



December 19, 2013

Nancy K. Stoner  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Acting Assistant Administrator Stoner:

As members of the Choose Clean Water Coalition, we thank you for all of the Environmental Protection Agency's (EPA) hard work to try to meet restoration goals in the Chesapeake Bay watershed. However, we are concerned about EPA's oversight of the stormwater permitting programs in key states in our region. Failing to ensure that these permits comply with core Clean Water Act requirements threatens the region's ability to make the necessary reductions of nutrient and sediment pollution contained in stormwater runoff, as the Chesapeake Bay Total Maximum Daily Load (TMDL) and state Watershed Implementation Plans mandate.

Stormwater permits being developed in EPA Region III are not following the Clean Water Act and EPA's implementing rules and guidance. This undermines the states' ability to meet interim and final reduction targets for nitrogen, phosphorus and sediment. Specifically, the stormwater permits in Region III fail to comply with rules and guidance for: (1) water quality standards (WQS) and total maximum daily loads, (2) "Maximum Extent Practicable" technologies, (3) monitoring and (4) public participation.

#### **BACKGROUND**

The Choose Clean Water Coalition's policy priorities include strengthening policies and permits to stop polluted runoff in urbanized areas. The Coalition recognizes that ongoing and upcoming renewals for stormwater permits throughout the watershed are critical to further reduce pollution as outlined in state clean water blueprints. For that reason, we are dedicated to urging the EPA to follow consistent, rigorous standards in reviewing and approving permits in the Bay watershed. Respectfully, this is not happening, and it is critical that this problem be addressed and rectified.

We are also dismayed by the fact that Prince George's County, Maryland's request for a stronger permit that will lead to cleaner and safer water for its residents and for downstream receiving waters was denied. Several Choose Clean Water Coalition groups and partner organizations came to agreement with the Prince George's County government on several changes to permit language that would have led to a better, stronger, more enforceable permit – indeed, these changes would help address many of the deficiencies noted in this letter. Despite the county's agreement and explicit request that these permit changes be made, the Maryland Department of the Environment (MDE) repeatedly denied this request. EPA and the states should be encouraging and assisting, not discouraging, local governments that are pursuing these responsible actions.



**A. The Permits Fail to Comply with Guidance on Water Quality Standards and TMDLs.**

1. Compliance with water quality standards and total maximum daily load wasteload allocations (WLA) is a central requirement of all Clean Water Act permits, including stormwater permits.

EPA has acknowledged critical requirement time and again:

- a. "The better reading of Sections 402(p)(3)(B) and 301(b)(1)(C) is that all [stormwater] permits... must include any requirements necessary to achieve compliance with WQS."<sup>1</sup>
- b. "Federal regulations require that all NPDES permits contain limitations to control discharges which may cause, have the reasonable potential to cause or contribute to an excursion above water quality standards. 40 C.F.R. § 122.44(d)(1)(i)."<sup>2</sup>
- c. "Pursuant to section 301(b)(1)(C) of the Clean Water Act and 40 C.F.R. § 122.44(d)(1)(vii)(B) permits must include any more stringent limitations, including those necessary to meet water quality standards, or schedules of compliance, that are consistent with all approved TMDL WLAs, including any requirements to offset new or increased discharges. ... Permits implementing Chesapeake Bay watershed WLAs, should also include appropriate 2 year milestones, and the reporting requirements to determine if these milestones are being met."<sup>3</sup>
- d. "In Part IV.E.2.b.i [of the Prince George's permit, regarding restoration plans], EPA recommends the language modification below...: 'Include the final date for meeting applicable WLAs, with associated annual pollutant reduction benchmarks and a detailed schedule for implementing all Chesapeake Bay TMDL requirements...'"<sup>4</sup>
- e. "WLAs, constitute a type of water quality based effluent limitation."<sup>5</sup>
- f. "Adjustments between the load and wasteload allocation may only be made following an opportunity for public participation and EPA approval."<sup>6</sup>
- g. "EPA does not require the establishment of a new TMDL to reflect these revised allocations [of Waste Load Allocations among point sources] as long as the total WLA, as expressed in the TMDL, remains the same or decreases, and there is no reallocation between the total WLAs and the total LAs."<sup>7</sup>

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<sup>1</sup> Memorandum from E. Donald Elliott, Assistant Administrator and General Counsel, EPA, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991) at 1.

