

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Case No. 2199, September Term, 2013

MARYLAND DEPARTMENT OF THE ENVIRONMENT, *et al.*

Appellants,

v.

ANACOSTIA RIVERKEEPER, *et al.*

Appellees.

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

RESPONSE BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This case concerns a renewed permit (“Permit”) issued on February 16, 2010, by the Appellant Maryland Department of the Environment (“MDE”) to allow pollutant discharges from the municipal storm sewer system owned and operated by Montgomery County. E. 75 – E. 107. The Appellees, Anacostia Riverkeeper, Potomac Riverkeeper, Friends of the Earth, Waterkeeper Alliance, Mac Thornton, and Pat Munoz, filed a timely request for contested case hearing on March 18, 2009. E. 168. Their request was dismissed by a judge in the Office of Administrative hearings based on his conclusion that Appellees lacked standing, E. 165. The dismissal was upheld by the Montgomery County Circuit Court on October 25, 2011. E. 10. On January 7, 2013, this Court ruled that the Appellees have standing to challenge the permit and remanded the case to the Circuit Court. E. 10-11.

On December 4, 2013, the Montgomery County Circuit Court ruled that the Permit had been issued in violation of Maryland and federal law. Opinion and Order, Rubin, J. (Dec. 4, 2013), E. 20-22; Transcript, E. 68-73. The court held that “the permit must include requirements needed to meet water quality standards” under both Maryland law and the federal Clean Water Act (“the Act”). E. 21. *See* Md. Code Ann., Envir. § 9-324, 33 U.S.C. § 1311(a)-(b). The court held that permit “requirements that are developed or modified outside of the permit process frustrate the public participation and judicial review requirements adopted by the General Assembly.” E. 21. The court noted that “[s]pecific, enforceable standards, benchmarks, and deadlines for meeting applicable requirements must be stated in the permit.” *Id.* The court ruled that MDE had failed to

include requirements needed to meet water quality standards. In particular, “[t]he permit lacks ascertainable metrics for meeting water quality standards that can either be met or not met,” and “[t]he 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 or noncompliance.” *Id.* The court found that MDE failed to adequately explain why it adopted the terms in the permit or how those terms meet the requirements of the law. *Id.* Finally, the court held that the Permit’s requirements to monitor water quality in one stream, and to submit annual reports regarding all activities under the Permit, are insufficient to meet federal minimum requirements for monitoring discharges from storm sewer systems under 40 C.F.R. § 122.26(d). *Id.* The court remanded the Permit to MDE to allow the Department to take further action consistent with the law. E. 22.

QUESTIONS PRESENTED

I. Is the Permit legally defective because it fails to ensure compliance with Maryland’s water quality standards as expressly mandated by both federal and Maryland law, and lacks specific requirements or schedules for achieving such compliance?

II. Does the Permit illegally circumvent mandatory public notice and comment procedures by providing for future approval of the key pollution control measures under the Permit without going through the formal permit amendment process?

III. Is the Permit legally defective because it does not require representative monitoring, or other monitoring needed to determine compliance with the Permit’s requirements, and instead requires monitoring in only one stream in the county?

STATEMENT OF FACTS

When it rains or snows, contaminants including bacteria, toxic metals, pesticides, grease, nitrogen and phosphorus, sediment, road salts, and trash are washed off of streets, industrial yards, parking lots, lawns, scrap piles, and other surfaces. *See* Permit, E. 79-81; MDE Tentative Determination to Issue Permit, E. 120. *See also Maryland's National Pollutant Discharge Elimination System Municipal Stormwater Monitoring*, E. 256-260. Montgomery County's municipal storm sewer system collects this pollutant-laden stormwater, and discharges it through a series of channels, pipes, and outfalls into rivers and lakes across the county such as the Potomac River, Rock Creek, Seneca Creek, and many others. E. 120. All of the parties in this case agree that storm water discharges from Montgomery County are contributing to serious degradation of water in local waters, downstream in the District of Columbia and Prince George's County, and in the Chesapeake Bay. E. 109, 120, 426-428.

