

VIA ELECTRONIC FILING

December 4, 2019

Louis Parnes
Nontidal Wetlands Division
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230

Re: 201961268/19-NT-0228 - CREG/ WESTPORT I, LLC – Abingdon Business Park, Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal, or Nontidal Wetland in Maryland

Dear. Mr. Parnes,

On behalf of the Gunpowder RIVERKEEPER® (Riverkeeper) I hereby submit the following comment. Riverkeeper thanks the Maryland Department of the Environment (MDE) for the opportunity to provide the following comments on permit application 201961268/19-NT-0228 Abingdon Business Park, Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal, or Nontidal Wetland in Maryland (JPA) submitted to MDE by CREG/WESTPORT I, LLC (Applicant).

Riverkeeper is a grassroots, advocacy-based membership organization and a recognized 501(C)(3) non-profit that champions enforcement and compliance of environmental laws to protect and conserve the Gunpowder River watershed and the sensitive species that inhabit the watershed for future generations. The organization represents 376 members who have environmental interests in Harford, Baltimore and Carroll Counties, Maryland, who work, live, recreate (including fishing, swimming and boating), and benefit from aesthetic uses of waterways in the Gunpowder River Watershed and adjacent Watersheds including the Bush and waterbodies near to, or downstream from the proposed Project including the Tier II segment of Otter's Point Creek I.

Riverkeeper is opposed to the issuance of a Wetlands and Waters Permit that would allow the following stated impacts: Permanent impacts to 17,112 square feet of forested (isolated) nontidal wetlands, 32,782 square feet of a nontidal 25-foot wetland buffer, 570 linear feet (6,457 square feet) within an intermittent stream, and 4,618 square feet of a 100-year floodplain. The temporary impacts are to 120 linear feet (1,573 square feet) of a perennial stream and 230 linear feet (3,235 square feet) of an intermittent stream, and 17,764 square feet within the 100-year floodplain to the Ha Ha Branch of Bush River for the following reasons:

1. Tier II Stream Impacts and degradation are not supported by the application:

Otter Point Creek I is a Tier II waterbody with part of its catchment area located within the boundaries of the proposed project site. MDE has identified the presence of a Tier II catchment on its permit application screening form.¹ Otter Point Creek I has no remaining assimilative capacity.² By MDE's own scoring, the water quality in the stream and its watershed is at the brink of Tier II high quality standards and any further anticipated impacts allowed by the permit would impair this designation. Substantial deforestation in and around the Tier II catchment paired with increased impervious surfaces will result in additional pollution loads to Otter Point Creek I. The applicant has not provided information to MDE that the project and wetland and waterways impacts will not result in degradation of Otter Point Creek I water quality below Tier II high quality standards.

State and federal regulations require that the water quality of Tier II waters *must be maintained* unless the Maryland Department of the Environment “determines a change in quality is justifiable as a result of necessary economic or social development; and [t]he change will not diminish uses made of, or presently existing, in these waters.”³

The Applicant has failed to provide MDE with any information that identifies the potential Tier II impacts from construction and operation, nor has it provided any information regarding why this degradation of Tier II waters is “is justifiable as a result of necessary economic or social development.”⁴ The JPA and its associated documents provide no economic analysis of the necessity of this proposed project. The JPA application document makes unsupported conclusory statements about providing jobs and the need for large warehouse space on the I-95 corridor⁵ but provides no economic or market analysis to support these statements. Without additional information presented to MDE it is impossible to make a determination that there is a justifiable economic necessity for impacting the Tier II waterbody. Further, the Applicant has stated publicly that the layout for the project is purely speculative in nature and that “[t]here are no tenants or users that have been established or signed up for the project.”⁶ No information has been made publicly available that contradicts the Applicant's own statements regarding the “purely speculative” nature of this project. MDE cannot and should not make determinations on speculative projects, as such the permit application should be denied.

¹ MDE Permit Application Screening Form Date Screened 7/19/2019.

<http://mdewin64.mde.state.md.us/ECollaboration/SearchPortal.aspx> Accessed 8/13/2019.

² Maryland Tier II High Quality Waters (2016)

<https://mdewin64.mde.state.md.us/WSA/TierIIWQ/index.html> Accessed 12/2/2019

³ Md. Code Regs. 26.08.02.04

⁴ *Id.*

⁵ JPA 201961268/19-NT-0228 Pg. 4.

⁶ Harford County Dept. of Zoning and Planning Community Input Meeting Preliminary Plan and Site Plan for Abingdon Business Park 1/15/2019 Pg. 14 Lines 2-8.

