



September 18, 2018

Sent via email.

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Water Management Administration
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Re: Draft Permit Modification for the General Permit for Discharges Associated with Industrial Activities State Discharge Permit 12-SW; NPDES Permit MDR00

Dear Mr. Richardson,

The Environmental Integrity Project (EIP), Center for Progressive Reform (CPR), Waterkeepers Chesapeake, Blue Water Baltimore, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and Environmental Action Center (hereinafter collectively referred to as “Commenters”) thank the Maryland Department of the Environment (MDE or “Department”) for the opportunity to comment on the tentative determination to modify the Maryland General Permit for Discharges Associated with Industrial Activities [National Pollutant Discharge Elimination System (NPDES) Permit No. MDR00 (State Permit No. 12-SW-A)] (hereinafter “Draft Modification”).

The introduction of the Chesapeake Bay Restoration Requirements in the current iteration of the General Permit for Discharges Associated with Industrial Activities (effective date: January 1, 2014; expiration date: December 31, 2018) (“hereinafter “General Permit”) was a critical step towards restoring Maryland’s river and streams, as well as meeting Chesapeake Bay and local Total Maximum Daily Load (TMDL) goals. The Department now proposes to authorize Maryland’s new nutrient trading regime (finalized in July 2018), *see* COMAR 26.08.11 (“Trading Regulations), as an alternative or equivalent measure to the General Permit’s Chesapeake Bay restoration requirements. In order to do so, MDE is proposing to modify the General Permit to (1) authorize trading as an option for meeting restoration requirements; (2) extend opportunity for generating marketable credits to those facilities who otherwise have no restoration requirements; (3) include specific reporting requirements when trading is occurring; and (4) extend the deadline for restoration requirements to December 1, 2020.

Commenters are concerned about these four stated changes in the Draft Modification and the legality of the Draft Modification itself. As explained in greater detail below, our main suggestions/concerns are as follows:

- The Department should not allow General Permit holders to trade restoration of impervious surfaces — through either generating or purchasing nitrogen credits — on the Registry. This is because:
 - Allowing permittees to trade nitrogen credits in lieu of completing their restoration requirements would eliminate important co-benefits, such as the reduction of toxic metals in stormwater discharged to Maryland waterways and the mitigation of floods and flooding hazards as climate change will continue to bring more frequent and heavier precipitation to the State.
 - Allowing permittees that have yet to restore 20 percent of their impervious surfaces to purchase credits by an extended two-year deadline is unfair to those sites that have complied with these restoration requirements, rewards noncompliance, and dis-incentivizes future compliance.
- If MDE goes forward with this modification, without conceding that the trading proposal is a good or defensible idea, Commenters strongly urge MDE:
 - To only allow industrial stormwater sources to sell credits to or purchase credits from other industrial stormwater sources covered under the General Permit and within the same sectors (as defined by the General Permit) and in the same sub-watershed.
 - To verify the compliance status (through site inspections) of any General Permit holder wanting to participate in the trading marketplace, and prohibiting any sites found to be in “noncompliance” from placing or purchasing credits on the Registry.

I. THE CLEAN WATER ACT AND ITS IMPLEMENTING REGULATIONS MAY PROHIBIT MODIFICATION OF THE GENERAL PERMIT TO INCORPORATE TRADING

As a threshold matter, Commenters are concerned about the legality of modifying the General Permit for the purpose of generating activity in the State’s new nutrient trading market. The terms and conditions in a Clean Water Act (CWA) permit cannot simply be changed at the discretion of either the permitting authority or the permit holder. Instead, Section 402(b)(1)(C) of the CWA, 33 U.S.C. § 1462(b)(1)(C), only allows permits to be modified “for cause,” generally reflecting the need for *more protective* standards in the modified permit.¹ Importantly, EPA’s implementing regulations, 40 C.F.R. § 122.62, enumerate the permissible grounds for modification “for cause.” None of these mandatory predicates are satisfied here and, in fact, the regulations specifically prohibit permit modifications that propose, as here, to extend a compliance schedule beyond the statutory deadlines for NPDES permits. The statutory deadline for NPDES permits is

¹ *Texas Mun. Power Agency v. Adm'r of EPA*, 836 F.2d 1482, 1485 (5th Cir. 1988).

five years, but this proposal would extend compliance for up to an additional two years beyond the current five-year expiration date of December 31, 2018.

