**TD Permit Comments**

Regarding

General Permit for Discharges from Stormwater Associated with Industrial Activities

State Discharge Permit Application No. 20SW

NPDES Permit No. MDR00000

August 27, 2021

# Contents

The comments from all commenters have been included in this document. One notable exception is the document provided by the Chesapeake Accountability Project or CAP. CAPs comments spanned over 100 pages, which included an intro addressing various criticisms of the Department and the draft permit, a six (6) page executive summary that summarizes comments/recommendations found in the detail portion of the document, an eleven (11) page section of facts that include MS4 input, data from the permit's fact sheet, PIA requests from the Department, climate background, introduction to Dr. Roseen's opinions. The Department captures the actual recommendations that follow those two sections (Page 22 through 110) and has included all those following comments in this document. A separate response to comments document address each of the comments.

## 1. COMMENT CATEGORY – Climate Change.

### Grouping – Changes in Climate Impact on WQS

"The Department should revise the Permit to include a reopener clause, committing to modify the Permit to address forthcoming climate change analyses, reports, and plans relevant to this Permit. Critically, the Department should ensure that reasonable modifications are made to this Permit no later than 2022 for the purpose of incorporating the state's commitment to address climate-attributable pollution loads to the Chesapeake Bay as part of the Bay TMDL mid-point assessment. Maryland committed to submit to EPA an addendum to its Phase III WIP that addresses previously unaccounted for loads of pollution attributable to climate change. Preliminary modeling of these loads by the Bay Program indicates that Maryland's share could amount to 2.19 million pounds of nitrogen per year by 2025 that are not currently accounted for by the state's WIP or in existing permitting programs. Maryland's climate addendum is due for submission in 2021, which is several years before this Permit will expire. The climate addendum is likely to consider new and revised commitments relevant to sources of climate-attributable pollution, including, for example, potential increases in stormwater discharges attributed to increasing intensity and quantity of precipitation within the region."[1]

"The Chesapeake Bay Program allocated Maryland and other watershed states a new, increased pollution reduction requirement because of climate change. In 2022, the State must have a plan to reduce an additional 1.1 million pounds of nitrogen by 2025. This additional reduction is needed to account for increased loads driven by climate impacts with the watershed.
Chesapeake Bay Program models show an increasing amount of nitrogen pollution from the stormwater sector over time, unlike all other sectors that are making progress to reduce pollution under the Bay Blueprint. Updating the volume control standards with more current precipitation data that include recent extreme storms and making those changes in the design manual within this permit term are needed to reverse this disturbing trend."[2]

"In addition, it is imperative that the Department build appropriate assumptions into its planning models and require monitoring sufficient to characterize the dynamic pollution loads associated with industrial facilities and how climate is affecting those loads. So far, the Department has arbitrarily failed to conduct any analysis of how changing precipitation patterns will influence the impact of industrial stormwater on water quality, and how the Permit might be changed to adequately protect water quality. If the Department takes the position that there is not enough information to perform the necessary analysis, then

[1] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[2] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation.

the Department should require more monitoring with a specific focus on this issue. Furthermore, failing to model and account for increases in rainfall and to adequately update the Permit to that effect jeopardizes the permit holder's financial and other resource investment in their businesses and operations."[3]

"***The Department Must Evaluate Climate Impacts on the Permit's Ability to Meet State WQS and the 2014 Chesapeake Bay Watershed Agreement.***
By signing the 2014 Chesapeake Bay Watershed Agreement, Maryland agreed to take measures to restore and support the resiliency of the Chesapeake Bay to a changing environment. Under this agreement, Maryland has specifically agreed to take measures to reduce pollutants and toxic contaminants, to improve water quality, and to increase climate resiliency of the Chesapeake Bay. For instance, the Agreement notes that "[c]hanging climatic and sea level conditions may alter the Bay ecosystem and human activities, requiring adjustment to policies, programs and projects to successfully achieve our restoration and protection goals for the Chesapeake Bay and its watershed." The Agreement further specifies that "[t]his challenge requires careful monitoring and assessment of these impacts and application of this knowledge to policies, programs and projects." The Permit in its current form does not have appropriate conditions or terms to properly monitor and assess climate impacts and meet the challenge of adjusting "policies, programs, and projects to successfully achieve" Maryland's restoration and protection goals under the 2014 Bay Watershed Agreement. At minimum this Permit renewal presents the Department with the opportunity to enhance the monitoring and data collection at 20-SW sites to gather more data that can be analyzed to assess the impact of increased extreme storm events on stormwater runoff, water quality and public health impacts from these sites. As stated above, PIA records indicate that the Department failed to adequately assess and consider climate change in developing the 20-SW and failed to assess how industrial stormwater discharges will contribute to the reduction of climate attributable Bay pollution loads."[4]

"Commenters have provided the Department with information pertaining to climate change considerations in the factual background above. The Department must consider the information cited and attached to this comment as well as other technical information and legal authorities and then make revisions to this draft permit that are consistent with the Department's CWA obligations to protect water quality. To issue the permit in its current form without evidence of any consideration of relevant climate information would be an arbitrary and capricious determination by the Department. The Permit is not adapted to present-day climate impacts and therefore fails to protect water quality as a matter of technical and legal sufficiency. To address these legal and technical insufficiencies, the Department must take the time to review the information we have provided as well as other resources and develop updates to storm design standards and BMPs required in the Permit. This effort should be undertaken immediately so that new standards are incorporated in their Permit or if promulgated after this permit is renewed then implemented into the Permit via a reopener clause."[5]

## Grouping – Changes in Designs or Plans based on Changes in Climate

"***The Permit Must Provide for a Mechanism to Adapt the Permit as State Agencies and Partners Release New Data and Impact Assessments.***
The Department must carefully review the recently enacted SB 227 / HB 295 of 2021, as this new law creates new obligations on the Department pertaining to stormwater management regulations and regular updates to those regulations that incorporate the most recent precipitation data available. The

[3] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[4] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[5] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

Department's Industrial Stormwater division must be involved in this update process to determine how the required update and new data can be properly incorporated into this Permit going forward.
…
To ensure new developments, data, information and experience with storms are properly addressed at any particular site, the Department should require regular SWPPP updates similar to that required in EPA's 2021 MSGP, part 6, which provides: "Facilities must keep their SWPPP up-to-date throughout their permit coverage, such as making revisions and improvements to their stormwater management program based on new information and experiences with major storm events." MDE must include similar language in the Permit's SWPPP conditions.
…
Lastly, it should also go without saying that stormwater BMPs must be designed to accommodate the storms of the next five years, not the storms of twenty years ago. This is the only way to have any hope of achieving the results that the Permit is intended to achieve."[6]

"Additionally, MDE should require that permittees updated their SWPPP's when new precipitation data becomes available, this would ensure that the new data and new stormwater control measures and designs would be implemented on a particular site as soon as possible and would not have to wait for the Department to reopen/renew the permit with the new data incorporated."[7]

"The permit represents a failure to address increased rainfall intensity, duration and frequency due to changing climate. It is unclear how more intense rainfall will affect pollution loading or biological impairment as a result of increased loads by themselves or coupled with hotter water discharges."[8]

"CBF tracks progress of the state's stormwater permits to accomplish nutrient and sediment load reductions under the Chesapeake Bay Blueprint. Increased precipitation volume and intensity has negative implications for water quality and aquatic ecosystems. As described by Hye Yeong Kwon, Executive Director of the Center for Watershed Protection, "Aquatic life can't tolerate the toxics in runoff, and there are bacterial problems and diseases that emerge as a result of some of these pollutants." With climate change potentially increasing the amount of precipitation, localized flooding can result as once designated 100-year storms occur with greater frequency. The Fourth National Climate Assessment predicts precipitation duration and intensity will increase with climate change in the northeastern United States. Stormwater practice design are based on the use of decades-old precipitation data as a guide for current and future volume control. This historic data no longer reflects the reality of storm intensity, duration and frequency in Maryland."[9]

"The CWA requires the Department to consider climate change impacts because the impacts of climate change could affect whether the Permit, or activities conducted pursuant to the Permit, achieve the permit's purpose of attaining WQS or meeting the requirements of the Act. The CWA requires that the Department issue a permit that will maintain and meet WQS and criteria. Inherent in the Department's assessment of this requirement is the consideration of how changes in precipitation in Maryland may impact the effectiveness of this Permit in maintaining water quality throughout the state. A reasonable consideration of climate change involves using, or requiring the use of, updated and climate-informed precipitation data, water quality information, technology, and stormwater management methods, among

[6] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[7] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[8] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing
[9] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation.

other practices. The Department has acknowledged this fact in a recent letter regarding Maryland Senate Bill 0227."[10]

"Not only did the Department fail to make these considerations but this failure results in a Permit that the Department cannot ensure will be protective of water quality and public health. The permit is grounded in outdated information and data pertaining to precipitation trends and projections for Maryland. Indeed, the Department's reliance on storm design standards based upon precipitation data from the early 1990s and earlier does not bear a rational relation to the Permit's purpose of ensuring compliance with WQS under present-day environmental conditions. This is also inconsistent with the goal and purpose of the CWA as a technology forcing statute requiring the continued updating of pollution reduction technologies and BMPs to further ratchet down water pollution towards the ultimate goal of elimination of that pollution to waters of the state."[11]

"***The Permit Fails to Adequately Account for a Rapidly Changing Climate***
Climate change must be adequately considered and addressed by the Department in the development of the Permit before its reissuance, and climate impacts, as well, must be adequately addressed by covered facilities in the selection, design, and maintenance of BMPs and other stormwater controls necessary to ensure compliance. As discussed in the Factual Background to this comment, climate change is already impacting the intensity, duration, and frequency of precipitation events in Maryland and resulting impacts to BMP effectiveness, stormwater controls, water quality, and public health relevant to this Permit, which must be more responsive and adaptive to these developing trends and water quality challenges. Maryland water quality and public health cannot risk waiting another five years or longer before the general permit is updated to adequately address climate change and its impacts on stormwater runoff. The Permit contains three provisions that discuss or address climate change. The comment and recommendations below will address some of these specific references in the Permit as well as make additional recommendations and raise other concerns."[12]

"***The Department Must Give Permittees and the Public Fair Notice of Climate Requirements.***
The Permit's climate-related provisions do not give permittees or the public fair notice of what is required. This creates a risk that permittees will face arbitrary enforcement actions and it fails to notify the public about the protections and enforcement provisions in place to protect water quality and public health. More detail and information are required so that permittees will have fair notice of how to comply with the permit. For instance, Part III.B.1.a.viii requires permittees to "consider … adapting operations to address climate change impacts." In order to give permittees fair notice, this section of the Permit should detail the impacts the Department has in mind—i.e., increased precipitation, stronger floods, etc. To provide permittees and the public with clear notice about the permit requirements, the Department should adapt storm design standards to be responsive to updated IDF curves and analyses, these updated standards could also be informed by other states studies, nuisance flooding maps, sea level rise projections and Special Flood Hazard Area designations. These updated design standards and updated data must be used to integrate climate change considerations into the BMPs required by the permit. Additionally, under Part II.F.1, the Permit urges permittees to consider climate adaptation measures, but the existing language indicates these steps are encouraged and not mandatory. The Department should strengthen the existing provision to require permittees to comply with these measures and specify how

[10] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[11] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[12] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

they have complied. This would allow the Department to track what measures are in place and their effectiveness."[13]

"**The permit fails to adequately account for a rapidly changing climate. The Department should update this permit's volume control standards with more current precipitation data and make accompanying changes in the design manual.**
The permit fails to acknowledge changing weather patterns linked to climate change that couple with growing impervious surface acreage to generate larger volumes of runoff, higher intensity storms and deleterious downstream erosion. Rainfall data also show increasing frequency of severe storms because of climate change."[14]

"A Permit that is not updated and does not contain complete information for permittees to properly design and implement stormwater control measures will also make this Permit difficult if not impossible to implement and comply with. This will increase permittees' legal liability to the Department and citizen enforcement. A Permit that is adequately updated and adaptable will be a benefit to all stakeholders involved with industrial stormwater"[15]

"***The Department Must Clarify that Good Engineering Practice Necessarily Requires Adaptation to Climate Impacts and Risks.***
The Permit at Part III.B.1 (pg.15) states that "[t]he selection, design, installation, and implementation of these control measures must be in accordance with good engineering practices." This is the Permit's only reference to "good engineering practices" and as such this statement leaves much up to interpretation. As discussed below, the Department must elaborate and provide more details and guidance to permittees regarding this provision.
Although "good engineering practices" is ambiguous and open-ended, as discussed below, at least one court and the EPA, in at least one instance, have stated that such practices include accounting for and adapting to climate change. In addition, "good engineering practices" reasonably refers to standards and practices articulated by leading professional engineering groups, the most prominent of which have recognized the importance of addressing climate change. The following are some illustrative examples for the Department to consider:
● In May 2016, EPA entered into a consent decree with the Town of Hull, Massachusetts to resolve alleged NPDES permit violations. Although the permit was for a wastewater treatment plant (not stormwater), the consent decree links "sound engineering practices" and climate change: "All work pursuant to this Order shall be performed using sound engineering practices to ensure that construction, management, operation and maintenance of the Town's Collection System complies with the CWA, including practices to improve the resilience of the sewer system to the impacts of climate change."
● In Conservation Law Foundation v. ExxonMobil, the U.S. District Court for the District of Massachusetts concluded that (1) Exxon's individual industrial stormwater permit "requires Exxon to consider foreseeable severe weather events, including any climate change-induced weather events," and (2) "good engineering practices" include "consideration of foreseeable severe weather events, including any caused by climate change." 448 F.Supp.3d 7 n.4 (D. Mass. 2020).
● In City of New York v. Anglebrook Ltd. Partnership, the Southern District of New York interpreted a NPDES stormwater permit's guidelines for SWPPP preparation, including the directive to prepare SWPPPs in accordance with "good engineering practices." The court did not define that phrase, but it held that the guidelines overall are "intended to be flexible rules which contemplate—and indeed

[13] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[14] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation
[15] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

require—applicants to exercise good engineering practices, informed by professional judgement and common sense." This decision can be read to require consideration of climate change impacts on the design and implementation of stormwater control measures under the Permit.

● Numerous Industry Groups have also emphasized the importance of climate change in "good engineering practices". The American Society of Civil Engineers Sustainability Roadmap states:

> "[Integrating Sustainability] into professional practice is required to address changing environmental, social, and economic conditions ethically and responsibly. Although challenging issues such as climate change, urbanization, and the rapid pace of technological advancement create opportunities, they also require serious re-evaluation of current professional practice and standards."

and

> "Clearly, previously reliable standards and protocols no longer suffice. Current prescriptive standards may apply in conditions of stationarity. However, where nonstationarity (a condition where statistical properties, such as mean or variance, of a data set are not constant over time) is prevalent, we must develop new standards and protocols that are performance-based rather than prescriptive. Those standards must address sustainability and resiliency of infrastructure, to ensures communities safety and its ability to recover from natural and manmade disruptions."

The Institution of Engineering and Technology has a Sustainability and Climate Change Position, which states: "It is essential that the longer-term impacts of any new technology and innovation are considered, that resilience and adaptation are built-in and that any view of the long term must consider the ethical implications on future generations and the impact on them by engineering decisions made today." Lastly, the World Federation of Engineering Organizations, which includes the American Society of Civil Engineers, has written a Model Code of Practice: Principles of Climate Change Adaptation for Engineers. This model code includes numerous references to climate change and that historical data and projections need to be adapted for future planning, some notable statements are found at pages 3, 7, 13, 15, 16, 17, 25.

These examples make clear that it is a good engineering practice to consider climate change in the design and implementation of stormwater control measures. Commenters recommend that the Department incorporate language that expressly includes climate impacts among the factors necessary to comply with good engineering practices. This should include proper preparation for future climate change events in the design, construction, and modification of industrial sites. In addition, permit reviewers should have climate change training to ensure they are accurately evaluating every permit for proper climate and precipitation changes. Currently, the state of Maryland, the Maryland Department of Natural Resources, and the Maryland Commission on Climate Change provide climate preparedness and infrastructure training through the Maryland Climate Leadership Academy. The Department, permit writers and permit reviewers must work with the Maryland Climate Leadership Academy to ensure their list of "good engineering practices" matches those of the Academy.

The Department should also:

● Include in the Permit a non-exhaustive list of what practices would fulfil the good engineering practice requirement, including a non-exhaustive list of present-day and future climate impacts that must be adapted to, as necessary, in the selection and design of SCMs to comply with the conditions and effluent limits of the Permit.

● Pursuant to the good engineering practices requirement of the Permit, provide permittees and the public with resources and other citations to professional engineering authorities that support consideration and adaptation of design based on climate impacts to precipitation and other climate impacts."[16]

[16] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

**Grouping – Flooding Risks**

"Maryland will soon also finalize several relevant climate studies, reports, and plans including, for example, a statewide plan to address nuisance flooding, an update to Maryland's modeling and mapping of 100-year flood-zones, and a water quality and climate change resiliency portfolio set to release in 2021. The Department must track these studies, reports, and plans and review them when they are available to determine if they will impact the terms, conditions, and design of this Permit."[17]

"The 2020 Accounting Guidance describes how additional impervious acre credits may be available to permittees that install BMPs designed to treat more than the required one inch of rainfall, recognizing that "[...]greater storage volume may be more resilient to changing weather patterns such as increasing annual precipitation and more frequent, intense short duration storms" and "helps reduce downstream flooding and channel erosion." Commenters agree that increasing the storage volume of stormwater BMPs is likely an important management strategy for permittees to adopt in order to adapt the design of BMPs to changing precipitation conditions, while producing additional co-benefits to mitigate downstream flooding. However, the additional prospective impervious acre credits offered by the Department do not alone address any change in the overall level of effort required of permittees to address increasing quantity and intensity of precipitation and flooding in Maryland, nor the watershed loads of nitrogen and phosphorus pollution attributable to climate change impacts that are not currently offset by Maryland's Phase III WIP for the Bay TMDL. The mere offer of potential credits for sizing up stormwater restoration BMPs is not alone an adequate approach to adapt the Permit to changed climate conditions."[18]

"Enhanced Control Measures for Extreme Flooding Conditions in Part III.B.1.a.viii.
In response to MDE's specific request for comment, ISRI does not support, as a practical matter, inclusion of enhanced control measures to address extreme flooding conditions. Proposed Part III.B.1.a.viii. would require facilities when selecting and designing control measures to consider "structural improvements, enhanced pollution prevention measures, and other mitigation measures, to minimize impacts from stormwater discharges from major storm events that cause extreme flooding conditions". The suggested measures include:

> *Reinforcing materials storage structures to withstand flooding and additional exertion of force;*
> *Elevating semi-stationary structures to the Base Flood Elevation (BFE) level or securing them with non-corrosive device to prevent them from floating away;*
> *Delaying expected deliveries or store materials as appropriate when a storm is anticipated within 48 hours;*
> *Temporarily storing materials and waste above the BFE level;*
> *Temporarily reducing or eliminating outdoor storage;*
> *Temporarily relocating any mobile vehicles and equipment to upland areas;*
> *Developing scenario-based emergency procedures for major storms that are complementary to regular stormwater pollution prevention planning and identify emergency contacts for staff and contractors; and*
> *Conducting staff training for implementing your emergency procedures at regular intervals.*

From a practical perspective, many of these activities and measures are especially challenging and perhaps infeasible for industrial sectors that have large outdoor operations with heavy equipment and materials, such as the recycling industry.
Some of these proposed activities and measures raise the question of whether temporary relocation of industrial vehicles, equipment, and/or materials into non-industrial areas of activity (e.g., employee

[17] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[18] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

parking lot) converts these non-industrial areas into areas of industrial activity. This could result in MSGP compliance issues.
As with the Proposed 2020 MSGP, the Draft 20-SW Permit does not define "major storm" or "extreme flooding event". Conceptually, some extreme flooding events might be so large that any of the contemplated activities and measures would be futile. Also, how would a permittee document that they considered each of the activities and measures under Part III.B.1.a.viii. and decided not to implement them? Could MDE disagree, and if so, what happens? The existence of this proposed provision raises all sorts of potential liability issues in the aftermath of a flooding event, whether "extreme" or not and whether from a "major storm" or not.
ISRI does not support inclusion of proposed Part III.B.1.a.viii. in the Final 20-SW Permit."[19]

## Grouping – Department Should Compare Other State Implementations

"***The Department Must Review and Consider How Other Jurisdictions and Entities Have Used Current and Projected Data to Create Climate Adjusted Storm Design Standards and BMPs.***
The Department must review the following examples and determine if similar methods could be used to update the Permit's storm design standards and BMPs to be adaptive to climate induced changes in stormwater runoff.
● The Chesapeake Bay Program - A recent memo within the Program summarized five recent studies "that downscaled precipitation projections for local stormwater management application." The memo also states that these downscaled precipitation projections are 'necessary to [] inform future stormwater design." The summary of these studies indicates that Rainfall Intensity Projections will increase across the watershed with increases ranging from 1% to 44%. The memo also states "that the use of IDF curves based on historic precipitation analysis are likely to underestimate future precipitation. Lastly, the memo notes a recently completed study of Maryland with resulting downscaled precipitation projections. Commenters urge the Department to track and communicate with the authors of this study and thoroughly analyze how the projected IDF curves that result may be implemented immediately into this Permit, through the use of a reopener, and/or updates to the storm design standards during the permit term.
● Chesapeake Bay Program Urban Stormwater Workgroup - This workgroup is developing a project to "develop future projected IDF curves for the entire Chesapeake Bay Watershed and host them on a web-based tool" with the goal "to design and build infrastructure assets to withstand anticipated future precipitation conditions, design standards should reflect future precipitation projections and not solely be based on historical precipitation records." We urge the Department to track and collaborate with this workgroup as necessary to implement the appropriate standards into the MS4 and to implement similar goals and motivations into the design and implementation of the MS4.
● Virginia Beach, Virginia - The City of Virginia Beach updated its Public Works Design Standards Manual in June 2020. These updates included the requirement that developers "plan for 20 percent more rainfall than current National Oceanic and Atmospheric Administration data calls for." This change was driven by studies from the City that indicated that "actual rainfall frequency depths in Virginia Beach are approximately 10% greater than those specified in NOAA" and "in order to address the need for more accurate design rainfall data and to consider projected increases in rainfall frequency depths over the next 30 years, rainfall depth-duration values were increased by 20% over NOAA Atlas 14 values." We urge the Department to conduct a similar analysis of Maryland as a whole, develop updated storm design standards applicable across the state and determine if any areas of the state require further enhancement of standards based on local/regional rainfall data.

[19] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

● Virginia Department of Transportation - "The Virginia Department of Transportation (VDOT) has also revised its bridge design manual to account for climate change. VDOT has implemented a 20% increase in rainfall intensity and a 25% increase in discharge in design of bridges."
● Maryland's Eastern Shore - The Eastern Shore Land Conservancy commissioned a study on extreme precipitation on Maryland's Eastern Shore. The conclusion of this study was that "extreme precipitation events are becoming more intense and bringing more rain, a trend which will continue and escalate in the coming decades. One of the key recommendations from the report was to "upgrade infrastructure to reflect future precipitation estimates".
● Anne Arundel County, Maryland - Updated 1-year storm designation to 2.7 inches in 2017.
● New Jersey - Executive Order 100 directs New Jersey Department of Environmental Protection ("NJDEP") to incorporate climate change in stormwater regulations, among other things.162 NJDEP issued an administrative order that sets deadlines for meeting NJDEP's obligations under EO 100. NJDEP also updated its Stormwater Best Practices Manual in March of 2021 to address climate change.
● New York - Recently, the New York State Department of Transportation has revised its highway design manual to account for future projected peak flow in culvert design. The change was a 20% increase. Additionally, New York City has issued the "Climate Resiliency Design Guidelines" (NYC Mayor's Office of Recovery and Resiliency, 2019). Among the guidelines provided is the recommendation that the current 50-year IDF curve be used as a proxy for the future 5-year storm (projected for the 2080s). The guidelines suggest that designers plan to use on-site detention/retention systems to retain the volume associated with that size storm event though it is not yet a requirement."[20]

## 2. COMMENT CATEGORY – Lack of Enforcement.

"The CWA and implementing regulations require permit conditions to ensure compliance with applicable CWA provisions and WQS. Without clear statements of what constitute permit violations, the Permit is much more difficult to enforce, which contributes to widespread noncompliance. Because the available data indicate that the Permit likely fails to protect water quality, the Permit conditions are not sufficient to ensure compliance with the CWA. Unenforceable language, lack of concrete standards, and confusing or duplicative standards in the Permit are examples of deficient permit conditions and must be strengthened."[21]

"***Permit Terms Must Be Enforceable as Required by Law***
In light of the widespread noncompliance and low rates of enforcement of such noncompliance, the provisions of the Permit must be made more enforceable. An unenforceable permit will not incentivize compliance and cannot ensure WQS will be met, as required by the CWA. Unless the Department places enforcement pressure on permittees to comply with benchmark monitoring requirements, the Department and the public will not even be aware of potential noncompliance with TBELs and the narrative WQBEL, which benchmark monitoring data may indicate. Many of Commenters' recommendations throughout this letter urge the Department to use more enforceable language, require more documentation be made publicly available, provide clearer, objective standards, and explicitly state when failure to take a required action will result in a permit violation; these recommendations are critical because unless the Permit is enforceable, it is unable to serve its purpose. An unenforceable permit is not a valid permit pursuant to the CWA and Maryland's authorization to implement the Act."[22]

[20] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[21] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[22] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

"***The Department Must Take Strong, Deterrent-Based Enforcement Actions Against Noncompliant Industrial Stormwater Permittees.***
To remediate the widespread and persistent noncompliance throughout the implementation of the 12-SW permit, the Department must use its full authority to undertake enforcement, including the issuance of appropriately deterrent-based penalties that also capture the economic benefit of noncompliance, and require appropriate injunctive relief against permit-holders seeking 20-SW renewal coverage. Those in noncompliance should not be afforded the opportunity to renew their permit until they can demonstrate a return to compliance or are under an enforceable schedule that will ensure timely return to compliance. Any permittee who has not yet complied with the ISR requirement under the 12-SW, for example, should not be eligible for coverage under the 20-SW until they have met this requirement. Likewise, penalties for repeat offenders should increase for each repeat offense. Penalties should also increase for illegal discharges to vulnerable waterways, such as drinking water sources, impaired water bodies, and Tier 2 waterways. Strong, deterrence-based enforcement strategies, such as prosecuting noncompliant facilities and collecting significant monetary penalties (that include recouping the economic benefit of noncompliance), are especially vital to meeting the state's WQS and ensuring greater public health protections.
Similarly, enhanced penalties should be imposed on facilities that commit permit violations near environmental justice communities, or communities that are "overburdened" or "disadvantaged." Race and income remain the most significant predictors of environmental risk and burden in the United States. In identifying environmental justice communities in Maryland, the Department should consider a threshold for census tracts with at least 45 percent non-White population and a poverty rate at or above 10 percent of the federal poverty line. Additionally, the Department should impose enhanced penalties for any illegal discharge in a tract that ranks in the top 25th percentile for the overall MD EJ SCREEN score or for the 'socioeconomic factors' category, which includes a number of indicators that measure social vulnerability.
We urge the Department to take these actions in order to send a strong message to industrial polluters that appropriate consequences follow from harming the environment or the health of communities, especially those that bear an unjust and disproportionate burden of pollution exposure and social stressors. This will also ensure the Department has sufficient funding for inspections and enforcement efforts to ensure greater oversight and, thereby compliance, among 20-SW permittees."[23]

"***Widespread Noncompliance with 12-SW Has Not Been Adequately Addressed.***
The number of actions taken by the Department to enforce the CWA and state water pollution control laws has declined substantially in recent years. Over the last two decades, the Department has lost funding for over 13 percent of its staff positions. These reductions, coupled with permits like the 12-SW that are incredibly difficult to enforce and other policy changes at the state and federal levels have limited the ability of agency staff to adequately hold industrial polluters accountable. The Department's 2020 Enforcement & Compliance report shows evidence of this with record lows in enforcement actions for a number of the agency's clean water programs. This includes record lows from surface water dischargers and stormwater management, with 22 and 4 enforcement actions for each program, respectively. Likewise, from 2017 through 2020, the Department only took 14 formal enforcement actions against industrial stormwater permittees, despite widespread findings of noncompliance – with approximately 75 percent of permittees found in some form of noncompliance by Department inspectors. The health of the Bay and communities across Maryland have suffered as a result of this dynamic.
The language and implementation of the 20-SW offers the Department a golden opportunity to change this failing dynamic and restore accountability for industrial polluters in Maryland. Put simply, the Department must incorporate enforceable permit requirements into the 20-SW, clearly state in the Permit

[23] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

that such requirements are enforceable, and aggressively enforce them. **But prior to the reissuance of the Permit, the Department must first address the widespread failure to comply with the 12-SW and the ISR requirement.** Generally speaking, in order for a permit to effectively accomplish its goals, the Department must implement a compliance and enforcement program designed to achieve compliance from the majority of permittees. If there is widespread noncompliance and the state does not reduce those levels through individual enforcement actions, which also have a deterrent effect that encourages compliance throughout the entire regulated community, the permit becomes fairly meaningless and does not faithfully implement or ensure compliance with the CWA. **Maryland regulations require that the Department only reissue a discharge permit when "[t]he discharge or proposed discharge specified in the application is or will be in compliance with all applicable requirements."** As demonstrated below, the noncompliance levels under the 12-SW are too high to ignore, bringing into question the effectiveness of the permit. To comply with Maryland regulations, the Department must require industrial permittees to achieve compliance prior to the reissuance of the 20-SW. This will also send a strong signal to permittees that the Department is taking permit noncompliance seriously, setting the Department on the right path for ensuring greater compliance with the 20-SW."[24]

"***Findings of 12-SW permit noncompliance and notable exceedances (2014-2017)***
Approximately 1,000 facilities are covered by the 12-SW permit statewide, and this permit sector is remarkably diverse. However, as mentioned above, many permittees that discharge toxic materials off-site, such as auto salvage, scrap metal, and landfills, are densely concentrated in places like Baltimore and Prince George's County. By the nature of these operations, one can find leaking car batteries at auto salvage yards, deteriorating metal parts at scrap recyclers, and eroding trash incineration ash waste at landfills, which, for example, Department inspectors discovered at Baltimore's Quarantine Road Landfill. The 2017 report from the Center for Progressive Reform and Environmental Integrity Project found that there was a widespread failure by facilities under the 12-SW Permit to test, report on, and stay within their allowable stormwater pollution limits between January 2014 and March 2017.92 From July 2016 through June 2017, the Department conducted onsite inspections at 292 facilities covered under the industrial stormwater permit and found noncompliance or violations during 70 percent of these inspections. This compliance rate is the second lowest among all permit classes by the Department's Water and Science Administration during this time period. It is important to note that the Permit covered more than 900 facilities during this period, so these inspections only scratch the surface of noncompliance. Although the Department cannot inspect facilities covered by the Permit at the same rate as it would facilities covered by individual NPDES permits, the inspection rate should be sufficiently high to ensure compliance. Out of the 228 permittees required to test and report on their stormwater pollution discharge levels during this time period, only 180 of them provided their quarterly sampling reports to the Department. Forty percent of these (72 of 180) only submitted partial data. Because the Permit is self-implementing, and regulators rely heavily on permittee reporting, the Department should take action in response to any failures to report. The Department should have sent a notice of violation and brought an administrative action for each of the facilities referenced above that failed to report.
Of the 180 sites that reported their discharge levels, 36 percent exceeded their benchmarks. These facilities exceeded their allotted pollution levels for four consecutive quarters, on average. The exceedances included discharges of copper, aluminum, zinc, and lead, among other toxic pollutants. The 2017 report found that stormwater discharge sampled from Salisbury Scrap Metal, Inc. in Salisbury exceeded the 0.014 mg/L permissible level of copper by an average of 1,564 percent. Meanwhile, on average, Cambridge Iron and Metal Company in East Baltimore discharged stormwater that exceeded the 0.082 mg/L permissible level of lead by 717 percent, and the Southern States agricultural supply facility

[24] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

in Cumberland discharged stormwater that exceeded the 0.12 mg/L permissible level of zinc by 1,378 percent.

