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**IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND**

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September Term, 2013

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No. 2199

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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  
(Ronald B. Rubin, Judge)

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**BRIEF OF APPELLANT  
MARYLAND DEPARTMENT OF THE ENVIRONMENT**

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DOUGLAS F. GANSLER  
Attorney General of Maryland

NANCY W. YOUNG  
Assistant Attorney General  
1800 Washington Blvd, Suite 6048  
Baltimore, Maryland 21230  
(410) 537-3042  
nancy.young@maryland.gov

Attorneys for Appellant  
Maryland Department of the Environment

July 3, 2014

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**STATEMENT OF THE CASE**

The Maryland Department of the Environment (the “Department” or “MDE”) and Montgomery County (the “County”) appeal from the judgment of the Circuit Court for Montgomery County reversing the Department’s grant of a renewal discharge permit (“permit”) to the County. The permit, which the Department issued to the County under § 9-323 of the Environment Article, regulates the discharge of stormwater to and from the County’s municipal separate storm sewerage system. Even though the United States Environmental Protection Agency (the “EPA”)<sup>1</sup> approved the permit, the circuit court

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<sup>1</sup> In order to avoid confusion, the Department’s brief, to the extent practicable, will limit the use of acronyms and initialisms to those in common use outside the regulatory system.

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determined that the permit “does not comport with Maryland law, the federal Clean Water Act and federal regulations implementing the Clean Water Act.” (E. 22.)

This case originated when appellees Anacostia Riverkeeper, Inc., Potomac Riverkeeper, Inc., Friends of the Earth, the Waterkeeper Alliance, Pat Munoz, and Mac Thornton filed a challenge to the Department’s final determination to issue the permit. After protracted procedural skirmishing regarding the challengers’ standing,<sup>2</sup> the circuit court held a hearing on November 20, 2013 on the merits of the petition for judicial review. On December 4, 2013, the court entered an order remanding the matter to the Department “for further proceedings to allow the agency to comply with Maryland law, the Clean Water Act, and federal regulations” consistent with the circuit court’s opinion. (E. 22.) The Department noted this timely appeal.

## QUESTIONS PRESENTED

1. Does the permit’s use of “best management practices” comply with Maryland and federal law when the Clean Water Act specifically exempts municipal separate storm sewerage system discharges from compliance with water quality standards and requires instead that permits reduce pollutants to “the maximum extent practicable”?

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<sup>2</sup> After the Department issued the County’s permit, the General Assembly, effective January 1, 2010, eliminated contested case hearings to challenges to certain permits issued by the Department, including permits issued under § 9-323 of the Environment Article. Md. Code Ann, Envir. § 1-601(a). The General Assembly also changed the law on standing to comport with threshold federal standing requirements. *Id.*, § 1-601(c). In the interim, the Office of Administrative Hearings (“OAH”), on June 24, 2009, had dismissed the case because it determined that the challengers lacked standing. (E. 164.) On appeal, this Court determined that, in light of the legislative changes, the appellees had standing. The Court remanded the case to the circuit court, which subsequently issued the decision that is the subject of this appeal. Meanwhile, the challengers filed a second action seeking judicial review of the same permit. That case is currently pending in this Court. *Anacostia Riverkeeper v. Maryland Dep’t of the Env’t*, Sept. Term 2010, No. 1932.

2. Does substantial evidence support the permit’s monitoring requirements?

## STATEMENT OF FACTS

### **Statutory and Regulatory Framework: *Federal Law***

The Federal Water Pollution Control Act—commonly known as the “Clean Water Act”—is the principal federal statute that requires the regulation of pollutant discharges to waters of the United States. *Piney Run Pres. A’ssn v. County Comm’rs*, 523 F.3d 453, 455-56 (2008). The centerpiece of the Clean Water Act is the National Pollutant Discharge Elimination System (“NPDES”) permitting program, which prohibits the discharge of any pollutant from a “point source,”<sup>3</sup> unless in accordance with a valid discharge permit. *See* 33 U.S.C. § 1342(a).

As enacted in 1972, the Clean Water Act initially mandated that all NPDES permits require compliance with state water quality standards by setting forth a specific “effluent limitation”—a limit restricting the amount of pollutants dischargeable at the point source. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (1999); *Building Indus. Ass’n*, 22 Cal. Rptr. 3d at 132. The EPA recognized early on, however, that pollution-control solutions applicable to discharges from wastewater treatment plants and other discrete point sources did not translate well to the more disparate and diffuse discharges from municipal stormwater systems. Accordingly, EPA, by regulation, exempted most municipal storm sewerage systems from the NPDES permit requirements. *Id.*

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<sup>3</sup> “Point source” means “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C § 1362(14).



