to clarify within the permit what violations would lead MDE to determine that water quality standards have been violated and to remove the discretion for this determination from a Permittee.

IV. Inadequate Protection of Maryland Water Quality Standards

- The Permit fails to establish new protections for water quality standards, fails to explain how water quality standards will be protected and contains conclusory and circular language that lacks any enforceable provision to protect water quality.
- We urge MDE to provide details or an explanation as to how this permit will protect water quality and remove vague, conclusory, and presumptive statements that prevent actual enforcement of these provisions of the Permit.

V. Inadequate Public Participation and Transparency

- This Permit maintains the deficient public participation provisions of the previous permit and this Permit does not facilitate transparency because it fails to provide adequate electronic access to relevant or required documentation.
- We urge MDE to extend the public comment period for applications for coverage under the Permit, require relevant permit documents be available during the comment period, and enhance electronic access to permit documents.

VI. Ineffective Corrective Action Sequence

- The corrective actions required in the Permit lack sufficient triggering mechanisms, are too subjective and will not stop pollution.
- We urge MDE to remove discretion by allowing local and state authorities to trigger corrective actions, include a menu of escalating corrective actions for sites with more than one triggering event and require electronic submission and public transparency of corrective actions.

VII. Inadequate Recognition of Climate Trends

- The permit fails to adequately consider and control for how climate change driven increases in extreme weather, sea level rise, and the intensity, duration, and frequency of rain events result in increased pollution to and degradation of Maryland's waters.
- We urge MDE to use adaptive management techniques and consider the facts regarding climate change presented in this comment as well as conduct their own analysis of the impacts and determine how to best update this Permit to adequately control the increases in stormwater runoff attributed to changes in precipitation trends in Maryland.

VIII. Inconsistencies with State Law

- Two definitions in the Permit are inconsistent with definitions in state law.
- MDE must correct these definitions so they are consistent with state law.

Background/Summary of Facts

Polluted runoff from construction sites is one of the largest potential sources of sediment pollution to waterways. According to the U.S. Environmental Protection Agency, runoff from an unstabilized construction site can result in the loss of approximately 35–45 tons of sediment per acre each year, and even just a short burst of rain “can contribute more sediment to streams than would be deposited naturally over several decades.”¹ With an average of well over 1,000 construction projects per year receiving coverage under Maryland’s construction stormwater general permit, the collective water quality impacts from construction sites is substantial and the stakes for creating an effective permit are high. Moreover, runoff from construction sites is not directly accounted for in the Chesapeake Bay Model, but rather the net effect of any land use change and attenuation by installed BMPs. The result being “coverage” under the permit does not offset runoff pollutants to the Bay as a result of construction activities.

Our organizations have committed substantial time and resources working with the Department and reviewing the Permit over the last several years because we are acutely aware, based on our work and the concerns of our members and partners, that the impact of polluted runoff from construction sites is not hypothetical or theoretical, but manifest and widespread and presents an ongoing threat to hundreds of streams and the restoration of the Chesapeake. Moreover, what was previously an anecdotal assumption is now a documented fact: Marylanders have indeed been inundating the state and county governments with complaints about enormous volumes of pollution flowing from construction sites. The Department’s recently released *Annual Report on Environmental Violations*² (August 2020) showed that in just one year, and only for half of Maryland’s counties and nine of its municipalities, there were 9,726 violations noted by inspectors of erosion and sediment control (“E&SC”) and building and grading laws and another 1,816 complaints filed by residents. Again, this is only for a subset of jurisdictions in Maryland and does not, of course, include the potentially thousands of additional complaints that were never filed due to a lack of time or ability of residents to understand the process for filing complaints.

Moreover, these staggering violation figures are likely far lower than they would be if there were as many construction site inspectors as the Office of Legislative Audits indicated there should be

¹ Developing a Stormwater Pollution Prevention Plan (SWPPP). U.S Environmental Protection Agency. Last Accessed December 18, 2020). Available at: <https://www.epa.gov/npdes/developing-stormwater-pollution-prevention-plan-swppp>.

²<https://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/2019%20Erosion%20and%20Sediment%20Control%20Environmental%20Violations%20Reported.pdf>

in repeat audit findings³ (noting that the state was short by about four dozen inspectors in order to meet statutory requirements). In their most recent report, legislative auditors found that only 1,033 of 5,942 sites were inspected during fiscal year 2016 despite an acknowledgement from the Department that “these inspections should be frequent because of the continuously evolving land conditions of active construction sites.” Beyond these local inspection and complaint data, the Department’s data shows that it has finalized fewer than 10 enforcement actions per year for all stormwater management and E&SC violations combined over the last three years, despite Department inspection data revealing that more than one-third of inspections ended in a finding of noncompliance or on-site compliance assistance being rendered.

In short, the recently expired permit has failed to stimulate compliance with its terms and to prevent illegal and excessive levels of pollution. As a result, our water quality has suffered tremendously and Marylanders all over the state are demanding change. The Department now has the opportunity to make this change, to stop the needless and ceaseless dumping of sediment, debris, and other construction waste, and to encourage more careful and protective development practices that protect wildlife, sensitive ecosystems, and water quality for current and future generations. We offer the following findings and recommendations after our review of the proposed General Permit for Stormwater Associated with Construction Activity and are happy to discuss these further with Department staff.

Acknowledgement of Positive Changes

We would first like to acknowledge some of the improvements proposed in the Permit. We applaud the inclusion of a specific section for “Water Quality-Based Limits” in section III.B. Regardless of the contents of this section, it is helpful for ease of reference for permittees and the public to separate these conditions into a specific section of the Permit with a prominent heading and to clarify that, as a Clean Water Act permit, there are effluent limitations contained in this permit designed to meet water quality standards. Some discharge permits issued by the Department have been clear and specific regarding the applicability and importance of water quality-based effluent limitations while others have not, including the expired construction stormwater general permit. We also appreciate the Department’s specific concern for PCB pollution and the addition of a discharge limitation for PCBs in subsection III.B.3; we do question why the Department has only included a specific limitation on PCBs but not other pervasive and hazardous pollutants. We encourage the Department to consider including water quality based effluent limits for priority pollutants in any Maryland waterbody with a local TMDL.

³ See *Audit Report, Department of the Environment* (May 2018), Maryland Department of Legislative Audits. <https://www.ola.state.md.us/umbraco/Api/ReportFile/GetReport?fileId=5afed0f14212031e902339dd> (last accessed December 2020); and *Audit Report, Department of the Environment* (January 2015), Maryland Department of Legislative Audits <https://www.ola.state.md.us/umbraco/Api/ReportFile/GetReport?fileId=5a8f4d0fcc9d7245606743e8> (last accessed December 2020).

We appreciate the inclusion in subsection III.A.2 of sediment track-out controls and the clarification that the dust minimization requirements of the ESC handbook are applicable to this sector, which removes uncertainty about whether dust suppression is an enforceable and mandatory requirement of the Permit. The chemical composition of sediment in areas where heavy industrial equipment is present poses significant risks to human health and aquatic biota, especially when left to wash or blow off impervious surfaces.⁴ Moreover, the language contained in paragraph III.A.2.h, while not numeric (which would be preferable), is at least relatively descriptive and should be sufficiently verifiable for inspectors and the public so as to be enforceable.

Other proposed provisions in the Permit contain similar helpful language. Paragraph III.C.6.d requires permittees to “[c]heck for signs of visible erosion and sedimentation (i.e., sediment deposits) that have occurred and are attributable to your discharge at points of discharge...” This is not only a commonsense pollution control requirement, but one that is verifiable by the public and Department inspectors. Paragraph III.A.2.j includes new requirements for the siting and maintenance of sediment traps that could be more protective than under the expired permit and enforceable. The same general comment also applies to paragraphs 2.k and 2.l in this subsection, governing protection measures for storm drain inlets and flow dissipation and erosion control features “along the length of any stormwater conveyance channel and at any outlet.” The language in these paragraphs is specific and clear, something that is otherwise lacking throughout this Permit, as we describe further below.

The preconstruction meeting requirement in subsection II.C.2 is a helpful addition in the Permit as these meetings reinforce the importance of this Permit’s provisions and conditions and give the permittee the opportunity to have any case-specific questions answered. The new stabilization provision in paragraph III.A.2.f is also important to establish in writing in this Permit. A similarly helpful addition is the rainfall-based inspection requirement in III.C.2, though as discussed below, we wonder whether the Department has introduced undue ambiguity in this provision by giving a permittee the ability to choose between the use of a rain gauge or to rely on data from “a representative monitoring station” instead.

Commenters are encouraged by the addition in Part II of a condition for coverage under the Permit upon “a response to any comments taken during the comment period (Part II.B), and the Department’s review of the submission.” The addition of a comment period is generally a positive outcome in the context of Clean Water Act and Maryland Water Pollution Control permitting processes and gives effect to the fundamentally important public participation requirements in these statutes. However as discussed further below, it is unclear how this additional comment

⁴ 2014 National Emissions Inventory, version 2 Technical Support Document

period will be considered in the broader context of Maryland administrative law and we are also not aware of any public process established in the Permit for the “review of the submission” of an NOI.

We are also appreciative of the Permit’s corrective action provisions introduced in section III.D, but as discussed below, we are unclear about how some of the proposed corrective actions will be triggered. We appreciate the clarity with which the Department expresses some of the potential corrective action triggers in paragraph III.D.1.e, which would clearly indicate the presence of serious pollution events: “Earth slides or mud flows,” “Concentrated flows of stormwater”; “Turbid flows of stormwater”; and “Deposits of sediment from the construction site on public or private streets”. By contrast, it is not clear how or when a permittee would know if paragraph III.D.1.c has been triggered (“Your discharges are causing an exceedance of applicable water quality standards”). This paragraph on the exceedance of water quality standards invokes an important purpose and so we do not recommend its deletion; instead, we urge the Department to expand upon this paragraph with explanatory language and details that are meaningful for a permittee, an inspector, and the public.

Substantive Comments

I. Lack of Staffing and Meaningful Review of Permits

On its face, the Permit appears to create an entirely new and more expansive permitting regime that represents a more rigorous approach to the application and review process. A lay person reading the 13 pages of provisions within Part I (“Permit Applicability”) and Part II (“Authorization Under this Permit”) of the proposed Permit and comparing it to the four pages in Parts I and II of the expired permit would reasonably assume that the Department has built an entirely new permitting program, complete with additional staff, to implement this more comprehensive process. If this were true, the Commenters would wholeheartedly endorse much of the new Permit as the beginning of a serious effort to protect stream health and water quality throughout Maryland that has previously been lacking.

