

Citizen Guide

Public Participation in Maryland's NPDES Permitting Program

A young girl with brown hair, wearing a pink t-shirt and a colorful floral skirt, stands on a large grey rock in a forest. She is looking towards a small stream that flows over several other rocks. The background is filled with lush green trees and foliage. A large, fallen tree trunk arches over the stream in the distance.

Midshore RIVERKEEPER® Conservancy (MRC)

Chesapeake Legal Alliance (CLA)

July 2017

A Citizen's Guide to Water Quality Permitting in Maryland

Understanding how citizens can participate in the Maryland National Pollutant Discharge Elimination System (NPDES) permit process

The purpose of this document is to promote citizen participation in the Maryland NPDES water quality permitting process.

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I. Introduction and Purpose

This Guide is a joint project of the Midshore RIVERKEEPER® Conservancy (“MRC”) and the Chesapeake Legal Alliance (“CLA”) and was prepared with assistance from Jill Grant & Associates, LLC. It was produced to educate citizens and increase their involvement in environmental decision-making in Maryland.

MRC is a non-profit organization dedicated to the restoration and protection of the Choptank, Miles, and Wye Rivers, Eastern Bay, and their tributaries. The organization serves as an advocate for the health of these tributaries and the living resources they support. MRC employs senior scientists, a Choptank RIVERKEEPER®, and a Miles-Wye RIVERKEEPER® who regularly patrol these rivers and tributaries, are ready to combat illegal pollution, and serve as guardians for these living resources. MRC also employs other scientists, outreach coordinators, and an experienced legal advocate, all of whom work at every level to improve and protect our rivers.

MRC is part of a growing network of over 180 river, bay, and lake “keeper” programs around the nation whose active presence on waterways is improving water quality and protecting fish, wildlife, and vegetation in and around the nation’s waters. Its office is located in Easton, Maryland, and it is a member of Waterkeepers Chesapeake, a group of eighteen Chesapeake Bay advocacy programs that is pooling resources, coordinating efforts, and building leverage to have an impact on environmental legislation and policy aimed at protecting the Chesapeake Bay watershed.¹

CLA is a not-for-profit organization that uses the law to protect and restore the Chesapeake Bay and its lands and waterways. CLA coordinates a network of *pro bono* lawyers who volunteer their time and professional skills, free of charge, to represent environmental organizations, citizens’ groups, and individuals in their efforts to improve the health of the Chesapeake and its watershed. CLA’s goal is to effect systemic change in compliance and enforcement, as well as to improve upon and create more effective laws, regulations, and policies to protect the Bay. The result it strives towards is a Bay with clean water, abundant native plants and animals, and opportunities for people to enjoy the Bay safely.²

We prepared this Guide to educate the public about the key avenues available, through the Clean Water Act permit process, for public participation in protecting our waters. Although this Guide is designed for residents of Maryland, much of the information it contains applies to the public comment process for Clean Water Act discharge permits generally, so it may be useful to residents of other states as well.

¹ For more information about MRC, please visit <http://www.midshoreriverkeeper.org/> or contact us at (443) 385-0511. To see a list of all the Riverkeepers in Maryland, please visit <http://www.waterkeeperschesapeake.com/>.

² For more information about CLA, please visit <http://www.chesapeakelegal.org/> or contact us at info@chesapeakelegal.org; (410) 216-9441.

The Clean Water Act (“CWA”)³ is the federal law that mandates the protection and restoration of surface waters in the United States, and it does so in major part by establishing a National Pollutant Discharge Elimination System (“NPDES”) permit program for certain sources seeking to discharge pollutants into “navigable waters,” as defined by the CWA.⁴ Although it is counterintuitive, “navigable waters” include waters that are no longer – or never were – navigable. The concept underlying the definition is that the body of water has a current or historical nexus to navigable waters. The term is defined broadly in the Clean Water Act as “waters of the United States.” It thus includes most surface waters, including rivers, streams and their tributaries, estuaries, and territorial seas, and may include certain lakes, ponds, wetlands, and oceans.⁵ While this text provides a general working definition, a more precise regulatory definition is the subject of a rule issued by the U.S. Environmental Protection Agency (“EPA”) and the Army Corps of Engineers. This rule is in the process of being revised and also is the subject of litigation as this Guide goes to press.

NPDES permits are issued under the Clean Water Act or an authorized program as a means of limiting the amount of pollution entering the Nation’s rivers, lakes, and streams (and other surface waters).⁶ Under the Clean Water Act, a state can administer the NPDES permit program under state law for discharges to waters within the state’s boundaries if EPA finds that the state law and regulatory regime are as strict and comprehensive as the Clean Water Act and the regulatory program established by EPA. Maryland is one such state. Therefore, the Maryland Department of the Environment (“MDE”), rather than EPA, is the NPDES permitting agency in Maryland. Maryland’s water pollution control laws govern discharges to any surface water or groundwater within the state’s jurisdiction. Groundwater discharges are regulated through state-issued groundwater discharge permits, and if it is established that a point source is connected to groundwater, then it may also be permitted through a NPDES permit.⁷

³ 33 U.S.C. §§ 1251-1388.

⁴ 33 U.S.C. § 1342.

⁵ A more detailed definition of “navigable waters” can be found in regulations issued by the United States Environmental Protection Agency and the United States Army Corps of Engineers. 33 U.S.C § 1362(7); 40 C.F.R. §§ 122.2, 328 (2015). The definition of navigable waters may change over time based on the Corps of Engineers definition. You also may check <http://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Pages/DesignatedUsesMaps.aspx> to determine whether discharges into a particular body of water in Maryland would be subject to the NPDES permit requirements.

⁶ Maryland also requires NPDES permits for certain activities that discharge into groundwater if those discharges might ultimately impact surface water. *See* MD. CODE REGS. 26.08.04.09.

⁷ Some groundwater pollution may also be addressed under the Safe Drinking Water Act, 42 U.S.C. §§ 300f – 300j-26.

The public can have a role in protecting the Nation's waters by participating in the NPDES permitting process. Specifically, before the issuance of any NPDES permit, there is an opportunity for public participation and comment on the draft permit. The permitting agency must consider those comments and respond to all significant issues raised by them before finalizing the permit.⁸

To encourage public involvement, this Guide provides an overview of Maryland's NPDES permitting process. Although reviewing and commenting on NPDES permits is likely to require the assistance of experts to address technical components of the permits, there are aspects of NPDES permits that do not require technical knowledge. This Guide also provides some basic information, tools, and tips to assist you in analyzing and commenting on NPDES permits in Maryland and, if necessary, seeking judicial review of an NPDES permit after it is issued. This Guide does not cover MDE permits outside of the NPDES process, such as groundwater discharge permits.

⁸ 40 C.F.R. §§ 124.10-124.12 (2015).

Public Involvement in the Permitting Process



II. The NPDES Permitting Program

This section explains in more detail what NPDES permits are and how they are drafted.

a. *What is an NPDES Permit?*

An NPDES permit sets the requirements and conditions under which a particular facility may discharge specified amounts of pollutants from point sources into a water body.⁹ In general, EPA and the permitting agency (in Maryland the permitting agency is MDE) determine the quantities of pollutants allowed in a facility's discharge by considering both the existing pollution control technologies that are available for that type of facility and the existing quality of the receiving water body.¹⁰ These amounts, called **effluent limitations**,¹¹ are stated in terms of mass (e.g., pounds per day [lbs/day]) or concentration (e.g., milligrams per liter [mg/l]) and are typically regulated in terms of either average monthly limits ("AMLs") and maximum daily limits ("MDLs"), or AMLs and average weekly limits ("AWLs").¹²

Most states, including Maryland, have obtained the authority to implement the Clean Water Act and administer the NPDES program within their borders.¹³ Accordingly, MDE administers all parts of the NPDES permit program for Maryland subject to EPA oversight.¹⁴

⁹ U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 1-5 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. The term "point source" is explained in subsection I.b, below.

¹⁰ See Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 33 (Mark A. Ryan, ed., 3d ed. 2011).

¹¹ According to 33 U.S.C. § 1362 (11), the term effluent limitation means "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

¹² 40 C.F.R. §§ 122.45(d)(1)-(2) (2015).

¹³ See U.S. Env'tl. Prot. Agency, PER NPDES Profile: Maryland (Jan. 17, 2005), *available at* https://www3.epa.gov/npdes/pubs/maryland_final_profile.pdf.

¹⁴ MD. CODE REGS. 26.08.04.01 § A and 26.08.04.07.

b. Who needs an NPDES Permit?

Dischargers that discharge through “point sources” require NPDES permits in order to discharge pollutants into “navigable waters.”¹⁵ **Point sources** are generally those that discharge from an identifiable location, such as a pipe or man-made ditch, but notably also include concentrated animal feeding operations (“CAFOs”) and certain non-agricultural stormwater runoff.¹⁶ Common dischargers that have point sources are sewage treatment facilities, known as publicly owned treatment works (“POTWs”); industrial facilities, such as manufacturing or power plants, that use and discharge water as part of their industrial processes; combined sewer overflows (“CSOs”), which release excess water and sewerage during times of high rainfall; municipal separate storm sewer systems (“MS4s”) which discharge stormwater gathered from streets and buildings; and CAFOs.¹⁷

There are two types of NPDES permits: individual permits and general permits. **Individual permits** are those issued to one specific facility based on site-specific criteria.¹⁸ Conversely, **general permits** provide standardized permit criteria for facilities that are separately located but share common characteristics.¹⁹ In Maryland, general permits have been issued for sources such as stormwater discharges from industrial and construction sites, smaller MS4s, landfills, and CAFOs.²⁰

The Clean Water Act defines **pollutant** to be any material or substance discharged into water.²¹ It also establishes three regulated categories of pollutants: conventional pollutants, toxic

¹⁵ 33 U.S.C. §§ 1311(a), 1362(12).

¹⁶ 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2 (2015).

¹⁷ See U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 1-6 to 1-7 (Sept. 2010), available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹⁸ Randy Hill, *NPDES Permit Application and Issuance Procedures*, in *The Clean Water Act Handbook* 59, 59-60 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁹ Randy Hill, *NPDES Permit Application and Issuance Procedures*, in *The Clean Water Act Handbook* 59, 59-60 (Mark A. Ryan, ed., 3d ed. 2011).

²⁰ MD. CODE REGS. 26.08.04.08 § (B)(2). A list of general permits is contained in MD. CODE REGS. 26.08.04.09. Smaller MS4s require only a general permit while larger MS4s require individual NPDES permits that involve key procedural and legal differences from most NPDES permits, beyond the scope of this Guide.

²¹ See 33 U.S.C. § 1362(6); U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 1-6 (Sept. 2010), available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

pollutants, and non-conventional pollutants.²² There are currently five regulated conventional pollutants, as specified by statute and regulation: biochemical oxygen demand (“BOD”), total suspended solids (“TSS”), pH, fecal coliform, and oil and grease.²³ There are 65 toxic pollutants designated by regulation, mostly heavy metals, pesticides, and chemical solvents.²⁴ Any other regulated pollutant, such as ammonia, nitrogen, or phosphorus, is considered non-conventional.²⁵ In addition, munitions, biological materials, and radioactive materials are included in the “pollutant” definition.

c. How Are Effluent Limitations Established in an NPDES Permit?

Effluent limitations dictate the allowable discharge of pollutants from a facility, as explained above, and are based upon two main considerations – effluent limitations and water quality standards.

