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Via Electronic Mail

Ms. Naomi Howell, Mr. Paul Hlavinka, Mr. Yen-Der Cheng, Mr. Michael Richardson
Water and Science Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
naomi.howell@maryland.gov
paul.hlavinka@maryland.gov
yen-der.cheng@maryland.gov
michael.richardson@maryland.gov

RE: Chesapeake Accountability Project (CAP) Concerns Regarding Backlog of Administratively Continued and Expired Individual NPDES Permits

Dear Ms. Howell and Messrs. Hlavinka, Cheng, and Richardson,

With this letter, the Chesapeake Accountability Project (CAP) coalition and its partners seek to reinforce some of the concerns we have expressed to the Department over the past year or more regarding long-expired permits. We appreciate the Department's willingness to involve us as it works to improve the renewal process for individual NPDES permits. We have been active and engaged in working to improve the Department's proposed Wastewater NPDES Permits Priority Rating System, intended to help Department staff determine the appropriate prioritization of renewal permits as applications are received. However, this rating system only addresses a portion of the larger problem with permit renewal delays.

Accountability, deadlines, and stated annual goals are needed to incentivize efficiency and appropriate allocation of resources at the Department to ensure the steady decline in the number of expired and administratively continued permits. We urge the Department to establish a timeframe, triggered by receipt of a complete permit application, within which permits are expected to be issued as well as a plan that outlines the steps the Department will take to ensure these expectations are realized. The Department could base such a policy on the 2012

Pennsylvania Department of Environmental Protection (PA DEP) “Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee.”¹ The PA DEP policy established concrete timeframes within which PA DEP is expected to issue permits, called Permit Decision Guarantees (PDG). The length of time differed based on the type of permit, but new NPDES permits were given a PDG timeframe of 188 business days or fewer.² This policy appears to have improved permit renewal time and a data review has shown that 70% of Individual NPDES permits are issued within the PDG timeframe.³ However, to avoid some of the pitfalls of Pennsylvania’s policy, as identified by the Pennsylvania General Assembly’s Legislative Budget and Finance Committee in a 2019 report, the Department should ensure that there are consequences for failure to meet the designated timeframes and create a plan of action outlining steps for meeting the timeframes.⁴

The Department should meet its established timeframes for each permit regardless of how it chooses to prioritize permit renewals, but the timeframes could be tailored to incorporate the priorities set forth in the Wastewater NPDES Permits Priority Rating System. For example, the policy could provide that permits for facilities in overburdened communities with a certain MD EJScore have a shorter timeframe within which to issue the renewal (and through the renewal process, ensure the permits are sufficiently stringent to protect water quality and human health). The established timeframes should also be shorter for renewals at facilities with permit violations, as these facilities are operating in violation of even their outdated permits, as discussed more fully below.

At a minimum, the Department should establish annual goals for the number of permits to be issued in the next year and share those commitments publicly. Yearly goals, along with

¹ Pennsylvania Department of Environmental Protection, Office of Program Integration, *Policy for Implementing the Department of Environmental Protection (Department) Permit Review Process and Permit Decision Guarantee*, 021-2100-001 (Nov. 2, 2012), available at https://files.dep.state.pa.us/ProgramIntegration/PermitDecisionGuaranteePortalFiles/021-2100-001_PRP_and_PDG_Policy.pdf.

² *Id.* at Appendix A.

³ Legislative Budget and Finance Committee, *Performance Evaluation of the Department of Environmental Protection Chapter 102 and Chapter 105 Permitting Programs*, 85 (June 2019), available at <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/646.pdf>.

⁴ These were two recommendations made by the Legislative Budget and Finance Committee of the Pennsylvania General Assembly in its report *Performance Evaluation of the Department of Environmental Protection Chapter 102 and Chapter 105 Permitting Programs*, upon finding that the timeframes were not being met for numerous permits. To improve the effectiveness of the policy, the committee recommended that PA DEP 1) “establish consequences for DEP regional offices and CCDs [county conservation districts] that do not meet PDG time frames”; and 2) “systematically collect, compile, analyze, and report data on PDG-eligible applications and implement a plan of action to ensure eligible applications are approved within the guaranteed time frame.” *Id.* at 86.

information to track Department progress toward these goals, would aid in creating accountability, transparency, and incentive for issuing permits as efficiently as possible.⁵

The remainder of this letter provides empirical support for the need to improve individual wastewater permit renewal efficiency and decrease the backlog, to ensure that permits are up-to-date—reflecting the most recent water quality data, containing the best available technology, and incorporating updated reasonable potential analyses to assess the impact on water quality.

