



September 2, 2022

Via email

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CC: Jennifer Fulton, Acting Chief, Clean Water Branch, US EPA Mid-Atlantic Region, fulton.jennifer@epa.gov
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Re: Lack of Electronic Public Access to Draft NPDES Permits on Public Notice in Maryland

Dear all:

The Chesapeake Accountability Project (CAP), together with the undersigned organizations, hereby request the Maryland Department of the Environment (Department) Water and Science Administration, as a delegated federal Clean Water Act permitting program, update its Clean Water Act public notice practices to do the following:

- 1) Publish a list of all draft National Pollutant Discharge Elimination System (NPDES) permits for which the Department is currently seeking public comment in a prominent, easily found place on the Department's website¹;
- 2) Include in this public notice list a description and location of the facility so that the public can identify the facility without knowing the permit number, as well as a phone number and email address the public can use to request more information; and
- 3) Include in this public notice list a hyperlink to each tentative determination/draft permit (called a draft permit in this letter) and draft fact sheet or statement of basis.

These are basic, threshold requirements to obtaining public participation in Clean Water Act permitting decisions at the current time. The vast majority of other states with delegated programs (as well as EPA's permitting program) have been implementing these practices for years. As such, **we request that the Department immediately prioritize this basic task and**

¹ For instance, the Department's main water page, <https://mde.maryland.gov/programs/water/Pages/index.aspx> or the Wastewater Permits Program page, <https://mde.maryland.gov/programs/water/wwp/pages/index.aspx>

that the Department’s November 2022 NPDES public notices be published online as described above. We further requests that the Department respond to this letter by September 30, 2022 and let CAP and the undersigned organizations know if the Department will make its November NPDES public notice available online as described above.

Additional actions, including the use of social media, better public outreach about specific permits, and translation resources, may be needed to provide adequate public access to these critical documents and to fully comply with the Clean Water Act’s public participation goals, as well as Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*

I. Introduction – Public Participation in Clean Water Act Permitting Decisions

Public participation is not a bonus or side feature in the Clean Water Act, it is at its heart. “Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act’s approach and philosophy.” *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 856–57 (9th Cir. 2003). The Department’s own regulations also emphasize the importance of public participation in water quality decisions: “The Department shall make a **maximum effort** to seek out and involve the interested public both at the preliminary stage and throughout the process of development of regulations, plans, and other [water quality] program actions.” COMAR 26.08.01.02 (emphasis added).

Public participation is especially important in the NPDES permitting process because NPDES permits contain key, legally enforceable effluent limits that control pollution. “**Public participation in the development, revision, and enforcement of any ... effluent limitation ... established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.**” Clean Water Act, 33 U.S.C. § 1251(e) (emphasis added). “NPDES permitting decisions should be determined in ‘the most open, accessible forum possible, and at a stage where the permitting authority has the greatest flexibility to make appropriate modifications to the permit.’” *Env’t Def. Ctr., Inc.*, 344 F.3d at 856–57 (quoting 44 Fed. Reg. 32,854, 32,885 (June 7, 1979), internal brackets removed); *see also Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980) (noting the “general policy of encouraging public participation is applicable to the administration of the NPDES permit program”).

A key way that the public participates in Clean Water Act permitting is through comments on draft permits. After a permit application is received, permitting agencies like the Department must publicly post a draft permit or draft denial and accept public comments on the draft for at least thirty days. 40 CFR § 124.6(e) (EPA regulations, applicable to delegated states under 40 CFR § 123.25); *see also Discharge Permit Application Processing*, COMAR 26.08.04.01-2. The public also has the opportunity to request a public hearing on the draft permit during these thirty days. 40 CFR § 124.12.

Effective public participation in state-funded permitting process, like Maryland’s NPDES program, is also mandated by Title VI of the Civil Rights Act of 1964, which prohibits agencies receiving federal funds from discriminating on the basis of race, color, and national origin. 42 U.S.C. §§ 2000d *et seq.*; 40 C.F.R. §§ 7.30, 7.35 (EPA Title VI regulations). To ensure

compliance with Title VI, it is essential that agencies “focus on early, inclusive and meaningful public involvement throughout the entire permitting process.” [Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs](#), 71 Fed. Reg. 14,207, 14,210 (Mar. 21, 2006).