In all, almost half of the 228 permittees either discharged above allowable levels or failed to test their stormwater, as required. Further, MDE inspectors only visited 54 percent of the facilities that reported pollution exceedances, and they inspected fewer than half of the facilities (42 percent) that failed to report, as required. Despite this level of noncompliance, the Department and the Office of the Attorney General only acted against 13 facilities covered by the 12-SW from 2014 through 2017. In at least nine of these cases, it is unclear whether the enforcement was directly related to violations of the industrial stormwater permit. It is imperative that these facilities come into compliance, with inspection verification from the Department, prior to reissuance of coverage under the 20-SW.

Although the 20-SW Fact Sheet indicates that the Department considered the 2017 report in the development of the 20-SW Permit, it does not indicate that the Permit remedies any of the issues raised in the report. In fact, the Fact Sheet appears to even misconstrue the data that it cites from the 2017 report. As noted above, the 2017 report states that out of 228 permittees required to test and report on their stormwater pollution discharge levels, only 180 of them provided quarterly sampling reports to the Department. The 20-SW Fact Sheet incorrectly interprets these data, stating that the 2017 report "found that of these [228] sites, 180 qualified for benchmarks, and of those 180, 65 exceeded acceptable pollution levels in four consecutive quarters." The Department completely missed the conclusion that the 65 sites that exceeded benchmarks were only those from within the group of permittees that actually submitted data. This ignores the significant reporting problems with the 12-SW Permit, including both the discrepancy between facilities required to submit benchmark monitoring data and those that actually did (228 vs. 180) and the frequent submission of only partial data, as noted above (40 percent). The Department's oversight of these data in the Fact Sheet reflects the greater problems that this Draft Permit, and its supporting analyses, were rushed; that the Department has overlooked the many ways permittees failed to comply with the 12-SW permit; and that the monitoring data are insufficient to fully evaluate permit compliance. These deficiencies underscore the need for greater permit enforceability that establishes concrete standards with which the permittee must comply, and accordingly, increased enforcement of noncompliance to hold permittee accountable for meeting such requirements."[25]

"***Inspection-driven findings of 12-SW permit noncompliance and related enforcement actions (2017-2020)***

As a follow-up to the 2017 report referenced in the section above, Commenters reviewed inspection data related to overall compliance with the 12-SW Permit from January 1, 2017 to December 1, 2020. These data only scratch the surface of noncompliance in Maryland as they only reflect what inspections found for industrial polluters; there likely are more noncompliance issues that go unnoticed, unreported, or are underreported. That said, Commenters' review of inspection data demonstrate how noncompliance with the 12-SW Permit continues to be widespread while enforcement efforts continue to lag by comparison. For instance, only **24 percent (475 of 1,979) of inspections found that industrial stormwater permittees were in compliance with their permit terms**. The Department found direct noncompliance in almost two-thirds (1,305) of its inspections. An additional 185 inspections found some form of noncompliance, as the inspections resulted in compliance assistance rendered, required corrective actions, or additional investigations.

**Despite finding some form of noncompliance in 76 percent (1,504 of 1,979) of its inspections, the Department only took formal enforcement actions against 0.3 percent (6 of 1,979) of the sites found in noncompliance.** The Department took an additional eight formal enforcement actions unrelated to inspections, against industrial permittees from 2017 through 2020. Only five of these enforcement actions were against the top 55 repeat offenders – facilities with the highest number of findings of noncompliance

[25] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

during this time period. For more than half (711) of the inspections that found noncompliance, the Department simply recommended that the inspection continue with no further action. For another 429 inspections that found noncompliance, the Department recommended an additional investigation; however, the Department's records do not indicate whether additional investigation even occurred. For five inspections that found noncompliance, the Department's recommended action was to "close file" even though four of the inspection sites were marked as "active." For 81 inspections that found noncompliance, the Department's recommended action was to "refer to others." Whether or not the Department took the recommended action from each inspection is unclear, but whatever action (or inaction) the Department took, it was not enough to deter future noncompliance, as demonstrated in the paragraph below. **Commenters strongly urge the Department to provide an explanation of both the nature of these violations and how it has applied its enforcement prioritization criteria to this sector. If the lack of enforcement is due to unenforceable permit terms, this must be corrected in the 20-SW; if there is another cause, it must be addressed.**

Inspection data show that numerous facilities were in noncompliance repeatedly, and many times consecutively. **Of the 1,305 inspections that resulted in direct findings of noncompliance, 617 of the inspected facilities were repeat offenders.** In other words, nearly half of inspections were for facilities that were previously inspected (from 2017-2020) and found to be in noncompliance. There were 55 facilities with five or more inspection findings of noncompliance. In this group, there are a large number of manufacturers of plastic, metals, concrete, and other materials. Nine of the 55 permittees are landfills or waste processing operations, and an additional nine operations process medical waste, waste oil, metal, tire, and other materials. The remaining top offenders under the 12-SW permit are made up of auto salvage yards, major construction operations, transportation facilities, wastewater treatment plants, a food processing facility, a lumberyard, and a number of other entities. The largest concentration of repeat offenders was in Prince George's County (13 facilities). Baltimore City and Baltimore County also had a large number of repeat offenders (7 each).

There were about five facilities with 10 or more inspection findings of noncompliance. The operation with the most inspection findings of noncompliance, LKQ Pick Your Part, is an auto salvage yard in Howard County that had thirteen findings of noncompliance from 2017 through 2020. At one point, the Department required the company to take some form of corrective action, but ten follow-up inspections showed continued noncompliance. This company owns auto salvage yards across the state responsible for 26 inspection findings of noncompliance during the same time period. This example demonstrates that corrective action requirements must be concrete and enforceable and, if corrective action fails to result in permit compliance, the Department must enforce the Permit to protect water quality.

Another operation that processes waste, Lawrence Street Industry, LLC in Prince George's County, had twelve findings of noncompliance. Another facility in Prince George's County, Brown Station Road Sanitary Road Landfill, had eleven findings of noncompliance in just over two years. Another auto salvage yard, Bank Auto Recyclers, and waste oil recycler, Storm Oil, LLC, both had ten findings of noncompliance from inspections. The remaining repeat offenders and their number of findings of noncompliance are captured in the table below:

| No. of Inspection Findings of Noncompliance | No. of Repeat Offenders |
|---|---|
| 9 Findings | 3 Facilities |
| 8 Findings | 4 Facilities |
| 7 Findings | 8 Facilities |
| 6 Findings | 14 Facilities |
| 5 Findings | 23 Facilities |
| 4 Findings | 36 Facilities |
| 3 Findings | 66 Facilities |
| 2 Findings | 140 Facilities |

Although the primary purpose of inspections is to ensure compliance with important environmental requirements, that does not seem to be the case here in Maryland, especially for those facilities with the largest number of repeat offenses. When a facility repeatedly fails to comply with permit terms or legal requirements, as demonstrated here, those requirements become meaningless. And companies continue to violate those requirements because they do not suffer any consequences as a result. The lack of significant penalties, on-the-spot fines, or other consequences effective enough to deter noncompliance in Maryland have preserved the status quo for far too long. This systematic failure has given peace-of-mind to polluters to continue to violate environmental permits and laws. As discussed in the previous section, the health consequences and environmental injustices resulting from ineffective regulation of industrial stormwater pollution are far too severe to allow this policy to continue. The Department must ensure that these facilities come into compliance prior to reissuing coverage under the 20-SW permit."[26]

"***The Permit Does Not Provide for Sufficient Department Oversight or Review and Approval, Instead Relying on the Permittee to Determine its Own Compliance.***
Certain aspects of the Permit are impossible to enforce. Any provision in the Permit that uses a standard that relies on the permittee's own judgment must be revised to use an objective criterion. For example: "If you find that your control measures need to be replaced or repaired . . . " (III.B.1.b.iii.)) and "**If you find** that your control measures are not achieving their intended effect of minimizing pollutant discharges . . ." (III.B.1) both rely on the permittee's own determination. There is no objective standard that the Department or the public could evaluate to determine whether control measures must be modified. The permittee is the decision-maker and judge under this standard, while also having an incentive to determine that there is not a problem with control measures. **This language, and all other instances where a requirement relies on the permittee's own determination, must be revised to use an objective standard to avoid impermissible self-regulation.** In these instances, the Department should use as the objective standard the best professional judgment (or best engineering judgment) of the permit writer."[27]

[26] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[27] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

"Furthermore, the language of III.B on page 15 of the Permit defining "minimize" is also vague and seems to conflict with other permit requirements. Particularly, the definition's constraint of economic practicability could undermine other permit requirements, such as the requirement to consider climate change (which could lead to potentially costlier BMPs)."[28]

"***The Department Must Remove Impermissibly Vague Language Throughout the Permit.***
The Department must remove vague language that is unnecessarily subjective, lacking in specificity or any discernible standards, or otherwise unenforceable. Such language presents due process concerns, invites arbitrary or absent enforcement, is unfair to both the public and the regulated community by failing to provide fair notice of prohibited conduct, runs counter to the purposes of the CWA and Maryland Water Pollution Control laws, and represents a waste of resources by inspectors, site operators, and the public. Vague language in the 12-SW is likely a significant reason why the Department data show such high noncompliance rates.
Commenters urge the Department to take a close look at the entirety of the permit for vague language and unenforceable standards. Vague terms are particularly prevalent and problematic in the sections of the Permit that establish control measures and effluent limits, which are too important to be controlled by unenforceable language. As just one example, Commenters urge the Department to clarify the meaning of the phrase "technologically available and economically practicable and achievable in light of best industry practice" found in section III.B, including by providing some illustrative examples for the benefit of the public and the regulated sector. The current language provides no direction to a permittee about what is, or is not, acceptable; no direction to an inspector about how to identify a violation; no way of allowing the public to understand whether a condition is an egregious violation or perfectly legal under this Permit. This could be contrasted with language in the similar permits from California and Washington, which were analyzed by Dr. Horner. In his assessment, Dr. Horner frequently relies on standards similar to "technologically available and economically practicable and achievable in light of best industry practice" but with more clear definitions and explanations of the standards and how to utilize them. Importantly the Permit needs to clearly articulate and emphasize the need for "stormwater management to rise to the BEST level found in industry practice."
Another example of vague language that must be made more clear, specific, measurable, and enforceable are the provisions pertaining to the management of runoff. Specifically, subsection III.B.1 states that "[y]ou must divert, infiltrate, reuse, contain, or otherwise reduce stormwater runoff, to **minimize** pollutants in your discharges." (Emphasis added). While Commenters recognize that the term "minimize" is defined in the permit, the definition is unhelpful for several reasons, including that, as noted above, it refers to the term "technologically available and economically practicable and achievable in light of best industry practice." The term "minimize" used throughout this subsection is unenforceable in that it would be impossible for a permittee or member of the public to know whether or when a permittee has done enough of the referenced activities to have effectively "minimized" pollutants in their discharges. The term "minimize" is subjective, whereas "eliminate" - or some other numeric standard - is objective and clear. Wherever possible, the Department should remove subjective language from the Permit and replace it with objective language that is clear, specific, measurable, and enforceable as EPA has stated that it expects from CWA permits.
Similarly, Commenters urge the Department to enhance clarity in the provision in subsection III.B.1 regarding dust control and vehicle tracking, which only states "[y]ou must minimize generation of dust and offsite tracking of raw, final, or waste materials." How is a permittee or member of the public to know whether or when a facility has established adequate controls? How could the Department possibly issue a sanction to a permittee for failure to control hazardous dust or off-site tracking of pollution if neither the inspector nor permittee knows whether these offsite emissions and flows are too large or

[28] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

sufficiently small? How could a court reviewing the issuance of a sanction for a violation of this permit uphold an enforcement action based on impermissibly vague language? These are unanswerable questions for anyone reading this permit as written. This provision is particularly important to strengthen in light of the need to protect fenceline communities from hazardous particulate pollution that become airborne due to vehicle traffic, other site operations, or wind. Commenters strongly urge the Department to include cognizable standards to minimize particulates and other industrial residues that accumulate during dry-weather conditions from discharging to receiving waterways.
**In sum, the Department must remove impermissibly vague, unenforceable language throughout the Permit, and use numeric standards, or clear, specific, and measurable narrative standards, including the use of examples, where appropriate**. Effective permits must contain clear standards as it is irrational to prescribe terms and conditions that set vague or undetectable criteria."[29]

"***Status of compliance with impervious surface restoration requirement***
Many facilities under the 12-SW permit that are required to restore 20 percent of untreated impervious surfaces in order to offset their discharges have failed to do so. Although the Department originally estimated that 299 facilities (29 percent) under the 12-SW permit were subject to the Chesapeake Bay restoration requirements, ultimately 438 facilities (43 percent) have been required to comply with these effluent limitations. The 12-SW permit has a deadline of January 1, 2019 for existing permittees to fulfill this requirement. New permittees, however, have four years from the date of their submitted NOI. According to our review of data from the Department's Wastewater Permits Interactive Search Portal, **approximately 28 percent (125) of permittees have not completed their required restoration by their respective deadlines**, and an additional 20 facilities may be in jeopardy of violating the requirement under the 12-SW Permit. The Department must ensure that these facilities comply with this requirement prior to reissuing coverage under the 20-SW. With more than a quarter of the permittees completely missing their deadline for impervious cover restoration, at least 236 acres of impervious surfaces were not treated, as required. The number of acres impacted is likely much greater, in reality, given that data were not submitted for close to a dozen permittees. Forty-three facilities still have time to complete their ISR requirements, but by the end of 2021, 14 of these facilities will have had to fulfill their ISR requirement or risk violating their permit terms. As the Chesapeake Bay restoration requirement targets large facilities (5+ acres) in urban areas located within the watershed, the combined impact of these facilities is something the state cannot ignore. To avoid ongoing noncompliance, the ISR requirements (which must be enforceable requirements in the 20-SW to avoid backsliding, as discussed in detail later in this letter) must be strengthened, including by explicitly stating that failure to comply with the requirement by the end of the permit term constitutes a permit violation."[30]

## 3. COMMENT CATEGORY – Environmental Justice.

"***The Department Must Ensure that the Impacts of Climate Change on Industrial Facilities Do Not Increase the Harm to Overburdened Communities.***
The Department and the State of Maryland have legal and regulatory duties to address the environmental inequities and environmental justice implications of this permit.170 As also discussed above, this Permit does not adequately control industrial stormwater contamination to protect water quality, designated uses, and public health. Because of this, the Permit fails to adequately protect the health and safety of vulnerable Marylanders nor does it resolve or attempt to resolve the disproportionate impact of this source of pollution on overburdened communities. Given that changing precipitation trends and projections will likely result in increases of industrial stormwater runoff and the Department's failure to address this fact

[29] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[30] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

This comment makes clear the environmental inequities and environmental injustices associated with this Permit, which result largely from a permit that fails to protect water quality, designated uses, and public health. This comment also makes clear that changing precipitation trends will likely have negative impacts on stormwater quality and quantity and our changing climate will result in increased vulnerability of industrial facilities and the communities around them. It is therefore imperative that the Department's cumulative impact assessment of the 20-SW include and factor in an assessment of how the climate impacts detailed in this section may result in continued outsized impacts on vulnerable populations in Maryland.
Oftentimes industrial facilities overburden communities with environmental harms and stormwater pollution. The Department must ensure that the Permit is stringent enough to cover the cumulative impact of the pollution it is permitting. Specifically, as the climate changes and precipitation increases, stormwater from industrial facilities will increase as well. Communities already overburdened with stormwater pollution will see an even further increase in this pollution, unless the Permit considers the cumulative impact of the permitted pollution. We also reiterate the above suggestion here that the Department involve the CEJSC and affected communities in both (a) contributing data and other information to the design and implementation of the cumulative impacts assessment and (b) tailoring action on the reissuance of the Permit to respond to their environmental justice and health needs, concerns, and priorities. Climate change impacts on these facilities and their pollution must be factored into any environmental justice assessment of the Permit and its enforceability."[31]

"***Lack of Enforceability is an Environmental Justice Issue.***
The Permit covers over 1,000 facilities across Maryland, elevating its potential environmental impact to orders of magnitude above that of an individual NPDES permit. The ability for the Department and the public to enforce the Permit is essential to discourage noncompliance and prevent water quality degradation. The lack of enforceability and resulting noncompliance built into this Permit furthers the inequities already suffered by the overburdened communities in which many of the facilities are located. Many of these facilities have been discharging pollutants at levels that exceed applicable benchmark thresholds. Because the Permit relies significantly on benchmark monitoring, rather than numeric effluent limitations, to evaluate the adequacy of control measures in ensuring water quality is protected, benchmark exceedances constitute a potential risk to water quality in these areas already disproportionately burdened. Unless the Department improves permit enforceability, the Permit will continue to contribute to these burdens."[32]

"***Industrial Stormwater Contamination Disproportionately Harms Overburdened Maryland Communities.***
Policymakers and researchers have increasingly recognized a need to integrate cumulative impacts analysis in environmental regulatory decision-making. Environmental justice screening tools, such as EPA EJSCREEN, are one common and accessible method for assessing the combined burden of environmental exposures and social stressors in communities. Maryland (MD) EJ SCREEN is a statewide mapping tool developed by Dr. Sacoby Wilson and his colleagues at the University of Maryland School of Public Health. Similar to EPA EJ SCREEN, the tool integrates environmental pollution and demographic data at the census tract level. However, it improves on the federal tool by incorporating additional indicators that were identified by affected communities in Maryland, and calculates a combined Environmental Justice (EJ) Score (from 22 indicators in four categories: Exposure, Environmental Effects, Sensitive Populations, and Socioeconomic Factors) for each census tract to demonstrate the combined burden of pollution and social stressors on a community. The methodology used to calculate

[31] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[32] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

the EJ score is similar to that employed in CalEnviroScreen, California's statewide tool, which is widely regarded as the most well-developed environmental justice screening tool available to date. Dr. Wilson and his colleagues explain how the EJ score is calculated in a 2019 paper published in the International Journal of Environmental Research and Public Health.

While environmental justice screening tools do not definitively identify an "environmental justice community", they serve as an important resource for screening areas that are heavily burdened, and where further investigation may be necessary. If used appropriately, employing MD EJ SCREEN or another methodology to assess cumulative impacts in the regulatory process would result in an industrial stormwater permit that is more protective of water quality and human health and wellbeing. These tools can also be used to help prioritize inspections and enforcement actions in overburdened communities.

To illustrate the value and need for this type of assessment, Commenters used MD EJ SCREEN to evaluate census tracts in Baltimore City and Baltimore County where industrial stormwater permittees are located. The Department's Wastewater Permits Portal yielded a list of 326 facilities across both jurisdictions covered by a 12-SW or 12-SR permit issued between 2014 to 2021. Commenters searched for the address associated with each facility in MD EJ SCREEN, noting the overall EJ score and the individual Exposure, Environmental Effects, Sensitive Populations, and Socioeconomic Factors scores for each census tract where the facilities were located. Twenty-six of the facilities were in census tracts where there was no data listed in MD EJ SCREEN, and, therefore, they were excluded from the analysis below. For the purpose of this evaluation, and in alignment with the methodology employed in CalEnviroScreen, we classified census tracts with a score greater than 0.75 as being "overburdened." A census tract with a score above 0.75 is in the top 25th percentile, meaning that it is more "overburdened" than 75 percent of census tracts in the state, and is therefore of greatest environmental justice concern.

**We found that of 300 facilities in Baltimore City and Baltimore County, 123 (41 percent) were located in overburdened census tracts (EJ score greater than 0.75). More than 100,000 Marylanders live in these tracts.114 In Baltimore City, specifically, 106 (69 percent) facilities were in overburdened tracts and eight tracts had an EJ score of 0.91 or greater, meaning they are in the top 10 percent of environmental justice burden compared to the rest of Maryland's census tracts. The data also reveal that census tracts where 12-SW and 12-SR permittees are located have higher EJ scores than other census tracts in that jurisdiction, on average**. As demonstrated in the table below, in Baltimore City, the total EJ score and the Exposure, Environmental Effects, and Socioeconomic Factors scores are greater in census tracts where industrial stormwater permittees are located compared to all tracts in Baltimore City, on average. **Of particular concern are the average Exposure and Environmental Effects scores (0.92 and 0.96, respectively), which are in the top 10 percent compared to all census tracts in Maryland.** These two categories include 12 indicators, including NATA Air Toxics Cancer Risks, NATA Respiratory Hazard Index, Watershed Failure, Proximity to Treatment and Disposal Facilities, and Proximity to Major Direct Water Discharges, among others. The Socioeconomic Factors category includes indicators that have been found to be strongly associated with levels of disease burden, such as percent low-income, percent non-white, and percent of households experiencing linguistic isolation, among others. The average scores also demonstrate that Baltimore City as a jurisdiction is more "overburdened" compared to the state overall. While Baltimore County has a lower combined burden of environmental and social stressors, the EJ, Exposure, and Environmental Effects scores were also greater in tracts with industrial stormwater permittees compared to all census tracts in Baltimore County, on average.

| | Average MD EJ SCREEN score for census tracts where 12-SW and 12-SR permittees are located (Average MD EJ SCREEN score for all census tracts in the jurisdiction)* | | | | |
|---|---|---|---|---|---|
| | EJ Score | Exposure Score | Environmental Effects Score | Sensitive Populations Score | Socioeconomic Factors Score |
| Baltimore City (153 facilities) | 0.79 (0.76) | 0.92 (0.80) | 0.96 (0.88) | 0.58 (0.61) | 0.75 (0.73) |
| Baltimore County (147 facilities) | 0.52 (0.51) | 0.60 (0.57) | 0.60 (0.55) | 0.45 (0.46) | 0.45 (0.45) |

*Scores in red show that the average score for census tracts where industrial stormwater permittees are located is greater than the average score for all census tracts in the jurisdiction.

Out of 99 census tracts with at least one industrial stormwater permittee, forty-two had two or more permittees, eight tracts had 10 or more, and three tracts had 20 or more. The two census tracts with the highest number of facilities were also among the most overburdened. Census tracts 24510250500 and 24510260404 are both located in Baltimore City and each have 24 facilities with 12-SW and 12-SR permits. Both tracts have an EJ score greater than 0.80, meaning that they rank in the top 20th percentile for environmental justice burden compared to all tracts in the state. Census tract 24510250500 encompasses residential parts of Curtis Bay, a community which has long grappled with environmental injustice, as well as Hawkins Point (tract population of more than 4,200). The sectors represented include landfill, land and water transportation, hazardous waste disposal, production of industrial inorganic chemicals, scrap recycling, auto salvage yards, and petroleum refining, among others. The tract has an Environmental Effects Score of 0.99 and a Sensitive Populations score of 0.96, indicating that proximity to pollution sources and the incidence of adverse health outcomes associated with pollution exposure are among the highest in the state. This tract is also home to two facilities—Curtis Bay Energy and Quarantine Road Municipal Landfill—which had five or more inspection findings of noncompliance with their 12-SW permits between 2017 to 2020. Therefore, not only is the tract an area already significantly burdened, but it is also home to facilities that are not properly employing required pollution controls. The census tract is also adjacent to two other overburdened residential tracts.

Census tract 24510250500 (left) and census tract 24510260404 (right)

Census tract 24510260404 encompasses the Pulaski and Orangeville Industrial Areas, as well as part of the Highlands residential neighborhood (tract population of more than 2,000). This tract has an Exposure score of 0.96, and Environmental Effects and Socioeconomic Factors scores of 1.0, meaning that they

rank highest in the latter two indicators compared to all tracts in Maryland. This tract is also home to a scrap metal facility that has had five or more inspection findings of noncompliance—United Iron and Metal, LLC. Furthermore, nearly all of the adjacent tracts, which are largely residential areas, rank among the most overburdened in the state.

In both of these examples, the census tracts contained a high number of facilities with 12-SW and 12-SR permittees and a high EJ score. While it is difficult to know the extent to which any industrial stormwater permit holder causes a greater environmental justice burden, they are all likely contributors. Furthermore, permit noncompliance in these tracts may expose community members to additional harm. The incidence of repeat noncompliance appears to be more prevalent in communities with a greater number of industrial stormwater permittees. Of the 12 facilities in Baltimore City and Baltimore County with the most instances of non-compliance, nine are located in census tracts with eight or more facilities with 12-SW or 12-SR permits. These 12 facilities are also located in census tracts that rank in the top 25th percentile for Exposure and Environmental Effects scores, on average.

Our preliminary assessment reveals that census tracts in Baltimore City and Baltimore County with 12-SR and 12-SW permit holders tend to have a greater environmental justice burden, on average, compared to all census tracts in each jurisdiction and the state overall. Furthermore, it appears that census tracts with a large number of facilities may also experience a greater environmental justice burden, and in some instances are home to facilities that are among the worst offenders in regard to noncompliance with their permits. These assessments reflect the strong connection between lack of permit enforceability, and the lack of actual enforcement by the Department that naturally follows, and alarmingly high rates of noncompliance. This is an entrenched cycle (but fortunately, a reversible one) that disproportionately impacts overburdened communities."[33]

"***The Department Should Complete an Environmental Justice Assessment before Reissuance of the Permit.***

As demonstrated in the above analysis, the lack of thoughtful consideration of cumulative impacts has resulted in a scenario where certain communities with industrial stormwater permittees bear a disproportionate burden of pollution exposure and public health harm. Therefore, prior to reissuance of the permit, the Department should complete an environmental justice assessment that considers pollution-, social-, and health-related stressors to understand the existing cumulative burden in communities. While MD EJ SCREEN is a readily available, community-informed, and state-specific tool, the Department may consider other methodologies for assessing cumulative impacts, such as those pioneered by researchers in Massachusetts and California. Whichever screening method the Department adopts, it must be based on a defined, systematic approach that is applied to all permit applications, and includes numerical variables that may be compared, rather than subjective measures. Otherwise, the Department cannot issue a permit consistent with its recently and contemporaneously developed Environmental Justice plan, or with its obligation under state law to protect human health.