The first is pollution control technology, as reflected in nationally applicable “effluent limitations guidelines” and new source performance standards set by EPA (the latter are applicable to discharges from facilities on which construction commenced after proposal of the standards). EPA issues these limits for various categories of point source discharges, primarily on an industry-by-industry basis, taking into account the best pollution control technology available for the particular industry sector or category of sources for which they are set.²⁶ In the absence of such regulations, MDE uses its “best engineering judgment,” reflecting the best available pollution control technology. Permit limits based on these limits are called **technology-based effluent limitations (“TBELs”)**.²⁷

The second consideration is the water quality standards applicable to both the water body into which the facility will be discharging and any water bodies downstream from that discharge that may be affected by it. Water Quality Standards (“WQS”) prescribe the designated uses of a

²² See 33 U.S.C. §§ 1314(a)(4), 1314(a)(8), 1311(g)(4)(B)(iv); U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 1-6 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

²³ 40 C.F.R. § 401.16 (2015).

²⁴ 40 C.F.R. § 401.15 (2015).

²⁵ U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 1-6 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

²⁶ See 40 C.F.R. Parts 405 *et seq.*

²⁷ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 34-35 (Mark A. Ryan, ed., 3d ed. 2011).

water body (such as swimming or cold water trout fishery) and the numeric or narrative criteria for water quality that may not be exceeded without impairing the water body's designated uses.²⁸ WQS are set by MDE or EPA under Section 303 of the Clean Water Act.²⁹ **Water-quality-based effluent limitations (“WQBELs”)** are included in permits as needed to ensure compliance with these WQS.

A receiving water body that does not meet applicable water quality standards is categorized as an “impaired water.” MDE or EPA is required to set a “**total maximum daily load**” (“**TMDL**”) for impaired water bodies, which is the maximum volume of a pollutant that may be discharged into the water body while still meeting water quality standards. The state, here MDE, then allocates that maximum load among point sources and categories of non-point sources (such as agricultural or urban stormwater discharges), even though the latter do not require NPDES permits. The WQBEL is a limit on the discharges from a point source required to achieve compliance with the TMDL waste load allocation, and is almost always more stringent than a TBEL by itself. This requirement is important in the Chesapeake Bay watershed, where there is a Chesapeake Bay TMDL that has resulted in wasteload allocations of nitrogen, phosphorus, and sediment in each Bay state, throughout the entire watershed. In addition, there are “local” TMDLs for these and other pollutants set for particular water bodies and river segments. These local TMDL allocations must be complied with by any point source discharging to the waters that are subject to those TMDLs.

NPDES permits are issued to publicly owned treatment works (“POTWs”), which treat municipal wastewater, based on either their secondary treatment capability or more stringent treatment capabilities, such as tertiary treatment or enhanced nitrogen removal (“ENR”) capabilities.

²⁸ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 39 (Mark A. Ryan, ed., 3d ed. 2011).

²⁹ See 40 C.F.R. Parts 130 and 131.

III. Maryland's NPDES Permitting Process

This section provides an overview of how NPDES permits are issued in Maryland. While this process is largely the same for both individual and general NPDES permits, there are some differences, which are noted. The various stages in the MDE NPDES permitting process are listed in the chart below, and each stage is described more fully in the narrative that follows the chart.

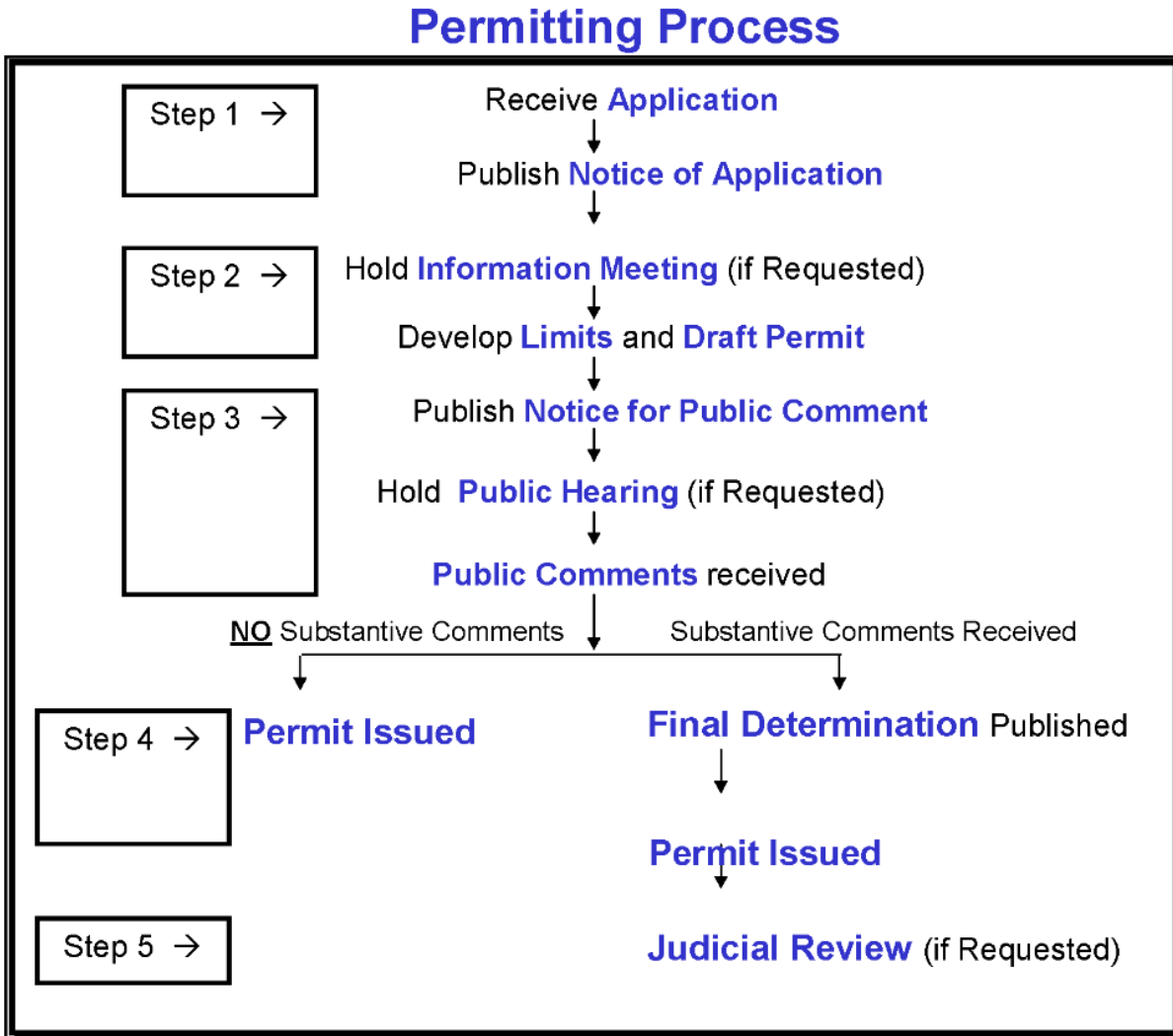


Figure adapted from Water Management Permitting Process document by Maryland Department of the Environment. Original available at: [http://www.mde.state.md.us/programs/Permits/WaterManagementPermits/Documents/03%20Permitting%20Process%20\(with%20Judicial%20Review\).pdf](http://www.mde.state.md.us/programs/Permits/WaterManagementPermits/Documents/03%20Permitting%20Process%20(with%20Judicial%20Review).pdf)

a. Step 1: Application Received; Public Notified

Dischargers must apply to MDE to receive, renew, or modify an individual NPDES permit.³⁰ For **new discharges** or **requests for permit renewal**, applications must be submitted no later than 180 days (six months) prior either to when the facility desires to commence the new discharge activity or to when its current permit will expire.³¹ An individual permit is valid for a maximum of five years,³² except a timely and sufficient application for renewal will extend the expiring permit until MDE issues the new one. A permit may also be modified at MDE's discretion or pursuant to a request by the permittee.³³

Once MDE receives a complete NPDES permit application for a new or renewed discharge, it will publish a public notice containing the applicant's name, the amount and type of the proposed discharge, and the discharge location.³⁴ Major permit modification³⁵ requests are subject to the same public notice and comment requirements, but "only the conditions subject to modification are reopened" and subject to notice and comment.³⁶

MDE's public notice will contain information on how members of the public may request an **informational meeting** on the permit request.³⁷ Informational meetings are forums where MDE and the permit applicant, when required, will explain the proposed discharge and its anticipated effects on water quality.³⁸ These meetings provide an opportunity for members of the public to acquire background information, ask questions, and demonstrate interest and concern.

³⁰ MD. CODE REGS. 26.08.04.01 § B and *see also* 26.08.04.01-1 § A.

³¹ MD. CODE REGS. 26.08.04.01-1 § A(1) - (2).

³² 40 C.F.R. §§ 122.46(a), (c) (2015); MD. CODE REGS. 26.08.04.06 § A(1).

³³ *See* MD. CODE REGS. 26.08.04.10 § A & D.

³⁴ *See* MD. CODE ANN., ENVIR. § 1-602(b)(1); MD. CODE REGS. 26.08.04.01-1 § D.

³⁵ Major modifications are those modifications not defined as minor modifications. Minor modifications are defined as typographical errors, increased frequency of monitoring or reporting by the permittee, certain changes to interim compliance dates, changes in ownership under some circumstances, certain changes in construction schedules for pollution control equipment installation, and removing a point source outfall that does not impact discharges from other outfalls. *See* MD. CODE REGS. 26.08.04.10 § C.

³⁶ *See* MD. CODE REGS. 26.08.04.10 § A(2) & D(2)-(3).

³⁷ MD. CODE REGS. 26.08.04.01-1 § D(2)(g).

³⁸ MD. CODE ANN., ENVIR. § 1-603(d)(1).

Informational meetings must be requested in writing within ten business days of the notice's publication, unless a longer time is specified in the notice, and requests must be made according to the procedure specified in the notice.³⁹ The public notice of application may already include a date for the informational meeting if one has already been scheduled by the Department, at its discretion. For example, MDE can predetermine that it will set a hearing date if it anticipates receiving requests for an informational meeting due to the high profile nature of or controversy surrounding a particular permit or facility.⁴⁰ Otherwise, if an informational meeting is requested in response to the notice of application, MDE will send out a separate public notice indicating the date, time, and location of the meeting.⁴¹ In practice, MDE staff may seek informal resolution of the requester's concerns in order to avoid the informational meeting.

MDE will disseminate public notice of a permit application by publishing the notice at least once a week for two weeks in a newspaper of general circulation in the geographical area in which the discharge is to be located and also will electronically post notice on the MDE website.⁴² After issuing the initial public notice, MDE will begin compiling a **direct notice mailing list** (at times referred to as an "**interested party list**"), which is a list of the individuals who will directly receive future public notices regarding the permit application.⁴³ The initial public notice should provide information on how to request inclusion on the direct notice mailing list and/or an MDE contact who can assist with that process. Individuals who attend informational meetings or public hearings and who sign up, as discussed below, are automatically added to this list. MDE will also add individuals to this interested party list if the individual reaches out to the agency and requests to be added to this list. MDE may also maintain broader direct notice mailing lists, for example, for different geographic areas or types of permits. Individuals or organizations may reach out to MDE to determine what broader lists MDE is keeping at that time and which lists may be of interest. MDE must provide notice of permit applications on its website,⁴⁴ and the public may submit requests for information on specific permits online through MDE's website.

For general permits, unlike individual permits, a facility does not submit an application to receive the permit. As explained in § II.b, above, a general permit is one that applies to a certain category of dischargers and applies the same requirements to all dischargers within that category,

³⁹ MD. CODE ANN., ENVIR. § 1-603(c)(1); MD. CODE REGS. 26.08.04.01-1 § D(2)(g).

⁴⁰ See MD. CODE ANN., ENVIR. §§ 1-603(c)(1), (3).

⁴¹ MD. CODE ANN., ENVIR. § 1-603(c)(3); MD. CODE REGS. 26.08.04.01-2 § A(5).