MDE has determined that discharges from the county's storm sewer system cause or contribute to violations of Maryland's statutory water quality standards in numerous receiving waters including the Potomac River, the Anacostia River, and Rock Creek. *Id.* (Maryland's water quality standards for surface and ground water are set forth at Md. Code Regs. 26.08.02.01 - 26.08.02.09.) For example, MDE has calculated that the county must reduce its pollutant discharges by 46% for sediment, 79% for nitrogen and phosphorus, and 96% for fecal bacteria in order to meet applicable water quality standards. MDE Response to Comments, E. 111; MDE Tentative Determination, E. 120 (identifying other total maximum daily load ("TMDL") calculations that have been or

will be performed in order to meet applicable water quality standards for various pollutants and waters across Montgomery County).

MDE issued the first five-year permit for the county's storm sewer system in March 1996, more than five years after the statutory deadline for doing so. MDE Response to Comments, E. 110; *see also* 33 U.S.C. § 1342(p)(4)(A) (requiring states to issue or deny permits not later than February 4, 1991). MDE issued a renewed permit for the system in July 2001, which remained in effect until 2010 when MDE issued the renewed Permit at issue here.¹ MDE published a tentative determination to issue the permit in September 2008. E. 417-21. A final determination to issue the Permit was published on March 4, 2009. E. 179. MDE issued the final effective Permit on February 16, 2010. E. 75. MDE delayed issuance of the Permit until February 16, 2010. E. 75. The Permit's five-year term will expire on February 15, 2015. E. 75.

The Appellees are local and regional environmental groups dedicated to restoring and protecting waters that flow through Montgomery County. E. 425-26. Their members use and enjoy waters that are polluted by discharges from the county's storm sewer system. *Id.* They filed timely comments on the draft permit raising a number of serious concerns including: the lack of specific, clear, enforceable requirements in the Permit for achieving pollution reductions needed to meet applicable water quality standards, E. 429-437; failure to incorporate the county's management and implementation plans into the

¹ MDE's Statement of Facts incorrectly states that the permit was renewed in 2006. MDE Br. at 7 (July 3, 2014). It was actually issued in 2010, more than three years after it was scheduled to expire.

permit, E. 438-43, 460-61; and failure to require a monitoring program for representative data collection needed to assess compliance with the Permit, E. 443-445. MDE received similar formal comments from many local, regional, and national environmental groups and people living near the affected waterways. *See* E. 464-484 and 485-88. The Washington Suburban Sanitary Commission also submitted comments explaining that poorly-controlled discharges from storm sewers in Montgomery County adversely impact the region's drinking water and sanitary sewage infrastructure, increasing treatment and maintenance costs, and reducing reservoir storage capacity. E. 489-91.

MDE published its final determination to issue the Permit on March 4, 2009, E. 179. The Permit's substantive requirements consist primarily of three categories: implementation of various ongoing "management programs," E. 77-81; a requirement to "restore" "twenty percent of the County's impervious surface area that is not restored to the [maximum extent practicable]," E. 83; and a requirement to "develop TMDL implementation plans" to "meet the storm drain system's share of [wasteload allocations] in EPA approved TMDLs," E. 86. MDE's Statement of Facts incorrectly states or implies that the Permit contains additional criteria, but such criteria are not stated in the Permit. MDE Br. at 8-9. Nowhere does the Permit or MDE's Response to Comments explain what "restoration" or what "not restored to the [maximum extent practicable]" means. Further, several alleged "requirements" stated in MDE's brief appear nowhere in the Permit. *See* MDE Br. at 8-9, citing MDE's stormwater manual, E. 511-12, 523, 531-35.

To assess the effectiveness of the county's activities under these programs, the Permit requires monitoring in only one stream called Lower Paint Branch, a tributary of

the Anacostia River. E. 83. MDE's Statement of Facts incorrectly states that the permit "requires the County to assess and monitor water quality within all of its watersheds."

MDE Br. at 10, citing E. 81. As further explained in section IV, below, monitoring within the meaning of 40 C.F.R. § 122.26(d) is required only in Lower Paint Branch.