<sup>2</sup> Letter from Jon Capacasa, Director, Water Protection Division, EPA Region III, to Jay Sakai, Director, Water Management Administration, MDE, re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit (MD0068284) 1 (Aug. 8, 2012).

<sup>3</sup> EPA Region III, Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed 4 (July 2010), available at [http://www.epa.gov/reg3wapd/pdf/pdf\\_MS4AOs/MS4GuideR3%20final07-29-10.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_MS4AOs/MS4GuideR3%20final07-29-10.pdf).

<sup>4</sup> Letter from Jon Capacasa, Director, Water Protection Division, EPA Region III, to Jay Sakai, Director, Water Management Administration, MDE, re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit (MD0068284) 3 (Nov. 29, 2012).

<sup>5</sup> 40 C.F.R. § 130.2.

<sup>6</sup> EPA Region III, TMDLs for Streams Impaired by Acid Mine Drainage in Kiskiminetas-Conemaugh River Watershed, Pennsylvania at 73 (2010), available at [http://www.epa.gov/reg3wapd/tmdl/pa\\_tmdl/Kiskiminetas/KiskiReport.pdf](http://www.epa.gov/reg3wapd/tmdl/pa_tmdl/Kiskiminetas/KiskiReport.pdf).

<sup>7</sup> EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (2002), available at <http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/final52002.cfm>.

2. Permits in Region III fail to ensure that water quality standards and Total Maximum Daily Load wasteload allocations will be achieved.



Unfortunately, in our groups' experience, state-issued permits in the region are not following EPA's direction, and the agency has not stepped in to demand improvements that make the permits legally sufficient.

For example, both the draft Prince George's County, Maryland permit and the recently finalized Arlington, VA permit both fail to ensure that water quality standards and TMDL wasteload allocations will be achieved. Both permits state that compliance with permit conditions constitutes adequate progress toward compliance with water quality standards and stormwater wasteload allocations. Yet these permit conditions are not sufficient to achieve such compliance, primarily due to the lack of legally sufficient compliance schedules.

Similarly, the general permit issued by the Pennsylvania Department of Environmental Protection for discharges from small MS4s does not include either numerical or non-numerical water quality based effluent limitations. To satisfy EPA regulations, either the municipality's numerical wasteload allocation or compliance with its TMDL Plan should be listed as effluent limitations in the permit. Moreover, some Pennsylvania municipalities have submitted reallocations from wasteload allocations to load allocations (LA) as part of their TMDL Plans, sometimes significantly lessening the municipality's required pollutant load reduction. These reallocations amount to revisions to the EPA-approved TMDL, but because it is unclear whether EPA Region III has any role in their review and approval, the permit does not assure compliance with approved wasteload allocations.

Finally, the Circuit Court for Montgomery County, Maryland recently found that the stormwater permit for Montgomery County was deficient in several respects. The court held that, although "the permit must include requirements needed to meet water quality standards," the permit issued by Maryland Department of the Environment "lacks ascertainable metrics for meeting water quality standards that can either be met or not met," and insisted that "specific requirements for meeting water quality standards must be stated in the permit."<sup>8</sup>

## **B. The Permits Fail to Ensure Green Infrastructure and Environmental Site Design are Used in Restoration and Retrofit Projects.**

1. Green infrastructure techniques are achievable and affordable and significantly reduce pollutant loads to receiving waters.