II. Maryland’s Failure to Provide Online Public Notices and Copies of Draft Permits Actively Discourages Public Participation in NPDES Permitting Decisions

Providing web access to a list of draft NPDES permits with open comment periods, as well as links to the draft permits themselves, should be a basic component of a NPDES permit program in 2022. And in fact, it *is* a basic component of most Clean Water Act delegated state and EPA permitting programs. Here are four examples: [Utah’s “all water” webpage](#) where the public can see all public notices relating to water, with hyperlinks to draft NPDES permits; the [NPDES public notice page for Mississippi](#); the [NPDES public notice page for Illinois](#); and the [page for EPA’s New Hampshire NPDES permits](#). This is only a small sample. A CAP member group, the Environmental Integrity Project (EIP), conducted a survey of access to public noticed draft permits for all fifty states. **In forty-four states, the public can access online NPDES permit drafts when those drafts become available for public comment.** EIP believes that Maryland, Virginia, West Virginia, Delaware, New Jersey and Ohio are the *only* six NPDES permitting authorities in the country that do not provide lists of public noticed NPDES permits on their websites with hyperlinked copies of the permit drafts. Even within this small list, **Maryland is one of the only states that does not even take the basic step of publishing its list of public noticed permits online.** This is unacceptable and inexcusable in 2022.

Indeed, in Maryland, a host of barriers stand between members of the public and commenting on a draft NPDES permit.

First, the member of the public may not even know that there is a public comment period. In 2022, members of the public who are seeking information about water quality permitting are likely to first look to the Department’s website, not a small notice in the back of certain, likely paywalled, newspapers. **But a visitor to the water quality sections of the Department’s website (like the [Wastewater Permits page](#) or [Water and Science homepage](#)) would never know that there are draft NPDES permits on public notice.** Rather, only those people who find the small notice in certain papers, happen to visit a clerk’s office, or are already on the Department’s mailing list even will know that the public comment is open. This cribbed notification system actively limits public information and participation to those “in the know” and keeps information away from communities affected by permitting decisions.

Second, if members of the public would like to review the draft permit documents in order to comment, obtaining access to those documents is not easy. They must:

- 1) Contact a permit writer by phone, email, or mail and ask for the draft permit and fact sheet. If members of the public have not already been in contact with Department staff, they likely would not know that emailing the permit writer is an option or know the email address to use. If members of the public seek this information in the evening, on a

weekend, or on a day when the permit writer is unavailable, or contact the Department by mail, it may take days or weeks to obtain the draft permit from the permit writer; or

- 2) Take time off from work and travel, potentially for hours, to view the records in person during business hours.

These hurdles not only discourage public participation in the permitting process, they act as an outright impediment to individuals without access to a car, their own computer, or the ability to take time off from work. For instance, if a person is trying to access these permits from a computer at a library or a friend's house, they must now go back, potentially multiple times, to check their email to see if the permit writer has sent them the draft permit. These insufficient distribution methods disproportionately harm disadvantaged populations, including those from environmental justice (EJ) communities.

Moreover, these burdensome requirements are likely to eat into the 30 days provided for public notice. All draft permits must be publicly noticed and made available for public comment for at least 30 days. 40 CFR § 124.6(e); *Discharge Permit Application Processing*, COMAR 26.08.04.01-2. However, if a person cannot actually review the draft permit and fact sheet until several days or weeks later because they must wait for the permit to be emailed to them or posted somewhere, that permit has not in fact been truly available for public comment for the full 30 days. Although members of the public may request an extension of the public comment period for an additional 60 days, this option is not stated in the Notice of Tentative Determination and members of the public may not be aware of it. To be truly "available for public comment," permit drafts should be immediately accessible to the public through the Department's website, starting on the first day of the public comment period.