STANDARD OF REVIEW

In judicial review of an agency action, the court reviews the administrative record to determine whether there is "substantial evidence in the record as a whole to support the agency's findings and conclusions," and must "determine if the administrative decision is premised upon an erroneous conclusion of law." *Motor Vehicle Admin. v. Lipella*, 427 Md. 455, 467 (2012), *reconsideration denied* (Aug. 16, 2012). With regard to discretionary action, the court reviews the record to determine whether the agency's action was arbitrary or capricious. *Assateague Coastkeeper v. Maryland Dep't of Env't*, 200 Md. App. 665, 691 (2011), citing *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 406, *cert. denied*, 396 Md. 12 (2006). An agency's actions will be classified as arbitrary and capricious if the "decision is not supported by facts," or if the decision was "unreasonable" or without a rational basis. *Baltimore St. Parking Co., LLC v. Mayor & City Council of Baltimore*, 194 Md. App. 569, 600 (2010); *Dep't of Human Res., Baltimore City Dep't of Soc. Servs. v. Hayward*, 426 Md. 638, 647 (2012).

The question whether certain statutory requirements apply to the Permit under review is purely a question of law. This court is "under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law." *People's Counsel for Baltimore Cnty. v. Maryland Marine Mfg. Co., Inc.*, 316 Md. 491,

497 (1989); *HNS Dev., LLC v. People's Counsel for Baltimore Cnty.*, 425 Md. 436, 449 (2012). Although in some cases a degree of deference might be accorded to the agency's interpretation of statutes it is charged with implementing, the court must "'ascertain and effectuate' the intent of the legislative body and to avoid 'construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense.'" *Id.*, citing *Mayor and Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 550 (2002).

The Court's review is limited to "the administrative record before the Department," and to "objections raised during the public comment period...." Md. Code Ann., Envir. § 1-601(d)(1). The court "court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency," or "for a reason plainly appearing on the record." *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569, 585-86 (1994). The court "may not accept appellate counsel's *post hoc* rationalizations." *Id.* (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

ARGUMENT

Summary of the Argument

Both Maryland law and the Clean Water Act prohibit the discharge of pollutants except in compliance with a permit that ensures compliance with Maryland's water quality standards. Md. Code Ann., Envir. § 9-324; 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); 40 C.F.R. §§ 122.4(d), 122.44(d)(1). Counsel for MDE argue to the contrary, urging the Court to hold that Maryland's water quality standards are "not applicable" to municipal storm sewers, based on an impermissible *post hoc* interpretation of the Clean

Water Act that conflicts with the governing statutes and rules as well as the Permit and MDE's contemporaneous supporting statements. MDE's interpretation also conflicts with Maryland law, which requires all point sources, including storm sewers, to meet water quality standards under § 9-324 of the Environment Code. Unless rejected by this Court, Maryland's approach would allow the agency to irrationally treat water quality standards as applicable to some storm sewer discharges but not to others, without any basis in the statutory language or purposes.

MDE's decision to issue the Permit was also arbitrary and capricious because MDE failed to show how its choices were supported by facts in the administrative record. MDE lacked factual support for finding that the county's TMDL implementation activities would be sufficient. MDE also failed to adequately explain the basis for the Permit's requirement to restore twenty percent of the county's impervious surface not restored to the maximum extent practicable. E. 83, E. 113. The Permit is rendered arbitrarily vague by MDE's failure to explain how the terms "restoration" or "restored to the [maximum extent practicable]" would operate under the permit. *Id.*

The Permit unlawfully allows MDE to approve new permit requirements, including requirements contained in TMDL implementation plans, E. 86, and impervious surface restoration plans, E. 82-83, in a manner that evades mandatory public process and judicial review. MDE refused to approve or incorporate these plans into the Permit through the mandatory process for permit modification. E. 86, 117. The Circuit Court correctly found that this approach impermissibly frustrates the public participation rights and judicial review requirements established by law.

The Permit is also legally deficient because it does not require a monitoring program for representative data collection for the term of the Permit, which is needed to determine compliance with the Permit's requirements. 40 C.F.R. §§ 122.26(d)(2)(iii)(A)(3) and (D), 122.26(d)(2)(iv)(C). Instead, the Permit requires monitoring at only one location. E. 83. MDE does not claim that it has complied with minimum regulatory requirements for monitoring; instead it argues that these requirements apply only to applications for permits and not to permits themselves, *see* E. 25. This construal is refuted by the plain text of the regulations.

Because of each of these critical failures, the Permit must be remanded to MDE to allow the agency to comply with the law.