In 1977, the United States Court of Appeals for the District of Columbia Circuit invalidated the EPA's regulatory exemption for municipal storm systems, holding that the EPA did not have the authority to exempt categories of point sources from the requirements of the Clean Water Act. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). In 1987, however, Congress amended the Clean Water Act to distinguish between "industrial" and "municipal" discharges. See 33 U.S.C. § 1342(p)(3). As amended, the statute now provides that discharge permits for *industrial* stormwater must meet "all applicable provisions of . . . section 1311" of the Act, which is the section of the Act that requires permits to include effluent limitations that comply with water quality standards. 33 U.S.C. § 1342(p)(3)(A). Discharge permits for *municipal* stormwater, by contrast, "shall require controls to reduce 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). Thus, in the context of municipal stormwater, Congress replaced compliance with water quality standards through numerical effluent limitations with "controls to reduce pollutants to the maximum extent practicable" in order to achieve the Clean Water Act's objective of restoring and maintaining water quality. See 33 U.S.C. § 1251(a) (stating legislative objectives).

Under the 1987 amendments, Congress directed the EPA to adopt regulations that would allow state programs—which are discussed in the following section—to include "performance standards, guidelines, guidance, and management practices and treatment requirements" within the permits they issue. 33 U.S.C. § 1342(p)(3)(B)(iii). The EPA subsequently promulgated storm water regulations that provided for the use of best

management practices “to control or abate the discharge of pollutants when . . . [a]uthorized under [§ 1342(p)] of the Clean Water Act for the control of storm water discharges.” 40 C.F.R. § 122.44(k)(2). Consistent with the 1987 amendments to the Clean Water Act and its implementing regulations, the EPA encourages the use of best management practices—sometimes referred to as “BMPs”—to control stormwater from municipal storm sewers. (E. 127); *see Divers’ Envtl. Conservation Org. v. State Water Resources Bd.*, 51 Cal. Rptr. 3d 497, 504 (Cal. Ct. App. 2006) (observing that, “in regulating stormwater permits, the EPA has repeatedly expressed a preference for doing so by way of best management practices, rather than by way of imposing technology-based or water quality-based numeric limitations”).

#### **Statutory and Regulatory Framework: *Maryland Law***

The Clean Water Act establishes a variety of cooperative federalism. It “anticipates a partnership between the States and the Federal Government” in which a state may choose to “administer” its own NPDES permit system if the EPA determines that the system meets certain minimum federal standards. *Department of Energy v. Ohio*, 503 U.S. 607, 633 (1992); *see* 40 C.F.R. § 123.25(a) (setting forth federal requirements applicable to states). The EPA continues to issue discharge permits under federal regulations for those states without approved NPDES discharge permit programs and retains veto authority over permits issued by states with approved programs. *Northwest Land Corp. v. Maryland Dep’t of Env’t*, 104 Md. App. 471, 478-79 (1995) (citing *Howard County v. Davidsonville Civic & Potomac River Ass’ns*, 72 Md. App. 19, 24 n.3 (1987)).

In the wake of the 1987 amendments to the Clean Water Act, the General Assembly adopted a State-law statutory framework that mirrors the federal Act. *See* Md.

Code Ann., Envir., Title 9, subtitle 3. Section 9-322 of the Environment Article prohibits the discharge of any pollutant to waters of the State unless authorized by § 9-323, which requires a person to hold a discharge permit issued by the Department for a facility, disposal system, outlet, or establishment “if its operation could cause or increase the discharge of pollutants into the waters of the State.” Consistent with the Clean Water Act, § 9-324(a) of the Environment Article requires the Department to ensure that discharges meet “*applicable* State and federal water quality standards and effluent limitations” and all other requirements of Title 9, subtitle 3. Md. Code Ann., Envir. § 9-324(a) (emphasis added). Pursuant to its authority under Title 9, subtitle 3, the Department subsequently promulgated implementing regulations establishing Maryland’s own NPDES permitting system. *See* COMAR § 26.08 chs. 01–04.

The EPA determined that Maryland’s statutes and regulations met the requirements of the Clean Water Act and approved the State’s discharge permit program. *Northwest Land*, 104 Md. App. at 479 n.3. Maryland law is, in fact, “more stringent than federal law; it regulates discharges to groundwater and surface water, whereas federal law regulates only discharges to surface water.” *Assateague Coastkeeper*, 200 Md. App. at 677.<sup>4</sup> Accordingly, as of 1974, the Department assumed operation of the NPDES permit program and now issues NPDES discharge permits for all Maryland discharges, including those discharges from municipal separate storm sewerage systems. *See id.*, at 478–79 (stating that “a person may not discharge pollutants into the waters of this State except as permitted by a state discharge permit issued by the MDE.”)

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<sup>4</sup> As this Court has explained, the States “are not precluded from omitting or modifying any provisions to impose more stringent requirements.” *Assateague Coastkeeper*, 200 Md. App. at 677 n.10. (citing 40 C.F.R. § 123.25(a)).