⁴² MD. CODE ANN., ENVIR. § 1-602(a)(1); MD. CODE ANN., ENVIR. § 1-602(b)(1)(i); MD. CODE REGS. 26.08.04.01-1 § E(2).

⁴³ See MD. CODE REGS. 26.08.04.01-1 § E(4).

⁴⁴ MD. CODE ANN., ENVIR. § 1-602(b)(1); see public notice and information at: <http://mde.maryland.gov/programs/water/WetlandsandWaterways/AboutWetlands/Pages/PublicInformation.aspx>.

or “class.” The general permit itself goes through public comment when MDE first drafts it and also when it is renewed, because, like individual permits, general permits are valid for no more than five years.⁴⁵ In contrast, a discharger claiming that it comes within a category covered by a general permit simply applies for **inclusion** under the general permit; the facility must show it is of the type covered by the general permit, in which case the general permit provisions will apply. When a specific facility requests to be included under a general permit, it submits a **notification of intent (“NOI”)** to MDE.⁴⁶ NOIs are not published prior to MDE approval, and the specific public notification and comment processes differ depending upon the type of general permit authorization being issued.⁴⁷ Individuals interested in knowing when any discharger submits an NOI for a general permit will want to identify which MDE office oversees the specific general permit of interest and request to be added to any notification list they may have for that general permit.

General permits also differ from individual permits in that public involvement does not arise until later in the permitting process, namely, at Step 3 of this section, and informational meetings are held at the discretion of MDE.⁴⁸ This delay occurs because MDE does not provide notice of a general permit until it releases the draft permit and its **tentative determination** explaining the draft permit.⁴⁹ In fact, sometimes this more expedited process occurs with individual permits as well; MDE may issue a draft permit along with the notice of application when renewals or modifications are requested that require few or no changes to the prior permit. Informational meetings are not available as of right for general permits, but instead are subject to MDE’s discretion.⁵⁰

⁴⁵ 40 C.F.R. §§ 122.46(a), (c); MD. CODE REGS. 26.08.04.08 § E and *see* § G(4).

⁴⁶ *See* MD. CODE REGS. 26.08.04.09-1 § B(2).

⁴⁷ *See, e.g., MDE Guide to Environmental Permits and Approvals*, MD Dept. of the Env’t., §§ 3.03, 3.23, 3.24, available at <http://www.mde.state.md.us/programs/Permits/Pages/busguide.aspx> (outlining the public processes for certain general NPDES permits); and compare *General Permit for Stormwater Associated with Construction Activity*, MD Dept. of the Env’t (2015), http://mde.maryland.gov/programs/water/Compliance/Pages/gp_construction.aspx (discussing public process for general NPDES permits for stormwater associated with construction activity) with MD. CODE REGS. 26.08.04.09 § N(3) (outlining public process for general NPDES permits for CAFOs, Animal Feeding Operations (“AFOs”) and Maryland Animal Feeding Operations (“MAFOs”)).

⁴⁸ MD. CODE REGS. 26.08.04.01-2 § B(1)(a).

⁴⁹ MD. CODE REGS. 26.08.04.08 § G(4)(a).

⁵⁰ MD. CODE REGS. 26.08.04.08 § H(2)(a).

b. Step 2: Permit Drafted; Informational Meeting Held Upon Request

As discussed above, MDE usually issues a notice to the public that it has received an application for an individual NPDES permit, or a permit renewal, separately from providing notice of its **tentative determination** on the application. During the time between these two notices, MDE will begin drafting the NPDES permit,⁵¹ and it is during this time that MDE will hold an informational meeting, if requested or otherwise scheduled.

c. Step 3: Draft Permit Released; Public Comment Accepted; Public Hearing Held Upon Request

When MDE proposes to issue an NPDES permit, whether it is an individual permit or a general permit covering a class of discharges, it will issue a proposed draft of the permit along with its tentative determination.⁵² A tentative determination includes the proposed permit limitations and conditions and explains the basis for the Department's decision.⁵³ When MDE determines it should not issue a permit in response to an individual permit application, it will issue a tentative determination that denies the application and explains the basis for its decision.⁵⁴

MDE will also issue a **fact sheet** along with its tentative determination, both for individual permits for major dischargers and for general permits.⁵⁵ Fact sheets provide an in-depth explanation of MDE's decision-making process, explaining proposed effluent limits and permit conditions, the omission of certain provisions, and the choices MDE has made among different available options.⁵⁶ MDE is not generally required to provide fact sheets with its tentative determinations in response to individual permit applications from non-major dischargers.⁵⁷

⁵¹ See MD. CODE REGS. 26.08.04.01-2 § B(1)(a).

⁵² MD. CODE REGS. 26.08.04.01-2 § B(1)(b) and 26.08.04.08 § G(1).

⁵³ MD. CODE REGS. 26.08.04.01-2 § B(1)(a) and 26.08.04.08 § G(3).

⁵⁴ MD. CODE REGS. 26.08.04.01-2 § B(1)(a)(ii).

⁵⁵ MD. CODE REGS. 26.08.04.01-2 § B(1)(c) and 26.08.04.08 § G(2). MDE maintains a list of major dischargers. Major municipal dischargers include all facilities with design flows of greater than one million gallons per day and facilities with EPA/state-approved industrial pretreatment programs. Major industrial facilities are determined based on specific ratings criteria developed by MDE.

⁵⁶ See MD. CODE REGS. 26.08.04.08 § G(2) and NPDES Permit Writers' Manual, at 11-8 to 11-10.

⁵⁷ See 40 C.F.R. § 124.8(a) (2015) (noting that fact sheets are required for all draft permits in certain circumstances, including those which require a variance or contain certain conditions).

However, regardless of facility type, MDE is required to provide fact sheets for NPDES permits that the State Director finds to be the “subject of wide-spread public interest.”⁵⁸ Factsheets may include complex technical information that may be difficult to interpret without assistance from a technical expert. Interested parties may want to seek assistance from technical experts or partner organizations at this stage to assist in reviewing technical aspects of the draft permit.

When MDE issues a tentative determination, it will provide public notice in the same manner as when it receives a permit application.⁵⁹ For general permits, however, MDE will also publish notice of its tentative determination in the **Maryland Register**, a state publication that serves to notify the public of important agency actions and rulemaking.⁶⁰ Publication of the notice of tentative determination begins the official **public comment period**, a 30-day window during which MDE will receive written comments regarding the tentative determination and draft permit.⁶¹ The public notice will contain information on how to submit those comments.⁶² A request to extend the public comment period may be made at this time. The public comment period may be extended once for up to an additional 60 days, upon request.⁶³ Public comments that reference any **supporting materials** generally must include those materials in full, unless they are: laws or regulations, EPA documents of general applicability, documents generally available, or materials that are already part of the administrative record.⁶⁴ If the Department determines that certain sources of supporting information, for example large maps, would be impractical to include, a commenter may instead include the source’s location.⁶⁵

⁵⁸ 40 C.F.R. § 124.8(a) (2015).

⁵⁹ See MD. CODE REGS. 26.08.04.01-2 § B(2)(a) and 26.08.04.08 § G(4)(a).

⁶⁰ MD. CODE REGS. 26.08.04.08 § G(4)(a); *Maryland Register Online*, MD Div. of State Documents, <http://www.dsd.state.md.us/MDR/mdregister.html>.

⁶¹ MD. CODE REGS. 26.08.04.01-2 § B(2)(b)(iii) and 26.08.04.08 § G(4)(b)(ii).

⁶² MD. CODE REGS. 26.08.04.01-2 § B(2)(b)(iii) and 26.08.04.08 § G(4)(b)(ii).

⁶³ MD. CODE ANN., ENVIR. §§ 1-606(d)(2)-(3).

⁶⁴ MD. CODE REGS. 26.08.04.01-3 § A(4) and 26.08.04.08 § I(4). The “administrative record” consists of all the documents that MDE is relying on in making its decision on the application, as well as copies of the public notices, comments and responses to comments, tentative and final determinations, fact sheets, draft and final permits, and other documents related to the permit at issue. See § III(e) below for a discussion of the administrative record.

⁶⁵ MD. CODE REGS. 26.08.04.01-3 § A(5) and 26.08.04.08 § I(5).

The public notice will also provide information on how to request a **public hearing**.⁶⁶ The public hearing is an opportunity for members of the public to present orally and in an open forum their views, comments, and information they may have about the tentative determination.⁶⁷ MDE may, at its discretion, require the permit applicant to attend the public hearing and provide information about the permit application.⁶⁸ Public hearings are recorded or transcribed.⁶⁹ MDE will hold a public hearing on the draft permit when a request for a hearing is made in writing, within 20 calendar days of the publication of the public notice.⁷⁰ Sometimes the notice of tentative determination will already include notice of a public hearing, for the same reasons as in the case of an informational meeting, described above. In that case, the public notice must be provided at least 30 days before the date of the hearing.⁷¹ MDE must accept written comments for up to five days after the public hearing.⁷²

As a rule, notice of public hearings must be published 30 days in advance of the hearing date.⁷³ Accordingly, a request for a public hearing made after notice of a tentative determination is issued will effectively extend the standard 30-day public comment period.

d. Step 4: Public Comment Considered; Final Determination and Permit Issued

If MDE does not receive any public comment adverse to its tentative determination, the tentative determination will become final and any draft permit may be issued as a final permit.⁷⁴ Otherwise, MDE must consider all comments and issue a **final determination** if comments adverse to the tentative determination are received or its final decision differs substantially from the tentative determination and all persons aggrieved have not waived, in writing, the right to a

⁶⁶ MD. CODE REGS. 26.08.04.01-2 § B(2)(b)(iv) and 26.08.04.08 § G(4)(b)(iii).

⁶⁷ MD. CODE REGS. 26.08.04.01-2 § B(5)(f).

⁶⁸ MD. CODE REGS. 26.08.04.01-2 § B(5)(d)&(e).

⁶⁹ 40 C.F.R. § 124.12(d) (2015); MD. CODE REGS. 26.08.04.01-3 § A(2)(c) and 26.08.04.08 § I(2)(c).

⁷⁰ The notice of tentative determination will state the procedure for making a written request for a public hearing. MD. CODE REGS. 26.08.04.01-2 § B(2)(b)(iv) and 26.08.04.08 § G(4)(b)(iii).

⁷¹ MD. CODE REGS. 26.08.04.01-2 § B(2)(c) and 26.08.04.08 § G(4)(c).

⁷² MD. CODE REGS. 26.08.04.01-2 § B(5)(g) and 26.08.04.08 § I(2)(b).

⁷³ 40 C.F.R. § 124.10(b)(2) (2015); MD. CODE REGS. 26.08.04.01-2 § B(6)(a) and 26.08.04.08 § H(4)(a).

⁷⁴ MD. CODE REGS. 26.08.04.01-3 § A(1) and 26.08.04.08 § I(1).

contested case hearing.⁷⁵ A final determination includes an explanation of the Department's decision and the final permit limitations and conditions.⁷⁶ Final determinations are published in the same way as permit applications; for individual permits, the notice must be published in the same newspaper as the notice of public hearing.⁷⁷

MDE will also address the public comments received during the public comment period by issuing a **Response to Comments**.⁷⁸ While MDE is not required to respond to every individual comment, it must respond to those that are "significant."⁷⁹ In its response document, MDE will indicate whether provisions of the draft permit have been changed as a result of any public comment and the reasons for such changes.⁸⁰

e. Step 5: Challenges to Final Permits

MDE's final permit determination may be challenged in circuit court by filing a petition for review. Originally, this challenge took place pursuant to a **contested case hearing**, but now challenges occur through the process of **judicial review** of the permit at issue.⁸¹ If judicial review is sought, MDE has to defend the basis for its permit decision and, if the challenge is successful, MDE may have to revise and re-issue the NPDES permit or decide not to issue the permit at all.