The anti-backsliding rule under Section 402(o), § 33 U.S.C. § 1342(o), may also prohibit the Department from modifying the existing General Permit in order to allow trading. The Chesapeake Bay restoration requirement is an effluent limitation² and its modification constitutes a rollback that weakens the General Permit through (1) the two-year compliance extension, and (2) the replacement of firm requirements (to restore impervious surface) with an opportunity to purchase inherently uncertain “credits,” where the credits (a) are not generated in a way that complies with EPA expectations, (b) overestimate pollution reductions on the part of the credit generator, and (c) will therefore lead to a net increase in pollution loads.³

An additional legal question posing concerns for both regulated entities and concerned citizens centers on the issue of protecting local water quality. The CWA prescribes specific standards for industrial stormwater permits that are separate from similarly situated holders of municipal stormwater permits and directly implicate water quality standards.⁴ The recently adopted Trading Regulations for nutrients in Maryland imposes artificial geographic constraints on the concept of water quality standards under the CWA. By drawing trading boundaries for impaired waters based on only three pollutants – nitrogen, phosphorus, and sediment – the regulations deliberately sanction a potential transfer of pollution reduction obligations between facilities situated across real and actual watershed boundaries. Such an action would contribute to a violation of local water quality standards where the credit purchaser is located in a watershed impaired by any number of other pollutants of concern. Modifying an otherwise valid CWA permit to introduce a legally deficient trading scheme would disrupt the regulatory certainty owed to current permit holders. This move would also worsen water quality for small sub-watersheds and local communities surrounding any permitted industrial stormwater facilities that might purchase credits following the modification.

Finally, if the Department adopts this Draft Modification, it will cast significant uncertainty upon any business involved in the State’s nascent trading market to the extent that credits are tainted by an invalid modification.⁵ Several courts have found invalid any new permit terms imposed through an illegal CWA permit modification and held that the original, unmodified permit

² 33 USC § 1362(11); *see also* Maryland Department of the Environment, Response to Public Comments re: State Discharge Permit Application No. 12SW (Oct. 31, 2013), pg. 5, *available at* <https://mde.maryland.gov/programs/Permits/WaterManagementPermits/Documents/GDP%20Stormwater/12SW-%20Final%20Determination%20Response.pdf>.

³ *See* U.S. Environmental Protection Agency, *Trading and Offset Technical Memoranda for the Chesapeake Bay Watershed*, *available at* <https://www.epa.gov/chesapeake-bay-tmdl/trading-and-offset-technical-memoranda-chesapeake-bay-watershed>; *see also* Environmental Integrity Project & Center for Progressive Reform, *Trading Away Clean Water Progress in Maryland* (Dec. 2017), p. 19, attached hereto as Exhibit A.

⁴ 33 U.S.C. § 1342(p)(3)(A).

⁵ *See* Exhibit A, p. 23-27.

terms remain in effect and subject to enforcement.⁶ If the Draft Modification is finalized under the current proposal, hundreds of permit holders might no longer be certain of which terms and conditions a court will hold them liable for, including the compliance deadline, jeopardizing important environmental compliance and pollution control projects and other business investment decisions. Further, if a court found this modification to be legally deficient, it could also wreak havoc on the trading market and any credit purchasers holding voided credits.

II. MDE SHOULD NOT ALLOW TRADING IN LIEU OF MEETING RESTORATION REQUIREMENTS

Allowing permittees without measurable loads (i.e., facilities without any site-specific or verifiable flow or other discharge data) – such as the permittees under the General Permit – into the trading regime may have detrimental effects on TMDL goals and the health of Maryland’s waterways. According to the Trading Regulations “[a]t its discretion, the Department may prohibit...from generating credits: (1) A permittee in noncompliance with permit terms.”⁷ As a threshold matter, MDE has not defined noncompliance for industrial stormwater general permit holders or articulated how it will assess which General Permit facilities are in noncompliance. For example, it is unclear whether a facility that has been marked by a site inspector as being in “noncompliance” is sufficient to prohibit the permittee from generating credits as per COMAR 26.08.11.08-F, or whether additional actions must be taken. There are currently around 1,359 facilities covered under the General Permit. It is unclear how the Department can ensure that only permittees that are in compliance with the General Permit can offer marketable credits on the Registry.

