



MEMORANDUM

To: Hans Riemer, President
County Council

From: **Stormwater Partners Network Members:**
Caitlin Wall, Potomac Conservancy
Eliza Cava, Audubon Naturalist Society
Kit Gage, Friends of Sligo Creek
Diane Cameron, Conservation Montgomery
Sylvia S. Tognetti, Maryland Sierra Club Montgomery County Group
Sara Robinson, Little Falls Watershed Alliance

CC: Patty Bubar, DEP Acting Director
Frank Dawson, DEP

Date: May 10, 2018

Subject: **Support T&E Committee vote on the CIP Budget for Montgomery County's Clean Water and Permit Compliance Program, and plan for completing existing clean water projects**

We write today in response to the May 8, 2018 memo from County Executive Isiah Leggett regarding the Transportation, Infrastructure, Energy and Environment (T&E) Committee 2-1 vote of May 4, 2018, to alter the recommended Capital Improvements Program (CIP) Budget for Montgomery County's Clean Water and Permit Compliance Program. We support Committee Chair Berliner's recommendation, approved by a 2-1 committee vote, to complete existing stormwater projects now in the design pipeline. The County currently has 624.75 acres to be completed in suspended projects; the new approach proposed by the Executive would build 526 acres. The T&E Committee's recommendation allows us to move forward with existing projects now, rather than waiting for a full procurement, bid, selection, and ramp up process for a new contractor.

We remain concerned about the nature, manner, and magnitude of the Executive's recommended changes to the program, in the context of the budget cycle, without opportunity for adequate review and public input, and before we know what the county obligations will be in the next municipal separate storm sewer system (MS4) permit cycle. We are open to exploring changes to the contracting process but, such drastic changes require extensive public transparency and discussion to ensure the proposed modifications are the right ones for Montgomery County. **Therefore, we support the T&E Committee's vote on the stormwater budget and plan for completing existing clean water projects. We urge the full Council to also support this plan.**

Montgomery County is a leader in stormwater management. The Council and Executive have supported multiple policy and funding decisions to continue raising the bar and restoring our streams and

waterways. The Stormwater Partners Network has been an ardent supporter of Council and Executive decisions in the past; we have also been a constant supporter and partner of the Department of Environmental Protection (DEP). For these reasons, we remain confused as to why the Executive is making these CIP recommendations, without stakeholder input, without public discussion, and without clearly explaining how his proposal will continue moving the County towards clean water. A detailed response to points raised in the Executive's memo follows.

1. The T&E Committee's decision is in the interest of County taxpayers and helps to achieve Montgomery County's clean water goals.

Preserving existing projects honors commitments to dozens of communities who have advocated for and been promised these projects. There are currently 44 existing projects considered "suspended". The County invested \$5.3M in these suspended projects; we need to preserve the taxpayer investment in these projects, which were chosen because they support critical environmental and community priorities. We understand that many of these projects are more than 60% complete for design, and that some are ready for construction at this moment. In addition, many of these projects represent low-cost stormwater projects, such as stream restoration or pond retrofits. These projects could be finalized and constructed right now, allowing the County to move ahead in meeting its next MS4 permit.

DEP staff used a thorough process for vetting and choosing these projects, analyzing a variety of criteria to ensure stormwater projects were located throughout the County to address environmental challenges for as many communities as possible. DEP staff included other environmental goals in this analysis - not just meeting the minimum MS4 permit requirements. We fail to see why a private contractor would be motivated to include additional clean water goals in any project selection, if those goals do not support the lowest dollar-per-acre bottom line. We understand that DEP will have the authority to approve and reject projects proposed by any contractor, but we have no way of knowing how the contractor will uphold Montgomery County's commitments to communities and clean water.

2. Efficiency and cost-effectiveness of the proposed new approach is uncertain and unknowable.

The public has not seen adequate information demonstrating how the new approach for a design-build-maintain (DBM) contract is an improvement over the existing approach. In addition, the Executive provided no opportunities for public or stakeholder hearings in which the full range of options could be openly considered. Due to procurement rules, the public is unable to know the exact criteria that will be used for determining efficiency and cost-effectiveness moving forward.