However, we are not aware of any new staffing or resources within the Department’s Industrial Stormwater Permits Division, which has only a few staff who likely have neither the time nor resources to implement the additional provisions of this Permit. Considering the Department receives between 1,000 and 2,000 notices of intent for coverage under the Permit per year,⁵ a miniscule roster of permitting staff cannot be considered a serious effort to regulate construction stormwater. By contrast, the Department’s Wetlands and Waterways permitting program typically

⁵ Data accessible on the Department’s e-Permits data portal, at: <https://egov.maryland.gov/mde/npdes/PublicNotice/Index>. Commenters also obtained archived data via a Public Information Act request.

maintains a staff of about 50 to review permit applications and implement their program. A person applying to the Department to construct on or over a wetland or waterway generally understands that their application will at least be closely read for consistency with state and federal law and regulations. The same cannot be said for an application for coverage under the construction general permit, which operates more like a rubber stamp given that coverage is automatically granted after an exceedingly short period of time whether key regulatory documents have been submitted to the Department for review by staff or the public; we note that it is an exceptionally rare event for the Department to deny coverage and require a more rigorous and protective individual permit.

The following section of comments (1) describe in detail several aspects of this Permit that cannot be implemented without additional staff and resources; and (2) demonstrate how the Permit will result in a lack of meaningful review of applications for coverage unless the Permit is strengthened, regardless of staffing and resource levels.

a. The Proposed Provisions Cannot Be Implemented with Present Levels of Agency Staff and Resources

As an initial matter, the Department's issuance of an authorization to extend permit coverage to an applicant is made contingent on "a response to any comments taken during the comment period (Part II.B), ***and the Department's review*** of the submission." (Emphasis added). Unless the Department plans to hire additional permit review staff, this level of review will not be possible. The proposed Permit, like the expired permit, attempts to confine the scope of public comments to a review of E&SC plans. These plans are generally issued by local agencies and, as such, the Department simply refers commenters to these agencies for questions about these plans, a fact made even more clear through new language proposed in subsection II.B.2 of the Permit ("E&SC and SWM Plans can be accessed through the appropriate approval authority"). More importantly, the Department is proposing to continue its practice of automatically covering applicants after a certain period, as long as the NOI is ***complete***, but not necessarily based on whether the submission is ***adequate***. This distinction is critical. Neither the process established in the Permit, nor the program implemented in reality, is predicated on actual ***review*** of any information submitted by the applicant or any information that describes local site conditions or the nature of receiving waters; only whether the required information has been ***submitted***.

The lack of meaningful review of permit applications is a concern that arises repeatedly throughout the Permit and, in particular, in section I.E, which describes various exclusions of coverage that, when triggered, would necessitate a permittee to apply for an individual permit with a more rigorous review process and permit requirements. Subsection I.E.5 contains an important exclusion from coverage under the Permit where "the Department determines that a discharge contains a prohibited non-stormwater discharge..." Without the staff or an adequate process for reviewing permits, this exclusion will never be triggered, and this provision provides only nominal

protection. After authorization is provided for coverage under the Permit, subsection I.E.6, if triggered, would require enhanced pollution controls at a construction site or even the cessation of construction activity upon a finding that water quality standards are exceeded. We applaud provisions like this that focus on the impact of a permit on water quality standards and that require immediate and automatic adaptive management. But, if the Department does not have adequate permitting staff to implement the provisions and conduct a review, then this provision is useless and contrary to a core principle of the Clean Water Act that permits are meaningfully and thoroughly reviewed.

Section III.B. likewise describes “additional controls (to meet the narrative water quality-based effluent limit above) on a site-specific basis, or require you to obtain coverage under an individual permit,” and section II.C. describes a promising process whereby the Department describes how it will impose “additional effluent limitations” or even “deny coverage under this permit” following its review of an application for coverage. **Unless the Department can present budgetary plans to support an increase in permitting staff and resources it cannot credibly maintain the assertions included in the new proposed Permit that it reviews permits on “a site-specific basis” or along with “supporting documentation.”** Permittees with any experience of working under previous versions of the construction stormwater general permit in Maryland will understand that this degree of review simply does not exist.

We strongly urge the Department to devote more staff and resources to the administration of this Permit in order to give effect to some of the significantly improved provisions in the Permit. Without additional resources, the provisions and conditions of the Permit are rendered hollow and of limited value. And while we recognize that the permit fee is established by regulation, we would like to comment on the importance of setting appropriate fees that provide sufficient revenues for the Department to administer this permit.

The application fee for this permit is predicated on the notion that the permit regulates a “discharge to the waters of the state.” To that end, the current permit fees are set based on the areal extent of disturbance, with higher fees paid for larger projects that generate more pollution to waters of the state. However, the fee schedule could be improved by developing a more expansive and nuanced approach to determining how much pollution may be generated or the impact of that pollution. For example, it is widely accepted that different land covers have different loading rates, as reflected in the Chesapeake Bay model. Thus, it stands to reason that the *type* of area disturbed matters as much as the *extent* of disturbance. The fee schedule could, therefore, be based on, or adjusted by, the presence or absence of other factors such as low loading rate land cover (e.g., forests), extent of disturbance within a stream buffer (e.g., 100 feet), or even characteristics of the watershed that would indicate a greater impact from pollution (e.g., Tier II or 303(d) listed for sediment). These factors could adjust the fee by, for example, applying an adjustment factor to the currently listed base fee. For example, a \$100 fee could be multiplied by 1.5 if the disturbance area is within a buffer, or by an increasing factor for each acre of forest cleared.

In addition to enhancing the fee schedule to better reflect the impact of a construction site on waters of the state, the fees simply need to be increased, both to account for inflation and for the lack of resources currently available to state agencies to manage this program. The fee was last updated in 2009, meaning that the value of fee revenues has decreased by nearly one-fifth over the intervening period (using CPI). **Under state law, fees are supposed to be set to cover the anticipated cost of program activities**, in this case managing pollution to waters of the state. In fiscal 2016, permit fee revenues amounted to only slightly more than \$300,000. Meanwhile, the lack of resources needed to inspect construction sites has been well documented by auditors and nonpartisan analysts. If there is any concern that the fees would impose an undue burden on the construction industry, then the lowest fees in the fee schedule could be maintained for applications associated with the smallest and lowest impact sites, while increasing the number of fee categories and value of fees associated with the higher values.

Considering the significant decline in the value of the current fees and the substantial resource needs of the program, there is no reason why the fees should not be increased concurrent with the renewal of the permit. A \$2,500 maximum fee is truly a minute fraction of the value of a large construction project. **Again, we recognize that the permit fee is outside the scope of this permit, but we strongly urge the Department to act to promulgate new fee regulations.**

b. The Permit Should be Amended to Enhance the Level of Review of Permit Applications

Even if the Department provides additional staff and resources for the administration of this permit program, the proposed Permit will need amendments to ensure that applications received for coverage are given adequate review for consistency with Permit requirements and state and federal law and regulations. For example, subsection I.B.3.a deems “new sources” to be eligible only “[w]hen the Department has not, prior to authorization under this permit, determined that discharges from your site will cause, *have the reasonable potential to cause, or contribute* to an excursion above any applicable water quality standard.” (Emphasis added). In addition to not possessing the staff to make these determinations or conduct reasonable potential analyses envisioned in this subsection, this language seems inconsistent with the rest of the Permit, which does not otherwise establish any protocol to ensure such reviews are taking place. **We urge the Department to clarify in the permit what processes and protocols it has in place to ensure such analyses and reviews for consistency with water quality standards will take place.**

The provisions governing the authorization and approval processes in Part II describe a streamlined and automated process in which coverage is extended to the applicant once the NOI submission is deemed “complete” and the 14-day period lapses. **We urge the Department to, at the very least, revise the Permit to not allow an NOI application to be deemed “complete” until an approved E&SC plan is uploaded to the e-Permit system along with the other required information.** An E&SC plan is undoubtedly an important pollution control measure that ought to be subject to review, and this is made even more important because the Permit suggests that public participation

and comment of an NOI be confined in scope solely to the contents of these E&SC plans (which in our view is inappropriate, as described below). Given the importance of the E&SC plan to the Permit and public participation process, it is imperative that the Department ensure that the review and comment period does not begin until the E&SC plan is available for review on the e-Permit page available to the public.

We also strongly urge the Department to revise subsection I.E.4 as it does not appear to reflect the permitting process laid out in the Permit or implemented in reality. This section states that “[i]f the Department determines that a discharge may cause water quality standards to be exceeded *in the receiving water*, where such a determination is made *prior to authorization*, based on a failure of your E&SC plan to meet State E&SC or stormwater management standards (see Part I.B.3 and Part II.B.3), you may be required to obtain an individual NPDES discharge permit.” (Emphasis added). We very much endorse the idea presented in this provision, but it appears that the general permit exclusion envisioned here would be impossible to trigger. The Department has no means to make a determination regarding whether a discharge may cause water quality standards to be exceeded “in the receiving water” during the exceptionally short pre-authorization period established in the Permit. This is exactly the sort of determination that might be contemplated in an application for an individual discharge permit, but that is wholly avoided by the Department in this general permit under the presumed rationale that it defeats the purpose of administrative efficiency which undergirds the use of general permits. If the Department is serious about evaluating the potential for violating local water quality standards then, in addition to securing additional staffing and other resources, the Permit ought to either (1) require permit applicants to do pre-authorization monitoring or other evaluations under specific circumstances; or (2) lengthen the pre-authorization period to enable the Department staff or others to evaluate whether construction activity might cause an excursion above water quality standards. As it stands, this is hollow language that alludes to a level of application review that does not exist.

Finally, we want to express as a generalized concern based on our experience with the expired permit that few, if any, permit applications are excluded from coverage under the general permit and subjected to greater scrutiny from the Department and the public under an individual permit. We appreciate that, despite this reality, the Permit language does not convey a sense that coverage under the Permit is a certainty. This message is indeed important as coverage under the general permit is not an entitlement, but a privilege granted through compliance with federal and state laws. But more important than this messaging is the inclusion of provisions that actually facilitate the identification of projects for which an individual permit is more appropriate and for which coverage under this Permit would be excluded. **We urge the Department to comment on how it plans to begin giving effect to the permit exclusion provisions going forward.**

II. Vague Language and Unenforceable Conditions

Another overarching issue pervasive throughout the Permit is the use of vague language and provisions that are unnecessarily subjective, lacking in specificity or any discernible guiding standards, or are otherwise unenforceable statements. Such language presents due process concerns, is unfair to both the public and the regulated community, are counter to the purposes of the Clean Water Act and Maryland Water Pollution Control laws, and represent a waste of resources by inspectors, site operators, and the public. **We urge the Department to take a close look at the entirety of the permit for vague language and unenforceable standards, including the following.**

- ❖ In subparagraph III.A.1(a)(ii), the verb “control” in **the phrase “control stormwater volume, velocity, and peak flow rates” should be modified and/or expanded upon** as it is not defined in Appendix A and is an important term in the Permit that could be subject to multiple interpretations. This is one of many examples in the Permit of a provision that is vague and unenforceable by virtue of the fact that it is devoid of numeric criteria. How is a permittee or member of the public to know when a construction site has established adequate controls? **How could a Department or local inspector possibly cite a permittee for pollution running off from “expected flow” if neither the inspector nor permittee knows whether these flows are too large or sufficiently small, or carry too much pollution as opposed to a suitably small amount?** How could a court reviewing the issuance of a sanction for a violation of these permits uphold the authority’s enforcement action based on impermissibly vague language? These are unanswerable questions for anyone reading this permit as written. Similarly, vague language in the 14GP is likely a significant cause for the thousands of E&SC violations each year and very few enforcement actions.
- ❖ Given the significant potential to discharge vast amounts of pollution from the disturbance of steep slopes, **this short and vague provision in paragraph III.A.2.d is unacceptable: “d. Minimize steep slope disturbances. Minimize the disturbance of “steep slopes” (as defined in Appendix A).”** There are no numeric, or even descriptive narrative standards, but only a vague reference to the need to “minimize” disturbances. **There is no direction to a permittee about what they can or cannot do; no direction to an inspector about how to identify a violation; no way of allowing the public to understand if the pollution flowing from steep slopes is an egregious violation or perfectly legal under this Permit.** By comparison, the numeric standard in III.A.2(e)(i) regarding the installation of sediment controls along any perimeter areas is useful, although we note that it is not clear if this provision requires a permittee to prevent sediment from escaping through the barrier.
- ❖ In paragraph III.A.2(n), the phrase “[i]f rare, threatened, and endangered species and/or their habitat is *identified*...” is not adequately descriptive. (Emphasis added). **The Permit should specify *how* these species are to be identified.** Are permittees expected to examine

the area of disturbance, the entire site, or the surrounding area? Are permittees allowed to (or supposed to) consult a web-based resource to help in identifying the location and presence of these species? Or is this provision only triggered if employees on the construction site happen to stumble upon one of these species? The E&SC manual does not address this issue and neither does the Permit. We urge the Department to clarify what the permittee is expected to do.