I. COMPLIANCE WITH MARYLAND'S WATER QUALITY STANDARDS

MDE's authority to issue permits is delegated to the state by the U.S. EPA under the Clean Water Act's "national pollution discharge elimination system" ("NPDES"), 33 U.S.C. § 1342(a)-(b). MDE's ongoing administration of its permitting program is also subject to minimum requirements under federal regulations. 40 C.F.R. § 123.25(a). Maryland's statutory requirements for water pollution discharge permits are codified in Title 9 of the Environment Code, Md. Code Ann., Envir. §§ 9-322 to 332. While Maryland is authorized to adopt more stringent requirements in its state program, its standards may not be less stringent than federal standards established under the Clean Water Act. 33 U.S.C. § 1370; Md. Code Ann., Envir. § 9-314(c). *Nw. Land Corp. v. Maryland Dep't of Env't*, 104 Md. App. 471, 479 (1995) (stating that "MDE's effluent standards must be at least as stringent as the federal standards.").

A. Federal and Maryland Law Require MDE to Issue Permits That Ensure Compliance with Maryland’s Water Quality Standards

The Clean Water Act was enacted by Congress in 1972. The fundamental goal of the Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Section 301 of the Act prohibits the discharge of pollutants into waters of the United States unless the discharge is authorized by a permit issued in compliance with the Act’s minimum requirements. 33 U.S.C. § 1311(a).² Section 402(a)(1) allows permitting authorities to grant such a permit only “upon condition that such discharge will meet [... all applicable requirements [of § 301].” *Id.* § 1342(a)(1).

1. Water quality standards

The essential backbone of the Clean Water Act is the prohibition in § 301 against discharge of pollutants except in compliance with a permit that ensures attainment of applicable water quality standards. *See Assateague Coastkeeper*, 200 Md. App. at 675 (discussing §§ 301 and 402(a)(1)); *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). Under § 301, *all* NPDES discharge permits must specify technology-based discharge limitations (that is, pollution limits achievable with certain types of pollution control structures), *plus* any more stringent limitations necessary to assure compliance with water quality standards for the receiving waters. 33 U.S.C. § 1311(b)(1)(C). Section 402(a)(1) incorporates this requirement. *Id.* § 1342(a)(1). Consistent with this, federal regulations

² Provisions of the Clean Water Act are frequently referred to by their original section numbering. 33 U.S.C. § 1311 is “section 301” and *id.* § 1342 is “section 402”.

implementing the Clean Water Act prohibit the issuance of any NPDES permit “[w]hen the imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d) (emphasis added). All point source permits must contain limitations necessary to “[a]chieve water quality standards.” 40 C.F.R. § 122.44(d)(1). (A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).)

The requirement to ensure compliance with water quality standards is echoed in Maryland’s water pollution control program. Similar to the Clean Water Act, the legislative purpose of Maryland’s program “is to establish effective programs and to provide additional and cumulative remedies to prevent, abate, and control pollution of the waters of this State.” Md. Code Ann., Envir. § 9-302(a). While Maryland may not adopt requirements that are less stringent than the Clean Water Act, any requirements that are more stringent than the federal program are preserved. 33 U.S.C. § 1370; *Arkansas v. Oklahoma*, 503 U.S. at 99.

Consistent with this, MDE is authorized to issue a permit to discharge pollutants into waters of the state “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(a)(1). Maryland’s regulations similarly allow MDE to issue or re-issue a NPDES permit for discharges to waters of the state only “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... [e]ffluent limitations [and] [s]urface and ground water quality standards....” Md. Code Regs. 26.08.04.02.A(1). Section 9-324 and MDE’s implementing regulations are applicable to all NPDES permits, including those for storm sewers. Maryland Courts have affirmed that MDE must apply these provisions in issuing an NPDES permit. *See Nw. Land Corp.*, 104 Md. App. at 479 (discussing Md. Code Ann., Envir. § 9-324). *Assateague Coastkeeper*, 200 Md. App. at 665 (discussing Md. Code Ann., Envir. § 9-324 and Clean Water Act §§ 301(a) and 402(a)(1)).