EPA has made clear that these multi-benefit strategies should be reflected in stormwater permits, consistent with the requirement that such permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable...."<sup>9</sup>

In that vein, EPA has said:

EPA strongly supports expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically sustainable communities. EPA expects that the restoration requirement in Maryland MS4 permits will be achieved through the use of a variety of green infrastructure retrofitting solutions, such as infiltration practices, green roofs, rain gardens,

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<sup>8</sup> *Anacostia Riverkeeper v. Md. Dept. of the Env't.*, No. 339466-V, slip op. at 2 (Dec. 4, 2013).

<sup>9</sup> 33 U.S.C. §1342(p)(3)(B)(iii).

rainwater harvesting, grass swales/filters, etc. Given the undisputed multiple benefits associated with green infrastructure, as well as general long-term financial benefits, EPA encourages the use of green approaches to stormwater management. Green practices have been proven through multiple studies to reduce stormwater runoff volume and help lessen the amount of pollutants entering surface waters untreated. We urge that the Maryland Department of the Environment (MDE) provide sufficient incentives in the permit and its administration (such as the green landscaping incentive in the DC MS4 permit) for the preferential use of such practices in meeting the permit terms and to solicit public comment on additional means to accomplish that end.<sup>10</sup>



2. Permits in Region III fail to ensure that green infrastructure will be used.

Despite EPA’s guidance with respect to these modern stormwater control techniques, the permits in our region have not consistently ensured that the Maximum Extent Practicable approaches are being used. Neither the Prince George’s County, Maryland nor the Arlington County, Virginia permit requires the use of green infrastructure (also called “Environmental Site Design”) practices in restoration or retrofit projects. Maryland’s guidance for restoration practices allows the use of less effective stormwater detention best management practices (BMP).

**C. The Permits Fail to Incorporate Monitoring Sufficient to Ensure Compliance with Water Quality Standards.**

1. Permits must include monitoring to ensure compliance with Clean Water Act.

EPA has frequently emphasized the importance of including monitoring designed to assure compliance with Clean Water Act requirements in permits, including those issued for stormwater systems. To take some examples:

- a. “The NPDES permit must also specify the monitoring necessary to determine compliance with effluent limitations. ... Where effluent limits are specified as B[est] M[anagement] P[ractices], the permit should also specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved (e.g., BMP performance data).”<sup>11</sup>
- b. “EPA recommends that such permits require collecting data on the actual performance of the BMP. These additional data may provide a basis for revised management measures. The monitoring data are likely to have other uses as well. For example, the monitoring data might indicate if it is necessary to adjust the BMP.”<sup>12</sup>
- c. “Water quality monitoring is the most direct—and usually the best—approach to evaluating the effectiveness of a SWMP [stormwater management plan]. Program evaluation through water quality monitoring can apply to several of the SWMP components, including illicit discharge detection, construction site runoff

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<sup>10</sup> Letter from Jon Capacasa, Director, Water Protection Division, EPA Region III, to Jay Sakai, Director, Water Management Administration, MDE, re: Specific Objection to Prince George’s County Phase I Municipal Separate Storm Sewer System (MS4) Permit (MD0068284) 3 (Nov. 29, 2012).

<sup>11</sup> U.S. EPA, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs 2 (2002), available at <http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf> (internal citations omitted).

<sup>12</sup> *Id.* at 5.



control and post-construction runoff control. The collection of water quality data (along with BMP performance data) would be especially useful for discharges to an impaired water body with an approved TMDL.”<sup>13</sup>

d. “Without assessing the effectiveness of the stormwater management program the permittee will not know which parts of the program need to be modified to protect and/or improve water quality and instead will essentially be operating blindly. Establishing a comprehensive monitoring and assessment program will enable the permittee to track progress in complying with permit provisions and implementing a program to protect water quality.”<sup>14</sup>

e. “Pursuant to 40 C.F.R. §122.44(i), Phase I permits must include relevant, interpretable and statistically significant evaluation and monitoring provisions. Infrequent end-of-pipe grab sample wet weather monitoring is discouraged, other than for purposes of finding or tracking specific pollutants or sources. Permittees may be encouraged or required to participate in regional monitoring consortiums. Monitoring/evaluation metrics should include physical and biological indicators in receiving water bodies. All monitoring and evaluation frameworks should be clear about how data will be interpreted. For Phase II MS4s, the permit must include evaluation procedures sufficient to clearly identify the progress of the permittee in meeting their program goals and assessing the effectiveness of selected Best Management Practices.”<sup>15</sup>

