

In the Matter of:

Maryland Department of the Environment

October 18, 2018
Public Hearing

Condensed Transcript with Word Index



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1 MARYLAND DEPARTMENT OF THE ENVIRONMENT

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4 TENTATIVE DETERMINATION TO MODIFY

5 ANNE ARUNDEL COUNTY'S NPDES

6 MUNICIPAL SEPARATE STORM SEWER SYSTEM,

7 MS4 PERMIT

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11 The hearing in the above matter commenced on

12 Thursday, October 18, 2018, at the Maryland Department of

13 the Environment, 1800 Washington Boulevard, Baltimore,

14 Maryland.

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19 Before: Stewart Comstock, Hearing Officer

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21 Reported by: Karen Willoughby, CER

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1 A T T E N D E E S

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3 Stewart Comstock, Maryland Department of the Environment

4 Brian Cooper, Maryland Department of the Environment

5 Andrew Tahoe, Maryland Department of the Environment

6 Michelle Crawford, Maryland Department of the Environment

7 Lee Curry, Maryland Department of the Environment

8 Janice Markusic, Anne Arundel County

9 Erik Michelsen, Anne Arundel County

10 Elaine Lutz, Chesapeake Bay Foundation

11 Ben Alexandro, Maryland LCV

12 Bruce Gilmore, Audubon Naturalist Society

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1 P R O C E E D I N G S

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3 MR. COMSTOCK: Today is Thursday, October 18th,

4 2018, and it's a little after 5:00 p.m. Today's public

5 hearing is regarding the Maryland Department of the

6 Environment's tentative determination to modify Anne

7 Arundel County's National Pollutant Discharge Elimination

8 System, or NPDES, municipal separate storm sewer or MS4

9 permit.

10 My name is Stewart Comstock and I am the Acting

11 Program Review Division Chief with the Sediment,

12 Stormwater and Dam Safety Program with the Department's

13 Water and Science Administration. And I'm also the

14 administrator for Anne Arundel County's permit. With me

15 today from MDE are Lee Curry, director of the Water and

16 Science Administration; Andrew Tahoe, Brian Cooper and

17 Michelle Crawford from my staff.

18 I'd also like to thank Janice Markusic and Erik

19 Michelsen from Anne Arundel County, who helped in getting

20 us to today's proceedings.

21 In accordance with Maryland's Administrative

22 Procedures Act, a tentative determination to modify Anne

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1 Arundel County's MS4 permit has been advertised in the

2 Maryland Register on August 31st and September 14th of

3 this year; sent out to the Department's interested party

4 list for Anne Arundel County and published in the Capitol

5 Newspaper on September 5th and 19th.

6 The notice was also posted on the Department's

7 website where the proposed permit modifications and

8 supporting fact sheet material can be found.

9 Is everyone signed up who wishes to speak today,

10 or signed the attendance sheet? If you are new tonight,

11 we'll add you to our interested party list and you will

12 receive notice of any actions regarding the county's

13 permit. If you want to be part of that interested party

14 list and did not sign up on one of these two sheets,

15 please do so before we finish today.

16 The purpose of today's hearing is to accept

17 public comment on the Department's tentative

18 determination to modify the county's MS4 permit. We have

19 some introductory remarks regarding this action, and

20 after that I would like to give Anne Arundel County, the

21 permittee, an opportunity to comment. After that, we

22 will work down the list of speakers that signed up today

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1 to give testimony.
 2 Today's hearing is scheduled for two hours, and
 3 I hope it's not going to go that long by any way, shape
 4 or mean. And we would like to provide everyone an
 5 opportunity to speak. Also, there -- please keep your
 6 remarks concise and focused on the permit modification.
 7 We will not be answering questions on the record tonight.
 8 This is an opportunity to provide comments.
 9 For background, Maryland has been delegated
 10 authority by the EPA to administer the NPDES program in
 11 the state. Final stormwater regulations were adopted by
 12 EPA in November 1990 according to Section 402(p) of the
 13 Clean Water Act. These regulations require in part that
 14 owners of this storm drain systems serving populations of
 15 greater than 100,000, including the county, apply for a
 16 phase one permit.
 17 For improving local water quality in the
 18 Chesapeake Bay, Anne Arundel County's most recently
 19 issued MS4 permit on February 12th, 2014, and it included
 20 the restoration of 20 percent impervious surface within
 21 the county that was not already managed for stormwater to
 22 the maximum extent practicable.

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1 On August 10th, 2018, the county formally
 2 requested an NPDES MS4 permit modification from the
 3 department to use Maryland's newly authorized nutrient
 4 trading program as an option to help meet its 20 percent
 5 impervious surface restoration requirement. The county
 6 anticipates that it will be able to complete the
 7 restoration of 2,0000 of the required 5,862 impervious
 8 acres by the end of its permit term on February 11th,
 9 2019. This is equal to about 34 percent of the county's
 10 impervious surface area restoration requirement.
 11 The Department has determined that Anne Arundel
 12 County's MS4 permit may be modified to allow the use of
 13 nutrient trading for the following reasons: In
 14 accordance with the Code of Federal Regulations, 40 CFR
 15 Section 122.62, the Department may receive new
 16 information which justifies applying conditions different
 17 from those in the permit if the information was not
 18 available at the time of permit issuance.
 19 In accordance with 40 CFR Section 122.62, the
 20 Department may modify an existing permit when proposed
 21 standards and regulations covering the permitted activity
 22 have changed since the issuance of the permit.

