



**COMMENTS OF THE
MARYLAND MUNICIPAL STORMWATER ASSOCIATION
REGARDING REISSUANCE OF LARGE PHASE I MS4 PERMITS
January 21, 2021**

I. INTRODUCTION

On October 23, 2020, the Maryland Department of the Environment (MDE) issued draft municipal separate storm sewer system (MS4) permits (Draft Permits) for the City of Baltimore, Anne Arundel County, Baltimore County, and Montgomery County and invited public comment through January 21, 2021.

The Maryland Municipal Stormwater Association (MAMSA) appreciates the opportunity to submit these comments. MAMSA is an association of proactive local governments and affiliated stormwater consulting firms that work for clean water and safe infrastructure in Maryland based on sound science and good public policy. MAMSA supports clean water, safe and vibrant communities, and a strong State economy by seeking to align clean water goals, smart stormwater practices, and affordable programs, practices, and infrastructure. Many of MAMSA's Members own and operate municipal separate storm sewer systems (MS4s) regulated under individual Phase I MS4 permits or the Small MS4 General Permit (GP).

MAMSA holds the MS4 programs in the City of Baltimore, Anne Arundel County, Baltimore County, and Montgomery County in high esteem. We know that each of these jurisdictions is serious about making environmental progress that will benefit the Chesapeake Bay and local waters as quickly as is practicable.

MAMSA is not submitting comments on the Draft Permits because we have any question about the extraordinary work these communities have done in the past or will do in the future. Our biggest concern is that MDE may use these Draft Permits as a template and impose a one-size fits all approach on medium and even small MS4 permittees. MDE should tailor future Phase I permits to match the capacities and strengths of each individual program (and it should defer to each county regarding an MEP level-of-effort, see comments below). MDE should also streamline the next Small MS4 GP to recognize the permittees' smaller size and the need for these local programs to prioritize and implement projects and programs over time.

We would also be remiss if we did not share our continuing concerns regarding COVID-19 impacts on local governments across the State.

On September 29, 2020, Governor Hogan issued a press release after a Board of Revenue Estimates meeting. Although he highlighted the fact that Maryland is in better financial shape than many other U.S. states, he ultimately concluded that "...this is still the biggest

fiscal challenge we have ever faced” and that this is “no time to declare victory.”¹ The Governor has subsequently announced emergency legislation for the 2021 General Assembly session that would provide relief for residents and small businesses; however, much of this funding is coming from cuts made by the Board of Public Works.

Maryland’s localities are also struggling with potentially significant budgetary impacts from the pandemic. The State’s citizens rely on MS4 localities to install, implement, inspect, and maintain the BMPs needed to achieve Bay clean-up goals. If local budgets are negatively impacted by the pandemic in 2021 and beyond, MS4 permittees may find it difficult to move forward with planned BMPs at the rate assumed in pre-COVID schedules.

Unfortunately, the Draft Permits impose new requirements (for example, requirements to develop a county level salt management plan) at exactly the wrong time. Until we have moved past the pandemic, it will be very challenging for any MS4 to ramp up their programs, either from a financial or an operational standpoint.

We appreciate the State’s partnership on COVID-related matters throughout 2020, and, although we hope it will not be necessary, we will look to the State for leadership and guidance again in the future if it becomes clear budgetary restrictions will affect our stormwater programs.

Further comments regarding the Draft Permits are set forth below.

II. COMMENTS

A. MDE Should Defer to the MS4 Locality on What Constitutes MEP

On June 7, 2019, MAMSA submitted comments in response to the State’s Draft Chesapeake Bay TMDL Phase III Watershed Implementation Plan (Phase III WIP).