Furthermore, after completing the assessment, the Department should review and revise the permit terms as necessary to ensure that dischargers will not contribute to or exacerbate existing burdens and disparities in the community. For example, if a discharger is located in a census tract or adjacent to census tracts that rank in the top 25th percentile for EJ Score and the Lead Paint and Individuals Under Five Years Old indicators (assuming use of MD EJ SCREEN), then the Department may consider imposing additional benchmark reporting requirements in order to limit additional exposure to sensitive populations. More thoughtful consideration and regulation of potential adverse impacts to communities can help remedy environmental injustice and address gaping health disparities in the state."[34]

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[33] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[34] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

"***The Department Should Consult with the Maryland Commission on Environmental Justice and Sustainable Communities before Reissuance of the Permit.***
Commenters are hopeful that the Department has already consulted with the Maryland CEJSC regarding this impending permit reissuance. If not, we strongly urge the Department to contact the staff and chair of the Commission and request consultation regarding the Permit and the impacts of industrial stormwater on public health, particularly in areas of the state where clusters of permitted sites are located, and solicit input. It is our hope that the Department would, at the very least, provide the CEJSC with ample time to make recommendations and, preferably, provide adequate staff or contractual resources to ensure any recommended analyses are undertaken.
As you know, the CEJSC exists to review and analyze the impact of state laws and policies on the issue of environmental injustice and to advise MDE and other agencies regarding how they can avoid, mitigate, or ameliorate these impacts. The CEJSC cannot provide their input if they are not consulted, and we believe that few permits or Department policies present as clear and substantial risks to environmental justice communities as the industrial stormwater general permit.
Therefore, we strongly urge the Department to seek input from the commissioners on the permit reissuance on the record and invite the Commission to host an informal hearing following a meaningful attempt to engage the public, where the public can present their perspectives. Once again, we strongly urge the Department to cease processing this permit, and, among many other things, ensure that it has adequately consulted the CEJSC. The Department should not make a new tentative determination to issue this Permit until CEJSC is fully informed of the purpose, design, and expected outcomes for this Permit, and has the opportunity to present their concerns to the Department on the record."[35]

"***Inadequate Regulation of Industrial Stormwater Threatens the Health and Safety of Vulnerable Marylanders.***
Maryland law requires the Department to address human health threats posed by industrial stormwater dischargers through development of CWA NPDES permitting and other regulations. "The Secretary shall investigate all nuisances that affect the public health and devise means for the control of these nuisances;" and "[…] may adopt rules and regulations necessary to prevent and control occupational diseases." MD Env Code § 10-102; MD Env Code § 6-701. "[B]ecause pollution is a menace to public health and welfare, [and] creates public nuisances, [...] it is the policy of this State: (1) To provide that no waste is discharged into any waters of this State without first receiving necessary treatment or other corrective action to protect the legitimate beneficial uses of the waters of this State; [and] (4) Through innovative and alternative methods of waste and wastewater treatment, to provide and promote prevention, abatement, and control of new or existing water pollution[...]" MD Env Code § 9-302. That is, the Department has the authority to include provisions in this Permit designed to prevent public and occupational exposures to industrial stormwater contaminants.
The Department has the authority to deny permit coverage to applicants whose facility operations impose undue risks of hazardous pollution. Maryland Regulation 26.08.04.09(B)(4) requires general industrial stormwater permittees to comply with, among other things, Md. Code, Environment Article, Title 7, Subtitle 2, which covers "Controlled Hazardous Substances." Environment Article § 7-240 provides that the Department "may deny an application for a facility permit if [the Department] finds," that the "controlled hazardous substance facility cannot handle, treat, store, or dispose of a particular controlled hazardous substance without imposing an undue risk to the environment."
The Department's duties and authorities to address the public health and water quality impacts of regulated industrial stormwater dischargers are also not limited to pollutant discharges in water media only. "For the purposes of [Water Management] subtitle, the Department of the Environment shall have and may exercise […] every incidental power necessary to carry out the purposes of this subtitle." MD

[35] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

Env Code § 4-405. "It is the purpose of this subtitle to provide additional and cumulative remedies to prevent, abate, and control the pollution of the waters of the State." MD Env Code § 4-403. Indeed, where point-sources emit non-theoretical, concrete and measurable pollutants that contaminate state waters, the Department is "obligated to regulate [those discharges] in accordance with their responsibility to properly administer the CWA." In Re Petition of Assateague Coastal Trust, Case No: 482915-V (finding that Maryland law required the Department to regulate air emissions of ammonia in a NPDES permit). "Acquiring a permit does not enable a point source to dump pollutants indiscriminately." Id.

The Department has acknowledged that "[n]ational studies show that Environmental Justice (EJ) Communities bear a disproportionate share of the negative environmental consequences resulting from industrial activities, land-use planning and zoning, municipal and commercial operations or the execution of federal, state, local programs and policies." The Department has committed the Department in its Environmental Justice Policy and Implementation Plan to, by July, 2021, "reduce current and future inequities, [and] develop a plan to expand outreach and communication efforts in EJ Communities for MDE permit-related actions." Further, the Department also commits by July, 2021, to "increase the level of communication among the agency, the permit applicant, and EJ Communities." The Department defines EJ Communities as "a community with a low-income or minority population greater than twice the statewide average."

The Department is also authorized to work with the Maryland Commission on Environmental Justice and Sustainable Communities (CEJSC) and communities disproportionately burdened by industrial pollution to resolve the environmental justice impacts of the issuance and implementation of the Permit. The Department has the authority and duty to "[a]dvise, consult, and cooperate with other units of the State [...] [and] affected groups [...] to further the purposes:" of the Water Management subtitle of the Code of Maryland. MD Env Code § 4-405(a). "'[E]nvironmental justice' means equal protection from environmental and public health hazards for all people regardless of race, income, culture, and social status." MD Env Code § 1-701.

Public participation must be central to the Department's regulatory process. "In the exercise of its responsibilities to improve, conserve, and manage the quality of the waters of the State, the Department recognizes and shall utilize the general principles set forth in this regulation for decision making and action." Md. Code Regs. 26.08.01.02.A. "The Department shall made [sic] a maximum effort to seek out and involve the interested public both at the preliminary stage and throughout the process of development of regulations, plans, and other program actions." Md. Code Regs. 26.08.01.02.E(2). "The major objectives of public participation include greater responsiveness of governmental actions to public concerns and priorities . . . ." Md. Code Regs. 26.08.01.02.E(4).

As discussed throughout this comment, the Permit does not adequately control industrial stormwater contamination to protect water quality, designated uses, and public health. Water quality based effluent limitations are not as stringent as necessary to restore impaired waters and are not consistent with waste load allocations, notwithstanding the Department's conclusory statements to the contrary unsupported by technical analysis. Corrective action and benchmark monitoring requirements, taken together, also fail to ensure that impermissible pollution, the effectiveness of stormwater control measures, and compliance with other effluent limitations in the Permit are even detected by dischargers and, therefore, the Department, let alone timely resolved within the permit term. Permit terms are not expressly enforceable; this sends a clear signal to permit holders that compliance and "good faith effort" is requested but not required. Such an approach to compliance assurance is impermissible and must be rectified. The lack of enforceability of the Permit—demonstrated both by its terms and by the Department's history of failing to pursue violations and require compliance, simply compounds the rate of noncompliance. It is a pattern that must be reversed. In short, **this Permit fails to adequately control contaminants that threaten the health and safety of vulnerable Marylanders and resolve the disproportionate impacts of this pollution on overburdened communities.**

The Department should implement policies to align decision making with Executive Order 12898 and ensure Department decision making in the industrial stormwater context is not perpetuating and continuing disproportionate human health and environmental effects on minority and low-income populations. The Department should also develop a strategy for implementing environmental justice in industrial stormwater and promoting nondiscrimination in this context. Additionally, given that the Department receives federal funding to implement environmental programs in Maryland, Title VI of the Civil Rights Act of 1964 is applicable to Departmental decision making pertaining to the Permit and Industrial Stormwater. The EPA has already determined that the Department receives federal financial assistance in a prior proceeding and as such the Department must ensure that decision making regarding this Permit's renewal is not continuing to discriminate on the basis of race, color, and national origin. The Department should undertake thorough technical analysis, consultation, and consideration of reforms to address the human health impacts, disproportionate burden, and widespread noncompliance with Permit 12-SW before its reissuance. Toxic and hazardous contaminants discharged and emitted from industrial stormwater permittees threaten the health and safety of workers and other vulnerable populations. Ongoing violations and noncompliance with the current permit are widespread, persistent, and result in a substantial burden on water quality and public health. The Department's posture towards enforcement, compliance assistance, has failed throughout the permit term to resolve or otherwise reduce noncompliance and substantial contamination. The Department's failures to develop an enforceable permit that addresses human health harms and to implement an enforcement regime that prevents widespread noncompliance perpetuate, and inevitably worsen, the disproportionate pollution burden imposed on Maryland's marginalized communities who live and work near industrial facilities. In other words, because there already is so much pollution in marginalized communities due to a high concentration of industrial facilities in these areas, these communities are hit even harder by a failure of the Department to enforce the permit, which allows rampant noncompliance and increased community exposure to harmful pollutants. **To remedy these failings, the Department should (1) conduct a cumulative impacts assessment and tailor action on the reissuance of the Permit in response to the assessment's findings; and (2) undertake the maximum effort to seek out and involve the CEJSC and affected communities in (a) contributing data and other information to the design and implementation of the cumulative impacts assessment and (b) tailoring action on the permit reissuance to correct enforceability deficiencies and respond to community needs, concerns, and priorities.**"[36]

"***Pollution from Industrial Stormwater Dischargers is a Public Health Threat.***
Industries regulated under the permit, such as scrap metal recycling facilities, auto salvage yards, and landfills, pose a variety of hazards to nearby communities. Metal torch cutting and welding, practices often employed at metal recycling facilities, can generate heavy metal-containing particle emissions and fumes, which may be inhaled. Fenceline air monitoring of these facilities in Houston, Texas detected concentrations of carcinogenic metals, such as nickel compounds, that contributed to increased cancer risk among nearby residents, even for facilities operating within legal limits. Metal recyclers that operate auto shredders also generate a waste residue known as auto fluff, which may contain contaminants such as petroleum hydrocarbons, lead, and cadmium. Auto fluff qualifies for treatment as a hazardous waste and has been detected in dust over a half mile from shredding facilities.
Workers at auto salvage and metal recycling facilities are regularly exposed to elevated levels of toxic metals such as arsenic, beryllium, hexavalent chromium, and cadmium.
Chronic occupational exposure to these toxins is linked to increased rates of heart and lung disease, lung cancer, kidney damage, brain dysfunction, and suppression of the immune system. Studies of U.S. electronic scrap recycling facilities have found heavy metal-laden dust on workers' skin and clothes, and

[36] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

elevated blood lead levels among workers. The harms may also be immediate. Since 2010, at least three metal recycling facilities in the United States have experienced accidental chlorine gas releases, injuring more than 30 workers (in one case, fatally).

In addition to occupational exposures, heavy metal-laden dust can be brought home by workers or blown off-site by wind, which can contaminate nearby soil and homes, exposing children, pregnant women, and others. Short- and long-term exposure to lead through inhalation or ingestion can cause abdominal pain, fatigue, headaches, irritability, and memory loss in adults. There is no safe level of lead exposure in children, and exposure can cause permanent brain and nervous system damage, delayed growth and development, learning and behavioral issues, and speech problems.

Hazards and health impacts associated with working and living in close proximity to landfills are well documented. Landfills can produce gases such as methane, ammonia, hydrogen sulfide, and NMOCs, like benzene, which may combust if in excess amounts. The Agency for Toxic Substances and Disease Registry has recommended investigation of storm sewers on or adjacent to landfills, which may convey landfill gases that could pose a risk of asphyxiation for utility workers in confined spaces. Fungi and bacteria, like Staphylococcus and E. coli, have also been detected above recommended levels in the air at landfill sites. These chemical compounds and bacteria, as well as disposal of certain types of waste (like manure) may produce noxious odors that cause headaches, nausea, respiratory issues, and stress in nearby communities. One study in Cecil County, Maryland found that hydrogen sulfide emitted by a landfill was the source of a "rotten egg" odor detected by residents. Particulates can also trigger respiratory health issues, especially for sensitive populations. One study of Staten Island, New York showed an increase in self-reported wheezing among people with asthma living near a landfill. These effects may be amplified for workers. Landfill workers face an increased risk of various degenerative diseases, infections, and other illnesses through regular exposure to toxic, dust-based metals, particulates, bacteria, and fungi. Furthermore, proximity to landfills has been linked to adverse birth outcomes. Research shows an increased risk of congenital malformations and low birth weight in communities near landfills, especially those containing hazardous waste.

Whenever it rains or snows, heavy metals and other contaminants on impervious surfaces may be redistributed throughout a community. In this way, stormwater acts as a vehicle for transporting toxic contaminants released into the air and soils into nearby communities and waterways, compounding the existing hazards associated with living near these facilities. In Maryland, stormwater is the fastest-growing source of pollution to local streams and rivers and jeopardizes progress to restore the Chesapeake Bay. The Anacostia and Patapsco Rivers are the only two waterways in the 64,000 square mile Chesapeake Bay watershed identified by the Chesapeake Bay Program as impaired by metals, polychlorinated biphenyls (PCBs), and toxic organic compounds. Chemical pollutants can be toxic to aquatic life, disrupting growth, reproduction, and survival of fish and other creatures. While not the only source, industrial stormwater runoff may contribute to chemical bioaccumulation in fish tissue, which may be harmful to humans who consume contaminated fish. Mercury has been detected at hazardous levels in freshwater fish of the Chesapeake Bay watershed, particularly in the Potomac and Susquehanna rivers. Furthermore, the Gunpowder and Bird rivers continue to have fish consumption advisories due to elevated concentrations of PCBs. Overall, as Department staff are aware, the National Stormwater Quality Database clearly shows elevated concentrations of metals and more hazardous pollutants from samples taken near urban industrial sites, providing overwhelming evidence to the regulatory community of the need for exceedingly strict controls at industrial stormwater sites to protect urban communities and waterways from a variety of toxic and carcinogenic substances.

In urban areas where impervious surfaces dominate the landscape, contaminated runoff from rainfall or snowmelt can be particularly harmful to nearby communities. In 2016, for example, stormwater runoff from Baltimore Scrap, a metal recycling facility, was found to have excess levels of heavy metals. One study of 20 industrial sites in the United States (encompassing 10 activities, including landfilling, junkyards, and scrap/recycling) found elevated levels of copper, zinc, nickel, and other contaminants in

stormwater runoff from these facilities, in some instances exceeding concentrations in landfill leachate. This can be especially hazardous to children due to their increased likelihood of exposure and susceptibility to contaminants in soil. Elevated blood lead levels have been detected in children who live near landfills due to soil exposure. Runoff of toxic contaminants may also pollute drinking water sources. A 2008 study of drinking water at a federal facility found detectable levels of some industrial contaminants (including manufacturing additives, industrial solvents, petroleum byproducts, and pavement- and combustion-derived compounds) in both water supplies from the Potomac River and in samples of the facility's treated drinking water. Contamination of groundwater used for drinking water by landfill leachate has been linked to increased cancer mortality rates, especially from bladder cancer. Nanomaterials, such as titanium dioxide and zinc oxide, have also been detected in water sources and soil around landfills, industrial discharges, and municipal wastewater. While still an emerging field of study, evidence suggests that exposure to certain nanomaterials through ingestion, inhalation, or skin penetration may be toxic to humans.
….[NOTE:SECTION MOVED TO BENCHMARKS]
The public health burden of toxic industrial stormwater runoff and other fugitive emissions is not equally distributed. The Center for Progressive Reform and Environmental Integrity Project's 2017 analysis found that many of the industrial facilities covered under the industrial stormwater permit are clustered in and around low-income neighborhoods. This includes areas such as eastern and south Baltimore, northern Anne Arundel County, Prince George's County bordering the District of Columbia, and Salisbury on the Eastern Shore. These same communities are plagued by a variety of polluting industries, according to EPA data, and are also where most of the state's public drinking water violations occur. Many of these areas score in the top 25th percentile on the Maryland EJ SCREEN tool (discussed in more detail later in this letter), meaning that communities experience a higher cumulative burden of pollution exposure and socioeconomic and health stressors compared to at least three-quarters of census tracts in the state. Particularly in Baltimore and Prince George's county, these communities are also home to a higher percentage of Black residents compared to the state overall. The disproportionate proximity of lower income communities and communities of color to industrial facilities is not by chance, but the result of structural racism and discriminatory housing and zoning practices. The high concentration of polluting facilities in these communities also contributes to growing health disparities. For example, residents of South Baltimore, an area of significant industrial activity, experience higher rates of asthma emergency room visits and hospitalizations, cancer, and heart attacks compared to the state, on average. As a result, the Department must act with a heightened sense of urgency to ameliorate these disparities by reducing pollution sanctioned by this Permit.
Considering the known environmental health burden associated with pollution from industrial stormwater permittees in Maryland, as well as the existing socioeconomic and health stressors in communities adjacent to these facilities, the Permit must be reformed before its reissuance to limit hazardous emissions that harm workers and nearby residents. Without proactive efforts to better account for and control pollution from these facilities, including by strengthening permit enforceability to hold permittees accountable for complying with permit terms, Maryland families will continue to be the ones that bear the cost."[37]

## 4. COMMENT CATEGORY – Part I (Applicabity) and Appendix A.

"Part 1. Applicability
Section B. Facilities Covered
1. Sector AD: Non-Classified Facilities

[37] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

a. Commercial vehicle storage facilities should be included within this sector. Lots storing one or more commercial vehicles should be regulated under this permit.
i. Vehicle storage facilities owned by permitted facilities but are not contiguously located on the same land parcel but located within 1,000 feet of the primary permitted facility shall be required to be permitted under this permit. These vehicle storage facilities would be considered under the primary permit if vehicle storage was located on the same land parcel. Such vehicle storage facilities located within 1,000 feet add to the cumulative impact on local water quality as part of their support to the industrial activities of the primary facility.
ii. Commercial vehicle storage lots not associated with a permitted facility should also be covered under this sector. Often vehicles associated with the activities industrial facilities covered under this permit are not owned by the permitted facility or stored by the permitted facility. These vehicles are stored (parked) uncovered on land parcels in industrial or commercial areas. The storage of these commercial vehicles has a significant negative impact on local water quality for the following reasons:
iii. These unregulated vehicle storage lots add to the cumulative impact of harms caused by the industrial facilities which they support.
iv. Commercial vehicles associated with the transport of industrial materials containing fine particulate matter track or haul these materials off of permitted facilities and onto the facilities where their stored. Particulate matter on these vehicles and tracked onto the grounds of these sites without stormwater controls is exposed to stormwater during weather events and flows off these sites and into the watershed.
1. Examples of these types of vehicles include but are not limited to dump trucks, concrete mixing barrel trucks, concrete batching trucks, flatbed trucks, tractor trailers, bulldozers, backhoes, bobcats, forklifts, and uncovered hitch trailers
v. Often commercial vehicles stored on these lots are owned by individual contractors who rent a "parking" when not in use. Owners of these storage lots do not have installed stormwater mitigation systems or controls nor do they regulate the use of their lots where the following activities associated with industrial facilities also occur:
1. Stockpiling of uncovered industrial manufacturing supplies
2. Storage of other industrial equipment and vehicle parts.
3. Large scale vehicle maintenance and repair activities
4. Dumping of industrial waste materials to clear vehicles for use on
the next job.
vi. Land owners have often removed trees and other vegetation from these lots and have not installed stormwater controls while creating these commercial vehicle storage lots."[38]

"Part 1. Applicability
Section B. Facilities Covered
1. Sector AD: Non-Classified Facilities
….
b. Material and equipment storage facilities used in support of the industrial activity of a permitted industrial facility but are not contiguously located on the same land parcel but located within 1,000 feet of the primary permitted facility should be included in this sector. The activities on these storage sites would subject to the conditions of the primary permit if the storage activities were located on the same land parcel. Such storage facilities located within 1,000 feet add to the cumulative impact on local water quality as part of their support to the industrial activities of the primary facility and should not be discounted when considering the overall impact of a facility with a quarter mile radius of its location.
i. Also require the following regarding these facilities:

[38] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710

1. Include the acreage of these facilities in the primary facility acreage for threshold benchmarking based upon facility acreage.
2. Also cite the primary facility's name, contact information, and permit number on the posted signage."[39]

".. the Department should consider, one, that a requirement that all facilities must declare any supporting auxiliary properties that support the facility's operation or any of the co-located operations on a site for evaluation, and that those auxiliary facilities if they are within 1,000 feet of the primary facility, especially if those auxiliary facilities that support the activities of the facility were not qualifying on their own for a general permit, industrial permit, under this section. .. So, as well, that if there are auxiliary sites that a -- the facility should be considered for an individual permit rather than for a general permit, and that all of the auxiliary supporting sites be considered part of that."[40]

"MDE should make it clearer in the permit that vehicle washing permits can now be obtained that might not necessitate connecting to the sanitary sewer."[41]

"The draft 20-SW contains language (bottom of page 4 of the Draft Permit) stating essentially that for affected industries the 15-MM takes precedent. However, page 1 of the Notice of Tentative Determination states otherwise. It says that SIC 2951 (asphalt paving production facilities) are now included in the 20-SW. MDE needs to state clearly upon adoption that those industries under the 15-MM remain under the 15-MM."[42]

"Since the 20-SW General Permit for Discharges of Stormwater Associated with Industrial Activity is generally not required for municipally owned and operated PW facilities (sector AD.a); could there also be a condition added for an SW covered municipal facility with good housekeeping and continued BMPs to qualify to graduate out of coverage? Appendix A: Industry Specific Sectors, SECTOR AD.a: DEPARTMENT OF PUBLIC WORKS AND HIGHWAY MAINTENANCE FACILITIES, NOTE: Coverage under this permit is not required for a municipally owned and operated facility unless the facility is notified by the Department that coverage is needed, or the facility was covered under the 12-SW permit."[43]

"Appendix A **Sector C.** In spring 2020, the US Composting Council put in an application with the federal agency that determines SIC numbers, for a unique SIC number for Composting, independent of *Agricultural Chemicals*. A decision is pending. When that new SIC number is issued, Composting Facilities covered by this permit may be subject to different benchmarks. Will submission of a revised SWPPP be allowed at that time?"[44]

## Grouping – No Exposure Exemption

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):

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[39] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[40] Alicia Melendez, Citizen and resident of Prince George's County, from Public Hearing
[41] Geoffrey Mason, Natural Resources Specialist, The Maryland-National Capital Park and Planning Commission
[42] Bernard Bigham, Chesapeake Environmental Group, Essex, MD
[43] Raquel J. Ketterman, Environmental Specialist,City of Cumberland
[44] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services

1. Mandate that facilities applying for a no exposure certification submit photographic evidence to support claim(s) of non-exposure to stormwater with their application for an NEC."[45]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….
2. Require that the Maryland State Department of Assessment and Taxation (SDAT) Real Property Tax Account Number(s) be used as an identifier for the facility in the application. To often an incorrect or alternative street address not associated with the facility or the actual land parcel in question is used for the certification request. The use of the SDAT Real Property Tax Account identifier would leave little room for doubt of the actual location of the facility or location. This was recently the case in Bladensburg where two one facilities shared the same street address but were located and operated on two different land parcels with different types of structural improvements. If MDE were to look up by address, MDE could mistakenly attribute the NEC to the incorrect."[46]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….
3. Require that an application for an NEC for exemption be filed every year for the entire term of the permit and for any permit administratively continued rather than every five years.
a. Failure to file an NEC in a timely manner should result in the following:
i. An unannounced site inspection by an MDE inspector.
ii. Dependent upon site inspection findings
1. On a finding of non-compliance, revoke the NEC revoked and order the facility to comply with the terms of the permit for the remainder of the permit cycle.
2. Level applicable fines for non-compliance"[47]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….
4. Public complaints filed against facilities holding an exemption shall result in the following actions:
i. An unannounced site inspection by an MDE inspector.
ii. Upon site inspection findings
1. On a finding of non-compliance, the NEC shall be revoked and the facility ordered to comply with the terms of the permit for the remainder of the permit cycle.
2. Level applicable fines for non-compliance."[48]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….

[45] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[46] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[47] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[48] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710

5. Facilities that previously failed to comply with their permits or violated the terms of their NEC shall not be eligible to apply for another NEC for the remainder of their permit cycle."[49]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….
6. have failed to comply with the terms of their NEC shall be required to apply for alternative permit coverage and shall not be eligible to apply for an, obtain, and comply with a full 20-SW cycle before being eligible for applying for an NEC."[50]

"Just because you've always done something a certain way is not a reason for continuing the practice. Does MDE have any data to support this position? I think I'd be more concerned about oily run-off from a Car-Max used car lot with hundreds of cars than a fleet of well-maintained trucks waiting for tune-ups. If a facility had the space to ensure all potentially leaking vehicles would be housed inside, would MDE consider that facility for a "No Exposure" Exclusion?"[51]

"Section F. No Exposure Certification
MDE should require the following for facilities applying for or granted a No Exposure Certification (NEC):
….
7. The definition of non-exposure shall include the required coverage of the open bed or trailers of commercial vehicles stored on site used to transport production materials, finished product,"[52]

"***Additional Regulatory Protection for the No Exposure Certification Program is Required.***
Commenters urge the Department to address a broad deficiency with the "no exposure" certification. As discussed, it is physically impossible and fundamentally inconsistent with the Bay TMDL and Maryland's Water Pollution Control Subtitle to establish a presumption that stormwater pollution will not be discharged from a site without full retention of stormwater onsite. Thus, in section I.F. the statement that "there is no potential for the stormwater discharged from your facility to waters of this state to be exposed to pollutants" should be deleted. Technically, the Department should not continue to allow new certifications unless the applicant demonstrates that all stormwater is retained on-site and not discharged; otherwise, this certification is not taking into consideration the potential for discharge of pollutants from deposition or run-on. Further, the Department should also require applicants to identify and make certification contingent upon measures to prevent discharge of contaminated stormwater during extreme weather and flood conditions, including, for example, certification that any material that has the potential to contaminate floodwaters or stormwater discharges is securely stored outside of flood hazard zones. Whether or not a pollutant was generated on site is irrelevant to whether pollutants are actually discharged in stormwater from the site to waters of the State, which is what is relevant under Maryland law governing discharge permits. Thus, at the very least, the Department must correct the inaccurate statement that "there is no potential for the stormwater discharged from your facility to waters of this state to be exposed to pollutants" to add the words "generated on site" at the end of that statement.
Beyond correcting that specific statement applicable to the no exposure certification, Commenters believe the certification must amount to more than an exclusion from regulation and introduce at least some

[49] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[50] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710
[51] Bernard Bigham, Chesapeake Environmental Group, Essex, MD
[52] Alicia C. Melendez, 4902 Taylor Street, Bladensburg, MD 20710

degree of regulatory protection given the role of deposition and run-on. These minimal regulatory requirements for lower risk facilities could include inspection, monitoring, and/or limited control measures, such as dust suppression, offsite vehicle tracking, and flow dissipation controls. Commenters recognize that this position represents a departure from current practice in Maryland and perhaps in most other jurisdictions. However, Commenters urge the Department at a minimum, to commit to moving away from this system whereby facilities can be fully excluded from regulation. Facilities granted this certification do, in fact, generate some stormwater pollution and discharge to waters of the state. Given this reality, it is perfectly reasonable, and arguably legally required, because the Department must ensure consistency with WQS, to establish a parallel regulatory process that would at least begin to mitigate discharges with this 20-SW permit cycle. Such state-based programs are consistent with the intent behind the Bay TMDL and Chesapeake Bay Agreements to establish a holistic and comprehensive approach to addressing pollutants from all sources.
…
Finally, Commenters also urge the Department to fully deny a "no exposure" certification to any **new** sources from newly established facilities, thus providing an incentive to fully retain stormwater and/or pre-treat runoff as a state-based new source performance standard built into the process of establishing new facilities with industrial stormwater discharges."[53]

"We also note that both Dr. Horner and Dr. Roseen have expressed concern about the proposed no exposure certification provisions in the Permit. Dr. Roseen has observed a problematic trend whereby industrial sites attempt to skirt regulation under the Clean Water Act by employing crude engineering measures to simply retain all stormwater onsite with no regard to impact on groundwater. Commenters are not aware of this practice being utilized by no exposure certification applicants in Maryland, but request that MDE improve the Permit by prohibiting such methods and appropriately requiring any infiltration of runoff receives appropriate filtration and does not otherwise contaminate groundwater – a water of the State. Dr. Horner recommended that the Department review the more careful no exposure certification requirements in Washington's industrial stormwater permit, which include 11 specific questions that must be satisfactorily answered to receive the certification."[54]

"MDE has improperly implemented the "No Exposure Exclusion" available in the federal program. The permit language in the 12-SW as well as the draft 20-SW both give the inaccurate impression that MDE is following the federal Multi-Sector General Permit (MSGP) program as regards to the opportunity to use the "No Exposure Exclusion" option which is part of the permit program. This option is available provided certain structural and operational controls are in place. … Again, according to the language contained in both the 12-SW and the proposed 20-SW the process of seeking a "No Exposure Exclusion" hinges on the industry's ability to satisfy the requirements of the "NO EXPOSURE CERTIFICATION for Exclusion from NPDES Stormwater Permitting." This form is taken directly and mirrors the federal EPA language. … If you review the form, you will see that other than construction activities, in the EPA program no Industry Sectors are prohibited from seeking the "No Exposure Exclusion." While it would appear MDE has adopted the EPA approach and that the option to pursue the "No Exposure Exclusion" is available to those who otherwise qualify, such is not the case. While MDE adopted language nearly identical to the federal permit language and uses the same form with the same language as the EPA, MDE has made it impossible for a large segment of the regulated industry to even consider the "No Exposure Exclusion" option. Why is this the case , when MDE is using the EPA permit language and the EPA forms which allow use of the "No Exposure Exclusion?" This is because MDE, in adopting the 12-SW