- ❖ In subparagraph III.A.3(a)(i) **the phrase “provide an effective means of eliminating” should be changed to “eliminate”**. Otherwise, the permittee and inspector are left with a subjective test of whether the means were or will be effective. Likewise, subparagraph III.A.3(c)(i) includes the phrase “a similarly effective means designed to minimize the discharge of pollutants from these areas” that should be replaced with “an effective means *as approved by the Department or in accordance with* [a specific standard]. The term “minimize” is subjective, whereas “eliminate” is objective and clear. Wherever possible, the Department should remove subjective language from the Permit and replace it with objective language that is clear, specific, measurable, and enforceable as EPA has stated that it expects from Clean Water Act permits. For example, in the same subsection, subparagraph (b)(ii) uses the phrase “ensure there is no discharge”. This language is more useful in that it provides a clear and measurable directive.
- ❖ More vague language is found in paragraph III.D.1.c where the Permit mandates “corrective action to address any of the following conditions identified at your site: ... discharges are causing an exceedance of applicable water quality standards.” **How is the site operator supposed to know if they are causing an exceedance of applicable water quality standards?** This is particularly problematic both because corrective action requirements are important to ensuring construction sites are adaptively managed and well-maintained throughout the duration of construction activity and because consistency with water quality standards is a fundamentally important purpose of state and federal clean water laws. In other words, this provision is far too important to not be amended for clarity so that the permittee can understand when they are in violation of the permit. We note that the corrective action triggering language in paragraph 1.e of this same subsection is much clearer and a helpful addition to the Permit: (“There are indications of significant amounts of sediment discharging such as: ... [t]urbid flows of stormwater ... [or] [d]eposits of sediment from the construction site on public or private streets outside of the permitted construction activity.”) These triggers are clearer and are visible and objective criteria.
- ❖ Another clause in this corrective action subsection that raises questions and needs amendment is in subsection III.D.2, which begins “[i]f the permittee observes any of the triggering events ... and the enforcement authority or the Department informs the permittee that one or more of the triggering events *was verified*...” This language needs to be

clarified to be more specific about how such information may be verified. Does it require an inspector site visit? What if sufficient photographic or video evidence is provided? **The permittee, public, and state and local inspectors need to know how to provide such verification** to implement the corrective action sequence.

- ❖ Elsewhere in the corrective action section, there are several problems with the following clause in paragraph III.D.2.a: “...must be corrected *immediately* and *may be considered to be a violation* of this permit until such time that they are corrected...” (Emphasis added). First, “immediately” is not a defined term, nor is it sufficiently descriptive. It must be replaced with an amount of time if it is to be given legal effect (e.g., not less than 24 hours). Second, “may be considered to be a violation” should just be “is a violation.” The term “may be a violation” is an invitation for arbitrary enforcement and raises serious questions about due process rights. **Clear lines must be drawn to establish whether conduct is a violation of the Permit or not.**
- ❖ In subparagraph III.A.1(a)(i) the language “[t]he expected amount, frequency, intensity, and duration of precipitation” needs greater clarity. Specifically, **the term “expected” should be deleted or amended so that the “frequency, intensity, and duration of precipitation” references an actual and credible source of information**, such as the NOAA precipitation frequency data. If some other data source is preferred, that should be specified. Commenters also urge the Department to include within this provision a reference to ongoing regional efforts to develop new estimates of the current and forecasted (i.e., “expected”) frequency, intensity, and duration of precipitation under actual climate conditions and trends. The Department should establish the expectation that these precipitation-based standards will soon change and that those changes will be incorporated into the Permit.
- ❖ Subsection III.C.2. includes a positive addition to the Permit defining a specific amount of rainfall (0.25 inches) that would trigger a specific monitoring requirement for site operators. However, in referencing weather stations “representative of their location” the Permit fails to provide sufficient guidance, such as a simple directive to refer to the “nearest” weather station.
- ❖ In subsection III.A.1 the phrase “this requirement” immediately preceding paragraphs a. through d. is vague. There are multiple requirements in this subsection, so this provision must at least be revised to the plural form “these requirements.” While this might seem to be a minor/grammatical issue, which we would otherwise address in a separate section at the end of these comments, we believe this correction has more substantive implications, as the contents of paragraphs a. through d. that follow the phrase “this requirement” are

important, such as the requirement in paragraph a. to “account for” specified “factors in designing your stormwater controls.”

- ❖ In Appendix A the Department should **revise the definition of “Discharge to an Impaired Water”** which says, “for the purposes of this permit, a discharge to an impaired water occurs if the first Waters of This State to which you discharge is identified as an “Impaired Water”.” This definition must describe which waters are included within the definition, specifically where the impairment is of a watershed, not a waterbody or stream segment. For example, the amended definition could say that all receiving waters in the segmentshed are deemed impaired if that segment is designated as impaired. As a corollary, **the Department must address throughout the Permit how to distinguish between the Bay TMDL and local TMDLs.** The Bay TMDL would seem to cover almost all waters of the State and raises questions as to when a construction site would *not* be discharging to impaired waters.
- ❖ Page 1 of Appendix B states that “[t]his SPZ is measured from the edge of stream...” which raises the obvious question - **what constitutes a stream?** Does the stream have to be mapped or listed somewhere? Do ephemeral or intermittent streams count? These are very real and obvious questions for hundreds of construction sites each year where linear channels are clearly evident but may or may not be mapped or otherwise designated by the state or federal government. Without a clear definition of “stream” the application of the Permit’s “stream protection zone” requirements will be rendered uncertain and/or useless for many site operators and concerned neighbors.
- ❖ Page 3 of Appendix B lists several supposed alternatives to maintaining a natural stream buffer including the statement that “[a]ccelerated stabilization (e.g., same day stabilization) may be required based on site characteristics or as specified by the approval authority”. This should be amended to clearly specify what the stabilization period must be to qualify for this alternative to maintaining a protective buffer. Instead of offering up “same day stabilization” as merely an example of what might constitute accelerated stabilization, the Permit should simply specify that “same day” “24-hour” or some other time period would constitute an acceleration and is required.

Finally, as a manner of increasing the overall enforceability of the Permit we urge the Department to be more transparent and specific about the enforcement measures it will take for various sorts of violations beyond the corrective action measures provided. The permit should give notice to the applicant of the minimum penalty to be assessed for certain common violations at the site by the inspector. This is fair, would provide certainty for the regulated community, and would incentivize compliance while keeping lesser matters out of court. Providing a checklist or flow chart showing the escalating penalties to be assessed is a concept followed by some other jurisdictions.

III. Inadequate Water Pollution Controls

Generally, the construction stormwater permit is designed to protect water quality through E&SC plans, effluent limitations, and other pollution control measures, practices, or policies, such as the proposed stream protection zones. In lieu of detailed and prescriptive pollution controls that might be contained in a Stormwater Pollution Prevention Plan (SWPPP) in other states, this Permit maintains the practice of delegating to local approval authorities the responsibility of reviewing and approving E&SC plans, which provide the bulk of site-specific pollution controls.

While we recognize that this delegation of authority has resulted in some degree of administrative efficiency and its continuance would be beneficial for the regulated community, for local authorities, and for the Department, we must nevertheless express the concern that this process may be a significant contributor to the problem of widespread violations and excessive flows of polluted construction site runoff. If too much of the Permit's pollution control methodology is wrapped into the existing process of reviewing and approving E&SC plans that have obviously not been sufficient to control pollution (as described above) then we would expect the proposed Permit to go beyond the E&SC plan as the primary means of controlling pollution. However, the Permit does not appear to do so. Instead, **we note an overall lack of sufficient pollution controls and a stream protection zone concept that offers far too much flexibility to actually protect streams.**

It is important to emphasize and restate that too many of the Permit's provisions describing the possibility of imposing enhanced pollution control measures ring hollow due to a lack of staffing and meaningful review of individual notices of intent (applications) for coverage. For example, subsection I.E.6, as discussed previously, describes the process of requiring either enhanced controls or possibly even the cessation of construction activity, both of which have the appearance of being stringent and protective, except that they require the Department to actually decide that a discharge has the "reasonable potential" (a term of art under the Clean Water Act) to cause or contribute to an excursion above a water quality standard. With the present staff and the lack of any process described in the Permit or any other Departmental policy to make such determinations, this language rings hollow. **We urge the Department to describe what it plans to do with respect to these determinations to provide the regulated community with clear expectations and the public with an understanding of what types of violations noted by inspectors might lead the Department to actually conduct the relevant analysis and make a "determination" that state water quality standards have been jeopardized.**

Similarly, in subsection I.C.1 governing the process of extending coverage under the Permit, the Department claims that they can require "additional effluent limitations." This sounds promising for those interested in protecting water quality, but once again, the prospect of mandating

additional pollution controls is casually introduced here with no additional substance. What would trigger the Department to require such “additional effluent limitations”? What processes are in place to ensure the Department actually conducts such analyses? Related questions arise again in section III.B., where the Permit discusses the possibility of situations “where additional controls are necessary to comply with a wasteload allocation in an EPA-established or approved TMDL.” Such controls, generally referred to as water quality-based effluent limitations, are a critically important concept for maintaining fidelity with the federal Clean Water Act. Again, the Permit teases the prospect of more protective construction stormwater controls and then moves on without describing how that would actually happen. This is particularly problematic because the Department is well aware that a “waste load allocation” rarely, if ever, applies to individual construction stormwater sites. Why introduce a concept unless the Department intends to actually give effect to it? **If imposition of water quality-based effluent limitations are a legitimate possibility for those covered under this Permit, then the Permit must develop this concept into clear and detailed language** that sets reasonable expectations for the public and regulated community and provides clear triggers for plan reviewers, inspectors, and other agency staff.