## 2. Permits in Region III fail to include monitoring sufficient to ensure compliance with the Clean Water Act.

The states in Region III have failed to include sufficient monitoring provision in stormwater permits to comply with the law as EPA has explained it. For instance, both the Prince George’s County, Maryland and Arlington County, Virginia permits contain monitoring requirements that are insufficient to yield data representative of their stormwater discharges, or to assure compliance with the limitations contained within the permits. The Prince George’s County permit requires comprehensive monitoring in only one water body (at only one outfall and one in-stream station). Arlington County’s permit requires no chemical monitoring, which is necessary to determine compliance with wasteload allocations.

Similarly deficient provisions led the court reviewing the Montgomery County, Maryland permit to find the monitoring program legally inadequate. The court noted that “[f]ederal regulations require that the permit include a monitoring program for representative data collection for the term of the permit, including a program to monitor and control pollutants in storm water discharges from sites that are contributing a substantial pollutant loading.”<sup>16</sup> In the case of the Montgomery County stormwater permit, the “permit requires monitoring in one tributary, and requires the permittees to submit an annual report to MDE regarding all activities under the permit. The Court finds that these requirements are not sufficient to meet the applicable requirements for monitoring.”<sup>17</sup>

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<sup>13</sup> U.S. EPA, Evaluating the Effectiveness of Municipal Stormwater Programs 3 (Jan. 2008), available at <http://nepis.epa.gov/Adobe/PDF/P1001QY0.PDF>.

<sup>14</sup> U.S. EPA, MS4 Permit Improvement Guide 95 (Apr. 2010), available at [http://www.epa.gov/npdes/pubs/ms4permit\\_improvement\\_guide.pdf](http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf).

<sup>15</sup> EPA Region III, Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed 5 (July 2010), available at [http://www.epa.gov/reg3wapd/pdf/pdf\\_MS4AOs/MS4GuideR3%20final07-29-10.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_MS4AOs/MS4GuideR3%20final07-29-10.pdf).

<sup>16</sup> *Anacostia Riverkeeper v. Md. Dept. of the Env't.*, No. 339466-V, slip op. at 2 (Dec. 4, 2013) (citing 40 C.F.R. §122.26(d)).

<sup>17</sup> *Id.*



#### **D. The Permits Fail to Incorporate Robust Public Participation.**

##### **1. Robust public participation is key in developing strong, protective permits.**

EPA has explained the policy reasons why it is important for stormwater permits to provide the opportunity for public review and input on key elements of the stormwater control program. As the agency said:

Stormwater management programs can be greatly improved by involving the community throughout the entire process of developing and implementing the program. Involving the public benefits both the permittee itself as well as the community. By listening to the public's concerns and coming up with solutions together, the permittee will gain the public's support and the community will become invested in the program. The permittees will likewise gain even more insight into the most effective ways to communicate their messages.<sup>18</sup>

Providing for public input on the pollution control requirements in a stormwater permit is not just good policy; it is the law. Water pollution management plans are "effluent limitations" under the law that the Clean Water Act requires to be subject to public comment and to be incorporated into the NPDES permit.<sup>19</sup> Indeed, all permittee-developed plans "that contain the substantive information about how the operator of [an] MS4 will reduce discharges to the maximum extent practicable" are subject to the Clean Water Act's public availability and public hearing requirements.<sup>20</sup>

##### **2. Permits in Region III fail to include robust public participation.**

Region III permits are not following the agency's guidance or the law. For example, the Prince George's and Arlington permits both fail to provide for adequate public participation during the development of all substantive plans and programs required by the permits. The contents of such plans are effluent limitations and therefore must be subject to the same public participation opportunities as permit terms themselves.