Consistent with applicable statutory requirements, the Department’s regulations provide that the Department “shall issue or reissue a discharge permit upon a determination that . . . [t]he discharge or proposed discharge specified in the application is or will be in compliance with all *applicable* requirements” of effluent limitations, surface and ground water quality standards, the Clean Water Act, State law or regulation, best available technology, and federal effluent guidelines. COMAR § 26.08.04.02A(1) (emphasis added). Because, since 1987, the Clean Water Act has not required municipal stormwater discharge permits to require compliance with water quality standards or numerical effluent limitations, the Department has administered Maryland’s stormwater permitting program to mirror the distinction made in the Clean Water Act between industrial stormwater and wastewater discharges on the one hand and municipal stormwater discharges on the other. (E.110.) Accordingly, the Department has required the municipal separate storm sewerage system jurisdictions to install stormwater controls to reduce pollutants to the “maximum extent practicable.” (E. 82, 114.) *See* 33 U.S.C. § 1342(p)(3)(B).

### **The Montgomery County Permitting Process**

With the EPA’s delegation in place, the Department issued the County its first municipal separate storm sewerage system permit in 1996. (E. 110.) The permit had a five-year term and was reissued in 2001 and 2006. (*Id.*) After the County applied for its most recent renewal of its discharge permit, the Department held a public informational meeting about the renewal and entered into discussions with several groups—including the Chesapeake Bay Foundation, the Natural Resources Defense Council, Stormwater Partners, Friends of Sligo Creek, the Audubon Naturalist Society, and the Anacostia

Watershed Association—that had expressed an interest in helping to shape the final contours of the permit.<sup>5</sup>

After receiving the input of the interest groups and public commenters, the Department submitted a draft permit to EPA for review and approval. The EPA submitted comments on April 21, 2008 (E. 309–27), and after the Department revised the draft permit accordingly, EPA approved the permit on May 6, 2008. (E. 84.) In approving the draft permit, the EPA determined that the “draft as written satisfies our questions and proposed changes.” (E. 284.) After EPA approved the permit, the Department published notice of its final determination to issue the permit on February 25 and March 4, 2009, in accordance with § 1-604(b) of the Environment Article. (E. 179–80.) The Department also addressed the comments submitted by members of the public. (E. 109–23.)

### **The County’s Municipal Separate Storm Sewerage System Permit**

The County’s permit requires controls to reduce the discharge of pollutants in stormwater to the maximum extent practicable and expressly prohibits the discharge of pollutants that have not been reduced to the maximum extent practicable. (E. 90.) Consistent with the federal approach to the control of stormwater pollution, the permit requires the County to use best “management practices” to control the stormwater collected in, and discharged by, its municipal storm sewers. (E. 82.) Specifically, the permit requires the County to implement or install best management practices on 20 percent of the impervious surfaces within the County in an effort to restore the pollution reduction functions performed by undeveloped land. Examples of the best management

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<sup>5</sup> The appellees chose not to participate in these discussions.

practices required under the permit include the removal of pavement, the disconnection of gutter systems to allow sheet flow across vegetated land, and the planting of rain gardens to control roof runoff. (E. 531-35.) These practices are designed to (1) reduce the volume of stormwater into the municipal separate storm sewerage system, (2) retain, filter or attenuate stormwater, and (3) facilitate vegetative uptake of stormwater. (E. 511-12.)

The 20 percent restoration requirement doubles the restoration required under the County's prior permit, which had called for the installation of best management practices on 10 percent of the County's impervious areas. (E. 407.) As a result, the County, under the new permit, must implement best management practices on 4,292 acres of land within its jurisdiction. (E. 407.) Other stormwater pollution controls required by the permit include implementation of a stormwater management program and a sediment and erosion control program, prohibition of illicit connections, trash reduction, management of chemicals on roads in winter, and watershed assessments. (E. 77-81.) Within a year of the permit, the County must submit an implementation plan for complying with the requirement for 20 percent restoration within the 5-year term of the permit. (E. 82.) Best management practices must meet baseline performance standards of 80 percent removal of total suspended solids and 40 percent removal of total phosphorus and must be monitored for assessment of their effectiveness. (E. 523.)

The best management practices required under the permit must also be adjusted and improved through a process of "adaptive management," which requires controls to be continually monitored, evaluated, measured and improved to insure that they result in the pollutant reductions contemplated by the permit. (E. 82, 87, 110, 419.) If the controls are not effective, or if improved controls are developed, the use of advanced controls is

required. *Id.* Together, adaptive management and installation of controls on 20 percent of impervious land assure that pollutants are reduced to the maximum extent practicable. (E. 82, 87, 419.)

The permit also requires the County to assess and monitor water quality within all of its watersheds. (E. 81.) These assessments allow the County to identify water quality problems and opportunities for water quality improvement, monitor the effectiveness of the restoration of impervious areas, and refine the applicable controls to meet the permit's pollution reduction goals. (E. 82.) This permit cycle targets the Lower Paint Branch for watershed monitoring and restoration opportunities. (E. 83, 408.) The monitoring of the Lower Paint Branch watershed must encompass not only chemical monitoring but also physical and biological stream monitoring.<sup>6</sup> (E. 84.) Monitoring will also take place within Hollywood Branch, Snowdens Mill Tributary, Stewart April Lane, Great Seneca Creek, Muddy Branch, the Clarksburg Special Protection Area, and an unnamed tributary to the Little Seneca Creek. (E. 82, 83, 85, 399.)

