UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

DEC 28 2012

Mr. David Dowling
Policy and Planning Director
Virginia Department of Conservation and Recreation
203 Governor Street, Suite 302
Richmond, Virginia 23219

Re: Virginia Stormwater Management Program (VSMP) General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (4 VAC 50-60-10, 4 VAC 50-60-1200 et seq.)

Dear Mr. Dowling:

This letter provides initial comments on Virginia's draft permit regulation, intended for codification at 4 VAC 50-60-10, 4 VAC 50-60-1200 *et seq.*- General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (Part XV), which the Department of Conservation and Recreation (DCR) submitted to the U.S. Environmental Protection Agency (EPA) for review and comment on November 2, 2012. EPA has also enclosed proposed marked-up copies of the draft regulation and fact sheet. Please be advised that EPA reserves the right to issue additional comments and/or object to the draft permit during the full comment period, which does not end until January 31, 2013.

Backsliding

As written, the draft permit contains provisions which were required to be completed during the last permit term, effectively providing permittees with additional time to complete items that are overdue. This type of provision constitutes impermissible "backsliding" under the Clean Water Act, because the permit contains conditions that are "less stringent than the comparable effluent limitations in the previous permit." *See* 33 U.S.C. § 1342(o). The regulations expand upon the statute's anti-backsliding requirement by providing that, in addition to effluent limitations, "standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit" (with certain exceptions not relevant here). 40 C.F.R. § 122.44(l)(1). In fact, EPA guidance indicates that the regulations are broad enough to encompass "backsliding from limitations derived from effluent guidelines, from new source performance standards, from existing case-by-case limitations to new case-by-case limitations, and from conditions such as monitoring requirements that are not effluent limitations." EPA, *NPDES Permit Writers' Manual* (Sept. 2010), section 7-1 (available at: http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45

Instances of such impermissible backsliding within the requirements for MS4 program plans include:

- TMDL action plans: The current permit requires MS4 program plans to include TMDL action plans within 18 months of permit coverage or within 18 months of any reopening of the permit to address wasteloads allocated to the regulated small MS4. The draft permit allows 24 months after permit coverage to update TMDL action plans for TMDLs approved prior to July 2008; 36 months after permit coverage to develop TMDL action plans for TMDLs approved between July 2008 and June 2013; and 36 months after TMDLs are approved to develop TMDL action plans for TMDLs approved after June 2013. To prevent backsliding, these deadlines should be changed to shorter periods which are no longer than the following: (1) 12 months after permit coverage to update TMDL action plans for TMDLs approved prior to December 31, 2012; (2) 24 months after permit coverage to develop TMDL action plans for the Chesapeake Bay TMDL; and (3) 18 months after TMDLs are approved to develop TMDL action plans for TMDLs approved after December 31, 2012.
- Storm sewer system map: The current permit requires MS4 program plans to include a map of the storm sewer system. Therefore, this permit cannot provide additional time to develop maps which were required in the previous permit cycle. The draft permit allows 48 months after permit coverage to update or develop new MS4 outfall maps. Storm sewer system maps must be comprehensive and include all roads, inlets, piping, swales, catch basins, channels, basins, and any other features of the permittee's storm sewer system including municipal boundaries and/or watershed boundaries, in addition to outfalls. Existing permittees must complete updates within 12 months of permit coverage. New applicants must complete system maps within 60 months of permit coverage.
- Good housekeeping: Good housekeeping is a requirement of MS4 program plans under the current permit. The draft permit provides 24 months after permit coverage to develop or update daily good housekeeping procedures. This deadline must be changed to 12 months from permit coverage for existing permittees.
- Urban nutrient management on state-owned lands: The current permit requires urban nutrient management plans to be developed and implemented on state-owned lands. The draft permit allows up to 60 months for implementation. For state lands that currently require urban nutrient management, plans must be updated and implemented within 12 months of permit coverage.

The marked-up version of the draft permit identifies sections where backsliding is occurring and includes suggested revised language to correct this oversight.

MS4 Program Plans

EPA also finds the draft permit deficient in terms of the following MS4 Program Plan requirements: (1) the Plans do not follow a sufficiently aggressive schedule to protect water quality; (2) the Plans lack measurable outcomes; and (3) the Plans use the term "maximum extent practicable" to qualify the degree to which MS4 program plans must be protective of water quality. These issues are each discussed in detail below; note that they are in addition to those identified in the backsliding section above.