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1 A new phase of the State's nutrient trading
 2 program with authorizing regulations in the Code of
 3 Maryland Regulations of COMAR 26.08.11 was formally
 4 adopted for use on July 16th, 2018.
 5 The EPA has reviewed and has not objected to
 6 Maryland's trading policy updates and draft MS4 permit
 7 modification language.
 8 The new trading policy allows MS4 to acquire
 9 nutrient credits was not in place at the time the
 10 County's MS4 permit was issued.
 11 Anne Arundel County has documented that while
 12 capital and operational funds necessary to meet the 20
 13 percent impervious restoration requirement are available,
 14 the physical capacity for implementing structural BMPs
 15 within the permit time frame is a limiting factor.
 16 The EPA, this Department and Maryland's Court of
 17 Appeals have determined that the 20 percent impervious
 18 surface restoration requirement is an approved effluent
 19 limit consistent with and satisfactory for addressing
 20 both the Chesapeake Bay and other applicable total TMDLs,
 21 or total maximum daily loads, and wasteload allocations.
 22 Trading for equal amounts of total nitrogen, TN,

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1 total phosphorus, TP, and total suspended solids, TSS,
 2 that would have been reduced to the 20 percent impervious
 3 surface restoration requirement, will have the same net
 4 effect on local and Chesapeake Bay water quality.
 5 And providing a nutrient trading option for the
 6 County to use as a means to comply with its MS4 permit
 7 can improve restoration cost effectiveness toward local
 8 and Bay water quality improvements.
 9 At this point, I would like to ask if anyone
 10 from Anne Arundel County would like to add comments to
 11 the public record at this point.
 12 MR. MICHELSEN: I think you've pretty well
 13 stated it. Again, we -- you know, in conversations with
 14 folks who were involved in the original drafting of the
 15 MS4 permit, it seems there was sort of an implicit
 16 understanding that trading was allowed. Obviously EPA
 17 decided that wasn't the case when the question was posed
 18 to them directly. We think that including this language
 19 in the permit, particularly given the State's development
 20 of the trading regulations, makes a lot of sense and
 21 allows us to accomplish this goal more effectively.
 22 MR. COMSTOCK: Thank you. Okay. There are no

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1 other elected officials here that would like to speak.
 2 So let's get started with the speakers that have signed
 3 up today to testify. Going from the top of the list
 4 down, Ben Alexandro from the Maryland League of
 5 Conservation Voters. Ben?
 6 MR. ALEXANDRO: Yes, thank you. Ben Alexandro.
 7 I'm the water policy advocate, Maryland League of
 8 Conservation Voters. I'm also the state lead for the
 9 Choose Clean Water Coalition.
 10 So I actually also worked on nutrient trading
 11 section of the 2015 Maryland Chesapeake Bay Restoration
 12 financing report from EFC. So I'm pretty familiar with
 13 basically how to make or break a good trading program.
 14 So thank you so much for the opportunity to comment. And
 15 actually nearly all of my comments I made last week, and
 16 for the most part those still hold true. So I'd be happy
 17 to enumerate those again if you like.
 18 But there are a few notable differences on how
 19 this might affect the county itself. First is that
 20 unlike Baltimore County, Anne Arundel County did not
 21 repeal their polluted runoff fee and is therefore, we
 22 believe, committing a more full faith effort towards

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1 reaching the permit as opposed to what I said about the
 2 other county.
 3 And, also, according to the financial assurance
 4 plans two years ago, the county did indicate more of a
 5 willingness to invest real money for credits to do actual
 6 additional projects that reduce pollution rather than
 7 looking for a free escape from their permit where zero
 8 dollars would be invested to suddenly get them to their
 9 permit requirements.
 10 So if the county put in considerable funding to
 11 use to finance, like, real, additional projects such as
 12 permanent riparian buffers or wetlands upstream on
 13 farmland in a cost effective way, we think that is
 14 appropriate if and only if done very properly.
 15 However, MDE needs to make sure that the county
 16 will not do a free trade with its own wastewater
 17 treatment plants that are currently operating below three
 18 parts per million if they got there simply because of,
 19 like, BRF funding. The taxpayer paid those taxes to
 20 ensure, you know, additional pollution reduction would
 21 not be traded away.
 22 So MDE has to make sure that these wastewater

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1 treatment plants would not -- could not just flood the
 2 market with the equivalent of, according to my back of
 3 the envelope calculations, you know, 13,500 and some odd
 4 acres worth of nitrogen credits for essentially no cost.
 5 Because this would effectively crash the market we are,
 6 you know, trying to -- trying to create here.
 7 And I forwarded to Ray those back of the
 8 envelope calculations and the understanding that you
 9 could send -- MDE would send back some more corrected and
 10 detailed ones. So I'm looking forward to see those.
 11 Because I know in the past MDE said that they wanted to
 12 only allow performance-based credits, not capacity
 13 credits. However, I want to make sure that MDE is still
 14 committed to that principal in full.
 15 The other questions and concerns that still
 16 exist that we enumerated at last week's hearing, you
 17 know, worries of this being injected right before the
 18 permit's about to expire; issues around additionality;
 19 pollution hot spots; environmental justice issues; really
 20 that's focused on, you know, just more questions about
 21 how are you going to comply with the regulations, let's
 22 say, for impaired streams. It has to be right upstream