2. Total maximum daily loads (TMDLs)

The CWA requires that the state establish, for waters that are not meeting water quality standards, a “total maximum daily load” (“TMDL”) for pollutants. The TMDL must be set “at a level necessary to implement the applicable water quality standards....” 33 U.S.C. § 1313(d)(1)(C). The TMDL therefore establishes the maximum amount of a particular pollutant that a waterway can receive and still meet water quality standards. CWA regulations require that TMDLs include an allocation of the total load among the sources that contribute that pollutant to the waterbody: either a “wasteload allocation” for “point sources” which are regulated by NPDES permits, or “load allocations” for non-point sources which are not regulated by NPDES permits. See 40 C.F.R. §§ 130.2(f)-(i). Storm sewer discharges are point sources covered by the NPDES permit requirements. *Natural Res. Def. Council, Inc. v. E.P.A.*, 966 F.2d 1292, 1295 (9th Cir. 1992).

CWA regulations mandate that effluent limits in NPDES permits be “consistent with the assumptions and requirements of any available wasteload allocation....” 40 C.F.R. § 122.44(d)(1)(vii)(B). “The allocation element of a TMDL assesses

responsibilities, identifies specific actions to be taken by identified parties, and results in an allocation of the total allowable pollutant burden.” *Communities for a Better Env’t v. State Water Res. Control Bd.*, 109 Cal. App. 4th 1089, 1106 (2003). Accordingly, MDE must ensure that NPDES permits include limitations needed to achieve compliance with the wasteload allocations applicable to the county’s storm sewer system under any final TMDLs. *Id.* (stating “[t]he TMDL will impose an effluent limitation that will protect the [receiving water] from all sources, which will necessarily include any [relevant pollutants] controllable by [the discharger].”).

B. MDE’s Lawyers’ Interpretation of the Water Quality Standards Requirement Is an Impermissible *Post Hoc* Rationale

MDE claims in litigation, for the first time, that water quality standards are inapplicable to storm sewers. The court must reject this argument because MDE’s decision must be based on the rationale stated by the agency in the administrative record, and not on *post hoc* rationale offered by counsel for the Department.

When it issued the Permit, MDE confirmed that “water quality standards form the basis of Maryland’s permitting programs.” Response to Comments, E. 111. Indeed, water quality standards supplied MDE’s basis for requiring that the Montgomery County storm sewer system must attain compliance with wasteload allocations in total maximum daily loads. *Id.*, E. 110, 111. MDE explained that TMDLs identify the pollution reductions that are “necessary for meeting water quality standards.” E. 111. And MDE further confirmed that “[b]ecause TMDLs are directly linked to Maryland’s water quality standards, meeting them is now explicitly stated [*sic*] throughout Montgomery County’s stormwater

permit.” *Id.* The Permit itself states that its goal is to “contribute to the attainment of water quality standards according to the [Clean Water Act].” E. 86.³

Nonetheless, counsel for MDE now urge this Court to adopt a different formulation of Clean Water Act § 402(p)—and to graft that formulation onto Maryland’s water pollution permitting statute. MDE Br. at 6, 17. This new interpretation conflicts both with the requirements in the Permit and with contemporaneous MDE statements in the record. MDE’s statements in the record only affirm the central importance of water quality standards. At no point in the administrative proceedings did MDE claim that standards are “not applicable.” *See* Response to Comments, E. 109-118, and Tentative Determination, E. 119-123.

In short, the Court must disregard MDE’s lawyers’ argument as an impermissible *post hoc* rationale. Further, even if that rationale could be considered, it would warrant rejection for reasons detailed below.

C. The Court Must Reject MDE’s Lawyers’ Interpretation of the Water Quality Standards Requirement.

Under the plain language of the Clean Water Act and implementing federal regulations, the “maximum extent practicable” requirement applies in addition to – and works in concert with – the water quality standards requirement under § 301. 33 U.S.C. §§ 1311(a), 1342(p)(3)(B), 40 C.F.R. § 122.44(d). MDE’s argument to the contrary runs

³ *Cf.* E. 111 (stating that a requirement “to meet water quality standards *in one permit term* is unreasonable.”) (Emphasis added). That MDE thought a requirement to meet standards within one five-year permit term would be unreasonable says nothing about whether the standards are applicable to the Permit in the first place.

afoul of longstanding caselaw and principles of statutory interpretation that are closely followed by Maryland courts.