Judicial review is initiated by filing a petition for review of the permit decision at issue with the circuit court for the county where the permitted discharge occurs. The court's review of the validity of a permit issuance or denial is based solely on the **administrative record**.⁸² The

⁷⁵ See MD. CODE REGS. 26.08.04.01-3 § A(2) and 26.08.04.08 § I(2).

⁷⁶ MD. CODE REGS. 26.08.04.01-3 § A(6) and 26.08.04.08 § I(6).

⁷⁷ MD. CODE REGS. 26.08.04.01-3 §§ B(1)-(2) and 26.08.04.08 § J(1).

⁷⁸ See, e.g., MD Dept. of the Env't., Response to Public Comments Regarding the 2014 General Permit for Stormwater Associated with Construction Activity (Oct. 28, 2014), available at <http://mde.maryland.gov/programs/Permits/WaterManagementPermits/Documents/Response-to-Comments-2014-GP-Final.pdf>.

⁷⁹ See, e.g., MD Dept. of the Env't., Response to Public Comments Regarding the 2014 General Permit for Stormwater Associated with Construction Activity (Oct. 28, 2014) at 1, available at <http://mde.maryland.gov/programs/Permits/WaterManagementPermits/Documents/Response-to-Comments-2014-GP-Final.pdf>; 40 C.F.R. § 124.18(a)(2) (2015).

⁸⁰ 40 C.F.R. § 124.18(a)(1) (2015).

⁸¹ MD. CODE REGS. 26.08.04.01-3 § B(3), C (individual permits) and 26.08.04.08 § K (general permits); MD. CODE ANN., ENVIR. § 1-601(b), (c).

⁸² MD. CODE ANN., ENVIR. §§ 1-601(d)(1), 1-606(c).

administrative record for a permit decision includes such documents as the final and draft permits, fact sheets, public comments, and documents relied on by MDE and contained in MDE's supporting file.⁸³ The public notice issued by MDE of its final determination will contain information on how and where to petition for judicial review.⁸⁴ While MDE's final determination with respect to issuance of and inclusion under a general NPDES permit is subject to judicial review, in most cases the application of general permit conditions to an included facility may not be challenged.⁸⁵

Under Maryland law, judicial review of MDE's final determination is available to any person who meets the **standing requirements** and **commented** on the issues raised in the challenge during the public participation process, either in writing during the public comment period or orally at a public hearing.⁸⁶ The standing doctrine ensures that the petitioner has sufficient interests at stake to seek judicial review of the permit, and requires: "(a) an actual or threatened injury, (b) caused by defendant's conduct, which is (c) redressable by the court."⁸⁷ A concern that pollution has affected or threatens to affect an individual's demonstrated recreational and aesthetic interests in a waterbody constitutes sufficient injury for standing purposes.⁸⁸ An organization (as opposed to a person) has standing to petition for judicial review if "(1) its members would have standing, (2) the interests the organization seeks to protect are germane to its purposes, and (3) neither the claim asserted nor the relief requested requires individual members to participate in the litigation."⁸⁹ As a precaution, it may be advisable to file in the name of one or more members of the organization, as well as the organization itself.

As noted above, petitions for judicial review of MDE's final determination, for both an individual or general permit, must be submitted to the circuit court for the county in which the application indicates the discharge will occur, within 30 calendar days of publication of the notice

⁸³ MD. CODE ANN., ENVIR. §§ 1-601(d)(1), 1-606(c).

⁸⁴ See MD. CODE REGS. 26.08.04.01-3 § B(3)(d) and 26.08.04.08 § J(2)(d).

⁸⁵ See MD. CODE REGS. 26.08.04.08 §§ J(2)(f) and K(1); *but see* 26.08.04.09 § N(3)(1)(ii) (providing that approval of certain plans required to be submitted by CAFOs, Maryland Animal Feeding Operations ("MAFOs"), and Animal Feeding Operations ("AFOs") may be challenged).

⁸⁶ MD. CODE ANN., ENVIR. § 1-601(c).

⁸⁷ *Patuxent Riverkeeper v. Maryland Department of the Environment*, et. al., (Md. Ct. App. 2011).

⁸⁸ Melanie Sheperdson, *Citizen Suits*, in *The Clean Water Act Handbook* 257, 260 (Mark A. Ryan, ed., 3d ed. 2011).

⁸⁹ Melanie Sheperdson, *Citizen Suits*, in *The Clean Water Act Handbook* 257, 260 (Mark A. Ryan, ed., 3d ed. 2011).

of final determination.⁹⁰ Judicial review is limited to objections raised during the public comment period, unless the petitioner can demonstrate that the objections were not ascertainable at that time or that the circumstances on which the objections are based arose afterward.⁹¹ The decision of the circuit court may subsequently be appealed to the Court of Special Appeals.⁹²

Petitioners should consult the Maryland Court Rules for administrative and substantive requirements regarding judicial review, and should also consider retaining legal counsel.⁹³

IV. Public Involvement

This section provides practical tips for the public in their review, comment, and challenge of NPDES permits in Maryland.

a. Pre-Application

- Develop an understanding of all relevant **state and federal laws and regulations**. The Clean Water Act is codified at 33 U.S.C. §§ 1251-1388, and its regulations are codified at 40 C.F.R. §§ 100-140, 401-471, and 501-503. The United States Code and Code of Federal Regulations are available online through the Government Printing Office (“GPO”), at <https://www.gpo.gov/fdsys/search/home.action>.

The Maryland Code addresses water pollution control largely in Title 4 - Subtitle 4, and Title 9 - Subtitle 3 of its Environment Article, available online at [https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules?guid=N22F98C609B6A11DB9BCF9DAC28345A2A&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules?guid=N22F98C609B6A11DB9BCF9DAC28345A2A&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)). Implementing regulations are codified at COMAR 26.08, available online at http://www.dsd.state.md.us/COMAR/subtitle_chapters/26_Chapters.aspx.

- EPA’s NPDES **permit writers’ manual** is a resource that provides a comprehensive overview of the framework of the NPDES program. Designed to be a technical guide for new state and EPA permit writers, the manual explains the basic steps of permit development and issuance. It also serves as one of the principal training tools to help permit writers develop legally defensible and enforceable NPDES permits. The manual is available on EPA’s website at <https://www.epa.gov/npdes/npdes-permit-writers-manual-0>. EPA’s general website for the NPDES program also has useful information and can be found at <https://www.epa.gov/npdes>.

⁹⁰ MD. CODE ANN., ENVIR. §§ 1-605(b), 1-601(e)(1).

⁹¹ MD. CODE ANN., ENVIR. § 1-601(d)(1)(i)-(ii).

⁹² MD. CODE ANN., ENVIR. § 1-601(e)(2).

⁹³ The Maryland Court Rules for judicial review may be found at MD Rules 7-201 to 7-211.

- Research **alternative technologies**. Identifying alternative technologies is useful for understanding whether there are more efficient ways to conduct business. Once a new technology is identified, you can compare the technology-based effluent limit with the existing technology and potentially make a case for stricter limits if the new technology can reduce the effluent to a lower concentration. To learn about the most recent and applicable technologies, consider conducting outreach to legal, technical, or other partner organizations that often review NPDES permits. These organizations and experts can likely help you determine what technologies may be considered an alternative technology.

- **Investigate point sources** in your watershed. For example:
 - Peruse **databases** to anticipate upcoming renewals or check for public notices you may have missed. MDE maintains a **Wastewater Permits Interactive Search Portal**, available at <http://mes-mde.mde.state.md.us/WastewaterPermitPortal/Default.aspx>, which provides facility information and may also include final permits, fact sheets, and other documentation.

 - If a permit is being renewed or a modification is being requested, study the discharger's **compliance history** to better understand their reputation and past performance. EPA's **Enforcement and Compliance History Online ("ECHO") database**, available at <https://echo.epa.gov>, contains all permit information for NPDES-permitted dischargers, including a permit's expiration date. Utilize "More Search Options" to restrict your search to "Water" for either the whole state or a particular county or zip code. Once you have selected a facility from the results, view its permit limits by selecting "CWA Pollutant Loading Report" from the "Related Reports" section. Within this report, there will be an option to "View Permit Limits and Monitoring Requirements." Review the facility's "Enforcement and Compliance" history to gain an understanding of the facility's compliance with its current permit. If a facility has frequent violations, determine the effluent limits it violated and by how much the violations exceeded the permitted limits. Although the ECHO database is only as up-to-date as information provided by the permitting agency, in this case MDE, it may have more permit information than is available on MDE's Wastewater Permits Interactive Search Portal.

 - MDE's **Permit Application Database**, available at <http://www.mde.maryland.gov/programs/Permits/Pages/SB47.aspx>, contains information on permit applications received, as well as the dates for informational meetings, public hearings, and request deadlines. Additionally, MDE has a **master calendar** of its hearings and meetings available to view at <http://mde.maryland.gov/Pages/Calendar.aspx>.

- **Investigate** current and past **water quality conditions**. For example:
- Consult with a **third party** such as your local Riverkeeper or watershed group and ask if they sample the water quality in the interested area. Contact the local college or university and see if their science department has conducted any local research. Ask if they have a science lab and the capabilities to analyze water quality samples.
 - **My WATERS Mapper**, available at <https://watersgeo.epa.gov/mwm/>, is an interactive map that displays data from EPA’s Office of Water program. The map displays the status of NPDES permits for each State, summary information from the Clean Watershed Needs Survey, and water quality assessments.
 - If water quality data is not available, considering collecting your own water samples. It’s highly recommended to contact a sampling and analytical testing firm and discuss sampling protocols.
 - While you are in the field investigating conditions, take photos, accompanied with GPS locations of anything worth documenting that could be used to show baseline conditions or an impact over time. Look for the impact any discharge or permitted action may have on the affected water body including on your use, or other’s use, of the water.
 - Determine whether the water bodies in your watershed are subject to a **Total Maximum Daily Load (“TMDL”)**. TMDLs are a limit on the amount of a pollutant that can be discharged into a water body from all sources combined and they are described in Sections II.c. and VI.b. of this Guide. If a TMDL is present, familiarize yourself with the **wasteload allocations** contained in the TMDL document. Information about TMDLs, including which waterbodies have one, how the TMDL is calculated, the implementation plan, and contact information can be found on MDE’s website at <http://mde.maryland.gov/programs/water/TMDL/Pages/index.aspx>.

b. Get Notice of the Permit

- Contact MDE to ask what kind of contact lists can be created and that you can be put on. When contacting MDE ask to speak with a manager in its industrial or municipal permits department. Municipal permits address discharges from municipal wastewater and water treatment facilities. Industrial permits address discharges from industrial, commercial, or institutional facilities. Get creative and ask MDE whether it can create a list based on a geographic area, such as a watershed or sub-watershed, or based on a substantive issue of concern.
- Watch **local newspapers**. For both individual and general NPDES permits, public notice is likely to be posted in the legal notice section of a newspaper of general circulation in the geographic area of the proposed discharge.⁹⁴
- Sign up for **MDE's Direct Notice Mailing List** for a particular permit by following the instructions in the public notice and/or reaching out to the MDE contact indicated in the notice.
- For general permits, notice will also appear in the **Maryland Register**.⁹⁵ The Maryland Register is published every two weeks and is available online at <http://www.dsd.state.md.us/MDR/mdregister.html>.
- Visit MDE's Public Notices and Information website regularly to see a list of public notices, which are posted on the website twice a month: <http://mde.maryland.gov/programs/water/WetlandsandWaterways/AboutWetlands/Pages/Publicinformation.aspx>.

c. Map the Timeline and Identify Key Dates; Request and Attend an Informational Meeting

- Start a **timeline or calendar** to keep track of the relevant dates and deadlines as they are set.
- For individual NPDES permits, submit an **informational meeting request**, in writing, within ten days of publication of the public notice, to the address specified in the notice.⁹⁶ Informational meetings are useful and allow you to ask MDE questions about the facility and the nature of its operation.
- For general NPDES permits, informational meetings are provided at MDE's discretion.
- The **public notices** will provide all information regarding dates and deadlines. Pursuant to federal regulations, public notice of any public hearing is required to reference the dates of

⁹⁴ See MD. CODE REGS. 26.08.04.01-1 § E(2) and 26.08.04.08 § G(4)(a).