[53] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[54] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

also developed a "Guidance Manual for Conditional Exclusion from MDE's Stormwater Permitting (12SW) Based on "No Exposure" of Industrial Activities to Stormwater," (Guidance Manual). … Page 4 of the Guidance Manual states: 2.1. Limitations on Eligibility for the No Exposure Exclusion In addition to construction projects not being eligible, the following situations limit the applicability of the no exposure exclusion: SECTOR P, Q and S: Land, Water and Air TRANSPORTATION have the potential to have vehicles waiting to be serviced parked outside where they are a potential source of pollution. Therefore, facilities that perform maintenance are not eligible for this exclusion. This language is NOT a part of the 12-SW nor of the draft 20-SW. It has never appeared in any of the EPA versions of the MSGP. … Has the regulated public ever had the opportunity to review this Guidance Document? After reading the language in the 12-SW and the draft 20-SW, then looking at the No Exposure Certification" form, there would be no reason for potential commentors to believe that MDE would ever contradict what was in those documents by buried language in an obscure document. It is not surprising that comment has not been made when MDE made it look all along that the federal EPA was being followed, when in fact, someone within MDE did not like the concept of a "No Exposure Exclusion" option for certain elements of the regulated community. Since this Guidance Manual alters the language of the General Permit so drastically, it should be viewed as a regulation. The document's Statement of Purpose should be given. Then a comparison to Federal Regulations should be included, describing the added language. After that there needs to be an "Estimate of Economic Impact," with all assumptions MDE made when doing the Estimate. Lastly, the Economic Impact on Small Businesses should be discussed. What is MDE's justification for this limitation? Has an actual analysis ever been done on leaks from vehicles at vehicle maintenance facilities? Taking this "long standing concept" one step further, is there any industry that does not have the potential to have a spill? No industry could ever receive a "No Exposure Exclusion."[55]

## Grouping – Require an Individual Permit

"Facilities with a history of significant noncompliance should be added to the list of facility types in Section 1.g.2 that should require an individual permit, especially if discharging into waters with any impairment due to metals."[56]

"***Permit Coverage is Overly Broad and Permissive, Thus Denying Adequate Attention and Protections for Large Dischargers of Pollution***
**Advance Notice to the Department and the Public Should be Required for Sites that Present Specified, Clearly Enumerated Risks, in order to Evaluate Whether Additional Controls and/or an Individual Permit Should be Required Instead.**
Stormwater general permits are not sufficiently protective or suitably tailored for all applicants. The NRC noted the greater ability of individual permits to regulate pollutants relative to a general permit. Additionally, as stated in EPA stormwater permit guidance, "NPDES authorities may find it more appropriate where resources allow to issue **individual permits that are better tailored to meeting water quality standards** for large industrial stormwater discharges with more complex stormwater management features, such as multiple outfalls and multiple entities responsible for permit compliance." Federal regulations discuss additional considerations for when an individual permit is more appropriate including, notably, compliance issues - which, as discussed, are widespread in Maryland - or where a facility is a significant contributor of pollutants.
Thus, in many cases, whether due to the condition of the receiving water, proximity to a contaminated site designated for cleanup, current compliance status, or due to the nature of pollutants to be discharged, an

[55] Bernard Bigham, Chesapeake Environmental Group, Essex, MD
[56] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing

individual permit should be used in place of a general permit. **We urge the Department to include in the Permit a requirement for applicants to provide advance notice to the agency, to EPA, and to the public if the site presents specified, clearly enumerated risks, in order to allow the Department to fully evaluate whether additional controls and/or an individual permit should be required instead.** The Department cannot make an informed decision to issue a more appropriate individual permit if it does not have the relevant information about the facility ahead of time. We note that the relative value of an individual permit also increases to the extent that the terms of a general permit are inadequate or insufficient, which is certainly a concern for this Permit based on the draft that the Department has tentatively determined should be issued.
A few circumstances that we believe warrant advance notice from applicants (as well as consideration of additional or enhanced controls) and/or individual permit coverage include: (1) ongoing noncompliance under the 12-SW permit, as identified by Department or EPA inspectors, especially for sites that are not in compliance with the ISR requirement; (2) new facilities that would discharge the same pollutant for which the local receiving water is listed as impaired or new facilities that propose to discharge within a catchment that drains to a Tier II water body; (3) sites located immediately upstream and within close proximity (e.g. a half mile) of a site on the National Priority List or in the State's Voluntary Cleanup Program; (4) sites that have applied a coal tar or high-PAH sealant within the previous year and ones that plan to apply such sealants (unless otherwise affirmed in the permit application); (5) locations within a community affected by environmental injustices, which could include either census tracts above a certain threshold (e.g. top quartile) in the CDC Social Vulnerability Index, MD EJ SCREEN, or an EPA EJSCREEN block group with more than one environmental or demographic indicator with an index score in the top quintile; and (6) sites at greater risk of inundation, including those that have flooded within the previous decade and those within a FEMA 100-year flood zone."[57]

"An additional pre-authorization wait period, similar to the concept proposed by EPA for the federal MSGP, should also be added to this Permit. Given the extraordinarily high rates of noncompliance from this permitted sector and the duty of the Department under its regulations to evaluate compliance with existing permits prior to the renewal or reissuance of a permit, the Department will need to establish a separate track for facilities with compliance issues, particularly those recognized as in "significant noncompliance" and those that failed to achieve their ISR requirements either by the deadline or by the time this Permit is reissued."[58]

"We recognize the Department has made a change to the Alternative Coverage section (I.G.) to address some problematic language in the same section of the previous 12-SW permit, which stated that "*if* the Department determines that a discharge may cause water quality standards to be exceeded in the receiving water, then the Department may require you to take additional actions including getting an individual permit." Now, the provision begins with a clear statement that "[y]ou must meet applicable water quality standards." However, alternative coverage under an individual permit is not required unless "the Department *determines prior to your authorization* to discharge that your discharges will not meet an applicable water quality standard." **This language must be strengthened.** At present the language provides no guidance to permittees regarding whether they will be eligible for coverage under the Permit and it invites arbitrary decisions for the Department. **Moreover, the Department does not possess adequate staff to implement this provision and has not established any processes in the Permit or otherwise to give effect to this provision.** To comply with the CWA and Maryland Water Pollution Control statute and give fair guidance to regulated entities, the Department must establish a clear process that describes how it will make this determination without vagueness or overly discretionary language. If

[57] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[58] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

advance notification is required for certain classes of facilities in order to allow the Department to conduct pre-authorization inspections and evaluations, the Permit must be amended to include it. We also note that the Department has continued to struggle to identify facilities that have evaded coverage under the Permit due both to a lack of staffing at the Department and to a lack of programmatic initiative. Commenters and our partners are being relied upon to bring unregulated facilities to the attention of the Department. Failure to obtain coverage is, of course, a serious matter of noncompliance under the CWA, which is reliant on a permitting program to drive progress toward attainment of WQS. It is unacceptable for the regulator to have to rely on referrals from the public to ensure it has adequate regulatory coverage over the universe of facilities. The Department must advocate for additional resources to build a credible permitting program."[59]

"Finally, the NRC recently recommended that EPA extend MSGP classification to "nonindustrial facilities with activities similar to those currently covered." The EPA has previously determined that there is a large universe of facilities and activities that fall outside of the regular MSGP sectors, many of which could be subject to Sector AD. Commenters urge the Department to begin the process of identifying additional sectors for coverage for subsequent issuances of this permit, because there is no reasoned basis for continuing to ignore all nonindustrial facilities with activities similar to those currently covered."[60]

"***The Department Should Require Individual Permits for All New Facilities, Including a Requirement to Offset any New Loads, Preferably Through Onsite Pollution Control Projects.***
As discussed, Congress required industrial stormwater permits to be in strict compliance with WQS. Along with that mandate comes additional requirements for permits issued for discharges to receiving waters with certain designations, such as impaired, subject to a TMDL, or high quality. The 20-SW, like the 12-SW, makes reference to these designations, for example, by requiring permittees to describe the receiving waters from their discharges, establishing the ISR standard designed to implement the Bay TMDL for some facilities, and requiring certain monitoring conditions for impaired waterways. However, the Permit does not go far enough in distinguishing between different classifications of facilities based on the status of the waters that receive discharges from those facilities.
Federal regulations prohibit the issuance of a permit in limited circumstances. One of these circumstances pertains to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." This prohibition applies unless there are "sufficient remaining pollutant load allocations to allow for the discharge" and "existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." Commenters appreciate that the Permit references these important provisions that are ignored in other Permits issued by the Department; the process for handling coverage for new facilities in subsection I.C.5 is clear and prescriptive. However, Commenters are concerned that the provision, which is maintained from the 12-SW permit, fails to comport with the Bay TMDL and the well-recognized impact that impervious surfaces have on nutrient loading to surface waters. Thus, for example, subsection I.C.5 (where the Permit authorizes coverage to a new discharger if, among other things, it can "prevent all exposure to stormwater" or "document that the pollutant for which the waterbody is impaired is not present at your site") references a result that is physically impossible and untethered from the reality of permitting consistent with the Bay TMDL. Nitrogen deposition means that all new impervious surfaces are sources of nutrient pollution within the Bay watershed. Unless a new facility can ensure all stormwater is retained onsite or can generate offsets within the same subwatershed or catchment, paragraph I.C.5 cannot pass muster and must be revised. **Commenters urge the Department to require individual permits for all new facilities and to require no new loads,**

[59] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[60] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

**preferably through onsite BMPs.** At a minimum, Commenters would recommend that the Permit prescribe specific additional or expanded control measures and ISR requirements to ensure no increase in discharges."[61]

## 5. COMMENT CATEGORY – Part II (Authorization).

"Part II F.1.c **Sludge Use and Disposal Practices:** The draft permit says "permittee's sludge use or disposal practices". Does this mean "sludge use and *sludge* disposal practices" or "sludge use and *waste* disposal practices". Clarification is needed for those who have disposal practices that are not sludge related."[62]

### Grouping – Deadlines

"Part II B **Deadlines for Coverage**: Please issue the Final Permit at least six months before the effective date, so that we have sufficient time to revise our SWPPPs."[63]

"**The New 6 Month Deadline for SWPPP submittals – Part II.B, Fact Sheet 4.2.2** The MDE Fact Sheet and draft permit state that permittees already covered by existing permit 12-SW and subject to Chesapeake Bay restoration requirements must submit a completed NOI within 6 months of the effective date of the new permit and a completed SWPPP at the same time. WSSC Water must update the current SWPPP for 10 separate facilities that are subject to this permit and it is not possible or fiscally reasonable to update those SWPPPs within 6 months as we rely on outside consultant services to prepare those plans and must allocate funds by Fiscal Yar to obtain consultant services. The proposed submittal deadline is half the one-year time allowed for NOI and SPWPP submittals under permit 12-SW. For these reasons, the proposed condition is especially problematic for entities such as WSSC. **WSSC requests that the draft permit be modified to provide that facilities with an existing SWPPP be allowed to submit an updated plan with the NOI within one year.**"[64]

### Grouping – Fees

"***Permit Fees Are Not Sufficient to Address Substantial Resource Constraints for Implementing the Permit and Ensuring Compliance***
One of the most common and frequent criticisms of nearly all Department programs is a lack of budgeted resources and staff. This deficiency has been documented by EPA, by state auditors, by nonpartisan legislative analysts, and by the Department itself. As EPA stated in its most recent review of the Department's stormwater permitting programs "Maryland has had its share of budget problems in recent years, which has had an effect on MDE's budget and that of its stormwater programs. **Representatives of these programs cite budget limitations and reduced staffing levels as the biggest challenges they face.**" (Emphasis added). A two-year study of all executive agencies in Maryland found the Department to be one of the most chronically understaffed. One need look no further than the extraordinary delays in the reissuance of this Permit, which has only gone through two iterations in the last two decades, for evidence of acute understaffing.
The Department is required by statute to "set a reasonable permit fee schedule for industrial users based on … the cost of monitoring and regulating the permitted facility … the flow of effluent discharge ... and

[61] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[62] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[63] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[64] James Price, Deputy General Manager for Operations, WSSC Water

… the anticipated needs for program development activities that relate to management of the discharge of pollutants into the waters of this State." Thus, resource constraints should, in theory, never be an issue for the Department in writing permits or ensuring compliance associated with the industrial stormwater general permit. Yet, in working closely with staff in the Industrial Stormwater Permits Division, Commenters note that it has become glaringly obvious that the Department has nothing more than a skeleton crew in charge of this highly important permitting program.

Commenters applaud the competence and professionalism of the staff in this Division, **but as the Department itself has repeatedly acknowledged, it simply does not have the resources to assure compliance with the permit's terms, WQS, and state and federal law. Its obligation under the law is to ensure compliance with the CWA and state laws. The lack of resources is, thus, a legal violation that must be immediately corrected by filling vacant positions and adding as many staff as is necessary to adequately carry out the terms of this Permit and to enforce violations of the Permit. A failure to do so makes the very issuance of the Permit in this form irrational, as it would be arbitrary and capricious to develop permit terms the Department knows it cannot carry out.**

A handful of staff is wholly unacceptable given the complexity of this permit, the number of facilities, the egregiously high rate of noncompliance, and the hazardous nature of industrial runoff. Moreover, as described above, industrial stormwater pollution presents disproportionate harms to communities already suffering most from environmental injustices, making it an important issue of environmental justice for the Department to provide adequate permitting and compliance staff.

**Unless the Department can show that the current fee revenue is sufficient to enable the Department to fill vacant positions, Commenters strongly urge it to increase the fee to account for inflation and the cost of enhancing the agency's regulation of industrial stormwater.** And because "the flow of effluent discharge" is a mandatory consideration, Commenters urge the Department to establish a fee schedule that accounts for the volume and impacts of the pollutants from individual sectors and for sites of different sizes.

Commenters recognize that fees are set by regulation at COMAR 26.08.04.09-1, but there is no reason the Department could not introduce a new fee structure in this Permit along with a proposed regulatory amendment to section .09-1 to enhance the fee schedule associated with the Permit. In fact, it is our view that **the Department must enhance fees to comply with the Memorandum of Agreement it signed with EPA** to implement the federal NPDES program, including to "maintain the legal capability . . . **and the resources required to carry out all aspects of the NPDES program**." (Emphasis added)."[65]

## Grouping – NOI

"The reissuance of this permit is of interest to our organization as Frederick County owns and operates eleven facilities regulated under the current administratively extended NPDES General Permit (12-SW). Upon review of the draft permit, Frederick County requests that the Department list "all documents submitted to the Department" (Part II.C.3), and which Division of the Department they are to be submitted to, in one section of the permit for easy reference. The inclusion of this information within the permit will help facilitate compliance according to the Department's intent."[66]

"Must our facility submit a Notice of Termination upon renewal of 20-SW permit or does MDE take care of that when our Notice of Intent for the new permit is submitted?"[67]

"***The Permit Should Be Accompanied by Greater Transparency and Accessibility***

[65] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[66] Angelia Miller, Office of the County Executive, Frederick County Government
[67] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg

The CWA was written with public involvement playing a central role. The very first section of the Act describes the need for agencies entrusted with administering the statute to facilitate public participation, a duty that flows to the Department via delegation of federal authority. Section 101 of the Act states that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this **chapter shall be provided for, encouraged, and assisted** by the Administrator **and the States**." (Emphasis added). Moreover, after accepting delegated authority to implement the CWA from EPA, the Department charged itself with adhering to certain basic principles, including public participation. In furtherance of this important principle, the Department's regulations declared that "active public involvement throughout the intergovernmental decision-making process shall be encouraged and utilized to accomplish the objectives of State and federal laws and regulations" and that the "**Department shall make a maximum effort** to seek out and involve the interested public." (Emphasis added). Finally, the Maryland Environmental Policy Act requires all state agencies to ensure "the fullest practicable provision of timely public information.""[68]

"Regarding NOIs, the Department should also expand the scope of information required of applicants in subsection II.A.1. For example, Commenters urge the Department to include additional and more specific geographic information about the permit. Instead of an 8-digit watershed identifier, the applicant should include the 12-digit watershed code, which is much closer to the neighborhood level and a geographic scale relevant to peoples' lives. The Department should require the applicant to refer to the agency's interactive maps for Water Quality Assessments and TMDLs and for Tier II waters and to provide the name, GIS ID, and any other location information associated with the receiving water body, as well as the geographic coordinates of each discharge point on the site and for the storm drain collection point and outfall, if any.
Additionally, the NOI requirements and NOI form provided by the Department should be amended to include the latest sampling data from a site covered under the previous permit. This data provides important information to Department staff documenting whether the facility is conducting sampling on the required schedule and in compliance with proper sampling procedures and that any benchmarks are not being exceeded. Again, this information is critical to evaluating compliance and enabling the Department to take enforcement action if necessary. Such information is also a critical component of the permitting process because the Department is required by law to ensure compliance by the permitted entity with all state and federal requirements. The Department could consider exploring the NOI processes of other states. One state with robust reporting requirements is New York."[69]

"***The Department Should Require Public Notice for Certain Permit Applications Prior to Granting Facility Coverage.***
Requiring advance notice for some or all permit applicants is important in order to give effect to permit coverage and exclusion considerations. The process for gaining coverage under the 20-SW Permit should be similar to the process for gaining coverage from the Department's general permit for Animal Feeding Operations (AFO). Specifically, that permit provides for public participation prior to the coverage of an individual facility, which is important since the NOI takes the place of a permit application. This Permit is similar in many respects to the AFO general permit and, given the large number of Marylanders in close proximity to industrial stormwater permitted facilities, it would seem even more important to solicit public comment prior to granting coverage under the Permit.
At the very least, advance notice should be required to be provided to the Department along with posting of such information on the Department website. Even if a formal notice and comment period is not

[68] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[69] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

established - which Commenters believe should be provided - advance notice would alert the surrounding community of the application, give them the opportunity to provide feedback to the Department, and help the Department drive greater awareness of this Permit, which does not exist at the present time. Because of the critical deficiency in staff and budgeted resources for the implementation of this Permit it is even more important that the Department seek information from the public."[70]

## Grouping – Signage

"Part II G.2 **Sign**: Instead of putting the MDE URL on the sign, can MDE provide permittees with a QR code to put on the sign for the public to use to get to this website?"[71]

"Requirement to Post a Sign of Permit Coverage in Proposed Part II.G.
ISRI does not support the proposed requirement in Part II.G. that permittees post a sign or other notice of permit coverage at a safe, publicly accessible location in close proximity to their facility. As noted in Section A.1 above, U.S. EPA originally included this provision in the Proposed 2020 MSGP because of an assumed equivalency between the CGP, which has this requirement, and the MSGP. Such equivalency does not exist because the CGP covers temporary construction activities at a site while the MSGP covers a permanent facility. This is particularly relevant to this proposed requirement. Posting of stormwater permit information for a construction site may serve the public interest precisely because the construction activities at the site are not permanent. This is not the case for an industrial facility.
This requirement should not be included in the Final 20-SW Permit because it is not necessary. The permittee's facility is permanent, and the facility's owner or operator can be found via its permanent street address. Anyone who wants more information about the facility and its stormwater management should be able to obtain it without too much effort, especially considering that certain stormwater information is submitted and posted electronically."[72]

"***The Department Should Further Strengthen Signage Requirements at Permitted Sites to Ensure Community Access to Facility Information.***
Commenters applaud the Department's decision to require applicants to post standardized signs on the exterior of their sites. Signs are essential public health tools that protect and empower the residents living in communities surrounded by industrial facilities, especially communities disproportionately affected by environmental pollution. Because industrial facilities are concentrated in overburdened communities, these communities stand to benefit the most from adequate signage that can alert community members to potential harm. Commenters believe the Department benefits when the public knows that the agency is there to protect their health and wellbeing. The public likewise needs to know what pollutants are being discharged into their communities, and the Department has an obligation under the law to facilitate the dissemination of environmental information. To this end, Commenters urge the Department to consider the inclusion of at least a few key elements into the new signage requirement.
First and foremost, section II.G should include a requirement for signs to be translated into Spanish and any other non-English language known to be common in the surrounding community. Additionally, the requirement to post a phone number for the facility is helpful, but this would be strengthened by including a web link where the public can report any pollution concerns or a "hotline" to call.
Finally, while Commenters appreciate the new requirement that the sign be posted "at potentially impacted public access areas", Commenters believe this requirement could be strengthened by specifying that signs be posted near each primary discharge point. For sites with a large number of discharge points,

[70] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[71] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[72] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

the Permit could require the posting of one main sign that complies with section II.G. and then smaller warning signs or stenciling around the other discharge points. These signs can warn community members, and especially children, not to loiter or recreate on public property directly adjacent to these points during or after rain events. Such signs can also help educate members of the community about the nature of industrial stormwater runoff. For example, an average person not aware of the difference between stormwater and a hazardous spill may see a stream of water from an outfall or discharge point at an industrial facility and believe it to be either illegal or an extremely dangerous spill or leak, rather than stormwater deliberately channeled from the site. This education could reduce fear and mistrust and perhaps improve the usefulness and quantity of public complaints that the Department handles. Because permittees are already required to designate the location where potential spills and leaks would discharge, Commenters believe this provision would be significantly enhanced by requiring permittees to place signage next to these outfalls to provide a basic warning to the public, including to children that may otherwise play nearby."[73]

## 6. COMMENT CATEGORY – Part III.A (Chesapeake Bay Restoration).

"**The Permit Does Not Contain Adequate Protections for Either Impaired or Healthy Waterways and Appears to Ignore the State's Water Quality Standards**
***The Permit Should Expand - Not Roll Back - Efforts to Restore Impervious Surfaces in Order to Protect Water Quality.***
As an initial matter, Commenters reiterate strong opposition to the rollback of the 20 percent ISR requirement, which serves as the most important WQBEL in the Permit. This rollback is inconsistent with the state's commitment to Bay restoration, with the Department's supposed renewed commitment to environmental justice, and with the spirit and letter of the CWA. The Department must reverse this proposed rollback and reinstate the 20 percent standard."[74]

"***The Permit Proposes to Roll Back the Chesapeake Bay Restoration Standard Contrary to the Clean Water Act Prohibition on Backsliding***
The CWA is designed to continually reduce pollution over time. The "national goal" of the Act is that "the discharge of pollutants into the navigable waters be eliminated." Thus, for permits that are not designed to achieve zero discharge of pollutants, the CWA envisions, among other things, water-quality based limits designed to ensure consistency with WQS and the "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation." In short, authorities issuing permits under the CWA's National Pollutant Discharge Elimination System must progressively tighten pollution limits until such time as the discharge of pollution is eliminated. This goal, passed nearly unanimously by Congress, is given effect through several provisions of the CWA and its implementing regulations, notably including the "anti-backsliding" provisions that generally serve to ensure that permits are continually improved and not weakened on the path toward eliminating pollution. Subsection 402(o) of the CWA contains this prohibition on weakening effluent limitations from one permit term to the next. As recently stated by the Maryland Court of Appeals, the twenty percent impervious surface restoration requirement expressed in the expired MS4 (municipal stormwater) permits, which is virtually identical in nature to the ISR requirement in the previous 12-SW permit, is a water quality-based effluent limitation. This effluent limitation is contained in section III.A. of the Permit. Subsection III.A.1 establishes the new standard for impervious surface restoration and broadly eliminates it, with narrow exceptions. The impervious surface baseline is maintained at January 1, 2006, the same as for the 12-SW permit, and paragraph c. states that "treatment of impervious surfaces added since January

[73] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[74] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

1, 2006 may be counted towards meeting the 20% requirement" indicating that compliance with the previous permit will be all that is required for most facilities. Paragraph e. further clarifies that only facilities "with prior coverage under the 12-SW that were not previously subject to the Chesapeake Bay restoration requirements or facilities that are newly covered under 20-SW for the first time which are now subject to the Chesapeake Bay restoration requirements, must implement control measures within four (4) years from the date an NOI is filed." However, all that the relevant provision says for "existing facilities" is that "[t]his permit does not relieve such facilities from meeting those prior permit terms." (Emphasis added). Thus, unless a facility failed to comply with the ISR requirement of the previous permit or is newly subject to the 20 percent ISR requirement for the first time, they will not be subject to any additional ISR requirement. The fact sheet confirms that, in lieu of a new 20 percent ISR requirement, the 20-SW permit intends to "build upon" the previous ISR requirement by merely "[m]aintaining practices or measures implemented under the 12-SW," and by "[p]roviding an incentive for facilities to increase their contribution of restoration through nutrient trading based on permit baseline**." As drafted, Part III of the Permit broadly eliminates the 20 percent ISR requirement as an effluent limitation for most facilities that were subject to that standard in the 12-SW permit, which constitutes impermissible backsliding under the statute.** In issuing the expired 12-SW permit, MDE's fact sheet for that permit stated that achieving the nitrogen reduction target in the state's watershed implementation plan "would require at least 28% of impervious surfaces area to be retrofitted **each permit cycle**." (Emphasis added). MDE indicated that implementation of the 20 percent ISR standard over three permit cycles starting with the 12-SW permit "equates to 7% nitrogen reduction per permit cycle" that "represents reasonable progress" and "represents a pace of progress towards meeting Bay water quality standards that is reasonably achievable by industrial facilities." Thus, repealing the ISR standard represents a significant reversal in policy established to meet the Bay restoration work that the Department committed to. Notably, this elimination of the 20 percent ISR standard from the Permit has not been supported by any reasoned explanation or analysis by the Department of the impacts to WQS or on WLA attainment of relevant TMDLs. As previously discussed, the Chesapeake Bay Model and water quality data establish that, not only are WQS not being met, but that stormwater pollution continues to increase overall statewide and in many urban locations. **Moreover, the fact sheet issued with this Permit describes the failure of facilities regulated under the industrial stormwater permit to meet benchmarks for nearly every pollutant.** The Department has not and cannot offer a reasoned explanation for its decision to reverse course on its prior decision to ensure each permit cycle includes the restoration of an additional twenty percent of impervious surfaces in the 20-SW permit. It is both illogical and legally impermissible to eliminate the 20 percent ISR standard rather than maintaining or increasing it. The Department has repeatedly emphasized the importance of "adaptive management" and making "iterative progress" in implementing its programs designed to fulfill WIP commitment and TMDLs more broadly. All relevant data and information since the final determination was made to issue the previous permit indicates that more stormwater management BMPs, not fewer, are needed. This Permit has not only failed to continue gradually enhancing its effluent limitations, it is proposing to reverse course on the specific commitments made by the Department to EPA, our partners in the Bay restoration effort, and the public through the WIPs. **The Department must, at a minimum, retain the 20 percent ISR standard in the previous permit. We are also disappointed and concerned that such a major policy decision to roll back the feature pollution reduction mechanism in the Permit was not undertaken with additional input and engagement.** As you are aware, many of the Commenters have been engaged with Department staff about the reissuance of this Permit for several years. Commenters have provided feedback prior to the tentative determination about the contours of what was understood to be in the Permit and had targeted discussions about the importance of retaining this important standard. At no time prior to the issuance of this Permit was the repeal of this standard discussed, and at no point did Commenters have any notion that the standard would be rolled back based on these discussions.