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1 of that. And, you know, given the nature of MS4
 2 jurisdictions, the need to, you know, put a limit on how
 3 much of the permit can be traded. And, you know, we
 4 still have our interest in seeing the transparent
 5 formulas of exactly how those credits will be calculated.
 6 And we hope also that webinar will help -- help us see
 7 some of that exactly how it would go into.
 8 So I'd be happy to have more detailed comments
 9 that I gave last week if you'd like me to go into that.
 10 But if not, I defer to those.
 11 MR. COMSTOCK: I think we'll be okay. We have
 12 the same -- these are the same comments that were handed
 13 to the Department at the hearing on October 11th for
 14 Baltimore County's permit.
 15 MR. ALEXANDRO: Right. So thank you again for
 16 this chance to comment.
 17 MR. COMSTOCK: Thank you, Ben.
 18 MR. CURRY: I would just ask since --
 19 MR. COMSTOCK: Please, Lee.
 20 MR. CURRY: -- Anne Arundel County wasn't here
 21 last time, if they wanted to hear the comments.
 22 MR. COMSTOCK: Did you want a copy of the

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1 comments? Would you like to see them?
 2 MR. MICHELSEN: If we could get a copy, that'd
 3 be great.
 4 MS. MARKUSIC: A copy of them, mm-hmm.
 5 MR. COMSTOCK: Can we -- I will share with you a
 6 copy of them. Will that be acceptable?
 7 MR. MICHELSEN: Sure, yeah.
 8 MR. COMSTOCK: Please make a note of that so I
 9 will recall that tomorrow morning. Thank you, Ben.
 10 MR. ALEXANDRO: And for both of these, I plan on
 11 submitting written comments as well.
 12 MR. COMSTOCK: Thank you. Bruce? Bruce Gilmore
 13 from the Audubon Naturalist Society. Thank you, Bruce,
 14 for coming tonight.
 15 MR. GILMORE: Sure. My name is Bruce Gilmore,
 16 B-r-u-c-e, G-i-l-m-o-r-e. I submitted a statement for
 17 the record and I'm not going to read it. I have given a
 18 copy to the Anne Arundel county colleagues that are here
 19 with us tonight. And the only thing that I'd like to
 20 echo one thing that Ben said, and that is to congratulate
 21 Anne Arundel County for keeping its stormwater fee. That
 22 shows the dedication that it is continuing to make to

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1 improve the water quality in the county. Eric's
 2 leadership is a second indication of that.
 3 However, there is an issue that I think needs to
 4 be further reviewed by MDE, and that is the implications
 5 of a stream restoration on the 2,000 acres that it says
 6 from its August letter until the February end date, it
 7 can conclude as restored imperviousness.
 8 And the concern that should be viewed is if the
 9 county was going to use stream restoration in its
 10 impervious surface restoration program, is there an issue
 11 with how much restoration it achieved using stream
 12 restoration versus how much its asking for in terms of
 13 the credits -- trading credits between -- in that interim
 14 period.
 15 And so we would -- we would like to see MDE take
 16 a look at that and examine that from their records, the
 17 county's records. Was the stream restoration template
 18 insufficient to result in the restoration success which
 19 was required? In particular, the stated restoration gap
 20 of 2,000 acres needs to be reviewed, as I said, for the
 21 amount of stream restoration this acreage contained or is
 22 attributable to it.

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1 Those are the only other things that I would add
 2 that are fairly pertinent to Anne Arundel County. And
 3 I'm sorry I've taken so much time in my remarks here
 4 today. But I'm going to conclude them.
 5 MR. COMSTOCK: Thank you, Bruce. Thank you. We
 6 have one more speaker on the sign-up sheet, Elaine Lutz
 7 from the Chesapeake Bay Foundation. Ms. Lutz?
 8 MS. LUTZ: Thank you. Thanks for the
 9 opportunity to comment. Elaine Lutz, Chesapeake Bay
 10 Foundation. Chesapeake Bay Foundation has never objected
 11 in theory to the inclusion of trading in the MS4 permits.
 12 But I think the underlying understanding with the trading
 13 program as a whole is the need for transparency and
 14 accountability and clear additionality as was mentioned
 15 by Ben.
 16 So for the method of impervious surface
 17 restoration, the underlying justification has always been
 18 that restoring an acre will pick up all of the key
 19 pollutants, nitrogen, phosphorus and sediment, as well as
 20 whatever additional pollutants happen to be on that acre
 21 of urban area.
 22 Going to trading obviously will lose some of the

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1 additional pollutants that would have been addressed with
 2 actual impervious surface restoration since the trading
 3 program does only address those three key pollutants.
 4 And that would -- you know, that's how the TMDL works and
 5 how the trading program works.
 6 But to ensure we're getting the full benefit, we
 7 are concerned that it's not clear in the current
 8 modification whether the county will be required to
 9 purchase the equivalent nitrogen, phosphorus and sediment
 10 that would be treated when an acre of impervious surface
 11 was treated. I do believe these comments to this
 12 transparent issue were made for the Baltimore County
 13 permit, and we have some recommendations. Our
 14 recommendation would be to have the current modification
 15 state very simply the amount in pounds of each pollutant
 16 that will be required to be purchased for each acre of
 17 impervious surface that remains to be restored under the
 18 permit. And that way the public can very easily see,
 19 okay, one acre of treatment would have resulted in --
 20 under the model 5.3 loading rates, reduction of 7.69
 21 pounds of nitrogen, 1.91 pounds of phosphorus and 0.3
 22 pounds of sediment.

