



March 18, 2009

Attn: Brian Clevenger
Maryland Department of the Environment
Water Management Administration
Sediment, Stormwater, and Dam Safety Program
1800 Washington Boulevard, Suite 440
Baltimore, Maryland 21230-1720

**Re: National Pollution Discharge Elimination System (NPDES) Permit for the
Montgomery County Municipal Separate Storm Sewer System (MS4),
Permit Number 06-DP-3320 MD0068349**

Dear Mr. Clevenger:

Anacostia RIVERKEEPER, Inc., Potomac RIVERKEEPER, Inc., Waterkeeper Alliance, Inc., and Friends of the Earth (“Requesters”), through their attorneys Earthjustice, hereby request a contested case hearing on the above-captioned permit (“Final Permit”). For reasons discussed below, Requesters specifically request that the final permit not be stayed, but instead be issued without delay while the issues raised below are resolved.

Requesters

Anacostia RIVERKEEPER, Inc. is a not-for-profit corporation existing under the laws of the District of Columbia, with its principal place of business in Washington, D.C. Anacostia Riverkeeper is dedicated to advocating for a clean and healthy Anacostia River, engaging in efforts to protect and enhance water quality in the river, enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia. Members of Anacostia RIVERKEEPER use and enjoy waters adversely affected by Montgomery County MS4 discharges, including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia. Their use and enjoyment includes, but is not limited to, recreation and aesthetic enjoyment.

Potomac RIVERKEEPER, Inc. is a not-for-profit corporation existing under the laws of Maryland, with its principal place of business in Washington, D.C. Potomac RIVERKEEPER is dedicated to advocating for a clean and healthy Potomac River and its tributaries, enforcing existing federal and state laws governing the Potomac watershed, protecting the Potomac from pollution and exploitation, and educating the public about issues affecting the Potomac watershed. Members of Potomac RIVERKEEPER use and enjoy waters adversely affected by Montgomery County MS4 discharges, including the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia. Their use and enjoyment includes, but is not limited to, recreation and aesthetic enjoyment.

Mac Thornton is a resident of Montgomery County and board member of Potomac RIVERKEEPER. Mr. Thornton owns property in Cabin John, Maryland and regularly kayaks and

canoes on rivers and streams in Montgomery County that are adversely affected by discharges from the County's MS4. His use and enjoyment of these water bodies is directly and adversely affected by the stormwater pollution that discharges from the Montgomery County MS4.

Pat Munoz is a resident of Washington, D.C. and board member of Potomac RIVERKEEPER. Ms. Munoz is an avid paddler, and kayaks and canoes regularly on rivers and streams in Montgomery County that are adversely affected by discharges from the County's MS4. Her use and enjoyment of these water bodies is directly and adversely affected by the stormwater pollution that discharges from the Montgomery County MS4.

Waterkeeper Alliance, Inc. is a not-for-profit organization representing the interests of over 182 members, including the Anacostia RIVERKEEPER and Potomac RIVERKEEPER. Each of these groups and their members have an express mission to preserve and protect the water quality in local waterbodies for aesthetic, recreational, health, and other purposes.

Friends of the Earth is a not-for-profit corporation existing under the laws of the District of Columbia, with its principal place of business in Washington, D.C. Friends of the Earth is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land. Friends of the Earth has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia. Members of Friends of the Earth use and enjoy waters adversely affected by Montgomery County MS4 discharges, including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia, as well as the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia. Their use and enjoyment includes, but is not limited to, recreation and aesthetic enjoyment.

Discharges from the Montgomery County MS4 system cause or contribute to pollution levels in waters used by Requesters' members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and MDE's failure to adequately limit them in the Final Permit as further described below, threaten the health and welfare of Requesters' members, impair and threaten their use and enjoyment of the above-mentioned waters, and deny them the level of water quality to which they are entitled under the federal Clean Water Act and Maryland law.