⁹⁵ MD. CODE REGS. 26.08.04.08 § G(4)(a).

⁹⁶ See MD. CODE REGS. 26.08.04.01-1 §D(2)(g).

all previous public notices relating to the permit.⁹⁷ However, you can also use MDE's **Permit Application Database**, at <http://www.mde.maryland.gov/programs/Permits/Pages/SB47.aspx>, to look up the dates for informational meetings, public hearings, and the deadlines to request them. Scheduled meetings and public hearings will also be on MDE's **master calendar**, available at <http://mde.maryland.gov/Pages/Calendar.aspx>.

- **Attend the informational meeting prepared** to listen and to ask questions. Often the permit applicant will be represented at the informational meeting. Take notes on MDE's and/or the permit applicant's explanations of the proposed discharge and any anticipated effects. Ask questions based on your knowledge of the regulations, information available in EPA or MDE databases, and any other materials you have been able to collect and review as outlined in subsection (e) of this section. Ask MDE if there are similar facilities that have an NPDES permit and how they compare. If the ECHO database shows that a facility has violated its existing permit, ask why these violations occurred and how they are going to be prevented in the future. If the water body has a TMDL, ask MDE why they are allowing an additional source of pollution. Take note of the answers to your questions and the questions of others. Request that MDE consider issuing a fact sheet along with the draft permit if it is not already required to do so.

d. Consider Strategy and The Involvement of Other Interested or Desirable Parties

- **It may not be necessary to comment on every permit application.** For example, does the draft permit seem protective? Has the facility been in compliance in the past? Have the water quality standards applicable to the water body at issue been achieved? If so, efforts may be better spent on more controversial or problematic point source discharges.
- Consider the benefit of **hiring technical experts**, such as engineers or consultants, to help make sense of proposed permit limits and to provide suggestions for improvement. Are the limitations and conditions particularly complex? Is this a facility for which there is no pre-existing effluent guideline? Is the discharge particularly controversial? Are there sensitive populations, either animal or human, that require special consideration? Are there federally listed endangered species in the vicinity of the discharge that could be affected?
- Consider **retaining an attorney** to assist in gathering and analyzing materials, drafting comments, or assisting you in drafting comments. The best approach if you are considering a challenge to the final determination is to hire an attorney with experience in environmental law. There are non-profit organizations, like the Chesapeake Legal Alliance, and law clinics that you can contact and ask for assistance, often free of charge. Judicial review is a legal proceeding, and as it will be limited to objections raised during the public comment period,

⁹⁷ 40 C.F.R. § 124.10(d)(2)(i) (2015).

having legal counsel involved early helps to ensure that the administrative record includes information that supports your position and important arguments are spotted and preserved.⁹⁸

- Investigate other potential allies such as Waterkeepers⁹⁹ and local watershed organizations. These groups tend to have experience with NPDES permits and are known for their grassroots organizing when it comes to holding polluters accountable. There may be other neighbors who will be affected by, or are concerned about, the proposed discharges, or organizations with an interest. Identifying and working with allies enables you to receive the benefit of other ideas, pool resources, share the workload, and provide strength in numbers in any proceeding.

e. Evaluate Standing Opportunities

As discussed above, only individuals or organizations that have **standing** and have participated in the public participation process can maintain a petition for judicial review.¹⁰⁰ If you are a concerned citizen but do not use the water body in question, you may not have standing to challenge the issuance of an NPDES permit that would affect those waters.¹⁰¹

- **Consider whether or not you will have standing.** Have you engaged in any recreational activities in that water body or have you enjoyed it aesthetically? Do you study any of the animals that use the water body? Do you wish to continue those activities in the future, and will lack of adequate pollution controls in the permit render that impossible or cause a negative experience? Is there a person or entity that may suffer economically?

If you do not have standing and you think judicial review may be important, consider **encouraging the involvement of other individuals or organizations** who do have standing. It is important to identify an individual or organization **before the end of the public process**, as they cannot petition for review without first submitting public comments, to which the judicial review will generally be limited.¹⁰² If possible, work with these individuals and organizations to ensure that their comments include your concerns.

⁹⁸ MD. CODE ANN., ENVIR. §§ 1-601(d)(1)(i)-(ii).

⁹⁹ To find your local Waterkeeper, visit <http://waterkeeper.org/waterkeepers/>.

¹⁰⁰ MD. CODE ANN., ENVIR. § 1-601(c).

¹⁰¹ See Melanie Sheperdson, *Citizen Suits*, in *The Clean Water Act Handbook* 257, 260-61 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁰² MD. CODE ANN., ENVIR. §§ 1-601(c)(2)(ii), (d)(1).

f. Gather Relevant Information and Identify Important Documents

- Public notices issued throughout the permitting process will include information on how to review and copy **permit applications, supporting information, public comments, tentative and final determinations, fact sheets, and draft permits.**¹⁰³
- If the NPDES permit is seeking to regulate an industrial discharge, there may be an applicable **effluent guideline or a new source performance standard.** These are, in effect, TBELs promulgated by EPA to regulate pollutant discharges from certain classes of industrial facilities.¹⁰⁴ A user-friendly resource for locating any applicable effluent guidelines can be found at <https://www.epa.gov/eg/industrial-effluent-guidelines>.

State-issued NPDES permit limitations for dischargers must be at least as stringent as federal effluent guidelines.¹⁰⁵ For Maryland dischargers, MDE has promulgated additional discharge limitations, which can be found at <http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=26.08.03>. MDE requires that the **best available technology economically achievable (“BAT”)** be incorporated into NPDES permit conditions.¹⁰⁶

- **Secondary treatment** is the minimum standard applicable to all POTWs discharging into Maryland waters.¹⁰⁷ These minimum standards are codified at 40 C.F.R. § 133.102. If the facility of concern is a POTW, contact MDE to ask whether the facility is, or will be, scheduled for upgrades and when those upgrades can be expected.
- If there is not an applicable effluent guideline or new source performance standard applicable to a particular discharger, MDE will use its best professional judgment to impose a **case-by-case TBEL.**¹⁰⁸ The imposition of a case-by-case TBEL will require the Department to issue a

¹⁰³ 40 C.F.R. § 124.10(d)(1)(iv); MD. CODE REGS. 26.08.04.01-1 § E(6)-(7), 26.08.04.01-2 § B(2)(b)(ii), 26.08.04.01-3 § A(7), and 26.08.04.08 § G(4)(b)(i).

¹⁰⁴ See *Industrial Effluent Guidelines*, U.S. Evtl. Prot. Agency (Jan. 29, 2016), <https://www.epa.gov/eg/industrial-effluent-guidelines>. See also discussion in § II.c. and 40 C.F.R. Parts 405 *et seq.*

¹⁰⁵ 40 C.F.R. § 125.3(a) (2015); MD. CODE ANN., ENVIR. § 9-314(c).

¹⁰⁶ MD. CODE REGS. 26.08.03.01 § C(2)(b).

¹⁰⁷ MD. CODE REGS. 26.08.04.04 § C(1).

¹⁰⁸ U.S. Evtl. Prot. Agency, NPDES Permit Writers’ Manual, 5-44 to 5-46 (Sept. 2010), available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf; 40 C.F.R. § 125.3(c)(2) (2015); MD. CODE REGS. 26.08.04.02 § B.

fact sheet along with the draft permit, which will justify the imposition of such TBELs and identify any data or information used in their development, even if a fact sheet would not otherwise be required.¹⁰⁹

- Determine the **water quality standards** applicable to the receiving water body.¹¹⁰ WQS establish both a water body's designated uses (e.g., fishing, swimming, agricultural) and the maximum permissible pollutant concentrations (criteria) required to maintain those uses.¹¹¹ Uses are arranged in four classes, and the individual designated uses included in each use class can be found at http://textonly.mde.state.md.us/programs/Water/TMDL/Water%20Quality%20Standards/Pages/Programs/WaterPrograms/TMDL/wqstandards/wqs_designated_uses.aspx.
- Use Class I: Water Contact Recreation, and Protection of Nontidal Warmwater Aquatic Life
 - Use Class I-P: Water Contact Recreation, Protection of Aquatic Life, and Public Water Supply
 - Use Class II: Support of Estuarine and Marine Aquatic Life and Shellfish Harvesting
 - Use Class II-P: Tidal Fresh Water Estuary – includes applicable Use II and Public Water Supply
 - Use Class III: Nontidal Cold Water
 - Use Class III-P: Nontidal Cold Water and Public Water Supply
 - Use Class IV: Recreational Trout Waters
 - Use Class IV-P: Recreational Trout Waters and Public Water Supply

MDE has developed an interactive map of **use classes** for Maryland:

<http://textonly.mde.state.md.us/programs/Water/TMDL/Water%20Quality%20Standards/Pages/DesignatedUsesMaps.aspx>. The corresponding **water quality criteria** for each use class can be found at <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.03-3.htm>.

¹⁰⁹ U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 5-48 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf; 40 C.F.R. §§ 124.8(a), 124.56(b)(1)(iv) (2015); MD. CODE REGS. 26.08.04.01-2 §§ B(1)(a), B(1)(c) and 26.08.04.08 §§ G(2), G(3)(c).

¹¹⁰ *See Maryland's Surface Water Quality Standards*, MD Dept. of the Env't, <http://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Pages/index.aspx> and *Water Quality Standards Regulations: Maryland*, U.S. Env'tl. Prot. Agency (March 16, 2016), <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-maryland>.

¹¹¹ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 40 (Mark A. Ryan, ed., 3d ed. 2011); 40 C.F.R. §§ 131.6(a), (c) (2015).

There are separate **numerical criteria for toxic substances**, which are outlined at <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.03-2.htm>. The numerical toxic substances criteria apply to Maryland's water bodies as specified in <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.03-1.htm> and in the water quality criteria linked above. MDE has also promulgated **narrative water quality criteria**, which provide a description of prohibited pollution: generally, that which is harmful to human health or the environment, interferes with a designated use, or is otherwise objectionable.¹¹²

NPDES permit limitations cannot allow pollutant discharges that would cause or are likely to cause the receiving water body to exceed either the water quality criteria or numerical criteria for toxic substances unless the permit imposes WQBELs to ensure continued compliance.¹¹³

Lastly, Maryland's waters are divided into **three tiers** for **anti-degradation** purposes.¹¹⁴ Maryland's anti-degradation policy imposes additional requirements upon permit applicants seeking to discharge into high-quality waters, which are waters where water quality exceeds the minimum requirements; these waters are designated as **Tier II**.¹¹⁵ **Tier III** waters are called "outstanding natural resource waters," and are described as "waters of national and State parks and wildlife refuges, and waters of exceptional recreational or ecological significance;" the water quality of such waters is required to be maintained and protected.¹¹⁶ Maryland has yet to designate any **Tier III waters**.¹¹⁷ Any waters not designated Tier II or III are **Tier I**.¹¹⁸

¹¹² See MD. CODE REGS. 26.08.02.03 § B.

¹¹³ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 42 (Mark A. Ryan, ed., 3d ed. 2011); 40 C.F.R. § 122.44(d)(1)(i) (2015).

¹¹⁴ See MD. CODE REGS. 26.08.02.04, 26.08.02.04-1, and 26.08.02.04-2.