I. Conclusions From Our Review of Expired and Administratively Continued Permits

From a recent review of data available on ECHO,⁶ based on a pull of data on July 14, 2021, we determined the total number of permits that are currently administratively continued or expired, those that have been administratively continued or expired (collectively, “lapsed” permits)⁷ for over one year and for over five years, and among those, the facilities that have violations and are in significant noncompliance. We identified 153 currently lapsed permits. All permits that have been lapsed for over one year are particularly concerning because they are already an entire year overdue for Department review and analysis to examine whether additional permit terms should be incorporated. Our analysis, based on ECHO data, identified 114 permits that have been lapsed for over one year and 22 permits that have been lapsed for **over five years**. For those egregiously delayed permits, an entire additional five-year permit term has gone by beyond the expiration date, without Department analysis of the pollutants being discharged and the appropriateness of effluent limitations, monitoring requirements, or other permit limits and controls. On top of that, according to ECHO data, several permits have been lapsed for **over ten years**, including Valley Proteins, Inc. (MD0003247), the expiration date of which was over 15 years ago, on February 28, 2006.

For the 153 lapsed permits, the average length of time that has passed since the permit’s expiration date is about three years. This means that beyond the five-year permit term, the currently lapsed permits have, on average, already been delayed three years, totaling eight years since the permit terms have been evaluated. During this time, the permitted facilities presumably continue to operate as they had been during the permit term, with no additional permit

⁵ If funding for improving efficiency is a concern, the Department could generate revenue by, in part, imposing fines on permittees that submit late applications for permit renewal, as these late applications also set back the timeline for issuing renewal permits.

⁶ We acknowledge that data on ECHO may have some inaccuracies, and we have vetted the data by removing from our list and analyses permits that we identified have been reissued, were not individual permits, were inactive permits covering facilities no longer in operation, or were out of state permits. We have also corrected the compliance status of any facilities that we determined were inaccurate.

⁷ For simplicity, in this letter we will refer to administratively continued or expired permits collectively as “lapsed” permits, to refer to permits for which the expiration date has passed. We recognize that there is legal significance to whether a permittee holds an expired permit (meaning a timely renewal application was not submitted) or an administratively continued permit (a timely and complete renewal application was submitted and/or the Department , but for purposes of summarizing our results, we will refer to these outdated permits collectively.

requirements based on Department analysis of current data from permittee applications or updates due to legislative or regulatory changes in the interim.

Even more troubling are the facilities that operate under a lapsed permit while violating the terms of that permit. These facilities—in addition to possible fines and/or enforcement action—should be subject to timely Department analysis of discharges, more stringent permit limits or permit conditions to prevent ongoing noncompliance, and compliance schedules to bring these facilities back into compliance. From our review, we identified 25 facilities with permits lapsed over a year and “Violation Identified” as their compliance status on ECHO. Twelve facilities have been lapsed for over a year and had a compliance status of “Significant/Category I Noncompliance.” Six facilities hold permits that have been lapsed for over 5 years and have a compliance status of either Violation Identified or Significant Noncompliance.

From our review, we developed a list of priority facilities that are in noncompliance, have been delayed, and for which no draft permit has been issued yet. Specifically, the nine facilities listed in **Table 1** below have either been lapsed for over 5 years and have a status of Violation Identified (VI) or have been lapsed for over one year and have a status of Significant/Category I Noncompliance (SNC). Additionally, eight of these facilities have had effluent violations in the last 3 years, meaning their VI or SNC status is not solely due to a failure to report of some kind. As the Department has not yet issued even a draft permit for any of these facilities, they warrant immediate attention. The renewal permits should also incorporate compliance schedules to bring the discharges into compliance. *See* COMAR 26.08.04.02.C(1) (the Department “may impose a compliance schedule as a condition of a permit for existing discharges which do not comply with permit conditions, effluent limits, or water quality standards.”)

Table 1: Priority facilities either lapsed for > 5 years with a violation identified (VI) or lapsed for > 1 year and in significant/category I noncompliance (SNC).