The monitoring and stream assessment required by the permit assists the County to track its progress toward reducing pollutant loads. (E. 82-85.) The Lower Paint Branch and the Clarksburg Special Protection Area are monitored in order to assess the effectiveness of best management practices—especially for stream channel protection—

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<sup>6</sup> The County already conducted watershed studies in the Little Falls and Sligo Creek, the Paint Branch, the Little Paint Branch, Upper and Lower Rock Creek, the Watts Branch, Cabin John Creek and Northwest Branch. Since 1996, the County completed assessments in about 40 percent of its total watershed area. During 2004, the County began watershed analysis of the Great Seneca Creek and Muddy Branch watersheds, which represent roughly one third of the total County land area. During 2006, 54 stations in the Little Seneca and Great Seneca were monitored for benthic organisms and fish and 19 stations with drainage areas of less than 300 acres were monitored for benthic organisms only. (E. 399.)

and the County's progress towards water quality improvement. (E. 85.) The permit also requires the County to screen 150 outfalls for illicit discharges to the municipal storm drain system and bring enforcement actions to require the disconnection of any such discharges. (E. 78–79.) Further evidence of the monitoring required by this permit is found in Attachment A to the permit, which includes all the data and parameters that must reported to the Department's database. (E. 95–106.)

Finally, to keep the County on track, the permit also requires the County to submit annual reports of its progress towards meeting permit conditions. (E. 87, 88.) Failure to treat 4,292 acres through best management practices or any other condition of the permit is a violation of a condition of the permit and subjects the County to penalties of \$10,000 per day, per violation. (E. 92.) *See* Md. Code Ann., Envir. § 9-342(a).

### **The Circuit Court's Decision on Judicial Review**

The circuit court concluded that it is “unable to understand why [the Department] adopted the terms in the permit” and that the “permit does not state with clarity what the permittees will do, how they are to do it, what standards apply, or how one will measure compliance.” (E. 21.) The court stated that specific, enforceable standards, benchmarks, and deadlines were not included in the permit, (E. 21), and opined that the permit lacked ascertainable standards and violated water quality standards. (*Id.*) Specifically, the court stated that (1) “it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports”; (2) “manuals and policies that exist outside the permit change frequently, and do not inform the public”; (3) “the Permit's requirement to restore 20 percent of impervious surface is simply too general”; and (4) monitoring in one tributary and submission of an annual report is insufficient to meet federal standards. (*Id.*) The court entered an order remanding the matter to the



Department “for further proceedings to allow the agency to comply with Maryland law, the Clean Water Act, and federal regulations” consistent with the circuit court’s opinion. (E. 22.)

## **ARGUMENT**

### **I. THIS COURT REVIEWS THE ADMINISTRATIVE DECISION TO DETERMINE WHETHER IT IS LEGALLY CORRECT AND BASED ON SUBSTANTIAL EVIDENCE.**

When an appellate court reviews the final decision of an administrative agency, the court looks through the circuit court’s decision, “applying the same standard[] of review, and evaluates the decision of the agency.” *Kim v. Maryland State Bd. of Physicians*, 423 Md. 523 (2011) (citing *People’s Counsel for Baltimore County v. Surina*, 400 Md. 662, 681 (2007)); *Assateague Coastkeeper v. Maryland Dep’t of the Env’t*, 200 Md. App. 665, 691 (2010) (upholding the Department’s issuance of a general permit for poultry waste accumulation by animal feeding operations). In reviewing an administrative agency adjudicatory decision, a reviewing court “is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173 (2011) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)); see *Motor Vehicle Admin. v. Shepard*, 399 Md. 241, 244 (2007) (holding that a circuit court decision vacating a license suspension was erroneous because “the administrative ruling was based on substantial evidence and was not rendered on the basis of an erroneous conclusion of law”). “In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the

agency reached.” *Shepard*, 399 Md. at 244 (internal quotation marks omitted). “A reviewing court must review the agency’s decision in the light most favorable to it; . . . the agency’s decision is prima facie correct and presumed valid, and . . . it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Id.* (internal quotation marks omitted); *see also Erb v. Maryland Dep’t of the Env’t*, 110 Md. App. 246, 257 (1996).

The Court of Appeals has instructed that “the expertise of the agency in its own field should be respected” by a reviewing court. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69 (1999) (citing *Fogle v. H & G Restaurant*, 337 Md. 441, 455 (1995); *Christ v. Department of Natural Res.*, 335 Md. 427, 445 (1994); *Board of Educ. for Dorchester County v. Hubbard*, 305 Md. 774, 792 (1986)). The authority delegated to an administrative agency “may include a broad power to promulgate legislative-type rules or regulations” in order for the agency to implement its statute. *Christ*, 305 Md. at 445. “Such rules or regulations will often, of necessity, embody significant discretionary policy determinations.” *Id.* *See Assateague Coastkeeper*, 200 Md. App. at 718–19 (2010) (deferring to the Department’s conclusion that issuance of a permit will not cause or contribute to a violation of water quality standards if the permit contains terms and conditions that will result in a net reduction in pollutant loadings because the conclusion was reasonable). The Department’s reasonable and consistent interpretation of Maryland law must be given deference. *Id.*; *see also Motor Vehicle Admin. v. Sanner*, 434 Md. 20, 31 (2013) (noting “an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts”).

