**What in the world are Tier II waters – and why you should care in 2021?**

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Section 402 of the Clean Water Act ("NPDES Program") is the basis for our current erosion and sediment control (E/S) and stormwater management (SWM) strategies locally as well as at the state level. It not only facilitates Maryland Department of the Environment's (MDE) contemporary criteria of returning stormwater runoff to the equivalent of "woods in good condition" via environmental site design (ESD) to the maximum extent practicable (MEP), but also directly drives the NPDES discharge permitting program.

For new construction disturbing an acre or more, the MDE – in addition to a local E/S plan – also requires a permittee to seek authorization for coverage under their NPDES General Construction Discharge Permit (GCP) via a fairly automated and straight forward online notice of intent (NOI) process.

Soon, a new five-year GCP will be issued formalizing potentially challenging requirements that directly affect new construction for the first time. The industry has already provided a lengthy letter of comment to MDE during the public interest period. Among the numerous concerns, two major highlights are requiring Stormwater Pollution Prevention Plans (SWPPP) for all projects - and complying with additional criteria in what is referred to as Tier II sensitive watershed.

A SWPPP is a substantial report-like document that incorporates an E/S plan but goes beyond that, usually only required in Maryland for industrial and commercial properties with potential "hot spots". But residential development typically did not require one when it had an approved E/S and SWM plan per MDE criteria because they were considered rigorous enough on their own already. Now all construction potentially can require one.

So what about Tier II waters?

In 2004, via U.S. EPA direction, the MDE through COMAR divided waters into three Tiers of quality and levels of protection, and required that those above Tier I receive greater protection mechanisms. The Tier II screening process is not a “permitting” one but rather is administered by comment coordination to other MDE permitting programs such as the MDE Wetland and Waterway Program (WWP) process when needing a permit to impact jurisdictional waters, including wetlands, or for NPDES industrial discharge approval – and now the MDE CGP NOI process for discharges associated with new construction.

Tier II streams throughout Maryland will require additional E/S and SWM measures determined by filling out a NOI online checklist to comply. If in a Tier II watershed, a project needs to go through an additional MDE Program review by policy frequently requiring 100' stream buffers of additional scrutiny, additional and redundant E/S and SWM practices, and a project need justification – especially in watersheds having streams that reached "assimilative capacity" as determined by Maryland Department of Natural Resources biological stream survey data.

Nothing wrong with that in concept but all this is already being done since the Tier II compliance practices were initiated years before our current water quality and SWM criteria, mandatory stream buffers at the local level via the natural resources inventory/forest stand delineation (NRI/FSD), Chesapeake Bay critical area program buffers and impervious limits, and WWP program criteria already in place - so this now may be perceived as redundant.

Yet Tier II project screening started this year via the NOI process – even if there are zero impacts to waters and even if no Tier II streams are on the project site. And getting MDE NOI approval at the E/S stage may need more planning, design, and regulatory compliance in a Tier II watershed as identified on MDE website mapping.

Documenting how a project already complies with other existing and current environmental criteria already in place may well be the means to demonstrate Tier II compliance. Stay tuned.

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