1. MDE cannot overcome the longstanding presumption against repeals by implication.

Counsel for MDE and Intervenor-Appellee Montgomery County contend that Congress “replaced the water quality standard with the maximum-extent-practicable standard, and replaced numerical effluent limitations with ‘management practices,’” and other such technology-based controls. MDE Br. at 14.⁴ They contend that Congress *implicitly* repealed the cornerstone requirement in § 301 of the Act as to municipal stormwater because, although Congress restated the requirement to comply with § 301 in provisions addressing industrial stormwater, it did not restate the same for municipal stormwater. *See* MDE Memo. at 5-6.

MDE does not address the long-held prohibition against implied repeal, which is uniformly applied by Maryland courts. “[R]epeals by implication are not favored and will not be so held unless there is some express reference to the previous statute, or unless there is a manifest inconsistency in the two, or their provisions are so repugnant that they cannot stand together,” *Green v. State*, 170 Md. 134 (1936); *see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (“We will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless

⁴ MDE’s brief does not address the relevant federal regulations at all. Intervenor-Appellant Montgomery County asserts that water quality standards are not “applicable” to storm sewers within the meaning of 40 C.F.R. § 122.44(d). County Br. at 14.

such a construction is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all.”) (Internal quotation marks omitted). The same principle applies when a later specific enactment is alleged to have repealed an earlier general requirement. *Atkinson v. Anne Arundel Cnty.*, 428 Md. 723, 743-44 (2012) (“when reconciling a specific and a general statute, a court should give effect to the specific statute in its entirety and should *retain as much of the general statute as is reasonably possible*.”) (emphasis added).

Although Congress restated § 301 in provisions pertaining to industrial stormwater, 33 U.S.C. § 1342(p)(3)(A), the fact that Congress chose not to restate that requirement in subsection (p)(3)(B) in no way created a “manifest inconsistency in the two.” Neither MDE’s lawyers nor the County attempt to argue that any such inconsistency exists. Indeed, numerous courts have recognized that a requirement “ensuring strict compliance with state water-quality standards” under § 402(p)(3)(B) is entirely permissible. *See, e.g. Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Tualatin Riverkeepers v. Oregon Dep’t of Env’tl. Quality*, 230 P.3d 559, 563 n.8 (2010). Moreover, as discussed below, the legislative history of § 402(p)(3)(B) explicitly refutes the notion of any supposed conflict.

As the Court of Appeals has affirmed, the essential backbone of the Clean Water Act is the prohibition in § 301 against discharge of pollutants except in compliance with a permit that ensures attainment of applicable water quality standards. *Assateague Coastkeeper*, 200 Md. App. at 675 (discussing §§ 301 and 402(a)(1)). It defies reason to think that Congress would undertake to “specifically exempt[]” municipal storm sewers

from the longstanding generally-applicable water quality standards requirement in § 301 without any express indication that it intended to do so.

2. MDE’s interpretation of Maryland law finds no support in the text of the statute, and is not a product of reasoned elaboration

The totality of the discussion in MDE’s brief is contained in a assertion that “[c]onsistent with the Clean Water Act, § 9-324 of the Environment Article requires the Department to ensure that discharges meet ‘*applicable* State and federal water quality standards and effluent limitations.’” MDE Br. at 6 (emphasis in original). MDE’s lawyers appear to read *Defenders of Wildlife*’s holding that water quality standards are applicable only to industrial, and not municipal, discharges. Even if the Ninth Circuit so held (which it did not), MDE’s lawyers’ argument ignores the fact that, unlike the Clean Water Act, Maryland law *does not make any distinction* between permit requirements for municipal and industrial stormwater discharges. Md. Code Ann., Envir. § 9-324. Even if Congress exempted storm sewers from water quality standards under § 301 (and it did not), MDE’s lawyers do not show evidence of legislative intent to exempt storm sewers from the central requirement of water quality standards under the State’s clean water law.

