



The Maryland Department of the Environment
Secretary Serena McIlwain

HB0942

Wetlands and Waterways Program – Authorizations for Stream Restoration Projects

Position: OPPOSE

Committee: Environment and Transportation Committee

Date: March 3, 2023

From: Gabrielle Leach

The Maryland Department of the Environment (MDE or the Department) **OPPOSES** House Bill 942. The bill would require MDE to take certain actions with respect to authorizations for stream restoration projects associated with National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) impervious surface restoration (ISR) credits, Chesapeake Bay Total Maximum Daily Load (TMDL) nutrient reduction credits, mitigation projects, and other restoration goals by October 1, 2024.

MDE has met with the sponsors of this bill, and has heard their concerns that it is perceived that some stream restoration projects may not be achieving ecological and water quality benefits envisioned, and can result in unintended consequences including the loss of riparian forest. The Department takes such concerns extremely seriously but for the numerous reasons detailed below does not believe HB 942 is an appropriate solution to those concerns at this time.

Ongoing House Bill 869 Study and MDE Stream Restoration Analysis: Currently MDE’s Wetlands and Waterways Protection Program is undertaking a study on ecological restoration permitting as mandated by HB 869 *Permitting for Ecological Restoration Projects - Required Study* enacted during the 2022 legislative session, which is due to be completed on or before June 1, 2024. The parameters of the study required by HB 869 overlap with many of the proposed requirements under HB 942. The current participants in the study represent a diverse group of community and environmental organizations, restoration practitioners, academia/research, and other government agencies. The Department is concerned that this legislation predetermines a review and permitting framework for stream restoration projects which will not allow for a thorough and meaningful completion of the HB 869 study and does not consider input from across the regulated community. In addition, MDE is charged with protecting Maryland’s waterways from loss and degradation as well as meeting Chesapeake Bay restoration and TMDL goals. As part of these responsibilities, MDE has undertaken many initiatives related to stream restoration to analyze Maryland’s progress towards these goals and ensure our resources (including riparian forests) are protected.

Wetlands and Waterways Review Procedures: Under HB 942, there would be a substantial commitment of time to process public notices and hold public meetings for every restoration project. Although the legislation requires meetings to be held for every project, it is unclear if that meeting is intended to be a hearing under § 5-204 of the Environment Article, a public information meeting under §§ 1-601 and 1-603, or a separate process to be developed. MDE would need to prepare additional regulations to provide more detail to considerations mandated in HB 942, including the review criteria, public notice and/or hearing/meeting, monitoring, and other required information.

Mitigation Banking: HB 942 would have serious negative consequences for mitigation banking in Maryland. As written, HB 942 significantly discourages mitigation banking and may incentivize permittee-responsible mitigation, including largely unsuccessful “postage stamp” sized mitigation projects. The 2008 Federal Mitigation Rule sets a preference for mitigation banks and the current mitigation program encourages

mitigation addressing larger scale watershed needs. HB 942 requires that stream restoration undertaken for mitigation be located in the same watershed as the impacts and that mitigation credits are only released after ten years, which limits banking feasibility.

TMDL/MS4 Crediting: TMDL credits are determined by protocols approved by the Chesapeake Bay Program (CBP) in order to align MDE's crediting process with the Chesapeake Bay Phase 6 Model. It would not be possible for MDE alone to alter them. Any changes to the ISR accounting and MS4 Equivalent Impervious Acre (EIA) calculations will require an update to the *2021 Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated Guidance for National Pollutant Discharge Elimination System Stormwater Permits* ("2021 Accounting Document"). Alteration of the accounting and credit calculations would require a major permit modification for all 10 issued MS4 Phase I permits, which must be approved by the U.S. Environmental Protection Agency and go through the state required public notice process.

Biological Uplift Goal: While stream restoration projects are designed to address acute bank stability and instream habitat impacts, impacts to biology cannot be remediated through stream restoration *alone* as upland pollution also contributes to biological impacts. Biological uplift is the goal of a holistic watershed management approach which utilizes a suite of best management practices (BMPs) (including stream restoration where necessary and approved) to address a multitude of pollutants that impact biology.

Monitoring: Under the proposed legislation, stream restoration projects must be monitored for a period of 10 years (prior to release of any credits) to verify achievement of stated goals. It will require a considerable undertaking for MDE to develop monitoring plan requirements to assess biological uplift goals (which may not be attainable) for individual projects independent of the monitoring and verification procedures that already exist. As stated above MDE believes that biological uplift is not a realistic goal for every stream restoration project.

Best Available Science: The 2021 Accounting Document directs jurisdictions to use protocols from the *2014 Recommendations of the Expert Panel to Define Removal Rates for Individual Stream Restoration Projects* ("Expert Panel") to calculate Stream Restoration credit, which incorporates the most recent science on crediting and verification methods and is written by a panel of local scientists, practitioners, and watershed managers. As MDE defers to the Expert Panel report, credit for MS4 EIA and TMDL progress as well as the reductions reported to the CBP for Bay TMDL progress already consider the best available science with regards to stream morphology, geology, biology, hydrology, ecology, watershed management, and wildlife corridors.

Upland Alternatives: MDE is required under HB 942 to incentivize upland alternatives (deemed to be "less destructive to the environment") to stream restoration through the crediting mechanisms for TMDL, MS4 targets, mitigation goals, or other restoration goals. Credits for non-stream restoration practices are consistent with efficiencies from the CBP and match the credit provided in the Chesapeake Bay Phase 6 Model. In order to provide additional incentives, MDE will have to develop additional unapproved BMPs, or be provided with (or conduct) studies demonstrating nutrient and sediment reductions that are greater than those already established by the current literature. In addition, compensatory mitigation to offset impacts to stream impacts cannot be offset through upland projects under federal requirements.

In conclusion, it is hoped that the ongoing efforts of the HB 869 study, rather than this bill, can continue to inform the process. For the reasons detailed above, MDE urges a **UNFAVORABLE** report for HB 942.