A. MDE Should Not Allow Trading in Lieu of Meeting Restoration Requirements, or at a Minimum, Should Not Allow Permittees to Place Credits on the Registry until MDE Verifies that the Permittee is in Compliance

The Draft Modification would allow both facilities that are smaller than five acres (and thus, not subject to the restoration requirements) and facilities that may choose to restore more than 20 percent of their impervious surfaces, to generate marketable credits on the Registry. Even looking at the compliance status of a small subset of these facilities shows how the Draft Modification may be unmanageable for the already resource-strapped Department.

Table 1, below, shows the compliance status of the 132 permittees that have completed their restoration requirements, as per the most recent site inspection reports for each site.⁸ As shown in Table 1, only 18 percent of these facilities have “satisfactory/compliance” status,

⁶ See *Pa. Pub. Interest Research Grp., Inc. v. P.H. Glatfelter Co.*, 128 F. Supp. 2d 747, 759 (M.D. Pa. 2001); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 523–24 (4th Cir.1999); *Citizens for a Better Env’t—Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1119 (9th Cir.1996).

⁷ COMAR 26.08.11.08-F

⁸ Based on site inspection report data from MDE (July 2018) and EPA’s ECHO database (last accessed Aug. 18, 2018).

according to their latest site inspection report (24/132).⁹ Over half of the sites have not been inspected by the Department, and thus their compliance status have not been determined (75/132).¹⁰ Meanwhile, 22 percent of these sites have been determined by MDE site inspectors to have a status of “noncompliance.”¹¹ These statistics mirror the findings uncovered in a recent report by EIP and CPR analyzing MDE’s enforcement and the regulated industries’ compliance with the General Permit (*see* EIP and CPR, Toxic Runoff from Maryland Industry (Nov. 2017), attached hereto as Exhibit B).

Table 1. Compliance Status of Facilities with Completed Restoration Requirements

Compliance Status of Facilities that have completed their restoration projects					
County	Additional Investigation Required	Noncompliance	Satisfactory/ Compliance	Not inspected	Grand Total
Anne Arundel	1	8	7	5	21
Baltimore		2	4	10	16
Baltimore City		6	1	8	15
Carroll		4	3	4	11
Cecil			1	6	7
Charles		2	1	2	5
Frederick			1	5	6
Harford		3		1	4
Howard	1			5	6
Montgomery		1	1	3	5
Prince George's		2	4	11	17
Washington	1	1	1	13	16
Wicomico		1		2	3
Grand Total	3	30	24	75	132

If the Department decides to allow trading, then at a minimum, the Draft Modification should not allow permittees to place credits on the Registry, and thus be valid or tradable, until MDE performs a site inspection that verifies that the permittee is in compliance with all provisions of the General Permit and the CWA. Given the unacceptably high rate of “noncompliance” and “not inspected” status among permitted industrial stormwater facilities, if MDE cannot commit to conducting site inspections before a permittee is allowed to generate credits on the Registry, then we urge MDE to forego trading with regard to the General Permit and the restoration requirements.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

B. MDE Should Not Allow Trading in Lieu of Meeting Restoration Requirements, or at a Minimum, Should Not Allow Permittees to Purchase Credits until MDE Verifies that the Permittee is in Compliance