Commenters also strongly urge the Department to make greater use of the additional pollution controls described in “Alternative 2” in the Stream Protection Zone requirements in Appendix B. If it is well recognized that the expired permit has failed to stimulate compliance and has been wholly ineffective in preventing significant quantities of illegal and excessive pollution from pouring into streams and down sidewalks and gutters into storm drains, then why should the Department not make greater use of the “redundant controls,” “upgrade controls,” or “reduction in the grading unit” concepts listed in Appendix B? In other words, **if the Department recognizes that a wide variety of additional measures, controls, or permit provisions are available to protect water quality, then why should these not be utilized more frequently** to curtail the frequent pollution events at permitted sites? At the very least, even if these additional protections are not established as a baseline level of pollution control for a wider subset of permitted sites, the Permit should utilize these additional controls as part of mandatory corrective action measures once the initial controls are demonstrated to not be sufficient.

Another aspect of the Stream Protection Zone requirement in Appendix B that Commenters believe should be strengthened is the unfettered flexibility to select Alternative 2 instead of maintaining the natural stream buffer zone that is supposedly the core concept introduced in this Permit and that would be more protective of water quality. For example, rather than allowing a site operator to simply select between the two options, **the Permit could clearly express that the purpose of the Stream Protection Zone requirement is to protect that buffer zone, and that operators only have flexibility to select an alternative if the operators demonstrate some sort of infeasibility, extraordinary physical or financial constraint, or meet some other criteria established by the Department.** It is our general understanding that: (1) land disturbance is inherently hazardous to the environment and no combination of controls can protect water quality

as well as leaving areas undisturbed, particularly areas that buffer or shield the edge of streams or other water features; and (2) the value of land is far greater to a developer than the cost of additional controls. **Given these principles, it is highly likely that the buffer zone will protect water quality better than additional controls, but that developers are far more likely to utilize the less protective alternative controls than to take valuable lands out of their plans. Without additional provisions to change this calculus and steer more permittees toward Alternative 1 in Appendix B, we firmly believe that the “Stream Protection Zone” will be a permit protection in print only and not an actual feature on construction sites in Maryland.** Instead, the applicant ought to be required to demonstrate within the NOI that work within the stream protection zone is necessary.

Commenters also urge the Department to consider adding a public health and environmental justice protection to the Permit to protect urban communities from the effects of illegal dumping, a construction practice that our organizations have discovered is unfortunately too common, even if it is only practiced by the worst actors in the industry. We have submitted evidence of this with these comments. There are several instances in the Permit which seem to make sense to introduce language that either reminds operators of the existing laws in place to address this problem or that create an additional enforceable prohibition. For example, in the Pollution Prevention Requirements subsection, subparagraph III.A.3.c.iv already creates several requirements pertaining to “hazardous and toxic waste” which would be present in most piles at illegal dump sites. This could be one place in the Permit to include a reminder to permittees that the management of debris from the site is governed under other local, state, and federal laws. This important issue could also be dealt with in paragraph III.A.2(o), although this paragraph generally regulates a different sort of debris pile. Regardless of the specific language used or the location in the Permit, we believe that additional language could help prevent this human health hazard by reminding site operators and their staff of the relevant legal requirements and by generating additional vigilance over this issue from state and local inspectors that might not otherwise be searching for evidence of illegal dumping of construction site material and debris, as it is currently handled mostly by local housing, health, or general law enforcement authorities.

Finally, we urge the Department to require automatic termination of coverage if construction activity ceases for a period of one year. We note that it appears to be commonplace that a site will be cleared of all trees and natural cover, destroying all habitat and ecosystem services and public benefits, without anything being built on the site for months or years (or ever), including any productive use of the land or any post-construction stormwater management features. **This staggering degree of environmental waste should not be tolerated. Coverage should be automatically terminated, and the site owner should have to re-apply for coverage, pay an additional fee, and incorporate any updated or modernized E&SC or stormwater management standards and technologies.**

IV. Insufficient Protection of Maryland Water Quality Standards

Protection of water quality standards is, of course, among the most fundamentally important objectives of the Department in issuing discharge permits consistent with the federal Clean Water Act and state Water Pollution Control laws. As discussed, we endorse the Department's inclusion of a specific section dedicated to "Water Quality-Based Limitations" (III.B.). We are concerned for the reasons stated above, however, that the Department has neither the staff, nor the necessary processes or protocols in place in its construction stormwater permitting program to identify risks to water quality standards or do anything to address such risks.

The disconnect between the Permit's provisions and the reality of the Department's regulatory capacity is perhaps best illustrated by a review of the basic permit eligibility requirements in section I.B. For a "new source" to be covered under this Permit, paragraph I.B.3 states that the Department may "authorize your coverage after you have included appropriate controls and implementation procedures designed to bring your discharge into compliance with this permit, ***specifically the requirement to meet water quality standards.***" (Emphasis added). This language raises a number of questions or issues. First, we note that the Department is not binding itself or a permittee to anything in this provision, but merely expressing that it has the "authority" to require additional controls. Such language is virtually meaningless but would be given meaning if it were followed by a process describing how, when, and why the Department would utilize such authority to require additional controls. Secondly, we note that the phrase "requirement to meet water quality standards" is unclear and seemingly circular in the context of the Permit's other relevant provisions. The closest the Permit comes to introducing a "requirement to meet water quality standards" is the Water Quality-Based Limits in section III.B, which says that "[d]ischarges must be controlled as necessary to meet applicable water quality standards." Already, one can see the irrational circular reasoning here. Moreover, this section goes on to qualify that requirement by saying "[i]n the absence of information demonstrating otherwise, the Department expects that compliance with the conditions in this permit will result in stormwater discharges being controlled as necessary to meet applicable water quality standards." If you put these provisions together, **the Permit effectively establishes nothing more than a circular sequence of statements along with a safe harbor provision stating that the Department presumes whatever "appropriate controls and implementation procedures" the permittee comes up with under the permit are sufficient to meet water quality standards. None of this explains how water quality standards will be protected or establishes any new protections.**

Another problem immediately evident in the water quality-based limits of section III.B is the **patently obvious problem of claiming that the addition of pollution from construction sites into impaired waters "meet applicable water quality standards."** If a receiving water is impaired, the only way that a permit could be consistent with water quality standards is if the permit resulted in no discharge, that the discharge was consistent with a waste load allocation that

was part of a larger TMDL being dutifully implemented and adhered to, or that the permittee was required to fully offset such pollution. Nothing in the Permit or based on past experience administering this Permit would support any of these contentions. It is well understood that polluted runoff from construction sites is widespread and we are not aware of any TMDL document that assigns a waste load allocation to any single construction site, or combination of sites, nor an explanation from the Department as to how much construction-based pollution is generated on average. We also note our concern that the Department has ceased its work for several years now, without explanation, on establishing an accounting for growth policy. Few permits are more directly impacted by this failure than the construction stormwater general permit and perhaps nowhere is the failure to offset growth more clear and obvious than in this context. **We strongly urge the Department to immediately begin work to finalize the “aligning for growth” policy.**

As a related matter, section III.B establishes as a corrective action trigger for the Department to require additional water quality-based controls “situations where additional controls are necessary to comply with a wasteload allocation in an EPA-established or approved TMDL.” On its face, this appears protective, but in practicality is a hollow statement, because, once again, the Department knows that the disaggregation of waste load allocations assigned to individual construction stormwater general permit sites does not exist. **We urge the Department to replace this language with a meaningful provision based on the way TMDLs are implemented in actuality**, including potentially requiring an analysis by the permittee of any applicable waste load allocation and of how various pollution events would relate to that waste load allocation or to the overall TMDL attainment.

Finally, another problematic provision in this section is found in subsection III.B.3, which specifies that “[i]f you discharge to a water that is impaired, the Department will inform you if any additional controls are necessary...” Virtually the entire state is within the Chesapeake Bay watershed, which is designated as impaired for nitrogen, phosphorus, and sediment and subject to the Chesapeake Bay TMDL. **Given this, nearly all site operators will be left guessing as to whether additional controls are necessary. Furthermore, the Department will have unfettered discretion, due to the lack of clear guidance in this provision, to require additional controls or not.**

a. Antidegradation

We appreciate that the Department has responded over the last several years to our requests to give greater effect to the antidegradation laws found in the federal Clean Water Act and Maryland’s Water Pollution Control law (40 CFR 131.12; COMAR 26.08.02.04-1(A)), which had previously been ignored in Maryland for general permits.

However, while we are encouraged by the proposed inclusion of an antidegradation checklist, **we are concerned that the Permit appears to reflect a misunderstanding of the antidegradation**

laws, including the Department’s own regulations. For example, subsection III.B.2 states that “...you must perform an antidegradation review (COMAR 26.08.02.04-1), *accomplished by* completing the antidegradation checklist in Appendix C.” (Emphasis added). If read literally and followed by permittees, this would circumvent the referenced antidegradation review procedures in COMAR. Instead of including the COMAR reference to the antidegradation procedures, the Permit must include mandatory language, such as “you must follow the antidegradation review procedures established in COMAR 26.08.02.04-1.” The prefatory language contained in the antidegradation checklist itself seems to acknowledge this issue (“you must perform an antidegradation review (COMAR 26.08.02.04-1)”), but does not cure it, as the provisions of the checklist omit a number of the procedures required in COMAR, including the social and economic justification (SEJ) and alternatives analysis provisions.

The anti-degradation checklist is not protective of Tier II waters in itself but is a useful tool for identifying potential impacts and conditions of an individual permit. Clear thresholds should be written into the checklist for when coverage of a construction project is likely to result in a reduction of water quality so that an individual permit determination can be made, and special conditions can be added to protect Tier II waters. **MDE must review responses to the anti-degradation checklist and verify that they match the project’s impacts.** The checklist, as a tool, is informative and includes an iterative process with permit writers to identify specific issues. However, members of the public are still screened from knowing what criteria the department will use to trigger individual permits. We also contend that the anti-degradation checklist and the Department’s review and response should be published with the NOI. The Department should track the implementation of this checklist including a summary report of the identified issues and their resolution.

