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IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND

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September Term, 2013

No. 02199

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MARYLAND DEPARTMENT OF THE ENVIRONMENT, *et al.*

Appellants

v.

ANACOSTIA RIVERKEEPER, *et al.*

Appellees

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On Appeal from the Circuit Court for Montgomery County, Maryland  
(Ronald B. Rubin, Judge)

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**BRIEF OF APPELLANT MONTGOMERY COUNTY, MARYLAND**

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Marc P. Hansen,  
County Attorney

Edward B. Lattner, Chief  
Division of Human Resources & Appeals

Walter E. Wilson,  
Associate County Attorney  
Walter.Wilson@ montgomerycountymd.gov

Office of the County Attorney  
101 Monroe Street, Third Floor  
Rockville, Maryland 20850  
(240) 777-6700

Attorneys for Appellant Montgomery  
County, Maryland

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## STATEMENT OF THE CASE

This case requires the Court to determine whether a stormwater discharge permit that the State of Maryland issued to Montgomery County, Maryland (the “County”) complies with the applicable legal requirements under state and federal law. The appeal arises from a judicial review ruling by the Montgomery County Circuit Court that reversed an administrative agency decision by the Maryland Department of the Environment (the “Department” or “MDE”) to grant a stormwater discharge permit to the County. The court, having opined that the terms and conditions in the Permit were not sufficient to comply with the federal Clean Water Act, applicable Maryland law, or the federal regulations implementing the Clean Water Act, remanded the matter to MDE for further proceedings with instructions that the Permit include, *inter alia*, specific requirements for meeting water quality standards. Appellant Montgomery County, Maryland contends that the Permit satisfies all of the legal requirements for municipal stormwater discharge permits under both Maryland law and the federal Clean Water Act. The County also maintains that since the decision to grant the Permit was not premised on an erroneous interpretation or conclusion of law, MDE is entitled to considerable judicial deference in the interpretation of the environmental laws and regulations that the agency is charged with administering and enforcing. Such decisions carry with them the presumption of validity and must, therefore, be reviewed in the light most favorable to the agency.

## **QUESTION PRESENTED**

Was the decision by the Maryland Department of the Environment to issue a stormwater discharge permit to Montgomery County that in the agency's determination satisfied all applicable legal requirements for municipal stormwater discharge permits under the federal Clean Water Act based upon substantial evidence?

## **STATUTES, ORDINANCES, AND CONSTITUTIONAL PROVISIONS**

The full text of all relevant statutes, ordinances, and constitutional provisions appears in the appendix to this brief.

## **STATEMENT OF FACTS**

In October of 2008, MDE published a Notice of Tentative Determination to issue MS4 Permit 06-DP-3320 MD0068349 (the "Permit") to Montgomery County. The Tentative Determination notice was followed by an MDE-sponsored public hearing in November and a written public comment period that ended in December of 2008. The Department made certain modifications to the proposed permit based on citizen feedback received through both live testimony and written comments. The Department then made a final decision, on or about February 18, 2009, to issue the MS4 permit to the County. The Department announced its final decision by publishing a Notice of Final Determination in a newspaper of general circulation on February 25, 2009 and again on March 4, 2009.

Appellees filed a request for a contested case hearing before an Administrative Law Judge ("ALJ") on March 18, 2009 to challenge MDE's final determination regarding issuance of the Permit. (E. 166-176). The Appellees consist of four organizations whose missions involve protecting and enhancing the quality of local

bodies of water for aesthetic and recreational purposes. The organizations claimed to have members that were adversely affected by the County's MS4 discharges because those members use Maryland bodies of water such as the Potomac River, Anacostia River, and other local streams for recreation and aesthetic enjoyment. (E. 166-167). With the exception of the Waterkeepers Alliance, which is based in New York, all the organizations are based in the District of Columbia. However, none of them own any property in Maryland.

There are also two individuals among the Appellees, Mac Thornton and Pat Munoz, both of whom claimed that their recreational use and enjoyment of rivers and streams in Montgomery County for activities such as kayaking, canoeing, and paddling, were adversely affected by stormwater discharges from the County's storm sewer system. At the time of the contested case hearing request, Pat Munoz was a resident of Washington, D.C. and Mac Thornton was a resident of Montgomery County. Apparently, however, neither of them owned property next to or near any Maryland waterways.

On June 24, 2009, Administrative Law Judge Thomas Welshko of the Maryland Office of Administrative Hearings ("OAH") granted the County's motion to dismiss Appellees' contested case hearing request for lack of standing on the ground that Appellees had failed to demonstrate aggrievement. The ALJ determined that Appellees had not suffered any special damage differing in character and kind from that suffered by the general public as a result of MDE's decision to grant the County a new MS4 permit. In response to the claims of special recreational interests cited by Mac Thornton or Pat



Munoz, the ALJ noted that recreational use of a body of water is a public right, not an individual right unique to either of the two individual Appellees, and that the specific activities cited were available to any member of the public. (E. 162-164).