The Trading Regulations only explicitly allow MDE to prevent permittees in noncompliance with permit terms from *generating* credits. The Trading Regulations do not explicitly prohibit noncompliant permittees from *purchasing* credits. This deficiency presents a potentially greater negative impact if trading were allowed as proposed in the Draft Modification, as each facility covered under the General Permit is not required to measure or otherwise calculate flow in order to determine the site’s actual nitrogen loads. By failing to require compliance on the part of credit purchasers, MDE would be allowing noncompliant sites to discharge dirtier stormwater runoff, in greater quantities, since they would not be restoring impervious surfaces. For example, AMG Resources Corporation, which operates a metal recycling facility in Dundalk, MD, has yet to complete its restoration requirements (shown in Table 2, below). This facility is in “noncompliance” according to its most recent site inspection report,¹² and has discharged stormwater over the past year with a concentration of Nitrate plus Nitrite Nitrogen that is **26,549 percent above** its 0.68 mg/L benchmark (shown in Table 3, below). The Trading Regulations and Draft Modification would permit this facility to purchase credits in lieu of restoring 20 percent of its impervious surfaces.

The compliance profile for the 166 permittees that have not completed restoration requirements (shown in Table 2, below) is similar to that for permittees that have completed their restoration requirements (shown in Table 1, above).¹³ According to data provided by MDE, around half of the 166 permittees that have not completed restoration requirements have yet to be inspected (87/166).¹⁴ Around 27 percent of these facilities are in noncompliance (45/166).¹⁵ In contrast, only 18 percent of these facilities have been marked as “satisfactory/compliance” by MDE inspectors in their most recent site inspection reports (31/166).¹⁶

Table 2. Compliance Status of Facilities Yet to Complete Restoration Requirements

Compliance of facilities that have not completed restoration projects					
County	Additional Investigation Required	Noncompliance	Satisfactory/ Compliance	Not inspected	Total
Anne Arundel		6	4	3	13
Baltimore		12	6	7	25
Baltimore City		11	4	14	29

¹² See nt. 8.

¹³ See also Map of Industrial Stormwater Facilities with Chesapeake Bay Restoration Requirements, by Compliance Status, attached hereto as Exhibit C.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Compliance of facilities that have not completed restoration projects					
County	Additional Investigation Required	Noncompliance	Satisfactory/ Compliance	Not inspected	Total
Carroll	1	1		3	5
Cecil			1	7	8
Frederick		1	1	8	10
Harford	1	3	3	5	12
Howard		3		9	12
Montgomery		5	3	3	11
Prince George's	1	2	9	14	26
Washington				10	10
Wicomico		1		4	5
Grand Total	3	45	31	87	166

Out of the 166 facilities that are subject to, but have yet to fulfill, the Chesapeake Bay restoration requirement, 45 permittees are required to conduct benchmark monitoring. Of these 45 permittees, 20 exceed benchmark levels on an annual average basis based on the site's most recent four-quarter sampling results (as shown in Table 3, below).¹⁷

Table 3. Facilities with Annual Average Benchmark Exceedances Yet to Complete Restoration Requirements¹⁸

Facility Name	NPDES Permit No.	Pollutants above Benchmark
AmeriWaste Processing and Transfer Station	MDR002198	Total Suspended Solids
AMG Resources Corp.	MDR000083	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Nitrite + Nitrate; Total Suspended Solids; Zinc
Beltsville Auto Recyclers / Balto.	MDR003182	Aluminum; Iron
Cambridge Iron & Metal Company, Inc.	MDR000682	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Total Suspended Solids; Zinc
Canam Steel Corp.	MDR000917	Zinc
ClarkDietrich Building Systems	MDR002419	Zinc

¹⁷ These findings are based on the standard hardness-level for hardness dependent metals and have not been adjusted based on any site-specific hardness data.

¹⁸ Commenters acknowledge that benchmark concentration exceedances are not considered permit violations, but they do trigger corrective action requirements, and are indicative of the permittee's stormwater practices.

Facility Name	NPDES Permit No.	Pollutants above Benchmark
LKQ Pick Your Part (1206)	MDR002262	Iron
LKQ Pick Your Part (1209)	MDR002259	Iron
Maryland Metals, Inc.	MDR000749	Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Zinc
Montgomery Scrap Co.	MDR000668	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Zinc
Noxell Corp.	MDR003186	Nitrite + Nitrate
Old Fairfield LLC/Baltimore Scrap Corp.	MDR000094	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Zinc
Owl Metals	MDR003053	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Total Suspended Solids; Zinc
Philadelphia Quartz Corp.	MDR000432	Nitrite + Nitrate
Poor Boys	MDR002557	Aluminum; Iron
Pulaski Highway Auto, LLC	MDR003120	Aluminum; Iron
Reliable Recycling Center	MDR002268	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Total Suspended Solids; Zinc
Salisbury Scrap Metal, Inc.	MDR002278	Copper; Zinc
Save More Used Parts, Inc.	MDR000839	Aluminum; Iron; Lead
United Iron & Metal East, LLC	MDR002535	Aluminum; Chemical Oxygen Demand [COD]; Copper; Iron; Lead; Total Suspended Solids; Zinc