We also note that the language of paragraph I.B.3.b appears to be a misstatement or misunderstanding of the antidegradation law and procedures. To be eligible for coverage under the Permit as a “new source”, any “[d]ischarges from your site to a Tier II water [must] not lower the water quality of the applicable water.” Commenters note that the antidegradation procedures in COMAR are not designed to ensure that a permitted discharge will not “lower the water quality of the applicable water” but rather require permittees to undertake certain evaluations and respond to those evaluations in a way that may avoid a lowering of water quality or at least justify impacts to high quality waters. For example, COMAR 26.08.02.04-1 specifies that a discharge to Tier II waters *that will result in a new, or an increased, permitted annual discharge of pollutants* and a potential impact to water quality, shall evaluate alternatives to eliminate or reduce discharges or impacts.” (Emphasis added). In other words, the **antidegradation laws recognize that there will be impacts to water quality and do not establish a legal fiction that compliance with a permit condition will necessarily not impact high quality waters.** To state otherwise in the Permit would be contrary to state regulations, arbitrary and capricious, and unsupported by any evidence, because, once again, voluminous data demonstrates that construction site runoff is commonplace. The Permit should not state that there will not be an impact to water quality, only

that the antidegradation procedures, checklist, and (hopefully) specific additional controls to protect Tier II waters must be followed, including subsequent controls triggered by effective corrective action measures. **We also strongly recommend that the Department consider amending the Permit to exclude general permit coverage in Tier II waters and require more protective individual permits instead, as is the case in Pennsylvania.⁶ Other potential enhancements to the suite of protections for Tier II areas could include: (1) stabilization within 24 hours; (2) grading units no larger than 5 acres; and (3) more frequent inspections.**

We also request clarification of language in subsection III.B.2, which begins “[f]or any portion of the site that *discharges to a water* that is identified by the Department, or EPA as Tier II...” (Emphasis added). How is the phrase "discharges to a water" supposed to be interpreted? Is it applicable if any portion of the site is located within a Tier II watershed or catchment area? Does a particular discharge point need to be located in such a watershed or catchment area? Does a particular discharge point need to be shown to flow directly into a Tier II segment? The bottom line is a permittee, inspector, and concerned members of the public need more information to give effect to this provision.

Finally, in this same subsection III.B.2, we urge the Department to strengthen the following language: “[o]perators with discharges to Tier II streams with no assimilative capacity *may be subject* to additional review by the Department.” (Emphasis added). The Department should delete this discretionary language and include clear, specific, and binding language to be fair to permittees and the public and to give effect to antidegradation regulations applicable when no assimilative capacity remains. **Once again, we strongly urge the Department to deny coverage and require an individual permit where there is no assimilative capacity; otherwise, we cannot foresee how Tier II waters will be protected.** We urge a similar change to correct the unnecessarily vague discretionary language in the following sentence: “In addition, on a case-by-case basis, the Department *may* notify operators of new sites or operators of existing sites with increased discharges that additional analyses, stormwater controls, or other measures are necessary to comply with the applicable antidegradation requirements or notify you that an individual permit application is necessary”.

V. **Insufficient Public Participation and Transparency**

a. ***Public Participation***

As the Department is aware, the Commenters have long expressed concerns about the extraordinarily deficient public participation provisions in the expired Permit, which are generally

⁶ PA Department of Environmental Protection, GUIDE TO PERMITS FOR LAND DEVELOPMENT, pg. 2. <https://www.pwdplanreview.org/upload/pdf/PA%20DEP%20Guide%20to%20Permits%20for%20Land%20Development.pdf>

identical in this Permit. These concerns include (1) that the 14-day period is unacceptably short; (2) that any comment period should not begin until all relevant materials are available on the NOI page for the public to review; (3) that the scope of permissible comments are inappropriately confined to concerns about the E&SC plan, as opposed to any other issue with the NOI; and (4) that the E&SC plan is not even required to be made available to the public for their review during the comment period.

The Permit continues the unacceptably short 14-day comment period in the expired permit. The abbreviated nature of this comment period is particularly troubling in light of the much longer 60-day wait period newly proposed in the Permit between when an NOI is submitted and when construction can commence for a new site.⁷ What harm would be caused by allowing for the standard 30-day comment period applicable to all other Clean Water Act permits if the Department is mandating this longer 60-day wait period? To not allow for a comment period longer than 14 days in this situation gives the appearance that the Department is deliberately curtailing the ability of the public to participate in commenting on individual NOIs and without serving any rational purpose. This impression is only bolstered considering that the 14-day comment period is allowed to begin *before* an applicant is required to provide an approved E&SC plan. **We strongly urge the Department to extend the comment period from 14 days to 30 days and to amend subsection II.B.2 to require that an approved E&SC plan be submitted by the applicant electronically consistent with the rest of the information required** of the applicants and that is posted on the Department's e-Permits database.

Commenters are likewise troubled by the lack of access to NOI information and request a response as to whether there is a legitimate reason for not making available NOIs submitted prior to "the previous week" (subsection II.B.2). A one-week period is not even consistent with the already unacceptably short 14-day comment period. **Even if the Department corrected this language to require posting of NOIs from the prior 14-days consistent with the comment period in the Permit, Commenters would nevertheless insist, in the interest of transparency and the spirit of public participation that the Department is charged with enabling, that the e-Permits database provide the option to view an archive of older NOIs approved for coverage,** or even download the contents of the database, consistent with the manner in which other databases the Department maintains are operated. If this proposed language is maintained, the Department will only be doing itself a disservice by inviting more Public Information Act requests that it has acknowledged it does not have the resources to handle.

In the past, in response to concerns raised by Commenters and others about how confining the scope of public comments to E&SC plans is unnecessary and inconsistent with federal regulations, the Department has indicated that these E&SC plans should be available by contacting the authorities in charge of issuing the plans. **This response represents the opposite of the agency's**

⁷ 20CP Table 1 Pg.12.

duty to facilitate and enable public participation. Directing concerned members of the public to take their concerns elsewhere and spend additional time trying to locate a plan that the Department is supposed to be reviewing already is not an efficient or effective method of engaging with the public. The Department’s current process relies on the hope that the local authorities are equipped to process requests quickly and efficiently for information about such plans before the 14-day period expires. Even if a member of the public were able to promptly receive a requested E&SC plan by the local approval authority within the 14-day period, they would have little time for review or to find assistance in reviewing and understanding the engineering described in the plan. **This entire process is wholly unacceptable and cannot be viewed as “public participation”.** This must be rectified by an amendment to the proposed language in the Permit.

Under the Clean Water Act an NOI is said to be the functional equivalent of an individual permit.⁸ The limited basis for providing comment in the expired permit (the E&SC plan) is contradictory to language in federal CWA regulations at 40 CFR 122.28 allowing for general comments from any “interested person.” Notably, the expired permit contained this broad language, despite its inconsistency with the narrower language confining comment to E&SC plans. **In the Permit, the Department is proposing to eliminate this inconsistency, but in favor of striking the provision consistent with federal regulations and retaining the unacceptably narrow scope of review of E&SC plans. We strongly urge the Department to revise this provision in II.B.2 to be consistent with federal law and fair to Marylanders who have a right to review a construction permit NOI.**

Commenters urge the Department to not only broaden this scope of review of NOIs, but to also give effect to the legitimate concerns expressed by the public by describing what actions the Department may, or will, take if it agrees with the public’s concerns. It is not at all unreasonable to require an applicant with a particularly complex or environmentally challenging construction project to apply for an individual permit, complete with the protections and processes in place for individual permits. An appeal from the public should, under some circumstances, trigger an automatic hold on the application for coverage under the Permit upon demonstration of any number of enumerated or reasonable grounds for appeal (e.g., site location in Tier II watershed, large forested area or wetland being disturbed, steep slopes, etc.). **The Department should either require an individual permit for an NOI that will likely jeopardize water quality if approved or, as an alternative to granting an individual permit, the Permit could instead trigger some intermediate steps, like the preparation of a SWPPP, heightened monitoring requirements, and/or additional effluent limitations.** Coverage under the Permit should not be a given, or an entitlement, as it has been in the past. Coverage should only be allowed if, after allowing the public to review an NOI, and after receiving scrutiny from trained Department staff, the Department is

⁸ *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9th Cir. 2003).

satisfied that the proposed controls and any additional specified measures will be highly likely to protect water quality.

Commenters would also like to point out a confusing provision that needs clarification. Paragraph III.B.2.b states “[i]f the E&SC plan is approved after the Public Notification Period, comments can be submitted to the Department’s Wastewater Permit Program under Part I.E.7 of this permit.” We note a few issues with this language. First, the reference to Part I.E.7 implies a right or procedure in that subsection to submit comments when no such provision exists. Secondly, the permit seems to be hinting at a second and subsequent comment period with this language but is not explicit about doing so. As the Department is aware, the public comment period serves a critical purpose in the Clean Water Act and a critical function under state and federal administrative law. It is thus important to **be clear and precise in defining whether the “comments” referenced in this paragraph are part of the official comment period, and whether the Department will consider them to be part of the pre-approval deliberative process** or more akin to a complaint lodged against an already-approved permittee. It seems that the intent of this provision is not to allow for the taking of additional public comment by the Department, based on language in a subsequent provision: “After 14 days have elapsed from the date the Department posted the NOI information on the NOI system, and the Department has received notification from the applicant demonstrating that the E&SC plan for the project has been approved ... *the site is covered under this permit.*” (Emphasis added). In other words, coverage begins, and any additional comment will not be considered before approving the permit after this time. We strongly recommend the Department correct this confusion by: (1) establishing a reasonable comment period of 30 days; (2) requiring the submission of all information necessary for Departmental and public review before the 30-day comment period begins; and (3) removing any reference to a subsequent comment period unless the Department is clear and explicit about the purpose of that comment period (e.g., for taking comment based on the proposed addition of provisions, conditions, or controls for coverage under the Permit) and describing how that additional comment period will be considered within the context of Maryland administrative law.

Finally, we recommend an addition to the language in paragraph II.A.2.b that would enable greater public participation. **The Permit requires an applicant to provide the “site’s latitude and longitude”, but more specificity is needed to provide guidance to applicants regarding the specific location** on which the latitude and longitude should be based. This is particularly important for larger sites where a given coordinate may not provide a reasonably accurate description of the site location. Neighbors in the same community as the proposed site may be unable to determine where the disturbance is happening if the coordinates are not specific or provided with an adequate level of precision. In order to prevent a situation in which a given coordinate with only one or two decimal points representative of the edge of a site (e.g., the proposed point of entrance) would be descriptive of a location hundreds of meters, or even several miles, away from the actual center of the proposed area of disturbance, we recommend requiring

that the coordinates represent an approximate center point of the area of disturbance and with at least 4 decimals.

b. Transparency

Commenters are encouraged by the requirement in section III.F for certain permittees to submit a stormwater pollution prevention plan (SWPPP), which was not required in the expired Permit. A SWPPP can help prevent pollution by generally forcing permittees to place a greater degree of focus, attention, and resources into the full scope of activities necessary to comply with the Permit and avoid the mistakes that lead to unnecessary pollution. This is why the U.S. Environmental Protection Agency (EPA) requires SWPPPs for all permittees in recognition of the many benefits of writing, reviewing, and periodically consulting these plans. **The Department should follow EPA's lead and not require the preparation of SWPPPs only to a subset of permittees.** After all, the Permit's SWPPP provisions seem to be relevant to any site.