MAMSA expressed support for MDE’s decision to apply the Clean Water Act’s maximum extent practicable (MEP) standard to the next round of permits for large and medium MS4s.² MAMSA questioned, however, MDE’s assumption that Phase I MS4s will be able

¹<https://governor.maryland.gov/2020/09/29/governor-hogan-on-covid-19s-impact-on-marylands-budget-the-biggest-fiscal-challenge-we-have-ever-faced/>

² Both the Draft and Final Phase III WIP included the following statement about MEP and stormwater permits: “To support the development of the next generation (fifth-generation) Phase I MS4 permits (see figure SW-1) the Department considered what pace of implementation can reasonably be expected in each five-year permit term, including limitations on the physical capacity to complete this level of work, i.e., staff, contractors, land availability, permitting delays. Additionally, as the inventory of stormwater management practices for each county increases, a greater share of its annual budget will need to be dedicated to operations and maintenance. This approach corresponds with the idea of local feasibility, or in the context of the CWA, the maximum extent practicable (MEP), instead of defining a restoration pace to meet specific allocations by 2025.” (Draft Phase III WIP, p. B-30; Final Phase III WIP, p. B-33).

to annually restore two percent of impervious surface areas that currently have little or no stormwater treatment.³

MAMSA was pleased that when MDE met with large MS4 permittees regarding this next generation permit, it acknowledged the MEP legal standard, consistent with the Phase III WIP. MAMSA was also pleased that MDE asked each county to submit a restoration portfolio to document the restoration projects that can reasonably be implemented over the next permit term.⁴

Unfortunately, it appears that MDE took the excellent work of these counties and revised the MEP-based portfolios to increase expectations. For example, Anne Arundel County submitted a portfolio with 1,641 acres of restoration; MDE revised that goal, nearly doubling it to 2,998 acres.⁵

MAMSA has not seen any hard data to support MDE's decision to revise local restoration portfolios; we do not believe MDE has provided this to interested stakeholders. We can only hazard a guess that MDE changed the restoration targets for the large MS4s so that the math works out—e.g., they average out to the cumulative two percent referenced in the Phase III WIP. MDE includes an oblique reference in Draft Fact Sheets to these changes. In the Anne Arundel County Draft Fact Sheet, MDE writes:

Considering the fiscal and physical capacity, the County generated a list of restoration BMPs and programs (i.e., BMP Portfolio) for implementation under this permit. The BMP Portfolio along with a justification narrative was submitted to inform the Department's determination as to the level of effort required for the County to meet the MEP standard. Based on discussions with the County regarding the justification narrative and BMP Portfolio which proposed 1,641 impervious acres, and comparison with the pace of past restoration trends, the Department determined that additional restoration is achievable. Specifically, the Department concluded, based on interest expressed by the County, that more green infrastructure and climate resiliency incentives will likely be implemented, along with other new BMPs included in the 2020 Guidance...Additionally, the County has several wastewater treatment facilities that may be used to generate nutrient credits...In light of these factors, the Department increased the restoration required for this permit term to 2,998 impervious acres. (Draft Fact Sheet, p. 11)

³ Although MDE retained language in the Final Phase III WIP regarding the two percent assumption, it also promised to "continue to work with permittees on an MEP analysis that will indicate what is feasible." (Final Phase III WIP, p. B-33).

⁴ On a related note, MAMSA is also pleased that MDE has clarified in each large MS4 Draft Permit that a benchmark is a goal or target but is "generally not considered to be enforceable." Although we would prefer that MDE drop the word "generally," MDE is absolutely correct that benchmarks are non-enforcement tools used in a clean water context to signal to a permittee that it should make future adjustments to its BMPs, programs, etc.. They are appropriate feed-back loops that drive adaptive management.

⁵ MDE increased Baltimore County's 2,451 acres to 2,696 acres, and Montgomery County's 1,649 acres to 1,814 acres. Baltimore City's numbers were unchanged.

It may be that Anne Arundel County, the City of Baltimore, Baltimore County, and Montgomery County are all confident that they will be able to achieve the restoration requirements in their individual permits. If so, that is laudable. If not, MDE should defer to what each county presented as feasible and revise the county's permit accordingly if the county asks for this treatment in individual comments.

More importantly, MAMSA is concerned that MDE still believes two percent per year in restoration is widely achievable. In fact, this is likely unachievable for some Phase I permittees. In some cases, permittees may have already implemented projects that were "low-hanging fruit," leaving fewer options for future restoration projects. In some cases, permittees may be financially strapped or operationally unable to attain this level of restoration each year for the five years of their permit cycle.

We note that the Maryland Association of Counties (MACO) made this point back in 2019 in a letter to the Department: "While the 10-percent-per-5-years rate of progress may be manageable over two permit cycles (or for 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."