**II. THE PERMIT COMPLIES WITH MARYLAND AND FEDERAL LAW REGARDING MUNICIPAL SEPARATE STORM SEWER SYSTEM DISCHARGE PERMITS.**

**A. Neither the Clean Water Act nor Maryland Law Requires A Permit for Stormwater Discharges from A Municipal Separate Storm Sewer System to Require Compliance with Water Quality Standards.**

The County's permit complies with all applicable requirements of federal and State law. Under the Clean Water Act, industrial and municipal stormwater permits are subject to different standards. Industrial discharge permits must contain "effluent limitations" to protect "water quality standards," while municipal stormwater is subject to controls to reduce pollutants to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). The Department, in its regulations, mirrors that distinction, requiring that discharges comply with water quality standards and effluent limitations only when they are "applicable" to the discharge. COMAR 26.08.04.02A(1); *see Tualatin Riverkeepers*, 230 P.2d at 566 (observing that, where a regulation requires compliance with "applicable" water quality standards, that regulation does not itself make those standards applicable, but simply requires compliance with those standards if they otherwise apply).

This issue of whether municipal stormwater must meet water quality standards was laid to rest 27 years ago. When the Clean Water Act was amended in 1987, it replaced the water quality standard with the maximum-extent-practicable standard, and replaced numerical effluent limitations with "management practices," "control techniques," "system, design and engineering methods," and other provisions that the State "determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii). Federal courts have repeatedly held that the Clean Water Act does not require municipal separate storm

sewerage system discharges to comply with water quality standards. *See, e.g., Defenders of Wildlife v. Browner*, 191 F.3d at 1164–65; *Divers’ Envtl. Conservation Org.*, 51 Cal. Rptr. 3d at 507 n.5 (stating that municipalities are only required to reduce “pollutants to the maximum extent practicable”); *Building Indus. Ass’n*, 22 Cal. Rptr. 3d at 142 (holding that § 1342(p)(3)(B)(iii) unambiguously demonstrated that Congress did not require municipal storm sewer discharges to comply strictly with water quality standards); *In re Natural Res. Def. Council, Inc. v. New York State Dep’t of Envtl. Conservation*, 974 N.Y.S.2d 521 (N.Y. App. Div. 2013) (stating that the “maximum extent practicable” is the statutory standard for municipal separate storm sewerage systems); *Tualatin Riverkeepers*, 230 P.3d at 564 (explaining that generally discharges must comply with state water quality standards but that under 33 U.S.C. § 1342(p)(3)(B), municipal stormwater discharges are not subject to that requirement).

In *Defenders of Wildlife*, the court of appeals rejected a challenge to several municipal separate storm sewerage system permits issued by EPA to five municipalities in Arizona, based on the contention that they did not “ensure compliance with state water-quality standards.” *Id.* at 1161. The court explained that Congress, in enacting the Water Quality Act of 1987, set two different standards, one for industrial stormwater discharges and another one for municipal stormwater discharges. *Id.* at 1164 (quoting 33 U.S.C. § 1342(p)(3)(B)). “Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311,” the inclusion of which requires industrial dischargers to comply with water quality standards, but specifically “chose not to include a similar provision for municipal storm-sewer discharges.” *Id.* at 1164–65 (emphasis in original). The court reasoned that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 1165 (citation omitted). There is simply no basis for the conclusion, accepted by the circuit court, that municipal storm system permits must require compliance with numerical effluent limitations in order to satisfy water quality standards.

The different standards that apply to municipal storm systems reflect the fact that “the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 blanket effluent limitations approach impractical and administratively burdensome . . . .” *Building Indus. Ass’n*, 22 Cal. Rptr. 3d at 141. Water discharges due to storm events are highly variable in frequency and duration and the pollution content of those discharges is not easily characterized. (E. 127.) As EPA put it in this case, “The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for dischargers.” (E. 127.) Congress adopted the “maximum extent practicable” standard to “address these administrative problems while giving administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution.” *Building Indus. Ass’n*, 22 Cal. Rptr. 3d at 141; *see also Divers’ Envtl. Conservation Org.*, 51 Cal. Rptr. 3d at 504 (explaining that pollution prevention plans allow permittees to develop and implement best management practices that are best suited for controlling discharges).

