

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WATERKEEPERS CHESAPEAKE, INC.,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; ANDREW WHEELER, in his
official capacity as Administrator of the U.S.
Environmental Protection Agency; and
COSMO SERVIDIO, in his official capacity as
Regional Administrator of the U.S.
Environmental Protection Agency – Region III,

Respondents.

No.

PETITION FOR REVIEW

Pursuant to Section 509(b)(1)(D) of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(D), Rule 15 of the Federal Rules of Appellate Procedure, and Local Rule 15 for the Fourth Circuit, WATERKEEPERS CHESAPEAKE, INC. hereby petitions the United States Court of Appeals for the Fourth Circuit for review of the formal denial letter by Respondents U.S. Environmental Protection Agency (EPA), EPA Administrator Andrew Wheeler, and EPA Regional Administrator Cosmo Servidio responding to Waterkeepers Chesapeake, Inc.’s Petition for Withdrawal of

the National Pollutant Discharge Elimination System (NPDES) Program Delegation from the State of Maryland. *See* Exhibit A, EPA Region III Letter from Cosmo Servidio, Regional Administrator to Eric Schaeffer, Environmental Integrity Project (April 12, 2019) (“Formal Denial Letter”).

This final agency action occurred on April 12, 2019, when Cosmo Servidio, Regional Administrator of EPA Region III, sent the Formal Denial Letter to the Environmental Integrity Project, counsel for Petitioner Waterkeepers Chesapeake, Inc. *See* Ex. A, Formal Denial Letter. In recognition of the prominent role that citizen involvement should have in any state-administered program, federal regulations provide that EPA may withdraw a state’s authority to administer the Act when the state’s program fails to comply with the public participation requirements of 40 C.F.R. Part 123 and the state fails to take corrective action. *See* 40 C.F.R. § 123.63(a). Through this Petition for Review, Waterkeepers Chesapeake, Inc. challenges EPA’s determination in the Formal Denial Letter that Maryland’s NPDES program complies with the public participation requirements under 40 C.F.R. § 123.27(d), which requires states to either (1) provide authority which allows intervention as of right in any civil or administrative action; or (2) provide assurance that the state agency will investigate and provide written responses to citizen complaints, not oppose permissive intervention, and provide a 30-day notice and

comment period on any proposed settlement of a state enforcement action. *See* Ex. A, Formal Denial Letter, at 30-32.

For the purposes of judicial review, this Petition for Review is timely filed within 120 days of EPA's final agency action on April 12, 2019, and venue is proper in this Court because Petitioner Waterkeepers Chesapeake, Inc. resides in Maryland. 33 U.S.C. § 1369(b)(1).

Respectfully submitted this 9th day of August, 2019.

s/ Sylvia Lam
Sylvia Lam
(Md. Bar No. 1512160028)
Environmental Integrity Project
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*Counsel for Petitioner
Waterkeepers Chesapeake, Inc.*

LIST OF PARTIES SERVED PURSUANT TO RULE 15(c)(1)

According to Rule 15(c)(1) of the Federal Rules of Appellate Procedure, Petitioner must serve, or have served, at the time of filing, a copy of the Petition for Review on each party admitted to participate in the agency proceedings. Pursuant to Rule 15(c)(2) of the Federal Rules of Appellate Procedure, Petitioner Waterkeepers Chesapeake, Inc. provides notice to the Clerk of the Court of the list of those so served. The Petition for Review was served on the parties listed here via first-class mail, postage pre-paid, at the following addresses:

Anacostia Riverkeeper
515 M Street SE, Ste. 218
Washington, DC 20003

Assateague Coastkeeper
P.O. Box 731
Berlin, MD 21811

Baltimore Harbor Waterkeeper
2631 Sisson Street
Baltimore, MD 21211

Chester Riverkeeper
114 South Washington Street, Ste. 301
Easton, MD 21601

Choptank Riverkeeper
114 South Washington Street, Ste. 301
Easton, MD 21601

Lower Susquehanna Riverkeeper
2098 Long Level Rd
Wrightsville, PA 17368

Patuxent Riverkeeper
17412 Nottingham Road
Upper Marlboro, MD 20772

Potomac Riverkeeper Network
3070 M Street NW
Washington, DC 20007

Sassafras Riverkeeper
114 South Washington Street, Ste. 301
Easton, MD 21601

Severn Riverkeeper
P.O. Box 6593
Annapolis, MD 21401

South Riverkeeper
2822 Solomons Island Road, Ste. 202
Edgewater, MD 21037

Waterkeeper Alliance
180 Maiden Lane, Ste. 603
New York, NY 10038

West/Rhode Riverkeeper
647 Contees Wharf Road
Edgewater, MD 21037

Maryland Department of the
Environment
1800 Washington Blvd.
Baltimore, MD 21230

Office of Maryland Attorney General
200 St. Paul Place
Baltimore, MD 21202

LIST OF RESPONDENTS

As required by Local Rule 15(b), Petitioner Waterkeepers Chesapeake, Inc. provides a list of respondents below identifying the Respondents' names and addresses, and the name and addresses of Respondents' counsel, for service.

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Matthew Leopold
General Counsel
U.S. Environmental Protection Agency
Mail Code: 2310A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

William Barr
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U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Cosmo Servidio
Regional Administrator
U.S. EPA Region 3
1650 Arch Street
Philadelphia, PA 19103

Cecil Rodrigues
Acting Regional Counsel
U.S. EPA Region 3
1650 Arch Street
Philadelphia, PA 19103

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, a true and correct copy of the foregoing Petition for Review was served on Respondents by certified mail, return receipt requested, to each of the following addresses:

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Matthew Leopold
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Cecil Rodrigues
Acting Regional Counsel
U.S. EPA Region 3
1650 Arch Street
Philadelphia, PA 19103

I certify that a true and correct copy of the Petition for Review has also been served on the parties named on the foregoing List of Parties Served Pursuant to Rule 15(c)(1) by first-class mail, postage prepaid, at the listed addresses.

s/ Sylvia Lam
Sylvia Lam
Environmental Integrity Project

EXHIBIT A



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

APR 12 2019

Mr. Eric Schaeffer, Executive Director
Environmental Integrity Project
1000 Vermont Ave, NW
Suite 1100
Washington, District of Columbia 20005

Dear Mr. Schaeffer:

This letter is in response to the December 4, 2009 petition (Petition) to withdraw Maryland Department of the Environment's (MDE) authorization to administer the National Pollutant Discharge Elimination System (NPDES) program. The U.S. Environmental Protection Agency (EPA) appreciates your patience as we responded to the Petition.

Upon review of the Petition, additional information provided by the petitioners, information provided by MDE, and independent reviews and audits performed by EPA staff, EPA has concluded that the Petitioners' allegations do not warrant initiation of proceedings for withdrawal of MDE's NPDES program approval. Although EPA acknowledges that there were issues with MDE's implementation of the NPDES program at the time the petitioners submitted their Petition, MDE's program has significantly improved. EPA has conducted multiple State Review Framework reviews and program audits of various elements of MDE's NPDES program and has worked with MDE to improve its implementation of the program. To the extent that any issues remain, they do not rise to the level that would justify withdraw of program authorization. EPA will ensure that the program meets federal requirements through its ongoing permit and enforcement oversight.

The enclosed response describes EPA's analysis of each of the issues presented by the Petitioners. If you have any questions, please do not hesitate to contact Ms. Catherine Libertz, Water Protection Division Director, at 215-814-2737.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cosmo Servidio".

Cosmo Servidio
Regional Administrator

Enclosure

cc: Mr. Robert Percival, Environmental Law Clinic Director, University of Maryland School of Law



**U.S. ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE
"CITIZENS PETITION FOR WITHDRAWAL OF THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
PROGRAM DELEGATION FROM THE STATE OF MARYLAND"**

The United States Environmental Protection Agency (EPA) is providing a response to the petition submitted on December 4, 2009 by the University of Maryland School of Law on behalf of the Anacostia Riverkeeper, Assateague Coastkeeper, Baltimore Harbor Waterkeeper, Chester Riverkeeper, Choptank Riverkeeper, Lower Susquehanna Riverkeeper, Patuxent Riverkeeper, Potomac Riverkeeper, Sassafra Riverkeeper, South Riverkeeper, West/Rhode Riverkeeper, and Alliance (together, the "Petitioners") seeking withdrawal of the approval of Maryland's National Pollutant Discharge and Elimination System (NPDES) program (the "Petition"). The Environmental Integrity Project (EIP) began representing the Petitioners in 2016. EPA and EIP have held multiple conference calls in 2016 and 2017 regarding the status of the Agency's response to the 2009 Petition.

The Petitioners seek withdrawal of Maryland's authorization to administer the NPDES program based on a number of allegations. First, the Petitioners allege that Maryland's permitting procedures fail to fulfill the requirements of the Clean Water Act (CWA), the federal regulations, and Maryland's 1989 Memorandum of Agreement (MOA) with EPA. Second, the Petitioners allege that Maryland fails to fulfill its inspection and monitoring responsibilities as required by the federal regulations at 40 C.F.R. §123.26 and the MOA. Third, the Petitioners allege that Maryland fails to maintain a program of timely and appropriate enforcement as required by the federal regulations at 40 C.F.R. §123.27 and the MOA. Fourth, the Petitioners allege that Maryland's statutory ceilings for both civil and criminal penalties are inadequate and Maryland fails to impose penalties that effectively deter violators. Finally, Petitioners allege that Maryland's program does not allow for adequate public participation in the permitting or enforcement processes of the CWA.

The federal regulations provide that "[t]he Administrator may withdraw program approval when a State program no longer complies with the requirement of this part, and the State fails to take corrective action." 40 C.F.R. §123.63(a). Upon review of the Petition, additional information provided by the Petitioners, information provided by Maryland, and independent reviews and audits of various elements of Maryland's NPDES program by EPA staff, EPA has concluded that the issues raised in the petition do not warrant initiation of withdrawal proceedings.

BACKGROUND

The CWA and federal regulations enable a state to administer the NPDES program if it meets certain requirements. Those requirements are detailed in 40 C.F.R. Part 123 and include the elements of a program that must be included in a state's submission seeking authorization, including particular requirements for permitting, compliance evaluations, and enforcement authority.

On September 5, 1974, EPA authorized Maryland to administer the NPDES program for individual permits in that State, pursuant to section 402(b) of the CWA, 33 U.S.C. § 1342(b), through a letter to the Governor. EPA and the Maryland Department of Health and Mental Hygiene, the predecessor to the Maryland Department of the Environment ("MDE"), entered into a Memorandum of Agreement ("MOA") in 1974 setting forth the state and EPA's roles and responsibilities pertaining to the administration of and enforcement of the program. The original MOA was replaced by an updated MOA signed in May 1989 (hereinafter referred to as the "MOA"). On September 30, 1991, by way of a letter from EPA Region III Regional Administrator Edwin B. Erikson to Maryland Governor William Donald Schaefer, EPA authorized Maryland to administer the NPDES General Permits program.

In accordance with sub-sections 402(c), (d) and (e) of the CWA (33 U.S.C. § 1342(c), (d), (e)), EPA oversees the states' NPDES programs. EPA has the discretionary authority to withdraw NPDES program approval "when a State program no longer complies with the requirements of this part, and the State fails to take corrective action." 40 C.F.R. §123.63(a). Procedures for the withdrawal of state programs are found in 40 C.F.R. §123.64. Specific procedures apply "when the [EPA] Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program." 40 C.F.R. §123.64(b).

On December 4, 2009, the Petitioners requested EPA to withdraw approval of Maryland's NPDES program. On November 10, 2010, and August 2, 2016, at the request of EPA, Maryland provided its responses to the allegations in the Petition. EPA also conducted its own reviews of the state's NPDES program implementation as part of its regular ongoing oversight of state NPDES programs. EPA conducts quarterly state oversight meetings with MDE to review Maryland's NPDES program performance in the NPDES compliance monitoring, enforcement and permitting programs. In addition, EPA performed the following NPDES program and sector specific reviews in Maryland: Permit Quality Review ("PQR") in February 2011; Stormwater Program Assessment in March 2014; State Review Framework ("SRF") review in federal fiscal years ("FY") 2003, 2007 and 2011; and Agricultural Program Assessment in August 2015 which included a review of Maryland's implementation of the authorized NPDES Concentrated Animal Feeding Operation ("CAFO") program.

EPA provided the Petitioners an interim response on June 30, 2011, which provided an update of the actions taken by EPA and Maryland since EPA's initial receipt of the Petition. EPA has had numerous and regular communications with the Petitioners, including an in-person meeting on March 24, 2010, and conference calls held on a monthly basis until December 2016. This response provides EPA's determinations regarding all of the allegations raised in the Petition, and takes into consideration information up to and including October 18, 2017. EPA's determination concerning the Petitioners' allegations is the issues raised in the petition do not warrant initiation of withdrawal proceedings.