For all of these reasons, MAMSA asks MDE to revise the large Phase I MS4 permits to reflect each county's MEP analysis, if the county so desires. MAMSA also asks MDE to review the medium Phase I MS4 restoration portfolios and defer to a locality if its MEP-based restoration portfolio includes a restoration goal of less than two percent restoration per year.

B. MDE Should Not Arbitrarily Limit MS4 Trading with Wastewater Plants

Each of the Draft Permits limits the use of trades with wastewater treatment plants. For example, Montgomery County will only be authorized to obtain 330 credits from wastewater treatment plants: "The maximum allowable credits obtained from a trade with a wastewater treatment plant shall not exceed 330 equivalent impervious acres restored." (Montgomery County Draft Permit, p. 10).

MDE's formula for determining the trade limitation is 10% of the original portfolio acres plus any additional acres added to the ISR requirement above the level in the restoration portfolio. For all permittees except for Anne Arundel County, this effectively limits trades to a less than 20% of the total acres that must be restored during this permit term.⁶

⁶ Montgomery County's 330 acres is approximately 18% of the total acreage of 1,814. Baltimore County's 490 acres is approximately 18% of the total acreage of 2,696. Baltimore City's 369 acres is approximately 10% of the total acreage of 3,696. Anne Arundel County's 1,521 acres is approximately 50% of the total acreage of 2,998, however this is due in large part to the Department nearly doubling their restoration requirement (see discussion above).

This is a significant reduction from the previous permit; MDE did not include such severe limitations when it modified large and medium MS4 permits in 2018 and 2019 to incorporate nutrient trading language.

MAMSA strongly supports nutrient and sediment trading. Maryland's trading program allows dischargers to exchange nutrient credits voluntarily in order to reduce pollutants at a lower cost to local citizens. EPA, the Chesapeake Bay Commission, and numerous other stakeholders also support trading because it is a way to drive faster reductions to the Bay without compromising local water quality.

MDE's support for trading goes back many years before it adopted the State's Trading Regulations in 2018. In 2015, MDE issued a formal policy statement, *Maryland Water Quality Nutrient Trading Policy Statement*, and said that "A number of studies have shown that the potential cost savings from trading increase substantially when regulated stormwater sources can participate and the scope and scale of trading expand." MDE concluded that: "Nutrient trading offers an attractive alternative to more traditional approaches for reducing water quality problems and can often achieve results faster and at a lower cost. Maryland's new trading program provides expanded opportunities for all point and nonpoint sources to access the water quality marketplace as a means to secure for every Marylander the health, economic, and recreational benefits that come from the protection and restoration of the State's water resources."

MAMSA is perplexed that MDE now seeks to limit access to a program that it lauded for many years as an economically beneficial, environmentally protective way to ensure water quality results.

MAMSA urges MDE to drop the arbitrary limitation on MS4 and wastewater trading from the large MS4 permits and to not include it in future individual permits or the Phase II General Permit. Especially given the current COVID-19 situation, MS4 localities may need to rely on trading options to comply with the next round of MS4 permits.

C. MDE Should Add Force Majeure Text to the Permits

On May 15, 2020, MAMSA sent a letter to MDE on managing the impacts of COVID-19 on local stormwater management. Given the unprecedented nature of the emergency, MAMSA asked that MDE carefully consider any compliance and enforcement issues for stormwater operations during the COVID-19 response. MAMSA also highlighted important financial challenges related to the pandemic, including revenue declines, expense increases, and bond interest rate increases. MAMSA asked that MDE exercise caution with any new regulatory burdens and carefully review any requests for revised capital project implementation schedules. As noted above, MAMSA has been very appreciative of MDE's overall response to this very trying public health situation.

That said, local stormwater managers, who were scrambling to deal with the impacts of this virus in early 2020 and continuing to do their utmost to comply with their permit obligations, would have greatly benefitted from force majeure language in their permits. Maryland's MS4 permits should acknowledge that there are some situations, like the

rapid spread of coronavirus, that legitimately challenge even a gold-standard MS4 program.

Virginia has language in both its Phase I and II MS4 permits that has been approved by EPA Region III and that could be easily incorporated into all future MS4 permit reissuances.