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1 If those equivalencies were put right in the
 2 modification, it would make it very easy to track and
 3 follow and translate between a register and the purchases
 4 that, you know, one acre would have treated these things;
 5 instead we're buying the equivalent amount of each
 6 pollutant.
 7 So we would recommend that that -- instead of
 8 referring to the guidance that doesn't address this
 9 conversion head on, although it has equations for BMPs to
 10 equivalent acres and all of, you know, those crosswalks.
 11 It doesn't directly -- it doesn't directly speak to a
 12 trading program that's expressed on the public registry
 13 in pounds.
 14 So I understand the conversion will be explained
 15 in more detail on the 22nd in the webinar, and we
 16 appreciate that. And I think that our comments in the
 17 future will be informed by how that equation turns out.
 18 And we will submit the more advanced written comments at
 19 that time.
 20 So, finally, I think this is probably obvious
 21 and may already be in the works, but we also believe that
 22 trading shouldn't occur until the Department has

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1 established the public trading register, which as far as
 2 we're aware -- is that up on a website already, the
 3 register itself?
 4 MR. CURRY: I think MDA has it.
 5 MR. COMSTOCK: Yes.
 6 MS. LUTZ: Okay. So the purchase -- I'm sorry,
 7 I know this wasn't a question and answer session. So
 8 I'll just say that we would encourage the public
 9 interface of the registry in its full -- however it's
 10 going to be hosted would be fully established before any
 11 trading occurs so we can track those traits. So that
 12 will do it for me. Thank you.
 13 MS. COMSTOCK: Thank you, Ms. Lutz. Thank you,
 14 Elaine. Anybody else have any other comments they want
 15 to put on the record?
 16 (No response.)
 17 MR. COMSTOCK: Okay. Thank you. Thank you,
 18 everyone. Additional information on the draft permit
 19 fact sheet and stormwater management in Maryland can be
 20 found on the Department's website. After the comment
 21 period is closed on November 29th, 2018, MDE will develop
 22 a response to your comments that will support a final

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1 determination to modify Anne Arundel County's MS4 permit.
 2 Anyone who signed up on our attendance sheet today or
 3 gave testimony will be added to the interested party list
 4 for Anne Arundel County and will be kept apprised of all
 5 permit actions via e-mail. Again, I want to thank
 6 everyone for coming out tonight. Thank you, really.
 7 This means a lot to us.
 8 One additional note: As we have all referred to
 9 and as most of the individuals in the room should have
 10 received notification, the Department is hosting a
 11 webinar on October 22nd from 1:00 to 3:00 to provide
 12 further outreach to the public on the nutrient trading
 13 process and to go through examples of how the trades can
 14 be executed, verified and certified.
 15 Information on this webinar is available. If
 16 you haven't received it already, please contact me or Ray
 17 via e-mail or by my phone number at 410-537-3550. And,
 18 again, thank you all for coming out tonight.
 19 (Whereupon, at 5:25 p.m., the
 20 hearing was concluded.)
 21
 22

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1 CERTIFICATE OF REPORTER
 2
 3 I, Karen Willoughby, do hereby certify that the
 4 foregoing proceedings were digitally recorded by me and
 5 reduced to typewriting under my supervision; that I am
 6 neither counsel for, related to, nor employed by any of
 7 the parties to the action in which these proceedings were
 8 transcribed; that I am not a relative or employee of any
 9 attorney or counsel employed by the parties hereto, not
 10 financially or otherwise interested in the outcome in the
 11 action.
 12
 13
 14
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 16 KAREN WILLOUGHBY, CER
 17 Court Reporter
 18
 19
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 22