Name	NPDES #	Expiration Date	# Yrs Expired	Compliance Status	# Effluent Violations in last 3 yrs
Valley Proteins, Inc.	MD0003247	02/28/2006	15	VI ⁸	24
Chesapeake City North WWTP	MD0020401	10/31/2019	1+	SNC	84
Chesapeake City South WWTP	MD0020397	10/31/2019	1+	SNC	80
Triumph Industrial Park	MD0024929	02/28/2014	7	VI	52

⁸ Some signatories to this letter have issued a notice of intent to sue Valley Proteins for violations of its permit. Those claims are separate and apart from the extreme delay associated with the administratively continued permit for this facility, the point of this letter.

Stevenson University WWTP	MD0066001	02/29/2016	5	VI	3
Galena WWTP	MD0020605	09/30/2019	1+	SNC	15
Greensboro Regional WWTP	MD0071269	07/31/2019	2	SNC	7
Accident WWTP	MD0051721	6/30/2018	3	SNC	117
Elizabeth B. Wilson Residence WWTP	MD0069540	09/30/2013	7	SNC	0

Within the last year, since we previously conducted a sweep for lapsed permits, 40 new facilities have been added to our general list of lapsed permits. Every year, more permits will reach their expiration date and the Department will need to work as efficiently as possible to address those newly lapsed permits while continuing to renew permits still in the backlog. With the backlog potentially expanding every year, it is critical that the Department establish specific policies and accountability measures to improve permit renewal efficiency and avoid the consistent lengthy delays.

II. Comparison of Prior Permits to Reissued Permits After Long Period of Delay

Several permits that were reissued recently after having been lapsed for over three years had significant changes between the prior permit and the new permit. These changes were long overdue and incorporated analyses that should have been conducted much earlier to ensure protection of water quality. For each five-year permit term, the Department should undertake a new analysis of the pollutants discharged to determine whether there is a reasonable potential that the facility may contribute to an exceedance of water quality standards. See 40 C.F.R. § 122.44(d)(1)(i) (requiring that NPDES permits contain limitations to control all pollutants or pollutant parameters that the Department determines “are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”). By delaying this process by over three years, and in some cases over five years, the Department authorizes permittees to continue operating and discharging at levels that may no longer be sufficient to protect water quality.

Changes from the lapsed permits to the recently renewed permits we reviewed included more stringent effluent limitations, monitoring for additional parameters, additional or more stringent toxicity testing requirements, and other, more stringent permit requirements based on specific facility circumstances. If the Department had not delayed in renewing these permits with more stringent requirements and limitations, some level of pollutant discharge to waterways from each of these facilities could have been prevented.

More stringent effluent limitations and increased monitoring requirements

Several of the permits renewed this year after being lapsed for more than three years included significant reductions in their effluent limitations and additions to the parameters required to be monitored. The renewed Deep Creek Lake WWTP permit became effective February 1, 2021, after having been lapsed for over five years, since May 31, 2015, with significantly more stringent effluent limitations than the prior permit. Effluent limitations were decreased for most pollutants, including warm-weather BOD₅, total ammonia nitrogen as N, and total phosphorus:

Table 2: Comparison of Effluent Limitations for Deep Creek Lake WWTP Outfall 001 prior to a planned facility expansion, 09DP1357A (2015, red) vs. 14DP1357 (2021, blue)

Pollutant	Mthly avg load (lbs/day)	Wkly avg load (lbs/day)	Daily avg load (lbs/day)	Mthly avg concentration (mg/l)	Wkly avg concentration (mg/l)	Daily avg concentration (mg/l)
BOD ₅ (5/1-10/31)	213/125	325/188	N/A	17/10	26/15	N/A
Total ammonia nitrogen as N (5/1-10/31)	28/18	N/A	118/59	2.2/1.4	N/A	9.4/4.7
Total ammonia nitrogen as N (11/1-4/30)	109/35	N/A	175/76	8.7/2.8	N/A	14/6.1
Total Phosphorus - P	13/11	19/18	N/A	1.0/0.9	1.5/1.4	N/A

As shown in **Table 2**, the decreases in effluent limits from the Deep Creek Lake WWTP prior permit to the current permit are significant, sometimes with reductions by two or three times. Additionally, an annual maximum loading rate was added for TSS, as well as a reporting requirement for the annual maximum loading rate for P, and monitoring requirements for total monthly flow, effluent total hardness as CaCO₃, and upstream total hardness as CaCO₃.