By failing to require compliance on the part of credit purchasers, MDE would be allowing noncompliant sites to discharge dirtier stormwater runoff, in greater quantities, since they would not be restoring impervious surfaces. In order to prevent this scenario from occurring, Commenters recommend that if MDE moves forward with the proposed Draft Modification to allow for trading, MDE should only allow facilities to participate in the trading marketplace, as either buyers or sellers of credits, if they are affirmatively shown to be in compliance with the rest of the terms in the General Permit. Sites that have not yet been inspected should not be presumed to be in compliance, and sites that have been issued notices of noncompliance should not be allowed to trade.

A. MDE Would Eliminate Reductions of Toxic Metals in Stormwater Discharges if Permittees Were Allowed to Purchase Credits in Lieu of Restoring Impervious Surfaces

Commenters strongly urge MDE against allowing those permittees subject to the Chesapeake Bay restoration requirements to purchase credits in lieu of restoring impervious

surfaces. A one-for-one trade for nitrogen takes away the co-benefits of these restoration requirements. As MDE acknowledged in its Response to Public Comments on the draft of the current General Permit, the “restoration requirements in Part III.A are the additional controls are specific to the Bay TMDL, however would provide benefits for other impairments as well.”

Stormwater discharges from these industrial sites may not only be contaminated by nitrogen, but also contain toxic metals and other dangerous pollutants, many of which bind to sediment.¹⁹ As estimated by MDE in several recent sediment-based TMDLs for local waters in Central Maryland, urban impervious landscapes generate roughly 5 tons of sediment per acre each year.²⁰ As explained in a recent report by EIP and CPR, “where the pollution profiles of buyers and sellers are vastly different, a one-for-one trade of nitrogen will not necessarily improve the environment or protect community health. In fact, such a trade could make matters worse for communities if the buyer is purchasing only a reduction of nitrogen in exchange for the permission not to control dozens, if not hundreds, of other toxic pollutants that would otherwise be captured.”²¹

The 2014 Chesapeake Bay Watershed Agreement recognized the potential negative impact of toxics and the importance of reducing toxic pollution in the Bay watershed. A goal of the Agreement is to “[e]nsure that the Bay and its rivers are free of effects of toxic contaminants on living resources and human health.”²² “Toxic contaminants harm fish and wildlife in the Bay and its watershed and create risks to human health that limit the amount of fish that people can eat. Reducing the impacts of toxic contaminants is critical to improve the health of fish and wildlife, thereby improving their recreational value for citizens.”²³

As mentioned above, out of the 166 facilities that are subject to, but have yet to fulfill, the Chesapeake Bay restoration requirement, 45 permittees are required to conduct benchmark monitoring. The Department recognizes that toxic metals from these 45 sites can be a concern, as all 45 of these permittees are required to conduct benchmark monitoring for one or more toxic pollutants, such as lead, zinc, and copper. Of these 45 permittees, 17 exceed benchmark levels on an annual average basis for one or more toxic metal pollutants, based on the site’s most recent four-quarter sampling results (as shown in Table 2, above).²⁴ Further, the average percentage exceedance of toxic metals in the stormwater discharged from these sites, based on the latest four-

¹⁹ Chesapeake Stormwater Network, Potential Benefits of Nutrient and Sediment Practices to Reduce Toxic Contaminants in the Chesapeake Bay Watershed (last accessed on Aug. 28, 2018), available at http://chesapeakestormwater.net/wp-content/uploads/dlm_uploads/2016/02/Toxics-Report-1.pdf.