Here is the Phase II MS4 General Permit regulatory language:

In the event the operator is unable to meet certain conditions of this permit due to circumstances beyond the operator's control, the operator shall submit a written explanation of the circumstances that prevented state permit compliance to the department in the annual report. Circumstances beyond the control of the operator include abnormal climatic conditions; weather conditions that make certain requirements unsafe or impracticable; or unavoidable equipment failures caused by weather conditions or other conditions beyond the control of the operator). The failure to provide adequate program funding, staffing or equipment maintenance shall not be an acceptable explanation for failure to meet state permit conditions. The board will determine, at its sole discretion, whether the reported information will result in an enforcement action.

Here is the language from a select Phase I MS4 individual permit:

In the event the permittee is unable to meet conditions of this state permit due to circumstances beyond the permittee's control, a written explanation of the circumstances that prevented permit compliance shall be submitted to the Department in the annual report. Circumstances beyond the permittee's control may include abnormal climatic conditions; weather conditions that make certain requirements unsafe or impracticable; or unavoidable equipment failure caused by weather conditions or other conditions beyond the reasonable control of the permittee (operator error and failure to properly maintain equipment are not conditions beyond the control of the permittee). The failure to provide adequate program funding, staffing or equipment maintenance shall not be an acceptable explanation for failure to meet permit conditions. The Board will determine, at its sole discretion, whether the reported information will result in an enforcement action. In addition, the permittee must report noncompliance which may adversely affect surface waters or endanger public health in accordance with Part 11.1.

MAMSA notes that in both cases the State Water Control Board retains the sole discretion to decide whether to pursue enforcement for alleged noncompliance. What this language does offer, however, is some guidance to permittees about how they should handle a serious situation that makes it temporarily impracticable, unsafe, or even impossible to follow specific requirements of their permits.

MAMSA asks MDE to revise the large Phase I MS4 permits to include a version of this text, if each county so desires. MAMSA also asks MDE to allow medium Phase I MS4s to request inclusion in their draft permits. Lastly, MAMSA requests that MDE include this text in the next draft iteration of the Phase II Small MS4 General Permit.

D. MDE Should Clarify Special Programmatic Conditions

Each of the Draft Permits includes Special Programmatic Conditions which mandate that the permittee “reflect” certain state growth “policies, programs, and implementation” as a “part of its net WLA accounting as stipulated” elsewhere in the permit.

MAMSA has come to understand that MDE intends for permittees to keep track of the impacts of growth in the community as a part of overall accounting of net reductions achieved under applicable TMDLs. This is not clear from the current text.

MAMSA respectfully suggests the following edits if they are acceptable to the four large MS4s and to the medium MS4s as those permit discussions begin:

“Maryland’s baseline programs, including the 1991 Forest Conservation Act, 1997 Priority Funding Areas Act, 2007 Stormwater Management Act, 2009 Smart, Green & Growing Planning Legislation, 2010 Sustainable Communities Act, 2011 Best Available Technology Regulation, and the 2012 Sustainable Growth & Agricultural Preservation Act effectively mitigate the majority of impacts from new development. Any additional loads will be offset through Maryland’s Aligning for Growth policies and procedures as articulated through Chesapeake Bay milestone achievement. Baltimore City shall ~~reflect~~ include a brief written analysis of the impacts of these ~~policies, programs, and implementation each year when it updates its Countywide Stormwater TMDL Implementation Plan~~ as part of its net WLA accounting as stipulated in Part IV.F.3.b of this permit.”

On a related note, MAMSA believes it would be useful for MDE to schedule ongoing meetings with the MS4 regulated community so that MDE can provide additional guidance on topics like how to analyze the impacts of the State’s growth policies on pollutant loadings.

MDE should begin that outreach with meetings on the new 2020 *Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated* and on the 2020 *MS4 Monitoring Guidelines*. MAMSA Members have numerous questions about both documents that only MDE can answer. MDE should not expect MS4s to implement sophisticated restoration and monitoring programs without offering explicit guidance on expectations. MAMSA requests that MDE schedule an “all-hands-on-deck” meeting that would allow MS4s and their consultants to ask questions on these important documents.