We presume that the Executive views "efficiency" as the lowest dollar-per-acre (the Executive still has not clearly defined this term). Yet, we find it inefficient to waste millions of dollars already invested in design work. The Executive cancelled 26 projects, at an investment of \$2.6M. No opportunity was provided for comment on project cancellations. We understand the Executive has the authority to cancel projects, but the magnitude and lack of rationale for this cancellation remain concerning. A review of a subset of these projects showed that nine projects (stream restorations and pond retrofits) could have been constructed at an average cost of \$46,440.38 per impervious acre. This figure is much lower than the FY17-18 County expenditures of stormwater projects averaging \$73,894.00 per impervious acre.

Of the 44 suspended projects, many, such as the Grosvenor Tributary Stream Restoration, are at or close to the final design phase, are supported by residents, and are cost-effective and important projects from an environmental perspective. Others, such as all four suspended Green Streets projects, represent opportunities for true community engagement and demonstration of green infrastructure in the public

right-of-way in neighborhoods without other stormwater management opportunities. These projects offer many options for reasonable continuation and some could be moving towards construction at this moment. Therefore, the T&E recommendation that some of these proceed under the existing approach builds upon lessons learned to achieve greater efficiency. This approach more clearly meets the definition of efficiency by preserving existing taxpayer investments while moving forward with in-progress stormwater projects.

Finally, the Executive's proposal zeroes out three other CIP budget line-items, for Green Streets, government facility retrofits, and inter-agency cooperative projects, in order to secure enough money to create the \$48 million RFP. These programs represent County initiatives supporting multiple benefits, such as agency collaboration and coordination, wildlife habitat, and pollinator protection. We have no assurance that the DBM contractor will prioritize these benefits in the future.

3. The WQPC is dedicated funding that supports essential clean water projects and programs.

Although the Water Quality Protection Charge (WQPC) is a line item on the property tax bill, it is an excise tax for service and is not part of the property tax. The WQPC is an investment that brings multiple benefits in addition to clean water. However, few residents are aware of this charge or where the funds are used. Watershed group leaders have found that when they explain that "*the WQPC supports clean water programs and projects,*" county residents support the WQPC. We agree with the Executive that residents need more information on why the WQPC is important and how it benefits Montgomery County's communities. But, the WQPC should not be conflated with property tax.

The WQPC rate has increased over time. But, the Council has been involved in all of the decisions to raise this rate and dedicate additional funding to clean water programs. The rate increases were incremental and reasonable, and should not be conflated with the higher costs (and benefits) of green infrastructure, because the county has not been constructing green infrastructure projects at a level that would require large increases in the WQPC. Instead, what we have recommended in the past, is for the County to conduct a full review of the WQPC, understand where the dollars should be most effectively spent for clean water, and demonstrate to the public the value of this dedicated funding.

4. Whether the increase in the WQPC is necessary is unknowable at this time.

While we were disappointed in the 70% cut to the stormwater CIP budget, we understand that funds are more than sufficient to complete work under the existing permit and consent decree. It is entirely reasonable to consider funding for work needed to meet obligations of the next permit once we know what those obligations will be, and what practices will be eligible for credits. Therefore, as Councilmember Berliner said, we do not need to raise the WQPC or the budget in the short term.

We share an interest in deploying our limited resources for the greatest benefits for clean water, and have asked the Maryland Department of the Environment (MDE) to more expeditiously approve and incentivize new, innovative, and cost-effective practices in the next MS4 permit. We continue to work with MDE to include these new practices in its revisions of the stormwater accounting manual.

5. Whether the new approach will save money or meet environmental goals is uncertain.

The Executive's memo claims that meeting our environmental goals is "achievable only if we modify our approach to contracting out the design, construction and maintenance of our stormwater management facilities." We have seen no evidence that this is the only approach for the County at this time. Indeed, the Executive recommended other changes to the program, apart from the DBM contract, to

save additional funds, including a switch from bonds to state funds. A DBM contract may or may not reduce costs, but we remain unconvinced it is the only option for doing so.