To the contrary, Commenters' focus in preparing to provide comments to the Department was on the need to expand the ISR standard to an additional segment of the regulated universe in order to provide greater protection to other waterways and to counteract the functional equivalent of backsliding resulting from climate change. The impervious surface restoration standard, like any WQBEL, is predicated on attainment of WQS. Water quality standards cannot be met through static limits. Rather a WQBEL must be calibrated to changing conditions, and for a stormwater permit, that means a recognition that stormwater pollution increases with a greater volume of water from more frequent and intense storms. As described above, the increase in precipitation in this region has resulted in greater generation of stormwater. Thus, expanding the ISR standard may be necessary to hold the line on the volume of stormwater generated from regulated sites and the amount of pollution discharged from them."[75]

"The permit should prevent any reduction of 20 percent impervious surface restoration requirement. A new permit must require additional impervious surface restoration to the previous permit even for those who had done impervious surface retrofits before, or we would consider that a requirement backsliding under the Clean Water Act."[76]

"**The permit allows existing facilities to backslide pollution reduction. The Department should remedy this error by fully reinstituting the 20% impervious surface restoration requirement for the coming permit term.**
This permit effectively lowers the standard for impervious surface restoration as compared to the last permit. The impervious surface restoration requirement is the permit's primary means of reducing polluted runoff. Reduction in polluted stormwater runoff is critical to restoring the Chesapeake Bay. While the permit sets out the same standard of 20% reduction, it then allows progress toward the previous permit's requirement to be credited in this permit term. The permit states, "Any treatment of impervious surfaces added since January 1, 2006 may be counted towards meeting the 20% requirement (including restoration completed under the previous permit 12SW).
This allowance represents backsliding, creates inequality among permittees, and provides additional leeway for permittees that failed to adhere to the last permit's terms. The elimination of the 20% requirement means that new facilities must meet higher standards than existing facilities with the same, or greater, runoff. The following table describes the potential effect of the new standard.

| **Facility** | **Runoff** | **Permit adherence last term** | **This permit requirement** |
|---|---|---|---|
| **Existing** Facility | **Exceeds** benchmarks for five pollutants by 50%. | **Failed**. Only completed 10% of impervious surface restoration requirement. | **10%** impervious surface restoration requirement |
| **New** Facility | **Exceeds** benchmarks for five pollutants by 25%. | N/A | **20%** impervious surface restoration requirement |

The lower standard for impervious surface restoration in this permit is especially concerning in light of data showing that pollution from stormwater is increasing. The Chesapeake Bay Model and water quality data both reveal this trend. In addition, the fact sheet issued with this Permit describes the failure of

[75] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[76] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing

facilities regulated under the industrial stormwater permit to meet benchmarks.3 The fact sheet shows average runoff for zinc, aluminum, COD, copper, iron, lead, nitrogen, and phosphorus exceeds benchmarks in multiple years including 2019.4
This rollback violates the Clean Water Act's prohibition against backsliding. Restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters are objectives of the Clean Water Act. These objectives are to be achieved through the federalized acceptance of national goals. National goals include eliminating the discharge of pollutants into the navigable waters, and, in the interim, achieving water quality that provides for the protection and propagation of fish, shellfish, and wildlife.
Failure of State permit programs to reduce pollution results in failure of the State to meet national goals. The Clean Water Act itself has a prohibition on weakening pollution controls. The impervious surface restoration requirement is the permit's primary means of reducing polluted runoff, and this permit effectively weakens that requirement."[77]

"**In addition to reinstating the 20 percent standard, MDE must also begin to embark on an expansion of the ISR standard.** As described above, the 12-SW has clearly not resulted in meaningful progress in reducing loads, and certainly not in a manner consistent with benchmarks, waste load allocations (WLAs), or to the extent needed to restore impaired waters. Thus, in order to make iterative progress toward attainment of WQS, the Department should establish a new ISR standard for a broader subset of 20-SW permittees, in addition to maintaining the 20 percent ISR standard for those 12-SR permittees subject to the standard in the previous permit.
This expanded ISR standard could apply to additional facilities based on any of the following factors, or a combination of them: (1) an acre threshold lower than 5 acres; (2) for sectors with higher recognized event mean concentration for specified pollutants - especially those pollutants that are more hazardous to human health, such as lead; (3) for permittees covered by a local TMDL, regardless of whether a disaggregated WLA exists; (4) for facilities with repeated findings of noncompliance; and/or (5) for large facilities that do not have 5 acres of paved surfaces, but may have 5 or more acres of heavily compacted soils that generate comparable amounts of runoff.
While the Department should apply a new ISR requirement to a broader universe of facilities covered by the 20-SW based on these and other factors, it is obligated to continually strengthen the Permit until such time as WQS are met. At present, data from the Chesapeake Bay Program and the Department indicate that, overall, the Permit is not resulting in meaningful improving water quality, making the case even more compelling for developing new and more stringent limitations, including and especially an expansion of the ISR standard.
Commenters recognize that first steps are often small steps, by necessity. The Department may find it appropriate to establish an ISR requirement for some or all of those facilities that are newly covered under this Permit that restores less than 20 percent of untreated impervious areas and perhaps at varying levels between 5 percent and 15 percent based on certain factors. Regardless of the decisions made by the Department, the law and facts compel the Department to act now with this Permit reissuance to take additional steps to protect water quality."[78]

"It would be wise for the Department to take to heart the observation of the NRC that industrial stormwater permitting needs to keep pace with the "rapid" improvement in the scientific understanding of industrial stormwater pollution. Perhaps nowhere in the world has there been more "experience in developing TMDLs and WLAs that address stormwater sources" than right here in Maryland. The state of science with regard to watershed modeling and stormwater management has advanced tremendously in

[77] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation
[78] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

this region, due both to the incredible scientific and modeling/computing prowess of the Chesapeake Bay Program and the degree of expertise in developing and studying low impact development techniques. **Put simply, this is exactly the time and place where one could reasonably expect to see a highly advanced stormwater permit that leads the nation in the direction EPA has been pointing stormwater permit writers. Instead, the Permit largely maintains the status quo with respect to stormwater control measures, while proposing to roll back the most significant pollution control requirement of the 12-SW permit.**

The failure to make iterative progress is particularly glaring in light of the heightened expectations that flow from the Bay TMDL and the 2014 Chesapeake Bay Agreement signed by Maryland. As the Department and its lawyers know well, section 117(g) of the CWA require that:

> "management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain … the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed … the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health … [and] the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem."

The State is currently engaged in litigation based upon these requirements and has frequently been chair of the Executive Council of the Chesapeake Bay Program. Thus, **the Department is acutely aware of Maryland's special obligations under the law and to other Chesapeake Bay partners to address sources of pollution to the Bay. Proposing a major rollback and abdicating its responsibility to address nutrient, sediment, and toxic pollution, promote climate resilience, and promote environmental justice is fundamentally inconsistent with these obligations**.

This abdication also flies in the face of EPA assessments of Maryland's progress in attaining its WIP goals and progress toward the Bay TMDL 2025 target. Before the Trump Administration eliminated the graphical accountability tool on EPA's website showing the level of progress of each pollutant source sector in each state, EPA had long held out Maryland's stormwater sector as deficient in the "backstop" status - the lowest grade EPA gave. Even without this scoring mechanism, EPA has recently stated in its evaluation of Maryland's Phase III WIP strategy for the stormwater sector that the Department must "[p]rovide further information …. on how it will achieve, by 2025, **implementation rates of those BMPs that are much higher than current rates** [and p]rovide additional information on how implementation in the stormwater sector will increase over time to meet its pollutant load reduction goals. Maryland asserts that regulatory tools are backed by effective compliance and enforcement programs that can implement legal backstops to ensure restoration progress. EPA recommends that Maryland provide additional information on how these regulatory tools will be used in the future to ensure compliance." (Emphasis added). **The Department must recognize the failure to abide by the EPA and Bay Program heightened expectations under the Bay TMDL and Bay Agreement and the lack of progress made to date.** We strongly urge the Department to significantly revise the Permit to include a more stringent and specific framework for the establishment of control measures and BMPs and then reopen the comment period to allow stakeholders the opportunity to provide further input."[79]

"**Not Imposing Additional Restoration Requirements in 20-SW is Not Backsliding Under the Clean Water Act** The "backsliding" prohibitions in the Clean Water Act and federal regulations prohibit renewal of an NPDES permit with interim effluent limitations, standards or conditions that are not at least as stringent as those in prior permits. 33 U.S.C. 1342 (o); 40 CFR 122.44(l)(1). MDE has not waived or

[79] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

modified the restoration requirements of the 12-SW Permit. MDE has the discretion, in its best professional judgment, whether to add new standard or condition regarding restoration; declining to add a standard or condition in a particular permit renewal does not equate to a "less stringent" standard or condition. The argument would seek to morph the prohibition against a less stringent permit into a requirement that each effluent limitation, standard or condition be made more stringent in every permit renewal. Tat is not, by any reasonable interpretation, the meaning of the language of the statues or regulation. For example, certain effluent limitations for pollutants in NPDES permits for wastewater facilities are not interpreted by MDE as being required to be lowered in each permit renewal due to these provisions – MDE is only required not to increase such limitations."[80]

"Commenters believe that the ISR requirement - once reinstated - should be strengthened by limiting the ability of a permittee to comply through off site restoration requirements or through practices and policies such as street sweeping and pollution trading. We urge the Department to tighten language allowing for permittees to complete their ISR compliance projects off site. To control industrial runoff from permitted sites obviously requires on site projects to retain and treat runoff from industrial areas. Off site ISR projects should not be permissible unless an independent, third-party engineer certifies that it would be physically impossible to undertake restoration on the site or without substantial disruption to business operations or impacts to the health and safety of workers. Commenters also believe this same standard must apply to steering impervious restoration activities to the industrial areas of a permitted facility first, before moving to areas like parking lots that do not generate as much polluted industrial runoff. When off-site projects are allowed, the Permit should make clear that off-site ISR compliance projects are not equivalent to on-site projects and, as such, should be supplemented with the restoration of greater surface areas off site and/or additional non-structural pollution control projects or practices on site. The Permit should also include a provision that prioritizes ISR projects in outfall drainage areas that permittees have designated as having the potential to discharge spills or leaks (see III.C.2.c) and those that are "likely to be significant contributors of pollutants to stormwater discharges." (III.C.5.b).
Street sweeping should be expressly excluded as a practice that can take the place of any impervious surface reduction. While sweeping plays an important role in reducing pollution, it is already a requirement of the Permit via the Good Housekeeping requirement. To allow additional credit for sweeping would constitute double counting, making any claimed reductions illusory."[81]

"**Finally, Commenters also strongly object to the allowance of pollution trading in the Permit.**
Nutrient trading, particularly as it has been implemented by Maryland, is a fundamentally flawed, mathematically unsound program that may prevent Maryland from reaching its TMDL goals and will result in "hot spots" that place yet more burdens on communities already suffering disproportional pollution impacts. Maryland's nutrient trading regulations prohibit trading in the context of this Permit. COMAR 26.08.11.09(D) states that "[c]redits may not be used for the purpose of complying with technology-based effluent limitations." Controlling runoff and promoting infiltration are part of the technology-based effluent limitation in the Permit (see, e.g., the Management of Runoff and AIM Measures conditions).
Additionally, the Department appears to be double-counting pollutant reductions via trading in the context of how most trades have been executed in Maryland to date. When wastewater treatment plants make pollution control upgrades, they immediately begin to report lower pollutant loads through their discharge monitoring reports. The Chesapeake Bay Program uses these discharge monitoring reports to inform the model used to track progress toward the TMDL goals. If a wastewater treatment plant made upgrades in 2012, then those pollutant reductions have already been counted toward Maryland's total pollution load.

[80] James Price, Deputy General Manager for Operations, WSSC Water
[81] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

An acre's worth of paper credits is not equal in value to an acre of restored impervious surface. The permitted activities will not meet the sector's waste load allocation, and the Permit will not protect water quality. Instead, the Permit is simply weaker, and this represents impermissible backsliding from previous requirements. The trading provisions, in addition to being contrary to regulatory mandate, will not produce pollutant reductions commensurate with what would have been achieved in their absence. The trading provisions also ignore the substantial benefits to local communities that accompany real, on-the-ground pollution reduction practices on industrial facilities and can exacerbate disproportionate impacts of pollution on already vulnerable communities. When jurisdictions are encouraged to outsource their pollution reduction activities rather than invest in green infrastructure projects that allow stormwater to infiltrate, the local communities lose out on the numerous co-benefits that the Department has written extensively about. Nutrient and sediment credits cannot replace these benefits. As noted by nationally renowned stormwater experts such as Tom Schueler and Dr. Richard Horner, stormwater BMPs that capture and retain sediment-laden stormwater not only reduce TSS, but also a myriad other dangerous pollutants that bind to sediment. Nutrient and sediment credits cannot replace reductions in other pollutants, such as toxic metals, that come with on-the-ground pollution reduction practices. Nutrient and sediment credits are simply not equivalent to BMPs—they do nothing to reduce pollutants other than nutrients and sediment, nor do they reduce stormwater flow volume, which contributes to downstream effects such as riverbank erosion. This violates the purpose of the CWA, violates the technology-forcing mandate of the Act, and violates the Act's specific requirements."[82]

"Reducing industrial stormwater pollution is essential to the Chesapeake Bay's restoration. The Chesapeake Bay Foundation finds the current draft permit fails to create clear standards for permittees, instead relying on applicants themselves to determine the requirements applicable to their proposed projects. For the permittee and the public to know when and how certain sections apply, MDE must clarify standards and definitions."[83]

"Finally, we reiterate that a number of important terms and conditions in the Control Measures and Effluent Limitations section are impermissibly vague and unenforceable. As just one example, the "management of runoff" condition, which will be the primary condition to control polluted runoff now that the Department is proposing to eliminate the impervious surface restoration standard, contains no standard at all. The condition only states that "[y]ou must divert, infiltrate, reuse, contain, or otherwise reduce stormwater runoff, to minimize pollutants in your discharges." This is one of many examples of language that must be made more enforceable. When is a permittee in compliance with this condition? How does a well-intentioned and conscientious permittee even measure their own compliance status? When would a facility be deemed in noncompliance with this critical provision? As noted by Dr. Richard Horner the Permit "gives no guidance or directions regarding where, when, or how these controls should be considered and implemented.""[84]

"Dr. Horner also emphasized that the "Permit exceedingly shortchanges treatment controls." Dr. Horner notes that "[s]ome industries simply cannot fulfill all stormwater permit obligations with these techniques alone and can only do so by applying effective treatment controls." Other states are complying with the CWA and leading the way by ensuring iterative progress between permits. Washington State, for example, mandates both "Treatment BMPs" and "Stormwater peak runoff rate and volume control BMPs". The California permit similarly distinguishes between "minimum BMPs" and "advance BMPs", both of which are required.

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[82] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[83] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation
[84] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

As noted in Dr. Horner's attached report, leadership by other states is beginning to bring about the intended technology forcing effect envisioned by Congress in writing the CWA, causing industries to turn to a host of new "advanced, active treatment controls." Through direct outreach with a number of companies, Dr. Horner identified more than 100 sites that now have advanced industrial stormwater treatment systems. The Department has mentioned an interest in stimulating a "restoration economy" but actually doing so requires technology-forcing permits, rather than policies like nutrient trading that reduce the incentive for the private sector to develop innovative green technologies."[85]

"**The permit does not fulfill its pollutant reduction responsibility under the Phase III WIP ...**
Stormwater reduction is a part of the strategy for Maryland to meet its Chesapeake Bay Blueprint requirements for 2025. The Phase III WIP documents the phosphorus and nitrogen pollution entering the Bay through stormwater. As shown in the graph below, while Maryland has successfully reduced pollutant loads from the agriculture sector, the pollution stemming from stormwater has remained relatively constant.

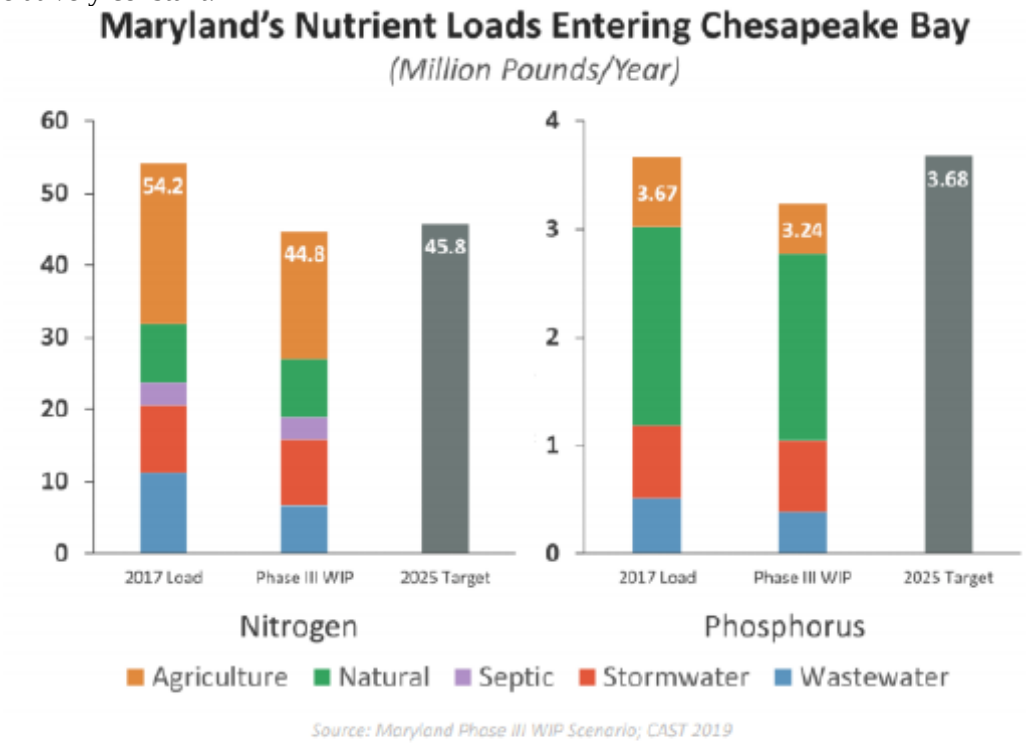


***Figure 1:*** *Current and projected total nitrogen and phosphorus loads by sector relative to Chesapeake Bay restoration targets.*

The Phase III WIP specifically notes that one strategy for stormwater reduction is the industrial stormwater general permit, through which "permittees will complete and maintain their retrofit requirements of 20% of their untreated impervious surfaces." In order to fulfill that strategy, the Chesapeake Bay Foundation finds that this permit must be strengthened.
… Impervious surface restoration should be accountable for documented reductions of a range of pollutants."[86]

[85] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[86] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation

"Part III.A.1.c. of the draft 20-SW permit specifies two different quantities of nitrogen reduction as equivalent to restoration of one acre of impervious surface area. Part III.A.1.c.iii. specifies 5.4 lbs total nitrogen per year. Part III.A.1.c.ii. refers to the Accounting Guidance document, the latest draft 2020guidance document specifies 18.08 lbs total nitrogen per year (Table 5 on page 10) and the current 2014guidance document specifies 7.69 lbs total nitrogen per year. The difference between these quantities is more than 300%, therefore confusion on the part of 20-SW permittees could be very costly for the permittees,and potentially detrimental to the state's progress on the Chesapeake Bay WIP. Please revise the draft permit to clarify which nitrogen reduction rate applies to III.A.1.c.ii and iii."[87]

"The failure of the Department to conduct a triennial review of stormwater permits within the past three years undermines the Department's ability to appropriately update this permit. Every three years, the Clean Water Act requires that States review their water quality standards in what is called the Triennial Review of Water Quality Standards. As described by the Department, the Triennial Review includes a robust public participation process prior to adoption of new or revised regulations.
The triennial review process generally includes public comment, and then incorporation of comments into a public document reviewed by the US Environmental Protection Agency. The Department's last triennial review was initiated in 2019 but does not appear to have been completed.1 Having failed to a complete a timely triennial review, the Department cannot adequately measure how the last permit and this permit meet water quality standards."[88]

"Is the parcel subject to treatment of 20% of the untreated impervious area by the end of the 5-year permit? The sand filter's DA is treated, but the BaySaver's DA would not be considered treated. If this interpretation is correct and the BaySaver can't be repaired, it should probably be replaced with a credit-worthy BMP."[89]

## 7. COMMENT CATEGORY – Part III.B.1 (Technology Based Limits).

"Part III B.1.a **Control Measures**: Please insert before viii the following: "viii.) improving soils on site by adding organic matter to create stormwater storage in the site soils."[90]

"Part III B.1.b.ii **Landfill Dumpsters:** What good housekeeping measures will be required for roll off boxes at landfills? These are usually uncovered to allow trash to be placed in them."[91]

"Use mandatory language to create enforceable permit obligations, for example, using "must" or "shall" rather than "should" or "may":
a. III.B.1.b.iii.) "Final repairs/replacement of stormwater controls ~~should~~ must be completed as soon as feasible but must be no later than the timeframe established in Part IV.A.2 for corrective actions, i.e., within 14 days or, if that is infeasible, within 45 days.""[92]

"***The Permit Lacks Limitations and Conditions Sufficient to Ensure Compliance with WQS.***
In addition to recommending that the Department reevaluate the potential impact of the Permit on marginalized communities and incorporate additional considerations into permit development, we

[87] Robert Hirsch, Manager Baltimore County, Department of Environmental Protection and Sustainability
[88] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation
[89] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg
[90] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[91] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[92] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

recommend many specific substantive changes to the Permit, as discussed below and in the sections that follow.

Commenters continue to urge MDE to specifically identify each enforceable requirement of the permit, to identify for the regulated community and the public what requirement a facility must meet to avoid noncompliance and the resulting enforcement. **After each and every permit limitation or control, the Permit should clearly state that failure to meet the limitation constitutes a permit violation that is subject to enforcement.** For example, we recommend adding the following explicit statements after the corresponding permit requirement:

● Failure to select, design, install, and implement control measures in accordance with good engineering practices and manufacturer's specifications (unless deviation is justified and justification is documented) constitutes a permit violation. Permit Part III.B.1.

● Failure to minimize the exposure of manufacturing, processing, and material storage areas to rain, snow, snowmelt, and runoff by either locating these industrial materials and activities inside or protecting them with storm resistant coverings constitutes a permit violation. Permit Part III.B.1.b.i.)

● Failure to regularly inspect, test, maintain, and repair all industrial equipment and systems constitutes a permit violation. Permit Part III.B.1.b.iii.)

● Failure to control your discharge as necessary to meet applicable water quality standards constitutes a permit violation. Permit Part III.B.2.a.

As highlighted in Dr. Horner's report, attached as Appendix E, the Washington state permit specifically states that each of the listed BMPs is "mandatory." This kind of language strengthens the permit, making it more enforceable and more likely that a permittee would comply."[93]

"The Permit contains two different standards for an appropriate response when control measures need to be replaced or repaired. The Department should clarify whether these are alternative requirements or two standards that both must be met to comply with the Permit. Of the two standards, Commenters prefer the second, as it is more specific and provides an example of what must be done to minimize pollutant discharges. The two standards as provided in the Permit are as follows:

- "If you find that your control measures need to be replaced or repaired, you must conduct the necessary maintenance immediately in order to minimize pollutant discharges." Permit pg. 17, Part III.B.1.b.iii.), lines 27-29.
- "If you find that your control measures need to be repaired or replaced, you must immediately take all reasonable steps to prevent or minimize the discharge of pollutants until the final repair or replacement is implemented, including cleaning up any contaminated surfaces so that the material will not be discharged during subsequent storm events". Permit pg. 17, Part III.B.1.b.iii.), lines 29-34."[94]

"***The Permit Conditions Applicable to Control Measures Are Not Sufficient***

The CWA is predicated on the notion that iterative progress must be continued until WQS are attained and, eventually, until pollution is eliminated. In the short term, this means that regulators must continually evaluate the effectiveness of control measures and best management practices (BMPs) and prescribe ever more effective measures to bring discharges in line with levels needed to meet WQS.

Current BMPs and control measures relied upon to date have not reached the level of effectiveness needed to help attain WQS; in fact, benchmark exceedances are commonplace, impaired waters remain impaired, and Bay Model data show increasing loads from stormwater. As courts and the EPA have made clear, BMPs must be demonstrated to be "reasonably capable" of ensuring compliance with WQS. After all, a permit cannot be issued consistent with CWA regulations "when imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." **As long as the**

[93] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[94] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

**record is devoid of evidence demonstrating that the current permitting approach is working to bring pollution levels in line with WQS it is not rational to maintain the same approach in this Permit.** We cannot find any meaningful change to the BMPs required or even recommended in the Permit, nor a framework establishing how certain types of BMPs, or more advanced BMPs, will be required based on identified deficiencies."[95]

## Grouping – Chemical Additives

"Use of Chemical Additives in Proposed Part I.E.5
Regarding proposed Part I.E.5 for use of chemical additives, ISRI seeks clarification. Proposed Appendix E does not contain a definition of either "chemical additives" or "cationic chemical additives", as stated in proposed Part I.E.5. In connection with the latter, ISRI also did not find any reference to an MDE approval policy in proposed Appendix D, Sector L.
ISRI noted in its MSGP Comments (at 5) that U.S. EPA included a similar provision in the Proposed 2020 MSGP because it was contained in the Federal Construction General Permit6 (CGP). U.S. EPA assumed an equivalency between the CGP and MSGP that does not exist. For instance, because the CGP applies to temporary construction activity at a site while the MSGP applies to a permanent facility, it makes sense to post CGP information publicly, before the construction activity is finished (see Section A.2.). In the case of stormwater management under the CGP, chemical additives, particularly cationic treatment chemicals, are used to control the level of total suspended solids (TSS) and/or turbidity in stormwater discharges. This is an expected activity that would be included in a Notice of Intent (NOI) under the CGP.
ISRI raises this issue because chitosan reportedly has been used at some industrial facilities in enhanced sand-filtration systems; certain chitosan formulations have been approved for treatment of turbidity at permitted construction sites. To the extent that use of chitosan or other chemical additives under the Final 20-SW Permit would only become desirable or necessary for facilities that reach higher AIM levels, there is no reason to require notification in the Notice of Intent (NOI), which makes it almost a condition of 20-SW Permit eligibility. Any notice or approval of use of chemical additives could be engaged as part of the AIM process.
ISRI seeks clarification from MDE on this proposed provision."[96]

## 8. COMMENT CATEGORY – Part III.B.2 (Water Quality Based Limits).

## Grouping – Numeric Limits

"As described in more detail in the accompanying report provided by Dr. Horner, a nationally recognized expert in stormwater management, Maryland's proposed Permit does little to stimulate the use of the sorts of reliable treatment technologies with known performance characteristics that are available and, indeed, in wide and growing use in jurisdictions with stronger industrial stormwater permits. As Dr. Horner notes, the Department's own Permit and accompanying fact sheet spotlight "persistent and long-standing problems in meeting benchmarks" and acknowledge that "… the ultimate solution may be structural control such as a treatment system …" But like the Commenters, Dr. Horner is confused that statements in the Permit Fact Sheet "identify a problem, and a solution, that is not given the deserved attention by 20-SW itself." In the judgement of Dr. Horner, the permitting approach here is backward; a regulator is supposed to "first set goals, then impose means of meeting them." If the correct sequence and process were followed, by the Department's own judgments expressed in the Fact Sheet, numeric effluent limits

[95] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[96] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

designed to meet the capabilities of advanced treatment technologies could be deployed, thus aligning the Permit with its statutorily imposed goals, which should be "first and foremost, a function of the protection and recovery needs of the affected environment."
Commenters recognize that iterative progress - and not full compliance within one permit term - is all that may be practicable. But maintaining the status quo is simply not acceptable as a matter of law and policy. EPA has been attempting to reconcile the reality of driving iterative progress toward attainment of WQS from stormwater permittees for decades. Generally, this approach has affirmed that, indeed, stormwater dischargers are point sources of pollution fully subject to CWA and NPDES requirements, but that WQBELs may be developed by permit writers in the form of BMPs. A reasonable approach, endorsed by Dr. Horner in his experience studying the way in which industrial stormwater permits have been implemented in other jurisdictions, is to begin to introduce numeric effluent limits into this Permit and expand upon their use in the next permit cycle. Numeric effluent limits have the benefit of being concrete and measurable, making them significantly more enforceable than current permit standards.
Successive iterations of EPA guidance documents on this subject have continually demanded greater accountability of permits. The most recent guidance provided by the EPA Office of Water reiterated the appropriateness of relying on BMPs, but clarified that permit writers need to develop stormwater permits with a "**greater emphasis on clear, specific, and measurable permit requirements and, where feasible, numeric NPDES permit provisions**". (Emphasis added). EPA has begun pushing in this direction in recognition that "stormwater discharges remain a significant cause of water quality impairment in many places" and that "States and EPA have obtained considerable experience in developing TMDLs and WLAs that address stormwater sources.""[97]

"The narrative WQBEL in Part III.B, "Your discharge must be controlled as necessary to meet applicable water quality standards," provides permittees no guidance or specificity as to what is required to protect water quality. At what point is the discharge required to meet WQBELs? And is there a mixing zone? **There is considerable geographic variability in the distribution of industrial stormwater dischargers and WQS are determined within the receiving waters, not at the facility. Lacking site-specific WQBELs suggests that the same level of treatment is sufficient to meet WQS where the applicant is the lone discharger or among dozens in a cluster discharging into the same receiving waterbody.** The blanket narrative limitation is legally insufficient in that it fails to provide guidance to permittees as to what actions are required to comply with the Permit, particularly when TBELs are insufficient to protect water quality. Here, the widespread noncompliance with TBELs indicates that water quality is not being adequately protected. Moreover, the narrative WQBEL is unenforceable based on the terms of the permit, which do not require enough monitoring from which to determine whether a permittee's discharge is being controlled as necessary to meet WQS. Based on the available data, the narrative TBELs and WQBELs have been insufficient to protect water quality. In light of the deficiencies of the effluent limitations, and the failures of the Permit to adequately protect water quality, Commenters urge the Department to develop numeric, enforceable WQBELs."[98]

## Grouping – Impaired Water Monitoring

"The Permit contains two different standards for when monitoring for a pollutant may be discontinued when discharging to impaired waters without a TMDL. One of these standards requires the permittee to document and maintain the support for its determination that the pollutant's presence is caused solely by natural background sources whereas the other requires a request be submitted to the Department with appropriate justification and that the request be granted.

[97] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[98] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

- "If the monitored pollutant is not detected in your discharge for three consecutive years, or it is detected but you have determined that its presence is caused solely by natural background sources, you may discontinue monitoring for that pollutant. To support a determination that the pollutant's presence is caused solely by natural background sources, you must document and maintain with your SWPPP, as required by Part III.C.8 . . ." Permit, pg. 39, Part V.B.3.a.i.), lines 19-22.
- "If the monitored pollutant is not detected in your discharge for three consecutive years, or it is detected but you have determined that its presence is caused solely by natural background sources, you may discontinue monitoring for that pollutant only after submitting a request to MDE's Permitting Program with the appropriate justification and receiving verification that the request was granted." Permit, pg. 39, Part V.B.3.a.i.), lines 37-42.

Commenters support the second approach, which requires the permittee to submit a request to the Department and receive verification that the request was granted. Monitoring is critical to ensure that facilities discharging to impaired waters do not contribute to the impairment of the receiving waters and should not cease unless the Department confirms that the permittee is not responsible for the presence of the monitored pollutant."[99]

"Impaired Waters Monitoring: According to the 2018 Integrated Report for Surface Water Quality: a. Category 5 Waters indicates 40% Chloride, low priority, no TDML in two years., b. Lower Seneca is HUC 02140208/020700080403. Acceptable total P and ammonia; Impaired for TSS, chlorides, temperature. Do these require impaired water sampling?"[100]

"Identifying PCB "potential pollutants" and PFAS "potential sources". a. If the City knows that PCBs or PFAs were ever used on the site, might benchmarking be required? b. Is there a list of potential PCB pollutants for guidance?"[101]

"Summary of Potential Pollutant Sources in Proposed Part III.C.3.b.