The EPA, too, has interpreted the Clean Water Act to require that permits for industrial stormwater comply with all applicable provisions of the Clean Water Act relating to water quality standards, but that permits for discharges from municipal separate storm sewerage systems “shall require controls to reduce the discharge of

pollutants to the maximum extent practicable.” (E. 126.) The implementing regulation, 40 C.F.R. § 122.44(k), authorizes “best management practices to control or abate the discharge of pollutants for the control of stormwater discharges when authorized”—as here—under the Clean Water Act. 33 U.S.C. § 1342(p)(3)(B)(iii).

The EPA determined that the Montgomery County permit at issue here included appropriate controls on the discharge of pollutants in stormwater and, as a result, exercised its authority under 33 U.S.C. § 1342(d) to approve the permit. It stated that the County’s permit “satisfies our questions and proposed changes” and moves “the [municipal separate storm sewerage system] program forward in Region III.” (E. 284.) The permit specifically prohibits the discharge of stormwater that does not meet the maximum-extent-practicable standard, and requires the County to install controls on 20 percent of impervious surfaces and to regularly review and refine its best management practices to achieve steady and measured reductions in pollutants. (E. 419, 109-10, 82-87.) These permit requirements are consistent with federal and State law and are appropriately included in a municipal separate storm sewerage system permit.

**B. The Permit Appropriately Incorporates by Reference the Provisions of Publicly Available MDE Stormwater Manuals that Provide Guidance on the Implementation of Best Management Practices.**

Despite the fact that federal and State law both provide for the use of best management practices to control municipal stormwater discharges, the circuit court concluded that such practices were “too general” to serve as measurable, enforceable permit terms. (E. 21.) In so concluding, the circuit court effectively rejected Congress’s policy determination, and the EPA’s technical determination, that the use of best management practices is the most effective approach to stormwater regulation. Although

the circuit court decision should be overturned on this legal ground alone, the record demonstrates that the best management practices required under State and federal are not “too general” because they are elaborated in detail by the MDE stormwater manual that is incorporated into the permit.

The science of controlling stormwater has evolved in the 27 years since the Clean Water Act was amended in 1987, and, during that time, governments and public interest organizations nationwide have researched and analyzed controls for the management of stormwater. In Maryland, the results of that research is encapsulated in several scientific texts developed by the Department, the Center for Watershed Protection, and the Mid-Atlantic Water Program: The 2000 Maryland Stormwater Design Manual (“*BMP Manual*”), Developing Nitrogen, Phosphorus and Sediment Reduction Efficiencies for Tributary Strategies, BMP Assessment: Final Report, 3/31/2009 (“*BMP Assessment*”); and Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated (“*Accounting Manual*”).

In its *BMP Manual*, the Department has established baseline performance standards that all best management practices must satisfy. (E. 116, 532-33.) Specifically, the Department moved to standardize best management practices, contracting for a study and analysis of such practices and their pollutant reduction capabilities. (See E. 508.) The best management practices described in the *BMP Manual* have measurable outcomes—they are capable of reducing total suspended solids by 80 percent and total phosphorus by 40 percent. (E. 523.) Other performance standards established in this

manual include the treatment of the first inch of stormwater, recharge of the water table to pre-development rates, and 90 percent average annual runoff reduction.<sup>7</sup> (E. 523-24.)

Consistent with the approach to stormwater regulation codified in the Clean Water Act, the *BMP Manual* relies less on single, large controls and more on installing smaller controls closer to the source of stormwater that will mimic natural hydrology. The goal is to restore natural controls in the environment before development eliminated them—to break up pervious areas and restore vegetated swales and depressions to attenuate velocity, absorb stormwater, and facilitate the uptake of the nutrients in stormwater. (E. 511.) Although the circuit court found these measures insufficiently specific and enforceable, best management practices are *designed* to be flexible so that regulatory agencies may adapt them to the highly variable nature of stormwater discharges. Stormwater management encourages local jurisdictions to adapt best management practices to local conditions, but only if those practices perform at or above minimum performance standards.<sup>8</sup> (E. 512.) Again, that flexibility is the defining characteristic of how Congress, the EPA, and MDE approach stormwater management.

That is not to say that the flexibility afforded permittees to adapt best management practices to local conditions is unbounded or allowed to unfold without regard to scientifically derived standards. To the contrary, the Center for Watershed Development, with the assistance of the Department, developed the *BMP Manual* to guide the

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<sup>7</sup> Best management practices provide retention, filtration or uptake of stormwater or prevent pollutants from entering stormwater, and include detention ponds, wetlands, filtering systems, open channel systems, stream buffers, and environmental site design such as rain gardens, green roofs, and pervious driveways.

<sup>8</sup> An exception is created for innovative best management practices such as forest buffers and stream restoration for which the *Accounting Manual* establishes their pollution reduction efficiencies.



development and use of best management practices and the Department developed the *Accounting Manual* to provide guidance on the use of alternative best management practices and a method for calculating the pollution reductions they are capable of achieving. (E. 181.) In addition, the Mid-Atlantic Water Program located in the University of Maryland, developed the *BMP Assessment*, which provided a science-based assessment of the effectiveness of best management practices in average operational conditions. (E. 221.) With these technical guidelines in place, local jurisdictions are encouraged to innovate and develop alternative best management practices. But even then, local jurisdictions cannot implement those practices unless MDE first approves them based on plans, specifications, and monitoring data demonstrating that they will meet applicable performance standards. (E. 512.)