We also urge the Department to amend subsection III.F.3 to require SWPPPs to be posted online as opposed to being kept "at the site or an easily accessible location." As acknowledged by the Department in subsection III.F.3, the SWPPP is a public record and may be provided to the public upon request. Given this, why would the Department not require the SWPPP and subsequent updates to be submitted to the Department electronically? The Permit requires other documents to be submitted electronically, so a lack of ability to submit documents electronically cannot possibly be the excuse. Under the currently proposed language in the Permit, the Department would be required to expend staff time (and possibly charge the public for the staff time utilized) retrieving a SWPPP and sending it to the public in response to any Public Information Act request for a SWPPP. This process is highly inefficient for the Department, the regulated community, and certainly for the public. Perhaps more importantly, **as the COVID-19 pandemic has reminded us, having electronic and remote access to important information is critical and MDE lacks any rational justification for keeping this critical regulatory information relatively inaccessible.**

We have similar questions and concerns about the important information required of all permittees to be kept on site by paragraph III.C.8(b), as well as the records of identified noncompliance in paragraph III.C.8.b. Most of the information in subparagraphs III.C.8(b)(i)-(x) would be critically important for Department staff to have at their fingertips and of high interest to members of the public. The omission of a requirement to submit this information in electronic format is particularly notable at the present time, not only because of the obvious value of electronic access to information during the pandemic, but also because the Department is in the midst of completing its multi-year and multi-million-dollar investment in an Electronic Tracking System to make permitting and compliance activities more efficient. **It would be an unfortunate irony for the Department to roll out a Permit reliant on paper-based records at the same time as it is**

completing an expensive upgrade to an electronic document management system capable of housing just the sort of information identified in paragraph III.C.8.b. Equally troubling is the requirement in paragraph III.C.8.f requiring permittees to send the information in subparagraphs III.C.8(b)(i)-(x) by mail *in paper form*. Why would the Department require itself to commit more of its extraordinarily scarce resources to sorting mail and handling and storing paper copies? Why would the Department make the ability of its own staff to access important regulatory information more difficult? Why make public access to public records even more difficult? What legitimate answer is there for any of these questions? If not amended, these provisions embody the sort of shocking inefficiency that stokes public cynicism and a lack of faith in government operation. **It is almost unfathomable in the year 2020 to require reams of paper be printed, packaged, and sent to be opened and filed in cabinets, when at less expense to the operator, Department, and public, the same information can be transmitted at the click of a button.**

Finally, we recommend that the Department require something more than the crude vicinity maps that are currently submitted by applicants, such as an online map in which the applicant must either select the center point of the relevant property or outline the property boundaries. **We recommend the use of a more sophisticated online map such as the State's MERLIN map that provides additional information about the proposed site of disturbance.**

VI. Ineffective Corrective Action Sequence

As noted, we are pleased that the Department has chosen to propose corrective action measures for the Permit, which were mostly absent in the expired permit, except for a few vague references to voluntary measures. An effective corrective action sequence can be a highly effective pollution prevention tool that recognizes the practical difficulties of managing the discharge of pollution from a source such as a construction site and the challenges inherent in undertaking more formal enforcement options. Corrective actions are not a replacement for fines, sanctions, and other deterrent consequences of traditional enforcement mechanisms, but they can provide a useful supplement.

While Commenters are supportive of the introduction of corrective action provisions in the Permit, it does not appear that the Permit's corrective action measures have sufficient triggering mechanisms to introduce additional controls. For example, the provisions of section III.B establish as the corrective action trigger a finding *by the permittee* or based on an unspecified determination by the Department. **We urge the Department to include as a trigger the results of a state or local inspection finding evidence of a discharge or insufficient controls.**

Additionally, the Permit should remove discretion from the process, making corrective action automatic except where a valid reason exists not to trigger the corrective action. Corrective action

measures are not akin to civil liability and do not result in the assessment of fines. While regulatory agencies may reserve considerable discretion to impose civil or criminal sanctions, there should not be a similar justification for avoiding lesser corrective action measures with an unnecessarily high threshold for triggering corrective action or by introducing unnecessary discretion. For corrective action measures to stimulate greater attention by permittees to following best practices and installing effective pollution controls, permittees must understand that if pollution is being discharged, they will necessarily and immediately be required to respond with greater controls or by fixing ineffective controls.

By contrast, the proposed corrective action sequence not only lacks that automatic trigger, but also contains relatively weak requirements in the corrective action section (III.D). For example, the second corrective action step is surprisingly weak (please note that we are unable to provide an adequate reference to this provision due to an apparent omission in the enumeration following subparagraph III.D.2.b.iv that must be corrected). Given that it is unlikely two violations will be discovered and reported for the same site, the triggering of a second or subsequent pollution event should be considered as a serious issue and indicative of larger environmental management problems at the permitted site. In the Permit, the only proposed consequence of reaching this point is that the permittee is required to come up with *its own* revised E&SC or SWM plans with no additional requirements or even guidance from the Department. **We strongly urge the Department to provide detailed guidance on what sort of corrective action measures will be required of permittees if a second or subsequent pollution event is discovered, including a menu of escalating actions for each subsequent discovery. We also urge the Department to include mandatory stop work orders as one potential response to provide some deterrent value short of a formal enforcement action.**

Finally, given how important the corrective action measures are to preventing pollution, **we recommend that the corrective action notices be sent to the Department electronically** to ensure staff are notified appropriately. These records should also be posted online to provide sufficient notice to the public and increase efficiency of government operations.

VII. Inadequate Recognition of Climate Trends

a. Increased Flooding and Extreme Weather is increasing Stormwater Pollution and Negatively Impacting Water Quality

Climate change and its associated increase in flooding and extreme weather events will increase stormwater pollution in the Chesapeake Bay watershed and hinder progress towards achieving water quality improvements required by the Chesapeake Bay TMDL. These effects must be considered in the Permit.

The Chesapeake Bay region is already experiencing flooding from sea level rise, and flooding will only continue to get worse as the region experiences stronger, wetter storms. The pace of sea level rise is expected to increase dramatically in Maryland. According to NOAA tide gauges, sea levels have risen about 13 inches over the last 100 years,⁹ and the likely range of sea level rise in Maryland between 2000 and 2050 is 0.8 to 1.6 feet, with a one-in-twenty chance of sea level rise exceeding 2.0 feet.¹⁰ If greenhouse gas emissions continue to grow unchecked, the likely range of sea level rise in Maryland is 2.0 to 4.2 feet over the next century, two to four times the rise experienced in the prior century.¹¹ In fact, the pace of inundation could actually be far worse in some areas, as other factors like land subsidence, or the sinking of land, accelerates the rising water levels.¹²

As a result of sea level rise, coastal cities and towns around Maryland are regularly experiencing flooding simply from high tide. The National Oceanic and Atmospheric Administration projects that under a low sea level rise projection (0.5 meter global rise by 2100), by 2100 “high tide flooding will occur ‘every other day’ (182 days/year) or more often within the Northeast and Southeast Atlantic.”¹³ Under an intermediate sea level rise scenario (1.0 meter global rise), “high tide flooding will become ‘daily’ flooding (365 days/year with high tide flooding.”¹⁴

Climate change will also increase the frequency of extreme weather, producing stronger and wetter storms. In 2016 and 2018, two intense storms hit historic Ellicott City, Maryland, producing a one in on thousand years rainfall event.¹⁵ That amounts to a 0.1% probability storm per year, hitting the same city twice in only two years.¹⁶ The cost of such extreme weather events is staggering. In six of the last ten years, the damage caused by the average number of storms exceeded \$1 billion per year.¹⁷ In 2017, 16 storms individually cost over \$1 billion, and the overall storm cost for the year was a record-breaking \$306.2 billion.¹⁸ The rising costs associated with storm damage caution against continued development in the coastal areas most susceptible to the risks of climate change, i.e., the areas already experiencing sea level rise and flooding during heavy rainfall events.

⁹ <https://tidesandcurrents.noaa.gov/sltrends/>.

¹⁰ Donald F. Boesch, et. al, University of Maryland Center for Environmental Science, *Sea-level Rise Projections for Maryland 2018*, iii (2018), <https://mde.maryland.gov/programs/Air/ClimateChange/MCCC/Documents/Sea-LevelRiseProjectionsMaryland2018.pdf>.

¹¹ *Id.*

¹² Maryland Geological Survey, Land Subsidence Monitoring Network, http://www.mgs.md.gov/groundwater/current/land_subsidence.html (last accessed Dec. 7, 2020).

¹³ NOAA, Patterns and Projections of High Tide Flooding Along the U.S. Coastline Using a Common Impact Threshold, NOAA Technical Report NOS CO-OPS 086, ix (2018), https://tidesandcurrents.noaa.gov/publications/techrpt86_PaP_of_HTFlooding.pdf.

¹⁴ *Id.*

¹⁵ Maryland Phase III WIP, at 42.

¹⁶ *Id.*

¹⁷ *Id.* at 43–44.

¹⁸ *Id.* at 44.

b. Changing Precipitation is Worsening Stormwater Pollution and Water Quality

Along with sea level rise, flooding and extreme storms, Maryland faces many negative climate change impacts that stem from changing precipitation patterns in Maryland and the Mid-Atlantic. Specifically, recent trends indicate precipitation has increased in frequency, duration, and intensity and is trending towards further increases. This translates to more rain and more stormwater generated pollution. The congressionally mandated Fourth National Climate Assessment¹⁹ indicates clearly that precipitation intensity is trending upward in the Mid-Atlantic and Northeastern United States at a faster rate than anywhere else in the U.S.²⁰ This was indicated in the 2014 National Climate Assessment that stated “water quality [was] diminishing in many areas, particularly due to increasing sediment and contaminant concentrations after heavy downpours.”²¹ The increase in precipitation amount, intensity, and persistence has well-documented direct negative impacts on water quality and aquatic ecosystem health because more intense rain events causes increased soil erosion and runoff.²²

The state must act with urgency to update and modernize policies to be reflective of current and future conditions. The health and quality of Maryland’s waters cannot wait another five years for this permit to be renewed again without considerable update to control for climate-induced increases in stormwater runoff. We urge MDE to reissue the draft permit with climate reforms and considerations.

The Phase III WIP acknowledges that “more intense storms are expected to change the effectiveness of BMPs to control pollution runoff.”²³ Considering that the 20CP is at its core a permit designed to control storm-generated pollution from construction sites, then the impacts that more intense storms have on construction site pollution control BMPs must be central to the design and considerations of the proposed 20CP.

¹⁹ USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018. <https://nca2018.globalchange.gov/>

²⁰ *Id.* See, Chapter 18. Northeast. <https://nca2018.globalchange.gov/chapter/18/>

²¹ National Climate Assessment: Key Findings - Water Supply (2014) <https://nca2014.globalchange.gov/highlights/report-findings/water-supply>

²² Fourth National Climate Assessment, Chapter 18, Key Message Number 1, *Intense Precipitation*. <https://nca2018.globalchange.gov/chapter/18/>

²³ Maryland’s Phase III Watershed Implementation Plan to Restore Chesapeake Bay by 2025, 45 (2019) https://mde.maryland.gov/programs/Water/TMDL/TMDLImplementation/Documents/Phase%20III%20WIP%20Report/Final%20Phase%20III%20WIP%20Package/Phase%20III%20WIP%20Document/Phase%20III%20WIP-Final_Maryland_8.23.2019.pdf.