ISRI seeks clarification about the proposed provision at Part III.C.3.b.iii. for "identification [of] potential sources of certain per- and polyfluoroalkyl substances (PFAS) at [the permittee's] operation which could be exposed to stormwater and list and address these sources in [the permittee's SWPPP]".

The lists of PFAS analytes in EPA Methods 533 and 537.1 are relatively short, given the large number of PFAS molecules. How would an applicant or permittee know whether any fire retardants or materials used or handled on-site contain those listed PFAS molecules or any PFAS chemicals, especially if any provided safety data sheets (SDSs) do not contain such information?

Would articles of clothing, shoes, or weather-resistant gear treated with listed PFAS molecules (e.g., for water repellency) and worn by employees, subcontractors, or customers, to the extent that any of this could be ascertained (e.g., SDSs), be considered potential sources that need to be listed and addressed?

If fire retardants (e.g., aqueous film-forming foams (AFFFs)) containing the listed PFAS molecules had been used on-site (presumably only during the 3 years prior to the latest SWPPP update or SWPPP creation, whichever is later), does addressing such on-site use require digging out or covering "impacted" soil or aggressively cleaning an "impacted" surface and disposing of all generated PFAS-containing material, likely at high cost?

Also, ISRI noticed the warning in Part III.C.3.b.iii. that MDE "may require ongoing monitoring under this permit if a PFAS-related impairment is identified in [the permittee's] receiving stream"; however, at this moment, there is no approved analytical method for surface water samples containing PFAS7. ISRI notes

[99] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[100] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg
[101] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg

that EPA Methods 533 and 537.1, mentioned in proposed Part III.C.3.b.iii., apply to drinking water samples, which are important for protecting drinking water supplies.
Given these uncertainties and no current analytical method for surface water samples containing certain PFAS molecules, ISRI requests that MDE clarify compliance with proposed Part III.C.3.b.iii., especially because PFAS is an economy-wide issue, not just an industrial-sector issue."[102]

"Concerning Impaired Waters Monitoring at proposed Part V.B.3.a., ISRI cannot help but notice the extremely asymmetrical requirements between proposed Part V.B.3.a.i. for discharges to impaired waters without an EPA-approved or established TMDL and proposed Part V.B.3.a.ii. for discharges to impaired waters with an EPA-approved or established TMDL. In the first case, the permittee would be required to perform for at least three years annual analytical monitoring of those parameters that are the cause of impairment and associated with permittee's industrial activity. In the second case, MDE informs the permittee whether analytical monitoring is even required. The difference in requirements between these two cases is somewhat puzzling except that the first case resulted from a provision in the settlement of U.S. EPA's "2015 MSGP Litigation" (20-SW Permit Fact Sheet at 14). ISRI understands that one anonymous commenter on the Proposed 2020 MSGP supported this provision, and U.S. EPA included it in the 2021 MSGP. MDE should reconsider Part V.B.3.a.i, or make it the same as Part V.B.3.a.ii."[103]

"Request that MDE create an online tool to input addresses to determine if impaired water monitoring is required. Using the current database it is difficult to determine which sites would require which water quality tests. Unless MDE makes it clearer which tests (if any) are required, it is unlikely to obtain compliance."[104]

"***The Inadequacy of the Pollution Controls in this Permit Will Cause and Contribute to New and Ongoing Water Quality Impairments, and, therefore, the Permit Requires New or More Stringent WQBELs Before it Can be Reissued.***
Under state and federal law, permitting authorities are required to consider the impact of a proposed discharge on the receiving water. A permit with the reasonable potential to cause or contribute to further impairment of a receiving water must include WQBELs. This Permit appropriately contains a section that makes reference to WQBELs in subsection III.C.2 (which is notable only because other permits issued by the Department fail to comply with this requirement), but unlike the 20 percent ISR condition, this section of the current permit is virtually devoid of any actual limitations beyond a prohibition on visible oil sheens or foam that does not dissipate within half an hour of the discharge."[105]

"Eligibility for the coverage in this permit is complex and confusing, requiring significant technical analysis on the part of the applicant, such as whether their discharge would meet water quality standards or comply with waste load allocations under a Bay or any other local TMDL."[106]

"The most recent guidance from EPA regarding what is required of stormwater permit writers is that an industrial stormwater permit "must contain WQBELs **as stringent as necessary to meet any applicable water quality standard for that pollutant**. EPA recommends that NPDES permitting authorities use the experience gained in developing WQBELs to design effective permit conditions to create objective and accountable means for controlling stormwater discharges." (Emphasis added). This Permit does nothing

[102] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[103] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[104] Geoffrey Mason, Natural Resources Specialist, The Maryland-National Capital Park and Planning Commission
[105] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[106] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing

of the sort. **Commenters strongly urge the Department to state with specificity what sorts of considerations would dictate whether additional control measures are needed and what some of those control measures might be.** Otherwise, the Permit will fail to meet relevant legal standards by controlling pollution sufficient to meet WQS.

EPA guidance for stormwater permits further states that "[t]he permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information. As discussed in the 2002 memorandum, **the permit's administrative record needs to provide an adequate demonstration** that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit **will be sufficient to implement applicable WLAs**." (Emphasis added). **The record clearly shows a lack of adequate progress, which can almost surely be explained by a lack of clear, specific, and enforceable WQBELs. The Department must correct this deficiency.**"[107]

"Commenters also strongly object to the statement, without any factual support, that "[t]he Department expects that compliance with the other conditions in this permit **will control discharges as necessary to meet applicable water quality standards…**" (Emphasis added). Not only is this more akin to a safe harbor provision and permit shield than an effluent limitation, it is also inconsistent with the Department's previous findings that each successive iteration of the Permit will need to contain a new 20 percent ISR requirement, which the Department has proposed to eliminate in this Permit. This statement also stands out as glaringly inconsistent with local TMDLs issued by the Department.

Beyond the 20 percent ISR requirement to help the state achieve the Bay TMDL targeted load reductions for nutrients and sediment, many permittees are also located in watersheds with local TMDLs and impairments. The Permit proposes no WQBELs designed specifically to achieve these other TMDLs or address locally impaired waters. Instead, subsection III.C.2 merely provides a generic statement that permittees "must implement all measures necessary to be consistent with an available wasteload allocation in an EPA established or approved TMDL, including the restoration requirements (Part III.A)." At the very least, where the Department has identified a 12-SW permittee as subject to a WLA, even an aggregate one, the Permit must require some sort of WQBEL, whether an impervious surface restoration requirement or some combination of additional or enhanced-level control measures, as are being increasingly utilized in other states with stronger permits, in order to ensure consistency with the TMDL. This should be the bare minimum requirement before the Department makes a sweeping declaration that it expects compliance with the Permit "will control discharges as necessary to meet water quality standards." Given the extraordinarily high rate of noncompliance from industrial stormwater permittees throughout the 12-SW permit term, especially in watersheds with clusters of 12-SW permittees, and given the lack of clarity provided in this subsection or elsewhere in the Permit, it is irrational for the Department to expect this statement to provide adequate direction to permittees about what WQBELs they are expected to adhere to or to assume this conclusory statement will suddenly generate pollution reductions where it has not in the past. **The Department should provide clear guidance in the Permit to permittees that gives confidence that the 20-SW will succeed in driving investments in control measures that protect local water quality where the 12-SW has clearly failed. The Department must also provide an adequate justification for this safe harbor language.**

**Moreover, unless the Department can provide an adequate factual justification for the conclusory language that "compliance with the other conditions in this permit will control discharges as necessary to meet applicable water quality standards" it must be removed.** The language as currently written provides what amounts to an affirmative defense to actual WQS violations. Since the issuance of

[107] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

the 12-SW permit, similar blanket statements have been struck down by courts as arbitrary and capricious and inconsistent with the CWA. Courts have logically held that a permit may not be issued that fails to give the permittee guidance as to what is expected or to allow the agency to determine whether the permittee was violating WQS. Commenters strongly urge the Department to replace the phrase "The Department will inform you if any additional monitoring, limits or controls are necessary" and similar phrases used in this Permit (including in the III.C.2.c regarding antidegradation), which, as noted, preserve total discretion for the Department.
Logically, if it is well-understood that previous controls have failed to meet WQS or make meaningful progress toward attainment of such standards, then it is irrational to merely authorize, but not require, additional measures. **The Department should instead replace this meaningless discretionary language with clear and specific direction to the permittees and public about what to expect** for those permittees discharging to impaired waters, with or without a TMDL in place. Otherwise, this discretionary language is an invitation to arbitrary decision making and, if history is any guide, inaction with respect to pollution problems from this sector."[108]

"Commenters also urge the Department to change the conditional statement in III.B.2.b.i. that begins "if you discharge to an impaired water with an EPA-Approved or Established TMDL..." Nearly all permittees in the state, except perhaps a few in the Westernmost portion of Garrett County or northeastern-most portion of Cecil County, or in the Coastal Bays watersheds, are subject to the Chesapeake Bay TMDL. If this term is applicable only to local TMDLs, it should be revised to state that."[109]

"Finally, the condition applicable to Tier 2 antidegradation requirements in paragraph III.C.2.c contains the same overly discretionary language that must be replaced with specific direction and guidance. Additionally, the Permit does not comply with antidegradation requirements of the CWA and is not consistent with the process set forth in Maryland regulations. **The Department must, at the very least, revise the Permit to be consistent with the antidegradation procedures established in COMAR 26.08.02.04-1.**"[110]

"The permit should include or strengthen BMPs that focus on sediment removal and pollutants that adhere to sediments such as metals and organic pollutants. And then finally MDE should analyze the potential cumulative impact of multiple permitted discharges into the same water body since the 12-SW permit was issued."[111]

"CBF notes many of the same deficiencies that have plagued previous industrial stormwater permits are still present in the one being contemplated. Yet according to CBF's analysis utilizing CAST, due to new development and lagging efforts to reduce pollution in established neighborhoods, polluted runoff from stormwater is increasing and will be Maryland's second largest source of nitrogen pollution by 2025.
In a previous letter sent to the Department as scoping comments before the tentative determination was released, CBF attempted to provide specific recommendations to facilitate meaningful updates to the permit by the Department. CBF acknowledges that some of these changes would represent a substantial shift in the Department's administration. However, we provided them because it is evident that a substantial change is necessary for the permits to have the needed and required effect."[112]

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[108] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[109] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[110] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[111] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing
[112] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation

"From this previous permit cycle, MDE could demonstrate that coverage under the general permit is protective of water quality standards and it would trigger individual permits for new discharges that might impair water quality."[113]

## 9. COMMENT CATEGORY – Part III.C (SWPPP).

"A few of the elements that Commenters urge the Department to include in whichever database is used would be: SWPPPs; annual reports; public notices; notices associated with corrective action; geospatial data, including for outfalls and monitoring points; and any additional information that the Department requires an applicant to submit. In the event that a unified database cannot be established in time for the next permit's issuance, Commenters urge the Department to simply consider adding layers to the state's already existing and well-known Open Data Portal until such time as the data can be integrated and migrated to the ETS or another database. The Open Data Portal is designed to be familiar to the public, user friendly, and supported by the state budget and state information technology professionals. Commenters see no reason not to use the Open Data portal as a temporary solution if necessary and Commenters see no reason why the Department should not comply with its duty to facilitate public access to public information by requiring electronic submission of data from permittees and posting such data online. EPA long ago led the way in data accessibility with the creation of the ECHO database and other transparency efforts associated with its Next Generation Compliance initiative.
In the event that the Department is unable to immediately make facilities' SWPPPs and annual reports available to the public through an electronic database, **at the very least** the Department should include a requirement that permittees make updated SWPPPs publically available within a definite time frame in order to ensure that they are available until such time as the Department can post them on the Department website. Washington State's permit, for example, requires permittees to provide access to, or a copy of, the SWPPP to the public when requested. The permittee must provide a copy of the SWPPP to the requestor within 14 days of receipt of the request, make the SWPPP available for viewing within 14 days of the request, or provide a URL in the NOI where a current SWPPP will be maintained. In New York, the industrial stormwater general permit also requires the owner or operator to make a copy of the SWPPP available to the public within 14 days of receipt of a written request.
The SWPPP is a particularly important document for the public to access because it describes the actions the site has pledged to take to comply with the Permit and protect surrounding waters. Public access to this information would allow the public to hold permittees accountable for taking the actions needed to comply with the Permit, making this an important process for ensuring permit enforceability. Subsection II.A.3 of the Permit directs permittees to "not include any confidential information in your submitted SWPPP" before submitting it to the Department electronically. **Given that the SWPPP is provided electronically to the Department and devoid of confidential information, there is no logical reason not to post these important documents online for the public to access. Much of the information required to be documented in a SWPPP would be of high interest to the public such as documentation of the pollutants present on site, which the surrounding community has a right to know about, as well as information such as the corrective actions the site is subject to.** Moreover, it would be illogical not to migrate these electronic records to the Department's new ETS database for permitting and compliance data."[114]

[113] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing
[114] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

"….ask that the requirements stating that the SWPPP documents must be physically on-site in paper form be removed from the permit. On page 7, highlighted below is the exact language from the proposed permit:

**3.** SWPPP
Proper formats for submitting your SWPPP are provided below.
**a.** You should not include any confidential information in your submitted SWPPP, which will be a public document available for review by the public.
**b.** You must submit an electronic copy of the SWPPP to the Department and have a hard copy available onsite. Your electronic copy (PDF, JPEG or Word) of the SWPPP must be provided to the Department by one of these methods.
***i.)*** Including a file on electronic media (CD, DVD, USB drive, or other approved media) along with your mailed copy of the NOI.
***ii.)*** Emailing the file to swppp.permit@maryland.gov when you send your NOI to the Department. The email cannot exceed 25 MB and so you may need to use more than one email to deliver the entire file. The email subject line should include "20SW", your previous registration number (if you did have previous coverage under 12SW) and your facility name.
***iii.)*** Posting a copy of the SWPPP using your NetDMR account when you send your NOI to the Department.
***iv.)*** Including a link (URL) to your SWPPP on your NOI, which provides access to your SWPPP on a publicly available company website.
***v.)*** Other electronic means that you make accessible to the Department such as a link to DropBox, Google Drive, SkyDrive, etc.

After 2020 and the COVID-19 mandates, several regulatory agencies requested to review electronic copies of documentation for all facilities to be inspected. Had this permit been in place, all Maryland facilities would have had a big delay getting documentation to regulators. As the entire world transitions to a digital platform to accommodate for any future unforeseen circumstances, it should be up to the discretion of the facility to decide what format they maintain documents. As long as all documents are readily available it should not be specified in the 20 SW Permit which media the documents should be maintained."[115]

"Part III C.3.f **Sampling Data History.** We plan a narrative summary. Will this be acceptable?"[116]

"Stormwater prevention -- stormwater pollution prevention plans require it to post on applicant's websites and upload it electronically to MDE are admirable, but there's no indication that these SWPPPs would be available for review by the public from the MDE website. Members of the public should have access to these plans and the results of MDE inspections that determine violations to those plans."[117]

"***The Department Must Provide the Public with Greater Access to Information About the Implementation and Enforcement of This Permit.***
Ideally, a single database should be created to allow for the collection, storage, analysis, and posting of information required to be submitted by 20-SW permittees. After all, as the Permit acknowledges "all submitted data, plans or reports prepared pursuant to this permit, including self-inspection information, must be available for public inspection". Thus, subject to specified exceptions under the Public Information Act, all data submitted under this Permit is public information and should be made accessible to the public in a way that the public actually consumes information; otherwise, the Department cannot argue that it is meeting its duty to make "maximum effort to seek out and involve" the public.
The e-Permit database for the construction stormwater general permit provides one potential template. Another particularly fruitful opportunity to integrate such data could be through the new Environmental Tracking System (ETS). Regardless of where the data is housed, it is important to collect, maintain, and distribute valuable environmental permitting and compliance data in an electronic format. For example,

[115] Adriana Lee, President and CEO, James Environmental Management, Inc.
[116] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[117] Doug Myers, Chesapeake Bay Foundation Senior Scientist from Public Hearing

both the municipal stormwater and animal feeding operation permitting programs utilize Microsoft Access and/or ESRI ArcMap software to provide access to analyzable information via spreadsheets and geodatabases. These electronic sources of data enable Department staff and its partners at EPA and among academia, the private sector, and the public to conduct important analytical research. Finally, Commenters would encourage the Department to look outside of Maryland for some other examples of functional and well-designed databases for housing SWPPPs and other permit data, including those used in California and Rhode Island."[118]

## 10. COMMENT CATEGORY – Part IV (Corrective Actions and AIM).

### Grouping – Deadlines and Timeframes

"Any timeframes for completion of corrective actions or Additional Implementation Measures (AIM) provided to the agency under Part IV must be enforceable deadlines. This includes the completion date to be provided to the Department if the permittee seeks to exceed 45 days to complete the corrective action (IV.A.2.b) and the action plan with milestones, submitted under Part IV.B.4. For example:
a. IV.B.4.b.i.): Add the following to this section to ensure enforceability of deadlines and the action plan milestones: "The deadline for submittal of the action plan and the milestones contained in the action plan are enforceable obligations under this permit."
4) The Department should characterize the time intervals and schedules in Part IV as enforceable deadlines. For example:
a. IV.A.2.b: "These time intervals are not grace periods, but are enforceable deadlines, the violation of which constitutes a permit violation ~~schedules considered reasonable for documenting your findings and for making repairs and improvements.~~"
b. IV.A.3: "~~Additionally,~~ Each failure~~ing~~ to take corrective action in accordance with this section and/or within the prescribed deadlines constitutes ~~is~~ an additional permit violation."
c. IV.B: Add to this section language comparable to IV.A.3: "Each failure to perform the required Additional Implementation Measures in accordance with this section and/or within the prescribed deadlines constitutes a permit violation."
d. As referenced in V.B.1: "Benchmark monitoring data are primarily for your use to determine the overall effectiveness of your control measures and to assist you in knowing when Additional Implementation Measures (AIM) may be necessary to comply with the effluent limitations in Part III.B. Failure to conduct any required measures within the timeframes set forth in Part IV, and/or the alternative timeframes provided by the permittee in a notification or action plan to the Department, would be a permit violation.""[119]

"The deadlines in AIM Level 4 are illogical and inconsistent.
AIM Level 4 Responses require the permittee to consult a professional to prepare an action plan for installing structural source controls and/or treatment controls. Part IV.B.4.b.i) allows the permittee to "take up to 30 days to select the professional, and an additional 30 days to prepare the action plan." Yet, the AIM Level 4 Deadlines provide that the permittee must install the appropriate structural source and/or treatment control measures within 60 days of the occurrence of the triggering event. This means that the action plan for installing control measures is due to the Department the same day as the actual installation of the control measures. If the action plan is meant to have any functionality as a plan, as opposed to a summary of actions already taken, it must be due prior to the deadline for the corrective action itself. The Fact Sheet adds to the confusion of the AIM Level 4 deadlines, stating that under the Permit, the

[118] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[119] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

treatment control measures "would be required to be completed within 30 days of the Level 4 triggering event." These deadlines must be revised to be consistent and logical, and the Permit must expressly state that failure to meet the deadlines constitutes a permit violation"[120]

"***The Permit must require Department approval for an extension beyond the 45-day timeframe.***
The Fact Sheet justifies the automatic extensions stating: "While persistent high levels of pollutants should be mitigated as soon as possible, the Department acknowledges that operators may need more time for planning, designing, and funding purposes." Simply put, the initial "deadlines" in the Permit are, in effect, merely unenforceable suggestions.
In the event that operators need more time than the initial time frame, which should be in the minority of circumstances, the Department and the public must have oversight over what circumstances warrant additional time. The Department's justification in the Fact Sheet recognizes that benchmark exceedances represent high levels of pollutants that should be mitigated as soon as possible, yet the Permit does not create a mechanism for any review or oversight of this process. **Each time a rationale for a time extension is required, the Permit should require an appropriate demonstration as defined in Appendix E. This definition should also be revised to exclude any impediments of the permittee's own creation or control**, for example: "Appropriate Demonstration – For purposes of this permit, this means that there is a clear impediment, outside of the permittee's control, to completing a task at hand, such as . . ." (red text is the recommended addition to existing Permit language)."[121]

"<u>The Department should clarify the deadlines for installing control measures and submitting the action plan.</u>
Although the Permit does not state that the Department must approve or reject the action plan submitted within 60 days of occurrence of a triggering event, it notes "If the Department does not reject the plan within the required 60 days or does not provide for an extension, you are obligated to proceed with plan implementation." This adds further confusion to when the control measures must be implemented and whether the action plan is subject to Department review and approval. The provision suggests that the Department has the ability to reject the action plan within 60 days of receipt, similar to the approval or disapproval of the "adequate demonstration" that the discharge does not result in exceedance of WQS. If this is how the Department intends for this section to work, **then the Permit must include a deadline for submitting a revised action plan**. The Permit must explicitly state that failure to comply with the stated deadline constitutes a permit violation.
Additionally, **the deadline for submitting an action plan should be reduced to 14 days or, at most, 30 days.** The Permit already gives permittees significant leniency by allowing them to comply with a series of AIM requirements rather than immediately subjecting them to enforcement and potential penalties. Once a permittee has reached AIM Level 4, the deadlines for submitting documents and implementing corrective actions should be strict. By this point, the permittee has been exceeding benchmarks, possibly violating TBELs, and potentially impairing water quality for up to **four years**, based on the AIM triggering events of the Permit.
For the AIM Level 4 section to be enforceable, the action plan and the milestone dates it sets forth must also be enforceable (i.e., violations of the plan constitute enforceable violations of the Permit). All deadlines under the action plan must be within 60 days from the triggering event for AIM Level 4, as 60 days is the deadline for the entire AIM Level 4 Response. The action plan should be made available to the public online at the same time that it is submitted to the Department, allowing the public to review the plan and assess whether the permittee complies with the milestone dates set forth."[122]

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[120] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[121] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[122] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

## Grouping – Clarifications

"***Several Elements of the Corrective Action Section Require Revision Due to Lack of Clarity, Illogical Timing, or Otherwise Confusing Messaging.***
Language related to the timing of AIM triggers is inconsistent and confusing.
Even if the Department does not revise the AIM triggering events as Commenters urge, it is critical for the regulated community and the public that the Department increase the clarity of this section and remove inconsistencies. The Permit should clarify when a triggering event may occur to trigger each AIM level. Part IV.B of the Draft Permit briefly notes that in the context of the AIM parts, "year you are subject to benchmarks" means 4 quarters of monitoring. Most of the AIM triggering events rely on this definition of a "Year" to determine when a permittee would enter each AIM level. As Commenters understand it, a year the permittee is subject to benchmarks is based on the provision in Part V.B.2 that a permittee may discontinue benchmark monitoring after 4 quarters of monitoring if the annual average does not exceed the benchmark for a parameter. The connection to this separate Part is not explained in the AIM section.
AIM Levels 3 and 4 include as triggering events that "one single sampling event during your [third/fourth] year of coverage for a parameter is over 4 times the benchmark threshold," which throws into question how the triggering events are meant to be interpreted. Does each use of "year you are subject to benchmarks" or "Year #" actually refer to the year of coverage under the permit, as used in these triggering events under AIM Levels 3 and 4? Or do AIM Levels 3 and 4 have one triggering event based on the year of being consecutively subject to benchmarks due to an annual exceedance and one based on the year of permit coverage? This confusion is exacerbated by the Fact Sheet, which notes: "A difference in the Department's approach is that each escalating level is based strictly on time." Assuming the Fact Sheet is referring to a difference from the EPA's approach in the proposed MSGP, the difference of each escalating level based "strictly on time" could refer to the "time", or year, in which the average annual benchmark exceedance occurred. The Fact Sheet does not explain the way the trigger is presumably meant to operate, that each level is based on whether the permittee has been subject to benchmarks for multiple four-quarter periods, meaning that you had at least one triggering event in the first four quarters of monitoring.
Although Commenters find the triggering events under the Permit to be arbitrary and capricious and urge the Department to revise the triggering events and require benchmark monitoring to continue beyond the first four quarters**, if the Department retains its current triggering events, it is imperative that it provide additional clarity.** The EPA webinar regarding the Final 2021 MSGP included a helpful flow chart graphic depicting how a permittee progresses from one AIM level to another. The Department should consider creating a flow chart that reflects how it intends for the AIM Levels to progress."[123]

"***The Department Must Revise the Corrective Action Provisions to Strengthen Triggering Events, Improve Enforceability, Avoid Impermissible Self-Regulation, and Increase Clarity***
The corrective action section is a critical element of the Permit because it establishes the concrete requirements a permittee must follow when its control measures have proved inadequate to protect water quality. Although an exceedance of a benchmark threshold does not constitute a violation in the Permit, it does indicate that the existing control measures are not functioning as necessary to protect water quality. Commenters have provided the Department with significant feedback on how to improve the corrective action section over the past year. We appreciate where the Department has followed these recommendations, such as by stating that the Department will revoke permit coverage if benchmark exceedances continue after Additional Implementation Measures (AIM) Level 4. However, under the

[123] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

Permit, four years of benchmark violations would have already passed before the permittee must obtain an individual permit. To avoid such a prolonged period of benchmark exceedances before coverage is revoked, and to ensure compliance with WQS, the Department must accelerate the triggering events for corrective action to occur immediately upon the permittee reporting a benchmark exceedance. This would also be more consistent with CWA and the technical basis for benchmarks."[124]

"***Any Exceedance of a Benchmark Threshold Must Trigger AIM.***
For the 20-SW Permit to ensure water quality is protected and that the BMPs a permittee implements are operating as necessary, any exceedance of a benchmark threshold must trigger corrective action. **The triggering events for the AIM levels as set forth in the Draft Permit do not have a technical basis and are arbitrary and capricious.** Because the current triggering events for AIM fail to require immediate action upon benchmark exceedances, they are inadequate to protect water quality and ensure WQS are met, as required by the CWA.
An exceedance of a benchmark threshold indicates that the control measures in place are ineffective to ensure that downstream WQS will be met. Accordingly, the trigger for corrective action should not be greater than (i.e., weaker than) the benchmark thresholds. Benchmarks are intended to serve as indicators of whether stormwater control measures are performing adequately and whether there is a potential for a water quality problem. According to the 20-SW Fact Sheet, the "benchmark thresholds are the **pollutant concentrations above which represent a level of concern**. The level of concern is a **concentration at which a stormwater discharge could potentially impair or contribute to impairing water quality or affect human health** from ingestion of water or fish . . . As such, **the benchmarks provide an appropriate level to determine whether a facility's stormwater control measures are successfully implemented**." The Fact Sheet references an additional way EPA interprets the purpose of benchmarks—that they are "designed to be as least burdensome as possible on operators while still providing the intended utility: a tool to for [sic] determining whether operators could have SWPPP/stormwater control measure deficiencies." As the Fact Sheet states, a benchmark exceedance "does require the facility to evaluate the effectiveness of its control measures, with follow-up Additional implementation Measures (AIM) response where required per Part IV."
Despite the statements in the Fact Sheet regarding the purpose of benchmarks, the Permit arbitrarily fails to use a benchmark exceedance as the trigger for AIM. **Given that pollutant concentrations above the benchmark thresholds represent a level of concern at which the discharge could potentially impair or contribute to impairing water quality, even one instance of a benchmark exceedance warrants corrective action.** Each benchmark exceedance represents a potential that the discharge is impairing water quality. The exceedance indicates that control measures must be adjusted to correct the problem that caused the exceedance. Each subsequent occurrence of a benchmark exceedance should then trigger the next AIM Level. The Department provides no technical support or justification for the AIM triggering events in the Permit, which would allow multiple benchmark exceedances without even requiring the minimal requirements of AIM Level 1. This in itself constitutes an express failure on the Department's part to ensure that WQS are not degraded. Without requiring immediate action to remedy benchmark exceedances, the Permit will continue to fail to adequately protect water quality and ensure compliance with WQS, as required by the CWA.
Adopting a single exceedance as a trigger for AIM is particularly appropriate given the response required by AIM Level 1 under the Draft Permit, which does not even necessarily require a change to the permittee's control measures. The AIM Level 1 Response in the Permit currently requires the permittee to review its control measures and determine if modifications are necessary to meet the benchmark threshold for the applicable parameter. If the permittee determines that no additional measures are necessary, the permittee must only document why it expects the existing control measures to bring the pollutant levels

[124] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

below the benchmark. If the benchmark exceedance triggering AIM Level 1 resulted from a one-time problem or unexpected event, the AIM Level 1 Response already accounts for this by providing a no-action option.

In contrast, the current triggering event—an annual average exceeding the benchmark threshold—indicates consistent failure of the control measures, and the option to merely review control measures and document rationale would be an insufficiently lenient response. When a permittee has exceeded a benchmark more than once in a four quarter period, this is indicative of a more consistent problem, not an outlier or one-time occurrence. As noted in Dr. Horner's Report, under Maryland's approach, "a discharger with multiple pollutants over their benchmarks could go an entire year without having to take any corrective action, so long as no benchmark exceedance was as high as four times [the benchmark threshold]." A permittee could go three full years without being required to consider permanent source control and treatment BMPs and four full years without having to consult a professional for guidance. Dr. Horner states in his report: "This schedule is egregiously lax in my opinion."