<p>A</p> <p>able 6:6</p> <p>accept 4:16</p> <p>acceptable 13:6</p> <p>accomplish 8:21</p> <p>accountability 15:14</p> <p>achieved 14:11</p> <p>acquire 7:8</p> <p>acre 15:18,20 16:10 16:16,19 17:4</p> <p>acreage 14:21</p> <p>acres 6:8 11:4 14:5 14:20 17:10</p> <p>Act 3:22 5:13</p> <p>Acting 3:10</p> <p>action 4:19 20:7,11</p> <p>actions 4:12 19:5</p> <p>activity 6:21</p> <p>actual 10:5 16:2</p> <p>add 4:11 8:10 15:1</p> <p>added 19:3</p> <p>additional 10:6,11 10:20 15:20 16:1 18:18 19:8</p> <p>additionality 11:18 15:14</p> <p>address 16:3 17:8</p> <p>addressed 16:1</p> <p>addressing 7:19</p> <p>administer 5:10</p> <p>Administration 3:13,16</p> <p>Administrative 3:21</p> <p>administrator 3:14</p> <p>adopted 5:11 7:4</p> <p>advanced 17:18</p> <p>advertised 4:1</p> <p>advocate 9:7</p> <p>affect 9:19</p> <p>ago 10:4</p> <p>Alexandro 2:11 9:4 9:6,6 12:15 13:10</p> <p>allocations 7:21</p> <p>allow 6:12 11:12</p> <p>allowed 8:16</p>	<p>allows 7:8 8:21</p> <p>amount 14:21 16:15 17:5</p> <p>amounts 7:22</p> <p>Andrew 2:5 3:16</p> <p>Anne 1:5 2:8,9 3:6 3:14,19,22 4:4,20 5:18 6:11 7:11 8:10 9:20 12:20 13:18,21 15:2 19:1 19:4</p> <p>answer 18:7</p> <p>answering 5:7</p> <p>anticipates 6:6</p> <p>Anybody 18:14</p> <p>Appeals 7:17</p> <p>applicable 7:20</p> <p>apply 5:15</p> <p>applying 6:16</p> <p>appreciate 17:16</p> <p>apprised 19:4</p> <p>appropriate 10:14</p> <p>approved 7:18</p> <p>area 6:10 15:21</p> <p>Arundel 1:5 2:8,9 3:7,14,19 4:1,4,20 5:18 6:11 7:11 8:10 9:20 12:20 13:18,21 15:2 19:1 19:4</p> <p>asking 14:12</p> <p>assurance 10:3</p> <p>attendance 4:10 19:2</p> <p>attorney 20:9</p> <p>attributable 14:22</p> <p>Audubon 2:12 13:13</p> <p>August 4:2 6:1 14:6</p> <p>authority 5:10</p> <p>authorized 6:3</p> <p>authorizing 7:2</p> <p>available 6:18 7:13 19:15</p> <p>aware 18:2</p> <p>B</p>	<p>B-r-u-c-e 13:16</p> <p>back 11:2,7,9</p> <p>background 5:9</p> <p>Baltimore 1:13 9:20 12:14 16:12</p> <p>basically 9:13</p> <p>Bay 2:10 5:18 7:20 8:4,8 9:11 15:7,9 15:10</p> <p>believe 9:22 16:11 17:21</p> <p>Ben 2:11 9:4,5,6 12:17 13:9,20 15:15</p> <p>benefit 16:6</p> <p>BMPs 7:14 17:9</p> <p>Boulevard 1:13</p> <p>break 9:13</p> <p>BRF 10:19</p> <p>Brian 2:4 3:16</p> <p>Bruce 2:12 13:12,12 13:13,15 15:5</p> <p>buffers 10:12</p> <p>buying 17:5</p> <p>C</p> <p>C 3:1</p> <p>calculated 12:5</p> <p>calculations 11:3,8</p> <p>capacity 7:14 11:12</p> <p>capital 7:12</p> <p>Capitol 4:4</p> <p>case 8:17</p> <p>CER 1:21 20:16</p> <p>CERTIFICATE 20:1</p> <p>certified 19:14</p> <p>certify 20:3</p> <p>CFR 6:14,19</p> <p>chance 12:16</p> <p>changed 6:22</p> <p>Chesapeake 2:10 5:18 7:20 8:4 9:11 15:7,9,10</p> <p>Chief 3:11</p> <p>Choose 9:9</p> <p>Clean 5:13 9:9</p>	<p>clear 15:14 16:7</p> <p>closed 18:21</p> <p>Coalition 9:9</p> <p>Code 6:14 7:2</p> <p>colleagues 13:18</p> <p>COMAR 7:3</p> <p>coming 13:14 19:6 19:18</p> <p>commenced 1:11</p> <p>comment 4:17,21 9:14 12:16 15:9 18:20</p> <p>comments 5:8 8:10 9:15 12:8,12,21 13:1,11 16:11 17:16,18 18:14,22</p> <p>committed 11:14</p> <p>committing 9:22</p> <p>complete 6:6</p> <p>comply 8:6 11:21</p> <p>Comstock 1:19 2:3 3:3,10 8:22 12:11 12:17,19,22 13:5,8 13:12 15:5 18:5,13 18:17</p> <p>concern 14:8</p> <p>concerned 16:7</p> <p>concerns 11:15</p> <p>concise 5:6</p> <p>conclude 14:7 15:4</p> <p>concluded 19:20</p> <p>conditions 6:16</p> <p>congratulate 13:20</p> <p>Conservation 9:5,8</p> <p>considerable 10:10</p> <p>consistent 7:19</p> <p>contact 19:16</p> <p>contained 14:21</p> <p>continuing 13:22</p> <p>conversations 8:13</p> <p>conversion 17:9,14</p> <p>Cooper 2:4 3:16</p> <p>copy 12:22 13:2,4,6 13:18</p> <p>corrected 11:9</p> <p>cost 8:7 10:13 11:4</p> <p>counsel 20:6,9</p>	<p>county 2:8,9 3:19 4:4,20 5:15,21 6:1 6:5 7:11 8:6,10 9:19,20,20 10:2,4 10:10,15 12:20 13:18,21 14:1,9 15:2 16:8,12 19:4</p> <p>county's 1:5 3:7,14 4:1,12,18 5:18 6:9 6:12 7:10 12:14 14:17 19:1</p> <p>Court 7:16 20:17</p> <p>covering 6:21</p> <p>crash 11:5</p> <p>Crawford 2:6 3:17</p> <p>create 11:6</p> <p>credits 7:9 10:5 11:4 11:12,13 12:5 14:13,13</p> <p>crosswalks 17:10</p> <p>current 16:7,14</p> <p>currently 10:17</p> <p>Curry 2:7 3:15 12:18,20 18:4</p> <p>D</p> <p>D 2:1 3:1</p> <p>daily 7:21</p> <p>Dam 3:12</p> <p>date 14:6</p> <p>decided 8:17</p> <p>dedication 13:22</p> <p>defer 12:10</p> <p>delegated 5:9</p> <p>department 1:1,12 2:3,4,5,6,7 3:5 6:3 6:11,15,20 7:16 12:13 17:22 19:10</p> <p>Department's 3:12 4:3,6,17 18:20</p> <p>detail 17:15</p> <p>detailed 11:10 12:8</p> <p>determination 1:4 3:6,22 4:18 19:1</p> <p>determined 6:11 7:17</p> <p>develop 18:21</p>
