



May 30, 2018

Benjamin H. Grumbles  
Secretary, Maryland Department of the Environment  
Montgomery Park Business Center  
1800 Washington Blvd.  
Baltimore, MD 21230

Dear Secretary Grumbles:

The Maryland Association of Counties (MACo) wishes to offer the following comments, based on input from county stormwater technical managers, on the Maryland Department of the Environment's (MDE's) pending Phase I Municipal Separate Storm Sewer System (MS4) permits. MACo is a nonpartisan organization that represents all 23 of Maryland's counties and Baltimore City.

For the past several years, both MACo and Maryland's Phase I MS4 managers have worked in partnership with MDE to meet both the spirit and the letter of their ambitious stormwater permits. We acknowledge both the dedication of MDE staff and their willingness to discuss key permit issues. While there has been significant progress in addressing permit concerns, critical components of the next permit remain unresolved with a number of the current permits set to expire in just a few months.

MACo is writing to provide the perspective of the technical managers of Maryland's Phase I MS4 permittees in getting these next generation permits issued in a timely fashion and providing regulatory certainty. These managers have formed a workgroup under the auspices of MACo, with the coordination of staff from the Metropolitan Washington Council of Governments.

Under the current permit, Maryland's 10 Phase I MS4 counties engaged in an extensive effort to reduce the impacts of urban runoff from their MS4 areas to surface waters. They have pioneered many innovations in stormwater funding, practice, and procurement; been recognized for their work at national conferences; and made substantial investments in the research and development of new stormwater best management practices (BMPs).

By the end of the current permit term, these 10 jurisdictions will have spent approximately \$1.3 billion to meet permit requirements and they have already committed hundreds of millions in additional capital expenditures in years beyond the current permit term.

The challenge has not been strictly financial. Ramping up the programmatic resources – including new staff, permitting processes, procurement methods, consultant contracts and maintenance agreements – to spend these funds effectively has been a multi-year process. Despite much progress, significant logistical challenges remain. For example, the concurrent timing of the permits has created a competitive market for consultants and construction firms that has exceeded the capacity of available local resources while significantly increasing implementation costs. As previously discussed with MDE, MACo and the workgroup believe the State should evaluate the local resource capacity to achieve current and future permit requirements.

Altogether, this financial and programmatic expansion represents the MS4 jurisdictions' maximum capacity toward meeting the current permit's 20-percent impervious surface restoration (ISR) requirement. As shown in the annual reports and discussed at numerous meetings with your staff over the past two years, this rate of progress translates into achieving approximately half of the required ISR acreage in 5 years. Thus, the rate of progress envisioned when the permits were first issued is at least twice as high as what experience has shown to be achievable. Montgomery County's experience in implementing its 2010 permit provides corroboration for this pace of implementation.

While the 10-percent-per-5-years rate of progress may be manageable over two permit cycles (or full achievement of the current 20-percent ISR goal after 10 years), it is likely not sustainable over a longer term as the number of cost-effective sites for retrofits shrinks and as the cost for maintaining the expanding inventory of BMPs escalates.

Based on these recognized realities, MACo and the workgroup offer the following recommendations on the status of the current permit and the restoration provisions of a new permit:

1. Extend the schedule to complete the 20-percent ISR requirement in the current permit to the end of the next permit term. This continuation is consistent with EPA guidance that MS4 programs should be implemented under an "iterative, adaptive management best management practices approach" and would not constitute "backsliding" under the permit for numerous reasons. For example, the new permit requirements would be at least, if not more, stringent than the current permit requirements and will necessitate further treatment during the term of the permit while maintaining the treatment levels already achieved.
2. Establish a pollution trading program and modify the current permits to allow the use of credits from wastewater treatment plants and other sources to meet the ISR requirement of the current permit as a trading-in-time option. In the absence of such an option, it is highly likely that the state will resort to consent decrees with individual permittees. Such a development would penalize the MS4 jurisdictions despite their good-faith efforts to make progress on the ISR

requirement, occupy critical resources in legal negotiations, and threaten public acceptance of the continued expenditure of local funds for these programs.

3. Because certain jurisdictions may not yet be on the pace to achieve half of their ISR acreage in five years, do not place an arbitrary limit on the percentage of ISR acres that can be met with trading credits in the current permit cycle. MACo and the workgroup could agree to the condition that trading credits cannot be used to meet the 20-percent ISR requirement by the end of the next permit term. However, trading should be available in future permits to meet additional requirements for ISR or nutrient and sediment reduction that go beyond the 20-percent standard, should such requirements be necessary.
4. Do not require the inclusion of any additional ISR acreage (or the equivalent nutrient reduction) under a Chesapeake Bay Restoration provision, or any other provision, in the new permit. For the reasons noted above, adding ISR acreage beyond the current requirement would leave many permittees once again in danger of non-compliance with a key permit provision. However, MACo and the workgroup are willing to consider, and discuss at the appropriate time, the need for additional restoration work in the permit cycle following the 2019-2024 cycle with two conditions:
  - a. that MDE can demonstrate the need for such work through a transparent gap analysis of future nutrient and sediment loading by source sector; and
  - b. that before the end of the 2019-2024 permit cycle MDE and the Phase I jurisdictions jointly engage in the development of what constitutes “maximum extent practicable” (MEP) going forward.

MACo and the workgroup have several other comments on the conditions of the next permit that are aimed at maximizing the flexibility to implement restoration work and to avoid duplication of effort, particularly in reporting progress:

- Adding interim benchmarks to the requirement for TMDL stormwater implementation plans in Section IV.E.1 is counterproductive and does not take into account the unpredictable nature of project development. It also precludes enforcement discretion by MDE. Experience to date has shown that planned projects can often be halted or even eliminated well into the design process due to various factors beyond local control, leading to BMP implementation rates that may fluctuate significantly from year to year.
- The language for adaptive management (Section IV.E.4) should be modified to allow more flexibility with respect to project implementation or redirection of resources for emergencies. An example of such an emergency would be the 2016

flood event in Ellicott City. Currently, the language only allows for more effort if the WLA benchmarks aren't met.

- Similarly, the requirement for additional public reporting on TMDL plan implementation (as proposed in Section IV.E.5) needs to be balanced with the significant and somewhat overlapping reporting requirements that already exist. These include annual MS4 progress reports, biennial Financial Assurance Plan reports and annual Watershed Protection and Restoration Program reports. MACo and the workgroup are willing to work with MDE on ways to make the information that the Phase I permittees already report more accessible to the public.
- Finally, while MACo and the workgroup welcome additional public input on program plans and priorities, we do not support a mandatory requirement to incorporate this input (as proposed in Section IV.E.5).

Both MACo and the county MS4 workgroup members appreciate the opportunity they have had to discuss the provisions of a new permit with MDE staff prior to the issuance of a tentative determination draft. We look forward to working with you on a new permit that will avoid non-compliance while making further improvements to water quality throughout Maryland.

Please do not hesitate to contact me at 410.269.0043 or [lknapp@mdcounties.org](mailto:lknapp@mdcounties.org) if you have questions or need further information.

Sincerely,



Leslie Knapp Jr.  
Legal and Policy Counsel  
MACo

CC: Lynn Y. Buhl, Assistant Secretary, MDE  
D. Lee Currey, Water & Science Administration Director, MDE