Appellees sought reversal of the ALJ's order dismissing their legal challenge to the Department's permitting decision by filing a Petition for Judicial Review in the Baltimore County Circuit Court on July 24, 2009. However, the petition erroneously named the OAH instead of MDE as the agency whose final decision was being challenged. Appellees later filed with the same court an amended petition on September 30, 2009, which added MDE as a party by correctly naming it, instead of OAH, as the administrative agency whose final decision was the subject of their judicial review petition.

After determining that Baltimore County was not the proper venue for judicial review of the ALJ's ruling, the Circuit Court for Baltimore County transferred the case to the Circuit Court for Montgomery County on September 27, 2010. The Montgomery County Circuit Court, having found that the administrative agency decision was supported by substantial evidence in the record and not premised on an erroneous conclusion of law, issued an order on October 25, 2011 affirming the ALJ's dismissal of the Appellees' contested case hearing request for lack of standing.

Appellees then appealed that court's ruling to the Maryland Court of Special Appeals. In an unreported opinion dated January 7, 2013, the Court of Special Appeals reversed the Circuit Court's decision and remanded the case to Montgomery County for further proceedings consistent with its ruling. (E. 130-155). On remand, the Circuit

Court ruled on November 20, 2013 that the Permit was not legally sufficient to comply with the requirements of the Clean Water Act and remanded the matter to MDE for further proceedings and revision of the Permit. (E. 21-22).

### **STANDARD OF REVIEW**

Maryland law is well settled with regard to this Court's review of administrative decisions and orders. When reviewing an administrative agency decision on appeal, the role of an appellate court is precisely the same as that of the circuit court in a judicial review proceeding. *Department of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303, 641 A.2d 899, 909 (1994). The appellate court reviews the decision of the administrative agency, rather than the findings of fact and conclusions of law made by the circuit court, and will defer to the administrative agency's findings of fact and inferences drawn, insofar as supported by the record. *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 413, 36 A.3d 439, 446 (2012). *See also MVA v. Shea*, 415 Md. 1, 17, 997 A.2d 768, 777 (2010) ("[O]ur role is not to review the Circuit Court's judgment, but rather to review the decision of the ALJ . . .").

Therefore, in deciding this appeal, this Court, no less than the circuit court, is required to afford deference to the findings made by the administrative agency acting within its statutorily prescribed area of expertise. *Pautsch v. Md. Real Estate Comm'n*, 423 Md. 229, 253, 31 A.3d 489, 503 (2011). When reviewing factual determinations, it is a fundamental principle of administrative law that a reviewing court may not substitute its judgment for the expertise of the administrative agency from which the appeal is taken. *Kram v. Md. Military Dep't*, 374 Md. 651, 656, 824 A.2d 99, 102 (2003). If,

however, the agency's decision is based on an erroneous conclusion of law, the reviewing court may substitute its judgment for that of the agency concerning questions of law. *Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 402, 586 A.2d 816, 822 (1991).

The scope of judicial review of decisions by administrative agencies is narrow, *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450, 800 A.2d 768, 774 (2002), as the decisions made by such agencies are entitled to the greatest weight and to a real presumption of validity. *Board of Educ. of Montgomery County v. Paynter*, 303 Md. 22, 40, 491 A.2d 1186, 1195 (1985). The decision of the agency must be reviewed in the light most favorable to the agency. *White v. North*, 121 Md. App. 196, 220, 708 A.2d 1093, 1105 (1998). Even with regard to some legal issues, an administrative agency's interpretation and application of the statutes and regulations that the agency administers is normally accorded considerable weight by reviewing courts out of respect for the expertise of the agency in its own field. *HNS Dev., LLC v. People's Counsel*, 425 Md. 436, 449, 42 A.3d 12, 20 (2012).

Furthermore, a reviewing court should not substitute its judgment for that of an administrative board or agency where the issue is fairly debatable and the record contains substantial evidence to support the administrative findings. *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080, 1087 (1979). This is so even when, if the matter had been originally before the court, the court might have reached a different conclusion. *Cason v. Board of County Com'rs for Prince George's County*, 261 Md. 699, 276 A.2d 661 (1971). Substantial evidence has been defined as such relevant evidence as

a reasonable mind might accept as adequate to support the agency's conclusion. *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978).

In assessing whether a determination is fairly debatable, the court must look to see whether there is evidence from which “a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record.” *Cason*, 261 Md. at 707, 276 A.2d at 664-65 (quoting *Board of County Commissioners of Prince George's County v. Oak Hill Farms, Inc.*, 232 Md. 274, 283, 192 A.2d 761 (1963)). The task of the court is to determine “whether reasoning minds could reasonably reach that conclusion by direct proof or by permissible inference from the facts and the record before the agency.” *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 43, 506 A.2d 263, 265 (1986) (quoting *State Commission on Human Relations v. Washington County Community Action Council, Inc.*, 59 Md. App. 451, 455, 476 A.2d 222, *cert. denied*, 301 Md. 354, 483 A.2d 38 (1984)). It is for the administrative agency to resolve any conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inferences. *Yancy v. Department of Labor Licensing and Regulation*, 125 Md. App. 719, 724, 726 A.2d 875, 877 (1999).