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<p>development 8:19 differences 9:18 different 6:16 digitally 20:4 directly 8:18 17:11 17:11 director 3:15 Discharge 3:7 Division 3:11 documented 7:11 doesn't 17:8,11,11 dollars 10:8 draft 7:6 18:18 drafting 8:14 drain 5:14</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1,1,1 3:1,1 e-mail 19:5,17 easily 16:18 easy 17:2 echo 13:20 EFC 9:12 effect 8:4 effective 10:13 effectively 8:21 11:5 effectiveness 8:7 effluent 7:18 effort 9:22 Elaine 2:10 15:6,9 18:14 elected 9:1 Elimination 3:7 employed 20:6,9 employee 20:8 encourage 18:8 ensure 10:20 16:6 enumerate 9:17 enumerated 11:16 envelope 11:3,8 Environment 1:1,13 2:3,4,5,6,7 Environment's 3:6 environmental 11:19 EPA 5:10,12 7:5,16 8:16</p>	<p>equal 6:9 7:22 equation 17:17 equations 17:9 equivalencies 17:1 equivalent 11:2 16:9 17:5,10 Eric's 14:1 Erik 2:9 3:18 escape 10:7 essentially 11:4 established 18:1,10 exactly 12:5,7 examine 14:16 examples 19:13 executed 19:14 exist 11:16 existing 6:20 expire 11:18 explained 17:14 expressed 17:12 extent 5:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 4:8 18:19 factor 7:15 fairly 15:2 faith 9:22 familiar 9:12 far 18:1 farmland 10:13 February 5:19 6:8 14:6 Federal 6:14 fee 9:21 13:21 final 5:11 18:22 finally 17:20 finance 10:11 financial 10:3 financially 20:10 financing 9:12 finish 4:15 First 9:19 flood 11:1 focused 5:6 11:20 folks 8:14 follow 17:3 following 6:13</p>	<p>foregoing 20:4 formally 6:1 7:3 formulas 12:5 forward 11:10 forwarded 11:7 found 4:8 18:20 Foundation 2:10 15:7,10,10 frame 7:15 free 10:7,16 full 9:22 11:14 16:6 18:9 fully 18:10 funding 10:10,19 funds 7:12 further 14:4 19:12 future 17:17</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 G-i-l-m-o-r-e 13:16 gap 14:19 getting 3:19 16:6 Gilmore 2:12 13:12 13:15,15 give 4:20 5:1 given 8:19 12:1 13:17 go 5:3 12:7,9 19:13 goal 8:21 going 5:3 9:3 11:21 13:17 14:9 15:4,22 18:10 good 9:13 great 13:3 greater 5:15 guidance 17:8</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>handed 12:12 happen 15:20 happy 9:16 12:8 haven't 19:16 head 17:9 hear 12:21 hearing 1:11,19 3:5 4:16 5:2 11:16</p>	<p>12:13 19:20 help 6:4 12:6,6 helped 3:19 hereto 20:9 hold 9:16 hope 5:3 12:6 hosted 18:10 hosting 19:10 hot 11:19 hours 5:2</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>I'd 3:18 9:16 12:8 13:19 I'll 18:8 I'm 3:13 9:7,8,12 11:10 13:17 15:3,4 18:6 I've 15:3 impaired 11:22 impervious 5:20 6:5 6:7,10 7:13,17 8:2 14:10 15:16 16:2 16:10,17 imperviousness 14:7 implementing 7:14 implications 14:4 implicit 8:15 improve 8:7 14:1 improvements 8:8 improving 5:17 included 5:19 including 5:15 8:18 inclusion 15:11 indicate 10:4 indication 14:2 individuals 19:9 information 6:16,17 18:18 19:15 informed 17:17 injected 11:17 insufficient 14:18 interest 12:4 interested 4:3,11,13 19:3 20:10 interface 18:9</p>	<p>interim 14:13 introductory 4:19 invest 10:5 invested 10:8 involved 8:14 issuance 6:18,22 issue 14:3,10 16:12 issued 5:19 7:10 issues 11:18,19 it's 3:4 5:3 16:7 18:9</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Janice 2:8 3:18 July 7:4 jurisdictions 12:2 justice 11:19 justification 15:17 justifies 6:16</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Karen 1:21 20:3,16 keep 5:5 keeping 13:21 kept 19:4 key 15:18 16:3 know 8:13 10:20 11:3,6,11,17,20 12:1,2,3 16:4 17:4 17:10 18:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>language 7:7 8:18 LCV 2:11 lead 9:8 leadership 14:2 League 9:4,7 Lee 2:7 3:15 12:19 let's 9:2 11:21 letter 14:6 limit 7:19 12:2 limiting 7:15 list 4:4,11,14,22 9:3 19:3 little 3:4 loading 16:20 loads 7:21 local 5:17 8:4,7</p>
--	---	---	---	--