Nor is there any basis to conclude, as the circuit court apparently did, that the manuals employed in this process “do not inform the public.” (E. 21.) The Department’s *BMP Manual* is incorporated into the permit, *see* COMAR § 26.17.02.01-1, and is available on the MDE website. (E. 77.) Because the *BMP Manual* is incorporated into regulation, the process of revising and amending the manual is itself a public process, carried out with multiple opportunities for public review and comment. And while the manual is fairly technical, so too are the State and federal regulations that govern the water pollution permitting process; the demand for technical expertise comes with the regulatory territory.

The Department’s determination that best management practices are a sufficient way to control stormwater is supported by substantial evidence. The EPA—the expert agency congressionally delegated to oversee the stormwater program—concluded that MDE’s permit met all applicable standards. The evidence shows that best management

practices for stormwater are well-vetted and must meet well-defined minimum standards. There is no evidence to support the claim that best management practices are not sufficient or that the Department's use of scientific texts—the *BMP Manual*, the *Accounting Manual*, and the *BMP Assessment*—is unreasonable, inconsistent with State or federal law, or insufficiently protective of water quality. To the contrary, the Center for Watershed Protection recognized that the counties in Maryland “have performed remarkably in establishing Maryland as a national leader in stormwater management technology.” (E. 511.)

**C. The Permit Condition Requiring the County to Install Best Management Practices on 20 Percent of Impervious Surfaces Is Specific, Measurable, and Enforceable.**

Substantial evidence also supports the Department's determination that the permit condition requiring the County to install best management practices on 20 percent of impervious surfaces is specific, measurable, and enforceable. The permit requires that the County, by the end of the permit term,

complete the implementation of restoration in a watershed, or combination of watersheds, to restore an additional twenty percent of the County's impervious surface area that is not restored to the [maximum extent practicable]. Restoration shall include but not be limited to the use of [environmental site design] and other nonstructural techniques, structural stormwater practice retrofitting, and stream channel restoration.

(E. 82, 83.) The permit thus requires Montgomery County to restore impervious surfaces—such as “rooftops, driveways, sidewalks, or pavement,” Md. Code Ann., Envir. § 4-201.1—to control stormwater and mimic the natural ability of undeveloped land to decrease the volume and velocity of stormwater and increase the opportunity for vegetation to uptake stormwater pollutants.

The 20-percent-restoration requirement is plainly measurable. The permit requires the County to implement controls on 20 percent of its previously uncontrolled impervious areas. Because the prior permit required the County to install best management practices on 10 percent of its impervious areas, the County already has in place a mechanism for calculating the total acreage of land that does not have stormwater controls. (E. 406.) That acreage comes to 21,458 acres—which excludes the 10 percent already controlled under the prior permit—and 20 percent of that amount comes to 4,292. *Id.*

The Department gauges compliance by identifying the location of the impervious areas to be controlled, the number of acres controlled by the best management practice installed by the County, and the pollution reduction efficiencies of those controls. With this information in hand, it is a relatively straightforward task to determine whether the County is meeting the performance standards reflected in its permit. And for alternative best management practices, which might call for application-specific calculations, the Department measures compliance by reviewing the County's calculation for consistency with the *Accounting Manual*. (E. 181.)

The restoration requirement is also enforceable. The County, within one year, must submit a plan for implementing the 20-percent-restoration requirement and must demonstrate that the plan calls for best management practices that meet baseline performance standards of 80 percent removal of total suspended solids and 40 percent removal of total phosphorus. (E. 523-24, 82, 83, 87.) The County must also be able to demonstrate that its plan will allow it to satisfy the 20 percent restoration requirement within the 5-year term of the permit. (E. 82, 86.) And, as it implements its plan, the County must submit annual reports that describe its progress toward meeting all permit conditions permit within the 5-year term of the permit. (E. 87, 88.) The annual report

must include the status of implementing the 20 percent restoration requirement, summarize monitoring data, and identify water quality improvements and other indications of progress toward meeting the wasteload allocations generated by the State's Total Maximum Daily Load process. (E. 87, 88.)<sup>9</sup>

These monitoring and reporting requirements give MDE yet another means of assessing the County's compliance with permit terms. And should the County fail to implement best management practices on the 4,292 acres required by the permit, it would be subject to State-law penalties of up to \$10,000 per day, per violation. (E. 92.) *See* Md. Code Ann., Envir. § 9-342(a). The EPA too would retain the authority to enforce the Clean Water Act directly and seek penalties of up to \$32,500 per day for each violation. 33 U.S.C. § 1319(d); (E. 92.)

