

From Tari Moore – FIRST MEETING- October 8, 2012

The Maryland Rural Counties Coalition met formally for the first time Monday, October 8, 2012 at the MACo offices in Annapolis. Representatives from the eight member Counties (including all five County Commissioners), as well as elected officials from other jurisdictions were also present.

It was mostly an administrative meeting with the election of officers and adoption of bylaws. However, there was an interesting presentation from the law firm of Funk & Bolton regarding Watershed Implementation Plans (WIP) and other planning matters. Funk & Bolton is representing Dorchester County and they have done research about the science behind WIP's and the federal and state mandates requiring them.

County has invited Funk & Bolton to our Oct 16th Work Session (9 a.m. at the County Administration Building). This is a public meeting, so all are invited to attend.



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September 20, 2012

The Honorable County Commissioners of Frederick County

Blaine R. Young, President
Kirby Delauter
David P. Gray
Billy Shreve
C. Paul Smith

17 E. Church Street
Frederick, Maryland 21701

Re: Phase II Watershed Implementation Plan ("WIP") Process
Waste Water Treatment Plant ("WWTP") Enhanced Nutrient
Removal ("ENR") NPDES Permits
Exelon Hydroelectric Power Plant (Conowingo Dam) Permit Renewal
Maryland Department of Planning ("MDP") Mandated Revisions to
County Master Plans
Regional Greenhouse Gas Initiative ("RGGI") Program

Dear County Commissioners:

Funk and Bolton, P.A. represents Dorchester County (the "County") with respect to the County's concerns with the Phase II WIP process, the MDP mandated revisions to the County's master plan, and perhaps the initiatives under the RGGI implementation plan process that were alluded to by State officials during the summer MACo program. In addition, the County is concerned with the cost of compliance with the new ENR National Pollution Discharge Elimination System ("NPDES") discharge limitations being inserted by the Maryland Department of the Environment ("MDE") in NPDES permits issued for WWTPs in the County. There is no rational basis for requiring WWTP users to pay tens of millions of dollars to meet the ENR discharge limitations, which remove only a fraction of a single percentage of the nutrient loading to the Chesapeake Bay and will not enhance the water quality of the Bay. The ENR requirements exceed MDE's authority under the federal Clean Water Act and the cost of compliance is a waste of limited resources that should be directed to projects that will make a meaningful improvement to the water quality of the Bay. The programs that MDE and MDP seek

to obligate the County and its citizens to fund are not necessarily well conceived and will not achieve the desired improvements to the water quality of the Bay.

Funk & Bolton has outlined a multi-pronged strategy to address the shortcomings of the various mandates and programs billed as Bay restoration actions in an effort to save the citizens of your county an exorbitant tax burden that will not yield any significant benefit, and to direct attention and, hopefully, resources to address issues that would achieve a meaningful and lasting improvement to the water quality of the Bay. Before outlining the multi-pronged plan, we will first spotlight the single largest contributing source to the nutrient loading of the Bay.

The Phase II WIP, the WWTP ENR NPDES discharge limitations and a number of the MDP master plan requirements have their origin in the U.S. Environmental Protection Agency ("EPA") total maximum daily load ("TMDL") allocation for the Chesapeake Bay states (*i.e.*, the states whose water flows impact the water quality of the Bay). We believe that EPA's TMDL allocation is fatally flawed because it neglects to take into account the largest contributing source to the nutrient loading of the Bay: the water and the sediment flowing through the Conowingo Dam during major storm events and on a day-to-day basis. The loading from this single source significantly eclipses the loading from all Maryland sources. The models used by EPA to apportion the TMDL allocation fail to account for such loading.

The U.S. Department of the Interior, U.S. Geological Survey report prepared by Robert M. Hirsch and titled, *Flux of Nitrogen, Phosphorus, and Suspended Sediment from the Susquehanna River Basin to the Chesapeake Bay during Tropical Storm Lee, September 2011, as an Indicator of the Effects of Reservoir Sedimentation on Water Quality* – Report 2012-5185 (the "Report"), details the magnitude of this loading. The Report was published on August 30, 2012. Figures 1 and 2 on the next page vividly capture the essence of the Report. Both photographs were taken in September 2011, shortly after Tropical Storm Lee passed through the Susquehanna River valley. Figure 2 shows nutrient laden sediments streaming through the Conowingo Dam at the rate of approximately 220,000 cubic feet per second.⁵ Figure 1 shows the nutrient laden sediments originating in the headwaters of the Susquehanna River on the northern border of Pennsylvania and flowing through the dam and over one hundred (100) miles south, all the way to the mouth of the Potomac River.⁶ During the aftermath of Tropical Storm Lee, 31% of the nitrogen loading, 61% of the phosphorus loading and 78% of the sediment loading of the Bay for 2011 occurred and emanated from above the Conowingo Dam. Forty percent (40%) of the remaining nutrient and sediment loading in 2011 emanated from above the Conowingo Dam.

