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RE: Potential Liability of Howard County under its MS4 Permit for Homeowner BMPs (NSGLC-16-04-03)

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Dear Amanda,

Thank you for submitting an advisory request to the National Sea Grant Law Center requesting information about the legal issues involved in Howard County's (County) new voluntary stormwater Best Management Practices (BMP) program to install residential rain gardens and rain barrels.¹ You informed us that the County will claim the impervious surface treated by these practices toward the requirements of the County's National Pollutant Discharge Elimination System (NPDES) municipal separate storm sewer system (MS4) permit issued by the Maryland Department of the Environment (MDE) under the Clean Water Act (CWA). Under the program, the County will cover 75% of the cost of these BMPs and obtain a 25% cost-share from residents, and residents will be responsible for maintenance after installation. You stated that there is concern about the County's liability if the BMPs are not properly maintained by the residents. Any action the County takes must be in compliance with its MS4 permit, and the County would be liable for violations. Below is my analysis of how the BMPs fit within the County's MS4 permit requirements and associated liability concerns.

¹ For more information on the program, see <http://www.cleanwaterhoward.com/cleanscapescommunities>.

Maryland MS4 Permits and the Chesapeake Bay TMDL

The CWA and its implementing regulations require jurisdictions with large populations to obtain NPDES MS4 permits for their stormwater discharges. Large municipal separate stormwater systems have populations of 250,000 or more, while medium municipal separate stormwater systems have populations between 100,000-250,000.² Both large and medium systems receive what are known as Phase I permits.³ In Maryland, ten jurisdictions have Phase I MS4 permits, including Howard County.⁴

In the current Maryland Phase I MS4 permits, MDE based each jurisdiction's permit on the same template; thus, all of the Phase I permits are essentially the same. The permits are based on the Maryland Stormwater Design Manual (Manual) and incorporate into their terms an Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated- Guidance for National Pollutant Discharge Elimination System Stormwater Permits (Guidance Document).⁵

The current Maryland Phase I MS4 permits were influenced by the Chesapeake Bay Total Maximum Daily Load (TMDL). The Chesapeake Bay TMDL is "a historic and comprehensive 'pollution diet' with rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region's streams, creeks and river."⁶ The states in the region have been working for years with EPA to develop a TMDL that addresses the nutrient pollution problem in Chesapeake Bay. As one of the states covered by the TMDL, Maryland has taken steps to implement the mandated reductions in nutrient pollution.

A TMDL is essentially the amount of pollutant that can enter a water body and allow it to meet its water quality standards under the CWA. A TMDL splits up the allowable amount of the pollutant among point sources and non-point sources, and accounts for a margin of error and natural background levels of the pollutant. The amount of the pollutant load allocated to point sources, which are discrete sources of pollution such as from a pipe or ditch, are known as waste load allocations, or WLAs.⁷ The WLAs in the current Maryland Phase I MS4 permits were influenced by the Chesapeake Bay TMDL.

Both the Chesapeake TMDL and the Maryland Phase I MS4 permits have been challenged in courts.⁸ However, the courts have upheld both the TMDL and the Maryland Phase I MS4 permits. A circuit court in Maryland dismissed the challenge to the County's permit in 2015.⁹

² 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26(b).

³ 40 C.F.R. § 122.26.

⁴ Paul Smail, *A Work in Progress: The Regulation of Stormwater Discharges from Municipal Separate Stormwater Sewer Systems in Maryland*, 48-JUN MD. BAR JOURNAL 12 May/June 2015.

⁵ Maryland Dept. of the Envir. v. Anacostia Riverkeeper, 447 Md. 88, --- A.3d ---, at *18 (Md. 2016).

⁶ U.S. ENVTL. PROT. AGENCY, CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY (2010).

⁷ See 40 C.F.R. §§ 130.2, 130.7.

⁸ See *Am. Farm Bureau Fed'n v. U.S. Env'tl. Prot. Agency*, 792 F.3d 281 (3rd Cir. 2015); *Md. Dep't of the Env't v. Anacostia Riverkeeper*, 447 Md. 88--- A.3d --- (Md. 2016).

⁹ See *Active Cases, Concluded Cases, Amicus Curiae, and Opinions*, CHESAPEAKE BAY FOUND. (June 21, 2016), <http://www.cbf.org/how-we-save-the-bay/in-the-courtroom/cases>.

The Howard County MS4 Permit

Howard County received its current NPDES MS4 permit in December 2014, and the permit will expire on December 17, 2019.¹⁰ The permit states that the County must manage its stormwater program to comply with the CWA and NPDES regulations, including:

1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with Maryland's receiving water quality standards;
2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body...; and
3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.¹¹

The County's MS4 permit contains a requirement to implement "restoration efforts for twenty percent of the County's impervious surface area."¹² This requirement is part of Maryland's strategy to meet the Chesapeake Bay TMDL.¹³ The permit also requires the County to develop a restoration plan for implementing BMPs for each stormwater WLA.¹⁴ Once finalized, these restoration plans become enforceable parts of the permit.