MDE (and the EPA) has satisfied itself that the 20 percent restoration requirement is an enforceable means to achieve municipal stormwater management. This Court, in *Assateague Coastkeeper*, concluded that similar determinations about how best to achieve statutory standards was “within the province of MDE to determine” and that it would “not substitute [its] judgment for that of the agency” on such technical matters. *Assateague Coastkeeper*, 200 Md. App. at 721. Because substantial evidence supports the Department's conclusion that the conditions of the permit—including the 20-percent-

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<sup>9</sup> The total maximum daily load (or “TMDL”) process requires each state to identify the total amount of pollutants that each waterway can assimilate and still meet water quality standards. 33 U.S.C. § 1313(d)(1)(C). The TMDL consists of wasteload allocations, which are the portions of a receiving water's loading capacity allocated to point source discharges (*e.g.*, industrial, commercial, and municipal discharges), and load allocations, which are the portions attributable to nonpoint sources of pollution (*e.g.*, urban, agricultural, and silvicultural runoff) or natural background sources. *See generally* *Sierra Club v. United States EPA*, 162 F. Supp. 2d 406, 416 (D. Md. 2001).

restoration requirement—satisfy the Clean Water Act’s requirement for pollution control, the same principles of deference to agency expertise apply here.

**D. Substantial Evidence Supports the Permit’s Monitoring Requirements.**

The circuit court’s final complaint about the permit—that the permit’s monitoring in only one tributary and submission of an annual report is insufficient to meet federal standards, (E. 21)—is similarly based on a failure to defer to the agency’s judgment about how best to tackle the technical challenges presented by municipal stormwater management. In arriving at the permit’s monitoring requirements, the Department evaluated what monitoring data is already known and what additional data needs to be generated. The County has already conducted extensive monitoring of many of its streams and waterways, *see supra* n. 7, (E.419); between 1996 and 2003, the County conducted assessments of about 40% of its total watershed area, and during 2004, an assessment of another one third of the County was undertaken. (E. 399.) In addition, the County has already determined the pollution characteristics of the stormwater generated by its municipal storm sewer system, as was required by its first two stormwater permits. (E. 114, 249.) The Department has thus already compiled the data generated by the County’s monitoring (E. 249), and has already developed a list of commonly-found stormwater pollutants and their concentrations. (E. 114, 264, 267–68.) Exercising its technical judgment, MDE determined that it was not necessary to generate additional similar data. (E. 114.)

Instead, the Department determined that the best way improve water quality was to concentrate resources on implementing best management practices and other stormwater controls and use monitoring to perform watershed assessments and to verify water quality improvement and pollutant load reductions. (E. 110, 113-14, 81-82.)

Although the Department has identified the Little Paint Branch as the watershed to be assessed during *this* permit cycle, it will not be the only watershed to receive such treatment moving forward. And, this permit requires the County to assess all of its watersheds. (E. 81.) This comprehensive assessment requires the County to monitor water quality, which will allow it to identify water quality problems and restoration opportunities, and to develop adaptive management strategies to improve the effectiveness of its restoration efforts.

The Maryland Department of the Environment is charged with making these types of technical decisions about how best to generate the water quality data and this Court should, in the absence of a legal constraint, defer to the agency's expertise on such matters. *Assateague Coastkeeper*, 200 Md. App. at 714. No such legal constraint applies here. While federal law mandates certain requirements that must be included in an *application* for a municipal stormwater permit, it does not impose specific monitoring requirements. *See* 40 C.F.R. § 122.26(d). Given the monitoring already completed by the County, the monitoring already completed by the Department in developing total maximum daily loads, and the research done by the Center for Watershed Protection, the research performed by the Chesapeake Bay Program and Mid-Atlantic Water Program, the determination by the Department to focus this permit on monitoring and the restoration of the Little Paint Branch watershed first is reasonable and supported by substantial evidence.

## **CONCLUSION**

The judgment of the Circuit Court for Montgomery County should be reversed and the Department of the Environment's issuance of the permit should be affirmed.

Respectfully submitted,  
DOUGLAS F. GANSLER  
Attorney General of Maryland

NANCY W. YOUNG  
Assistant Attorney General  
Office of the Attorney General  
1800 Washington Boulevard, Suite 6048  
Baltimore, Maryland 21230  
nancy.young@maryland.gov  
(410) 537-3042  
(410) 537-3943 (facsimile)

Rule 8-504(a)(9) Certification: this brief has been printed with proportionally-spaced type, Times New Roman - 13 point.

**IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND**

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September Term, 2013

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No. 2199

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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  
(Ronald B. Rubin, Judge)

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**APPENDIX**

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this 3<sup>rd</sup> day of July, 2014, two copies of the foregoing Brief of Appellant Maryland Department of the Environment in the above-captioned case were sent via first class mail, postage prepaid to:

Jennifer C. Chavez, Esq.  
Earth Justice  
1625 Massachusetts Ave., N.W.  
Washington, D. C. 20036

Walter E. Wilson, Esq.  
Office of the County Attorney  
101 Monroe Street, Third Floor  
Rockville, Maryland 20850

---

Nancy W. Young