Commenters urge the Department to adopt more stringency in the AIM levels, as Dr. Horner recommends, and apply a "much quicker action trigger." Specifically, the Permit must trigger corrective action upon a single quantitative benchmark exceedance. ….

**The Department's failure to adopt a single benchmark exceedance as a trigger for AIM is arbitrary and capricious in light of the stated justifications for benchmarks, the no-action option in the AIM Level 1 Response, and the egregiously lax schedule that would result from the proposed approach. The approach in the Permit ignores the practical, technical, and legal basis for a benchmark exceedance to trigger corrective action based on the potential that the discharge will impair water quality and, consequently, fails to adequately protect water quality.**"[125]

"**Dr. Horner also advises that the Permit "specify the types of control measures that must be evaluated at each level, with treatment the ultimate recourse, and provide for earlier qualified professional involvement**." The Maryland Permit as written would allow a permittee consistently discharging pollutants above benchmark thresholds to continue operating under the general permit for up to **four years** before the Department revokes coverage. This timeframe is approaching the entire permit term, despite the facility repeatedly demonstrating that its control measures are insufficient to meet benchmarks. Consistent benchmark exceedances demonstrate well before Year 4 that control measures are insufficient and that the site-specific analysis of an individual NPDES permit is necessary. Permits in other states serve as helpful examples of how benchmarks should be effectively used to trigger corrective action. In Washington's Industrial Stormwater General Permit, the first exceedance of a benchmark triggers the first level of corrective action. Virginia's Industrial Stormwater General Permit also uses a single benchmark exceedance to trigger SWPPP review and implementation of additional control measures as necessary.

If the benchmark levels are set to indicate when a permittee's control measures are deficient, there is no reason that a permittee must have an annual average over the benchmark, or mathematical certainty of such exceedance prior to the end of four quarters, to trigger corrective action**.**"[126]

"***Several Aspects of the Corrective Action Section Must be Strengthened to Avoid Impermissible Self-Regulation by the Permittee.***

The corrective action section does not involve sufficient Department or public oversight in the required documentation, extensions of deadlines, and rationale for any such extensions. Without Department oversight or requiring documentation be immediately available to the public, the permittee is the only entity that may hold itself accountable for complying with the corrective action and AIM requirements.

[125] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[126] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

The Permit terms also delay the timing of when the Department or the public would even become aware of a triggering event and any necessary corrective actions.
The delay in the Department's awareness, unenforceable deadlines that can be automatically extended, and lack of clear standards to justify additional extensions, as explained below, all contribute to making the corrective action and AIM provisions practically impossible to enforce. Because it is effectively unenforceable, the Permit provides no opportunity to ensure compliance with the Permit terms. Without enforceability and oversight to ensure compliance with the Permit terms, the conditions outlined below are insufficient to assure compliance with the CWA."[127]

## Grouping – Level 2 or Level 3

"Additional Implementation Measures (AIM) in Proposed Part IV.B.
First, ISRI appreciates that MDE did not adopt the AIM framework as articulated in the Proposed 2020 MSGP. ISRI expressed significant concerns with AIM and associated Appendix Q in the Proposed 2020 MSGP (ISRI's MSGP Comments at 17-23), as did FSWA (FSWA's MSGP Comments at 27-36).
In those comments, ISRI noted that that AIM framework was not consistent with the monitoring framework envisioned by NASEM (Report at 53). The proposed AIM framework was too aggressive in its movement of permittees up the AIM tiers based on exceedances of existing benchmark values based on water quality standards (WQSs) (if not updated benchmarks as recommended by NASEM (Report at 31)). …
As also noted by MDE in its 20-SW Permit Fact Sheet (at 69), AIM was intended to address past inadequate "compl[iance] with the permit by making only minimal SCM changes, or no changes, and often these changes did not lower pollutant levels below the benchmark thresholds, indicating poor stormwater control effectiveness". This rationale contains two important issues. First, it identifies a problem related to lack of corrective action in follow-up to benchmark exceedances, independent of what the follow-up corrective actions would be. Second, it assumes that benchmarks reflect the intrinsic capabilities of SCMs to produce effluent with concentrations of benchmark parameters at or below benchmarks. NASEM notes in its Report (at 60) that "[m]any MSGP benchmarks are based on water quality criteria". The proposed AIM framework did not address either of these two issues. The existence of AIM does not correct the identified lack of or inadequate compliance; it just increases requirements on those permittees that have been complying. AIM cannot and does not address the existing disconnect between the intrinsic capabilities of SCMs and benchmark values based on WQSs.
The AIM framework in the Draft 20-SW Permit lacks some of the problematic AIM provisions of the Proposed 2020 MSGP (e.g., AIM level triggers using 8-times the benchmark to accelerate permittees into higher AIM levels quickly). However, ISRI is concerned about several aspects of this AIM framework, including important provisions that it lacks.
a. Starting Certain Permittees Starting at AIM Level 2
ISRI opposes starting certain permittees previously covered under the 12-SW Permit at AIM Level 2. Aside from the punitive optics of this proposed provision, 20-SW permit applicants required to start at AIM Level 2 could need to substantially modify their facilities with "all feasible SCMs" per Part IV.B.2.b.ii. Implementing these SCMs could take time and delay the updating of their SWPPP to the requirements of the Final 20-SW Permit. It is unclear whether the AIM Level 2 implementation deadlines in Part IV.B.2.c. apply in this situation. Even if not, this work could delay submission of their NOI and possibly result in missing the NOI submission deadline for 12-SW permittees. Also, proposed Part IV.B.2.b.ii. relies on U.S. EPA's proposed Appendix Q, which U.S. EPA did not include in the 2021 MSGP; therefore, compliance with AIM Level 2 is somewhat unclear.

[127] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

Also, at least one of the proposed benchmarks in the Draft 20-SW Permit has been increased relative to its value in the 12-SW Permit, and it is possible that the Final 20-SW Permit could contain other increased benchmarks as well (e.g., aluminum). These increased benchmarks could result in 12-SW permittees with 12-SW benchmark exceedances but not 20-SW benchmark exceedances.
On the other hand, if some of the benchmarks in the Final 20-SW Permit are lower (e.g., certain saltwater benchmarks), then 12-SW permittees with no 12-SW benchmark exceedances could effectively have 20-SW benchmark exceedances. Given these uncertainties and changing benchmarks, MDE should not include this provision in the Final 20-SW Permit."[128]

"… The AIM framework also included a proposed Appendix Q that was flawed and contained outdated information and entailed compliance complexities that promise to burden permittees, especially those with large outdoor operations such as recycling facilities…ISRI is concerned about several aspects of this AIM framework, including important provisions that it lacks.
b. Inclusion of U.S. EPA's Proposed Appendix Q in Proposed Part IV.B.2.b.ii.
In its MSGP Comments (at 22), ISRI found both the Sector N portion of proposed Appendix Q and AIM Tier 2 compliance using it to be extremely problematic (see also the FSWA's MSGP Comments at 32). Given that MDE noted in the 20-SW Permit Fact Sheet (at 75) that proposed Appendix Q was "yet unproven and still in draft form at the time this permit is being written", MDE should not include Appendix Q in the Final 20-SW Permit.
As noted above, U.S. EPA withdrew its proposed Appendix Q because it was flawed and contained outdated information. The 2021 MSGP does not include or refer to Appendix Q."[129]

## Grouping – Level 4

"…the Permit should state that failure to comply with permit conditions could result in revocation of coverage in addition to enforcement. We appreciate where the Department has incorporated this language into certain sections of the Permit (e.g., stating that the Department will revoke coverage in the event that benchmark exceedances continue after following the entire corrective action process) and where the Department has included more precise definitions (e.g., defining "all reasonable steps")."[130]

"c. AIM Level 4 at Proposed Part IV.B.4.
ISRI finds AIM Level 4 in proposed Part IV.B.4 extremely problematic. MDE should not retain it in the Final 20-SW Permit.
Proposed AIM Level 4 is inconsistent with the purpose of AIM to address past inadequate "compl[iance] with the permit by making only minimal SCM changes, or no changes" (20-SW Permit Fact Sheet at 69). Proposed AIM Level 4 lies at the other end of the compliance spectrum. This level especially is predicated on the assumption that benchmarks are related to SCM performance and indicative of it (i.e., not meeting a benchmark necessarily means that the SCM is not performing at its intrinsic maximum capability). Because benchmarks are based on WQSs or water quality criteria (WQC) rather than intrinsic SCM performance, this assumption is untrue, rendering AIM Level 4 quite problematic."[131]

"The AIM Level 4 provision at proposed Part IV.B.4.b.i should be moved to Part IV.B.5. as an AIM exception that is available at any AIM level. This provision allows a permittee to demonstration to MDE's satisfaction that the permittee's discharge does not result in any actual exceedance of WQSs. Such

[128] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[129] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[130] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[131] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

a demonstration at a lower AIM level could avoid substantial effort and expense of implementing SCMs that were not necessary to meet in-stream WQSs."[132]

"The AIM Level 4 provision at proposed Part IV.B.4.b.ii is unreasonable. Revoking 20-SW Permit coverage for an entire facility because of a single benchmark exceedance for one parameter at one discharge point makes no sense. It is important to realize that each parameter at each discharge point has its own AIM level. The recycling industry has 7 benchmark parameters, and a facility with, for instance, three monitored discharge points has 21 AIM statuses to track. This makes AIM compliance somewhat challenging, especially under proposed AIM Level 2 using U.S. EPA's Appendix Q (ISRI's MSGP Comments at 17)."[133]

"Commenters recognize that a short statement was added to subsection III.C.2, which is otherwise maintained in similar form from the expired 12-SW permit, that states "The Department may impose additional control measures (to meet narrative water quality-based effluent limit above in Part III.B)". This is virtually meaningless language as it is completely discretionary and provides no guidance to the permittees or public regarding whether and when the Department will actually impose new control measures. CWA and applicable regulations **require** a permit to ensure compliance with WQS. Yet, this statement in the Permit does not mandate action if the available information indicates that the discharge is not being controlled as necessary to meet WQS. The Permit should clearly state that if, after the permittee has implemented the required corrective action, the discharge still fails to meet WQS, the Department will require the permittee to obtain coverage under an individual permit."[134]

"***The Department Must Require an Individual Permit or Otherwise Deny Permit Coverage if Corrective Action or AIM Level 4 Response is Unsuccessful.***
If a permittee has gone through corrective action process or the AIM Levels and at the conclusion of the response actions continues to exceed applicable benchmarks or otherwise trigger the corrective action section, coverage under the Permit is not working and an individual permit or ceasing operations is necessary to protect water quality. The CWA requires NPDES permits to contain "any more stringent limitations . . . necessary to meet water quality standards." With benchmark thresholds representing a level of concern above which the discharge could potentially impair water quality, the repeated benchmark exceedances that would result in AIM Level 4 signify a clear threat to water quality that must be remedied for the Permit to comply with the CWA. If the required AIM fail to bring the discharge to below benchmarks, the Permit cannot be relied upon to protect water quality and must be revoked. Though the Permit contains language in AIM Level 4 that if a permittee continues to exceed the quarterly benchmark threshold for the same parameter after complying with the required AIM Level 4 Response, the Department will revoke coverage, the messaging on this point in other materials has not been clear. It is critical that the Department revoke coverage under the Permit if the corrective actions/AIMs fail to eliminate exceedances. Commenters support the current clear statement in the Permit that the Department will revoke coverage.
Language in the Fact Sheet and presented at the public hearing were troubling, and contrary to the Permit, on this issue. Page 76 of the Fact Sheet notes that the "permittee is put on notice that if they continue to exceed the benchmark threshold for the same parameter even after installation of structural source controls or treatment controls, the Department may revoke coverage under this permit, unless you are under a consent order or they have obtained an individual permit which considers site specific water quality based limits." The use of permissive language rather than mandatory in the Fact Sheet is

[132] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[133] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[134] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

problematic and should be adjusted to be consistent with the Draft Permit language to avoid confusion. Immediately afterward, the Fact Sheet provides that after AIM Level 4 the permittee must continue benchmark monitoring but that, "the monitoring would be in a cycle of repeating Level 4, or installing controls or the alternatives as stated above." Based on the Permit language that the Department will revoke coverage under the general permit if AIM proves unsuccessful, there cannot be a repeat of AIM Level 4 because coverage would cease at the conclusion of AIM Level 4 or monitoring must have indicated no further exceedances.
The public hearing for the Permit on March 3, 2021 raised similar concerns regarding revocation of permit coverage. The presentation noted that the Department is proposing "an option to revoke coverage under the permit." The idea of an "option" to revoke coverage is also permissive and is inconsistent with the current Permit language. **Commenters strongly support the mandatory language in Part IV.B.4.b.ii) of the Permit stating that the Department will revoke coverage if the permittee continues to exceed quarterly benchmark thresholds for the same parameter after following the AIM Level 4 response**."[135]

"The language in the Permit also does not specify at what point a permittee is deemed to "continue to exceed the benchmark threshold for the same parameter even after installation of structural source controls or treatment controls…" (Part IV.B.4.b.iii.) Is this based on the next 4 quarters of monitoring after the controls were installed pursuant to AIM Level 4? Based on one quarter? These points should be clarified."[136]

"The circumstances at one particularly concerning facility demonstrate the importance of revoking coverage under 20-SW once corrective actions have proved ineffective in preventing benchmark exceedances. This site was subject to an enforcement action and has been under a settlement agreement for a number of years. The owner attempted to install some control measures but the site continues to regularly exceed benchmarks. At this time, the State is unwilling to require an individual permit. Although the pollution continues to impact local waters, all indication is that the State will not require anything further because the 12-SW Permit only requires the permittee to implement control measures. In this instance, even when all conditions of the permit are met, pollution continues and water quality is not protected. To avoid this outcome, the Permit must make clear that the State's next response to continued exceedances is to revoke the Permit, either prohibiting the facility from discharging through full on-site retention of stormwater or subjecting it to an individual permit that would take into account site-specific conditions in a reasonable potential analysis to determine water quality limitations.
**Similarly, the Permit must include non-discretionary language in Part IV.A providing that if corrective actions are unsuccessful in remedying the triggering events listed in Part IV.A.1 the Department will revoke coverage under this Permit.** Without this mandate, a permittee could continue operating under the Permit despite the fact that control measures are demonstrably failing to adequately protect water quality. Accordingly, the following language should be added to Part IV.A.3:

> "If your control measures are insufficient to prevent reoccurrence of a triggering event listed in Part IV.A.1 after you have followed the Corrective Action requirements of Part IV.A.2, the Department will revoke coverage under this permit through the development of an individual permit to address site specific water quality limits, or a final determination to deny permit coverage, unless you are under a consent order.""[137]

[135] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[136] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[137] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

"**The Department should not only require a permittee to obtain individual permit coverage upon failure to stay below benchmark thresholds after AIM Level 4 or upon reoccurrence of triggering events for corrective action, but also make the permittee ineligible to reapply for future iterations of the Permit.** A permittee that has failed to correct the problems that result in consistent benchmark exceedances or corrective action triggering events should not be allowed to avoid the heightened scrutiny of an individual permit in subsequent permit terms by simply applying for the next version of Permit 20-SW."[138]

## Grouping – AIM Exceptions

"b. IV.B.5.b.i.): "After reviewing and revising your SWPPP, as appropriate, you ~~should~~ must notify the other facility or entity contributing run-on to your discharges and request that they abate their pollutant contribution."
c. IV.B.5.b.ii.): "If the other facility or entity fails to take action to address their discharges or sources of pollutants, you ~~should~~ must contact MDE's Compliance Program.""[139]

"d. AIM Exceptions at Proposed Part IV.B.5.
ISRI agrees that the AIM Exceptions at proposed Part IV.B.5. should include the proposed exceptions for natural background pollutant levels and run-on. However, Part IV.B.5. should also include demonstration of no actual in-stream WQS exceedance, as described in proposed AIM Level 4 at Part IV.B.4.b.i.
While MDE makes a reference to an "'aberration' demonstration" in the 20-SW Permit Fact Sheet (at 70), MDE did not include any aberration exception in the Draft 20-SW Permit. MDE should include abnormal events to the AIM Exceptions, as well as to alternative benchmarks for copper and aluminum, as contained in the 2021 MSGP"[140]

"***The AIM Exceptions in the Permit are Inconsistent with the EPA MSGP and the CWA and Must be Revised or Eliminated.*** The Permit is inconsistent with EPA's MSGP with respect to AIM exceptions for natural background, and must be revised.
EPA's proposed MSGP included a new method for calculating AIM exceptions due to natural background, which it described as a "subtraction method." According to the proposed MSGP, the AIM exception would apply if [t]he four-quarter average concentration of your benchmark monitoring results minus the concentration of that pollutant in the natural background is less than or equal to the benchmark threshold. This is this same language that the Department included in the Permit. However, in our comments on EPA's draft MSGP, Commenters noted that EPA's draft language regarding AIM exceptions was legally and technically unsound.
EPA agreed with our comments. Among other things, EPA noted that "the proposed subtraction method essentially would allow operators to contribute higher concentrations to receiving waters than previously allowed without triggering AIM. This is not EPA's intention with this exception." As a result, EPA abandoned the flawed proposal and reverted to the language in the 2015 MSGP. The final MSGP states that the "natural background" exception only applies if [t]he four-quarter average concentration of your benchmark monitoring results (or fewer than four-quarters of data that trigger an exceedance) is less than or equal to the concentration of that pollutant in the natural background.
The Department's Permit language - which tracks the proposed MSGP language - is therefore inconsistent with EPA's final MSGP and must be changed.

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[138] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[139] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[140] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

Independent of whether the Permit aligns with the final MSGP, the Department should revise its natural background exception language for all of the reasons that we provided in our comments on the MSGP: The language in the Permit does not only waive monitoring for pollutants whose benchmark exceedances are solely attributable to background, it actually waives monitoring unless the exceedances are solely attributable to the permittee. This would represent backsliding from the prior permit and be contrary to the CWA. As EPA stated in the fact sheet for its final MSGP, the proposed language was inconsistent "with existing EPA policy concerning the establishment of site-specific water quality criteria based on natural background conditions."
**In sum, the Department must change the impermissible natural background AIM exception language to make the Permit consistent with the CWA and the final EPA MSGP.**"[141]

"The Department must not waive monitoring based on run-on from a neighboring source. The Department proposes to waive "AIM or additional benchmark monitoring" where "run-on from a neighboring source . . . is the cause of the exceedance." For all of the reasons set forth in the preceding section, we object to this waiver.
It is not clear what the Department means by "the cause," but we suspect that the Department intends for this section to mirror the natural background exception, such that the Department would apply the same flawed logic with respect to exceedances "solely attributable" to natural background. Again, for all of the reasons set forth above - including the fact that EPA has disavowed the subtraction method being proposed by the Department – **The Department cannot waive monitoring just because run-on contributes to a benchmark exceedance.** If a permittee is causing or contributing to a benchmark exceedance, then that permittee must continue the AIM process and additional benchmark monitoring. The only theoretical scenario in which a permittee might legitimately be exempt is where the pollutant load is entirely attributable to run-on (i.e., where the contribution from on-site industrial stormwater is zero). However, we question whether there is any value in a carve-out for this scenario. If a permittee is able to separately monitor run-on, then the permittee should be able to avoid commingling, and no net calculations should be necessary.
If the Department chooses to keep the run-on exception, Commenters urge the Department to incorporate Dr. Horner's recommendations from page 9 of his report related to the steps necessary to solve the problem from the run-on pollution. As Dr. Horner's report describes, the permittee's response to run-on from an external source should be to first determine if there is a potential solution that could be implemented at the permittee's own property, then to work cooperatively with the operator of the external source to identify a solution. Finally, if those efforts fail, the permittee should be required to contact the Department. The Permit should then specify what actions the Department will take to pursue a solution and communicate to the permittee. The permittee should be required to document all of the steps and actions it took in this process in an updated SWPPP and annual report."[142]

## 11. COMMENT CATEGORY – Part V (Inspections, Monitoring and Reporting).

"Part V A.1 **Routine Facility Inspection Signature:** The routine inspection described herein must be signed according to Part II C.2. This means that the routine inspection must be signed by the principal executive officer or ranking elected official with the certification. Can this be delegated to a duly authorized representative, as described in Part II.C.3?"[143]

[141] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[142] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[143] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services

## Grouping –Benchmark Selection

"***The Department should adopt universal monitoring for discharge flow-rate.***
Maryland should require industry-wide monitoring and reporting for discharge flow-rate, because without flow-rate data there is no way to determine pollution loadings from benchmark data with sufficient certainty. The NRC report states that a "pollutant concentration measured at a single time during a stormwater event cannot be considered to be representative of the [event mean concentration]," which is necessary for determining pollutant loads and therefore downstream water quality impacts. NRC further recommends additional monitoring to collect data sufficient to support evaluation of stormwater control measures, benchmark thresholds, and numeric effluent limitations. These evaluations would necessarily require analysis of pollutant loadings predicated upon reliable discharge flow-rate data. Given that there are several low- to medium-cost monitoring technologies and methodologies for measuring flow-rates, requiring flow measurements industry-wide would not be a significant burden on permittees.
The Kentucky Pollutant Discharge Elimination System Permit to discharge stormwater runoff associated with industrial activities includes flow, in addition to TSS, oil & grease, and pH, in its list of effluent monitoring requirements that must be reported twice each year for all point source discharges of stormwater runoff associated with industrial activity. Delaware also requires flow measurements to be submitted for each representative sampled storm event, including: the date and duration of the storm event sampled; rainfall measurements or estimates of runoff of the storm event; the duration between the storm event sampled and the end of the previous measurable storm event; and an estimate of the total volume of the discharge sampled. Maryland should adopt industry-wide benchmark monitoring for flow, to generate data on the quantity of stormwater and pollutants discharged by both individual sites and the industrial stormwater sector statewide."[144]

**"*The Department Must Require Benchmark Monitoring for All Permit-Holders***
The Department must adopt universal benchmark monitoring provisions for all covered sectors. To remedy this legal insufficiency of the draft permit, Maryland should adopt universal benchmark monitoring for already established Chemical Oxygen Demand (COD), Total Suspended Solids (TSS), pH, phosphorus, and nitrogen benchmark thresholds. Maryland should also require calculation and reporting of flow-rate during benchmark sampling in order to support determination of actual pollutant loadings. This monitoring and the resulting data are necessary to ensure detection of a given facility's violation of effluent limitations and the effectiveness of their control measures. The monitoring and data are also necessary to verify compliance with applicable WQS and WLAs, and to support future improvements to the permit.
***The Department should adopt universal benchmark monitoring for Chemical Oxygen Demand, Total Suspended Solids, and pH.***
The Department should require all permit-holders to conduct benchmark monitoring for the state's established COD, TSS, and pH benchmark thresholds. Maryland has many waterbodies impaired for pollutants that reduce dissolved oxygen or contribute to toxicity. For these waters, industrial stormwater discharges with high COD and excessively high or low pH may contribute to low dissolved oxygen levels and high toxicity. TSS is a low-cost surrogate for a broad array of both inorganic and organic industrial contaminants. However, there are few limitations on these pollutants in the current or proposed permit. Universal benchmark monitoring for COD, TSS, and pH are needed to ensure compliance with WQS for dissolved oxygen and toxicity-related impairments. 40 C.F.R. 122.4(d) ("No permit may be issued . . . (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").

[144] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

The NRC recommends adoption of industry-wide monitoring for pH, TSS, and COD as "basic indicators of the effectiveness of stormwater control measures." The Department notes in the Fact Sheet that the state is not implementing a universal benchmark monitoring requirement because "the selection of these constituents can be considered arbitrary." However, the Department fails to explain how - or by whom - the selection of these indicators is arbitrary, as a legal or technical matter. Certainly, the Department's decision does not bear a rational connection to the technical consideration and weight behind the NRC's analysis and recommendation for adoption of these universal benchmarks. Washington and California, for example, include universal benchmark monitoring in industrial stormwater general permits. In accordance with the NRC's analysis, the EPA initially proposed to adopt its recommendation and then subsequently issued a final permit that adopts the recommendation in part, reasoning that the data collected from this requirement would then be used to inform future consideration of universal benchmark monitoring. Without requiring industry-wide monitoring for these indicators, the Department and permit-holders themselves, especially those not already required to conduct benchmark monitoring, lack critical information to assess the effectiveness of stormwater control measures, violations of effluent limitations. The Department also fails to acquire data from dischargers necessary to verify compliance with applicable WQS and WLAs and to support improvements to the permit.**"**[145]

"***The Department should adopt universal benchmark monitoring for nutrients and sediment.***
The Department should require all permit-holders to conduct benchmark monitoring for established nitrogen, phosphorus, and sediment thresholds. Monitoring for and controlling excess nutrients and sediment pollution from all permit-holders is necessary to ensure that Maryland meets its commitment to achieve nutrients and sediment reductions to restore the Chesapeake Bay by 2025 and to protect and restore the water quality of all Waters of the State. Furthermore, imposition of universal benchmark monitoring for sediment will provide the additional benefit of ensuring control of a broader segment of industrial stormwater contaminants for which TSS serves as surrogate.
Virginia has successfully implemented required quarterly nitrogen, phosphorus, and sediment monitoring for all facilities covered by the state's industrial stormwater general permit and for all five years of the permit's term. The data permitted Virginia to verify whether pollutant loading rates from the industrial stormwater sector are consistent with applicable WLAs as well as the Commonwealth's allocation under the Chesapeake Bay TMDL. In analyzing the data, the Chesapeake Bay Foundation found that roughly one-third of permitted facilities likely discharge nutrients and sediment pollution at rates that exceed the sector's WLA.198 Because of the lack of nutrients and sediment industrial stormwater discharge monitoring data for nutrients and sediment in Maryland, the state is likely grossly underestimating this source as a contribution to the Bay TMDL.
A small subset of dischargers (<1%) demonstrate nutrient and sediment loading rates that substantially exceed (>10x) the applicable waste load allocations. This subset of dischargers, however, are not insignificant because their discharges represent very high nutrient and sediment loading rates relative to Virginia's overall targets to address Bay pollution from the broader stormwater sector. Significantly, the subset of dischargers, representing 20 different Standard Industrial Classification (SIC) codes across the state, would have not been identified as substantial sources of nutrients and sediment pollution had Virginia not required the nutrients and sediment monitoring in its permit."[146]

"Industry Specific Benchmarks… ISRI encourages MDE to increase the aluminum benchmark as recommended by NASEM (Report at 33). U.S. EPA raised the aluminum benchmark from 0.75 mg/L to 1.1 mg/L (1,100 µg/L) in the 2021 MSGP, even though the Proposed 2020 MSGP did not contain such an

[145] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[146] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

increase. ISRI sought a greater increase based on NASEM's recommendation (ISRI's MSGP Comments at 11)."[147]

"***The Department Must Retain its Aluminum Benchmark of 750 ug/L.***
The Department must retain an aluminum benchmark of 750 ug/L. As we explained in our comments on EPA's MSGP, the current recommended water quality criteria for aluminum do not support a benchmark any greater than 980 ug/L, and a benchmark that is truly protective of the environment would have to be even lower. The 2018 aluminum criteria document does not provide single values for either the criteria maximum concentration (CMC) or the criterion continuous concentration (CCC). Instead, the new criteria document presents a calculator for deriving site-specific criteria based on pH, hardness, and dissolved organic carbon (DOC) conditions. Both EPA and the NRC cited the 2017 draft criteria document as recommending an "acute criteri[on] of 1,400 µg/L based on a pH value of 7, hardness value of 100 mg/L, and DOC value of 1 mg/L." This value now appears to be outdated.
We noted that EPA's past practice was to set the aluminum benchmark equal to the CMC. The NRC recommended adopting the draft aluminum criteria document approach. With this approach, using the same default pH, hardness and DOC values cited in the draft document – pH of 7, hardness of 100 mg/L, and DOC of 1 mg/L – the new, final criteria calculator would yield a CMC (and benchmark) of 980 ug/L. However, to select a fixed benchmark that will protect all receiving streams, it would make more sense to select a lower bound value. The aluminum criteria calculator states that "EPA aluminum criteria recommend staying within specified limits for pH (5.0-10.5), total hardness (0.01-430 mg/L as CaCO3) and DOC (0.08-12.0 mg/L) for generating criteria." Applying these parameter ranges yields aluminum CMC values as low as 0.0014 µg/L. These conditions are of course very unlikely to occur in the real world, but this example serves to demonstrate that a static value would have to be significantly lower than 1,400 µg/L to be protective of all or even most receiving streams.
To take a much more realistic example, at a pH of 6.5, hardness of 45 mg/L, and DOC level of 3 mg/L, the CMC would be 750 µg/L – equal to the current benchmark. The same result can be achieved by adjusting the three parameters to various levels near the middle of their recommended ranges. This means that the current benchmark is appropriate for ordinary, real-world scenarios. The aluminum criteria document therefore supports a decision to retain the existing benchmark. It should be noted, however, that neither the 750 µg/L benchmark nor a benchmark of 980 µg/L would be protective in all cases.
The Department provides additional support for a stringent aluminum benchmark in the Draft Permit fact sheet: When reviewing 12-SW benchmark monitoring data, "[t]he total aluminum benchmark of 0.75 mg/L was not met during a single year during the permit cycle." Clearly aluminum is a widespread pollutant of concern at industrial facilities, and any action by the Department to weaken the benchmark threshold would not be rationally related to the technical authorities. It is also a pollutant of concern in receiving streams, which frequently exceed EPA's recommended water quality criteria. Maryland has an aluminum problem. In order to better understand the problem and how to fix it, the Department needs better monitoring data, and must retain a benchmark that is truly protective of the environment. The Department must retain the 750-ug/L benchmark."[148]

"Industry Specific Benchmarks….Concerning benchmarks, ISRI appreciates that MDE increased the iron benchmark from 1 mg/L to 3 mg/L, which is important for the recycling industry. However, ISRI supported U.S. EPA's suspension of the iron benchmark as recommended by NASEM (Report at 32). MDE should reconsider NASEM's recommendation on the iron benchmark."[149]

[147] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.
[148] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[149] David L. Wagger, Director of Environmental Management, Institute of Scrap Recycling Industries, Inc.