Grounds for Contested Case Hearing

The above Requesters submitted timely comments on the proposed permit to the Maryland Department of the Environment (MDE) on December 1, 2008. The Requester Comments identified a number of deficiencies in the proposed permit. On March 4, 2009, MDE published its Notice of Final Determination to Issue the Permit with only one substantive change from the proposed permit. The Final Permit does not correct the following specific flaws that the Requesters and others raised during the comment period:

- The permit fails to ensure compliance with Maryland’s water quality standards, in violation of the Clean Water Act and regulations, 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.44(d)(1) and 122.4(d), and Maryland regulations, COMAR 26.08.04.02(a)(1)(b), and MDE failed to make a legally required determination that the permit is or will be in compliance with applicable water quality standards.— The permit does not contain water quality-based effluent limits that “are consistent with the assumptions and requirements of any available wasteload allocation for the discharge,” in violation of Clean Water Act regulations, 40 C.F.R. § 122.44.
- The permit lacks numeric water quality-based effluent limitations, without an adequate explanation for this omission, in violation of 40 C.F.R. § 122.44(k)(3).
- The permit does not meet Clean Water Act requirements for public participation in the permit process, in violation of 33 U.S.C. § 1251(e).
- The permit fails to restrict discharge of nutrients to surface waters as required by COMAR 26.08.03.01(C)(3).

In addition, as further detailed below, MDE’s issuance of the Final Permit was arbitrary and capricious on several grounds.

Discussion

A. **The permit fails to ensure compliance with Maryland’s water quality standards, in violation of 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.44(d)(1) and 122.4(d), and COMAR 26.08.04.02(a)(1)(b).**

Clean Water Act (CWA) § 301(b)(1)(C) mandates that “[i]n order to carry out the objective of this chapter there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.” 33 U.S.C. § 1311(b)(1)(C). Accordingly, CWA regulations state that “each NPDES permit shall include conditions meeting the following requirements when applicable . . .,” including conditions to “achieve WQS [water quality standards].” 40 C.F.R. § 122.44(d)(1).¹ Those regulations state further that “[n]o permit shall be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d). In other words, state water quality standards take effect immediately in accordance with their terms.

Permit conditions to achieve WQS are also mandated by Maryland law, which states that “[t]he Department [of the Environment] shall issue or reissue a discharge permit upon a determination that . . . [t]he discharge or proposed discharge specified in the application is or will

¹ The federal CWA regulations apply directly to Maryland’s permitting program, unless they have been supplanted by more stringent state provisions. *See* 40 C.F.R. § 122.26 (federal stormwater regulations are “applicable to State NPDES programs”), and 40 C.F.R. § 122.25 (state programs “must be administered in conformance with” several listed federal regulations, including 40 C.F.R. § 122.26).

be in compliance with all applicable requirements of . . . [e]ffluent limitations [and] [s]urface and ground water quality standards. . . .” COMAR 26.08.04.02(a)(1)(b).

There is no exception from these requirements for municipal stormwater systems. The applicable statutes and rules, cited above, apply to all NPDES permits, and contain no exception whatsoever for MS4 permits. Moreover, although the plain language of the statutes and rules is dispositive, EPA guidelines for stormwater permits also call for permit conditions that ensure compliance with water quality standards. *See* EPA Memorandum, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs, (Nov. 22, 2002) (recommending that “TMDL plans are periodically assessed for their achievement of water quality standards. . . and adjustments made as necessary.”) (internal quotation marks omitted); and EPA Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43,761 (Aug. 26, 1996) (calling for “[BMPs] in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards”).

Montgomery County’s current MS4 discharges cause or contribute to violations of WQS. Pursuant to CWA § 303(d), 33 U.S.C. § 1313(d), Maryland has adopted pollution caps for a number of waters that are adversely affected by Montgomery County MS4 discharges, because those waters are not meeting water quality standards. These EPA-approved Total Maximum Daily Loads (TMDLs) contain wasteload allocations (WLAs) for the Montgomery County MS4 system, reflecting the fact that discharges from that system cause or contribute to water quality standards violations in the affected waters.² *See also* MDE, MDNR, 2008 *Integrated Report of Surface Water Quality in Maryland* (approved by EPA Sept. 8, 2008).