2. Nontidal wetland and Stream Impacts are not justified in an already impaired watershed:

It is a goal of the State that “further degradation and losses to nontidal wetlands due to human activity be prevented wherever possible”.⁷ In determining whether to allow impacts to nontidal wetlands an applicant must demonstrate to MDE, among other things, that the proposed activity “[w]ill not cause or contribute to a degradation of groundwaters or surface waters and that it has no practicable alternative”.⁸ The publicly available documents make no such demonstrations and any approval determination from MDE on this permit would be arbitrary and capricious.

The entire Bush River watershed stream system is already impaired by various pollutants associated with urban, commercial, and residential stormwater runoff.⁹ All of these impairments impact the water quality and biological integrity of the watershed. Furthermore, MDE’s Watershed Report for Biological Impairment of the Bush River (“Watershed Report”) indicates that the biological stressors in the Bush watershed and the degradation stemming from them are representative impacts of urban developed landscapes.¹⁰ The Watershed Report also indicates that “[a]pproximately 100% of the Bush River watershed is estimated as having fish and/or benthic indices of biological impairment in the poor to very poor category.”¹¹ The Watershed Report is clear that Bush River and its tributaries are heavily impacted by polluted runoff stemming from urban development. The applicants proposed project will remove a large patch of forest within the watershed and replace it with impervious pavement and buildings and it is likely that this project and associated land use changes will result in further degradation of the Rush River watershed.

The Applicant has provided little information in their application packet that addresses these issues and identifies solutions to limit negative impact to the already impaired watershed.

3. The Application is Incomplete and fails to provide a defensible alternatives analysis:

The Applicant has failed to provide an adequate practicable alternatives analysis to MDE. The Applicant failed to identify on the application or otherwise, the quantity, names, and locations of possible alternative sites. The application provides one sentence stating that Abingdon Woods is the only appropriate site location because of its size and proximity to I-95. There is no supporting documentation in the application packet that backs up this assertion

⁷ Md. ENVIRONMENT Code Ann. § 5-902.

⁸ *Id.* at 5-907.

⁹ Maryland’s Searchable Integrated Report Database:

<https://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Pages/303d.aspx?a=go&qBasinCode=%20&qBasinName=Bush%20River&qHUC=%20&qCountyName=%20&qWaterType=%20&qListingCategory=%20&qImpairmentCategory=> Accessed 12/2/19 (Impaired by TSS, Chlorides, Sulfates, Habitat Alterations/Channelization, and lack of riparian buffers).

¹⁰ Watershed Report for Biological Impairment of the Bush River (2013) Pg. 17.

https://mde.maryland.gov/programs/Water/TMDL/DocLib_Bush_02130701/Bush_River_BSID_19Dec13_Final.pdf

¹¹ *Id.* Pg. 7.

or demonstrates that the Applicant conduct even a cursory practicable alternatives analysis. State law is clear that Applicants must “demonstrate to the satisfaction of [MDE] that practicable alternatives have been analyzed and that the regulated activity has no practicable alternative.”¹² The Applicant must also “prove to [MDE’s] satisfaction that alternative sites for the proposed project have been examined”.¹³ The application packet does not provide MDE with sufficient information to a determination that “no practicable alternative” exists. For MDE to make such a determination based on the limited information provided by the Applicant would be arbitrary, capricious, and contrary to state laws.

Furthermore, the Applicant has provided MDE with no information regarding a “demonstrated public need”¹⁴ for this project and its associated nontidal wetland and stream impacts. The application packet contains no information about the economic value the proposed project would contribute to the state or local economy, in fact, as stated above, the Applicant itself has claimed that the project is purely speculative and has no tenants or anyone signed on for space in the proposed business park. This lack of information makes it impossible for MDE to weigh “the economic value of the propose project” against the “ecological and economic value associated with the nontidal wetlands”.¹⁵

Because a substantial amount of information regarding practicable alternative site analysis is missing from the Application, MDE must deny it, or at a minimum require the Applicant to provide sufficient information to MDE.

4. Nontidal Wetland Mitigation Issues:

The Applicant’s intent to mitigate nontidal wetland impacts through payment to the Nontidal Wetland Compensation Fund¹⁶ is not appropriate in this situation. MDE has identified the entire Bush River stream system as impaired for various pollutants associated with urban stormwater runoff.¹⁷ Nontidal wetlands provide effective stormwater runoff controls and protect stream water quality. The Applicant is proposing to remove more wetlands from an already degraded stream system. MDE must require the Applicant to conduct nontidal wetland mitigation via enhancement, restore, or creation of wetlands within the Bush River watershed and preferably in the Ha Ha Branch and/or Otter Point Creek sub watersheds. This would satisfy the State’s goal “to attain no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions.”¹⁸

¹² Md. ENVIRONMENT Code Ann. § 5-907(b) and Md. Code Regs. 26.23.02.04.

¹³ Md. Code Regs. 26.23.02.05.