"The 2019 Consensus Study Report by the National Academy of Sciences' Committee on Improving the Next-Generation EPA Multi-Sector General Permit for Industrial Stormwater Discharges recommended that EPA suspend the benchmark for iron. The Chairperson of this prestigious group was Allen P. Davis, PhD, PE, a professor at University of Maryland in College Park. According to the University, he is "an internationally recognized leader in stormwater management and treatment."

EPA has concurred with the Committee's recommendation as to dropping iron from the list of benchmarks in the MSGP. On the other hand, MDE has not removed iron from the Sector N list, but proposes raising the iron benchmark parameter from 1 mg/l to 3 mg/l.

MDE's rationale for maintaining iron as a benchmark appears to be twofold, with the comments that iron is present in scrapyards and that iron causes staining of receiving waters. We certainly concur with the first comment but have been unable to find any scientific studies regarding staining of receiving waters as it relates to scrapyards specifically or even otherwise. Speaking as a non-scientist, there does not appear to be adequate support for MDE taking a different approach than the National Academy of Sciences and EPA.

We respectfully ask that MDE reconsider its position and remove iron as a Sector N Benchmark Parameter until such time as there is a sufficient basis for its inclusion."[150]

"Appendix D **Iron:** The benchmark Appendix D identifies different testing methods for iron among different industry classifications: Landfill (total iron), Automobile Salvage Yards (total iron), Scrap Recycling (recoverable Iron) and Salt terminals (iron). Please explain the reasoning behind the different testing methods and why each was chosen for each industry."[151]

"Appendix D **Iron:** There is often a high iron content in Maryland soils. Soils are greatly disturbed during construction activities as well as during landfill daily cover and capping activities. While construction activities are covered by a different NPDES stormwater permit, they are in many instances a great potential source of iron in stormwater runoff. Yet there is no benchmark required for iron levels in those projects governed by a NPDES Construction Activity permit. Landfills, on the other hand, are governed by NPDES rules herein that require benchmark monitoring of iron. Please explain the logic of what is different about landfill operations from land construction activities that requires these industrial activities need to have iron benchmark levels."[152]

"***The Department Must Retain an Iron Benchmark of 1 mg/L.***
We support the Department's decision to retain iron benchmark monitoring, but the Department should revert to a 1-mg/L benchmark for iron.
The NRC recommended removing the iron benchmark based on a lack of evidence showing acute toxicity. EPA did so. We opposed this part of the proposal because the scientific literature does in fact show evidence of iron toxicity, including evidence of acute toxicity at concentrations well below the current benchmark.
One recent study observed that "[i]n neutral waters, [iron] has been found to increase turbidity, reduce primary production, and reduce interstitial space in the benthic zone, which smothers invertebrates, periphyton, and eggs. Iron precipitates also physically clog and damage gills causing respiratory impairment." That same study evaluated iron toxicity in several species over a period of 30 days. The authors found that iron was lethal in boreal toad tadpoles, and also caused a variety of sublethal effects, including "reduced growth for boreal toad tadpoles and mountain whitefish, reduced development for boreal toad tadpoles, and reduced reproduction for Lumbriculus [blackworm]." Using the results of their

[150] David Simon, President, Baltimore Scrap Corp.
[151] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[152] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services

study, combined with other chronic toxicity literature values, the authors derived a Final Chronic Value (FCV) of 499 µg/L. Although this result is not directly relevant to the question of acute iron toxicity, it does suggest that EPA's current chronic criterion for iron (1 mg/L) may be too high.
The same authors performed a separate, 10-day "mesocosm" experiment in which they exposed naturally colonized communities of benthic macroinvertebrates in experimental streams to various iron concentrations. These experiments yielded EC20 values as low as 234 µg/L, and the authors derived an FCV of 251 µg/L, again suggesting that EPA's current water quality criterion for iron may be too high.
In a study focused on acute effects, Shuhaimi-Othman et al. describe a series of four-day toxicity tests on eight freshwater aquatic species. For iron, species-specific LC50 values ranged from 0.12 to 8.49 mg/L. Following EPA guidance, the authors derived a Final Acute Value (FAV) of 74.5 µg/L, and a CMC of 37.2 µg/L. This is of course much lower than the current iron benchmark of 1 mg/L.
Dr. Horner's report, attached as Appendix E, also describes toxicity testing results for iron, noting that, for a variety of aquatic species the concentration lethal to 50 percent of the test organisms (LC50) begins at less than 1.0 mg/L, with exposure times as short as 24 hours.
It would be arbitrary and capricious to eliminate a benchmark where EPA has evidence of toxicity, including acute toxicity, at levels significantly lower than the current benchmark. To repeat EPA's reasoning with respect to arsenic, the Department should choose "not to weaken a discharge requirement unless good scientific evidence exists that a pollutant is less toxic than previously believed." This reasoning applies with added force to iron. Not only is there a lack of evidence that iron is less toxic than previously believed, there is in fact evidence that iron is more toxic than previously believed.
In sum, the predicate for NRC's recommendation and EPA's proposed decision with respect to iron – that there is no evidence of acute or subchronic toxicity – is false and not rationally related to the prevailing science in the matter. In our comments on EPA's MSGP we cited and attached two studies showing iron toxicity over periods of 4 and 10 days at levels well below the current benchmark. In light of this evidence, it would be irresponsible and unreasonable to remove or weaken the iron benchmark. The Department must continue benchmark monitoring for iron, but with a benchmark of 1 mg/L."[153]

"***The Department Must Adopt a Revised Selenium Benchmark Consistent with the MSGP.***
Our comments on EPA's proposed MSGP noted that the selenium benchmark for freshwater should be revised from 5 ug/L to 1.5 ug/L (for lentic waters) and 3.1 ug/L (for lotic waters). EPA agreed, and the freshwater selenium benchmark in the final MSGP is 1.5/3.1 ug/L. The Permit includes a freshwater selenium benchmark of 5 ug/L. This is inconsistent with the final MSGP. The Department must revise the freshwater selenium benchmark to 1.5 ug/L (lentic) and 3.1 ug/L (lotic)."[154]

"The Quarantine Road Landfill site (State Permit 12SW0257, NPDES Permit MDR000257), located in Baltimore City, demonstrates the importance of requiring universal monitoring for flow under the General Permit, and additional sector specific parameters for landfills, to ensure WQS will be met. The 12-SW Permit applicable to the Quarantine Road Landfill required stormwater benchmark monitoring for iron and TSS, but these parameters are insufficient to evaluate whether the stormwater control measures are adequate to prevent exceedance of WQS. Because of ongoing concerns about this site, the Department requires semi-annual monitoring reports to be provided, which include groundwater and other monitoring results. The first semi-annual 2019 Monitoring Report for the Quarantine Road Landfill, submitted to the Department by SCS Engineers, shows several parameters in exceedance or equal to their respective MCLs: antimony, arsenic, beryllium, cadmium, chromium, lead, mercury, nitrate, and selenium. Additional general chemistry parameters were also detected at elevated levels: ammonia, calcium,

[153] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[154] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

hardness, iron, magnesium, manganese, sodium, specific conductance, total dissolved solids, sulfates, and chlorides.
Because the only benchmark monitoring requirements for landfills are for iron and TSS, the Department and the public have no way of knowing whether the stormwater discharged pursuant to the General Permit contains any of the numerous pollutants that are exceeding MCLs for groundwater. Particularly, it is important to know whether corrective action or additional implementation measures are warranted for additional key pollutants, like ammonia, cadmium, calcium, chloride, magnesium, mercury, lead, and sulfates, which were elevated in the groundwater monitoring results at the site and are also associated with landfill leachate.
Additionally, the risk the site poses to the receiving water body cannot be fully captured without stormwater flow measurement. The quarterly benchmark monitoring data from the last quarter in 2020 show benchmark exceedances for both iron and TSS. But, without measurements for flow, the Department and the public cannot calculate pollutant loads from the site to evaluate the potential harm."[155]

"***The Department Must Require Additional Benchmark Monitoring for Landfills***
Maryland must adopt additional benchmark monitoring requirements for landfills in order to ensure compliance with WQS. Given the broad array of toxic contaminants found in landfills and their runoff and leachate discharges. Maryland should consider adoption of benchmarks for cadmium, mercury, and lead, which are constituents associated with municipal solid waste leachate and incinerator ash residue. Additionally, Maryland should also consider adoption of benchmarks for alkalinity, ammonia, calcium, COD, chloride, hardness, iron (total), magnesium (total), nitrate, potassium, sodium, and sulfate (all common leachate indicator parameters). The Quarantine Road Landfill example discussed in the Factual Background demonstrates the need for more than only monitoring for TSS and iron at facilities with the opportunity for many harmful pollutants to contaminate the stormwater."[156]

"Appendix D, Sector AD "**Inactive Landfills: Sector AD.e states: ""**Sector AD.e - Inactive Landfills. ADb.1. Covered Stormwater Discharges. The requirements in Sector AD.b. apply to stormwater discharges associated with industrial activity from inactive landfills as identified by the Activity Code specified under Sector AD.e in Appendix A of the permit. AD.b.2 Additional SWPPP Requirements. In addition to the requirements of Part III, the SWPPP shall include, at a minimum, the requirements listed for Sector L - Landfills and Land Application Sites"".
Sector AD.b. is for School Bus Maintenance Facilities. Does this mean that the same requirements apply to both inactive landfills and school bus maintenance facilities? Does this mean that the same SWPPP requirements apply to both active and inactive landfills? Howard County's two inactive landfills have no industrial actvities, so many of the SWPPP requirements for active landfills seem unnecessary.
Howard County recomends that inactive landfills with no industrial activities should not be required to comply with the 20-SW permit.""[157]

"**The permit does not … adequately address pollutants from scrap metal yards and landfills. The Department should take steps to ensure that the permit's terms will reduce stormwater pollution, and facilities that are sources of contaminants toxic to aquatic life.**
The 20SW permit also fails to adequately address pollutants from scrap metal yards and landfills. The current permit does not distinguish these facilities in any way, yet they are sources of potentially toxic contaminant loads. The clustering of such facilities, such as around the Baltimore Harbor, could cause

[155] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[156] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[157] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services

cumulative impacts. CAP is requesting those facility types be required to seek individual permits, citing human health concerns.
CBF also requests MDE to establish that scrap metal yards and landfills seek induvial permits, and that the Departments set specific standards and specific benchmarks for those sites. Scrap metal yards and landfills are sources of contaminants toxic to freshwater aquatic life of tributaries to the Bay.
To more broadly understand the pollutant loading and impervious area reduction upon other common toxic industrial contaminants, CAP asked Dr. Roseen to examine data from the 2018 Maryland daily monitoring reports. This data set included 6,744 entries for a wide range of contaminants. The table below shows statistics for 7 common contaminants of concern.
The data shows that the average concentrations reported for Aluminum, Cadmium, Copper, Lead, and Zinc exceed both the acute and chronic freshwater aquatic life criteria. Dr. Roseen writes, "Exceedances are on average over 10X the acute criteria. Notably, Copper is especially toxic for aquatic life and is nearly 24 times the average acute aquatic life criteria for freshwater, and 183 times the standard deviation. Fish toxicity levels for dissolved copper are < 6 ug/L and dissolved lead are particularly low at 0.2 to 0.4 ug/L when total hardness is 10-20 mg/L as CaCO37."

*Table 4: Summary Statistics for 7 Common Industrial Pollutants from 2018 MD Daily Monitoring Reports*

| POLLUTANT | MIN (MG/L) | AVG (MG/L) | ST DEV (MG/L) | MAX (MG/L) | COUNT | ACUTE CRITERIA (MG/L) | CHRONIC CRITERIA (MG/L) | WATER QUALITY CRITERIA |
|---|---|---|---|---|---|---|---|---|
| Aluminum, total (as Al) | 0.00 | 2.27 | 5.70 | 42.79 | 77 | 0.75 | 0.087 | Aquatic Life, Freshwater |
| Arsenic, total (as As) | 0.00 | 0.10 | 0.44 | 2.00 | 21 | 0.34 | 0.15 | Aquatic Life, Freshwater |
| Cadmium, total (as Cd) | 0.00 | 0.14 | 0.40 | 1.70 | 21 | 0.0018 | 0.00072 | Aquatic Life, Freshwater |
| Copper, total (as Cu) | 0.00 | 0.33 | 2.23 | 24.20 | 134 | 0.014 | 0.0093 | Aquatic Life, Freshwater |
| Hydrocarbons, total petroleum | 0.00 | 1152.72 | 2820.51 | 6910.05 | 6 | | | |
| Lead, total (as Pb) | 0.00 | 0.08 | 0.16 | 0.87 | 128 | 0.065 | 0.0025 | Aquatic Life, Freshwater |
| Zinc, total (as Zn) | 0.00 | 10.39 | 71.66 | 703.82 | 106 | 0.12 | 0.12 | Aquatic Life, Freshwater |

Note: water quality criteria average exceedances are highlighted in red.

*Roseen, Robert M., Concerns Regarding the Draft 2020 General Permit for Discharges from Stormwater Associated with Industrial Activities Discharge Permit NO. 20-SW, NPDES Permit No. MDR0000, April 15, 2021.*

The Department should use the available data to inform its approach to industrial stormwater permitting. If the Department continues to use impervious surface reductions requirements as the main tool for addressing industrial stormwater, that tool must be maintained, as discussed in the previous section. Stormwater best management practices designed to reduce nutrients and sediments may also provide a secondary benefit of removing PCBs, which preferentially bind to the organic carbon fraction of sediments. Impervious surface restoration should be accountable for documented reductions of a range of pollutants."[158]

## Grouping –Benchmark Frequency and Clarifications

"Monitoring required if street/inlet cleaning equipment stored without cover (under roof or tarp). If we tarp or move this equipment under cover, will we be exempt from benchmark monitoring?"[159]

[158] Josh Kurtz, Executive Director Maryland Office, Chesapeake Bay Foundation
[159] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg

"Since the oil recycling facility is covered, does that mean it isn't subject to benchmark sampling?"[160]

"**The Department Must Require More Frequent Sampling for Benchmark Monitoring and Sampling Methodologies that Produce Data that are Representative of Industrial Stormwater Discharges**
The Department's proposed requirements for the frequency and methodology of grab sampling of industrial stormwater discharges are technically and legally insufficient, because the resulting data are not representative of the quality of industrial stormwater discharges as a matter of statistical significance. At pages 28-30 of his report, Dr. Roseen discusses how the required quarterly grab sampling produces poor quality data that cannot be rationally relied upon for the purpose of evaluating excursions of benchmark thresholds and, therefore, whether a permittee has complied with required control measures and other technology-based effluent limitations and/or has caused or contributed to a downstream water quality impairment. Maryland must ensure that the required sampling frequency and methodologies for benchmark monitoring are technically sufficient for the stated purpose. That is, to monitor whether the permittee is complying with the effluent limitations and other requirements of the permit. Therefore, the Department must require a sampling frequency for benchmark monitoring that provides at least the minimum quality and quantity of data necessary to ensure compliance as a matter of statistical significance. Further, the Department should require low-cost alternatives to grab sampling, such as first flush samplers or passive diffusion samplers, to ensure benchmark monitoring data that are higher quality and more representative of industrial stormwater discharges."[161]

"d. V.A.3: "These [quarterly stormwater] samples are not required to be collected consistent with 40 CFR 136 procedures but ~~should~~ must be collected in such a manner that the samples are representative of the stormwater discharge.""[162]

"HCC would like to note that Part V.B.2. Benchmark Monitoring Schedule does not address facilities that have already fulfilled their benchmark monitoring schedule. HCC has fulfilled the benchmarking monitoring requirements when averaging the analytical for the past four quarters from Q4 2014 through Q3 2015. Starting in Q4 of 2015, HCC has discontinued monitoring after speaking to Bill Lee and communicated in writing via a letter dated 10/6/15. HCC would like MDE to provide further clarification in the draft permit for facilities that have already fulfilled benchmark monitoring schedule. We will continue operating under the Stormwater Pollution Prevention Plan completing quarterly visuals and annual reviews."[163]

"Part V B **Benchmark Monitoring:** If a permittee has met the benchmark standard for their 12-SW permit at one of their outfalls and has qualified for discontinuing benchmark monitoring, do they need to start again and qualify all of their outfalls for the 20-SW?"[164]

"***The Department Must Require Benchmark Monitoring for all Permit-Holders and throughout the Entire Permit Term***
The purpose of Title 9 of the Maryland Code is to "establish effective programs [...] to prevent, abate, and control pollution[...]" 9-302. "No permit may be issued […] (d) when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 CFR 122.4(d). Each NPDES permit must control the discharge of all pollutants that have a "reasonable

[160] Anthony Berger, PE, Engineering Services Division Chief, City of Gaithersburg
[161] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[162] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders
[163] Vinnie N. Glorioso, Manager, Heritage-Crystal Clean, LLC
[164] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services

potential to cause or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). "[E]ach NPDES permit shall include conditions meeting the following [...] monitoring requirements [...] to assure compliance with permit limitations." 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its compliance with the permit's effluent limitations.186 "[T]he Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit." Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles, 725 F.3d 1194, 1207 (9th Cir. 2013). The proposed benchmark monitoring requirements fail to ensure that authorized discharges comply with the effluent limitations in the permit and that the discharges do not cause or contribute to violations of WQS.

The Permit requirements for discharge monitoring are technically inadequate and legally insufficient to ensure compliance with the requirements of the CWA and Maryland law. **The Permit does not require discharge monitoring throughout the permit term nor require discharge monitoring for all permit-holders. Without requiring monitoring of all dischargers throughout the permit term, the Permit fails to ensure permittee compliance with effluent limitations and the effectiveness of control measures, and it fails to verify compliance with applicable WQS.**

**Maryland must require benchmark monitoring throughout the permit term and require discharge monitoring by all permit-holders in order to ensure compliance with effluent limitations, the effectiveness of other control measures, and to verify compliance with applicable WQS. Maryland must also require a frequency and methodologies for sampling that are technically sufficient for producing data representative of industrial stormwater discharges and for identifying excursions of benchmark thresholds and other compliance matters. Maryland should adopt universal benchmark monitoring requirements for nutrients and sediment in accordance with and to ensure compliance with the Chesapeake Bay TMDL. Further, Maryland should also adopt universal benchmark, or, at a minimum, "report-only," monitoring requirements for Chemical Oxygen Demand (COD) and pH, in accordance with the 2021 U.S. EPA Multi-Sector General Permit. Maryland must also retain its aluminum and iron benchmark thresholds, while also adopting revised thresholds for the selenium benchmark. Lastly, Maryland must also adopt additional benchmarks for landfills.**

***The Department Must Require Benchmark Monitoring Throughout the Permit Term***

Benchmark monitoring must be required throughout the entire permit term in order to ensure that permit-holders are complying with effluent limitations and that control measures are adequate and effective. Without requiring benchmark monitoring throughout the permit-term, the permit conditions fail to detect and necessarily trigger any resolution of a violation of effluent limitations in the permit due to, for example, a change in a permit-holder's operations or in environmental conditions occurring after the first four required quarters of benchmark monitoring. As Dr. Horner's report states, "A permittee could abandon all efforts at controlling pollutant discharges for as much as 80 percent of the Permit's coverage. Even without a concerted decision to forsake stormwater management efforts, bad habits could form with lack of practice." The lack of this requirement also removes any enforcement authority on the Department's part in the absence of an on-site inspection.

Furthermore, continuous efforts to monitor discharges against benchmark thresholds are also important to identify where problematic changes to pollutant loadings at the watershed-scale threaten to violate WQS. Above all, this failure to require benchmark monitoring through the entire permit term does not bear a rational connection to the Department's own stated purpose for benchmark monitoring; that is, to monitor the effectiveness of control measures and determine when corrective actions are warranted due to violations of effluent limitations in the permit. Without adequate monitoring, permit limitations are difficult, or impossible, to enforce, because compliance cannot be objectively evaluated. The Department must revise and issue a permit that requires benchmark monitoring throughout the entire permit term, irrespective of compliance with benchmark thresholds at any one time.

The NRC found in its 2019 study that data produced by benchmark monitoring over only one year of a five-year permit cycle are inadequate to characterize or describe the performance of control measures over the entire permit term. Indeed, the Department itself acknowledges in the fact sheet for this proposed permit that its benchmark monitoring data are incomplete and therefore skewed due to the drop-off in monitoring by facilities that met benchmark thresholds throughout the first four required quarterly sampling events. Incomplete data prevent the Department from verifying compliance with applicable WQS and hamstrings its ability to acquire pollutant discharge data necessary to support future improvements to the permit.**"**[165]

"During the current permit cycle, Park staff have observed that Visual Quarterly Monitoring has not helped them access pollution issues. This combined with the challenge of being on site during a significant rain event makes us question its usefulness. MDE should consider its usefulness before it is included in the permit again."[166]

"Although there is a Substantially Equivalent Outfall provision in the current permit, some inspectors question its use and request that all the outfalls be monitored. Montgomery Parks maintenance yards are rather homogeneous, and we generally pick the most impacted outfall to monitor. This should be considered a legitimate strategy."[167]

"I am looking specifically at Appendix D, Sector A, Table A-2 The terms "recoverable" and "total recoverable" are the same, a total metals analysis. What is the significance of having arsenic listed as "recoverable" and copper listed as "total recoverable"?"[168]

"On (PDF) page 44 of the Permit, the Monitoring Procedures are explained further into Section 4 -Sample Type. The first paragraph mentions grab sampling and explains that if a grab sample could not be collected in the first flush, that it should be collected ASAP and provide a written explanation in their SWPPP. Does this protocol also apply to collecting Benchmark samples? In the next paragraph the first sentence states, "For benchmark monitoring, you may use a composite sampling method instead of taking grab samples as described above". While I recognize the permit allows composite sampling, my specific question/clarification relates to collecting grab samples for Benchmark monitoring. If a site collects a grab sample after the allotted time for the first flush and provides documentation, is this sample still viable to submit to the NetDMR?"[169]

## Grouping – Reporting

"Part V.A.2. of the draft 20-SW permit requires an annual comprehensive site compliance evaluation report. When a permitted industrial facility discharges to an MS4, the contents of these annual reports includes information pertinent to illicit discharges. MS4 permits require MS4 owners to screen outfalls and industrial areas for illicit discharges, and take action to prevent and eliminate illicit discharges. Screening outfalls and investigating discovered illicit discharges to identify their sources requires substantial time and resources. Access to the information in these annual reports would improve the efficiency and effectiveness of MS4 permittee IDDE programs. Please make these annual reports available on MDE's website."[170]

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[165] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[166] Geoffrey Mason, Natural Resources Specialist, The Maryland-National Capital Park and Planning Commission
[167] Geoffrey Mason, Natural Resources Specialist, The Maryland-National Capital Park and Planning Commission
[168] Robert T. Smith, Vice President, KU Resources, Inc.
[169] Kelsey Pearce, Lead Environmental Specialist, Maryland Environmental Service
[170] Robert Hirsch, Manager Baltimore County, Department of Environmental Protection and Sustainability

"Part V A.2 **Comprehensive Site Compliance Evaluation:** There is no requirement that the Comprehensive Site Compliance Evaluation must be signed in accordance with Part II C.2. However, according to Part IV C.1.d, if an AIM exists, then the certification must be included. Please confirm that this is consistent with MDE's intent."[171]

"Notifications that a permittee intends to exceed corrective action or AIM deadlines, along with the rationale and proposed completion date, should be made publicly available through NetDMR, as discussed in more detail later in this letter. This is critical for the public to be able to ensure a permittee is meeting the self-assigned completion date for its corrective action."[172]

"The Permit must explicitly state that failure to timely submit justification for any time extension through NetDMR, along with any additional documentation of any actions taken, constitutes a permit violation. A permittee's rationale and schedule for implementing additional control measures must be made available to the public through NetDMR.
The permittee's rationale and schedule for implementing additional control measures may not even be available to the public until the annual report, if at all, as IV.C.2 does not specify where the permittee must document its rationale and schedule. While the permittee must summarize its corrective actions and/or AIM responses in the annual report, this does not necessarily include the justification for extensions. If the permittee notified the Department regarding an allowed extension of the timeframe, it must attach its documented rationale to its next DMR, but in most instances the permittee is not required to notify the Department regarding an allowed extension, so this requirement would not apply. Consequently, the Department and the public would not be aware that the permittee planned to extend its deadline or any rationale provided for such extension. The public should not have to trust the permittee; the Permit must hold the permittee accountable and require the permittee to make information publicly available, to allow the Department and the public to confirm compliance.
Confusingly, the documentation language for extensions beyond the original deadline changes for AIM Levels 3 and 4, compared with AIM Levels 1 and 2, and Corrective Actions in Part IV.A. AIM Levels 3 and 4 specify that if the initial deadline is not feasible, the permittee may take up to 90 days, documenting in the facility's SWPPP why it was infeasible to meet the initial deadline. As discussed later in these comments, Commenters have significant concerns about the public's ability to timely access updated SWPPPs. On top of the need for updated SWPPPs to be readily available to the public, the inconsistency of documentation requirements from level to level of the AIM process would hinder the ability of both the Department and the public to track compliance and ensure accountability. To avoid inconsistent documentation and to ensure that the Department and the public have the ability to hold a permittee accountable for meeting deadlines and providing reasonable justifications for any extensions, **the permittee must be required to document its rationale for any extensions through NetDMR, not only those for which the Department was notified.** This documentation must be submitted within 14 days. As stated above, the Permit must explicitly state that failure to timely submit documentation of the rationale for any time extension through NetDMR, along with any additional documentation of any actions taken, constitutes a permit violation"[173]

"***When a triggering event occurs, the permittee must be required to submit a notification through NetDMR within 24 hours of becoming aware of the condition.***

[171] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services
[172] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[173] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.

The Permit already requires the permittee to document the existence of any triggering events within 24 hours of becoming aware of the conditions, but the Permit must also require this documentation to be submitted by NetDMR to avoid impermissible self-regulation and enable Department and public oversight. A summary in the annual report at the conclusion of the AIM response, or at the end of the year for corrective actions under IV.A, is insufficient to inform the Department and the public that the facility is subject to the corrective action requirements and that it must be held accountable for meeting the provisions of Part IV.
Without timely documentation, enforceability of these sections is practically impossible, as the public may not even know that corrective action was required until reviewing the annual report much later. Given the length of time between the triggering event and notice to the Department in the annual report, permittees may be violating TBELs for up to 12 months before the Department is even aware of the benchmark exceedances. In the event that the benchmark exceedances would prompt the Department to inspect the facility, that would take additional time and postpone any necessary enforcement even further, none of which could begin until the Department has reviewed the annual report.
The Permit must explicitly state that failure to timely submit notice of triggering events, along with the documentation of any actions taken, constitutes a permit violation.
<u>The permittee must be required to justify any time extension with an "appropriate demonstration," which must exclude any impediments within the permittee's control.</u>
The corrective action and AIM deadlines for Levels 1 and 2 are 14 days, with an automatic extension to 45 days if the permittee documents that 14 days is infeasible. For corrective actions, beyond the 45-day extension, the permittee may set its own completion date if completion of the corrective action will exceed the 45-day timeframe and the permittee notifies the Department Compliance program and provides a rationale. The permittee does not need Department authorization or approval to proceed with its extended timeframe, nor does its rationale need to meet some kind of threshold standard to justify the extension. Without a standard for an appropriate rationale for an extension or a requirement that the Department approve the extension, the Department and the public are left having to trust that the permittee makes an appropriate determination as to whether or not it needs an extension and that its proposed completion date is reasonable."[174]

## 12. <u>COMMENT CATEGORY – Part VI (Standard Permit Conditions)</u>

"V.I.B **Civil and Criminal Liability:** Permit 12-SW, Part V.I.B states "Civil and Criminal Liability - Nothing in the permit shall be construed to preclude the institution of any legal action nor relieve you from any civil or criminal responsibilities, liabilities, and/or penalties for noncompliance with Title 9 of the Environment Article, Annotated Code of Maryland *or any other federal, local or other state law or regulation.*" Draft Permit 20-SW, Part VI.S., states "Civil and Criminal Liability - Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the premittee is or may be subject under section 309 of the CWA, *with Title 9 of the Environmental Article, Annotated Code of Maryland, any applicable State or Federal law, or regulation under authority preserved by section 510 of the CWA."* This seems to severely curtail the County's ability to protect County waterways if MDE declines to do so. Please revise the italicized section to read :"AND/OR FOR NONCOMPLIANCE with Title 9 of the Environment Article, Annotated Code of Maryland, OR any applicable State or Federal law, or regulation ~~under authority preserved by section 510 of the CWA~~."[175]

[174] David Flores, Center of Progressive Reform on behalf of Chesapeake Accountability Project and stakeholders.
[175] Cynthia Alden, Engineering Specialist, Howard County Bureau of Environmental Services