## ARGUMENT

**The decision of the Maryland Department of the Environment to issue a stormwater discharge permit to Montgomery County that the agency deemed to be in full compliance with the legal requirements applicable to municipal stormwater discharge permits under the federal Clean Water Act was based upon substantial evidence and not premised on an erroneous conclusion of law.**

### **A. Introduction.**

The Permit in question was issued under Maryland statutory provisions that prohibit the discharge of pollutants into either ground or surface waters except as authorized by a discharge permit issued by MDE. Md. Code Ann., Envir. §§ 9-322, 9-323 (App. 4). Those provisions are part of a greater statutory and regulatory regime governing the State's water pollution control permitting program under a delegation of federal environmental permitting authority.

The Federal Water Pollution Control Act (the "Clean Water Act" or "CWA") prohibits the discharge of pollutants from "point sources"<sup>1</sup> into surface waters except in accordance with the terms of a permit issued by the U.S. Environmental Protection Agency ("EPA"). 33 U.S.C. § 1311(a) (App. 2). The EPA is the federal agency responsible for administering the CWA and is charged with overseeing the restoration and maintenance of the chemical, physical and biological integrity of the nation's waters by preventing the pollution of navigable waters of the United States. 33 U.S.C. § 1251(d) (App. 1). The required permit is issued under a national regulatory program known as the National Pollutant Discharge Elimination System ("NPDES"), which is the

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<sup>1</sup> Point source pollution is water pollution that enters a body of water through a "discernable, confined or discrete conveyance" such as a pipe, outfall, channel, tunnel, etc. 33 U.S.C. § 1362 (14).

centerpiece of the Clean Water Act. 33 U.S.C. § 1342 (App. 3-4). The Clean Water Act authorizes and directs the EPA to establish water quality standards and promulgate regulations as needed to establish effluent limitations for point source discharges and achieve certain other goals and objectives of the CWA. 33 U.S.C. § 1311(b) (App. 2). These effluent limitations apply in particular to the operators of point sources of pollution, who must obtain a permit under the NPDES permit program prior to the discharge of any pollutant.

The Clean Water Act also directs EPA to delegate the authority to administer the NPDES permit program to the governments of those states that can demonstrate to EPA's satisfaction that they have adequate legal authority to meet certain federal statutory requirements and thereby control pollutant discharges into surface waters within the state's jurisdiction. 33 U.S.C. § 1342(b) (App. 3-4). *See generally*, 40 C.F.R. Part 123 (State Program Requirements). If the state program meets certain requirements, the EPA approves the program and suspends its own NPDES permitting program within that state. At that point, the appropriate state environmental agency becomes the sole issuer of NPDES permits to applicants in that state. However, the EPA continues to receive copies of applications for NPDES permits and retains the power to veto state NPDES permits. *Howard County v. Davidsonville Area Civic & Potomac River Assos.*, 72 Md. App. 19, 24 n.3, 527 A.2d 772, 774 (1987).

The NPDES program is administered mainly by state pollution control agencies to whom the EPA has delegated permit issuing authority. The terms and conditions of the individual discharge permits that the state issues to the owners of local government

facilities set specific enforceable requirements to which the personnel responsible for operating those facilities must adhere. These NPDES permits for municipal stormwater discharges, referred to as municipal separate storm sewer system (“MS4”) permits, require local government permittees to implement various stormwater controls in the form of best management practices aimed at reducing the discharge of pollutants into surface waters to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii) (App. 3-4). They are distinct from the NPDES permits issued for industrial stormwater discharges, which require industrial permittees to strictly comply with water quality standards. 33 U.S.C. § 1311(b)(1)(C) (App. 2).

MDE implements the NPDES program in Maryland because the EPA has approved the State’s program after having made a determination that the program satisfies all of the applicable requirements under federal law. *See* COMAR § 26.08.04.07 (App. 6). The Department may issue a discharge permit upon its determination that the terms of the Permit meet all state and federal regulations, applicable water quality standards, and appropriate effluent limits. Md. Code Ann., Envir. § 9-324 (App. 5). MDE’s effluent standards must be at least as stringent as the federal standards. *Id.* § 9-314(c).

The Department issues NPDES permits under Title 9, Subtitle 3, of the Environment Article, which is the State’s water pollution control law. Thus, any discharger of pollutants into Maryland’s waters – *i.e.*, ground waters as well as surface waters – who holds and complies with the terms of an NPDES permit satisfies its

obligations under both the Clean Water Act and the State's water pollution control statute. Md. Code Ann., Envir. §§ 9-322 to 9-324 (App. 4-5).

**B. The Clean Water Act does not require municipal stormwater discharge permits to achieve strict compliance with water quality standards, but instead mandates the use of best management practices to reduce the discharge of pollutants to the maximum extent practicable.**

The Montgomery County Circuit Court incorrectly decided that to comply with the Clean Water Act and applicable state law, the County's MS4 Permit would need to include requirements for meeting water quality standards under Sections 301 (33 U.S.C. § 1311) (App. 2) and 402 (33 U.S.C. § 1342) (App. 3-4) of the Clean Water Act (the "CWA" or the "Act"), 40 C.F.R. § 122.44(d) (App. 5), which is a regulatory provision adopted under the CWA, and Section 9-324 of the Environment Article of the Maryland Code. (E. 21). The court's ruling is at odds not only with the plain text of the federal clean water statute, but also longstanding judicial precedent on the matter of strict water quality standards compliance.