¹¹⁵ See MD. CODE REGS. 26.08.02.04 and 26.08.02.04-1. Tier II maps can be found at: <http://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Pages/HighQualityWatersMap.aspx>. The minimum requirements can be found in the MDE water quality standards codified at <http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=26.08.02> Maryland's Tier II waters are listed at <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.04-1.htm>.

¹¹⁶ MD. CODE REGS. 26.08.02.04-2 § A.

¹¹⁷ *Maryland's High Quality Waters (Tier II)*, MD Dept. of the Env't., <http://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Pages/AntidegradationPolicy.aspx>.

¹¹⁸ MD. CODE REGS. 26.08.02.04-1 § D(1).

- Determine the water body’s **past and present health**. Look to Maryland’s **Integrated Reports**, published once every two years, to determine whether the water body currently meets and has historically met applicable water quality standards.¹¹⁹ Maryland’s 2014 Integrated Report is available online, at <http://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Pages/2014IR.aspx>. Reports for prior years are available at http://mde.maryland.gov/programs/water/TMDL/Integrated303dReports/Pages/303d_list_archives.aspx.
- Become familiar with the Maryland Public Information Act and submit a **Public Information Act (“PIA”) request** to review documents and information relating to a permitted facility that are not already available in the administrative record for the permitting action at issue. Such information may include **past permits, past performance** under those permits, **past public comment and agency responses, discharge monitoring reports (“DMRs”), notices of non-compliance or violation, filings from past hearings or litigation, and correspondence** between the facility and agency. You can also use a PIA request to obtain any **water quality data** from testing conducted both upstream and downstream of the proposed discharge. Any interested person may request to inspect or copy MDE’s public records.¹²⁰ Information regarding current permits limits, past performance, DMRs, and past violations may also be available online via EPA’s ECHO database.

PIA requests may be made via electronic or regular mail, online form, fax, or by phone.¹²¹ As of the writing of this Guide, contact MDE’s Water Management Administration (“WMA”) PIA Liaison, and direct requests to their attention by mail at: Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, MD 21230.¹²² MDE also maintains an online request form, available at <http://www.mde.state.md.us/programs/Marylander/PublicInfoAct/Pages/submitapia.aspx>.

Information requests should be as specific as possible, including your name, address, and telephone number, along with the facility name and address, and the type of documents sought.¹²³ You will want to cast your request as broadly as possible. Written requests must

¹¹⁹ See MD Dept. of the Env’t., 2014 Integrated Report Fact Sheet, *available at* <http://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Pages/2014IR.aspx>.

¹²⁰ MD. CODE REGS. 26.01.04.03.

¹²¹ See MD. CODE REGS. 26.01.04.

¹²² *MDE PIA Liaisons*, MD Dept. of the Env’t, <http://mde.md.gov/programs/Marylander/PublicInfoAct/MDERequestersGuide/Pages/CitizensInfoCenter/PublicInfoAct/mderequestersguide/faqtable.aspx>.

¹²³ See MD. CODE REGS. 26.01.04.05 *and MDE Guide for PIA Information Requesters*, MD Dept. of the Env’t,

also include the requestor's signature.¹²⁴ If the request is granted, MDE will provide copies of or access to the requested documents within 30 days.¹²⁵ Requestors are generally charged search and copying fees, unless a fee waiver is requested and granted.¹²⁶ **Fee waivers** should be requested in writing and are granted at the discretion of MDE when determined to be in the best interest of the public.¹²⁷ To help with a fee waiver request, suggest that you are willing to visit the office where the files are stored and that, if possible, you will bring a scanner to copy available files. You may also request to use their office scanner to scan files to a portable memory stick. For frequently asked questions ("FAQs") regarding PIA requests, as well as associated search and copying fees, visit <http://www.mde.state.md.us/programs/Marylander/PublicInfoAct/Pages/mderequestersguide.aspx>. The PIA manual is a resource developed for those who have the responsibility to implement the Act and can be viewed at http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf. **A template Maryland Public Information Act request & fee waiver letter document is included at the end of this Guide in section VII.**

If you find yourself in a dispute with MDE regarding the Public Information Act, you can reach out to the Ombudsman designated to resolve disputes between applicants and custodians relating to requests for public records.¹²⁸ This person has the responsibility to make reasonable attempts to help applicants and records custodians resolve their dispute. More information on the types of disputes, and how to contact the Public Access Ombudsman, can be found here: <http://www.marylandattorneygeneral.gov/Pages/PAO/default.aspx>.

<http://www.mde.state.md.us/programs/Marylander/PublicInfoAct/Pages/mderequestersguide.aspx>.

¹²⁴ MD. CODE REGS. 26.01.04.05.

¹²⁵ MD. CODE REGS. 26.01.04.07 § B.

¹²⁶ *See generally* MD. CODE REGS. 26.01.04.13.

¹²⁷ MD. CODE REGS. 26.01.04.13 § G; *MDE Guide for PIA Information Requesters*, <http://www.mde.state.md.us/programs/Marylander/PublicInfoAct/Pages/mderequestersguide.aspx>.

¹²⁸ MD. General Provisions Article § 4-1B-04.

g. Analyze the Permit; Request a Public Hearing

- If the notice of tentative determination does not indicate that a public hearing has already been scheduled,¹²⁹ **submit a public hearing request**, in writing, within 20 calendar days of the publication of the public notice, to the address specified in the notice.¹³⁰

Before the public hearing, review and analyze the draft permit:

- Compare the **effluent limitations** in the draft permit with any applicable **effluent guidelines** or new source performance standards. See if there are relevant standards in MDE's promulgated effluent limitations,¹³¹ and check for any **variances** from otherwise-applicable permit limitations or conditions. Make sure the effluent limitations are **at least as stringent as the BAT standards**.¹³² As indicated above, if the facility seeking a permit is **new** or the discharge is the result of a **new addition of pollution to an existing discharge** that is independent of, or replaces a source at an existing facility, the federal **new source performance standards ("NSPS")** (which accompany the federal effluent guidelines in the Code of Federal Regulations) will apply.¹³³
- Where applicable, **compare the draft permit with the facility's existing permit**. In general, a new permit may not contain effluent limitations that are less stringent than those in the previous permit.¹³⁴ This requirement is known as **anti-backsliding**. Because there are exceptions,¹³⁵ look for an explanation in MDE's analysis if you see effluent limitations in the new permit that are less stringent than the previous permit.
- Examine a facility's **past performance**. Use the ECHO database (as discussed in Section IV.a of this Guide). Review the reported discharges in the **discharge monitoring reports**. Do they indicate that the facility was in compliance with the limits established by its prior permit? Are

¹²⁹ MD. CODE REGS. 26.08.04.01-2 § B(2)(c) and 26.08.04.08 § G(4)(c).

¹³⁰ MD. CODE REGS. 26.08.04.01-2 § B(2)(b)(iv) and 26.08.04.08 § G(4)(b)(iii).

¹³¹ See MD. CODE REGS. 26.08.03.00.

¹³² 40 C.F.R. § 125.3(a) (2015); MD. CODE ANN., ENVIR. § 9-314(c); MD. CODE REGS. 26.08.03.01 § C(2)(b).

¹³³ 40 C.F.R. § 122.29 and Subchapter N (Parts 401 et seq.).

¹³⁴ 33 U.S.C. § 1342(o)(1); 40 C.F.R. § 122.44(l)(1) (2015); U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 7-2 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹³⁵ See 33 U.S.C. §§ 1342(o)(1)-(2) and 40 C.F.R. §§ 122.44(l)(2)(i)-(ii) (2015).

there any **notices of non-compliance or violation** in the file? Have there been any **hearings or litigation** regarding past performance? Is the discharger currently under, or subject to a consent order or decree for lack of compliance? All of this information is helpful when forming the following arguments: why the facility should not be granted the renewal permit, why the permit should include certain special conditions, why MDE should require the facility to develop plans that identify preventative measures to address frequent violations, or why MDE should have more regular and thorough oversight of the facility.

- If the draft permit proposes a new discharge, or an increase in a pre-existing discharge, that will potentially impact the water quality of a **Tier II water** body, an **antidegradation analysis** must be performed.¹³⁶ If the same impact could occur with respect to a **Tier III water** body (assuming there are Tier III waters in the future), the discharge may only be permitted if there will be **mitigation** of those effects elsewhere in the water body.¹³⁷ In such cases, check that the antidegradation or mitigation analysis is part of the draft permit.
- Examine the permit’s **monitoring and reporting requirements**, as monitoring will serve to record the facility’s performance. There are no set requirements for monitoring frequency, other than that it be sufficient to obtain samples or data “representative of the monitored activity.”¹³⁸ Factors that should be considered in setting monitoring frequency include: variability of the discharge, the facility’s design capacity, treatment method, compliance history, and nature of the pollutants.¹³⁹ Reporting frequency may also be determined on a case-by-case basis, but should generally occur no less than once a year.¹⁴⁰ While certain parameters, such as the pollutants limited and the effluent volume, will be subject to monitoring in every permit, the Department has discretion to include additional monitoring parameters as well.¹⁴¹

¹³⁶ MD. CODE REGS. 26.08.02.04-1 §§ A-B.

¹³⁷ MD. CODE REGS. 26.08.02.04-2 § I(1).

¹³⁸ 40 C.F.R. §§ 122.41(j)(i), 122.48(b); MD CODE REGS. 26.08.04.03 § A; U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 8-5 – 8-6 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹³⁹ U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 8-5 – 8-6 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹⁴⁰ 40 C.F.R. § 122.44(i)(2) (2015); *see also* MD. CODE REGS. 26.08.04.03 § C(3). MDE requirements must be at least as stringent as the federal. *See, e.g.*, 40 C.F.R. § 123.25.

¹⁴¹ 40 C.F.R. §§ 122.44(i)(1), 122.48(b) (2015); MD. CODE REGS. 26.08.04.03 § A(1) and 26.08.04.08 § C.

- Note that the effluent limitations are expressed in terms of **mass** (weight – e.g., lbs, grams) and **concentration** (portion of volume – milligrams per liter (mg/l) whenever possible).¹⁴² Generally, unless inappropriate, discharge limits must be imposed in terms of weight,¹⁴³ but both measures are beneficial. Mass-based limitations encourage water conservation and pollution prevention, while concentration-based limitations ensure that pollutant discharge is always proportionate with respect to the total amount of discharge being released.¹⁴⁴
- **Net credits** may be granted to a requesting facility when it cannot meet the prescribed effluent guidelines because its intake water is already polluted.¹⁴⁵ If you see net credits for pollutants in the draft permit, check that they do not exceed the pollutant levels in the intake waters. Also, ensure that monitoring is required of the influent, as well as the effluent.
- Determine whether **WQBELs** should be included or are appropriate. Does the monitoring data or do the permit terms show that there has been or will be a discharge of pollutants for which there is an applicable limit in the water body’s **water quality criteria** or the **numeric criteria for toxic substances**? Find out whether there are any special circumstances regarding the receiving waters near the proposed discharge, such as the presence of sensitive aquatic species, that may need greater protection than that provided by the WQBEL. Does MDE’s analysis in the fact sheet or tentative determination address this? Has any toxicity testing been required? What were the results? Is it anticipated that the pollutants discharged could interact in a way that is toxic? If so, ask if MDE will create a special type of WQBEL - **whole-effluent toxicity (“WET”) limitations** – that are specially-crafted to address those effects.¹⁴⁶

Further, some impaired water bodies (i.e., those that are not meeting all applicable water quality standards) are subject to additional **total maximum daily load (“TMDL”)** restrictions for certain pollutants, as discussed in Sections II.c and VI of this Guide. There is a priority rating for purposes of allocating resources, but no distinction between “impaired” and “very impaired” in terms of which waters are subject to TMDLs. If the facility is proposing to discharge into a water body subject to TMDLs, ensure that the draft permit addresses the

¹⁴² See 40 C.F.R. § 122.45(f)(2) (2015).