Indeed, in the recent T&E Council packet, it states “[t]he Recommended CIP assumes savings in per-acre retrofit costs totaling about \$5 to \$6 million in the six-year period. However, actual savings will not be known until the new contract is awarded.” The Executive’s proposed changes to the County’s program are based on an assumption. We know the county has already cancelled projects worth \$2.6M and the suspended projects are worth \$5.3M. We understand these projected savings are an estimate and are subject to future decisions, and we hope this estimate is conservative. But, we fail to see why the Executive’s CIP recommendation is based on an assumption of cost savings where we have already cancelled projects worth one third of that estimate.

The Executive, the Office of Management and Budget (OMB), and DEP leadership have not met the burden of proof demonstrating that the DBM approach is the only way, or even the best way, to reduce costs. For example, the public has not seen construction cost investments for these projects. A collaborative review of the program, which is impossible to conduct during a busy budget season and with no notice provided by the Executive, would enable us all to better understand and address the reasons for delays and inefficiencies.

6. A big glass half-full: Montgomery County is well-positioned to successfully address future permit requirements.

The MDE required a 20% impervious acre retrofit in the county’s 2010 MS4 permit. This was indeed an unprecedented target that the Executive championed and supported, with full support and engagement of the Stormwater Partners Network. For multiple reasons, the county was unable to meet this MS4 requirement and entered into a consent decree with the MDE. While we wished the county had been able to fully meet its 2010 permit requirements on time, the Stormwater Partners stood with DEP in noting that this was still a monumental achievement and a “glass half-full.” Together with DEP, we successfully argued that MDE should not impose a cash fine on Montgomery County, but to instead issue a more beneficial requirement for Supplemental Environmental Projects. While we understand that the consent decree represents an enforcement action taken against the county, and that some see it as a black mark on the county’s legacy, we firmly disagree. Many large urban jurisdictions enter into consent decrees to address water quality issues; for example, Washington, D.C. is building multiple billion-dollar tunnels to address a combined sewer overflow issue through a consent decree.

Despite this enforcement action, we see DEP and the County as poised now to effectively address its remaining 2010 permit and consent decree requirements, and build a solid foundation to address future MS4 permit requirements (which remain unknown). The county spent years developing a framework with contractors, management, and staff to design, permit, and build stormwater projects. There have been delays in this work. However, the existing model cannot solely be blamed for these delays, as it was not even implemented until three years into the existing 2010 permit. This existing model, publicly-managed at each major step of the process including project selection and watershed-wide project coordination, is responsive to citizen requests for projects. And, it has built-in transparency and accountability elements that are essential in order to continue and build on its strong public support and civic engagement.

We feel that DEP staff have the expertise to understand county clean water goals, prioritize green infrastructure projects, engage communities, and collaborate with other agencies. We do not wish these responsibilities to be managed by a private entity. Furthermore, the Executive claims the DBM contract is “critical for the County’s ability to meet its MS4 permit requirements”. We assume this means the next

MS4 permit, but we do not yet know what those requirements will be. Indeed, we have cautioned Council that the requirements will be more than the assumed 5% impervious acre requirement. Furthermore, we *do* know that we have enough projects in the pipeline to build over 624.5 impervious acres now - the T&E Committee's recommendation to move forward on these projects seems prudent to us.

7. The County should not move forward with the DBM approach until additional questions are answered.

We understand that the DBM contractor will share the risk of stormwater management with the County, which is a fine approach. But, in the end, the County still bears the ultimate risk of fines and penalties if future MS4 permit requirements are not met. The County and taxpayers bear the risk of future stormwater-related damages to public and private infrastructure, facilities, and lands, such as flooded parklands, undermined bridges and roads, and blown-out streams. These damages threaten WSSC sewers and our drinking water supplies, when higher-cost but also higher-benefit projects are not selected by a for-profit contractor. For this reason, we urge a cautious approach towards shifting to a DBM model, with a full description of this process provided to stakeholders and the public.

The Executive's memo notes that a large volume of impervious acre restoration is the focus for the new DBM contract. Yet, this volume of work is only possible by zeroing out dozens of existing projects and programs, including many projects requested by communities to solve localized stormwater challenges. We are not convinced that developing an attractive RFP for bidders should come at the expense of keeping promises made to citizens.