As a matter of law, nothing in Section 402 of the Clean Water Act requires municipal stormwater to comply with water quality standards. Courts at both the federal and state levels, following the lead of the Ninth Circuit U.S. Court of Appeals in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9<sup>th</sup> Cir. 1999), have consistently articulated this basic interpretation of the plain text in Section 402 (p). *See, e.g., Conservation Law Found., Inc. v. Boston Water & Sewer Comm'n*, 2010 U.S. Dist. LEXIS 134838, 18 (D. Mass. Dec. 21, 2010) (stating that the "Clean Water Act does not mandate that permits issued . . . for municipal stormwater discharges require compliance



with numeric water quality standards”); *Tualatin Riverkeepers v. Or. Dep't of Env'tl. Quality*, 235 Ore. App. 132, 140, 230 P.3d 559, 564 n.10 (2010) (holding that under 33 U.S.C. § 1342(p)(3)(B) (App. 3-4), dischargers of municipal stormwater are not subject to the requirements of 33 U.S.C. § 1311(b)(1)(C) (App. 2) to strictly comply with state water quality standards). Prior to 1987, the Clean Water Act did not expressly regulate stormwater discharges. In fact, following the CWA’s enactment in 1972, EPA promulgated regulations exempting certain categories of discharges, which included most municipal stormwater, from permitting requirements. *See, e.g., Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1372 n.5 (D.C. Cir. 1977) ( citing 40 C.F.R. § 125.4(f) (1975), which provided that generally no NPDES permit was required for “uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity. . . .”). When it amended the Clean Water Act in 1987 to explicitly regulate stormwater discharges, Congress acknowledged that municipal stormwater is different from industrial stormwater, and therefore, needs to be regulated differently. *See Defenders*, 191 F.3d at 1165. Consequently, whenever a permit is required for the discharge of stormwater, the Clean Water Act sets two different standards, depending on whether the Permit authorizes discharges associated with industrial activity or whether it authorizes discharges from municipal storm sewers. *Id.* at 1164.; 33 U.S.C. § 1342(p)(3) (App. 3-4). Permits authorizing the discharge of *industrial* stormwater must require compliance with state water quality standards. The applicable provision in the Clean Water Act states that “[p]ermits for discharges associated with industrial activity shall meet all applicable

provisions of this section and section 301 [33 USCS § 1311].” *Id.* § 1342(p)(3)(A) (App. 3-4). However, for permits authorizing the discharge of *municipal* stormwater, Congress established an MS4-specific compliance standard which mandates that those permits require controls to reduce the discharge of pollutants to the “maximum extent practicable,” the so-called MEP standard. More specifically, the relevant statutory requirement in Section 402 (p) states the following:

- (B) Permits for discharges from municipal storm sewers--
  - (i) may be issued on a system- or jurisdiction-wide basis;
  - (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
  - (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

*Id.* § 1342 (p) (3) (B) (App. 3-4). (Emphasis added.)

Section 301 (33 U.S.C. § 1311) (App. 2) of the Clean Water Act, which requires industrial permittees to meet “any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law”, is inapplicable to the discharge permit issued to Montgomery County since the County is not an industrial permittee. This too is supported by the Ninth Circuit’s ruling in the *Defenders* decision, where the court explained that Congress’ choice to require industrial stormwater discharges to comply with 33 U.S.C. § 1311 (App. 2), but not to include the same requirement for municipal discharges, must be given effect. *Defenders*, 191 F.3d at 1165. The court went on to opine that:

33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers “reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] Administrator [or the State] determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii). In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

*Id.* (Emphasis added).

The Circuit Court’s conclusion that Montgomery County’s MS4 permit must satisfy the requirements of Section 301 in order to be compliant with the Clean Water Act is, therefore, at odds with established judicial precedent as well as what is clearly indicated in the text of the Section 402 (p) (3) of the Clean Water Act. Not only does the Montgomery County permit contain numerous conditions to ensure the reduction of pollutants to the maximum extent practicable, Part VI.A (Enforcement and Penalties) of the Permit unequivocally states the following: “The discharge of stormwater containing pollutants, which have not been reduced to the MEP, is prohibited.” (E. 90). Given that the County’s permit pertains solely to the discharge of municipal stormwater and its terms and conditions rely upon the MEP standard, the Permit fully complies with what is required under the applicable provisions of Section 402 (p).

The Circuit Court’s order also cites 40 C.F.R. § 122.44(d) (App. 5) as one of the federal regulations with which the conditions in the Montgomery County permit must comply. Section 122.44 begins by stating that “each NPDES permit shall include conditions meeting the following requirements *when applicable*” (emphasis added).

Among the requirements are those contained within subsection (d), which include “any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to. . . [a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d) (App. 5). The County’s permit is not governed by any of these requirements because, as clearly indicated by the statutory references in that provision, the requirements are only applicable where compliance with water quality standards is required.