PETITIONERS' ALLEGATIONS AND EPA'S DETERMINATIONS

I. ALLEGATION: MARYLAND'S PERMITTING PROCEDURES FAIL TO FULFILL THE REQUIREMENTS OF THE CWA AND ITS MOA WITH EPA

The Petitioners allege that Maryland fails to fulfill the requirements of the CWA, the federal regulations, and Maryland's MOA with EPA with respect to permitting. The Petitioners point to three bases for their allegation: (1) Maryland does not issue NPDES permits when legally required; (2) Maryland issues permits that do not meet legal requirements; and (3) Maryland fails to reissue expired permits in a timely manner.

1. Allegation: Maryland Does Not Issue NPDES permits when legally required.

Summary of Petitioners' Allegation: The Petitioners allege that the State operates dosers under the Maryland Abandoned Mine Reclamation Program, that dosers are point sources that discharge pollutants to waters of the state, and that no doser has been issued an NPDES permit. The Petitioners allege that the McDonald Mine doser is contributing to water quality impairment of Georges Creek.

Information from Maryland: In its response, Maryland explained that "[t]he Petition correctly states the MDE does not issue NPDES permits for equipment that the agency operates to treat abandoned mine discharges [in which it is exercising its authority under funding provided under Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)] ... The dosing equipment only adds a buffering agent to the acid mine drainage discharges that are currently characterized [by MDE] as a non-point source." 2016 MDE letter at p. 2.

"[The work in Maryland through acid mine drainage treatment] ... significantly improves nearly 100 miles of streams impacted by drainage from abandoned coal mines. MDE's successes include the restoration of fisheries and recreation in the North Branch Potomac River, the Casselman River and the delisting of Aaron run for pH from [Maryland's] 303(d) list." 2016 MDE letter at p. 2.

EPA Discussion: The Petitioners cite MDE's actions regarding the McDonald Mine in Allegany County, Maryland. The McDonald Mine operated from 1923 to 1964, ceasing operation before enactment of SMCRA. Because the McDonald Mine is a "pre-law" mine, MDE has obtained funding to reclaim the mine under Title IV of SMCRA.

The McDonald Mine Doser Project was a cooperative project between MDE, the Western Maryland Resource Conservation and Development Council, Inc., and the Georges' Creek Watershed Association, among others. The project involved the installation of a limestone doser for the purpose of treating acid mine drainage in the form of a gravity discharge from an abandoned deep mine near Barton, Maryland. Space limitations prevented the construction of a large passive type system to treat the acid mine drainage before entering Georges' Creek.¹ As MDE stated in its response, "The dosing equipment only adds a buffering agent" to the acid mine drainage discharge". 2016 MDE letter at p. 2.

¹ OSMRE Annual Evaluation Report for the Regulatory and AML Programs Administered by the State of Maryland for the Evaluation Year 2003.

EPA addresses acid mine drainage treatment, including dosers installed on pre-SMCRA law sites, through its Non-Point Source Program; and provides funding for remediation under CWA 319(h). In addition, EPA has initiated discussions with Maryland about options to address abandoned mine discharges under the Clean Water Act and applicable guiding principles for Good Samaritan projects at abandoned mine lands.

EPA Determination: EPA considered the Petitioners' allegations, the information provided by Maryland related to its action under Title IV of SMCRA for the McDonald mine, and the environmental improvements that resulted from this work and similar actions by Maryland involving abandoned mines under CWA 319(h). Given this context, EPA has determined that the allegations raised by the Petitioners do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program at this time. EPA will continue to work with MDE to identify options to continue to address these issues under the Clean Water Act.

2. Allegation: Maryland issues permits that do not meet legal requirements.

2a. Summary of Petitioners' Allegations: The Petitioners claim that Maryland fails to perform a sufficient analysis of the receiving waterbody associated with the discharge, including failing to consider impaired waters and Total Maximum Daily Loads ("TMDLs"), and fails to ensure compliance with water quality standards ("WQS").

The Petitioners raise this argument with respect to three particular NPDES permits. First, the Petitioners claim that the terms of Maryland's CAFO general permit ("MDG01/14AF") fail to consider the "applicable" impairments and TMDLs in receiving waters, thereby failing to ensure compliance with WQS, and fail to provide meaningful monitoring requirements and "water quality based operational limitations." Second, the Petitioners claim that Maryland issued a draft individual permit authorizing Bauserman Service Inc. to discharge construction stormwater from the Maryland Airport runway expansion project in Charles County that did not meet statutory and regulatory requirements such as ensuring discharges would not exceed WQS. Finally, the Petitioners claim that Maryland issued a draft individual permit for Montgomery County's Municipal Separate Storm Sewer System ("MS4") that failed to ensure compliance with WQS.

Information from Maryland: MDE stated that it accounts for the impaired status of water bodies and "that Maryland's NPDES permits are written to achieve our State's [WQS]." MDE also stated that it reviewed draft NPDES permits for discharges to impaired waters "for conformance with TMDLs to ensure the compliance with waste load allocation targets are met." and that MDE's templates for permits and fact sheets "indicate if the receiving waters are impaired and identify is [sic] there are specific TMDLs applicable to the discharge." 2010 MDE letter at p. 3.

With respect to Maryland's CAFO general permit (referred to as the General Discharge ("GD") Permit), MDE noted that "the permit includes numerous provisions designed to prevent discharge of nitrogen, phosphorous and sediment." 2010 MDE letter at p. 4. "New sources have a 'no discharge' standard (effluent limitations guideline [{"ELG"}]) under 40 CFR § 412.46), meaning that no manure, litter, or process wastewater is permitted to be discharged to surface waters from the production areas of the [Animal Feeding Operation ("AFO")] and land applied manure, litter, or process wastewater must not be applied in excess of the recommendations

prescribed in the Nutrient Management Plan (“NMP”) developed for that particular AFO. The recommendations in the required plans are incorporated into each registration under the [General Discharge (“GD”)] Permit, becoming terms and conditions of the GD Permit. Thus, although this [is] a ‘general permit’, each registration is designed for that specific AFO, taking into account site-specific environmental conditions and resource concerns. . . . The first GD Permit became effective on December 1, 2009 and expired on November 30, 2014. There were 548 CAFOs registered, mostly poultry. This permit was revised and became effective December 1, 2014 and will expire on November 30, 2019. To date, [Maryland has] registered 180 CAFOs under the renewed permit, with 348 administratively extended under the prior permit.” 2016 MDE letter, at p. 3.

“The Bay model includes CAFOs that are covered by the GD Permit as not being a source of nutrients since they comply with a no discharge standard. The GD permit provides consistency with the [ELG] under 40 CFR § 412.45 and 40 CFR § 412.46 that requires no discharge from production areas of poultry CAFOs. The Chesapeake Bay [TMDL] Watershed Implementation Plan (“WIP”) supports this ELG by requiring no discharge from CAFOs. . . . Therefore, it is required that the permittee be in compliance with implementing nutrient and sediment controls, which are consistent with the assumptions of the Bay TMDL. . . . The Phase II WIP specifies a variety of practices that are required for CAFOs handling animal waste . . . Since these practices are specified in the GD Permit, the effluent limits in the permit would be consistent with [the] Bay TMDL.” 2016 MDE letter, at p. 3.

With respect to the permit issued to Maryland Airport (State Permit # 09IP0346/NPDES Permit #MD09I0346), “MDE did review the 303(d) list and the TMDL prior to the issuance of this permit. There is a TMDL for nitrogen and phosphorus in Mattawoman Creek which was approved by EPA in 2005. The TMDL, though, does not establish a Waste Load Allocation (WLA) or other requirements for construction sites and there is no specific language to be included in the individual permit to address this particular TMDL. For this permit, MDE relies on language of Section V of the permit requiring the permittee to comply with other applicable TMDL requirements or WLAs that might be developed after the permit is issued. Part IV.A of this permit specifically requires the permittee to meet water quality standards. Other aspects of the permit (including requirements to obtain and comply with an approved Erosion and Sediment Control Plan, and to review site controls and potentially install additional controls in the event of a significant discharge of sediment) provide additional procedures to ensure the permit meets water quality standards.” 2010 MDE letter, at pp. 3-4, “Further, the Department’s General Permit for Stormwater Associated with Construction Activity was renewed with specific review provisions for certain large development projects that discharge to impaired waters.” 2010 MDE letter, Attached table, at p. 1 row 4.

With respect to Montgomery County’s Phase I MS4 permit, “new TMDL provisions were incorporated into the Montgomery County [permit] that specify that a TMDL implementation plan must be developed for all EPA approved TMDL’s [sic] within the jurisdiction”. 2016 MDE letter, Attached table, at p. 1 row 4.

EPA Discussion: Pursuant to its MOA with Maryland, EPA reviews certain categories of NPDES draft permits prior to their issuance, including draft NPDES permits for sources identified as significant dischargers to the Chesapeake Bay. In general, EPA has found that Maryland is appropriately incorporating water quality based effluent limitations (“WQBELs”) in NPDES permits, thereby ensuring compliance with applicable WQS. For example, Maryland

modified or reissued publicly owned wastewater treatment works (“POTW”) permits to include effluent limits consistent with the Chesapeake Bay TMDL.

With respect to Maryland’s CAFO general permit, MDG01/14AF, Maryland submitted the draft permit to EPA for review to ensure that it met federal requirements in June 2014. Maryland resubmitted the permit after working with EPA to address comments and recommendations on the draft permit. EPA accepted the permit with no further comments in September 2014. The 2010 Chesapeake Bay TMDL included a WLA for Maryland regulated agriculture, which was based in part on no discharge occurring under the previous CAFO general permit from the production area. As such, the previous permit and its requirements are consistent with the TMDL. The 2014 CAFO general permit included numerous improvements from the previous version of the permit, including the addition of new definitions, the incorporation of new requirements an updated annual report form, and an updated fact sheet. As required by state and federal law, Maryland published the draft permit for public notice and comment prior to finalizing it on December 1, 2014.

In August 2014, EPA published a review of Maryland’s animal agriculture programs, including Maryland’s NPDES CAFO program.² Overall, EPA found that Maryland’s NPDES CAFO program is a well-implemented program. Maryland conducts regular compliance visits, coordinates Annual Report reviews with the Maryland Department of Agriculture (“MDA”), and takes enforcement actions and issues penalties to address noncompliance.

With respect to the permit issued to Bauserman Service, Inc. for the Maryland Airport expansion, the permit discussed in the Petition refers to Maryland’s general permit for stormwater associated with construction activity (“Maryland’s Construction GP”). This type of permit is temporary in nature because it remains in effect only during active construction. The reissued Maryland Construction GP, effective January 1, 2015, contains language to ensure that construction activities are controlled as necessary to meet water quality standards. Specifically, the permit states: “The permittee must select, install, implement and maintain control measures (i.e., BMPs, controls, practices, etc.) at the construction site that minimize pollutants in the discharge as necessary to meet applicable water quality standards.” (Maryland’s Construction GP Part IV.A. 1). In addition, “At anytime after authorization, MDE may determine that the permittee’s stormwater discharges may cause, have reasonable potential to cause, or contribute to an excursion above any applicable water quality standard, or are causing or contributing to an impairment of a waterbody [i.e., waterbodies listed as impaired on the Integrated Report for Section 303(d)]. If such a determination is made, MDE will require the permittee to: (1) Modify the stormwater controls to adequately address, achieve and document the identified water quality concerns; (2) Submit valid and verifiable data and information that are representative of ambient conditions and indicate that the receiving water is attaining water quality standards; and/or (3) Cease discharges of pollutants from construction activity and submit an individual permit application according to Part I.C.” (Maryland’s Construction GP at Part IV.A.2)

With respect to the Montgomery County Phase I MS4 permit, that permit was issued on February 16, 2010, and has since expired and been administratively extended. All revised Phase I MS4 permits in Maryland issued after December 23, 2013 include a 20% impervious surface reduction standard as well as a condition to develop Watershed Assessments and TMDL Restoration Plans for all approved TMDLs within one year of permit issuance to address local

² <https://www.epa.gov/sites/production/files/2015-09/documents/marylandanimalagricultureprogramassessment.pdf>

water quality issues. EPA expects that these same requirements will be included in the Montgomery County Phase I MS4 permit when it is reissued. EPA reviewed MD MS4 permits issued after December 23, 2013, and found them to be consistent with the requirements in the CWA and implementing regulations, including but not limited to those regarding applicable WQS and TMDLs.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners for withdrawal of Maryland's authorization to implement the NPDES program are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

2c. Summary of Petitioners' Allegation: The Petitioners claim that Maryland violates federal regulations because it fails to consider whether stormwater pollution prevention plans ("SWPPPs") proposed by regulated entities adequately control stormwater pollution before issuing permits to those entities.

Information from Maryland: "Maryland has consistently adhered to EPA's national approach, which makes it clear that review of SWPPPs is not required before issuing permits. MDE is not obligated under its delegation to review all SWPPPs prior to permit issuance. Maryland does, though, review SWPPPs during site visits if site conditions warrant additional controls of pollutants in stormwater." 2010 MDE letter, at p. 4.

EPA Discussion:

The SWPPP is intended to document the selection, design, and installation of control measures that the permittee will implement during the term of the permit. Federal regulations identify the application requirements for stormwater discharges associated with industrial activity; they do not require the review and/or approval of SWPPPs prior to permit issuance. See 40 C.F.R. § 122.26(c).

