

## **Recommendations for trash controls in the Montgomery and Prince George's Counties' MS4 Permits**

**Honor the Clean Water Act and MDE's (and the counties') commitments to a trash-free Potomac by 2013 through implementation of trash reduction technologies and through required annual trash reductions of 15% per year, baseline monitoring and measurable goals for litter controls; recycling enforcement and trash traps.**

**The Problem:** An estimated 20,000 tons of trash reaches the Anacostia River *every year*. As for the Potomac, over 20 elected officials have agreed that the benefits of the watershed “are severely impaired by the many forms of trash carried by the Potomac and its tributaries, such as the Anacostia River.” Where trash accumulates in these watersheds, it is ugly, potentially dangerous, and prevents the use of these waters for the purposes they have been designated to serve. The problem is so severe in the Anacostia watershed that Maryland and the District of Columbia have both listed the river as impaired for trash. However, even though storm sewers are one of the principal recognized sources of trash going into the river, and even though 34 percent of the Anacostia watershed is located in Montgomery County, the county MS4 permit presently lacks specific trash limitations, and has only a weak requirement that the county must provide information about a host of water quality issues to the public, including “[l]itter control, recycling, and composting.” Prince George's County likewise shares significant blame; it contains approximately 49 percent of the Anacostia watershed.

**The Solution:** The permits must contain meaningful requirements that address the system's contribution to the current trash pollution problem. This obligation stems from numerous sources.

First, the leading decisionmakers throughout the watershed – including Governor Ehrlich and County Executives Duncan and Johnson —have already committed to a “Trash Free Potomac by 2013.” Achieving this goal will be impossible without restricting the trash pollution that comes from the storm water systems, which presently contribute significant amounts of trash to the watershed. Accordingly, signers of the Trash Treaty agreed that officials will “implement[] regional strategies aimed at reducing trash and increasing recycling.” And parties to the 2006 Action Agreement<sup>1</sup> committed, by March 2007, that “[k]ey Anacostia jurisdictions will adopt and begin to implement the Anacostia Watershed Trash Reduction Strategy as a model for other major subwatersheds.” The MS4 permits represent a real test of these politicians' resolve and that of the agencies that are charged with giving effect to this commitment – will the permits contain the concrete steps that are necessary to actually achieve the trash-free pledge, or will MDE's action be the first sign of an empty promise?

Second, despite listing the Anacostia as impaired, MDE has expressed a strong desire that the trash problem be addressed outside of the Clean Water Act's polluted waters cleanup

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<sup>1</sup> Signed by Maryland Secretary of Planning Scott on behalf of Governor Ehrlich, by Arthur Holmes, Montgomery County Director of Public Works and Transportation on behalf of County Executive Duncan, and by Michael Herman, Chief of Staff, on behalf of County Executive Johnson

regime, the Total Maximum Daily Load (TMDL) program. Specifically, MDE and EPA have recently written that “we know that the quickest and most efficient way to achieve the desired result of a cleaner river is to identify and implement programs and controls in the near term,” and that they “wish to work together with [Anacostia] jurisdiction[s] to accelerate opportunities to remedy the Anacostia trash impairment in advance of a TMDL.” This is a possibility; EPA’s regulations and guidance recognize that if an impaired water body will be cleaned up because of requirements to reduce pollution, a TMDL may not be needed. 40 C.F.R. § 130.7(b)(1); Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, at 54-56 (July 29, 2005). If the state is serious about pursuing this option, the permits must contain sufficient limitations on trash pollution to eliminate the system’s contribution to the recognized water quality standards violation so that the impairment can be remedied. The recent MDE/EPA letter seems to recognize this principle by indicating that avoiding a TMDL will involve “implementation targets and commitments, which could include budgetary obligations, *permit conditions*, and new ordinances that will lead to trash loading reductions” (emphasis added).