The County’s permit is, instead, subject to the requirements specified in subsection (k) of the regulation. That provision requires “[b]est management practices (BMPs) to control or abate the discharge of pollutants when. . . [a]uthorized under section 402(p) of the CWA for the control of storm water discharges”. 40 C.F.R. § 122.44(k) (App. 5). The Montgomery County permit mandates the use of best management practices to control stormwater discharges to the maximum extent practicable (E. 82), which fully complies with the statutory and regulatory provisions that are applicable. Since municipal stormwater discharge permittees are not, as a matter of law, required to achieve compliance with water quality standards, the Circuit Court’s order stating that Montgomery County’s permit must fulfill the requirements of 40 C.F.R. § 122.44(d) (App. 5) is erroneous.

Also, since the Permit is required to impose best management practices to reduce the discharge of pollutants to the maximum extent practicable rather than to meet water quality standards, the Circuit Court likewise erred in stating that the Permit must include

conditions to meet water quality standards under Section 9-324 in the Environment Article of the Maryland Code. That statutory provision authorizes the Maryland Department of the Environment to issue a discharge permit if the Department finds that the discharge meets “[a]ll *applicable* State and federal water quality standards and effluent limitations.” Md. Code Ann., Envir. § 9-324 (App. 5) (emphasis added). There are no “applicable” water quality standards that municipal stormwater discharges are required by law to meet.

**C. The Circuit Court exceeded the permissible scope of judicial review by improperly substituting its judgment for the expertise of the Maryland Department of the Environment in deciding whether the conditions included in the Permit are adequate to achieve the pollution reductions mandated under the Clean Water Act.**

It must be emphasized at the outset that the statutory provision under Section 402 (p) of the Clean Water Act which governs all permits for the discharge of municipal stormwater states, in pertinent part, that MS4 permits must “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii) (App. 3-4) (emphasis added). Congress could not have been clearer in expressing its intent that the executive agency charged with issuing and enforcing permits for municipal stormwater discharges have broad latitude to apply the professional judgment needed to determine which terms and conditions are necessary to include in the MS4 permit for a particular local jurisdiction to

reduce the discharge of pollutants to the degree required by law. The Circuit Court erred by substituting its judgment as to what conditions are adequate to achieve pollution reductions.

However, even leaving aside the language in the Clean Water Act, Maryland courts have also been very clear in describing the narrow role to be exercised by the judiciary when reviewing decisions made by administrative agencies acting within their statutorily prescribed fields of expertise. For instance, a reviewing court must review the agency's decision in the light most favorable to the agency, since the decisions of administrative agencies are *prima facie* correct and carry with them the presumption of validity. *Paynter*, 303 Md. at 35-36, 491 A.2d at 1193. In a 2011 decision issued by the Maryland Court of Special Appeals in response to a legal challenge contesting MDE's issuance of an NPDES permit in connection with agricultural stormwater discharges, this Court articulated the well-established administrative law principle that a court's role in reviewing an administrative agency decision is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and whether the administrative decision is premised upon an erroneous conclusion of law. *Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 690, 28 A.3d 178, 193 (2011). That ruling relied on an earlier decision by the Maryland Court of Appeals in *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 12 A.3d 1255 (2011), in which the Court opined that “a court's task on review is not to ‘substitute its judgment for the expertise of those persons who constitute the administrative agency.’” *Id.* at 173, 12 A.3d at 1261.

Even on questions of law, both state and federal courts defer to an agency's construction of its own regulations as well as the statutes that the agency has been entrusted to administer and enforce. *See, e.g., Envir. Def. Fund v. EPA*, 210 F.3d 396, 400 (D.C. Cir. 2000) (courts bound to accept agency's interpretation of its own regulations unless plainly wrong; especially on a highly technical question, courts must show considerable deference). *See also In re City of Annandale*, 731 N.W.2d 502, 511-13 (Minn. 2007) (when a state agency is charged with the day-to-day responsibility for enforcing and administering a federal regulation, courts should give the same deference to the state agency's interpretation of the federal regulation as they would to the agency's interpretation of a state regulation). The *Najafi* Court also acknowledged the high level of judicial deference normally accorded to the statutory and regulatory constructions of administrative agencies in stating that even with regard to some legal issues, an administrative agency's interpretation and application of the statutes and regulations that the agency administers should ordinarily be given considerable weight by reviewing courts out of respect for the expertise of the agency in its own field. *Najafi*, 418 Md. at 173, 12 A.3d at 1261 (internal citations omitted). *See also Marriott Employees Fed'l Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445, 697 A.2d 455, 459 (1997) ("The consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute's subject."). Similarly, the Court of Appeals held in *Maryland Transportation Authority v. King*, 369 Md. 274, 799 A.2d 1246 (2002), that "an agency's interpretation of an administrative regulation is of

controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Id.* at 288-89, 799 A.2d. at 1254.

There was nothing clearly erroneous about MDE’s interpretation or application of any of the statutory or regulatory provisions under the Clean Water Act that are cited in the Circuit Court’s order. In making its determination about what terms and conditions needed to be included within the Permit, MDE fully complied with all applicable federal and state laws that pertain to controlling municipal stormwater discharges.