Maryland's General Permit for Discharges from Stormwater Associated with Industrial Activities ("MD 12-SW") requires applicants to "Develop and submit to the Department, a Stormwater Pollution Prevention Plan (SWPPP) according to the requirements in Part III.C and, where applicable, Part III.A.2 of this permit." (MD 12-SW Part II. A) As MDE pointed out, nothing in its authorized program requires MDE review of all SWPPPs prior to authorization to discharge under the general permit. Therefore, Maryland is consistent with the federal regulations.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, and other information provided, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

2d. Summary of Petitioners' Allegation: The Petitioners allege that Maryland failed to comply with federal requirements when it issued an NPDES permit to Genovique Specialties Corporation ("Genovique") based on its fundamentally different factors ("FDF") variance petition without either acquiring EPA approval of the petition or fulfilling the necessary requirements for such a variance. The Petitioners allege that MDE set effluent limitations in the permit that exceeded national effluent limitation guidelines ("ELGs").

Information from Maryland: "MDE has consistently deferred to EPA on this matter, and EPA has consistently agreed with the terms of the permit and approved it. For example, on September 14, 1993 EPA provided written approval for MDE to issue its first renewal of the permit during the period of the pending FDF variance petition using alternative limits until an EPA decision on the variance occurs. That permit was issued January 1995. The next renewal permit was submitted to EPA for comment with the following response from EPA in its September 21, 2001 letter: 'Please add a reopener clause which would specify that the permit would be reopened should EPA decide against continuing the existing variance for Biological Oxygen Demand ("BOD") and Total Suspended Solids ("TSS").' The resulting renewal occurred in February 2002. [As of November 10, 2010, Maryland was] in the process of issuance of the next permit renewal after publishing a tentative permit decision in June 2010 which was also based upon an EPA review and concurrence of the terms of the draft permit." 2010 MDE letter, at p. 4.

EPA Discussion: According to the Petitioners, Maryland issued this permit with effluent limits that exceeded the national effluent limitation guidelines without having obtained an FDF variance for the permit from EPA. The facility petitioned for a FDF variance which was never approved by EPA. The FDF variance that was at issue in the Petition is now moot. The permit was reissued with an effective date of November 1, 2013 which contains Best Available Technology ("BAT") based limits that reflect of current operations and are consistent with the applicable ELG, 40 C.F.R. Part 414 Subpart I.

Since 2009 when the Petition was filed, Maryland reissued the NPDES permit issued to Genovique's successor, Eastman Specialties Corporation with an effective date of November 1, 2013 and the permit is consistent with federal regulations 40 C.F.R. Part 414 Subpart I. The permit does contain a number of stringent conditions and requirements including BAT limits for BOD and total suspended solids TSS, bio-monitoring for acute toxicity, a monthly average limit for free cyanide, increased monitoring frequency for certain parameters (pH, TSS, BOD, total nitrogen, total phosphorus, phenol, toluene, xylene, bis (2-ethyl hexyl) phthalate), and composite sampling for organic chemicals. The BAT limits have been found to be sufficiently stringent to protect water quality.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, EPA's analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

3. Allegation: Maryland fails to reissue expired permits in a timely manner.

Summary of Petitioners' Allegation: The Petitioners claim that Maryland has not reissued three (3) expired general permits in a timely manner: (1) the General Discharge Permit for Stormwater Associated with Industrial Activities, which took effect on December 1, 2002 and expired on November 30, 2007; (2) the General Permit for Discharges from Small MS4s, which took effect on April 14, 2003 and expired on April 14, 2008; and (3) the General Permit for Discharges from Marinas, which took effect on January 3, 2002 and expired on January 2, 2007. The Petitioners also claim that Maryland has not reissued expired individual permits, identifying seven permits that were expired at the time of the Petition: the Charles County Phase I MS4 permit, the Frederick County Phase I MS4 permit, the New Page Corporation permit, the Genovique permit, the Westernport Wastewater Treatment Facility permit, the Mayo Large Communal Water Reclamation Facility permit, and the Kelly Foods Corporation permit.

Information from Maryland: "This issue is under monthly review by MDEStat. The Department has taken several actions to improve performance in this area. For example, work is underway to clarify and standardize certain permit requirements to streamline the permitting process and facilitate public participation. Improving our use of standardized permit conditions is part of a broader project to streamline permit development and issuance, a project we will implement during [the 2010] fiscal year. The Petition references EPA's performance target of 90% for reissuance, suggesting that compliance with this goal is a requirement for delegation. MDE is required by law to extend permits administratively when a renewal application is received two weeks prior to permit expiration. The Petition notes several examples of administratively extended NPDES permits and claims these facilities are operating under outdated regulatory requirements. MDE is not in violation of 40 C.F.R. Part 123.63 [sic] [which] provides for administrative extensions of permits upon timely renewal application submittal [under federal law; there is a similar provision in Maryland law]. ... MDE is fulfilling its MOA obligations but desires to improve its performance in this area. In addition to the reduction in the number of administratively extended permits for major facilities, the Department has established performance targets for minor facilities, facilities with [enhanced nutrient removal ("ENR")] schedules, [and for] groundwater discharge permits, and provided EPA with a renewal schedule for expired MS4 Phase I and general stormwater permits. These actions will ensure that discharge permits for Maryland's facilities are consistent with the State's [WQS]." 2010 MDE letter, at pp. 4-5.

"The permit backlog fluctuates from year to year, depending on the number of permit expirations, number of new permits to be issued, and the complexity of the permits that must be issued or re-issued. In September 2012, [Maryland] recorded an overall backlog rate of 66% (based on 1,985 backlogged permits out of 2,990 active [permits]). By July 2015 [Maryland] had reduced the overall backlog rate affecting all permit types to 15%. As of July 6, 2016, the total backlog has increased to 21% (672 of 3163 permits backlogged). However, in 2016, we will be publishing tentative determinations on renewals of two of our larger universes of general permit registrations (the Marina General Permit and the Mineral Mine General Permit). The eventual finalization of these renewals will result in the removal of 501 backlogged permit discharges from the 672 total. Thus, we are on course to soon be at the lowest total backlogged percentages in recent memory (potentially under 10%). With the assistance of contractual arrangements and [Chesapeake Bay Regulatory and Accountability Program ("CBRAP")] funding, [Maryland] is improving the NPDES permit issuance system and implementing Bay

TMDL nutrient limits to meet point source requirements of the Bay TMDL. [Maryland] has enhanced [its] environmental management system including nutrient loading analysis tools, tools and applications that automate tasks for backlog reduction/improved permit issuance efficiencies, employed technical writing services to improve permit engineers' permit output, and implemented electronic document management." 2016 MDE letter, at p. 4.

With respect to the general permit for industrial stormwater discharges, Maryland issued a revised permit in 2012. "This permit includes a 20% untreated, impervious restoration requirement . . . [and] requires submittal of SWPPPs to the Department along with the application for content review and approval before [permit coverage] will be issued." 2016 MDE letter, at p. 6. With respect to the general permit for Small MS4s, Maryland committed to issuing tentative determinations for that permit and the Phase II general permit for state and federal facilities by the end of September 2016. 2016 MDE letter, at p. 4. With respect to the Marina General Permit, Maryland planned to provide a draft permit renewal to EPA in November 2010 "for review with the goal of final issuance by the beginning of 2011". 2010 MDE letter, Attached table, at p. 3 row 4.

With respect to the individual permits identified by Petitioners, Maryland submitted a permit reissuance schedule for stormwater permits on August 12, 2010, which included the Charles County and Frederick County MS4 permits. The schedule identified a date of March 15, 2011 to reissue those permits. See August 12, 2010 letter from Jay Sakai to Jon Capacasa. With respect to the New Page Corporation permit, Maryland stated that "[o]nly one area of the facility has potential for discharges to reach the Savage River. This area is referred to in the renewal permit as the Savage Woodyard. The final permit being issued effective September 1, 2010 includes a new specific prohibition against cooling water or process water discharges from the Savage Woodyard." 2010 MDE letter, Attached table, at p. 3 row 7. With respect to the Westernport Wastewater Treatment Facility permit and the Mayo Large Communal Water Reclamation Facility permit, Maryland stated that a "draft permit renewal will be provided to EPA for review and comment before the end of [2010]." 2010 MDE letter, Attached table, at p. 4 rows 1-2. With respect to the Kelly Foods Corporation permit, Maryland stated that it "will begin to fully meet EPA goals regarding administratively extended permits by the end of calendar year 2010 for majors, and by the end of calendar year 2011 for all others." 2010 MDE letter, Attached table, at p. 4 row 3.

EPA Discussion: The Petitioners correctly point out that, according to the date on which the Petition is based (from 2007 and earlier), Maryland did have a significant backlog of expired and administratively continued permits. However, according to EPA's most recent available data, Maryland has made significant progress in reducing its backlog since that time. MDE references MDEStat in its response. MDEStat is a management oversight and accountability system designed to assess and improve the performance of environmental regulatory programs and processes at MDE, including permitting. According to EPA reporting data for 2016, at the end of the fiscal year Maryland had a backlog of 25.8%; out of 2,647 active NPDES permits in Maryland (including individual and non-storm water general permits), 682 were in need of reissuance. Data for fiscal year 2017 indicates that Maryland's permits are 92.7% current.³

³ https://www.epa.gov/sites/production/files/2017-12/documents/final_fy17_eoy_non-tribal_backlog_report_card-sum.pdf

An important aspect of Maryland addressing its backlog of expired permits is whether it is meeting its commitment to reissue “priority permits”. On March 4, 2004, EPA established the priority permits initiative under the Permitting for Environmental Results initiative.⁴ Each year, EPA and states authorized to implement the NPDES program jointly determine the number of permits that the state must reissue in order to satisfy its priority permit commitment. Once a number is established, EPA and the state together identify the specific permits (based on expiration status, water quality issues, etc.) to be prioritized for reissuance. This list is tracked as an Annual Commitment System (“ACS”) commitment for EPA Region III. For fiscal year 2016 Maryland agreed to issue 11 of 14 listed priority permits and did issue 11 permits, which met the commitment. Similarly, for fiscal year 2017, the state met its commitment to issue 8 permits.⁵

The Petitioners specifically identify Maryland’s failure to renew three general permits that cover a significant number of discharges, as well as seven individual permits.

First, the Petitioners identify three general permits: Maryland’s General Permit for Stormwater Associated with Industrial Activity (“the IGP”), Maryland’s Phase II MS4 General Permit, and Maryland’s General Permit for Discharges from Marinas. Maryland reissued the IGP effective January 1, 2014 and the permit is currently in effect.⁶ Maryland submitted an informal draft of its Phase II MS4 General Permit to EPA in February 2014. EPA gave Maryland comments on that informal draft in April 2014. Maryland revised the draft permit and submitted it for formal EPA review on September 18, 2014. EPA and Maryland held lengthy discussions regarding changes to that draft; EPA provided Maryland with its last comments on September 29, 2016, and Maryland published the draft permit for tentative determination on December 22, 2016. The final issuance of the Phase II MS4 General Permit is currently pending. Maryland reissued the General Permit for Discharges from Marinas (Permit No. 10-MA) with an effective date of August 1, 2017.

In addition, the Petitioners identify seven individual permits that, at the time of the Petition, had expired and not been reissued. Most of those permits have since been reissued, although some have expired again and are administratively extended. The Charles County and Frederick County Phase I MS4 permits were reissued in December 2014 and are currently in effect. The New Page Corporation permit (MD0001422) was reissued effective September 1, 2010 and expired August 31, 2015. The Eastman Specialty Corporation permit (formerly Genovique; MD0000345) was reissued effective November 1, 2013 and expires October 31, 2018. The Upper Potomac River Commission’s Westernport Wastewater Treatment Facility permit (MD0021687) was reissued effective September 1, 2014 and expires August 31, 2019. The Mayo Large Communal Water Reclamation Facility permit (MD0061794) was reissued effective October 1, 2013 and expires September 30, 2018. The Kelly Foods Corporation permit (MD0001309) was reissued effective August 1, 2012 and expired July 31, 2017.

⁴ <https://www.epa.gov/npdes/npdes-program-management-and-oversight#priority>

⁵ https://www.epa.gov/sites/production/files/2017-11/documents/final_fy17_priority_permits_issuance_report2.pdf

⁶ In May 2012, MDE sent EPA the draft IGP for review. EPA submitted comments on the draft Maryland IGP to MDE, and the state subsequently revised the permit to address EPA’s concerns. On August 21, 2012, EPA communicated to Maryland that it had no objection to the permit being published for public notice and comment. The permit was published in the Maryland Register for Public Notice on October 5, 2012, and the comment period ended January 4, 2013. The permit was reissued with an effective date of January 1, 2014.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, and other information provided, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program. EPA will continue to monitor the permit backlog in Maryland as it does in all Region III states as part of its oversight responsibilities.

II. ALLEGATION: "MDE IS FAILING TO MEET ITS REQUIREMENTS UNDER FEDERAL LAW AND VIOLATING ITS MOA WITH EPA BECAUSE IT HAS CONDUCTED FEWER INSPECTIONS IN RECENT YEARS AND FAILS TO CONDUCT FOLLOW-UP INSPECTIONS WHEN VIOLATIONS ARE DETECTED."