Language added to the renewal permit also discussed that a water quality analysis of eutrophication was done for Deep Creek Lake and Deep Creek watershed, which was approved by EPA on September 9, 2011, after the effective date of the prior permit. The renewal permit notes that the prior total phosphorus limits of 1.0 mg/l and 0.7 mg/l (the pre-expansion and post-expansion limits respectively) were considered for the renewal permit, but that “stricter TP limitations are incorporated” based on the Youghiogheny River Phosphorus Reduction Strategy requirements.⁹ Given that the water quality analysis of eutrophication had not yet been done at

⁹ Deep Creek Lake WWTP, Permit No. 14-DP-1357 (NPDES MD0054348), page 7 of 39 (“In the water quality analysis (WQA) of eutrophication for Deep Creek Lake and Deep Creek watershed, approved by the EPA on 09/09/2011, total phosphorus (TP) limits of 1.0 mg/l monthly average and 0.7 mg/l monthly average for the flows of 1.5 MGD and 2.2 MGD, respectively, were considered. The parameter limits for TP in this permit are in conformance with

the time of the prior permit, the over five-year delay in renewing the permit contributed to an even longer period in which the permit failed to incorporate appropriate analyses and calculate updated limits. The fact that several permit limits were then reduced, in addition to the total phosphorus limit, underscores this issue.

The Hebron WWTP permit was also renewed this year, with an effective date of August 1, 2021, after having been expired for over 3.5 years, with additional monitoring requirements and an additional limit on total phosphorus. The renewed permit added monitoring requirements for total kjeldahl nitrogen and enterococci (replacing e. coli) and also added a requirement to measure and report effluent characteristics for an additional two sampling points.¹⁰ These effluent characteristics (BOD₅, enterococci, and dissolved oxygen) must be measured and reported at the two additional sampling points “to ensure that the effluent characteristics at the end of the pipeline do not violate the permit limitations.”¹¹ Considering the recent noncompliance at this facility for BOD₅ effluent exceedances,¹² these additional permit limitations appear to be necessary to address compliance issues as well as prevent further degradation of water quality. A total phosphorus annual maximum loading rate limit of 428 lbs per year was also imposed in the renewal permit, compared to a report only requirement previously.¹³

Additional or more stringent toxicity testing

Some renewal permits also incorporated changes to toxicity requirements. For example, the renewed permit for Eastern Correctional Institute (MD0066613), effective April 1, 2021 after over 4 years since the prior permit’s expiration date, imposed additional requirements related to whole effluent toxicity (WET) testing and potential limits. Among other additions, the new permit provides that if a WET test result shows reasonable potential for toxicity, and it has not been demonstrated that the source of toxicity has been eliminated or controlled, WET limits shall be required.¹⁴ This is a more stringent standard than the prior permit, which only required WET permit limits to be imposed if unacceptable toxicity is confirmed. While the new permit retains the standard based on unacceptable toxicity, it adds the standard for WET limits in circumstances where there is even a reasonable potential for toxicity. This more stringent standard serves to protect water quality by requiring additional actions and limitations if there is a risk of toxicity.

Similarly, the renewed Deep Creek Lake WWTP permit required implementation measures to eliminate acute toxicity and/or chronic toxicity identified from testing, and that if the measures do not result in compliance with the toxicity limitations, a WET permit limit and compliance

this WQA. Considering Youghiogheny River Phosphorus Reduction Strategy requirements, stricter TP limitations are incorporated for the proposed permit renewal.”

¹⁰ Hebron WWTP, Permit No. 17-DP-1999 (NPDES MD0059617), pages 8-9.

¹¹ *Id.* at pg. 12.

¹² Based on DMRs from ECHO for March and April 2021.

¹³ Hebron WWTP, Permit No. 17-DP-1999 (NPDES MD0059617), page 6.

¹⁴ Eastern Correctional Institute, Permit No. 16-DP-3027 (NPDES MD0066613), page 20 of 41.

schedule will be required.¹⁵ These specific processes and more stringent responses to identified toxicity are vital tools to prevent toxic pollution from permitted facilities.