In its current form the permit is not adequately designed to effectively control pollution from climate change-induced increases in storm volume, intensity, and duration. The Permit will not protect water quality in Maryland and will not meet state and federal water quality standards.

c. Extreme Heat is Worsening Stormwater Pollution and Water Quality

Studies show that Maryland's freshwater aquatic resources are directly threatened by higher water temperature.²⁴ Higher water temperatures are caused by the combination of climate change, deforestation, increases in rain events, and high percentages of impervious surfaces.²⁵ This results in higher ambient water temperatures as well as more and higher temperature stormwater runoff.²⁶ This combination has negative impacts on the biological health of Maryland's water resources.²⁷

d. Recommended Improvements to Reflect Climate Change

Extrinsic agency records indicate that the Department has not considered nor addressed the impacts of climate change and other meteorological changes in the development of the Permit. In July, 2020, Commenters submitted a Maryland Public Information Act (PIA) request to MDE for climatological and meteorological data, analysis, and other information relied upon by the Department in its development of the Permit.²⁸ On August 25, 2020 and on September 15, 2020, the Department released five (5) documents and a website address in response to the PIA records request.²⁹ On October 5, 2020, the Department confirmed that the transmitted documents constitute the entirety of records responsive to the PIA request. The records do not include, nor even reference, relevant data or analysis of climate impacts or meteorological changes, nor how such factors relate to or are addressed by the Permit, or even other permits and regulations for stormwater associated with construction activity. Included among the responsive records is the Department's own "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated Guidance for National Pollutant Discharge Elimination System Stormwater Permits (June 3, 2020 Draft)" guidance document. However, the guidance is explicitly focused on Municipal Separate Storm Sewer Permits, not construction stormwater, and the guidance explicitly relies upon the 2000 Maryland Stormwater Design Manual (revised 2009), which does not consider

²⁴ https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/protecting_ocean_life/envclimateaquaticecosystemspdf.pdf.

²⁵ Jones, R., Travers, C., Rodgers, C. et al. Climate change impacts on freshwater recreational fishing in the United States. *Mitig Adapt Strateg Glob Change* 18, 731–758 (2013). <https://doi.org/10.1007/s11027-012-9385-3>.

²⁶ *Id.*

²⁷ Fourth National Climate Assessment, Chapter 18. <https://nca2018.globalchange.gov/chapter/18/>

²⁸ Email from David Flores, Center for Progressive Reform, to Amanda Redmiles, Maryland Department of Environment (July 23, 2020).

²⁹ PDF documents titled, "WQGIT_APPROVED_ESC_EXPERT_PANEL_REPORT_LONG_04142014 (1).pdf;" "final_proposed_2020_msgp_-_fact_sheet (1).pdf;" and "final_2017_cgpfact_sheet (1).pdf;" "FundamentalsSuccess slides 6-4-19.pdf" and "2020 MS4 Accounting Guidance Document-EPA-June_2020.pdf," and a hyperlink to a website, www.mcet.org/SWPPP. MDE PIA Request Tracking Number 2020-01689.

changed climate and meteorological conditions over the last ten-year period, at the very least, or longer.

1. The Department Must Strengthen Numeric Storm Design Standards in the Permit to Account for Changed Precipitation Conditions.

Recent studies have indicated that throughout most of the United States storm control infrastructure is under-designed for the increasing frequency and severity of extreme rainstorms.³⁰ This study indicated that the increase in extreme storms paired with under designed storm water control systems will lead to the failure of many stormwater systems throughout the country.³¹ The study also indicated that the eastern United States is experiencing extreme rain events 85 percent more often in 2017 than in 1950.³² The lead author of this study stated in a press release “that infrastructure in most parts of the country is no longer performing at the level that it’s supposed to, because of the big changes that we’ve seen in extreme rainfall”.³³ Additionally, on a more regional scale the Phase III WIP indicates the same, that “increasingly frequent and severe extreme weather events will damage BMPs and necessitate more inspections, maintenance, or replacement and that more BMPs need to be installed to compensate for an anticipated loss of BMP pollution reduction efficiency.”³⁴ The recent study and the Phase III WIP make it clear that the BMPs and storm designed standards contained in the proposed 20CP are likely under designed and, at a minimum, must be reviewed by MDE in light of new data and IDF curves to determine their projected effectiveness and if new standards should be included in the permit.

The proposed 20CP in its current form does not take the above facts into consideration and maintains outdated storm design standards. The permit relies heavily on guidance from the 2011 Erosion and Sediment Control Handbook (2011 ESC Handbook).³⁵ The 2011 ESC Handbook lists “Climate” as one of four principle factors that determines the erosion potential of any area, stating that “[r]ainfall characteristics (i.e. frequency, intensity, and duration) directly influence the amount of runoff generated.”³⁶ This means that climate considerations, such as accounting for new data and trends showing increases in the intensity, duration, and frequency of storms are inherent to the design and implementation of practices to control erosion and sedimentation. However, in practice and by the terms of the CSGP this requirement is largely absent, and the Permit lacks any affirmative duty or requirement for MDE and/or applicants to ensure that climate changes are

³⁰ <https://news.agu.org/press-release/us-infrastructure-unprepared-for-increasing-frequency-of-extreme-storms/> and <https://agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2019GL083235>

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 46

³⁵ See 20-CP pg. I.2.

³⁶ 2011 ESC Handbook pgs. I.1 - I.2.

<https://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/2011%20MD%20Standard%20and%20Specifications%20for%20Soil%20Erosion%20and%20Sediment%20Control.pdf>.

adequately considered. Despite the reference to climate in the 2011 ESC Handbook, it too is insufficient to protect waters of the state and relies on old and under-designed storm standards to inform the contents of the Handbook.

MDE must research and analyze data regarding effectiveness of current BMPs and analyze and update numeric storm design standards to be reflective of recent data and current trends. As discussed above, Commenters requested records of MDE's consideration and analysis of these climate factors in the design and drafting of this Permit and disclosed records indicated that no such analysis or even discussion of such analysis was considered or undertaken by MDE.

MDE has an opportunity to make this Permit truly protective of State waters and be a **true climate leader on this front. Commenters urge MDE to take the time necessary to fully assess the factors and issues we have discussed** above to ensure that the new Permit is responsive to these trends and that MDE does not lag behind and wait till it is too late when this permit is renewed again in five years.

Numerous entities have begun similar updates and Commenters urge MDE to review, contact, and, if necessary, coordinate with any of the below entities that have updated IDF curves and storm design standards based on current rain data and trends regarding impacts from a changing climate.

- ❖ The Chesapeake Bay Program - A recent draft memo within the Program summarized five recent studies that “that downscaled precipitation projections for local stormwater management application.”³⁷ The memo also states that these downscaled precipitation projections are ‘necessary to [] inform future stormwater design.’³⁸ The summary of these studies indicates that Rainfall Intensity Projections will increase across the watershed with increases ranging from 44% to 1%.³⁹ The memo also states “that the use of IDF curves based on historic precipitation analysis are likely to underestimate future precipitation.”⁴⁰ Lastly, the memo notes that a study of Maryland with resulting downscaled precipitation projections is currently underway with results pending. Commenters urge MDE to track and communicate with the authors of this study and thoroughly analyze whether the projected IDF curves that result should be implemented immediately into this Permit.

- ❖ Chesapeake Bay Program Urban Stormwater Workgroup - This workgroup is developing a project to “develop future projected IDF curves for the entire Chesapeake Bay Watershed

³⁷ *DRAFT for USWG Review of Recent Research on Climate Projections for the Chesapeake Bay Watershed*
Chesapeake Bay Program. Pg. 12.

https://www.chesapeakebay.net/channel_files/40324/memo_3_summary_of_climate_projections_review_draft_9.4.20.pdf

³⁸ *Id.* at 13.

³⁹ *Id.* at 17.

⁴⁰ *Id.* at pg.2.

and host them on a web-based tool” with the goal “to design and build infrastructure assets to withstand anticipated future precipitation conditions, design standards should reflect future precipitation projections and not solely be based on historical precipitation records.”⁴¹ We urge MDE to track and collaborate with this workgroup as necessary to implement the appropriate standards into the CSGP and to implement similar goals and motivations into the design and implementation of the CSGP.

- ❖ Virginia Beach, Virginia - The City of Virginia Beach updated its Public Works Design Standards Manual in June 2020.⁴² These updates included the requirement that developers “plan for 20 percent more rainfall than current National Oceanic and Atmospheric Administration data calls for.”⁴³ This change was driven by studies from the City that indicated that “actual rainfall frequency depths in Virginia Beach are approximately 10% greater than those specified in NOAA” and “in order to address the need for more accurate design rainfall data and to consider projected increases in rainfall frequency depths over the next 30 years, rainfall depth-duration values were increased by 20% over NOAA Atlas 14 values.”⁴⁴ We urge MDE to conduct a similar analysis of Maryland as a whole, develop updated storm design standards applicable across the state and determine if any areas of the state require further enhancement of standards based on local/regional rainfall data.
- ❖ Virginia Department of Transportation - “The Virginia Department of Transportation (VDOT) has also revised its bridge design manual to account for climate change. VDOT has implemented a 20% increase in rainfall intensity and a 25% increase in discharge in design of bridges.”⁴⁵
- ❖ Maryland’s Eastern Shore - The Eastern Shore Land Conservancy commissioned a study on extreme precipitation on Maryland’s Eastern Shore. The conclusion of this study was that “extreme precipitation events are becoming more intense and bringing more rain, a trend which will continue and escalate in the coming decades.”⁴⁶ One of the key

⁴¹ https://www.chesapeakebay.net/channel_files/40321/urbanstormwaterworkgroup_16june2020.pdf.

⁴² https://www.vbgov.com/government/departments/public-works/standards-specs/Documents/_June%202020%20Design%20Standards%20Manual.pdf.

⁴³ <https://www.wavy.com/weather/flooding/starting-this-summer-developers-must-plan-for-more-flooding-in-order-to-build-in-virginia-beach/>.

⁴⁴ Virginia Beach Public Works Design Standards Manual. Pg. 8-9.

https://www.vbgov.com/government/departments/public-works/standards-specs/Documents/_June%202020%20Design%20Standards%20Manual.pdf. See underlying study here: <https://www.vbgov.com/government/departments/public-works/comp-sea-level-rise/Documents/anaylsis-hist-and-future-hvy-precip-4-2-18.pdf>.

⁴⁵

https://www.chesapeakebay.net/channel_files/40324/memo_3_summary_of_climate_projections_review_draft_9.4.20.pdf pg. 12 and 21. See also, <http://www.virginiadot.org/business/resources/bridge/Manuals/Part2/Chapter33.pdf>.