First, the draft permit provides permittees 24 months for the Program Plan Update for compliance and enforcement. This deadline should be shortened to a timeframe within 12 months of permit coverage or less. Similarly, permittees have 60 months in the draft permit to implement stormwater pollution prevention plans (SWPPs). Again, this deadline should be shortened to within 24 months of permit coverage or less.

Further, the draft permit requirements that are intended for implementation of the minimum control measures (MCMs) do not include enough specific, measurable outcomes that permittees must include in the MS4 program plans. For example, the permit must identify the number and types of public education and outreach materials that the permittee must complete under MCM 1. The permit must also identify methods for demonstrating the effectiveness of outreach efforts. Under MCM 4, the permit must define levels of compliance and enforcement allowable under a progressive compliance and enforcement strategy and ensure that the minimal level is sufficiently protective. Under MCM 6, the permit must include a quantitative determination for what constitutes a high-priority facility requiring a stormwater pollution prevention plan. Without these types of requirements, it will be nearly impossible for DCR or EPA to evaluate overall compliance and progress of individual programs.

Finally, the draft permit states that implementation of best management practices (BMPs) pursuant to Section II constitutes compliance with the standard of reducing pollutants to the "maximum extent practicable" (MEP). A determination of what MEP is belongs with the permit writer, and not the permittee. It would be appropriate for the fact sheet to address this, but the permit should contain measureable requirements and not this type of qualifier language. Moreover, the permit does not provide a sufficient record to support this statement, so the reference to MEP should be removed from this context accordingly.

Chesapeake Bay TMDL

EPA is pleased to see that the draft permit provides some measurable outcomes for Chesapeake TMDL action plans. However, EPA will not find the permit to be satisfactory until the following changes are completed to make the permit consistent with the assumptions of the Chesapeake Bay TMDL and Virginia's Phase I and II Watershed Implementation Plans (WIPs). EPA established the Chesapeake Bay TMDL allocations based largely on the actions and pollutant reductions proposed in Virginia's Phase I WIP. Virginia developed the Phase II WIP to update the Phase I WIP and provide more information on strategies at the local level. The pollutant reductions called for in the Phase II WIP represent the same level of effort as the Phase I WIP and, therefore, the Bay TMDL.

First, the permit must clearly describe and set forth the level of controls and compliance schedule for the phased approach consistent with achieving the TMDL wasteloads allocated to permittees and the WIP objectives over three permit terms. The first phase of reductions must apply to new or expanded urbanized areas as identified by the 2010 U.S. Census. Further, the permit must require that any action plan commitments and demonstrations of progress to determine whether permittees achieved five percent of the pollutant reductions necessary to meet the Bay TMDL in this permit term be quantifiable and consistent with the allocations and the

assumptions of the Chesapeake Bay TMDL. The permit must require permittees to submit Chesapeake Bay TMDL action plans to DCR for their review and approval.

The permit and fact sheet must explain the meaning of Level 2, or L2, implementation in terms of pollutant reductions and comparable levels of best management practice (BMP) implementation. EPA also suggests that, in order to avoid an objection, the draft permit should indicate that Tables 2a – 2d and 3a – 3d are based on the Watershed Model Phase 5.3.2. Further, both sets of tables need to include corresponding calculations for the portion of Virginia's Eastern Shore that is within the Chesapeake watershed. Finally, the fact sheet must explain how the numbers in the tables were derived and provide instructions for how permittees could use the Watershed Model Phase 5.3.2 outputs or other comparable methods and tools to calculate columns 3 and 5.

Moreover, the draft permit is not sufficiently protective of water quality in that it allows any modifications to the Bay TMDL or the WIPs that occur during this permit term to be addressed in the next term. If any modifications were to change the amount of the reductions necessary in this permit term to meet the five-percent requirement, then the MS4 program plans and Chesapeake TMDL action plans must be modified accordingly *during this permit term*.

Finally, the draft permit states that permittees must implement their TMDL action plans for the Chesapeake Bay to the maximum extent practicable (MEP). The phrase "MEP" should not be used in this context. The permittee should create a plan that reflects what it is able to do and therefore should be fully implemented.

Additional Recommendations:

This letter also transmits EPA's suggested recommendations for further improving the draft permit. In order for the permittee to demonstrate progress quantitatively and consistent with the Chesapeake Bay TMDL allocations and assumptions, EPA recommends that the permit direct permittees to use the Chesapeake Bay Program Watershed Model Phase 5.3.2, which the Chesapeake Bay Program is using to track progress toward the Bay TMDL, or the Virginia Assessment and Scenario Tool (VAST), which replicates the Watershed Model, to calculate whether five percent of the pollutant reductions necessary to meet the Bay TMDL has been achieved during the permit term. If DCR prefers another tool or methodology which would be consistent with the Watershed Model, it should be specified in the permit.