¹⁴ Md. Code Regs. 26.23.02.04.

¹⁵ Id.

¹⁶ JPA Pg. 5. Part 8.

¹⁷ Supra note 10.

¹⁸ Md. ENVIRONMENT Code Ann. § 5-902

MDE's website shows that only one programmatic wetland mitigation project has been undertaken in the Bush River watershed.¹⁹

Furthermore, state regulations only allow monetary compensation if MDE "determines that mitigation is not a feasible alternative" and "[m]onetary compensation may not substitute for the requirement to avoid or minimize nontidal wetland losses."²⁰ The Applicant has not provided MDE with any information to support a determination that actual mitigation of nontidal wetlands is not a feasible alternative, the Applicant's activity is not exempted from mitigation requirements and therefore MDE "shall require the permittee to develop and implement mitigation practices."²¹

5. Climate Change:

The information provided by the Applicant to MDE contains no information or discussion about how the proposed construction and operation of the project will be designed to address the impacts of climate change that effect this region. Chapter 18 of the Fourth National Climate Assessment²² details the climate change impacts facing Maryland and the Northeast. This report makes it clear that Maryland and the Northeast are experiencing a larger increase in the intensity of precipitation events than the rest of the contiguous United States. These recent increases in rainfall intensity are expected to continue. The Climate Assessment also states that increases in precipitation intensity will impact freshwater aquatic ecosystems that are vulnerable to water quality changes stemming from increased high flows, decreases in low flows, and higher water temperatures. Forests and wetlands provided vital ecosystem services that reduce the impact from stormwater runoff from increased precipitation events. Forests and wetlands are natural and effective buffers against the impacts of climate change and must be preserved, not eliminated. The Applicant and MDE must ensure that adequate controls are in place and part of the application that will account for climate change driven increases in stormwater runoff from more intense precipitation events.

6. Cumulative Impacts:

The application packet of information does not include any discussion or analysis of the cumulative impacts stemming from the construction and operation of this project. The JPA application at Pg. 2 part 2.b. states that there will be no permanent perennial stream impacts

¹⁹ https://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Pages/pwm_by_watershed.aspx (Accessed 12/4/2019).

²⁰ Md. Code Regs. 26.23.04.07.

²¹ Md. Code Regs. 26.23.04.02.

²² **Dupigny-Giroux**, L.A., E.L. Mearns, M.D. Lemcke-Stampone, G.A. Hodgkins, E.E. Lentz, K.E. Mills, E.D. Lane, R. Miller, D.Y. Hollinger, W.D. Solecki, G.A. Wellenius, P.E. Sheffield, A.B. MacDonald, and C. Caldwell, 2018: Northeast. In *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 669–742. doi: 10.7930/NCA4.2018.CH18 <https://nca2018.globalchange.gov/chapter/18/> (Accessed 12/3/19).

stemming from the project. Ha Ha branch, a perennial stream, bisects the project area, 68% of the forest within this stream's watershed will be removed and replaced by millions of square feet of impervious surfaces. This large scale deforestation of the watershed of Ha Ha branch will result in permanent impacts to the water quality of the stream, the application fails to identify any of these impacts and provide that information to MDE for their consideration and balancing of the public necessity of the project compared to the ecological and economic value of the currently forested project site.

7. Procedural Issues:

The following list represents procedural and public participation/notice issues that have harmed public participation in this proceeding.

- The vast majority of the Application and associated documents were incomplete and not available to the public prior to the public hearing.
- Riverkeeper and the public's ability to provide public comment is harmed by the absence of and lack of access to the pertinent information.
- The 30-minute question and answer period prior to the start of the public hearing is not sufficient or formalized enough to address the numerous substantive questions and concerns posed by Riverkeeper and those at the public hearing.
- Prior to the public hearing, the Application packet was only available via Public Information Act (PIA) request to MDE. This practice provides inadequate access to information as it is unlikely that the PIA request will produce documents within a 30-day public comment period. Riverkeeper did not obtain the PIA files until the Friday before (2 business days) the public hearing leaving limited time to review the documents in preparation for the public hearing. Riverkeeper and others requested a public hearing for this project in August and September prior to the publication of the public notice on October 15. MDE and the Applicant were aware of the significant public interest in this project for weeks before the public hearing, but the Application packet was not posted on MDE's website until November 8th. This harms Riverkeeper's ability to provide substantive public comments.
- There is significant public interest in this project and therefore MDE must exercise their authority and discretion to request a transcript of the public hearing.²³ The transcript should also be published with the rest of the permit application documents.
- Riverkeeper has raised significant concerns with Harford County regarding the project's compliance with the Forest Conservation Act and the adequacy of the site's Forest Conservation Plan. Approving this Application without a resolution of those issues would be premature.
- The State's engagement of underrepresented communities is lacking in this instance. Information in the Application packet demonstrates that there could be special considerations in this instance. The Maryland Historical Trust (MHT) letter from