⁴⁶ <https://www.eslc.org/wp-content/uploads/2020/01/ExtremePrecipitationReport.pdf> pg. 27.

recommendations from the report was to “upgrade infrastructure to reflect future precipitation estimates”.⁴⁷

- ❖ Anne Arundel County, Maryland - Updated 1-year storm designation to 2.7 inches in 2017.⁴⁸
- ❖ New York - “The New York State Department of Transportation has revised their highway design manual to account for future projected peak flow in culvert design. The change was a 20% increase.” and “as another example, New York City has not adjusted its design manual, but has issued the “Climate Resiliency Design Guidelines” (NYC Mayor’s Office of Recovery and Resiliency, 2019). Among the guidelines provided is the recommendation that the current 50-year IDF curve be used as a proxy for the future 5-year storm (projected for the 2080s). The guidelines suggest that designers plan to use on-site detention/retention systems to retain the volume associated with that size storm event though it is not yet a requirement.”⁴⁹

2. The Department Should Limit Permit Eligibility for Sites Exposed to Flooding.

In response to the overwhelming science demonstrating the effects of climate change on flooding, sea level rise, and extreme precipitation in the region, the Department should require more expansive reporting of flooding events at permit sites, and limit permit eligibility for sites exposed to flooding.

Climate change poses a threat to the effectiveness of BMPs at project sites as the frequency of storms and the amount of precipitation increases. The Phase III WIP acknowledges that “more intense storms are expected to change the effectiveness of BMPs to control pollution runoff.”⁵⁰ The WIP states that “[t]hese enormous costs are raising questions, nationally and in Maryland, whether building and rebuilding should continue in areas with repeat catastrophic weather events. As the State continues to invest in BMPs to restore the Bay, it must carefully consider their placement to avoid areas that are at risk from the most severe climate impacts.”⁵¹ The writers of the WIP, including many MDE staff that contributed to writing it, identified a number of reasons why doing nothing will force the state to incur additional costs later:

⁴⁷ *Id.* at pg. 3.

⁴⁸ <https://www.baltimoresun.com/news/environment/ac-cn-stormwater-management-0805-20200805-c4ic23hcrvesxequaxpt6rsfm-story.html?outputType=amp>.

⁴⁹ http://ny-idf-projections.nrc.cornell.edu/idf_tech_document.pdf and https://www.chesapeakebay.net/channel_files/40324/memo_3_summary_of_climate_projections_review_draft_9.4.20.pdf pg. 12 and 19.

⁵⁰ Maryland Phase III WIP, at 43.

⁵¹ *Id.*, at 44.

First, increasingly frequent, and severe extreme weather events will damage BMPs and necessitate more inspections, maintenance, or replacement. Second, more BMPs need to be installed to compensate for an anticipated loss of BMP pollution reduction efficiency. Third, additional BMPs are likely needed to address increased future pollution loads.⁵²

Given the increasing likelihood of flooding to permitted facilities and the potential risk of flood-induced pollution discharges, MDE should revise the draft permit's reporting requirements in order to capture data for every incident of flooding that occurs at a permitted facility, not only at sites discharging to sensitive waters.⁵³ An all-encompassing requirement for reporting flooding incidents at permitted sites will be beneficial to permittees and MDE in a number of ways. First, the requirement would ensure that any episode of potential flood-induced discharges is documented. Second, the documentation and reporting would also benefit the permittee and agency by providing site-specific flood data that could help with the design and implementation of future flood mitigation measures. Lastly, the collection of this data would allow Maryland to begin creating a record of flooding to support future permit-wide adaptation reforms.

Climate change has already increased the risk of flooding and the intensity and volume of precipitation in Maryland. Therefore, MDE should require all permit applicants to identify and consider present-day flood risks and precipitation conditions at their construction sites in applications for permit coverage and in the design and maintenance of stormwater control practices. **MDE should also require permittees to document and report all flooding incidents** that impact the construction area (regardless of whether inundation or an overflow occurred) to regulators in order to gather data on site-specific flood risks and all potential pollution discharges.

As MDE implements the Permit, the Department should also pay particular attention to construction projects proposed in flood prone areas or areas susceptible to sea level rise. It is imperative for the protection of waters of the State that MDE establish siting standards to keep new construction out of areas of high risk of inundation now or under future climate conditions. At a minimum, **we strongly urge MDE to deny the use of the general permit for new construction sites in a FEMA flood zone (areas not determined to be an area of minimal flood hazard), in areas subject to potential inundation by storm surge from a Category 1 or 2 hurricane, and areas projected to be at risk of inundation from storm surge when sea levels increase by two feet or less.** Science shows that these areas are at the most risk from flooding in response to climate change in the present and near future, and the costs associated with damage to facilities in these areas is already staggering. If applicants are insistent on building in these areas, MDE should at least require an individual permit in order to more adequately analyze the risks associated with the project and the impacts stormwater pollution from the construction phase

⁵² *Id.*, at 46.

⁵³ See Draft Permit, Section III.C.3.

would have on the water quality in light of the increased precipitation resulting from climate change.

3. The Department Must Consider Climate Impacts and Changed Meteorological Conditions in Designing Provisions and Requirements for Technology- and Water-Quality Based Effluent Limitations

There is no indication that the required controls, practices, and effluent limitations in this permit are designed to adequately control or respond to the increasingly extreme precipitation, flood, and heat events occurring in Maryland.⁵⁴ The increased threat of extreme rain, flood, and heat events in Maryland must be part of the Department's consideration and design of this draft permit. It is not sufficient to rely on outdated standards when the science is clear that Maryland and the Mid-Atlantic are experiencing extreme rain events at a greater frequency than any other part of the contiguous United States. The Erosion and Sediment Controls, Pollution Prevention Requirements, Construction Dewatering Requirements, and other numeric and narrative effluent limitations, such as requirements to install and maintain perimeter sediment and other pollutant controls and to minimize erosion, dust, tracking of sediment, and soil compaction must be re-examined in light of current and projected precipitation, flooding, and extreme heat trends in Maryland to ensure that discharges will meet applicable water quality standards.

4. The Department should consider revisions to the draft permit and future modifications to the reissued permit to account for forthcoming studies and planning processes.

MDE should revise the draft permit to include a reopener clause, committing to modify the permit to address forthcoming climate change analyses, reports, and plans relevant to this permit. Critically, MDE should ensure that reasonable modifications are made to this permit no later than 2022 for the purpose of incorporating the state's commitment to address climate-attributable pollution loads to the Chesapeake Bay as part of the Bay TMDL mid-point assessment. Maryland committed to submit to EPA an addendum to its Phase III WIP that addresses previously unaccounted for loads of pollution attributable to climate change. Preliminary modeling of these loads by the Bay Program indicates that Maryland's share could amount to 2.19 million pounds of nitrogen per year by 2025 that are not currently accounted for by the state's WIP or in existing permitting programs. Maryland's climate addendum is due for submission in 2021, which is several years before this permit will expire, and soon after this permit could be issued. The climate addendum is likely to consider new and revised commitments relevant to construction sources of climate-attributable pollution, including, for example, potential increases in stormwater discharges

⁵⁴ Draft Permit at Part III.A-B.

attributed to increasing intensity and quantity of precipitation within the region.⁵⁵ Maryland will soon also finalize several relevant climate studies, reports, and plans including, for example, a statewide plan to address nuisance flooding, an update to Maryland’s modeling and mapping of 100-year flood-zones, and a water quality and climate change resiliency portfolio set to release in 2021.

Finally, Commenters appreciate that the Permit defines a specific amount of rainfall in subsection III.C.2. to trigger a precipitation-based inspection requirement, but, as discussed above, we believe **the Department should mandate the use of precipitation data from representative monitoring stations**, as the use of a standard data set will enable the Department and permittee to instantaneously consult a standard source of data remotely. We recommend the Permit be amended to specify how a “representative” station should be identified (e.g., the closest station, or the nearest station in the same county) in order to remove discretion or ambiguity.

VIII. Inconsistencies with State Law

The Department must correct two definitions in the Permit that are inconsistent with the comparable definitions in the Water Pollution Control statute. In Appendix A, “Discharge of a Pollutant” is defined inconsistent with the definition of “discharge” contained in 9-101(b) of the Environment Article. Similarly, “Pollutant” is defined more narrowly in the Permit than the definition provided in 9-101(g) and must be corrected.

Minor and Grammatical Issues

Commenters would also like to point out the following few typographical and/or grammatical issues that the Department should correct prior to issuing the final determination for the Permit:

Page 3: Part I. “Waters of This State” - “This” should not be capitalized

Page 3: I.B.1.c. A word appears to be missing in the opening clause prior to the enumeration of subparagraphs i through iv.

Page 6, I.E.3. The industrial stormwater general permit is not given its proper name and there is an extra period at the end of the subsection.

⁵⁵ Notably, in its Phase III Watershed Implementation Plan, Maryland specifically commits to continued research on the impact of increased precipitation on stormwater BMP performance, which would support the modification of stormwater design standards and other elements of this permit to account for the impacts of climate change.

Page 29, III.D.2. The text in subsection D.2 needs to be properly enumerated, specifically the language that follows subparagraphs b.i through b.iv.

Conclusion

While we applaud several of the additions to this Permit, we have noted throughout the comment that MDE lacks the resources to adequately administer the expanded scope proposed for this permit and water quality will be degraded as a result. Additionally, the Permit contains vague language, unenforceable conditions, inadequate water pollution controls, is not protective of water quality standards, and does not provide adequate public participation and sufficient transparency. The permit deficiencies are particularly glaring in the face of climate change and its impacts on precipitation, flooding, storms, and sea level rise in Maryland, all impacts that permit largely fails to consider. We strongly urge MDE to consider the critiques, suggestions, and recommendations contained within this letter and revise the permit with the requisite updates. We are happy to meet with Department staff to discuss our findings and recommendations for improvement.

Commenters also include in this comment and submit to the administrative record the attached appendix that contains pictures collected by signatories to this comment and other organizations documenting construction site pollution throughout the state. This information is included to provide physical evidence and examples to support the findings, concerns, and recommendations contained within this comment letter. Please let us know if you have any questions about any of the documentation/pictures contained within.

The undersigned members of the Chesapeake Accountability Project and other stakeholders look forward to your response to these issues with the 20-CP tentative determination and thank you for the opportunity to provide these comments. If you have any questions for the commenters please contact Evan Isaacson, Chesapeake Legal Alliance, evan@chesapeakelegal.org, or Paul Smail, Chesapeake Bay Foundation, psmail@cbf.org.

Signed,

Members of the Chesapeake Accountability Project:

Center for Progressive Reform
Chesapeake Bay Foundation
Chesapeake Legal Alliance
Environmental Integrity Project

Other Stakeholders:

Anacostia Watershed Society
Baltimore Tree Trust
Blue Water Baltimore
Chapman Forest Foundation

Clean Water Action
Corsica River Conservancy
Defensores de la Cuenca
Friends of the Nanticoke River
Friends of Quincy Run Watershed
Friends of Ten Mile Creek
Land Trust Alliance
Maryland League of Conservation Voters
National Parks Conservation Association
Rock Creek Conservancy
Safe Healthy Playing Fields, Inc.
ShoreRivers
Sierra Club - Maryland Chapter
St. Mary's Watershed Association