Third, restricting trash pollution is necessary to meet Maryland water quality standards, which each permittee must do. Under applicable EPA regulations, “each NPDES permit shall include conditions” which, among other things, must “[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1). Similarly, Maryland law specifies that reissued permits must comply with a variety of requirements, including water quality standards. COMAR § 26.08.04.02(A)(1)(b). These requirements apply with equal force to permits for stormwater systems. *See, e.g.*, Memorandum from E. Donald Elliott, EPA General Counsel, to Nancy J. Marvel, EPA Regional Counsel, “Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991) (“The better reading of Sections 403(p)(3)(b) AND 301(b)(1)(C) is that all permits for MS4s must include any requirements necessary to achieve compliance with WQS.”).<sup>2</sup>

As MDE knows, and as the comments of 24 interested groups explained in requesting that the Anacostia watershed be listed as impaired, the state’s water quality standards directly address trash. In the state, all waters are designated at least as “Use I” waters, which means they must protect several basic uses, including water contact recreation. COMAR § 26.08.02.07(E)(5) (“Any stream segment not listed in Regulation .08 is Use I water”); *id.* (“All surface waters of this State shall be protected for water contact recreation, fishing, and protection of aquatic life and wildlife.”). In addition, Maryland has a generally applicable narrative water quality criterion which provides that “[t]he waters of this State may not be polluted by . . . [a]ny material, including floating debris, . . . in amounts sufficient to . . . [b]e unsightly; . . . [c]reate a nuisance; or . . . [i]nterfere

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<sup>2</sup> At a minimum, MDE has the authority to insist on water quality-based effluent limitations in the MS4 permit. *See City of Abilene v. U.S. EPA*, 325 F.3d 657, 660-61 (5<sup>th</sup> Cir. 2003) (“The plain language of § 1342(p)(3)(B)(iii) clearly confers broad discretion on the EPA to impose pollution control requirements when issuing NPDES permits.”); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-67 (9<sup>th</sup> Cir.1999) (holding that permitting authority is not required to impose water quality-based limitations, but has the authority to do so).

directly or indirectly with designated uses. . . .” COMAR § 26.08.02.03(B)(2). State law further defines a “nuisance” to include “[a]n excessive accumulation of trash or garbage. . . .” MD Code, Health – General, § 20-301(a)(8).

MDE recognized that these standards are obviously violated in the Anacostia watershed. But they are also obviously violated whenever trash makes conditions unsightly or interferes with water contact recreation, which common sense and experience tells us will happen when even a very small amount of trash is found in the water. Accordingly, water quality-based effluent limitations will need to effectively eliminate trash discharges to the state’s waterways.

Fourth, the Clean Water Act specifies that pollutants discharged from MS4s must be reduced to the “maximum extent practicable,” and this will require MDE to survey the available trash control techniques and technologies and include those options that represent MEP in the permits. Among the things that need to be evaluated are: controls on new development and redevelopment; multi-language signage and education; enhanced street sweeping; catch-basin clean out program; BMP maintenance; enforcement of litter laws; recycling enforcement and education; approaches identified by the Trash Free Potomac Watershed Initiative’s Research and Management Committee; and methods recognized by similarly-situated jurisdictions, such as Los Angeles. *See, e.g.*, California Regional Water Quality Control Board, Trash Total Maximum Daily Loads for the Los Angeles River Watershed (Draft, July 7, 2006) (discussing several trash removal options and also analyzing cost information). These types of trash control and elimination techniques should be written into the MS-4 NPDES permits along with clear, observable and quantitative actions, and dates certain for their implementation.

#### **Specific Recommendations:**

- The upcoming revision to Montgomery County’s MS4 permit must include and require the system to implement all available trash control techniques so that releases are reduced to the maximum extent practicable, including both best management practices and trash control technologies.
- The permit must reduce the MS4’s current contribution of trash to the watershed by demonstrable amounts in order to address the current violation of water quality standards in the Anacostia and prevent violations in other waters. In order to achieve the commitments made throughout the region to a trash-free Potomac watershed by 2013, this obligation should take the form of a program to conduct baseline monitoring in the first year, with a requirement to reduce trash loading to the watershed by 15% of the baseline in each subsequent year of the permit, and with continued monitoring to ensure compliance and recalculate the baseline if necessary.
- The permit for Prince George’s County must be reopened and revised to incorporate parallel provisions to address trash.