1. Allegation: Maryland failed to conduct adequate periodic inspections at permitted facilities.

Summary of Petitioners' Allegation: MDE is required to have "a program for periodic inspections of facilities subject to regulation" and inspections of "the facilities of all major dischargers at least annually". Petition at p. 36, quoting 40 C.F.R. §123.26. The Petitioners allege that MDE does not meet this requirement because it "fail[s] to conduct adequate periodic inspections at permitted facilities." Petition, p. 37, subheading 1. The Petitioners do not challenge MDE's inspection of major dischargers.

Information from Maryland: "As discussed in MDE's 2008 Annual Enforcement and Compliance Report (p. 101), the reported inspection coverage rate for surface water dischargers was significantly lower than 2007 because MDE no longer counted [Discharge Monitoring Report ("DMR")] audits as inspections, only physical inspections of the facility. As part of an internal goal to improve transparency, changes were made in reporting methodologies including this change to more accurately reflect the activity. The number of sites inspected was actually similar in 2007 and 2008 [1,201 and 1,544 respectively]. In addition, the total number of entities regulated by [Maryland] included many non-NPDES permittees. During this same period, MDE experienced a predicted but temporary reduction in total number of inspections due to deployment of new in-the-field technology for inspections. We expected a decrease in the number of inspections due to the need for training personnel on new equipment and an anticipated increase in the length of time for each inspection. It should be noted that while the length of time for each inspection increased, the quality and extent of data collected is significantly improved. This technology is now improved and number of inspections" increased in 2010 to 1,618. 2010 MDE letter, at pp. 5-6.

Maryland "follows the annual 106 work plan and compliance monitoring strategy [{"CMS"}] negotiated with EPA each year based on the number on individual permits issued. While MDE, under the grant commitment to EPA, is not obliged to inspect any subset of minors at a specified frequency unless they are wastewater treatment plants [{"WWTP"}] in 'significant non-compliance' [{"SNC"}], our inspectors follow an inspection priority scheme that does allow routine inspections of minors as time allows. EPA accepted this [CMS] for the year reviewed. It should be noted that EPA performed the 2007 [SRF] audit and did not find serious issues with MDE's regulatory oversight of the NPDES enforcement/compliance program implementation at that time." 2010 MDE letter, at p. 6.

Maryland “recognizes that the inspection coverage ratio for some categories of lower priority permits is low. . . . Of course, we would welcome additional resources that would allow higher coverage rates. Coverage rates, and opportunities to target inspections given resource limitations are regularly discussed at MDEStat. While the 10% coverage rate is low, as you know, it is only one indicator of the strength of an enforcement program. When establishing inspection priorities, we generally target those facilities where the discharges have the greatest actual or potential impact to public health and the environment, as well as those with prior enforcement issues.” 2010 MDE letter, at p. 6.

EPA Discussion: EPA reviewed the compliance monitoring and inspection data cited by the Petitioners using EPA’s national enforcement database, the Integrated Compliance Information System (“ICIS”), as well as supplemental data provided by Maryland through sources such as annual program reports and federal fiscal years 2014-2017 Compliance Monitoring Strategies for Core Program and Wet Weather Sources. EPA also conducted SRF reviews of Maryland’s FY 2007 and 2011 programs.

Federal regulations set forth requirements for compliance evaluation programs for states seeking to obtain or retain program authorization. Specifically, as relevant here, authorized states must have “a program for periodic inspections of facilities subject to regulation”. 40 C.F.R. §123.26(b)(2). However, the federal regulations do not define what qualifies as “periodic” or set the frequency with which states must conduct inspections. *See* 45 Fed. Reg. 33290, 33381. On July 17, 2007, EPA published the CWA NPDES Compliance Monitoring Strategy for Core Program and Wet Weather Sources, which provided authorized states with inspection frequency goals for core program and wet weather sources. EPA published revised CMS guidance on July 21, 2014. <https://www.epa.gov/sites/production/files/2013-09/documents/npdescms.pdf>. The compliance monitoring goals in EPA’s 2007 and 2014 CMS guidance documents are intended to provide a starting point for annual negotiations between EPA and states authorized to administer the NPDES program and to allow states the necessary flexibility to address environmental priorities when developing their annual Section 106 Grant Plans and CMS plans. For example, using risk-based targeting, states and EPA may modify inspection frequency goals for facilities with good compliance records that are not contributing to water quality impairments. In addition, it should be noted that the 2007 national CMS guidance anticipated state implementation to begin during the FY 2009 planning cycle (October 1, 2009 through September 30, 2010). The timeframes for the compliance monitoring information cited by the Petitioners (2005 through May 2009) do not include years in which the implementation of the 2007 national CMS was in effect (October 2009).

EPA’s 2011 SRF review did identify NPDES general permit and MS4 compliance monitoring performance issues for FY2011 where Maryland failed to meet projected annual inspection commitments as set forth by the state’s FY 2011 CMS. The 2011 SRF final report included recommendations addressing a finding of “Area for State Improvement,” for the state’s failure to meet specific CMS commitments. As a component of MDE’s follow up activities under this SRF element, MDE and EPA finalized a Stormwater Work Plan in June 2014 which included comprehensive compliance monitoring strategies for MS4 and other stormwater programs.

Table 1. Core Program Compliance Monitoring Performance FY 2014, FY 2015, FY 2016 and FY 2017⁷

Fiscal Year	Traditional Major Permittees		Traditional Non-Major Permittees	
	Number of Permittees	Number inspected	Number of Permittees	Number inspected
2014	81	81	418	109
2015	81	78	418	133
2016	80	80	461	135
2017	80	80	407	107

Since the submission of the Petition, Maryland and EPA have worked closely on an annual basis to determine appropriate CMS inspection commitments that meet the requirements of the 2014 Revised CMS Policy as well as other MDE-EPA agreements pertaining to compliance monitoring and enforcement commitments. While Maryland acknowledged a temporary decrease of NPDES inspections performed in the 2007-2008 timeframes, the state has improved its compliance monitoring performance in subsequent years. A review of the CMS core program data submitted by Maryland for FY 2014, FY 2015, FY 2016, and FY 2017 indicated that Maryland met all of the 2014 Revised CMS Policy goals for inspections of traditional NPDES individual permitted major and non-major facilities (Table 1).

The 2014 Revised CMS Policy inspection goals for the state are a minimum frequency of at least one comprehensive inspection every two years at a traditional major NPDES permittee; and a comprehensive inspection at a traditional non-major NPDES permittee once every five years. Maryland's compliance monitoring performance for FY 2014, FY 2015, FY 2016, and FY 2017 met the 2014 Revised CMS Policy goals for all years. MDE does not differentiate between the universes of Traditional Non-Majors that do or do not contribute to CWA Section 303(d) listed impairments.

Subsequent to EPA's receipt of the Petition, EPA's annual review of Maryland's compliance monitoring and inspection performance found Maryland's NPDES program consistently achieved targeted annual NPDES inspection commitments through FY 2017. The relevant information for EPA and state NPDES compliance monitoring activities is publicly available through EPA's Enforcement and Compliance History On-Line national database, available at: <http://www.epa.gov/compliance/data/systems/multimedia/echo>.

EPA continues to monitor Maryland's compliance monitoring and inspection performance through quarterly enforcement meetings/calls, review of annual CMS commitments and through periodic programmatic assessments. For the years cited by the Petitioners, any temporary decreases in the number of NPDES inspections performed by MDE are not considered deficiencies that rise to the level of withdrawal of NPDES state program authorization.

⁷ Table 1 does not include data regarding permittees in the mining sector.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, EPA has determined that the allegations raised by the Petitioners are not supported by the facts and do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

2. Allegation: Maryland failed to conduct follow-up inspections of repeat violators.

Summary of Petitioners' Allegation: The Petitioners allege that Maryland fails to conduct follow-up inspections of repeat violators and facilities with a high number of violations, and provide eight examples of that alleged failure.⁸

Information from Maryland: "The Petition includes information cited in a New York Times article, which investigated EPA compliance and inspection records in several states. . . . MDE found numerous errors in the New York Times analysis, many of which were related to how compliance data was being captured in EPA systems. For instance, in an example also noted by the Petitioners, the New York Times article claimed that the Elkton Striped Batch Hatchery, has not been inspected since September 1992 – more than 17 years ago. MDE records indicate that the facility was inspected three times in CY2000, one time in 2002 and once in 2005. The facility was inspected for NPDES on July 8, 2008 and for sediment on February 10, 2009 as part of a complaint about erosion and sediment control violations against a construction project at nearby Baker Hill subdivision. The July 8, 2008 inspection noted the Hatchery facility as non-compliant [sic] for failure to submit timely DMR's [sic] for two periods in 2007. The missing DMRs were submitted and the facility was advised that failure to submit timely reports as required by the permit could trigger an enforcement action." 2010 MDE letter at pp. 6-7.

"Similarly, the NY Times article indicated that the Horn Point Laboratory in Cambridge, Maryland had over 80 self-reported violations between 2004 and May 2009 and stated that MDE has not inspected it since August 1995. Upon review, MDE found that the non-reporting violations cited in the article for this facility were probably due to a data reporting issue with EPA's ICIS system, which indicated non-reporting violations on monthly DMR submissions when, in fact, the permit required quarterly submissions. The site was inspected on December 10, 2009 at which time minor violations were noted related to monitoring of outfalls that have not been used, miscalculated averages on DMRs, and a failure to implement a Spill Prevention Control and Countermeasure Plan [(“SPCCP”). MDE verified that the outfalls will be monitored if ever used, reviewed the SPCCP that is in place and received corrected DMRs.” 2010 MDE letter at p. 7.

With respect to the Cambridge Iron & Metal facility, Maryland states that it “is not obliged to inspect any subset of minors at a specified frequency unless they are [WWTPs] in [SNC]. . . . MDE reinspected this facility in 2005 after identifying deficiencies with the SWPPP which were subsequently corrected. MDE assessed a penalty for the violations.” 2010 MDE letter, Attached table, at p. 4 row 8.

With respect to Golden Eye Seafood, Maryland states that “[t]he facility holds a seafood processing general discharge permit, but [as of 2010 was not] processing seafood or discharging.

⁸ Those examples are the Cambridge Iron & Metal recycling facility, T/A Golden Eye Seafood, Horn Point Laboratory, Northrop Grumman Systems Corporation, Spencer Sand & Gravel Eastside, J.M. Huber Corporation, the Susquehanna Water Filtration Plant, and the Potomac Water Filtration Plant.

If the facility no longer needs the discharge permit it will be terminated. MDE is reviewing the case to determine whether enforcement action is needed to resolve any alleged self-monitoring violations.” 2010 MDE letter, Attached table, at p. 5 row 1.

With respect to the Northrup Grumman Systems Corporation permit, Maryland states that the “previous individual permit was terminated on July 7, 2006 and replaced with two individual permits (one for hydrostatic testing general discharge and one for industrial stormwater).” 2010 MDE letter, Attached table, at p. 5 row 1.

With respect to the Spencer Sand & Gravel permit, Maryland states that “[o]n October 17, 2007, MDE sent a letter to Spencer Sand & Gravel advising them that it had identified [TSS] violations during the first and second quarters of 2007 and requesting information concerning any corrective actions implemented or planned to insure compliance with permit limits. On October 27, 2007, MDE received a response from the owner of the property stating that the land had been sold to Harford County and two secondary catch basins had been installed to prevent future violations. On March 3, 2008, MDE sent a letter acknowledging the sale of the property and facility upgrades. MDE decided not to pursue a penalty against the previous owner for the effluent violations at that time, but reserved its rights with respect to future violations. MDE monitored the facility at that time and noted that it reported compliance from the third quarter 2007 through the first quarter of 2008. Note that the reporting violations listed in ECHO are incorrect because the permit was changed to no longer require information for certain outfalls, but it was not changed in ICIS.” 2010 MDE letter, Attached table, at p. 5 row 2.

“In separate discussions with the Petitioner[s], the Department has discussed the problems with access to correct data generally. The Department recently discussed data access with the Petitioner[s] and we intend to work with Petitioner[s] to ensure greater access to information in Maryland.” 2010 MDE letter at p. 7. Maryland further states that it “has implemented a Standard Operating Procedure and tracking system for its significant violations identified during inspections and through DMR review. A new database tracks all significant violations to verify timely response and referral for formal enforcement action and resolution.” 2010 MDE letter, Attached table, at p. 4 row 7.

EPA Discussion: The Petition cites a September 12, 2009 *New York Times* report that investigated EPA compliance and inspection records in several states, including Maryland, to evaluate enforcement and inspection shortcomings. However, Maryland has indicated that both the newspaper article and the Petitioners have reached conclusions based on inaccurate underlying data. Maryland indicates that it has engaged in discussions with the Petitioners to address problems with access to appropriate data.