¹⁴³ 40 C.F.R. § 122.45(f)(1); MD. CODE REGS. 26.08.04.02-1 § A(1).

¹⁴⁴ U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 5-31 to 5-33 (Sept. 2010), available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹⁴⁵ 40 C.F.R. § 122.45(g) (2015).

¹⁴⁶ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 42-43 (Mark A. Ryan, ed., 3d ed. 2011); U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 6-38 to 6-40 (Sept. 2010), available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

wasteload allocation (“WLA”) for that pollutant and, where applicable, the portion of the total pollutant load that the facility at issue is allowed to discharge to that water body.¹⁴⁷

- Review any **special permit conditions** in the draft permit. Whenever there are special permit conditions, check MDE’s analysis and justification. For example, permits may provide for the designation of a **surface mixing zone**, which allows increased pollutant levels in the area where the discharge first meets the water body.¹⁴⁸ Surface mixing zones should be no larger than necessary, and are not at issue when the effluent meets water quality criteria upon discharge.¹⁴⁹

Permits may also include **compliance schedules**, which set forth deadlines for a permittee to comply with permit conditions, effluent limits, or water quality standards.¹⁵⁰ Pursuant to Maryland regulation, compliance schedules are only appropriate in the permitting of existing, as opposed to new, discharges.¹⁵¹ Federal regulations further provide that in cases of recommencing discharges, compliance schedules may only be utilized for requirements issued or revised within the three years prior to recommencement.¹⁵² EPA has established guidance for evaluating the appropriateness of WQBEL compliance periods, which may be helpful in evaluating all compliance periods.¹⁵³ This guidance is available at https://www3.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf. In general, a

¹⁴⁷ U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 6-13 to 6-14 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf; 40 C.F.R. § 122.44(d)(1)(vii)(B) (2015).

¹⁴⁸ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 48 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁴⁹ MD. CODE REGS. 26.08.04.02-1 § D(1). Mixing zones may be determined by MDE on a case-by-case basis. The following requirements apply to the calculation of the regulatory mixing zones for conventional pollutants: (a) in freshwater streams and rivers, a mixing zone width may not exceed 1/3 of the width of the surface water body; (b) in lakes, the combined area of all mixing zones may not exceed 10 percent of the lake surface area; and (c) in estuarine areas, the maximum cross-sectional area of the mixing zone may not exceed 10 percent of the cross-sectional area of the receiving water body. *See* MD. CODE REGS. 26.08.05.B.

¹⁵⁰ 40 C.F.R. § 122.47(a) (2015); MD. CODE REGS. 26.08.04.02 § C(1).

¹⁵¹ MD. CODE REGS. 26.08.04.02 § C(1).

¹⁵² 40 C.F.R. § 127.47(a)(2) (2015).

¹⁵³ U.S. Env’tl. Prot. Agency, NPDES Permit Writers’ Manual, 9-9 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

request for a compliance schedule requires a reasonable explanation as to why it is necessary, and the schedule must ensure compliance with permit requirements as expeditiously as possible.¹⁵⁴

- When an NOI for general permit issuance is published, consider **whether an individual NPDES permit would be more appropriate** for that specific facility. MDE can require an applicant for inclusion under a general permit to instead apply for an individual permit.¹⁵⁵

h. Prepare for and Attend the Public Hearing

The public hearing is your opportunity to learn more about the draft permit from MDE or, potentially, from the permit applicant.¹⁵⁶ It is also an opportunity for you to make comments in a public forum, which other members of the public, including the press, can attend. If there are any parts of the draft permit that you do not understand, this is the opportunity to ask for an explanation. The following are a few tips to help make the most of the public hearing:

- Organize and compile all the materials you have reviewed. It is important to **have the draft permit on hand**, as it is the main subject of discussion. Your materials should be easily accessible during the hearing in case you wish to reference them at any point.
- **Collaborate** with others who are concerned, such as neighbors or non-profit group members. Have a preparatory meeting to **discuss and plan talking points and the issues you will raise**.
- Come prepared with notes on the **questions and comments** you have from analyzing the draft permit. The notes will help ensure you do not forget any of the points you wish to make.
- **Be equipped to take notes** on comments and responses that you may want to reference in either your spoken remarks or any written comments you submit following the hearing. Although the public hearing will be recorded or transcribed and placed in the administrative record, there will likely not be enough time to obtain a copy of the transcript before the end of the public comment period.¹⁵⁷
- Be aware that state permitting staff will be present to receive your comments, but generally will not respond to questions or comments during the hearing. They are required to respond in writing to significant comments and questions in their final determination document.

¹⁵⁴ See Memorandum from James A. Hanlon, Director, Office of Wastewater Management, EPA, to Alexis Strauss, Director, Water Division, EPA Region 9 (May 10, 2007), *available at* https://www3.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf.

¹⁵⁵ 40 C.F.R. § 122.28(b)(3)(i) (2015); MD. CODE REGS. 26.08.04.08 §D.

¹⁵⁶ MD. CODE REGS. 26.08.04.01-2 § B(5)(d).

¹⁵⁷ 40 C.F.R. § 124.12(d) (2015); MD. CODE REGS. 26.08.04.01-2 § B(5)(g), 26.08.04.01-3 § A(2)(c) and 26.08.04.08 §§ I(2)(b)-(c).

i. Submit Written Comments

- **Write a letter** to MDE with your comments, concerns, and recommendations regarding the draft permit.

Begin with an **introductory statement** that includes a brief personal description and the importance of the matter to you. Then, clearly outline every claimed permit deficiency and provide, when possible, a recommendation on how you would like these deficiencies to be fixed in the final permit. It is important to try to delineate clearly each distinct issue and include recommendations for each issue, even if they are not complete solutions or are hypothetical. Proposing a solution increases the chances that MDE will make a change to the permit.

Provide your strongest arguments first, such as an alleged failure of the draft permit to conform to applicable effluent guidelines or other regulatory requirements. However, comments can also request permit conditions that are not necessarily required. For example, a commenter might request that MDE reserve the right to reopen a permit before its expiration based on the results of future monitoring data, which could establish a basis for more protective conditions as that data becomes available. Other comments may express concern with a facility's historical failure to conform to permit conditions, as evidenced by notices of violation and non-compliance and/or as recorded in discharge monitoring reports. Comments might also note MDE's use of incorrect, misleading, or inadequate information in determining permit conditions, or provide suggestions as to additional resources that MDE should consider. Comments may also include requests that MDE change advisory language such as "could" or "should" to mandatory terms such as "shall" or "must." Similarly, comments may request that vague or subjective terms such as "as soon as practicable" or "periodically" be replaced with specific deadlines and timeframes.

It is important to remember that **not all comments need to be critical**. It may be beneficial to comment favorably on permits and permit conditions to help ensure that those components are included in the final permit. Conclude your letter by thanking MDE for its time in considering your comments. Typically, it also a good idea to offer to respond to any questions the agency may have on any of your comments, even though agencies rarely follow-up on such offers. **Make sure the permit name and permit number are clearly marked on each page of your letter.**

- **Send the letter to MDE** as directed in the public notice. Comments must be submitted within 30 days of the notice's publication unless specified otherwise in the notice (or the time for comment is extended). In cases where a public hearing is held, MDE must accept comments for at least five days after the public hearing.¹⁵⁸ Even if you have already submitted written comments, if you have more to say after the hearing, you may submit additional or responsive comments.

¹⁵⁸ MD. CODE REGS. 26.08.04.01-2 §§ B(2)(b)(iii), B(5)(g) and 26.08.04.08 §§ G(4)(b)(ii), H(5)(b).

j. Act on the Final Approval

- If you disagree with MDE’s final permit determination, **petition for judicial review** by filing your petition within 30 calendar days of publication of the final determination’s public notice in the circuit court for the county in which the discharge will occur.¹⁵⁹ Remember that petitioners for judicial review must meet standing requirements and must have commented on the permit during the public comment period.¹⁶⁰ Judicial review is limited to objections raised during the public comment period, unless the petitioner can demonstrate that the objections were not ascertainable at that time or arose afterward.¹⁶¹ A petition initiates the judicial review process; petitioners should consult the Maryland Court Rules for administrative and substantive judicial review requirements and consider retaining legal counsel.¹⁶²
- **Congratulate yourself** if the final permit incorporated your comments or concerns. Your efforts helped protect Maryland’s waterways!
- Continue to **follow the permit and track the facility’s compliance**. NPDES permits may be modified at any time for new information, which includes evidence of adverse environmental impacts,¹⁶³ so keep track of discharge monitoring reports and notices of violation or non-compliance through EPA’s ECHO database and/or continued PIA requests.

k. Enforcement of Final Permit

Some permit violations may be enforced through a citizen suit under the CWA citizen-suit provision. Section 505 of the CWA allows citizens or groups to initiate a citizen suit against anyone “who is alleged to be in violation of... an effluent standard or limitation under this chapter.”¹⁶⁴ Under the CWA citizens and organizations have statutory standing to bring an action against a violator. The process for bringing a citizen suit is outside the scope of this Guide. If you think there is a violation of a CWA permit that should be raised in a citizen suit it is suggested that you consult with an attorney or experienced advocacy groups for more information on permit enforcement.

¹⁵⁹ MD. CODE ANN., ENVIR. §§ 1-605(b), 1-601(e)(1).

¹⁶⁰ MD. CODE ANN., ENVIR. § 1-601(c).

¹⁶¹ MD. CODE ANN., ENVIR. §§ 1-601(d)(1)(i)-(ii).

¹⁶² The Maryland Court Rules for judicial review may be found at MD Rules 7-201 to 7-211.

¹⁶³ 40 C.F.R. § 122.62(a)(2) (2015).

¹⁶⁴ 33 U.S.C. § 1365(a)(1).

V. Graphic: Timeline

Public Involvement in the Permitting Process



VI. How Maryland's Water Quality Standards and the Chesapeake Bay TMDL Can Help

This section provides more information on Maryland's Water Quality Standards as well as the Chesapeake Bay TMDL. These requirements can be valuable resources for commenters, as they may provide the basis for key arguments made in comments on NPDES permits.

a. Maryland's Water Quality Standards

Under the Clean Water Act and its implementing regulations, states are required to develop water quality standards for inter- and intrastate waters that include **designated uses**, **water quality criteria**, and an **antidegradation policy**.¹⁶⁵ Accordingly, Maryland has adopted water quality standards for its water bodies.¹⁶⁶

The intent of water quality standards is to ensure that each water body is clean and safe enough for its designated uses. In Maryland, **designated uses** are arranged into **eight classes**, with uses ranging from sport and recreation, to fishing and shellfish harvesting, to agricultural and industrial use.¹⁶⁷ Each **use class** has correlating **numeric water quality criteria**, which dictate the maximum concentrations and types of pollutants that may be present in those waters and still provide for safe usage for that designated use.¹⁶⁸ **Toxic substances** have separate numeric criteria and apply to Maryland's water bodies depending both upon water type as well as whether there will be human consumption of either the water itself or organisms in or near the water.¹⁶⁹ Maryland's **narrative water criteria** prohibit all sewage, industrial, and other wastes in amounts that would be harmful to human health and the environment, interfere with a designated use, or are otherwise objectionable.¹⁷⁰

¹⁶⁵ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 40 (Mark A. Ryan, ed., 3d ed. 2011); 33 U.S.C. §§ 1313(a)(3)(A), 1313(c)(2)(a); 40 C.F.R. § 131.6 (2015).

¹⁶⁶ See *Maryland's Surface Water Quality Standards*, MD Dept. of the Env't, <http://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Pages/index.aspx> and *Water Quality Standards Regulations: Maryland*, U.S. Env'tl. Prot. Agency (March 16, 2016), <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-maryland>.

¹⁶⁷ MD. CODE REGS. 26.08.02.02.