⁵ The picture in Figure 2 was taken at 4:30 pm on September 12, 2011. The peak measured rate of flow through the Conowingo Dam from Tropical Storm Lee was 778,000 cubic feet per second at 4:00 am on September 9, 2011.

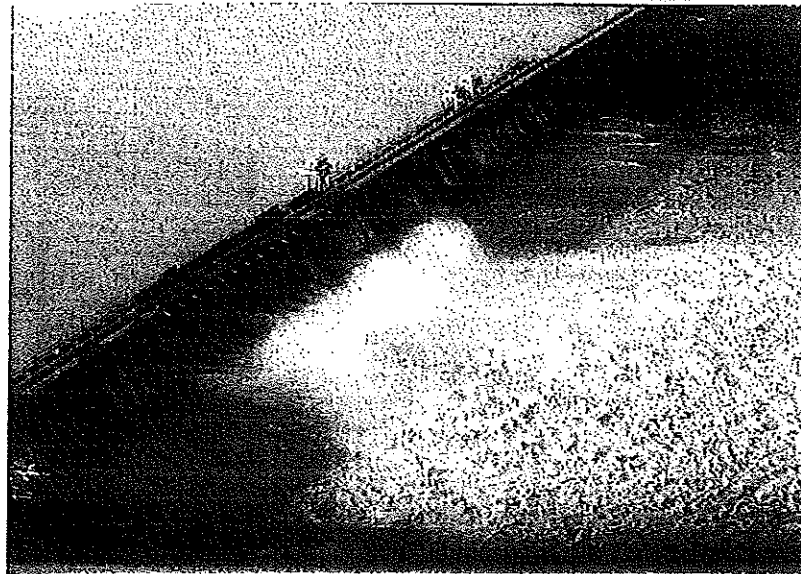
⁶ The satellite photograph in Figure 1 was taken on September 13, 2011 by the National Aeronautics and Space Administration Terra Satellite using Moderate Resolution Imaging Spectroradiometer imaging technology. Note that no sediments are observable in the waters from the Potapasco River; the West, South or Severn Rivers; the Bush, Sassafras and Bohemia Rivers; the Chester River; the Wye River; the Choptank River; the Nanticoke River; or the Pocomoke River.



Figure 1



Figure 2



The Report scientifically demonstrates that nutrient and sediment laden waters flowing through the hydroelectric dams in the Chesapeake Reservoir (*i.e.*, Muddy Run, Safe Harbor and Conowingo) deliver the vast majority of the nutrient loading to the Bay. A significant portion of such nutrient loading comes from the sediments that have accumulated in the reservoirs behind those dams. Yet to date, not one cent (\$.01) is budgeted to dredge and remove such nutrient laden sediments before they are flushed into the Bay.

In 2004, in the aftermath of Hurricane Ivan, the same kind of flushing we saw after Tropical Storm Lee occurred.

The sediment and nutrient loading that occurs after such storm events completely destroys any Bay grass planting and any oyster restoration initiatives that may have taken place between such storm events. The nutrient laden sediments flushing into the Bay during such storm events choke off such grasses and smother the oyster beds. Such nutrient laden sediments continue to release nutrients over a long period of time; as cleaner waters replenish the Bay the nutrients bound to the sediments become water soluble and are naturally released into the waters in the Bay. Such nutrients have an immediate and a longer term deleterious effect on the water quality of the Bay.

Over the past three decades, Maryland's State and local governments have implemented and funded significant programs to reduce the State's contribution to the nutrient loading of the Bay (*e.g.*, WWTP biological nutrient removal, no-till farming practices and buffers, nutrient management plans, MS-4 stormwater permits, BMP stormwater management practices, etc.). It makes no fiscal or scientific sense for Maryland citizens to continue spending millions and millions of dollars to remove an ever diminishing percentage of the nutrient loading to the Bay only to have the discharges from its northern/upstream neighbors completely negate the benefit from such costly initiatives. Maryland's resources and tax revenues are being wasted on ineffectual programs. The time has come for Maryland's local governments to say, "No more!"

