

MEMORANDUM

TO: Leslie Knapp, Jr., Esq.
Maryland Association of Counties

FROM: Christopher D. Pomeroy

DATE: October 11, 2012

RE: County Options for MDE Stormwater MS4 Permit Requirements

As a follow-up to MACo's informative WIP Implementation Discussion held October 5, 2012, this memorandum briefly addresses regulatory flexibility for counties under existing clean water regulations to "right-size" draft discharge permit requirements for an individual Municipal Separate Storm Sewer System (MS4) prior to permit reissuance by the Maryland Department of the Environment (MDE).

On October 5, I expressed my expectation or hope that the reasonable management team at MDE would make reasonable decisions on MS4 permit requirements if the permittee presents MDE with reasonable and credible information demonstrating that a draft permit requirement is not reasonably achievable. The permittee must be proactive in developing and presenting this type of information (in as specific a manner as possible under the circumstances) to enable this discussion with and consideration by MDE. If necessary, such information could also be used in the available review process to challenge any decision by MDE that imposes unaffordable, unachievable, or otherwise unreasonable permit requirements.

There are three (3) overlapping regulatory concepts that may be readily available to achieve this result. While all three are discussed below, the first (MEP Analysis) is most directly applicable to MS4 permits.

MAXIMUM EXTENT PRACTICABLE (MEP) ANALYSIS & DETERMINATION

For MS4 permits, arguably the **ultimate or long-term extent** of permit requirements, and more certainly the overall **pace** of implementation for the five-year period covered by a discharge permit, are governed by the so-called "maximum extent practicable" compliance standard under Clean Water Action § 402(p)(3)(B)(iii). As described by the U.S. Environmental Protection Agency (EPA) in the *Federal Register* when adopting one of its major stormwater regulations for MS4s:

Maximum extent practicable (MEP) is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. The CWA requires that NPDES permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices,

control techniques and system, design and engineering methods.” CWA Section 402(p)(3)(B)(iii). This section also calls for “such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants.” EPA interprets this standard to apply to all MS4s, including both existing regulated (large and medium) MS4s, as well as the small MS4s regulated under today’s rule.

EPA has intentionally not provided a precise definition of MEP to **allow maximum flexibility in MS4 permitting**. **MS4s need the flexibility** to optimize reductions in storm water pollutants on a **location-by-location basis**. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, **specific local concerns**, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, **implementation schedules**, current **ability to finance** the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.

64 Fed. Reg. 68,754 (Dec. 8, 1999) (emphasis added).

As the current U.S. EPA Region III Water Division Director once stated to me in a room full of MS4 permittees, water quality standards compliance is the goal, but “**maximum extent practicable**” **controls the pace** of implementation by the permittee.

Similarly, in reissuing Montgomery County’s MS4 Permit, MDE stated in its Response to Formal Comments (Feb. 2009) that:

The CWA recognizes fundamental differences between municipal stormwater and other so-called point source discharges and does not mandate that EPA or any delegated state impose effluent limitations of any type (numeric or narrative) on discharges from municipal storm sewer systems. Rather, Section 402(p)(3)(B)(iii) of the CWA states that municipal storm sewer system permits must require stormwater controls to reduce the discharge of pollutants “**to the maximum extent practicable**” (MEP).... The overall goals of Maryland’s NPDES municipal stormwater permit program are to control stormwater pollutant discharge by implementing the BMPs and programs required by the permit, **show progress** toward meeting WLAs developed under EPA approved TMDLs, and **contribute to the attainment** of water quality standards.” (Emphasis added.)

MDE, however, has not yet applied, or had the opportunity to apply, MEP on a case-by-case basis with respect to the currently-generic Impervious Area Restoration Provision, which raises the most serious question of achievability during the five-year permit term.

Instead, current drafts uniformly require adding sufficient treatment, within five (5) years, to twenty (20) percent of the county’s impervious area from which stormwater is not deemed sufficiently treated at present.

Admittedly, it can be difficult for MDE to apply the MEP standard to a particular MS4 permit and determine an appropriate county-specific implementation level and schedule in the absence of county-specific information about financial ability and other resources.

The point of a county-generated MEP Analysis is to develop and present to MDE the type of information required for MDE to make a reasonable MEP decision on the extent and/or pace of implementation for the next five-year permit term.

Earlier this year, at least one county requested guidance from the MDE Water Division on developing an MEP Analysis. No response has been received to our knowledge.

Thus, the MEP Analysis is very much an ad hoc process and was so designed as described in the *Federal Register* excerpt above. It is the primary means of addressing feasibility, achievability, affordability, etc., for MS4 permit requirements prior to permit reissuance.

The bottom line is that counties and municipalities subject to MS4 permitting should conduct an MEP Analysis, submit it as promptly as possible, and pursue the matter with MDE management to achieve a reasonable outcome.