In September 2012, EPA conducted a SRF review of Maryland’s implementation of the authorized NPDES compliance monitoring and enforcement program utilizing FY2011 data as the basis for the review. The 2011 SRF review and findings are based upon program metrics derived from a review of federal and state data systems, compliance monitoring and enforcement files reviews, and interviews with state program managers and staff. Maryland has made subsequent programmatic improvements in several areas of concern that EPA identified in the report. Specifically, Maryland has been working with EPA to improve the consistency and accuracy of NPDES data management procedures in order to meet the requirements of the federal NPDES Electronic Reporting Rule. Since the 2011 SRF review, Maryland continues to enhance its NPDES data management capacity to reduce internal data management errors that

result in inaccurate facility specific NPDES compliance information. In February 2013, Maryland updated its Inspection, Enforcement and Penalty Procedures (program SOP) to improve identification of single event violations during inspections and assist with prioritization of facilities in significant noncompliance (SNC), which enhanced Maryland's ability to identify and address repeat violators.

EPA monitors Maryland's progress toward completion of the SRF recommendations on a quarterly and annual basis. The status of a state's progress toward implementation of SRF recommendations is publicly available at <https://echo.epa.gov/oversight/state-review-framework/tracker-recommendations>. EPA assesses Maryland's performance on an ongoing basis through quarterly state enforcement oversight calls and annual data analysis to verify the state's progress toward completing each SRF recommendation. In addition, EPA receives quarterly updates on all NPDES permitted facilities that have been in SNC status for over 90 days. EPA and Maryland will often utilize quarterly enforcement calls to identify facilities in ongoing noncompliance and/or repeat violators to ensure noncompliant facilities are addressed with a timely and appropriate enforcement response. EPA's SRF review of Maryland's FY2017 information, which will occur in 2018, will assess Maryland's progress toward ensuring state enforcement actions return facilities to compliance and appropriately address repeat violators.

EPA acknowledges the data quality challenges cited by the Petitioners and recognizes the effort MDE has taken since the Petition to coordinate with EPA to improve data accuracy and quality, especially for major and non-major individually NPDES permitted facilities. The following information provides the individual facility status as reflected in EPA's ECHO database for the eight examples cited by the Petitioners. EPA will investigate with MDE where there are discrepancies between the ECHO database and information provided by MDE for the following facilities.

Cambridge Iron & Metal (MDR000682): The facility is covered by Maryland's Industrial Stormwater General Discharge Permit. Maryland re-inspected this facility in 2005 after identifying deficiencies with the SWPPP, which were subsequently corrected; Maryland assessed a penalty to address the facility's violations. The ECHO database shows that the facility, now known as Canton Metal Recycling, is in reportable noncompliance (January 1, 2017-June 30, 2017) but has had no significant noncompliance for the past 36 months as of October 4, 2017.

Golden Eye Seafood (MDG522347): According to the ECHO database, MDE conducted compliance evaluations of this facility in March 2016 and January 2017. The facility, a non-major, was reported in compliance April 2016-June 2016, and October 2016-December 2016. Between January 1, 2017 and June 30, 2017 the facility is reported in significant noncompliance for reporting violations (non-receipt of DMRs).

Horn Point Laboratory (MD0051403): The non-reporting violations for this facility, a non-major, that were cited in the New York Times article were not true violations, as described by Maryland. Maryland inspected the facility on December 10, 2009 and identified some violations, which the facility subsequently resolved. Maryland inspected the facility again on April 28, 2015 and did not identify any violations. According to the ECHO database, the facility is in compliance as of October 4, 2017.

Northrup Grumman Systems (MD0000850): The ECHO database shows the facility's non-major NPDES individual permit was terminated May 31, 2008. Information from Maryland shows the permit was terminated on July 7, 2006. EPA will coordinate with MDE to verify and update this information as necessary.

Spencer Sand & Gravel (MDG499861): According to MDE's 2010 response, the property was sold to Harford County in 2007. This facility is currently no longer being tracked in ECHO. EPA will coordinate with MDE to verify and update this information as necessary.

J.M. Huber Corporation (MD0000531): The ECHO database shows the facility in compliance and no significant noncompliance for the past 36 months as of October 4, 2017. The date of the last compliance evaluation was June 6, 2012 by MDE.

Susquehanna Water Filtration (MDG679482): This facility is now referred to as Town of Perryville WTP and is a non-major general permittee. The ECHO database shows the facility in compliance as of October 4, 2017.

Potomac Water Filtration (MD0051586): Maryland conducted compliance evaluations at the facility in 2013 and in 2015. The State issued a civil judicial action in 2015 with a penalty of \$100,000 for previous noncompliance. The ECHO database shows the facility in compliance the past three years as of October 4, 2017.

Annually, EPA and MDE coordinate to verify the previous calendar year's inspection and facility data that was input into the State database or directly entered into ICIS by the state, which is reported in the ECHO database. EPA Region III sends the data output from the ECHO database reflecting the number of NPDES permittees, inspections, penalties, etc. and distributes it to MDE for review. MDE is provided the opportunity to identify and correct any inaccurate data. The data metrics analysis review provides EPA and MDE the opportunity to verify that data being entered into the State database or ICIS is being reflected accurately in the ECHO database.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, annual data metrics analysis review, oversight of the MDE's Data Management Strategy, oversight of MDE's compliance with the NPDES Electronic Reporting Rule and other information provided, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program. EPA will continue to work with MDE to ensure data quality.

III. ALLEGATION: MARYLAND FAILS TO MAINTAIN A STRONG ENFORCEMENT PROGRAM.

1. Allegation: Maryland failed to follow up on reported violations

Summary of Petitioners' Allegation: The Petitioners allege that when Maryland is notified of permit violations through facility self-reporting, inspections, or citizen complaints, it frequently does not take enforcement action against violators as required by 40 C.F.R. §123.27 and the MOA. Specifically, the Petitioners cite eight examples of facilities at which Maryland failed to take enforcement actions.

Information from Maryland: “An initial review of the 212 facilities that the NY Times article reported as having 30 or more NPDES permit violations found that 118 are active facilities covered under individual permits and 89 are swimming pools, mineral mines, oil operations terminals, seafood facilities and marinas covered under the general permit. MDE has taken enforcement actions against facilities covered under the general permit. However, as noted, a lack of resources prevents the Department from providing the same level of oversight for the general permit population as it does for the individual minor and major permit categories. Typically, inspections and enforcement actions at general permit facilities result from complaints regarding the operations of these facilities. MDE’s priority ranking of inspections at these facilities is in accordance with the 106 grant commitments. In 2010, MDE provided EPA with its QA/QC plan that is being implemented to provide a more thorough and efficient in-house review of the compliance status of the more than 2,201 facilities covered under the NPDES general permit.” MDE 2010 letter, p. 7.

“MDE issued enforcement actions including administrative and civil orders and penalty actions to 44 of the 118 individual permitted facilities referenced above and referred 31 significant noncompliance cases to the Office of the Attorney General or EPA in accordance with [Maryland’s] enforcement procedures.” MDE 2010 letter, p. 7.

“Although the review of the remaining minor NPDES individual facilities did identify some sites in violation due to failure to timely submit DMRs or report specific parameters, there are many instances where the data recorded in ICIS does not match the data in the ECHO database or the violations do not rise to the level of SNC under EPA’s guidance.” MDE 2010 letter, p. 7.

“MDE keys its enforcement responses for NPDES cases to EPA’s SNC guidance. As an example, the NY Times article noted that according to ECHO data the National Aquarium was noncompliant 85 times between 2006 and in [sic] 2008 all related to reporting/monitoring. In accordance with State Discharge Permit 00-DP-2002, this facility is required to monitor four outfalls for flow, fecal coliform and pH. DMRs were submitted for the facility for the calendar year 2006, but indicated “no discharge” for the first, second, and third quarters. The fourth quarter DMR indicated no discharge from three of the four outfalls and wastewater discharged from Outfall 001 was in compliance with permit effluent limits. DMRs submitted for the calendar years 2007 and 2008 also indicated no discharge with the exception of the fourth quarters from Outfall 001 and the data indicated the discharges were compliant. MDE conducted an inspection of the facility on April 3, 2007 and noted that there were only two minor reporting discrepancies during the inspection that were related to the incorrect federal identification number noted on the DMRs and the use of the incorrect sample type reported for the flow measurement. A review of the data in EPA’s [ICIS] indicates the data has been entered correctly as noted on the DMR.” MDE 2010 letter, p. 8.

“According to the ECHO data, the Consolidated Coal Sales facility was noncompliant 66 times between 2006 and 2008. While the facility reported intermittent effluent violations, MDE determined that the violations did not rise to the level of [SNC] and determined that no enforcement action was warranted. ICIS also incorrectly indicated non-reporting violations when the facility actually reported “no discharge” on the DMRs. MDE has advised EPA prior to this review that the data in the ECHO system frequently does not mimic what has been entered into ICIS. ... MDE remains committed to ensuring that data in the ECHO database is an accurate

representation of the compliance status of NPDES facilities and that enforcement actions are issued as warranted.” MDE 2010 letter, p. 8.

“MDE has made comprehensive changes to its overall enforcement approach, including the development of standardized operating procedures for case resolution, including timeframes for referral for legal action and the implementation of standardized approaches to settlements, supplemental environmental projects, and consent orders. Through the emphasis on enforcement procedures, enforcement actions in all programs increased by 54% from FY2007 to FY2010. This information is provided, not to show that there are no remaining resource issues, but to show that the Department has made many improvements.” MDE 2010 letter, p. 8.

Since 2010, Maryland “has enhanced its development and tracking of enforcement actions and associated compliance activities designed to act as strong deterrents to pollution of the Bay and to require corrective actions to mitigate and prevent future adverse impacts to the Bay and local streams.” MDE 2016 letter, p. 5.

“[Maryland] procured contractual services to provide enforcement coordination and data quality services. Services include: initiation; development and tracking of enforcement actions and associated compliance activities related to permittee-submitted DMRs; reviewing monthly operating reports and violation reports; staff inspection reports and site complaints; preparation of litigation packages; and administrative and civil orders and penalties for NPDES/State discharge permits. Contracted services provided administrative services to input NPDES data into ICIS and TEMPO [Tools for Environmental Management and Protection Organizations] (the Department’s environmental management system), perform QA/QC, prepare reports for State Review Framework deliverables, and participate in the development of enforcement actions with EPA. Contracted services are also in place for focused inspections and enforcement of General Permit for Stormwater Discharges Associated with Industrial Facilities. MDE is utilizing NetDMR, wherein permittees enter data into this EPA system that transfers to ICIS directly, eliminating facility reporting and staff transcription errors. For example, MDE has 72% of its major NPDES facilities now utilizing NetDMR. The program is actively engaged in implementing all of EPA’s NPDES Electronic Rule requirements.” MDE 2016 letter, p. 5.

Current data from MDE reflect an increase in NPDES facilities having registered for Net DMR. MDE has reported that as of January 2018, 100% of major NPDES facilities (total of 82) have registered for Net DMR. Three hundred seventy-five (375) non-major individual NPDES facilities are required to use Net DMR. Approximately 356 are registered, 95%, with one facility having submitted a waiver.

The following information provides the individual facility status for the eight examples cited by the Petitioners:

P & J Contracting: “[Maryland] issued an Administrative Consent Order to P&J on October 16, 2012 to resolve illegal open dumping, illegal refuse disposal activities, and illegal solid waste processing for disposing of demolition material without a permit as well as erosion and sediment control and stormwater discharge violations that occurred from 2007 through 2012. MDE collected a \$30,000 penalty and held \$80,000 in abeyance to be paid if P&J failed to comply with the terms of the Administrative Consent Order. Subsequent inspections revealed P&J’s failure to comply with the Consent Order and on July 10, 2014, MDE filed a complaint in Circuit Court to enforce the terms of the Consent Order. MDE and P&J held Court ordered mediation and on August 7, 2015 MDE and P&J entered into a judicial Consent Decree and

Judgment to require the implementation of corrective measures and payment of a \$250,000 civil penalty with \$100,000 to be paid over a 24-month period and \$150,000 held in abeyance pending compliance with a new Consent Order. In follow-up the Department conducted inspections that documented the ongoing failure to comply with the terms of the Consent Decree and on March 1, 2016, issued a request for payment of stipulated penalties for failure to comply with the Consent Decree. P&J provided a response that indicated the consultant hired to address the CD requirements was at fault. The Department and the Office of Attorney General are reviewing the case to determine the appropriate enforcement response.” 2016 MDE letter, Attachment at p. 1.

Martin Reese G&G Auto: “Corrections completed since the 2004 inspection. A recent inspection on September 16, 2014 indicated the facility was in noncompliance with the General Industrial Stormwater Permit specifically related to the requirement to conduct and maintain records of employee training; inclusion of general location map on the SWPPP and failure to include required information on [SWPPP] site map. These violations do not rise to the level of SNC in accordance with the Compliance Program’s SOP for minor general permits.” 2016 MDE letter, Attachment at p. 1.

Berg Brothers Recycling Company (MDR001402): “This site holds an industrial stormwater general discharge permit. An inspection report dated January 9, 2002 noted that the site needed a SWPPP and that there was sediment and other unknown contaminants from run-off at nearby street storm drains. The facility provided a SWPPP to MDE on April 17, 2002. In the absence of any complaints MDE has not inspected this site.” 2010 MDE letter, Attached table, p. 6 row 1.