²⁰ See e.g., Maryland Department of the Environment, Total Maximum Daily Load of Sediment in the Non-Tidal Patuxent River Lower Watershed, Anne Arundel, Calvert, Charles, Prince George’s and Saint Mary’s Counties, Maryland (last accessed on Aug. 28, 2018), available at https://mde.maryland.gov/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/Pax_River_Lower_Sediment/PATXL_SedTMDL_060418_final.pdf#page=28.

²¹ Exhibit A, p. 13.

²² Chesapeake Bay Program, 2014 Chesapeake Bay Watershed Agreement, p. 8.

²³ *Id.*

²⁴ These findings are based on the standard hardness-level for hardness dependent metals and have not been adjusted based on any site-specific hardness data.

quarters of data, are at least two times greater than benchmark levels (217 percent for Lead, total) and as high as 26 times greater than benchmark levels (2,640 percent for Copper, total) (as shown in Table 4, below).

Table 4. Average Percent Over Four-Quarter Benchmark Levels for Toxic Metals²⁵

Pollutant	Percent Exceedance Above Benchmark
Aluminum, total	365%
Copper, total	2,640%
Iron, total	555%
Lead, total	217%
Zinc, total	454%

By allowing these permittees to purchase nitrogen credits instead of restoring impervious surfaces, MDE would be undercutting any reductions in toxic metals. Without conceding that the trading proposal is a good or defensible idea, Commenters would like to observe that one way to minimize the potential damage would be to restrict trading to General Permit holders. In other words, MDE would only allow industrial stormwater sources to purchase credits from other industrial stormwater sources covered by the General Permit. But this would not be good enough, because it would still allow for trades between dissimilar sources, and could still eliminate important co-benefits.

To adequately protect Maryland’s waterways, we strongly urge MDE to restrict any trading of restoration requirements to sites covered under the General Permit and belonging to the same sectors (as defined in the General Permit) and within the same sub-watershed. Allowing trading from other sectors in different watersheds would negatively impact local water quality and would be sacrificing co-benefit improvements such as toxics reductions and flood control in areas such as Baltimore City, Baltimore County, and Prince George’s County as discussed in sections above and below. The Trading Regulations allow the Department to do adopt such standards. As per COMAR 26.08.11.09-F, “[p]ermits may contain conditions on the use of certified credits, including:...(2) [w]hen, *and from what source*, certified credits may be acquired by the permittee” (emphasis added).

B. MDE Would Eliminate the Co-Benefit of Flood Mitigation if Permittees Were Allowed to Purchase Credits in Lieu of Restoring Impervious Surfaces

Commenters strongly urge MDE against allowing those permittees subject to the Chesapeake Bay restoration requirements to purchase credits in lieu of restoring impervious surfaces. The Draft Modification and Maryland Trading Regulations would allow permittees

²⁵ These findings are based on the standard hardness-level for hardness dependent metals and have not been adjusted based on any site-specific hardness data.

subject to the Chesapeake Bay restoration requirements to purchase credits from *any* permitted facility on the Registry. For example, an auto salvage yard would be able to purchase nitrogen credits placed on the Registry from a wastewater treatment plant. However, this one-for-one trade for nitrogen fails to take into account and thus relinquishes another crucial co-benefit of the restoration requirements: mitigation of flooding and flooding hazards to communities in urban areas. In addition to having an effect on local streams, both in water quality and streamflow, impervious surfaces can change the flooding characteristics of local waterways.²⁶

According to data provided by MDE, a third of the permittees that would have the ability to purchase nitrogen credits in lieu of completing their Chesapeake Bay restoration requirements are located in Baltimore City (25 permittees), Baltimore County (29 permittees), and Prince George’s County (26 permittees). *See* Table 2. Likewise, these same three counties also have the most permittees that have yet to meet restoration requirements. In addition, Baltimore City, Baltimore County, and Prince George’s County are three of the most densely populated counties in Maryland and have among the highest concentration of impervious cover.