²³ Md. Code Regs. 26.23.02.02

2004²⁴ describes how prehistoric materials and artifacts were discovered within the subject property and the possible presence of Native American Burial mounds onsite. The MHT determined to not recommend the site for historic designation and protection. However, with this information MDE should have taken the opportunity to enhance their engagement of underrepresented communities with ancestral, cultural, and historic ties to the region and to any prehistoric and Native American artifacts found on site. This is an opportunity missed considering that Harford County has had this information for 15 years and to Riverkeeper's knowledge has conducted no outreach or engagement with underrepresented native communities in the region and in MD. MDE must enhance outreach when special cultural or demographic concerns arise in a permit proceeding.

- Similarly, the Maryland Environmental Justice Screen Tool (MDE EJScreen)²⁵ identifies the Abingdon/Edgewood area as having environmental justice indicators that are 62% higher than similar areas in the state. MDE must consider these environmental justice factors when implementing public notice procedures and work to ensure that underrepresented and environmental justice communities are fully notified and given adequate access to information and participation in the permitting process. MDE and other state agencies recently entered into a resolution agreement²⁶ with the federal government regarding steps MDE must take to enhance engagement of underrepresented groups and ensure equity in the environmental permitting processes. The MDE Wetland and Waterways division should review this resolution agreement and consider how their permitting process could be enhanced by implementing some of the procedures and safeguards noted in the agreement.
- The public notice packet had readability issues as the provided plans used a small font.
- The Public Notice does not contain information regarding potential Tier II impacts to Otter Point Creek I from the project. Public notice of potential Tier II impacts is required by state regulations.²⁷
- The Application form does not contain any sections for Tier II identification and analysis of potential impacts. State antidegradation policies are explicit that nonpoint source pollution must be controlled when there are tier II impacts.²⁸
- Riverkeeper and the Public were not able to review most of the permit documents and therefore public cannot provide MDE comments pertinent to:

²⁴ Phase I Archeological Survey, Abingdon Woods, Harford County, Maryland Historical Trust 2004 <https://mde.state.md.us/programs/Water/WetlandsandWaterways/Documents/PN/MHT-Phase-I-Concurrence-Letter-Abingdon-Business-Park.pdf> Accessed 12/4/2019.

²⁵ <https://p1.cgis.umd.edu/ejscreen/> Access 12/4/2019

²⁶ Final Resolution Letter and Agreement to MD Recipients. EPA Programs and Projects Office of General Counsel <https://www.epa.gov/ogc/final-resolution-letter-and-agreement-md-recipients> Accessed 12/4/2019.

²⁷ Md. Code Regs. 26.23.02.04

²⁸ *Id.*

- Practicable alternatives analysis, including comments related to possible alternative sites for the project,
 - Cumulative impacts and degradation of already impaired waterbodies,
 - Stormwater and flooding impacts already experienced in the residential areas surrounding Abingdon Woods.
- The Application is missing comments from federal agencies. MDE required comments from federal agencies to be submitted by December 1, 2019. If MDE received any of these comments they have not been made available to Riverkeeper and the public.
 - The Application packet is missing the supporting documents that referenced in the MHT Letter noted above. This letter references studies and reports that were not made publicly available and thus harms Riverkeeper's ability to provide public comments on the issues of environmental justice and cultural significance.
 - The Application is confusing regarding the Applicant's request for a Letter of Exemption.²⁹ The Application appears to indicate the Applicant is applying for a Letter of Exemption but then the Applicant fills out sections of the Application that are not required if applying for letter of exemption. This is confusing and must be clarified by MDE and the Applicant.

For the aforementioned reasons, it is abundantly clear that the application provided to MDE fails to meet the State and Federal statutory and regulatory requirements for permit to impact nontidal wetlands. Gunpowder RIVERKEEPER respectfully requests that MDE deny the permit because it is incomplete. MDE must require more information from the applicant to address the issues raised in this and other comments. MDE must re-notice the project and reopen the public comment period when the Applicant provides the missing information and that information is made available for public comment.³⁰ Furthermore, the full administrative record must be made available to interested parties upon its completion.

Riverkeeper thanks MDE for the opportunity to comment on this Application.

Respectfully submitted,

²⁹ JPA Pg. 4. Part 5.

³⁰ MDE has set precedent for this request. In the case of MD Solar 1 – Shugart Valley Place MDE held the comment period open will it request and received more information from the Applicant in that instance. The additional information was made publicly available. See, https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/MD_Solar_1.aspx

A handwritten signature in black ink, appearing to read "Patrick DeArme", with a long horizontal flourish extending to the right.

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