Maryland and Virginia Milk Producers: “This facility reported BOD and TSS violations during the winter months in 2007 and 2008. They connected Outfall 001 to the sanitary sewer in February 2009 to resolve those violations. Outfall 002 is discharging only non-contact cooling water and reported recent TSS, pH and temperature violations, but the facility is not currently in [SNC].” 2010 MDE letter, Attached table, p. 6 row 2.

Fort Detrick Wastewater Treatment Plant: “MDE cannot take penalty action against the federal government. MDE recently referred this facility to EPA for action for delays in [Enhanced Nitrogen Removal (“ENR”)] completion. The Plant is inspected annually. There were no effluent limitation violations found during the June 2009 inspection. The only effluent violations recorded were isolated pH daily minimum and a weekly average BOD concentration violation on April 23, 2009, which did not place the facility in SNC. The facility has reported four small sanitary sewer overflows (200 gallons, 500 gallons, 200 gallons and one of an indeterminate quantity to groundwater).” 2010 MDE letter, Attached table, p. 6 row 3.

Mirant MD Ash Management/Brandywine Coal Combustion (“CCB”) Waste Landfill (MD0054836): “Civil Consent Decree CJ-13-1926, filed May 1, 2013 in United States District Court for the District of Maryland to address compliance for three CCB Storage Sites owned by GenOn MD Ash Management, LLC. The three sites are the Faulkner, Brandywine and Westland sites located in Charles, Prince George’s and Montgomery Counties, respectively. This Consent Decree resolves past violations with the payment in the amount of \$1,900,000 and provides a schedule for compliance.” 2016 MDE letter, Attachment at p. 1.

Princess Anne Wastewater Treatment Plant: “On April 4, 2011, MDE issued a settlement agreement to the Somerset Sanitary District to resolve [BOD], total phosphorus and chlorine violations that occurred at the Princess Anne WWTP for the time period of April 2009 through

May 2010. The violations were settled for a payment of \$6,000 to the Clean Water Fund.” 2016 MDE letter, Attachment at p. 1.

Chesapeake Beach Wastewater Treatment Plant: “MDE has forwarded a litigation package to the OAG to address mandatory penalties due for TSS violations in March 2008, as well as other effluent violation[s] in December 2007 and May 2008. The [litigation] pack also addressed non-submittal of the required BioMonitoring and Toxic Chemical Reporting Plan. A letter was issued on July 20, 2010 to Town of Chesapeake Beach regarding delays in the schedule for the ongoing ENR upgrade. The superintendent was notified during inspection on June 14, 2010 that he should submit a letter to the Department explaining the delays in the ENR upgrade and plans to complete it.” 2010 MDE letter, Attached table, p. 6 row 6.

EPA Discussion: As discussed in section II.2 above, Maryland instituted several enforcement program improvements based upon the findings and recommendations from EPA’s 2011 SRF review of Maryland’s implementation of the authorized NPDES compliance monitoring and enforcement program (SRF review based upon analysis of Maryland’s FY2011 NPDES data, inspection and enforcement files). The SRF report recommends that Maryland coordinate more closely with EPA to identify recalcitrant facilities that present long-term compliance issues. In addition, the report recommends that Maryland review EPA guidance for addressing facilities in SNC and conducting timely and appropriate enforcement, and that Maryland revise or update its enforcement program SOP, “Inspection, Enforcement, and Penalty Procedures for the Compliance Program in the Water Management Administration,” to address enforcement program performance issues identified during the SRF program review. EPA’s guidance for timely and appropriate enforcement is set forth in the 1989 NPDES-CWA Environmental Management System.⁹ Maryland revised its SOP and inspection forms to address timely reporting and identification of SNC as well as identification and reporting of single event violations identified during compliance inspections. In addition, EPA provided the state with training in the above areas, and is conducting ongoing oversight to monitor the state’s progress in addressing any enforcement program performance issues. Currently, EPA and Maryland conduct quarterly reviews of the compliance status for each NPDES major facility identified as being in SNC and EPA tracks Maryland’s progress toward timely resolution of the outstanding violations. EPA is scheduled to conduct another SRF review of Maryland’s compliance monitoring and programs in FY2018, which will determine whether Maryland has completed the previous SRF recommendations.

EPA reviewed the ECHO database regarding the eight facilities identified by the Petitioners, with the following results supplemented with enforcement updates:

- P&J Contracting (MDR001359): The ECHO database shows the facility in compliance and no violations showing for the past 36 months as of October 4, 2017. The date of the last compliance evaluation was January 20, 2015 by MDE.
- Martin Reese/GG Auto (MDR001375): The ECHO database shows the facility, now referred to as Marty’s Auto Parts, in compliance and no violations showing for the past 36 months as of October 4, 2017. The date of the last compliance evaluation was March 30, 2017 by MDE.

⁹ See <https://www.epa.gov/sites/production/files/documents/emscwa-jensen-rpt.pdf>.

- Berg Brothers (MDR001402): The ECHO database shows the facility had one quarter of significant noncompliance in the past 36 months as of October 4, 2017. The date of the last compliance evaluation was September 29, 2016 by MDE.
- Virginia and Maryland Milk Producers (MD0000469): MDE conducted compliance evaluations on August 17, 2015 and June 15, 2017. The ECHO database shows that the facility has been in compliance with no violations for the past 36 months as of October 4, 2017. On April 10, 2013, the company paid a \$3,000 penalty to MDE to resolve a one-day unauthorized discharge of treated process water to waters of the State which were required to go to the sanitary sewer.
- Fort Detrick Wastewater Treatment Plant (MD0020877): MDE conducted 5 compliance evaluations of the facility in the past 5 years. EPA conducted an inspection of this facility on March 20, 2013. At that time, the ENR upgrade was complete and the plant had been operating for over a year as an ENR facility. The facility reported a violation of the monthly average limit for total nitrogen for the month of March 2013 which resulted from the delay in chemical delivery. However, overall compliance at the facility was adequate. The ECHO database shows the facility has had three quarters of noncompliance in the past 12 quarters, as of October 4, 2017, for permit schedule events unachieved and one effluent exceedance.
- Mirant MD Ash Management (MD0054836): MDE conducted 7 compliance evaluations at the facility in the past 5 years. The date of the most recent inspection by MDE is August 14, 2017. The ECHO database shows the facility, now NRG MD Brandywine Flyash Management, in noncompliance as of October 4, 2017 for permit schedule events unachieved and effluent exceedances. MDE issued a CWA penalty and administrative order in May 2017 assessing a penalty of \$3,660. Two civil judicial actions were issued by MDE in 2012 and 2013 for \$300,000 and \$1,900,000, respectively.
- Princess Anne Wastewater Treatment Plant (MD0020656): The Princess Anne permit was reissued on October 1, 2015. MDE conducted sampling and compliance evaluations at the WWTP annually from 2013-2016. The ECHO database shows the facility in noncompliance as of October 4, 2017 for effluent exceedances. The facility has occasional effluent violations of permitted limits for BOD, Nitrogen, Phosphorous, and Chlorine since 2010. Violations did not put the facility in SNC until May of 2016 - two violations of the chlorine limit of 20% or greater in February and May of 2016. EPA will follow up with MDE.
- Chesapeake Beach Wastewater Treatment Plant (MD0020281): The WWTP has been inspected by MDE annually since 2012. The ECHO database shows the facility in noncompliance for 1 out of 12 quarters (non-SNC reporting violations) as of October 4, 2017.

Additionally, EPA had conducted an MDE Stormwater Program Assessment (“Assessment”) which was finalized in March 2014. The Assessment found many compliance challenges with respect to MDE’s implementation of the MS4 Program, particularly with respect to appropriate response to effective compliance monitoring and response to violations. MDE and EPA entered into a joint work plan to address this identified deficiency in June 2014. While

MDE has yet to take a formal enforcement action against Phase I MS4 permit violations, it has procedures to review annual reports and conduct compliance evaluations. In subsequent investigations into MS4 permittee compliance, EPA has noted that MDE is reviewing annual reports, conveying identified deficiencies to the permittee for correction, establishing dates by which the deficiencies are to be corrected, and follows-up on submitted responses. As a result, EPA is maintaining a high level of compliance oversight of the MDE MS4 program and has conducted a Stormwater Program review in 2018. The report for the 2018 review has not been finalized.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, and other information provided, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program. As part of its routine state oversight responsibilities, EPA monitors Maryland's enforcement responses to NPDES violations through quarterly enforcement management meetings and the SRF state NPDES program reviews. EPA will work to ensure that MDE responds appropriately to violations. Where EPA finds the state response insufficient, it will take appropriate action.

2. Allegation: Maryland failed to enforce consent decrees, administrative orders and settlement agreements.

Summary of Petitioners' Allegation: The Petitioners allege that Maryland fails to enforce existing administrative orders requiring corrective actions, consent decrees, and settlement agreements. The Petition cites three examples where Maryland allegedly failed to follow-up on previous state enforcement action settlements, allowing violators to continue to illegally discharge subsequent to Maryland's initial enforcement actions.

Information from Maryland: "[Maryland] has an established tracking system for enforcement actions to track milestones." 2010 MDE letter, Attached table, p. 6 row 7. Maryland provided EPA information on follow-up enforcement activity and the current compliance status of each of the three facilities identified in the Petition:

LaPlata Wastewater Treatment Plant (MD0020524): In 2010, Maryland provided the following information: "An earlier consent order was amended on May 18, 2000 and again on August 9, 2000 in response to requests by the Town for extensions of time for completion of BNR upgrade to April 2003. MDE sent a letter to the Town on January 7, 2008 concerning effluent violations at the Plant. An inspection on February 8, 2010 identified several minor operational corrections that were needed. The facility is doing another upgrade for ENR and reported sporadic violations of pH, ammonia, total phosphorus and fecal coliform during mid-2009 up to February 2010. There also continue to be SSO problems with the collection system. A litigation package is being referred to the Office of the Attorney General for a formal enforcement action." 2010 MDE letter, Attached table, p. 6 row 8. Maryland determined that "[i]mprovements to the Town Collection System were complete as of March 2011. On October 24, 2011 MDE and the Town of La Plata entered into a Consent Order for the completion of an ENR upgrade to [the WWTP]." 2016 MDE letter, Attachment at p. 1. "On June 13, 2012, MDE executed a Settlement Agreement with the Town of La Plata for payment of penalties to resolve past SSO and Consent Order violations. [As of 2016, the] ENR upgrade has been completed but

the WWTP continues to experience effluent violations. The Department has issued a letter to request information regarding the cause and corrective measures implemented or proposed to address the noncompliance.” 2016 MDE letter, Attachment at p. 1. The facility “has two sets of limits in the Permit, based on the current flow of 1.5 mgd or an increased flow to 2.0 mgd. The Department was incorrectly advised the Plant is currently operating at 2.0 mgd. In response, the parameters in ICIS were revised to reflect the associated limits. In addition, the facility is not using pre-print DMRs that accurately reflect the permit requirements. MDE has now determined that the facility was upgraded to ENR but has not increased its flow to 2.0 mgd. The facility has verified that the flow is less than 2.0 also as evidenced by the DMRs. The parameters in ICIS have been revised accordingly. The Department has requested re-submittal of the DMRs from April 2014 to [June 2015] and will review to determine compliance.” MDE FFY 2015 3rd quarter non-compliance summary. “The Town of La Plata has re-submitted all of the DMRs from April 2014 to the present. MDE's review of the DMRs determined that [...] The ENR construction was completed in April 2014 and the Plant has been in compliance with the annual maximum Total Nitrogen and Total phosphorus limits established in the Permit for 2014 through 2016. Start-up of the ENR Plant was completed in April 2015.” Electronic Correspondence between EPA and MDE, October 18, 2017.

Celanese WWTP now known as North Branch WWTP (MD0063878): The Celanese plant “was under a Consent Agreement from October 16, 2003 through September 30, 2005 during the construction of an upgrade and expansion of the WWTP. [As of 2010], [t]here were no discharge violations since 2007. This is a major facility that is inspected annually. . . . [I]nspections were conducted on July 13, 2009 and June 28, 2010 and the Celanese WWTP was found to be in compliance.” 2010 MDE letter, Attached table, p. 6 row 9. NPDES inspections were conducted at the Celanese facility on May 26, 2011 and May 29, 2012. Both inspection reports noted that the facility was in compliance with its permit. There have been no discharge violations since 2007. “Annual compliance evaluation and compliance sampling inspections conducted at the facility since 2011 to [2016] indicate the facility is in compliance with its NPDES permit.” 2016 MDE letter, Attachment at p. 2.

Constellation Power CP Crane Generating Station: “The information in ECHO is incorrect related to thermal violations from January 2007 through December 2009. There were no thermal violations. ICIS incorrectly captured the information as MBTU/hour instead of MBTU/day, which is the NPDES limit. . . . This is a major facility that is inspected annually. [As of 2010, the] last inspection occurred on July 21, 2010 and only minor corrections are noted.” 2010 MDE letter, Attached table, p. 7 row 1.