This is significant because urbanization leads to increased stormwater runoff and generally increases the size and frequency of floods and may expose communities to increasing flood hazards.²⁷ Urbanization allows for more stormwater runoff because impervious surfaces – by replacing vegetation and porous surfaces – reduce the area where stormwater can infiltrate the ground.²⁸ Thus, more stormwater runoff occurs – runoff that must be collected by extensive drainage systems that combine curbs, storm sewers, and ditches to carry stormwater runoff directly to streams.²⁹ More simply put, in a developed watershed, much more water arrives into a stream much more quickly, resulting in an increased likelihood of more frequent and more severe flooding.³⁰ An average of 16.7 MGD of precipitation is estimated to fall on the approximate 900 facilities subject to the General Permit, based on MDE’s estimations from 2012.³¹

Climate change increases the risk and severity of flooding, which makes this important co-benefit of impervious surface restoration requirements even more critical. As cited in a report by the Maryland Commission on Climate Change, the U.S. Climate Change Science Program “concludes that extreme precipitation episodes (heavy downpours) have become more frequent and more intense in recent decades over most of North America and now account for a larger

²⁶ U.S. Geological Survey, Impervious Surfaces and Flooding (last accessed Aug. 24, 2018), *available at* <https://water.usgs.gov/edu/impervious.html>.

²⁷ U.S. Geological Survey, Fact Sheet 076-03 Effects of Urban Development on Floods (last accessed Aug. 24, 2018), *available at* <https://pubs.usgs.gov/fs/fs07603/>.

²⁸ *Id.*

²⁹ U.S. Geological Survey, Impervious Surfaces and Flooding (last accessed Aug. 24, 2018), *available at* <https://water.usgs.gov/edu/impervious.html>.

³⁰ *Id.*

³¹ Maryland Department of the Environment, 12SW - General Permit for Stormwater Discharges Associated with Industrial Activity Fact Sheet (last accessed Aug. 28, 2018), *available at* https://mde.maryland.gov/programs/Permits/WaterManagementPermits/Documents/GDP%20Stormwater/12_SW_FactSheet_Final.pdf.

percentage of total population.”³² According to the U.S. Global Change Research Program, “the frequency of heavy downpours is projected to continue to increase [with time],” with the Northeast, already experiencing a 71 percent increase in precipitation over the last 50 years.³³ By allowing industrial stormwater permittees to purchase credits instead of restoring impervious surfaces, MDE is allowing an increase in stormwater flow and flooding. This is not just a theoretical risk. Sites that fail to restore impervious surfaces will have greater flow volumes than they would otherwise.

Thus, Commenters strongly urge MDE against allowing permittees to purchase nitrogen credits in lieu of completing their restoration requirements. At a minimum, the Department should only allow permittees to purchase credits from other facilities that are subject to the General Permit and have restored impervious surfaces above the 20 percent of acreage required under the General Permit.

III. MDE SHOULD NOT ALLOW FACILITIES WHO OTHERWISE HAVE NO RESTORATION REQUIREMENTS TO GENERATE MARKETABLE CREDITS

The Draft Modification would allow “[a]ll facilities, including those smaller than 5 acres, [to] have the option to perform restoration to create marketable credits in accordance with [the] final Maryland Water Quality Trading Program regulations” (COMAR 26.08.11). According to the Trading Regulations, “baseline” “means the practices, actions, or levels of nitrogen, phosphorus, or sediment reductions that must be achieved *before* a credit seller becomes eligible to generate credits, enter the trading market, and trade credits.” COMAR 26.08.11.03-B(7) (emphasis added). The Trading Regulations further provide that the “baseline for a stormwater point source is the restoration requirement of the stormwater point source’s current NPDES discharge permit.”³⁴

MDE proposes to allow permittees without a restoration requirement to generate credits, but it is unclear from the Draft Modification how the Department will determine the baseline for facilities not subject to the General Permit’s Chesapeake Bay restoration requirements. This is an important consideration because permittees that are not required to meet restoration requirements may have otherwise chosen to restore impervious surfaces as a control measure necessary to comply with other provisions of the General Permit (e.g., as a corrective action triggered by a four-quarter benchmark exceedance where MDE determines that existing control measures are not stringent enough for the site’s discharge to meet water quality standards). MDE should not allow these same facilities to double-count previously installed control measures by subsequently selling credits on the Registry. If it did, the Department would be allowing trades to occur that, in actuality, would amount to a step backward in achieving healthier waterways. In order to prevent this

³² Science and Technical Working Group Report to the Maryland Commission on Climate Change, Chapter Two: Comprehensive Assessment of Climate Change Impacts in Maryland (July 2008), *available at* <http://www.mde.state.md.us/programs/Air/ClimateChange/Documents/FINAL-Chapt%202%20Impactsweb.pdf> (citing U.S. Climate Change Science Program, Synthesis and Assessment Products).