Similarly, in Pennsylvania, municipalities that have been assigned wasteload allocations in an approved Total Maximum Daily Load are required to submit "TMDL Plans" that provide municipality-specific information about how each municipality plans to comply with its assigned wasteload allocation. The Pennsylvania Department of Environmental Protection allows the TMDL Plans to be submitted in two steps. The first portion of the TMDL Plan, the "TMDL Strategy," must be submitted with the Notice of Intent; the second, the "TMDL Design Details," must be submitted one year after coverage under the general permit has been approved. The Pennsylvania Department of Environmental Protection's process fails to provide for public participation at several critical steps. There is no public notice of the municipality's submission of its Notice of Intent and TMDL Strategy, or its later submission of the TMDL Design Details. This lack of notice, together with the lack of an opportunity for a public hearing on either submission, inhibits public participation in the review of these components of the TMDL Plan. Finally, there is no public notice of the Department of Environmental Protection's final action on municipalities' complete TMDL Plan (TMDL Strategy plus TMDL Design Details), which inhibits administrative review of the decision.

Finally, in Montgomery County, Maryland, the reviewing court ruled that "[s]pecific, enforceable standards, benchmarks, and deadlines for meeting applicable requirements must be stated in the permit. Permit

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<sup>18</sup> U.S. EPA, MS4 Permit Improvement Guide 22 (Apr. 2010), available at [http://www.epa.gov/npdes/pubs/ms4permit\\_improvement\\_guide.pdf](http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf).

<sup>19</sup> See, e.g., *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 503-04 (2d. Cir. 2005).

<sup>20</sup> *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832, 857 (9th Cir. 2003).



requirements that are developed or modified outside of the permit process frustrate the public participation and judicial review requirements....”<sup>21</sup> Furthermore, the court ruled that “it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports on their activities. Manuals and policies that exist outside of the permit change frequently, and do not inform the public or the Court of what the permit specifically requires.”<sup>22</sup>

### CONCLUSION

We strongly urge EPA to assert the authority the agency has under the Clean Water Act to assure that state-issued discharge permits comply with the law. Insisting on improvements in water quality standards and total maximum daily loads, “Maximum Extent Practicable” technologies, monitoring and public participation would be a significant step in the right direction. Communities like Prince George’s County, Maryland deserve EPA support of their efforts to craft a better, stronger, more enforceable permit.

The Choose Clean Water Coalition is ready and willing to continue to work for protective, enforceable stormwater permits in Region III that will improve local water quality and contribute to restoration of the entire watershed. We need EPA’s help. Please contact Peter J. Marx by phone at 410-905-2515 or by email to [Peter@ChooseCleanWater.org](mailto:Peter@ChooseCleanWater.org) if you would like to discuss this matter further.

Sincerely,

American Rivers  
Anacostia Watershed Society  
Audubon Naturalist Society  
Blue Heron Environmental Network  
Chapman Forest Foundation  
Chesapeake Bay Foundation  
Citizens for Pennsylvania’s Future (PennFuture)  
Clean Water Action  
Delaware Nature Society  
Friends of Lower Beaverdam Creek  
Friends of the Nanticoke River  
Interfaith Partners for the Chesapeake  
James River Association  
Maryland League of Conservation Voters  
Maryland Sierra Club  
Mattawoman Watershed Society  
National Parks Conservation Association  
National Wildlife Federation’s Mid Atlantic Regional Center  
Natural Resources Defense Council  
Pennsylvania Council of Churches  
Potomac Conservancy  
Rock Creek Conservancy  
Severn Riverkeeper  
Sparks-Glencoe Community Planning Council

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<sup>21</sup> *Anacostia Riverkeeper v. Md. Dept. of the Env’t.*, No. 339466-V, slip op. at 2 (Dec. 4, 2013).

<sup>22</sup> *Id.*

Southern Environmental Law Center  
Virginia Conservation Network  
Waterkeepers Chesapeake  
West Virginia Rivers Coalition  
West Virginia Highlands Conservancy