EPA Discussion: Although Petitioners provide three examples of situations where Maryland allegedly did not enforce consent decrees or other actions, two of the examples do not support the allegation. Specifically, the allegations regarding the Celanese WWTP and Constellation Power station describe allegedly ongoing issues at the facilities subsequent to MDE having taken enforcement action but do not describe any failure to close out the enforcement actions taken; such allegations are similar to those identified in section III.1 above. As discussed in section III.1 above, EPA conducts ongoing state oversight to determine if Maryland pursues timely and appropriate enforcement to address facilities that violate the conditions of State issued consent decrees, administrative orders, and settlement agreements. As a result of case-specific circumstances, timeframes and approaches for enforcing administrative or judicial consent orders vary from case to case. EPA generally assesses a state's enforcement

program performance for timely and appropriate enforcement on an individual case by case basis and addresses enforcement performance issues with the state program on an as-needed basis. EPA identified NPDES program performance issues during its 2011 SRF review specific to actions Maryland took to promote facilities returning to compliance and whether Maryland took timely and appropriate enforcement actions to address NPDES violations.

The 2011 SRF report highlighted the need for Maryland to ensure that enforcement escalation procedures contained in the “Inspection, Enforcement, and Penalty Procedures for the Compliance Program in the Water Management Administration” are followed for facilities identified as failing to return to compliance subsequent to an enforcement action or failing to comply with the terms of a compliance order or schedule. EPA will continue to evaluate the potential need for further revisions to the state’s enforcement SOP to address these performance issues. In addition, EPA and Maryland review individual cases on a quarterly basis to identify facilities that present long-term noncompliance issues and assess each case for potential enforcement alternatives including referral to EPA for federal enforcement support. EPA verifies Maryland’s timely and appropriate enforcement actions through analysis of annual enforcement data, and ongoing reviews of enforcement cases during quarterly enforcement management meetings. The 2011 SRF recommendations are considered complete and will be confirmed as completed upon verification through the formal FY2018 SRF review.

EPA reviewed the ECHO database regarding the facilities identified by Petitioners, with the following results:

- Town of La Plata (MD0020524): The ECHO database shows the facility in reportable noncompliance, but not in significant violation, as of October 4, 2017. MDE has conducted 18 compliance evaluations in the last 5 years.
- Celanese Wastewater Treatment Plant (MD0063878): The ECHO database shows the facility is in compliance as of October 4, 2017. MDE has conducted 8 compliance evaluations over the last 5 years. The date of the most recent evaluation is July 25, 2017.
- Constellation Power CP Crane Generating Station (MD0001511): The ECHO database shows the facility is in compliance as of October 4, 2017. MDE has conducted 6 compliance evaluations over the last 5 years. The date of the most recent evaluation is April 20, 2017. MDE issued 2 State penalty orders and assessed \$5,000 each in August 2013 and June 2015. According to MDE’s 2010 response, there were no thermal NPDES violations and the error was corrected in the database.

EPA Determination: Having considered the Petitioners’ allegations, the information provided by Maryland, and EPA’s analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland’s NPDES program. In fulfillment of its oversight responsibility, through its quarterly enforcement management meeting and the 2018 SRF, EPA will continue to ensure that MDE responds appropriately to violations of State issued consent decrees, administrative orders, and settlement agreements.

IV. ALLEGATION: MARYLAND'S STATUTORY CEILINGS FOR CIVIL AND CRIMINAL PENALITIES ARE INADEQUATE AND MARYLAND FAILS TO IMPOSE AND/OR COLLECT FINES IN AMOUNTS THAT WILL EFFECTIVELY DETER VIOLATORS

1. Allegation: Maryland has an inadequate statutory range of penalties.

Summary of Petitioners' Allegation: The Petitioners allege that Maryland has no law that automatically adjusts civil penalties for inflation and has not raised most of its statutory penalties in over twenty years; as a result, Maryland's penalties do not effectively deter future violations.

Information from Maryland: In 2010, Maryland reported that it "had attempted to raise its administrative and civil penalties through legislative initiatives and [would] try again." 2010 MDE letter, Attached table, p. 7 row 4. In 2016, Maryland reported that "[c]ivil penalty authority for water pollution violations was doubled by a statutory amendment in 2014 (§9-342 Environmental Article, Annotated Code of Maryland) from \$5,000 per day to \$10,000 per day for each violation and from \$50,000 to \$100,000 total." 2016 MDE letter, p. 5.

EPA Discussion: EPA does not require states to enact penalty authorities that are equivalent to federal minimum or maximum penalties when authorizing states to implement the NPDES program. Federal regulations require that states have the ability to assess fines of at least \$5,000 per day per civil violation. 40 C.F.R. §§123.27(a)(3)(i), (b)(1). Maryland's statutory maximum civil penalties for violations of the Clean Water Act are \$10,000 per day per violation, or \$100,000 total. Given that Maryland's statutory maximum is consistent with the requirements of the federal regulation, EPA considers Maryland's authorities for civil penalties for NPDES violations to, meet requirements.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and its own analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

2. Allegation: Maryland fails to impose penalties and fines that deter future violations.

Summary of Petitioners' Allegations: The Petitioners allege that Maryland fails to impose and/or collect fines in amounts that will effectively deter violators and that it routinely reduces the amount of penalties it imposes and collects from violators.

Information from Maryland Response: "[Maryland] has developed a strong track record of pursuing appropriate penalties. We disagree with the statement that Maryland's civil environmental penalties have remained unchanged for over twenty years. MDE has also developed specific criteria and procedures for enforcement coordinators to ensure that penalties are assessed in a fair and consistent manner." 2010 MDE letter, p. 8. In addition, "MDE reduces penalties in accordance with established standard operating procedures approved by the Secretary and the Office of the Attorney General. MDE does not 'allow' final penalties to remain unpaid. All issued penalties are tracked on the Department's penalty database. Invoices are tracked through the FMIS [Financial Management Information System] program. Delinquent accounts for final penalties that are due and owing are referred to Maryland's Central Collection

unit. MDE is free to exercise its enforcement discretion in enforcement matters.” 2010 MDE letter, Attached table, p. 7 row 5.

Maryland provided information on the formal enforcement activity for each of the three facilities identified in the Petition as follows:

Cambridge Iron & Metal: “Regarding the penalty cited in the delegation petition, MDE’s inspector inspected the facility on two separate days in 2005 and noted an oil discharge and SWPPP inadequacies related to housekeeping. The facility did have a SWPPP and it was considered adequate, but they needed to improve implementation. MDE reinspected in May 2005 and observed that the facility had improved housekeeping at the site in order to prevent discharges. The facility was found to be in compliance and the penalty action was to settle the violations for the two days that MDE actually observed violations. The penalty settlement is based on MDE’s review of factors in the law regarding administrative penalties and reduction to encourage settlement instead of investing the resources of MDE and the Attorney General in a contested case. The site was inspected on March 20, 2010 of this year [2010] and minor violations related to general housekeeping were identified. MDE requested a copy of the most recent pollution prevention plan. A follow up inspection was conducted on August 11, 2010 and the site was found to be in compliance.” 2010 MDE letter, Attached table, p. 7 row 6.

Assateague Point/Frontier Town WWTP: “MDE followed up on a call from the Coastkeeper on July 8, 2008 regarding the July 3, 2008 [SSO]. The County reported a 500 to 1,000 gallon [SSO] in a wooded wetland and the County cleaned up the spill. MDE did not take an enforcement action for the isolated SSO.” 2010 MDE letter, Attached table, p. 7 row 7.

ISG Sparrows Point: “From July 30, 2007 to February 10, 2010, MDE collected \$131,600 in penalties against Bethlehem Steel, ISG and Severstal for NPDES violations at the Sparrows Point facility. [In 2010, Maryland reported that it] did not interfere with CBF’s recent lawsuit following issuance of a Notice of Intent to sue.” 2010 MDE letter, Attached table, p. 7 row 8. Maryland subsequently reported that “Sparrows Point LLC, MCM Management Corporation and HRE Sparrows Point, LLC have entered into [a] settlement agreement with MDE to resolve alleged violations of Environmental Article Titles 2, 4, 7, and 9 at the former RG Steel at Sparrows Point Site on April 2, 2015. This settlement agreement provides for \$1,500,000 in fines with a provision for an offset of \$1,125,000 with an MDE approved Supplemental Environmental Project (“SEP”). The SEP portion of this agreement was submitted by the aforementioned parties and is currently under review by MDE for sufficiency. Work continues on the property with respect to recycling activities involving the pre-existing structures material on this site and routine inspections continue as the site transitions from a steel manufacturer to a business park. The NPDES permit has been transferred to Tradepoint Mid-Atlantic.” 2016 MDE letter, Attachment p. 2.

EPA Discussion: Federal regulations recognize that EPA may exercise its discretion to withdraw a state program if EPA finds a “[f]ailure to seek adequate enforcement penalties or to collect administrative fines when imposed” (40 C.F.R. § 123.63(a)(3)(ii)) and “the State fails to take corrective action” (40 C.F.R. § 123.63(a)).

A civil penalty assessed must be “appropriate to the violation.” 40 C.F.R. § 123.27(c). These regulations do not require states to assess minimum and maximum penalties or penalties that are identical to those EPA is authorized to assess. Rather, the regulations afford significant flexibility on the part of states in the amount of penalties that are actually assessed in individual

enforcement actions. Given this discretion, EPA's evaluation of whether a state's penalty assessments are "adequate" for purposes of 40 C.F.R. § 123.63 focuses on whether the state's assessment considers penalty factors that are generally relevant to penalties under the Clean Water Act and case law (e.g. seriousness of the violations, amount of economic benefit resulting from the violations, history of the violations, any good faith efforts to comply, economic impact the penalty on the violator, etc.). Maryland's authorities provide that it will consider multiple factors when determining an appropriate penalty, such as the willfulness of the violation, actual harm to the environment or human health, cost of cleanup and restoration, degree of hazard posed by particular pollutant, and recurrent pattern of violation. Md. Code § 9-342 (2014).

With respect to the issue of whether Maryland routinely reduces the amount of penalties it imposes and collects from violators, state penalty policies generally allow for latitude to reduce or increase final penalties in consideration of the case-specific factors associated with enforcement case settlements. Just as there are with any federal enforcement action, there are many variables that may impact the final penalty calculation in resolution of a state enforcement action, including the gravity and duration of the violations, supplemental evidence presented by the alleged violator demonstrating compliance, strength of evidence, ability to pay, and a violator's willingness to cooperate during settlement negotiations. See, e.g., Md. Code § 9-342 (2014).

In response to concerns regarding documentation, Maryland revised the enforcement program's SOP, "Inspection, Enforcement, and Penalty Procedures for the Compliance Program in the Water Management Administration," to address deficiencies in the calculation of civil penalties including documentation of the assessed and final penalty, capturing economic benefit when appropriate and record retention records. This is an important step towards improving the state's documentation of its consideration of penalty factors. EPA is monitoring Maryland's progress toward implementation of the SOP and will consider the state's progress on this issue during EPA's FY2018 SRF review of Maryland's NPDES compliance monitoring and enforcement program.

With respect to the issue of whether Maryland imposes and/or collects fines in amounts that will effectively deter violators, in consideration of the unique circumstances and varying factors associated with individual enforcement actions, EPA does not evaluate a state's performance based on the final penalty amount in individual cases but whether an enforcement action returned or is expected to return a violator to compliance. Element 9 of the 2011 SRF assessed whether "Enforcement Actions Promote Return to Compliance: Enforcement actions include required corrective action that will return facilities to compliance in specified timeframe". EPA's 2011 SRF review of Maryland's enforcement files did not identify any issues with the amount of penalty assessed by MDE, nor did it identify any performance issues related to Maryland's collection of final penalties assessed in the enforcement files reviewed by EPA. EPA's 2011 SRF concluded that "MDE enforcement actions resulted in violators returning to compliance in a specified timeframe in 14 of 21 enforcement files reviewed by EPA." It further found that "The majority of enforcement actions available to EPA's [team] during the period of review were non-SNC violations at major and non-major facilities. . . . MDE enforcement responses returned facilities to compliance or set forth a compliance schedule in 14 of 21 enforcement response or 66.7% of the time. The remaining files indicated that the 7 facilities remained in non-compliance following the enforcement response. However, the files did not provide adequate documentation to determine if failure to return to compliance was due

to a need for additional injunctive relief or a lack of enforcement escalation to address reoccurring violations.” Although EPA acknowledged this as an area for state improvement, EPA has worked with Maryland to improve its return to compliance rate. To that end, Maryland reviewed and modified its “Inspection, Enforcement, and Penalty Procedures for the Compliance Program in the Water Management Administration” to include guidance regarding enforcement escalation for ongoing noncompliance.

Based on the evidence to date and ongoing oversight of Maryland’s program, EPA concludes that MDE increasingly is issuing and collecting fines that will deter violators and return them to compliance and is improving its internal procedures to increase its return to compliance rate.

EPA Determination: Having considered the Petitioners’ allegations, the information provided by Maryland, and EPA’s analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland’s NPDES program. In fulfillment of its oversight responsibility, EPA through its quarterly enforcement management meetings and the 2018 SRF review will continue to ensure that MDE responds appropriately to violations. Where EPA finds the state response insufficient, it will take appropriate action.