³³ U.S. Global Change Research Program, National Climate Assessment (2014), *available at* <https://nca2014.globalchange.gov/report>.

³⁴ COMAR 26.08.11.05-D.

scenario from occurring, MDE would need to establish baselines for each of the facilities attempting to sell marketable credits, and not assume that restoration of any impervious surfaces at these sites generates such credits. Unless MDE is able and willing to do so, we recommend that the Department forego allowing these facilities to generate marketable credits.

IV. THE REPORTING REQUIREMENTS IN THE DRAFT MODIFICATION DO NOT ADEQUATELY ALLOW FOR PUBLIC TRANSPARENCY AND ACCOUNTABILITY

According to proposed Appendix G of the Draft Modification, facilities covered under the General Permit that are seeking to generate marketable nitrogen credits by restoring impervious surfaces at their sites “must use assessment tools consistent with the Chesapeake Bay Program modeling tools and accepted by the Department.” However, “[a]ny assumptions or backup data used in the calculations of credits must be maintained on-site.” *See* Draft Modification, Appendix G. This provision in the Draft Modification, if finalized, would place additional strain on site inspectors who would need to physically visit the facility in order to review its calculations and data and would keep this information outside the scope of the Maryland Public Information Act.

For point sources with measurable loads, the generation of credits is more readily verifiable through publicly accessible discharge monitoring reports on the U.S. Environmental Protection Agency’s Enforcement and Compliance History Online (ECHO) website. In contrast, it would be next to impossible for citizens to verify the acreage of impervious surface restored above the required 20 percent without access to the same data used by facilities.

For the above reasons, Commenters recommend that MDE require permittees to submit their methods of calculations and data to the Department, and for MDE to proactively place these records on its website for citizens to access. For example, these records should be made available through the Department’s Wastewater Permits Interactive Search Portal, accessible through <http://mes-mde.mde.state.md.us/WastewaterPermitPortal/>. At a minimum, these records should be made available through Maryland Public Information Act requests to MDE. This would lighten the strain placed on site inspectors who otherwise must physically visit the facility in order to review these calculations and data. Further, this would promote public transparency and accountability, as the public would be able to obtain and verify these important calculations.

V. EXTENSION OF THE DEADLINE TO MEET RESTORATION REQUIREMENTS IS UNFAIR TO PERMITTEES WHO HAVE TAKEN TIME AND UTILIZED RESOURCES TO COMPLY WITH SUCH REQUIREMENTS

In its Response to Public Comments for the current iteration of the General Permit, MDE explicitly stated that it “cannot accommodate extensions” when replying to the comment that the “Department should include a provision to allow on a case by case basis an extension of the

requirement to complete restoration.³⁵ Yet the Draft Modification would allow “those facilities subject to the restoration requirement of this permit that have not fully completed those requirements by December 31, 2018” to complete the work “no later than December 31, 2020.”³⁶ Around 132 permittees have completed their restoration requirements, and 166 permittees have not. *Cf.* Table 1 *with* Table 2. In other word, roughly half of the permittees have already complied. The extension of the deadline is unfair to these permittees, rewards noncompliance, and disincentivizes future compliance.

Thank you for considering our comments.

Sincerely,



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³⁵ MDE, Response to Public Comments re: State Discharge Permit Application No. 12SW (Oct. 31, 2013), pg. 35, available at <https://mde.maryland.gov/programs/Permits/WaterManagementPermits/Documents/GDP%20Stormwater/12SW-%20Final%20Determination%20Response.pdf>.

³⁶ Draft Modification at 13A.

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