¹⁶⁸ MD. CODE REGS. 26.08.02.03-3; Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 41 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁶⁹ MD. CODE REGS. 26.08.02.03-1 § B and 26.08.02.03-2. As applied, *see, e.g.*, MD. CODE REGS. 26.08.02.03-3 § A(7).

¹⁷⁰ MD. CODE REGS. 26.08.02.03 § B.

Maryland’s **antidegradation policy** generally prohibits the “downgrading” of a water body’s designated use to one that requires less stringent standards, and ensures that waters currently of higher quality than required for their designated uses – **Tier II waters** – maintain that higher quality.¹⁷¹ Accordingly, a new discharge or an increase in a pre-existing discharge to a Tier II water body that will potentially impact water quality criteria for which the water was designated will be permitted only upon completion of an **antidegradation review** that considers reasonable no-discharge alternatives, the extent to which the discharge can be minimized and, if an impact would be unavoidable, a social and economic justification.¹⁷²

Maryland’s antidegradation policy also protects waters that contain exceptional biological resources, known as “outstanding natural resource waters” or **Tier III waters**.¹⁷³ Tier III waters are to be designated by a nomination process, and new or increased discharges to Tier III waters are permitted only if there will be **mitigation** of any adverse effects upon the resource for which the water body was nominated.¹⁷⁴ All other waters of the state are **Tier I**, for which discharges will be permitted so long as existing uses are maintained and protected.¹⁷⁵

Water quality standards can be important to NPDES permitting decisions, because if a discharge will or has the potential to cause a water body to exceed the pollutant levels established by the applicable water quality criteria, WQBELs will be required in the NPDES permit.¹⁷⁶ Further, in cases of Tier II or Tier III waters, a discharge may require either an antidegradation review or mitigation before permitting.¹⁷⁷ These requirements apply in addition to the TBELs generated from any applicable effluent guidelines, or based upon the agency’s best professional judgment when effluent guidelines are unavailable or inapplicable.¹⁷⁸

¹⁷¹ MD. CODE REGS. 26.08.02.04 §§ B, D and 26.08.02.04-1 § A.

¹⁷² MD. CODE REGS. 26.08.02.04-1 §§ B, G.

¹⁷³ MD. CODE REGS. 26.08.02.04-1 § D(1) and 26.08.02.04-2 § B.

¹⁷⁴ MD. CODE REGS. 26.08.02.04-2 § D, I(1). There are not currently any Tier III waters.

¹⁷⁵ MD. CODE REGS. 26.08.02.04-1 §§ D(1), P.

¹⁷⁶ Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 42 (Mark A. Ryan, ed., 3d ed. 2011); 40 C.F.R. § 122.44(d)(1)(i) (2015).

¹⁷⁷ MD. CODE REGS. 26.08.02.04-1 § H(5) and 26.08.02.04-2 § I(1).

¹⁷⁸ See Karen M. McGaffey & Kelly F. Moser, *Water Pollution Control under the National Pollutant Discharge Elimination System*, in *The Clean Water Act Handbook* 27, 44 (Mark A.

b. The Chesapeake Bay TMDL

Every two years, the Clean Water Act requires states to create an “impaired waters” list, which is a list of the water bodies in the state that are not meeting their water quality standards despite the effluent limitations in NPDES permits.¹⁷⁹ Once a water body is placed on this list, states are required to develop a **total maximum daily load (“TMDL”)** for the pollutant(s) in those water bodies that are present at levels exceeding the applicable water quality standards.¹⁸⁰ A TMDL is a combined limit on the amount of a pollutant that can be discharged into a water body from any and all sources, such that the pollutant will not be present in the water body at levels exceeding applicable water quality criteria.¹⁸¹

The Chesapeake Bay, the watershed that covers most of Maryland, has a TMDL for **nitrogen, phosphorus, and sediment** that sets restrictions on these pollutants in six states, including Maryland, and the District of Columbia.¹⁸² The Chesapeake Bay TMDL is the largest and most complex TMDL in the country, and is comprised of 92 smaller TMDLs that limit discharges into the Bay’s tidal tributaries.¹⁸³

TMDLs limit point source discharges by establishing a **wasteload allocation (“WLA”)**.¹⁸⁴ The WLA is, generally, the combined total amount of a pollutant that may be discharged into a

Ryan, ed., 3d ed. 2011); U.S. Env'tl. Prot. Agency, NPDES Permit Writers' Manual, 5-44 to 5-46 (Sept. 2010), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

¹⁷⁹ 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. §§ 130.7(b)(1)-(2), (d)(1) (2015); Steven T. Miano & Kelly A. Gable, *Total Maximum Daily Loads: Section 303(d)*, in *The Clean Water Act Handbook* 207, 209 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁸⁰ 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.7(c)(1)-(2).

¹⁸¹ Steven T. Miano & Kelly A. Gable, *Total Maximum Daily Loads: Section 303(d)*, in *The Clean Water Act Handbook* 207, 208 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁸² U.S. Env'tl. Prot. Agency, *Chesapeake Bay TMDL Executive Summary*, in *Chesapeake Bay TMDL Document ES-1, ES-1* (Dec. 29, 2010), *available at* <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>.

¹⁸³ U.S. Env'tl. Prot. Agency, *Chesapeake Bay TMDL Executive Summary*, in *Chesapeake Bay TMDL Document ES-1, ES-3* (Dec. 29, 2010), *available at* <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>.

¹⁸⁴ Steven T. Miano & Kelly A. Gable, *Total Maximum Daily Loads: Section 303(d)*, in *The Clean Water Act Handbook* 207, 208 (Mark A. Ryan, ed., 3d ed. 2011).

water body, and sometimes is divided into individual allocations per point source.¹⁸⁵ When a receiving water body is subject to a TMDL, the WLA, or a portion of the WLA, is incorporated into a point source's NPDES permit to ensure the facility will not discharge that pollutant at levels that would contribute to a violation of the TMDL's maximum. Maryland implements the Chesapeake Bay TMDL through its **watershed implementation plans ("WIPs")**, which set "target loads" for point and nonpoint sources discharging to Chesapeake Bay Segments.¹⁸⁶

¹⁸⁵ Steven T. Miano & Kelly A. Gable, *Total Maximum Daily Loads: Section 303(d)*, in *The Clean Water Act Handbook* 207, 208 (Mark A. Ryan, ed., 3d ed. 2011).

¹⁸⁶ See Steven T. Miano & Kelly A. Gable, *Total Maximum Daily Loads: Section 303(d)*, in *The Clean Water Act Handbook* 207, 217 (Mark A. Ryan, ed., 3d ed. 2011) and *Appendix B* to State of MD, Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Watershed (Dec. 3, 2010), available at http://mde.maryland.gov/programs/water/TMDL/TMDLImplementation/Pages/Final_Bay_WIP_2010.aspx, and *Appendix F* to State of MD, Maryland's Phase II Watershed Implementation Plan for the Chesapeake Bay TMDL (Oct. 2012), available at http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Pages/FINAL_PhaseII_WIPDocument_Main.aspx.

VII. Template: Maryland Public Information Act Request & Fee Waiver Letter

Background:

Maryland's Public Information Act ("PIA"), grants the public a broad right of access to records that are in the possession of state and local government agencies.¹⁸⁷ The basic mandate of the PIA grants you the right to review the available records that are disclosable and to obtain copies of those records without unnecessary cost or delay.

Under Maryland Code Annotated, General Provisions § 4-206(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the applicant is indigent and files an affidavit of indigency; or if, after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest. Environmental organizations with 501(c)(3) tax status and a "public interest" mission may be able to obtain a waiver or reduction of fees.¹⁸⁸

Resources:

Md. Code Ann., General Provisions §4-101-601 (2016):

[https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules?guid=NF6292290F67E11E384FBC0A4074EEC71&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules?guid=NF6292290F67E11E384FBC0A4074EEC71&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

Maryland Public Information Act Manual (14th Ed.) (October 2015):

http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf

Maryland Public Information Act Compliance Board:

<http://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.aspx>

¹⁸⁷ Md. Code Ann., General Provisions § 4-101-601 (2016).

¹⁸⁸ See MD Code § 4-206(e)(2)(ii).

Template: Maryland Public Information Act Request & Fee Waiver Letter

CERTIFIED MAIL

[Client/organization name]

[Street address]

[City, state, zip]

[Date]

[Name of recipient]

[Title]

[Agency name]

[Street address]

[City, state, zip]

[Phone number]

[Email address]

Re: Public Information Act Request

Dear *[Name of recipient]*:

[Client/organization name] submits this request under the Maryland Public Information Act (“PIA”), Title 4, of the General Provisions of the Maryland Code for documents relating to *[Insert the issue or subject matter prompting PIA request]*.

[Discuss organization’s or individual’s reasons behind PIA request].

On behalf of *[Client/organization name]*, I hereby request that the *[Recipient organization name]* produce for inspection and copying all documents in your custody and control as follows:

- (A) Please provide all documents relating to *(issue #1)*.
- (B) Please provide all documents relating to *(issue #2)*.
- (C) Please provide all documents relating to *(issue #3)*.

Please produce electronically all documents already in electronic format, and make any other documents available for inspection and copying at a mutually convenient time and location, which may include your office or the place where the documents are located.

The term “documents” shall mean any writing, recording, electronically stored information or photograph in your actual or constructive possession, custody, care or control which pertain directly or indirectly to the above requests, including but not limited to writings, records, files, correspondence, reports, memoranda, maps, calendars, electronic messages, e mails, telephones message records or logs, computer and network activity logs, document image files, databases, spreadsheets, worksheets, summaries, compilations, charts, diagrams, graphic presentations, drawings, photographs, jottings and notes.

Template: Maryland Public Information Act Request & Fee Waiver Letter

[Optional: Request for Waiver of Fees – choose the appropriate text suggested below based on whether you will request a fee waiver]:

[Client/organization name] requests that the [Recipient agency] waive any fees for the production and copying of documents responsive to this request pursuant to Section 4-206(e)(2)(ii). [Client/organization name] is seeking information for a public purpose and not for any narrow personal or commercial interest. [If your organization is a not-for-profit entity and/or has Section 501(c)(3) tax status, say so.] There is a significant public benefit in making this information available in that it could [discuss potential public benefit].

Maryland courts have upheld fee waiver requests where the information sought meets the public benefit test. See Mayor & City Council of Balt. v. Burke, 506 A.2d 683 (Md. Ct. Spec. App. 1986) (The Maryland PIA shall be construed in favor of allowing inspection of public records with the least cost and delay to the person requesting the inspection. The federal Freedom of Information Act contains a similar fee waiver provision which has been liberally construed in favor of the media or other requesters who will provide broad public dissemination of the information sought.).

As described above, *[Client/organization name]* submits that it fully meets such criteria.

[Emphasize that the records sought are not solely for a private, profit-making purpose, and explain in your letter how the requested records will “contribute significantly to the public understanding of the operations or activities of the Government.” You should explain, for example, how the records will add to what the public already knows about the topic, and how you intend to disseminate the information you receive to the public. If you are a media representative, or an “educational or non-commercial scientific” entity, send along proof of this fact with your request letter.]

If the requested fee waiver is denied, please provide me with a written justification for that denial and an estimate of the costs, if any, for obtaining the documents before any costs are incurred.

[If a fee waiver is not requested, the following language is recommended to ensure that you are not later surprised by a large invoice]: Please first provide me with an estimate of the cost of producing these documents, and in any case, please do not allow the cost to me of producing these documents to exceed [amount] without my prior written consent.

I look forward to receiving the records requested promptly within 30 days. If the *[Recipient organization]* considers any of the documents requested as privileged, please identify the document and the privilege asserted. If a portion of any document contains privileged information, please produce the entire document with all appendices, tables and attachments with the privilege information redacted.

Sincerely,

[Your name]

[Client/organization name]