Ideally, the MEP Analysis should be submitted by reapplication, or if not possible, at least prior to tentative determination. If neither is feasible, it should be submitted during the public comment period, recognizing that MDE may not accept a request submitted "too late." Once submitted, this information should encourage MDE to reach a reasonable decision on county-specific implementation requirements based on the best available information.

In the unfortunate event that MDE were to reissue the permit on unreasonable terms, the county will (1) have given MDE every opportunity to reach a reasonable decision, (2) have staked out the "moral high ground" in the permitting process, and (3) have created an administrative record on which to stand during any necessary appeal before a circuit court judge (the first neutral decision maker in the entire TMDL-WIP-Permit process).

The following sections describe two general (i.e., non-MS4-specific) permitting provisions that further illustrate the fact that MDE has the authority, discretion, and obligation to make reasonable discharge permit determinations.

TEMPORARY VARIANCE REQUEST

Draft MS4 permit provisions related to the Chesapeake Bay TMDL and WIP, such as the Impervious Area Restoration Provision discussed above, are water quality-based effluent limitations under the Clean Water Act. For such water quality-based effluent limitations, EPA regulations at 40 C.F.R. 122.21 provide:

- (m) Variance requests by non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise

applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

* * *

(5) Water quality related effluent limitations. A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

MDE regulations similarly recognize the availability of variances. For example, the Water Pollution Regulation at COMAR 26.08.01.01.B recognizes the availability of a temporary variance known as a "restoration variance":

"Restoration variance" means a temporary exception to the water quality standards allowing nonattainment of designated uses granted in situations where no enforcement action will be taken if the nonattainment is due to the existence of one or more of the justifications in 40 CFR §131.10(g). Restoration variances will be reviewed every 3 years at a minimum as required by the Clean Water Act and EPA regulations.

The variance justifications at 40 C.F.R. § 131.10(g) include: "**human caused conditions** or sources of pollution prevent the attainment of the use and **cannot be remedied** [within the five-year permit term, presumably] or would cause more environmental damage to correct than to leave in place" and "controls more stringent than those required by sections 301(b) and 306 of the Act would result in **substantial and widespread economic and social impact.**"

Further, the Permits Regulation at COMAR 26.08.04.11.C(10) recognizes the opportunity to apply for a variance:

In addition to the application fee calculated in accordance with §C(4) of this regulation, the Department shall assess the applicant for any cost associated with evaluating or reviewing mixing zone studies, **variance petitions**, site-specific criteria studies, chemical or biological translator studies, or any other studies submitted as part of an application to determine discharge permit requirements. For the purposes of this assessment: (a) The minimum fee for each component (for example, mixing zone, **variance**, etc.) will be established at \$5,000....

This generally-applicable variance procedure is potentially available to all types of discharge permits. While the more direct and MS4-specific procedure is the MEP Analysis discussed above, the availability of the variance is referenced here to illustrate the broad range of flexibility that MDE possesses to "right-size" the requirements of a five-year discharge permit based on real world considerations.

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Based on our inquiry of MDE Municipal Permits staff, it is our impression that MDE has not had much occasion in the past to apply this general variance provision.

COMPLIANCE SCHEDULE (OR IMPLEMENTATION SCHEDULE)

A closely-related, long-accepted, and frequently-applied regulatory principle is that a permittee must be allowed a reasonable period of time to achieve compliance with new requirements. In fact, this has been allowed with all ENR upgrades of municipal wastewater treatment plants in the State.

COMAR § 26.08.04.02.C, provides that MDE may grant a “compliance schedule as a condition of a permit for existing discharges which do not comply with permit conditions, effluent limits, or water quality standards” and that this schedule shall be “the shortest **reasonable time** consistent with the requirements of the Federal Act and State law or regulation.”

Similar to the MEP Analysis and variance provisions discussed above, the focus of the compliance schedule regulation is on allowing a **reasonable amount of time** for implementation by the permittee.

CONCLUSION AND NEXT STEPS

This memorandum summarizes the types of flexibility to which I referred during the MACo meeting on October 5. I would be glad to discuss these concepts and how best to implement them with you at any time.

One opportunity to do so is at the November 7 meeting of the Stormwater Association of Maryland (SWAM) in Howard County. SWAM includes staff from a number of counties represented at the October 5 MACo meeting, and SWAM’s November 7 meeting agenda includes the above topic. Please attend if you are available, and feel free to extend the same invitation to any MACo county members who may be interested. Or contact me at chris@AquaLaw.com to arrange a time to discuss this in more detail at your convenience.

Thank you again for the engaging meeting on October 5 and for the opportunity to contribute on behalf of SWAM and the Maryland Association of Municipal Wastewater Agencies. I truly enjoyed discussing this important issue with you and your membership.

C.D.P.