While the Permit states that one of the “overall goals” of the program is to “contribute to the attainment of water quality standards according to the CWA,” the permit does not require the Montgomery County MS4 system to comply with WQS. Permit Part III.J.1. Nor does the permit contain conditions that would ensure compliance with WQS. Instead, the permit requires the County to develop and implement a series of Management Programs (Permit Part III.E.), to undertake limited “Watershed Restoration” activities (Permit Part III.G.), and to develop and submit TMDL implementation plans for MDE’s review and approval (Permit Part III.J.). These requirements do not satisfy the above-cited CWA and Maryland legal requirements that the permit contain limitations necessary to meet water quality standards. There are no provisions in the permit that require implementation of controls sufficient to meet water quality standards, nor

² The following EPA-approved TMDLs contain WLAs for the Montgomery County MS4 system:
Cabin John Creek in Montgomery County TMDLs for fecal coliform
http://www.epa.gov/reg3wapd/tmdl/MD_TMDLs/CabinJohnBacteria/CabinJohnDR.pdf
Anacostia River TMDLs for biochemical oxygen demand, total nitrogen, and total phosphorus
http://www.epa.gov/reg3wapd/tmdl/Anacostia_BOD/AnacostiaBOD_DR.pdf
Anacostia River TMDLs for bacteria
http://www.epa.gov/reg3wapd/tmdl/MD_TMDLs/AnacostiaBacteria/AnacostiaBacteriaDR.pdf
Anacostia River TMDLs for sediment
http://www.epa.gov/reg3wapd/tmdl/anacostia_tss/decision_rationale.pdf
Rock Creek in Montgomery County TMDLs for fecal bacteria
http://www.epa.gov/reg3wapd/tmdl/MD_TMDLs/RockCreekBasin/RockCreekBacteriaDR.pdf

does the Permit does require the County to demonstrate the programs or activities required by the permit will be effective at meeting WQS. To the contrary, MDE itself concedes that the permit will not achieve compliance with applicable WLAs during the permit term, and does not identify any known time frame within which compliance with such WLAs will occur.

Further, MDE has failed to make the legally required “determination that . . . [t]he discharge or proposed discharge specified in the application is or will be in compliance with all applicable requirements of . . . [e]ffluent limitations [and] [s]urface and ground water quality standards. . . .” COMAR 26.08.04.02(a)(1)(b). No where did MDE determine that Montgomery County’s MS4 discharges will be in compliance with all applicable requirements of surface and groundwater quality standards. Moreover, any such finding, even if made, would be arbitrary and capricious, as the permit terms do not require such compliance, nor is there any data or analysis in the record showing that the measures required by the permit will be sufficient to comply with standards.

B. The permit does not contain water quality-based effluent limits that “are consistent with the assumptions and requirements of any available wasteload allocation for the discharge,” in violation of 40 C.F.R. § 122.44.

CWA regulations require that NPDES permits contain water quality-based effluent limits that “are consistent with the assumptions and requirements of any available wasteload allocation for the discharge.” 40 C.F.R. § 122.44. The Montgomery County MS4 is subject to wasteload allocations in TMDLs for fecal coliform in Cabin John Creek and Rock Creek (tributaries of the Potomac), and for biochemical oxygen demand, total nitrogen, total phosphorous, bacteria, and sediment in the Anacostia and its Maryland tributaries. *See* FN 2. MDE concedes that MS4 discharges are currently exceeding these wasteload allocations, stating that cuts in the County’s stormwater discharges needed to meet these wasteload allocations include “reductions of sediment by 46%, nitrogen and phosphorus by 79%, and bacteria by 96%.” MDE Response to Comments, 3 (Feb. 25, 2009).