<p>long 5:3 look 14:16 looking 10:7 11:10 lose 15:22 lot 8:20 19:7 Lutz 2:10 15:6,7,8,9 18:6,13</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>managed 5:21 management 18:19 market 11:2,5 Markusic 2:8 3:18 13:4 Maryland 1:1,12,14 2:3,4,5,6,7,11 3:5 4:2 5:9 7:3 9:4,7 9:11 18:19 Maryland's 3:21 6:3 7:6,16 material 4:8 matter 1:11 maximum 5:22 7:21 MDA 18:4 MDE 3:15 10:15,22 11:9,11,13 14:4,15 18:21 mean 5:4 means 8:6 19:7 meet 6:4 7:12 mentioned 15:14 method 15:16 Michelle 2:6 3:17 Michelsen 2:9 3:19 8:12 13:2,7 million 10:18 mm-hmm 13:4 model 16:20 modification 5:6 6:2 7:7 16:8,14 17:2 modifications 4:7 modified 6:12 modify 1:4 3:6,22 4:18 6:20 19:1 money 10:5 morning 13:9 MS4 1:7 3:8 4:1,18</p>	<p>5:19 6:2,12 7:6,8 7:10 8:6,15 12:1 15:11 19:1 municipal 1:6 3:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1 3:1 name 3:10 13:15 National 3:7 Naturalist 2:12 13:13 nature 12:1 nearly 9:15 necessary 7:12 need 12:2 15:13 needs 10:15 14:3,20 neither 20:6 net 8:3 never 15:10 new 4:10 6:15 7:1,8 newly 6:3 Newspaper 4:5 nitrogen 7:22 11:4 15:19 16:9,21 notable 9:18 note 13:8 19:8 notice 4:6,12 notification 19:10 November 5:12 18:21 NPDES 1:5 3:8 5:10 6:2 number 19:17 nutrient 6:3,13 7:1 7:9 8:5 9:10 19:12</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 3:1 objected 7:5 15:10 obvious 17:20 obviously 8:16 15:22 occur 17:22 occurs 18:11 October 1:12 3:3 12:13 19:11 odd 11:3</p>	<p>Officer 1:19 officials 9:1 okay 8:22 12:11 16:19 18:6,17 ones 11:10 operating 10:17 operational 7:12 opportunity 4:21 5:5,8 9:14 15:9 opposed 10:1 option 6:4 8:5 original 8:14 outcome 20:10 outreach 19:12 owners 5:14</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 p.m 3:4 19:19 paid 10:19 part 4:13 5:13 9:16 particular 14:19 particularly 8:19 parties 20:7,9 parts 10:18 party 4:3,11,13 19:3 percent 5:20 6:4,9 7:13,17 8:2 performance-based 11:12 period 14:14 18:21 permanent 10:12 permit 1:7 3:9,14 4:1,7,13,18 5:6,16 5:19 6:2,8,12,17 6:18,20,22 7:6,10 7:15 8:6,15,19 10:1,7,9 12:3,14 16:13,18 18:18 19:1,5 permit's 11:18 permits 15:11 permitted 6:21 permittee 4:21 pertinent 15:2 phase 5:16 7:1 phone 19:17</p>	<p>phosphorus 8:1 15:19 16:9,21 physical 7:14 pick 15:18 place 7:9 plan 13:10 plans 10:4 plants 10:17 11:1 please 4:15 5:5 12:19 13:8 19:16 point 8:9,11 policy 7:6,8 9:7 pollutant 3:7 16:15 17:6 pollutants 15:19,20 16:1,3 polluted 9:21 pollution 10:6,20 11:19 populations 5:14 posed 8:17 posted 4:6 pounds 16:15,21,21 16:22 17:13 practicable 5:22 pretty 8:12 9:12 principal 11:14 probably 17:20 Procedures 3:22 proceedings 3:20 20:4,7 process 19:13 program 3:11,12 5:10 6:4 7:2 9:13 14:10 15:13 16:3,5 17:12 projects 10:6,11 properly 10:14 proposed 4:7 6:20 provide 5:4,8 19:11 providing 8:5 public 3:4 4:17 8:11 16:18 17:12 18:1,8 19:12 published 4:4 purchase 16:9 18:6 purchased 16:16</p>	<p>purchases 17:3 purpose 4:16 put 10:10 12:2 17:1 18:15</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 5:17 8:4,8 14:1 question 8:17 18:7 questions 5:7 11:15 11:20</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 rates 16:20 Ray 11:7 19:16 reaching 10:1 read 13:17 real 10:5,11 really 11:19 19:6 reasons 6:13 recall 13:9 receive 4:12 6:15 received 19:10,16 recommend 17:7 recommendation 16:14 recommendations 16:13 record 5:7 8:11 13:17 18:15 recorded 20:4 records 14:16,17 reduce 10:6 reduced 8:2 20:5 reduction 10:20 16:20 referred 19:8 referring 17:8 regarding 3:5 4:12 4:19 register 4:2 17:3 18:1,3 registry 17:12 18:9 regulations 5:11,13 6:14,21 7:2,3 8:20 11:21</p>
---	--	--	---	--