V. ALLEGATION: MARYLAND’S PROGRAM DOES NOT ALLOW FOR ADEQUATE PUBLIC PARTICIPATION IN THE PERMITTING OR ENFORCEMENT PROCESSES OF THE CWA. MARYLAND LAW DOES NOT GIVE CITIZENS AN EXPLICIT RIGHT OF INTERVENTION IN AGENCY ENFORCEMENT ACTIONS AND MARYLAND’S RECORDKEEPING METHODS HAMPER THE ABILITY OF THE PUBLIC TO OBTAIN INFORMATION THROUGH THE PUBLIC INFORMATION ACT.

1. Allegation: Limitations on Citizen Intervention

Summary of Petitioners’ Allegations: The Petitioners allege that Maryland law does not allow citizens to fully participate in enforcement actions. The Maryland rule governing intervention does not explicitly provide citizens the right to intervene in state enforcement actions, and some trial courts have withheld the right to intervene in such cases. The Petitioners also allege that Maryland does not publish notice of and provide for a 30-day comment period for proposed settlement agreements. Therefore, the Petitioners allege that the state’s program does not meet the public participation requirements of the CWA.

Information from Maryland: “It is accurate that state law does not require public comment on proposed consent decrees as is required under federal law and the Department does not implement such process due to the significant resources needed to do so. Maryland law does provides [sic] for intervention pursuant to Maryland Rule 2-214(a), which provides that any person who ‘claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties’ may intervene in a civil action as of right. This is identical to the Federal Rule governing intervention as of right, see Fed.R.Civ.P.24(a), and is the kind of authority that has

been deemed to be sufficient to satisfy the requirements of 40 C.F.R. §123.27(d)(1). See *CLEAN v. Premium Standard Farms, Inc.* 2000 WL 220464, *17 (W.D.Mo. 2000) (quoting N.R.D.C., 859 F.2d at 177).” 2010 MDE letter at p. 9.

“Over the past two years, MDE has actively supported intervention by citizens and citizen groups in MDE’s civil enforcement actions. Recent legislative changes expanding standing in Maryland consistent with federal Article III requirements will make it easier for citizen and citizen groups to intervene in MDE enforcement actions. MDE has enhanced public participation opportunities within its existing permit promulgation process, including new provisions for public access to relevant plans in its General Permit for Stormwater Associated with Construction and our recent [CAFO] permit.” 2010 MDE letter at p. 9.

EPA Discussion: Federal regulations recognize that EPA may exercise its discretion to withdraw a state program if EPA finds a “[f]ailure to comply with the public participation requirements of this part” (40 C.F.R. §123.63(a)(2)(iii)) and “the State fails to take corrective action” (40 C.F.R. §123.63(a)). Part 123 requires that a state administering an NPDES program “provide for public participation in the State enforcement process by providing” one of two methods for participation. 40 C.F.R. §123.27(d). The first option is to provide “[a]uthority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest which is or may be adversely affected”. 40 C.F.R. §123.27(d)(1). The second option is to provide “[a]ssurance that the State agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4); (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.” 40 C.F.R. §123.27(d)(2).

Maryland chose the first option, which is to provide intervention as of right by adversely affected citizens. See Maryland Rule 2-214(a). EPA determined, when it authorized Maryland to implement the NPDES program, that this rule satisfied the applicable requirements. A court that considered whether a state rule met 40 C.F.R. § 123.27(d), interpreted provisions such as Maryland’s Rule 2-214(a) to satisfy the requirements of 40 C.F.R. §123.27(d)(1). See *CLEAN v. Premium Standard Farms, Inc.*, 2000 U.S. Dist. LEXIS 1990 (W.D.Mo. 2000) at *59 -- *62 (quoting *Natural Resources Defense Council v. U.S. Env’tl. Protection Agency*, 859 F.2d 156, 177 (D.C. Cir. 1988)). The Petitioners cite a case where they were denied intervention, *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179 (2010), as evidence that Maryland fails to comply with the public participation requirements of the federal regulations. Although the judge in that case did deny intervention despite intervention being supported by MDE, one instance does not demonstrate a failure by the state to provide adequate public participation.

Although the Petitioners claim in a December 20, 2016 letter to EPA that “a review of case law prior to and after *Mirant* shows that there have not been any instances of environmental groups or citizens intervening in state Clean Water Act enforcement actions”, the Petitioners do not state whether intervention had been attempted and denied or simply not attempted at all. Further, in the *Mirant* case itself, Maryland had supported the environmental groups’ intervention. *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179 (2010) page 3. In light of the fact that the state has procedures that meet the requirements of

the federal regulations, the state's NPDES program thus, complies with applicable requirements for public participation.

EPA Determination: Having considered the Petitioners' allegations, the information provided by Maryland, and EPA's analysis of the statute, regulations, and other information including applicable case law, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland's NPDES program.

2. Allegation: Deficient Handling of Public Information Requests

Summary of Petitioners' Allegation: Maryland is not meeting the public participation requirement of 40 C.F.R. § 123.63(a)(iii) or the terms of its MOA. Maryland does not consistently respond to public information requests in accordance with the 30-day timeframe required by Maryland's Public Information Act ("PIA"). When Maryland does produce public records pursuant to a PIA request, it often produces only a fraction of what was requested or fails to produce a document that it should have in its possession.

Information from Maryland: "Maryland's Public Information Act provides that agencies must provide the first two hours of response to a PIA without cost; for any effort beyond that, the agency may request a reasonable fee. It is unreasonable to assume that a request for all records regarding over a thousand facilities (such as the summer 2009 Baltimore Harbor Waterkeeper PIA) would not have a significant cost impact on MDE. MDE staff would have had to put aside their other important permitting, compliance and enforcement duties to gather, review, prepare, and refile (after public review) the thousands of files that were requested. While the fees MDE requested to respond to the above PIAs may be more than some permit fees for a single permit, they are certainly less than the permit fees MDE would collect for the hundreds or thousands of permits the PIAs requested. The summer 2009 Baltimore Harbor Waterkeeper PIA requested all permitting, compliance, and enforcement records for all facilities discharging to the Lower Patapsco River watershed or Back River Watershed. The PIA did not identify the facilities. MDE's own analysis of the request indicated that it would encompass 1,258 facilities." 2010 MDE letter, Attached table, p. 8 row 5.

"Generally, though, the Department agrees. It is the custodian of a vast number of data and files that are routinely requested (over 4000 requests annually) for the purposes such as those cited in the Petition, related to real estate transactions, and a host of other reasons. The manual system is no longer adequate. To address this, two projects are underway. The first is the TEMPO project referenced earlier which is consolidating information by facility from over 170 individual databases to a centralized system. The second is an upgrading of the Department's website so that it can support electronic transactions including providing access to files. For both projects, the costs are significant for the agency and are being implemented in phases." 2010 MDE letter at p. 10.

"The Department has recently updated the database that is used for tracking [PIA] requests. The Department has moved from an Oracle database to a web-based platform. The new system allows file custodians access where they did not previously have access. This database also allows MDE to process requests faster, more efficiently and reduce the use of paper, envelopes and stamps." 2016 MDE letter, p. 6.

“In 2015, the Department went live with a web application that gives the public the ability to query for permit information using a variety of different fields. Printouts of final permits and factsheets can also be generated from this application. The portal is available directly at <http://mes-mde.md.state.md.us/WastewaterPermit Portal/>.” 2016 MDE letter, p. 6.

The specific case examples are addressed as follows:

Waterkeeper Alliance PIA request dated June 17, 2009: “The PIA was overbroad (essentially all permitting, compliance, and enforcement records for all 93 major dischargers) and MDE does not maintain records in the manner many such requests are made which requires additional time to compile requested data. The official hard-copy files for such facilities are voluminous; the Compliance Program prepared an estimate of the number of hours required to respond based on its experience preparing such files for PIA requests. All enforcement records must be reviewed to determine whether enforcement confidential information must be withheld, which adds to the time to prepare a response to such a broad PIA. After the Waterkeeper Alliance amended its request to request electronic (database) information, the Compliance Program provided the requested information.” 2010 MDE letter, Attached table, p. 8 row 6.

Sassafras Riverkeeper PIA request dated July 10, 2009: “MDE’s PIA records do not show any requests from the Sassafras Riverkeeper dated July 2009. MDE did receive a PIA request from the Sassafras Riverkeeper to inspect the inspection and compliance file dated November 17, 2009. MDE received it November 23, 2009. MDE sent a letter to the Sassafras Riverkeeper on December 16, 2009, indicating that files were available. The requestor reviewed the files on February 2, 2010. This is not a valid complaint.” 2010 MDE letter, Attached table, p. 9 row 1.

Baltimore River Keeper PIA requests related to MS4 information: “The original requests were for municipal stormwater permit information since the beginning of the State’s program in 1990. Petitioners chose not to pay the fees associated with document preparation. Some time passed before the focus of the request was narrowed to the most recent five year period (September 2009). Files were prepared and made available in November 2009. Only three of the original nine files have been reviewed to date, with those remaining awaiting Petitioners’ action.” 2010 MDE letter, Attached table, p. 9 row 2.

PIA Request for No Exposure Certifications (NEC) exemptions: “This informal request was not handled appropriately, both by MDE and by the Harbor Waterkeeper. The request was made directly to an MDE engineer who has no supervisory or data processing responsibilities. The request should have next been presented to program supervisors to follow up. The division chief in that program has excellent database skills and is well known to have stayed late on many occasions to be responsive to public and customer special requests for information. The situation was the result of a change in MDE resources and the elimination of the customer service section of MDE who previously routinely handled such requests, and a slow acceptance of the loss of that resource by some staff members.” 2010 MDE letter, Attached table, p. 9 row 3.

PIA Request regarding Mirant Morgantown Generating Station: “MDE’s permit for the facility does not require that MDE keep a copy of all SWPPPs on file in keeping with paperwork burden reduction. Therefore, MDE is not custodian of this record. Clearly this request by a third party that MDE provide a copy of the SWPPP through a PIA request was an extraordinarily new concept at the time. MDE has no obligation to produce documents requested under the PIA that are not currently in its possession. Second, the permit is clear that the permittee was obligated to

keep the plan on site and not necessarily in an MDE file. The requestor was aware of each of these facts. Furthermore, the EPA national permit in effect at the time of this request provided for the same method – the public would contact the permittee directly and obtain a copy of the plan in that manner. As noted in other PIA examples in the petition, the Department has resource issues. It took some time for the Department to consider whether those limited resources should be expended toward chasing down information not otherwise required under a PIA, and what precedent that would set.” 2010 MDE letter, Attached table, p. 9 row 5.

Sassafras Riverkeeper request of SWPPP for Alexander Gravel Pit facility: “MDE’s permit for the facility does not require that MDE keep a copy of all SWPPPs on file in keeping with paperwork burden reduction. Therefore, MDE is not the custodian of this record. The Department is considering requiring submittal of an electronic copy of the current SWPPP at the time that the notice of intent is due for registration under the Department’s general permit. A draft of Maryland’s pending industrial stormwater general permit renewal will be provided to EPA by the beginning of the year.” 2010 MDE letter, Attached table, p. 9 row 6.

EPA Discussion: EPA may exercise its discretion to initiate withdrawal procedures if there is “[f]ailure to comply with the public participation requirements of this part” and “[w]here the State program fails to comply with the terms of the Memorandum of Agreement required under [40 C.F.R. §] 123.24.” 40 C.F.R. §§123.63(a)(2)(iii), (a)(4). The MOA does include a public participation section that requires, in pertinent part, that “[p]ermit applications, draft permits, public notices, fact sheets and statements of basis (when prepared) and all effluent data will be made available to any party upon request of payment of applicable state duplication fees.” 1989 EPA MOA at Section III.G (p. 10). Maryland’s PIA not only is consistent with these requirements, but Maryland makes available significantly more information than required by the MOA. Maryland reportedly is working to provide even greater access via the TEMPO project and other online access to documents, which goes beyond the scope of the MOA. EPA evaluated Maryland’s implementation the NPDES Electronic Reporting Rule in 2017. The NPDES Electronic Reporting Rule will provide greater clarity on what entities are or are not in compliance and enhances public transparency. A September 14, 2017 evaluation letter from EPA Region III concluded Maryland was meeting the requirements evaluated for Phase 1 implementation of the rule and Phase 2’s implementation plan. Approximately 95% of the universe of individually permitted DMR filers have limits data in the EPA national system ICIS.

EPA Determination: Having considered the Petitioners’ allegations, the information provided by Maryland, and EPA’s analysis of the statute, regulations, and other information, EPA has determined that the allegations raised by the Petitioners are not supported by the current facts and therefore do not warrant initiation of proceedings to withdraw approval of Maryland’s NPDES program.

CONCLUSION

EPA has determined that the allegations in the Petition do not warrant the initiation of withdrawal proceedings based on the significant improvements in many of the areas addressed in the petition as discussed above. EPA recognizes that there are a few areas where MDE is continuing to make improvements and EPA will continue to work with MDE through its regular

oversight in these areas to monitor MDE's progress and address any specific issues as EPA determines is necessary.