The final permit does not specifically limit stormwater pollution so as to meet existing wasteload allocations. *See* Requester Comments, 36-37. Instead, the permit requires the county to develop and submit TMDL implementation plans for each watershed or portion of a watershed covered by the permit. *See* Permit, Part III.J. The permit does not require the County to actually implement the TMDL implementation plans, nor does it set any outside limit on the time frame for the County to implement the plans or to achieve any pollution reductions. *Id.*

These TMDL provisions of the permit are also deficient because they do not require the County to demonstrate that its TMDL implementation plans will meet the required pollutant reductions needed to meet WLAs in TMDLs. The Permit refers vaguely to “watershed restoration” (Part III.J.2.b), and alludes to “compliance with EPA approved TMDLs” (Part III.J.4), but it contains no enforceable minimum requirements for such actions, and generally requires no particular outcome from the measures Montgomery County identifies in its TMDL implementation plans. Although MDE’s Fact Sheet at 3 claims that “a net reduction in pollutant loadings over the five-year permit term is required,” there is in fact no such requirement in the permit. *See* Permit Part III.E. (management programs) and III.J.2 (TMDL implementation plan).

Further, while the permit states that the implementation plan must be submitted for MDE's "review and approval" (Part III.J.2.), the permit provides no recourse to Requesters or others in the event the County submits a plan that will not result in achieving wasteload allocations. For all of these reasons, the permit requirement for submission of a TMDL implementation plan is inadequate to meet the legal requirements described above.

The prevalence of vague, unenforceable permit conditions is exacerbated by the absence of deadlines for compliance. *See* Requester Comments, 2-3, *passim*. Even if the measures required by the permit were sufficient to at some point provide for compliance with standards (which they are not), without deadlines for these measures the permit cannot assure compliance with standards (including WLAs) as the law requires. The following key provisions in the final permit provide a few examples where mandatory requirements are rendered ineffective by the absence of deadlines:

- a. Part III.J. (TMDLs) requires the county to develop TMDL implementation plans that include benchmark pollutant load reductions in compliance with TMDLs, but only requires that benchmarks be "achieved by specific deadlines." Part III.J.1. It does not specify those deadlines, so it is left to the county to set its own deadlines for meeting WLAs, without any outside limits.
- b. Part III.E. (Management Programs) contains no deadlines by which the county must complete the three separate Management Programs for stormwater, erosion and sediment, and illicit discharge. It sets no deadlines by which the actions and BMPs selected in the county's management programs must be implemented.
- c. Part III.C. (Source Identification) sets no deadline for the permit's source identification requirements.
- d. Part III.F. (Watershed Assessment) requires the County within one year of permit issuance to "provide a long-term schedule for the completion of detailed assessments for each watershed in Montgomery County." The permit sets no outer date by when the watershed assessments must be completed.

Because the permit lacks specific deadlines for compliance and implementation, the County could postpone compliance with TMDL WLAs and WQS indefinitely, while still technically complying with the permit as it is written. Maryland regulations authorize MDE to include a compliance schedule in the permit, but require that any such compliance schedules must require achievement of compliance within "[a]pplicable periods established in effluent limitations or water quality standards, or . . .in the absence of any legally applicable schedule of compliance, the shortest reasonable time consistent with the requirements of the Federal Act and State law or regulation." COMAR 26.08.04.02. Any such compliance schedule spanning over nine months or more would be required to include interim requirements for every nine months or less, *id.*, and would require MDE to establish "quantitative limits [] for the interim period as well as for the period following the final compliance date." COMAR 26.08.04.02- 1. However, MDE chose not to include compliance schedules in the Final Permit. In the absence of a compliance schedule that complies with Maryland regulations, the CWA and CWA regulations

make no allowance for noncompliance with standards, WLAs, or other requirements for any period of time.

C. The permit fails to incorporate required effluent limits, BMPs and other measures into the permit, and its reliance on plans that are outside of the permit violate the Requesters' right to notice and comment, in violation of 33 U.S.C. § 1251(e).

Pollution controls that are intended to fulfill federal and state water quality requirements must be incorporated in the Permit pursuant to the CWA's provisions governing State permit programs. *See* 33 U.S.C. § 402(b) (authorizing States to issue NPDES permits only "upon condition that such discharge will meet . . . all applicable requirements" of CWA § 301, § 302, and others. In turn, CWA § 301 requires that permits include "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations... or any other Federal law or regulation," and CWA § 302 requires permits to contain "water quality related effluent limitations." 33 U.S.C. §§ 1311, 1312.