<p>related 20:6 relative 20:8 remains 16:17 remarks 4:19 5:6 15:3 repeal 9:21 report 9:12 Reported 1:21 Reporter 20:1,17 requested 6:2 require 5:13 required 6:7 14:19 16:8,16 requirement 6:5,10 7:13,18 8:3 requirements 10:9 response 18:16,22 restoration 5:20 6:5 6:7,10 7:13,18 8:3 8:7 9:11 14:5,9,10 14:11,12,17,18,19 14:21 15:17 16:2 restored 14:7 16:17 restoring 15:18 result 14:18 resulted 16:19 Review 3:11 reviewed 7:5 14:4 14:20 right 11:17,22 12:15 17:1 riparian 10:12 room 19:9 runoff 9:21</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Safety 3:12 satisfactory 7:19 says 14:5 scheduled 5:2 Science 3:13,16 second 14:2 section 5:12 6:15,19 9:11 sediment 3:11 15:19 16:9,22</p>	<p>see 11:10 12:6 13:1 14:15 16:18 seeing 12:4 send 11:9,9 sense 8:20 sent 4:3 separate 1:6 3:8 September 4:2,5 serving 5:14 session 18:7 sewer 1:6 3:8 shape 5:3 share 13:5 sheet 4:8,10 15:6 18:19 19:2 sheets 4:14 shouldn't 17:22 shows 13:22 sign 4:14 sign-up 15:6 signed 4:9,10,22 9:2 19:2 simply 10:18 16:15 Society 2:12 13:13 solids 8:1 sorry 15:3 18:6 sort 8:15 speak 4:9 5:5 9:1 17:11 speaker 15:6 speakers 4:22 9:2 spots 11:19 staff 3:17 standards 6:21 started 9:2 state 5:11 9:8 16:15 State's 7:1 8:19 stated 8:13 14:19 statement 13:16 Stewart 1:19 2:3 3:10 storm 1:6 3:8 5:14 stormwater 3:12 5:11,21 13:21 18:19 stream 14:5,9,11,17 14:21</p>	<p>streams 11:22 structural 7:14 submit 17:18 submitted 13:16 submitting 13:11 success 14:18 suddenly 10:8 supervision 20:5 support 18:22 supporting 4:8 sure 10:15,22 11:13 13:7,15 surface 5:20 6:5,10 7:18 8:3 14:10 15:16 16:2,10,17 suspended 8:1 System 1:6 3:8 systems 5:14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 Tahoe 2:5 3:16 take 14:15 taken 15:3 taxes 10:19 taxpayer 10:19 template 14:17 tentative 1:4 3:6,22 4:17 term 6:8 terms 14:12 testify 9:3 testimony 5:1 19:3 thank 3:18 8:22 9:6 9:14 12:15,17 13:9 13:12,13 15:5,5,8 18:12,13,13,17,17 19:5,6,18 Thanks 15:8 that'd 13:2 that's 11:20 16:4 17:12 theory 15:11 thing 13:19,20 things 15:1 17:4 think 8:12,18 10:13 12:11 14:3 15:12</p>	<p>17:16,20 18:4 three 10:17 16:3 Thursday 1:12 3:3 time 6:18 7:9,15 12:21 15:3 17:19 TMDL 16:4 TMDLs 7:20 TN 7:22 today 3:3,15 4:9,15 4:22 9:3 15:4 19:2 today's 3:4,20 4:16 5:2 tomorrow 13:9 tonight 4:10 5:7 13:14,19 19:6,18 top 9:3 total 7:20,21,22 8:1 8:1 TP 8:1 track 17:2 18:11 trade 10:16 traded 10:21 12:3 trades 19:13 trading 6:4,13 7:1,6 7:8,22 8:5,16,20 9:10,13 14:13 15:11,12,22 16:2,5 17:12,22 18:1,11 19:12 traits 18:11 transcribed 20:8 translate 17:3 transparency 15:13 transparent 12:4 16:12 treated 16:10,11 17:4 treatment 10:17 11:1 16:19 true 9:16 trying 11:6,6 TSS 8:1 turns 17:17 two 4:14 5:2 10:4 typewriting 20:5</p> <hr/> <p style="text-align: center;">U</p> <hr/>	<p>underlying 15:12,17 understand 17:14 understanding 8:16 11:8 15:12 updates 7:6 upstream 10:12 11:22 urban 15:21 use 6:3,12 7:4 8:6 10:11 14:9</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>verified 19:14 versus 14:12 viewed 14:8 Voters 9:5,8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 4:13 11:13 12:22 18:14 19:5 wanted 11:11 12:21 Washington 1:13 wasn't 8:17 12:20 18:7 wasteload 7:21 wastewater 10:16 10:22 water 3:13,15 5:13 5:17 8:4,8 9:7,9 14:1 way 5:3 10:13 16:18 we'll 4:11 12:11 we're 16:6 17:5 18:2 webinar 12:6 17:15 19:11,15 website 4:7 18:2,20 week 9:15 12:9 week's 11:16 wetlands 10:12 willingness 10:5 Willoughby 1:21 20:3,16 wishes 4:9 work 4:22 worked 9:10 works 16:4,5 17:21 worries 11:17</p>
--	--	---	---	--

worth 11:4	3		
written 13:11 17:18	3:00 19:11		
X	31st 4:2		
	34 6:9		
Y	4		
yeah 13:7	40 6:14,19		
year 4:3	402(p) 5:12		
years 10:4	410-537-3550 19:17		
you'd 12:9	5		
you've 8:12	5,862 6:7		
Z	5.3 16:20		
zero 10:7	5:00 3:4		
0	5:25 19:19		
0.3 16:21	5th 4:5		
1	6		
1.91 16:21	7		
1:00 19:11	7.69 16:20		
100,000 5:15			
10th 6:1			
11th 6:8 12:13			
122.62 6:15,19			
12th 5:19			
13,500 11:3			
14th 4:2			
16th 7:4			
18 1:12			
1800 1:13			
18th 3:3			
1990 5:12			
19th 4:5			
2			
2,000 14:5,20			
2,0000 6:7			
20 5:20 6:4 7:12,17			
8:2			
2014 5:19			
2015 9:11			
2018 1:12 3:4 6:1			
7:4 18:21			
2019 6:9			
22nd 17:15 19:11			
26.08.11 7:3			
29th 18:21			