We have repeatedly raised the issue of green infrastructure with the Council. Green infrastructure is often the only viable option for water quality improvement in older, more developed downcounty neighborhoods. Green infrastructure often does indeed have an inherently higher unit cost than traditional gray infrastructure, but it also provides multiple benefits, such as climate change mitigation and carbon capture, wildlife and pollinator habitat, cleaner air (e.g. from tree plantings and forest buffers), community green space, and native plantings. And, green infrastructure addresses other Council legislation, such as the Climate Emergency legislation and the pesticide ban. For all of these benefits and more, DEP with the Stormwater Partners in 2016 published the Green Infrastructure Definition and Policy, which includes a commitment to 60% green stormwater retrofits. We are concerned the DBM contractor will focus project selection on lowest unit cost-per-acre, which may mean that green infrastructure projects are omitted from future stormwater project lists.

Experience with design/construct/maintain partnerships suggest they may be effective for some aspects of implementation. However, it is critical that local governments have the capacity to manage the process through strategic planning to guide project selection, build in transparency, accountability, and citizen and interagency collaboration measures, and ensure that the right projects are selected for the right reasons. For these reasons, we have advocated recently for the inclusion of 7 principles to be included in any stormwater program changes; these include 1) attaining watershed-specific restoration and protection goals; 2) ensuring public involvement in project planning and review; 3) ensuring the county's commitment to 60 percent green infrastructure is fulfilled; 4) prioritizing existing investments (i.e. sunk costs in 44 "delayed" projects); 5) enabling the next executive administration to be adaptable and flexible, especially to meet the needs of a higher permit requirement; 6) promoting public transparency; and 7) promoting greater coordination between the departments that conduct stormwater work.

8. The proposed new approach lacks public transparency.

We first officially learned about changes under consideration in December 2017 (in the form of rumor and hearsay) when the Executive was considering moving responsibilities for managing stormwater construction to the Department of Transportation (DOT) or even to a full public-private partnership. This original DOT proposal was never mentioned publicly until recently. DOT may be effective in the construction phase of stormwater management, but their green infrastructure and community engagement experience is limited. Rather than engage with the environmental community, Council, or the public, these decisions were being made in isolation. When we finally met with the Executive, the plan under consideration had changed and we were informed that responsibilities would stay within DEP under a new contracting mechanism. Details of this mechanism emerged slowly over the past two months, as stakeholders and the Council continuously asked for more information.

The request that this decision be delayed until it can be properly reviewed, rather than rolled out of a black box, during the budget cycle, and without knowing future MS4 permit requirements is entirely reasonable. The Executive has not provided an opportunity for this new approach to have a full public hearing, which would enable residents to understand the reason for the inefficiencies that are supposedly being addressed with this new approach, and so that more options can be considered, with public input. The most prudent approach is to have an open process that gets resident and stakeholder input, honors existing commitments and investments, and keeps making progress.

9. In Conclusion: Support the T&E Committee's recommendation.

We are proud of the County's accomplishments under the existing program and want Montgomery to continue being a leader in stormwater management. Continuing work now on the 44 suspended projects will provide credits to help the County meet the next permit ahead of schedule, thus providing a buffer for future decision-making and program review with sufficient time for public and Council input. Again, the burden of proof has not been met to show that existing projects are not cost-effective or otherwise inefficient. We appreciate Acting Director Bubar's efforts to explain this new approach, but the Executive still has not provided us with enough data or analysis showing why these changes are needed at this time, without more public discussion.

As stated in the letter sent by former DEP Director Lisa Feldt to the Secretary of MDE, Montgomery County DEP has made a good faith effort to meet their compliance responsibilities with actual on-the-ground projects that improve water quality. To our knowledge, the County has done more than any other MS4 jurisdiction in Maryland, and is being held to a higher standard due to timing of its 2010 permit. We salute Executive Leggett, the Council, and the DEP for past leadership in this area. But, changing contract structures without even knowing the objectives of the next permit will not actually address the challenge of meeting compliance obligations and improving water quality.

We urge the Council to keep its promises to communities who want stormwater infrastructure, including green infrastructure, and to maintain public transparency and accountability when it comes to our environmental programs. **Please vote for the T&E Committee CIP budget recommendation for Montgomery County's Clean Water and Permit Compliance Program.**

Thank you,

Caitlin, Eliza, Kit, Diane, Sylvia, & Sara

Leadership and Members of the Stormwater Partners Network