Dorchester County has dispatched Funk and Bolton to enlist other counties and those municipalities operating wastewater treatment plants to consider a collective engagement for purposes of coordinating and undertaking the following initiatives:

1. Monitor, intervene in and submit comments during the Exelon Federal Energy Regulatory Commission ("FERC") permitting process. Exelon Generation Company, LLC is in the process of having its permit to operate the Conowingo and Muddy Rivers Hydroelectric Dams renewed. A review of environmental issues should take place as part of the renewal process. Millions of residents of Pennsylvania (and perhaps other States) benefit from the electricity generated by such hydroelectric dams. Exelon should participate in the process of remediating the impact of the sediments that have accumulated in the reservoirs behind those dams. Local government participation in the FERC permitting process will demonstrate the commitment of Maryland's local governments to the promotion of meaningful action to improve the water quality of the Chesapeake Bay.



2. Monitor, urge the State to intervene in, and if necessary attempt to intervene in American Farm Bureau Federation, et al. v. U.S. EPA, U.S. D. Ct. for the Middle District of Pennsylvania, Case No. 11-CV-0067 SHR. The foregoing federal case was initiated by a number of organizations who have objected to the EPA TMDL allocation for the Chesapeake Bay. Some organizations, such as the National Homebuilders Association, take the position that EPA exceeded its authority in establishing the allocation. Some organizations contend that EPA's allocation is directory but not mandatory and contend that the states ultimately are charged with determining how to meet the overall TMDL established by EPA. One glaring problem that has not been raised in the litigation is that EPA's modeling and TMDL allocation completely fails to account for the loading emanating from the Conowingo Dam and reservoirs and, therefore, woefully underestimates the contribution from the states above the Conowingo Dam, particularly Pennsylvania and New York.
3. Object to the BNR requirements that MDE has placed in WWTP NPDES permits and, if necessary, initiate administrative and legal proceedings to challenge those requirements. The nitrogen, phosphorus and suspended solids requirements that MDE has placed and is placing in WWTP NPDES permits that are being renewed exceed its authority under the Clean Water Act and the NPDES program. Requiring local governments to spend tens and hundreds of millions of dollars to remove a fraction of a percent of the solids and nutrient loading to the Bay is arbitrary and capricious and a waste of public funds. Local governments should refuse to engage in such fiscally irresponsible conduct.
4. Object to the Phase II WIP requirements that MDE and MDP are foisting on the counties. Local plans should not be required to have an agricultural component as the counties lack authority to regulate agricultural activity; which is regulated by the federal and State Departments of Agriculture. A local government cannot even obtain the nutrient management plan for a particular farmer or parcel of farmland. The counties should not acquiesce to a flawed TMDL allocation through participation in the Phase II WIP process and should not commit to irresponsible funding of programs that will not meaningfully impact the water quality of the Bay.
5. Consider objections to the MDP master plan initiative. A number of the master plan revisions that MDP seeks to require counties to make appear to lack a rational basis. Absent a valid and sound foundation for such mandated components, the counties could object to including such elements in the master plan revisions that they are being required to submit.



6. Monitor and prepare to oppose any unfounded initiatives the State commits to and then tries to shuffle to local governments during the implementation of RGGI. As displayed at MACo's 2012 Summer Conference, MDE and MDP are considering how to commit to RGGI goals and objectives. If implementation of RGGI follows the path of WIP implementation, Maryland's local governments could be required to make ill conceived expenditures to implement RGGI when a significant portion of the greenhouse gases in Maryland migrate here from power plants and other operations in the Ohio River Valley states. Before local governments find themselves in the position that they face today with respect to the WIPs and the ENR discharge limitations that have been inserted in WWTP NPDES permits, they should monitor State implementation of RGGI and object to poorly conceived and potentially costly initiatives at an early stage.

Funk & Bolton, on behalf of Dorchester County, would appreciate the opportunity to address the matters raised in this letter in more detail and to answer any questions you may have about what Dorchester County is proposing and suggesting. Dorchester County believes that if a number of counties and municipalities coalesce to pursue some or all of the above initiatives, then the State and the agencies responsible for the programs at issue will have greater incentive to reconsider the positions currently being pursued and the mandates imposed in those programs. The potential savings to counties, municipalities and the citizens of Maryland whose taxes finance such programs should be substantial. Uniting with a common purpose will save any individual local government that has to take the lead with such initiatives from bearing a disproportionate burden of the cost in advancing positions that will be beneficial to all. Because the information and analysis necessary to advance the initiatives is the same for all, it does not make sense for each local government to separately gather and analyze such information.

We look forward to meeting and to further exploring the formation of a local government coalition to advance some or all of the foregoing initiatives.

Sincerely,



Charles D. MacLeod

cc: / David B. Dunn, County Manager
John S. Mathias, Esq., County Attorney

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Office of the
County Manager