In addition, EPA notes the new definition in the draft permit of "existing sources" as "pervious and impervious urban land uses serviced by the MS4 as of June 30, 2009." EPA recommends that the fact sheet also address this concept, and explain the rationale that the June 30, 2009 date is relevant as the final day of the 2009 progress run, which serves as the baseline for the Chesapeake Bay TMDL.

Further, some of the implementation actions called for in the draft permit are less than the level of effort described in Virginia's Phase I and II WIPs and assumed within the Bay TMDL. For example, Phase II WIP calls for urban nutrient management on 43 percent of pervious urban lands within Virginia's portion of the Chesapeake watershed by 2025. However, the draft permit only calls for nutrient management on lands owned or operated by the MS4 operator where

nutrients are applied to a contiguous area of more than one acre. EPA recommends that the permit include implementation requirements that achieve at least the same amount of pollutant reductions as called for in Virginia's WIP to meet the Bay TMDL allocations, although implementation may occur over multiple permit cycles.

The marked-up copies of the draft permit and fact sheet include proposed language to address these concerns and recommendations.

TMDL Action Plans for TMDLs Other than the Chesapeake Bay

Aside from the Chesapeake Bay TMDL, the draft permit does not require TMDL action plans to include interim milestones or interim and final deadlines for implementing actions to meet TMDL wasteload allocations. The draft permit also fails to identify how permittees would demonstrate that they have implemented sufficient actions to meet TMDL wasteload allocations. The permit should be revised to identify methods such as monitoring or calculating the load reductions associated with management actions using modeling or other tools. Any monitoring, modeling or other tools should be reviewed and approved by DCR for consistency with any models or methods used to establish the corresponding TMDL allocations so that implementation progress can be accurately compared to wasteload allocations. As discussed in the Chesapeake Bay TMDL action plan section, the permit must require permittees to submit TMDL action plans to DCR for their review and approval. Finally, the list of TMDLs in Virginia that is included in the fact sheet must also appear in the permit.

The marked-up copies of the draft permit and fact sheet include suggested specific language designed to address these concerns.

Trading and Offsets

Section I.C.2.b.(1) and (4) of the draft permit include provisions that appear designed to ensure that, for regulated lands, permittees will meet their Chesapeake Bay TMDL pollution reduction requirements through implementation on unregulated lands. It also allows for permittees to secure certified credits in order to comply with MS4 requirements. Any offsets, trades or credits must be certified by the appropriate state agency, demonstrate that they are consistent with all applicable TMDL wasteload and load allocations, and be protective of local water quality, and the permit must reflect these points.

The marked-up copies of the draft permit and fact sheet include specific language to address these concerns.

Additional Recommendations

EPA has the following, additional recommendations for the draft permit and fact sheet. First, given that the Virginia Department of Transportation (VDOT) is a non-traditional MS4 by definition, *see e.g.*, EPA, *MS4 Program Evaluation Guidance* (Jan. 2007) at 8, EPA believes that VAR04 may not be the most appropriate mechanism for VDOT to maintain compliance with the underlying program requirements of the general permit. Recent EPA regional inspections of

transportation facilities identified that VDOT (along with other state transportation authorities) conducts significantly different operations than those more traditional municipal-type permittees for which the Phase II general permit was written. Therefore, EPA recommends that DCR issue a separate, individual state-wide permit to VDOT for MS4 coverage. Permitting VDOT under its own individual permit would allow permit conditions to be tailored to the day-to-day operations unique to the transportation sector, while at the same time ensuring that the permittee has the ability to comply with the terms of the permit.

EPA also recommends that the fact sheet provide an overview and supporting rationale for any major changes between the current and the proposed general permit for small MS4s. Finally, EPA recommends that DCR make the additional revisions to the draft regulation and fact sheet included in the enclosed markup. These revisions increase clarity and consistency with EPA's expectations for MS4 permits and will make the permit more enforceable.

Next Steps

EPA recognizes that the current General Permit for Discharges of Stormwater from Small MS4s will expire on July 8, 2013. As such, we are expecting to work closely with DCR to reach agreement on final language. I have asked my staff to meet with you in person in January in order to work through these concerns as expeditiously as possible, so that we may avoid issuing an objection to the draft documents.

If you have any questions, please contact me at (215) 814-5717 or Ms. Katherine Antos at (410) 295-1358.

Sincerely,

Evelyn S. MacKnight

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