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Via Electronic Mail

Sharon Talley
Compliance Program
Water and Science Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
sharon.talley@maryland.gov

Harry E. Hunsicker
Senior Compliance Assurance Advisor
Office of the Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
harry.hunsicker@maryland.gov

RE: Chesapeake Accountability Project (“CAP”) Priorities and Concerns with Enforcement of the Maryland General Permit for Discharges from Stormwater Associated with Industrial Activities

Dear Ms. Talley and Mr. Hunsicker:

In preparing to submit comments to the Maryland Department of the Environment (the “Department”) regarding the Draft 20-SW General Permit for Discharges from Stormwater Associated with Industrial Activities, the CAP coalition analyzed key data to inform our recommendations. Much of this information relates to noncompliance and enforcement concerns and may benefit the Compliance Program in improving permit compliance. We hope you will consider the following conclusions and recommendations that our coalition finds critical to improving the effectiveness of the Compliance Program.

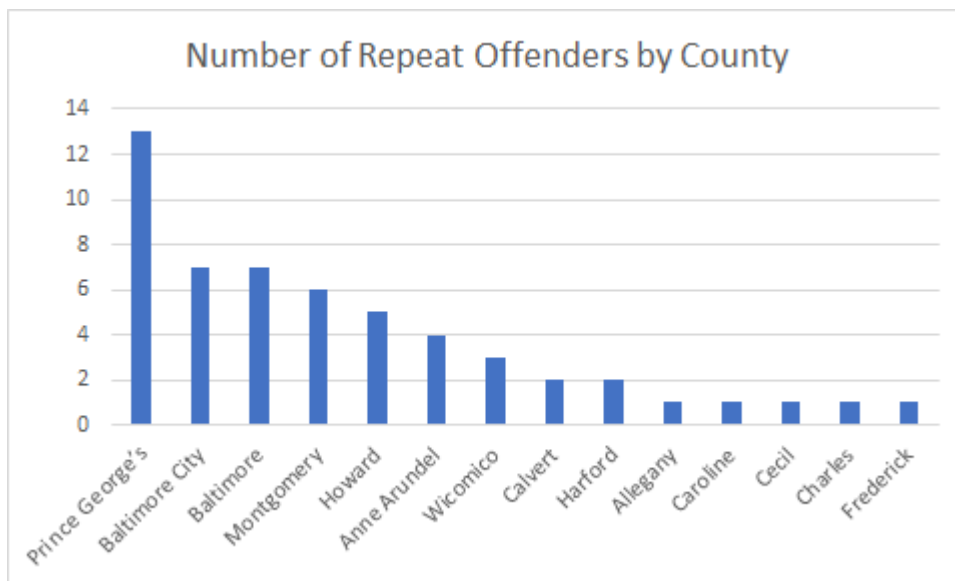
I. The Department’s Current Enforcement Policy is Not Effective in Deterring Noncompliance.

Based on a review of outcomes from Department inspections, the compliance rate for the industrial stormwater general permit is one of the lowest of the regulated sectors tracked by the Water and Science Administration. Permit noncompliance exacerbates racial inequities due to the location of many industrial

facilities in communities of color. Despite the high levels of noncompliance, formal enforcement actions against industrial stormwater permittees are relatively rare. We ask the Department to explain the lack of enforcement of these permits and urge the Department to adopt a more aggressive enforcement policy to hold permittees accountable for complying with their permit terms.

In the period from January 1, 2017 to December 1, 2020, the Department conducted 1,979 inspections, and only 475 (24%) of those inspections found the industrial stormwater permittee to be in compliance. The inspection reports for 1,305, about two-thirds, of the total inspections directly stated “noncompliance” as the condition of the permitted site. An additional 185 inspections resulted in compliance assistance rendered, or required corrective actions or additional investigation. Because the available data did not indicate the type of noncompliance, we cannot assess the severity of the noncompliance, even where “noncompliance” was the specific condition of the site. However, given the prevalence of this finding, the Department should address the widespread noncompliance with the industrial stormwater general permit.

Inspection data show that numerous facilities were in noncompliance repeatedly, and many times consecutively. Of the 1,305 inspections that resulted in direct findings of noncompliance, 617 were of facilities that were repeat offenders—meaning the facilities had previously been inspected in the same timeframe and found to be in noncompliance. In fact, from the inspections, 55 facilities were found to be in noncompliance five or more times in the three-year timeframe. The three counties with the largest concentration of repeat offenders, facilities with 5 or more findings of noncompliance over the three-year period, were Prince George’s County, Baltimore City, and Baltimore County. The distribution of worst offenders by county shows the environmental injustice that results from noncompliance with, and lack of enforcement of, these permits, as the worst repeat offenders are most concentrated in the two counties with the highest percentages of Black population in the State.