The MS4 permit that MDE issued to the County requires the County to reduce the discharge of pollutants to the maximum extent practicable and imposes additional conditions that the Department indeed determined were appropriate to move the County toward meeting water quality standards within a reasonable timeframe. Therefore, MDE did exactly what it was required to do under the Clean Water Act. In the absence of any violation of that CWA, the Circuit Court was not free to substitute its judgment for that of the Department and remand the Permit for revision with a directive that MDE include conditions that would require Montgomery County to comply with inapplicable statutory and regulatory provisions promulgated to implement the CWA’s requirements. In light of the very stringent and enforceable conditions that MDE included in the County’s permit, all of which are reasonably calculated to lead to the achievement of water quality standards over time, the conditions that MDE would have to add in any revision of the Permit to comply with the Circuit Court’s order are neither required by law nor necessary.



**D. Though not required by Section 402(p) of the Clean Water Act, the terms and conditions included in the Permit are sufficient to ensure attainment of water quality standards.**

The County's permit not only satisfies the applicable requirements of the Clean Water Act; the Permit actually contains conditions that are more stringent than those required to under Section 402 (p) of the Act. The terms and conditions contained in the Permit are adequate to ensure compliance with water quality standards, although, as earlier emphasized, compliance with Section 301 (33 U.S.C. § 1311) (App. 2) of the CWA is not something that is strictly required under Section 402 (p) (33 U.S.C. § 1342(p)) (App. 3-4). At the same time, however, Section 402(p) contains a provision that grants the permitting authority the discretion to determine whether and to what degree strict compliance with water quality-based standards is necessary and to impose more stringent requirements than needed to satisfy the MEP standard if appropriate under the circumstances. The provision declares that "permits for discharges from municipal storm sewers . . . shall require . . . such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B) (iii) (App. 3-4) (emphasis added).

MDE has chosen to exercise this discretionary authority by issuing to the County a permit that seeks to achieve water quality standards over time through a dynamic, iterative process that involves development, implementation, documentation, evaluation, and improvement of pollution controls to achieve measurable goals. Under the terms of the Permit, the County must regularly review and refine its best management practices as needed to produce a net reduction in pollutant loadings within the five-year timeframe

covered by the Permit. It should also be noted that the design standards and guidelines that the Permit explicitly requires the County to rely upon in the development and implementation of its best management practices (E. 77) are specified in the *2000 Maryland Stormwater Design Manual*, which is incorporated by reference into state law. See COMAR § 26.17.02.01-1 (App. 6-7).

Specifically, the County must identify the control measures it will utilize, estimate the pollutant loading reductions to be achieved by those measures, set a schedule for implementing those control measures. Under a continuing iterative process, the County must also monitor and assess the effectiveness of its control measures, document the progress it has made in reducing pollutant loads, and annually report its progress to MDE. If the pollutant reduction benchmarks are not achieved according to schedule, the County is required to develop and implement additional or alternative stormwater control measures. (E. 86).

In addition, the Permit contains conditions that require the County to undertake measures aimed at actually improving water quality rather than simply ensuring that discharges from its storm drain system do not adversely affect water quality. In the area of watershed restoration, for instance, the County must restore 20 percent of its impervious surface area by installing or implementing best management practices to the maximum extent practicable to control runoff from impervious surfaces that currently have little or no stormwater control treatment. This 20 percent restoration requirement, which must be achieved by the time the Permit is set to expire in February 2015, is in addition to a 10 percent impervious area restoration that the County was required to

complete under its previous MS4 permit. (E. 82-83). This means that by the end of this permit term, the County will need to have treated 30 percent of its impervious surface area. The County's obligation under the terms of the Permit to fulfill these watershed restoration requirements along with achieving waste load allocations are among the conditions reasonably calculated to result in the County's eventual compliance with water quality standards.

The Permit contains several other enforceable conditions aimed at achieving water quality standards. One of those conditions is the requirement that the County identify the sources of pollutants in stormwater runoff and link the identified sources to specific water quality impacts in each of its watersheds individually. The County must use this source identification process to develop watershed restoration plans that effectively improve water quality. (E. 76).

In addition, the Permit mandates that the County use analyses and additional monitoring data required under the Permit to assess the effectiveness of stormwater management programs as well as County watershed restoration projects. The County must then document its progress toward meeting waste load allocations included in Total Maximum Daily Loads (TMDLs)<sup>2</sup> approved by EPA for watersheds and stream segments located in the County. (E. 76-77).

The Permit specifically identifies several programs designed to control stormwater discharges to the maximum extent practicable that the County must implement in areas

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<sup>2</sup> A Total Maximum Daily Load (TMDL) is a regulatory term in the Clean Water Act that describes a value of the maximum amount of a pollutant that a body of water can receive, from both point sources and non-point sources, while still meeting water quality standards. 33 U.S.C. § 1313 (d).

served by its storm sewer system and maintain throughout the term of the Permit. The list of management programs specified include stormwater management, erosion and sediment control, illicit discharge detection and elimination, trash and litter reduction and recycling, property management, road maintenance, and public education. (E. 77-81).