III. Maryland's Failure to Provide Online Public Notices and Hyperlinked Copies of Draft Permits Actively Discourages Meaningful Involvement from Individuals in Environmental Justice Communities, Those with Limited Financial and Technical Resources, and/or Those Without Past Experience Participating in Environmental Decision-Making

The EPA has directed all delegated states to ensure "meaningful involvement" from individuals in environmental justice (EJ) communities in permitting actions affecting their community. EPA, [*Environmental Justice 2020 Action Agenda*](#), pp. 16-18 (2016). The state of Maryland has also made public commitments to environmental justice and, as part of that commitment, to proactively engage marginalized and disenfranchised communities in environmental regulatory decisions. See, e.g., [*Environmental Justice Implementation at the Maryland Department of the Environment*](#). EPA's [*Environmental Justice 2020 Action Agenda*](#) specifically notes that meaningful involvement in permitting includes "the use of tools such as...**web-posting of data** that increase the availability of information to the public." *EPA EJ Agenda* at 18 (emphasis added). Requiring those in EJ communities to drive to an agency office to view or make copies of the permit drafts or to repeatedly visit their local library for computer access in order to check their email for the requested documents are not strategies for meaningfully involving environmental justice communities in permitting decisions. In fact, they can result in keeping environmental justice communities *out* of important permitting decisions.

Compliance with Title VI of the Civil Rights Act is also aided by providing easy and clear online access to permitting documents. To ensure state compliance with the provisions of Title VI, the EPA has directed delegated permitting authorities to “ensure that decision-making processes are open and accessible to all interested groups, including those with limited financial and technical resources, English proficiency, and/or past experience participating in environmental decision-making.” [Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs](#), 71 Fed. Reg. at 14,210. This 2006 guidance specifically highlights the barriers faced by marginalized communities around convenient access to environmental permitting information, and notes that one way to address this is “[e]stablishing an online information repository for public access.” *Id.* at 14215. Maryland has failed to take this basic step.

IV. Maryland Has the Resources to Provide Direct Online Access to a Public Notice List and Draft Permit Documents

Finally, providing direct online access to a public notice list and draft permit documents in 2022 is neither costly nor difficult.

Regarding posting the public notice itself, the Department already compiles a list of public noticed draft permits and sends it to the newspaper every month in order to comply with COMAR 26.08.04.01-1(E). Adding a small extra step whereby the Department posts that list onto the Department’s existing website every month is not unduly burdensome.

Regarding adding links to the draft permit and fact sheet, free software, like Google Drive, allows a user to easily upload a document and provides a public link to that document. In addition, the Department already appears to have a number of tools that would allow it to easily post these draft permits. The Department has a [limited permit portal](#) – it seems possible that the Department could upload draft permit documents to that existing portal and paste links to the documents on the public notice page. Maryland also has a [permitting bulletin](#) which could include the list of public noticed permits with hyperlinks. And for selected permits, the Department has already put together helpful websites with information about the facility and links to draft permit documents, like the [webpage for Valley Proteins Linkwood Renewal Permit](#).

Providing this basic online access to public notice and permit documents will not only improve public access to permits, but it may save the Department time and resources. Permit writers will no longer need to use their time answering emails requesting permit documents. It may also decrease the number of open records requests.

Conclusion

For the reasons described in this letter, we ask that the Department’s November 2022 NPDES public notice list, and all future NPDES public notices, be published online with hyperlinks to the draft permits and supporting documents as described in the beginning of this letter. This is a basic, fundamental step to ensuring that the Department complies with the public engagement goals of the Clean Water Act, the nation’s civil rights laws, and Maryland’s environmental justice commitments.

Best,

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Friends of Quincy Run

Maryland Conservation Council

Maryland League of Conservation Voters

ShoreRivers

Sierra Club - Maryland Chapter

Southern Maryland Audubon Society

St. Mary's River Watershed Association

West Montgomery County Citizens