Although the compliance rate for the industrial stormwater general permit over the three-year period represents one of the worst rates of any regulated sector under the Water and Science Administration, enforcement rates do not match. Despite the consistent noncompliance, there were only 14 formal enforcement actions against industrial stormwater permittees in the same three-year timeframe. We ask

the Department to explain why facilities regulated under the industrial stormwater general permit consistently show among the highest rates of noncompliance and what the Department is planning to do to rectify this situation. Evidently, the current enforcement policy is not working effectively to deter noncompliance. The Department has a statutory duty to ensure compliance with state and federal environmental laws and a responsibility to protect the public from the particularly toxic discharges that flow from many of these sites into neighboring areas. We urge the Department to meet its duty and responsibilities by increasing enforcement against industrial stormwater permittees consistently failing to comply with their permits. The following section presents potential targets for the Department to consider for enforcement.

II. The Department Should Pursue Formal Enforcement Against the Worst Repeat Violators of the Industrial Stormwater General Permit and Facilities in Noncompliance in Overburdened Communities.

Based on our review of inspection reports and a general compliance sweep for industrial stormwater general permittees in noncompliance, we have identified 9 facilities that warrant immediate enforcement. Facilities with Maryland EJScores of 0.75 or greater are located in census tracts overburdened by environmental pollution. Scores in this range indicate that the census tract is in the top quartile of all census tracts in Maryland for environmental justice risk indicators.

1. MDR001093

- Waste manufacturing
- Hyattsville, in Prince George's County
- 12 findings of noncompliance from inspections over about a four-year period (January 2017-November 2020)
- Receiving water Anacostia River impaired for bacteria, ions, nutrients, PCBs, stream modifications, sediments, trash
- Maryland EJScore of 0.81

2. MDR001216

- Baltimore City
- Auto scrap recycling/salvage yard
- MD EJScore 0.92
- 42 benchmark exceedances from January 2018 – September 2020
- Inspection reports found noncompliance
- A settlement agreement closed in 2020 did not resolve the noncompliance, as noncompliance has continued.

3. MDR001402

- Baltimore City
- Auto scrap recycling/salvage yard
- MD EJScore 0.85
- 16 Benchmark exceedances June 2018-Sept 2020
- December 2019 Inspection found noncompliance

4. MDR003182

- Baltimore City
 - Auto scrap recycling/salvage yard
 - MDE EJScore 0.83
 - 42 benchmark exceedances from January 2018 – September 2020
 - Significant noncompliance for failure to report
5. MDR002262
- Auto salvage yard, company owns auto salvage yards across
 - Jessup, in Howard County
 - 13 findings of noncompliance from inspections over a 3.5 year period (February 2017-September 2020)
 - Department required corrective action during this time period, but ten follow-up inspections showed continued noncompliance
 - Maryland EJScore of 0.75
6. MDR003292
- Kitchen grease collection, bulking, and filtering
 - Beltsville, in Prince George’s County
 - Receiving water Anacostia River impaired for bacteria, ions, nutrients, PCBs, stream modifications, trash
 - 10 findings of noncompliance in 2.5 year period (February 2017 -August 2019)
 - Maryland EJScore of 0.76
7. MDR000401
- Upper Marlboro, in Prince George’s County
 - 11 findings of noncompliance from inspections in just over a three year period (August 2017-November 2020)
 - Maryland EJScore of 0.35
8. MDR001287
- Conowingo, in Cecil County
 - 10 findings of noncompliance in 3.5 year period (March 2017-October 2020)
 - Maryland EJScore of 0.39
9. MDR001382
- Auto scrap recycling/salvage yard
 - Rockville, in Montgomery County
 - 9 findings of noncompliance in 3.5 year period (March 2017 - October 2020)
 - Maryland EJScore of 0.33

III. The Department Should Expand its Efforts to Identify, and Pursue Enforcement Against, Facilities Discharging Industrial Stormwater Without a Permit.

Facilities discharging industrial stormwater without permit authorization are operating entirely outside the scope of the Clean Water Act. Because discharges at unpermitted facilities are not monitored, no

control measures are required, and no water quality assessments can be made, these facilities should be a high enforcement priority for the Department. Based on a recent investigation by one of our partner organizations, we believe that there are significant numbers of facilities that should have an individual or general industrial stormwater permit and are operating without either.