In order to ensure that each County watershed has been thoroughly evaluated and has an implementation plan to maximize water quality improvements, the County is required to systematically assess water quality within all of its watersheds. Each of those watershed assessments must include a detailed analysis of water quality conditions, identify and prioritize water quality improvement opportunities, and provide an implementation schedule of plans and benchmarks to control stormwater discharges to the maximum extent practicable. (E. 81-82)

The extensive and continuous chemical, biological, and physical monitoring that the County must undertake to document its progress toward satisfying the watershed restoration requirements quantified under Part III.G. of the Permit (E. 81-82) is also consistent with the overall objective of achieving water quality standards. The Permit is likewise very specific in setting out the timeframes and procedures that define when and how the County must assess the effectiveness of all of the controls it is required to implement. In the area of chemical monitoring, for example, the County must monitor 12 storm events per year, collect stormwater flow samples from each monitoring station, and have at least three representative storm event samples analyzed to determine the average concentration of specific substances itemized in the Permit. (E. 83-84.). In addition to the various elements of watershed restoration assessment that the County must perform

and report on annually, the Permit compels the County to determine the effectiveness of stormwater management practices for stream channel protection by monitoring the Clarksburg Special Protection Area.<sup>3</sup> (E. 85).

Finally, the County must develop TMDL implementation plans that include estimates of pollutant load reduction benchmarks to be achieved. Those plans must describe the actions the County will take to achieve those reductions and specify the deadlines for meeting the benchmarks. (E. 86). If the County's proposed actions turn out to be unsuccessful at meeting the applicable wasteload allocations in accordance with the benchmarks and deadlines contained in the County's TMDL implementation plans, the Permit then mandates the use of an iterative approach whereby the County proposes and implements additional or alternative stormwater controls to achieve those wasteload allocations. (E. 87).

Finally, the Permit includes significant penalties to be imposed for the County's failure to comply with the conditions specified in the Permit. Failure to comply with any of the terms and conditions of the Permit is a violation of the Clean Water Act, which can subject the County to civil penalties as high as \$32,500 per day for each offense. (E. 91). Beyond those penalties for violating the federal law, the County could also be liable for civil penalties under Section 9-342 of the Environment Article for up to \$10,000 per day. Md. Code Ann., Envir. § 9-342 (2013). Criminal penalties may also be imposed against

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<sup>3</sup> A special protection area a geographic area where: (1) existing water resources, or other environmental features directly relating to those water resources, are of high quality or unusually sensitive; and (2) proposed land uses would threaten the quality or preservation of those resources or features in the absence of special water quality protection measures which are closely coordinated with appropriate land use controls. Montgomery Cnty, Md. Code § 19-61 (2013).

County personnel under the Permit. (E. 91-92). The conditions of the Permit, all of which are reasonably calculated to result in compliance with water quality standards, are therefore fully enforceable.

**E. The conditions in the Permit are also sufficient to ensure achievement of waste load allocations.**

Protecting water quality through compliance with waste load allocations, which eventually results in the streams and lakes within the County achieving water quality standards, is one of the crucial conditions contained in the Permit. The County is required to meet pollutant load reductions consistent with applicable waste load allocations within specific time frames under Part III.J (Total Maximum Daily Loads) (E. 85-87) of the Permit. The Permit requires use of an iterative approach where needed to ensure achievement of these waste load allocations. As earlier noted, the County must submit a TMDL implementation plan that includes estimates of pollutant load reductions to be achieved and describes the actions necessary for achieving the waste load allocations for each EPA-approved TMDL for a watershed or portion of a watershed covered by the Permit.

The Clean Water Act requires states to not only develop water quality standards, but also to identify bodies of water within their boundaries that are “impaired” by one or more pollutants. 33 U.S.C. § 1313(d)(1)(A) (App. 3). Once a body of water has been identified as impaired, the state is directed to establish a TMDL for each impairing pollutant that can be accommodated by that water body without violating water quality standards and to allocate the available load to existing and future sources of discharges.

*Id.* § 1313(d)(1)(C) (App. 3). *See also Assateague Coastkeeper*, 200 Md. App. at 674-75, 28 A.3d at 184.

In addition to identifying the actions it will take to meet pollutant load reduction targets, the County must describe how it will modify its ongoing watershed restoration efforts to address any applicable waste load allocations. The County must then provide specific deadlines for all of its actions so that its progress toward meeting the pollutant load reductions can be assessed. (E. 86).

Furthermore, there is an important public participation component that the TMDL implementation process entails. The County must make the public aware of its implementation plan and allow a minimum 30-day public comment period to provide interested parties the opportunity to submit written comments. (E. 86). Afterward, MDE takes the public comments into consideration in deciding whether or not to approve the County's implementation plan based on its own assessment of the likelihood that the plan will result in compliance with waste load allocations. If MDE approves the TMDL implementation plan, the County must then follow up by evaluating and documenting its progress toward meeting the waste load allocations on an annual basis. These annual reports must also summarize how the County has addressed or will address any material comments received from the public during the aforementioned comment period. The County must analyze the effectiveness of its actions by reporting the pollution reduction results achieved by those actions. If, as earlier noted, its efforts do not meet waste load allocations in accordance with the benchmarks and deadlines identified in its TMDL implementation plan, the next step for the County is to propose and implement additional

or alternative stormwater controls to achieve waste load allocations. (E. 87). The practical effect of this iterative approach is that the County will continue to make adjustments as needed to meet the benchmarks that will result in compliance with waste load allocations.