The permit also directs that the restoration required under the permit be done in compliance with the Guidance Document, which terms are incorporated into the permit. The Guidance Document lays out how the County can "apply impervious restoration credits for BMP implementation."¹⁵ The document details how to calculate credits for BMPs and how the credits are entered into a database tracking the BMPs.

Inspection and Monitoring Requirements

Both the MS4 permit itself and the Guidance Document repeatedly discuss the need to monitor and inspect the restoration completed under the permit. For instance, the permit directs the County to "[e]valuate and track the implementation of restoration plans through monitoring or modeling to document the progress toward meeting established benchmarks, deadlines, and stormwater WLAs." The MS4 permit also requires the County to include in its annual report "[a] summary describing the number and nature of enforcement actions, inspections, and public education programs."¹⁶

¹⁰MD. DEPT. OF THE ENVIR., HOWARD COUNTY NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MUNICIPAL SEPARATE STORM SEWER SYSTEM DISCHARGE PERMIT, <http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/Howard%20Final%20Permit%2012%2011%202014.pdf> [hereinafter PERMIT].

¹¹ *Id.* at Part III.

¹² *Id.* at Part IV.E.2.a.

¹³ MD. DEPT. OF THE ENVIR., ACCOUNTING FOR STORMWATER WASTELoad ALLOCATIONS, GUIDANCE FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORMWATER PERMITS, 1 (2014) [hereinafter GUIDANCE DOCUMENT].

¹⁴ PERMIT, *supra* note 10, at Part IV.E.2.B.

¹⁵ GUIDANCE DOCUMENT, *supra* note 13, at 1.

¹⁶ PERMIT, *supra* note 10, at Part V.1.d.

The Guidance Document also repeatedly discusses the need to inspect and monitor BMPs. For example, the document states that BMPs must be monitored after installation in order for the County to continue to receive credits for installation. The Guidance Document states that inspection and maintenance of all BMPs is necessary to demonstrate compliance with both the twenty percent impervious restoration requirement and with TMDL WLAs.¹⁷ Section V goes on to further state that:

[s]uccessful restoration requires that BMPs function properly to ensure that the expected water quality improvements are achieved. Therefore, BMP inspection and routine maintenance need to be conducted in order for MS4 jurisdictions to claim credit. Further, to receive proper credit toward the Chesapeake Bay TMDL, MDE will need to report BMP data... Otherwise, the credits will be removed until proper performance is verified. Therefore, BMP inspection, maintenance, and verification are essential for compliance with NPDES permit requirements.¹⁸

In discussing the BMP database, the Guidance Document states BMPs shall be maintained every three years and that the maintenance should be documented. If this maintenance does not occur, the County will lose the credits for those BMPs.¹⁹ With respect to individual homeowner practices, the Guidance Documents states that localities can receive credits for homeowner BMPs, as long as the installed rain barrels or gardens meet design standards.²⁰ To ease the reporting burden, local jurisdictions can choose to report homeowner BMPs on “a regional or watershed scale.”²¹ However, as with the other BMPs, the Guidance Document directs counties to track and monitor these individual homeowner projects if the County wishes to keep credits for homeowner BMPs.

Penalties

Although other parties may complete projects that count towards compliance with the County’s MS4 permit, the permit states that “the County remains responsible for permit compliance.” Responsibility for permit compliance and permit compliance liability may not be transferred to another entity.²² In other words, the County may not shift its liability to a private homeowner. Although the County will use the homeowner’s assistance to generate the wasteload reductions required by its MS4 permit, the County remains solely liable for permit violations. Civil and criminal penalties could potentially be assessed for MS4 permit violations under both the CWA and Maryland environmental laws.²³

Conclusion

Both the County’s MS4 Permit and the Guidance Document make clear that the County has a duty to inspect all BMPs it claims towards its restoration efforts. If the County does not inspect the BMPs, including homeowner BMPs, the County risks losing the credit. If the loss of the credit could jeopardize the County’s ability to meet its restoration requirements, the County risks violating its MS4 permit and being assessed penalties.

¹⁷ GUIDANCE DOCUMENT, *supra* note 13, at 24-25.

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 16.

²¹ *Id.*

²² PERMIT, *supra* note 10, at Part VII.

²³ *Id.*

A range of monitoring options may be available depending on the type of BMP installed. The County should consider inspection and monitoring options when it is developing its BMP installation program. The County should also carefully consider its capacity to inspect and monitor individual BMPs when deciding which BMPs to claim towards its MS4 permit requirements. The County, for instance, may wish to omit very small projects that would be burdensome to inspect or monitor. In addition, adding the potential of penalties against homeowners that do not maintain BMPs on their property may add to the administrative burden of the County. Again, this may be something that the County should consider.

I hope you have found this information useful. If you have follow-up questions or would like additional information, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Catherine Janasie".

Catherine Janasie
Research Counsel