Magothy River Association (MRA) queried the Department's databases and found that, of the 12 facilities in the watershed that appeared to be subject to the industrial stormwater general permit, 6 facilities were operating without coverage, 5 had expired permits, and 1 site had coverage, but had only recently obtained it. Based on this narrow review, it is reasonable to assume that hundreds of other facilities are operating across the state without the necessary coverage under an industrial stormwater permit.

MRA's review led the organization to pursue a citizen action against one unpermitted facility, Ecology Services, Inc., for improper discharge of stormwater that appeared to be flowing from the site, down the road, and into Lake Waterford. MRA sent a Notice of Intent to sue Ecology Services on October 1, 2020. Though the Department required Ecology Services to implement corrective actions shortly thereafter, to be in place by December 11, 2020, these efforts clearly did not prevent ongoing stormwater violations, given that the Department later filed suit against the company on April 19, 2021.

We urge the Compliance Program to hire additional staff or contract with an outside engineering firm to devote significant time and resources to identify facilities operating without a permit. If the Department finds facilities that knew, or should have known, about the requirement to be covered by the permit, those facilities should pay substantial penalties for violating the Clean Water Act and face potential civil and criminal enforcement actions. Similarly, the Department should impose significant penalties on those facilities that do not promptly and fully comply with the Department's request to submit an application for coverage and comply with all the terms and conditions. Penalty revenues collected from these enforcement actions are deposited in the Clean Water Fund, which is designed to ensure that the Water and Science Administration has the resources it needs to fulfill its statutory duties. In the future, these revenues should be dedicated to hiring the staff or contractors needed to bring unpermitted dischargers within the permit and to verify the continued validity of those operating with no exposure certifications, as discussed further below.

IV. Operators Should Not Be Permitted To Support No Exposure Certifications With Outdated Inspections and the Compliance Program Should Inspect All Facilities Seeking No Exposure Certification Prior to the Issuance of the 20-SW Permit.

Another category of problematic industrial facilities are those operating with No Exposure Certifications based on inspections that are over five years old. Even assuming that facilities that initially receive No Exposure Certifications were appropriately granted these certifications, facilities should not be permitted to continue operating without an updated professional inspection. From a review of the No Exposure Certification documents available through the MDE Wastewater Permits Interactive Search Portal, we determined that there is a wide variety of documentation submitted in support of No Exposure Certification and in many cases a professional was last involved over five or six years prior to the No Exposure Certification renewal. We urge the Department to universally require updated inspections with the submission of each application for No Exposure Certification and, before the reissuance of the permit, to conduct inspections at each of the facilities seeking No Exposure Certifications to determine if they are still eligible.

From our review of No Exposure Certifications, we identified several instances where a facility operator submitted a current No Exposure Certification application form when seeking renewal but provided no updated certification or inspection report from a professional. In these examples, the last documented inspections were in 2014 or 2015, and these inspections were used to support No Exposure Certifications issued in 2020 and 2021 respectively. This is particularly problematic because, once issued, the No Exposure Certification is valid for five years, meaning that the facilities can continue to operate without permit coverage as late as 2025 or 2026 based on inspections conducted 2014 or 2015. Although the assumption may be that the facilities' practices have not changed since the last certification, and the operator may indicate this somewhere on the application form, a professional engineer or other certified professional is the more appropriate person to opine on whether any pertinent changes have been made to the site. The Department should not simply rely on the facility operator's position that the facility remains eligible for No Exposure Certification and should consistently require an updated certified professional inspection or conduct an inspection itself.

In a few instances, the facility operator did not even provide an updated application form, instead just stated in an email that the facility still meets the requirements and standards for No Exposure Certification. Similar to the reliance on old inspections based on the statement that conditions have not changed, this process relies entirely on the regulated entity and provides no updated third-party certification to verify the operator's position. Again, in this case, the Department is relying on an inspection that is over five years old, with no indication that a certified professional has visited the site to assess the current exposure conditions.

To ensure consistency and that facilities are still eligible for No Exposure Certification, the Compliance Program should conduct, or hire third-party consultants to conduct, inspections on all facilities seeking new or renewal No Exposure Certifications before the 20-SW permit is issued.

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We welcome the opportunity to meet with the Department's compliance program to answer any questions about our findings and recommendations. Thank you for your time and consideration of our concerns.

Sincerely,

CAP Members

Environmental Integrity Project

Center for Progressive Reform

Chesapeake Legal Alliance

Chesapeake Bay Foundation