Given the diffuse and unpredictable sources of pollutants in discharges through municipal storm drains over a large geographical area when compared with discharges from well-defined point sources such as an industrial plant or a wastewater treatment facility, MDE has determined that this iterative approach is a reasonable and realistic approach toward the ultimate goal of achieving compliance with water quality standards. This mandated approach is one that requires constant oversight, monitoring, data gathering, evaluation, alteration, fine-tuning, and improvement. It should be noted that EPA has issued a policy directive endorsing this iterative approach to achieving waste load allocations in recognition of the fact that stormwater discharges are due to storm events that are highly variable in terms of frequency and duration. (E. 127).

## **CONCLUSION**

Based on the foregoing, it is clear that MDE's final determination to issue to Montgomery County the MS4 permit at issue in this matter was entirely consistent with applicable federal and state law. In addition, MDE is entitled to judicial deference in the interpretation of its own regulations as well as the federal statutes and regulations that it is charged with the day-to-day responsibility for administering and enforcing. There was nothing about MDE's final decision to grant the Permit that was arbitrary or capricious. The Department properly exercised its permitting authority by issuing a new MS4 permit



that included enforceable measures that MDE deemed effective and appropriate to reduce the discharge of pollutants into water bodies within the County to the maximum extent practicable. That being the case, the Permit fully complies with all applicable requirements of the federal Clean Water Act and Maryland law.

For the foregoing reasons, Appellant Montgomery County, Maryland respectfully requests that this Court reverse the Circuit Court's decision to remand MS4 Permit 06-DP-3320 MD0068349 to MDE for revision and affirm the agency's decision to issue to the Permit as currently written.

Respectfully submitted,

Marc P. Hansen  
County Attorney

Edward B. Lattner, Chief  
Division of Human Resources &  
Appeals

Walter E. Wilson  
Associate County Attorney

Dated: June 20, 2014

Statement pursuant to Maryland Rule 8-504 (a) (8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

## APPENDIX

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## **Excerpts from United States Code:**

### **33 U.S.C. § 1251**

#### **§ 1251. Congressional declaration of goals and policy**

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.]--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

\* \* \*

(d) Administrator of Environmental Protection Agency to administer 33 USCS §§ 1251 et seq. Except as otherwise expressly provided in this Act [33 USCS §§ 1251 et seq.], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act [33 USCS §§ 1251 et seq.].

\* \* \*

### **33 U.S.C. § 1311**

#### **§ 1311. Effluent limitations**

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

\* \* \*

### **33 U.S.C. § 1313 (d) (1)**

#### **§ 1313. Water quality standards and implementation plans**

\* \* \*

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B) (App. 2)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

\* \* \*

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

\* \* \*

### **33 U.S.C. § 1342 (p) (3)**

#### **§ 1342. National pollutant discharge elimination system**

\* \* \*

(p) Municipal and industrial stormwater discharges.

\* \* \*

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section

301 [33 USCS § 1311 (App. 2)].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

#### **Excerpts from Maryland Annotated Code:**

#### **Md. Code Ann., Envir. § 9-322**

##### **§ 9-322. Discharge of pollutants prohibited; exceptions**

Except as provided in this subtitle and Title 4, Subtitle 4 of this article and the rules and regulations adopted under those subtitles, a person may not discharge any pollutant into the waters of this State.

#### **Md. Code Ann., Envir. § 9-323**

##### **§ 9-323. Discharge permit required**

(a) In general. – A person shall hold a discharge permit issued by the Department before the person may construct, install, modify, extend, alter, or operate any of the following if its operation could cause or increase the discharge of pollutants into the waters of this State:

- (1) An industrial, commercial, or recreational facility or disposal system;
- (2) A State-owned treatment facility; or
- (3) Any other outlet or establishment.

\* \* \*

#### **Md. Code Ann., Envir. § 9-324**

## **§ 9-324. Issuance of discharge permit**

(a) In general. – Subject to the provisions of this section, the Department may issue a discharge permit if the Department finds that the discharge meets:

(1) All applicable State and federal water quality standards and effluent limitations; and

(2) All other requirements of this subtitle.

\* \* \*

## **Excerpts from Code of Federal Regulations:**

### **40 C.F.R. § 122.44**

#### **§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).**

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

\* \* \*

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

\* \* \*

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

\* \* \*

**Excerpts from Code of Maryland Regulations:**

**COMAR § 26.08.04.07**

**.07 Administration of Federal NPDES Program by the State.**

A. The Department shall administer the National Pollutant Discharge Elimination System (NPDES) program as part of its own discharge permit system.

B. This administration shall be in accordance with:

(1) Environment Article, Title 9, Annotated Code of Maryland;

(2) This chapter; and

(3) The Federal Act.

**COMAR § 26.17.02.01-1.**

**.01-1 Incorporation by Reference.**

A. In this chapter, the following documents are incorporated by reference.

B. Documents Incorporated.

(1) The 2000 Maryland Stormwater Design Manual, Volumes I & II (Maryland Department of the Environment, April 2000), Supplement 1, is incorporated by reference by the Administration and shall serve as the official guide for stormwater management principles, methods, and practices.

\* \* \*