MDE relies on measures that are outside of the Permit to comply with key CWA requirements, including "management programs" to address erosion and sediment control, stormwater, and illicit discharge detection and elimination (Part III.E.), and TMDL implementation plans (Part III.J). The permit does not incorporate the elements of these management programs as enforceable conditions of the permit. *See* Permit Part III.E. According to MDE, these management programs "are designed to control stormwater discharges to the MEP" as required by the CWA, 33 U.S.C. § 1342(p)(3)(B). Permit Part III.E.; and Response to Comments, 7. As such, these programs are narrative effluent limitations as defined in the CWA, 33 U.S.C. § 1362(11) ("any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . ., including schedules of compliance"). Because MDE is relying on these management plans for purposes of meeting Maryland water quality standards and the CWA's MEP requirement, but is not making these plans enforceable permit conditions, the Permit violates CWA § 301.

Further, the CWA requires MDE to provide adequate opportunities for public participation in the permit process. 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any... effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."). The Permit violates these requirements by allowing the County, after issuance of the final permit, to develop key management programs without requiring the County to provide public review and comment on those programs. *See* Requester Comments, 13-18; Permit Part III.E.1.-3. As a result, the permit allows the County to amend key permit conditions without providing opportunity for public review and comment, in violation of 33 U.S.C. § 1251(e). With no opportunity for public review, the County is free to write management programs that entirely fail to meet the requirements they purport to achieve.

D. The permit fails to restrict discharge of nutrients to surface waters as required by COMAR 26.08.03.01(C)(3).

Maryland law requires that all discharges “containing nutrients which cause or contribute to eutrophication be... [g]iven advanced waste treatment before discharge... [and be] [d]isposed of by other practicable procedures which will avoid direct discharge to surface waters. COMAR 26.08.03.01(C)(3). Thus, the permit must include a requirement that the County reduce discharges associated with the application of fertilizers, herbicides, and pesticides to the MEP. *See* Requester Comments, 24. However, the permit lacks any enforceable requirements to reduce nutrients. The only reference to nutrients in the permit is a statement that the permit “encourages Montgomery County to assist with the implementation of the Tributary Strategy designed to meet the nutrient and sediment reduction goals of these tributaries.” Permit Part V.A. MDE did not attempt to address or explain this omission in the Final Permit or Fact Sheet. The failure to provide any explanation or meaningful response renders MDE’s action arbitrary and capricious. In addition, Stormwater pollution from the County’s MS4 discharges significantly impacts the Chesapeake Bay Watershed. *See* Requester Comments, 4. Controls on nutrient discharges from the MS4 are required to meet the applicable cap load allocations adopted by Maryland and other states to protect the Bay.

E. A stay of the permit is not required by Maryland law and will not aid in resolving the legal deficiencies of the permit.

Requesters specifically request that the final permit not be stayed, but instead be issued without delay and implemented while the issues raised below are resolved. Because the prior permit expired in 2006, this permit is long overdue. A stay of the permit is not required by law, would not aid in resolving the legal deficiencies in the permit, and would only encourage unnecessary delay of actions to manage stormwater pollution. There is no reason that Montgomery County cannot and should not implement the planning and other measures required by the Final Permit during the time the requested contested case hearing is resolved, particularly given the Requesters are asking that the permit be made stronger, not weaker. Requesters are not challenging any of the foregoing provisions as overly stringent and are not requesting that MDE relieve the County of any of the obligations set forth in the final permit, and the County would therefore not be prejudiced absent a stay. Accordingly, Requesters request that MDE issue the final permit, and require Montgomery County to comply with its terms until such time as the issues raised above are resolved.

[continued]

Conclusion

For the foregoing reasons, we request that MDE grant a contested case hearing and issue the permit without further delay.

Respectfully submitted,

/s/ Margaret Anne Parish
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³ Ms. Parish is a member of the Maryland Bar. Upon receipt of a Notice of Contested Case Hearing from the Maryland Office of Administrative Hearings, the Requesters intend to submit a Motion for Special Admission for Ms. Chavez, pursuant to Rule 14 of the Maryland Rules Governing Admission to the Bar.