Other permit requirements based on specific facility circumstances

Renewal permits often also strengthen other conditions that impact water quality and, if implemented timely, could ensure continued water quality protection from permit term to permit term. For example, the renewed Hebron WWTP permit included a new requirement to sample and report dissolved oxygen levels both upstream and downstream of outfall 001A, and summarize in a report submitted with DMRs an analysis of whether variations of effluent quality between the locations are significant.¹⁶ This provides the Department and the public additional key information from which to assess whether water quality is impacted by the facility's discharge. The renewed Hebron WWTP permit also improved the existing Wastewater Capacity Management requirements, which the permit specifically noted were to "address the facility's discharge that frequently surges over its 0.101 million gallons per day (mgd) design capacity."¹⁷

Climate Change

Lastly, and more generally, the Department's lags in timely permit renewals also result in permits that are not designed using the most recent and updated precipitation data. Recent studies and tools have been published that would allow the Department to better assess climate change's impacts on precipitation intensity, duration, and frequency; the Department should use this data to inform stormwater controls as well as effluent limits for discharges that contain stormwater.¹⁸ Timely renewal will enable the Department to use these updates in data and the recent studies and tools to ensure that stormwater controls and effluent limits are designed and implemented to protect water quality and public health.

Although all of these highlighted changes reflect the Department's diligent work to incorporate the findings of their reasonable potential analyses and other analyses to protect water quality, they also demonstrate how critical it is to renew permits timely and the avoidable impact to water quality renewal delays cause. Timely renewals are important to ensure that these analyses are conducted, and protective measures implemented, on the intended five-year schedule.

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¹⁵ Deep Creek Lake WWTP, Permit No. 14-DP-1357 (NPDES MD0054348), page 18 of 39.

¹⁶ Hebron WWTP, Permit No. 17-DP-1999 (NPDES MD0059617), page 13.

¹⁷ *Id.*

¹⁸ National Oceanic and Atmospheric Administration, *The new U.S. Climate Normals are here. What do they tell us about climate change?* (May 4, 2021), <https://www.noaa.gov/news/new-us-climate-normals-are-here-what-do-they-tell-us-about-climate-change>; The Chesapeake Bay Program, *Projected Intensity-Duration-Frequency (IDF) Curve Data Tool for the Chesapeake Bay Watershed and Virginia*, <https://midatlantic-idf.rcc-acis.org/> (last visited Aug. 2, 2021).

Based on our review and analysis tracking lapsed permits, we remain concerned about the Department's progress and efficiency with renewing individual permits in a timely fashion. We reiterate the recommendations and requests of prior letters—that the Department should provide concrete timeframes within which individual renewal permits are expected to be issued (similar to PA DEP), develop annual goals for the number of renewal permits to be issued in a year, and develop and implement a plan of action items to reach these goals. We appreciate the emphasis on how to prioritize the order in which renewal permits will be addressed and we hope that the Department's ultimate priority rating system incorporates many of the concerns the CAP coalition and partners have highlighted. However, we believe additional accountability measures are critical to ensuring that efficiency improves and the backlog of expired permits is eliminated.

Sincerely,

CAP Members

Mary E. Greene, Deputy Director
Environmental Integrity Project

Katlyn Schmitt, Policy Analyst
Center for Progressive Reform

Josh Kurtz, Maryland Executive Director
Jon Mueller, Vice President for Litigation
Chesapeake Bay Foundation

Patrick DeArmey, Staff Attorney
Chesapeake Legal Alliance

Other Interested Stakeholders

Matt Pluta, Choptank Riverkeeper & Director of Riverkeeper Programs, ShoreRivers

Annie Richards, Chester Riverkeeper, ShoreRivers

Brent Walls, Upper Potomac Riverkeeper

Nina Cardin, Maryland Campaign for Environmental Human Rights

Judith Stribling, Friends of Nanticoke River

Alexander Winter, Mattawoman Watershed Society

John Groutt, Wicomico Environmental Trust

Diana Edensword Conway, Safe Healthy Playing Fields Inc.

Katherine Schinasi, Corsica River Conservancy

cc:

Catherine Libertz, Director, Water Division, EPA Region III

Karen Melvin, Director, Enforcement and Compliance Assurance Division, EPA Region III

Cecil Rodrigues, Regional Counsel, Office of Regional Counsel, EPA Region III

Evelyn MacKnight, Chief, NPDES Permitting, EPA Region III