Section 9-324 is clear and unambiguous. However, to the extent that there is any ambiguity in the term “applicable,” MDE cannot choose an interpretation that contravenes the plain text of the statute in such a way as to undermine the core purpose of this State’s clean water law. *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 446, (1997) (“An administrative agency's construction of the statute is not entitled to deference, however, when it conflicts with the unambiguous

statutory language.”) There simply is no basis under § 9-324 or other provisions of Maryland law that this was the General Assembly’s intention. Moreover, because Maryland is free to adopt more stringent requirements in its state program, there is no basis for assuming that Maryland’s law must be read to mirror the Clean Water Act in every respect. 33 U.S.C. § 1370.

MDE’s interpretation is also suspect because it purports to give the agency unbounded discretion in a manner not contemplated in either federal or Maryland law. *See Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004) (rejecting an agency’s interpretation that was plausible based on the text, but would have given the agency “unfettered discretion” to exempt some claims and not others); *Gonzales v. Oregon*, 546 U.S. 243, 260-61 (2006) (rejecting expansive interpretation of “control” that would “transform the carefully described limits on the Attorney General’s authority... into mere suggestions.”). *S. Coast Air Quality Mgmt. Dist. v. E.P.A.*, 472 F.3d 882, 895 (D.C. Cir. 2006), *decision clarified on denial of reh’g*, 489 F.3d 1245 (D.C. Cir. 2007) (holding that where Congress had not evinced an intention to allow discretion, agency’s interpretation “in a manner to maximize its own discretion is unreasonable”).

The Court must also reject MDE’s lawyers’ interpretation because it was not formulated through reasoned elaboration. There is no evidence that MDE has ever evaluated the significance of such an interpretation within the surrounding statutory context and other applicable requirements. Such an analysis would have revealed serious questions regarding the viability of the MDE’s interpretation. Most importantly, Maryland’s ability to achieve water quality standards throughout the state’s waters would

be hobbled if MDE were empowered to allow the state's municipalities to violate water quality standards with impunity. That interpretation would flout the requirement that upstream states can cause or contribute to violations of water quality standards in downstream states. *See* 40 C.F.R. § 122.4(d). There is no evidence whatsoever that the Maryland General Assembly has ever contemplated or sanctioned this result.

D. Requirements for Meeting Water Quality Standards Are Not Displaced by the “Maximum Extent Practicable” Requirement

In addition to the plain language of Clean Water Act § 301 and the federal implementing regulations, MDE's duty to apply water quality standards in the Permit is only bolstered by the history of the 1987 amendments that added the municipal stormwater provisions in § 402(p) to the Act.

The history of the 1987 amendments addressing stormwater goes back to 1973, when the U.S. EPA issued regulations attempting to exempt certain categories of “point sources” from the Clean Water Act's permit requirements, including storm sewers. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). After citizen groups challenged the regulations, these exemptions were struck down by the United States Court of Appeals for the District of Columbia Circuit. *Id.* The D.C. Circuit acknowledged that although administrative challenges involved in formulating effluent limits for stormwater “may result in adjustments in the permit programs,” “it does not authorize the Administrator to exclude the relevant point source from the NPDES program.” *Id.* 1379.

Ten years later when EPA and the states had still failed to make the needed adjustments to their permit programs to address the growing problem of stormwater pollution, Congress stepped in. In 1987 Congress adopted the Water Quality Act, which amended the Clean Water Act by adding the provisions now codified in section 402(p), 33 U.S.C. § 1342(p). *See Am. Min. Cong. v. U.S. E.P.A.*, 965 F.2d 759, 772 (9th Cir. 1992). These amendments established “explicit and firm deadlines for EPA regulation of storm water discharges.” *Id.* at 763. Among other things, Congress set deadlines for EPA to adopt rules describing the permit application requirements for municipal storm sewer systems, along with deadlines for EPA or the states to issue or deny permits for such systems. 33 U.S.C. §1342(p)(4) (requiring EPA to adopt regulations by February 4, 1989 and requiring EPA and the states to issue or deny permits no later than February 4, 1991.) Congress explicitly commanded that such permits provide for compliance “as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit,” *i.e.* February 4, 1994. *Id.* § 1342(p)(4)(A).

The Water Quality Act of 1987 also established technology-based requirements for municipal storm sewers. Specifically, Congress mandated that permits for such systems “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...” *Id.* §1342(p)(3)(B)(iii). This standard is sometimes called the “maximum extent practicable” or “MEP” standard, and the controls required under this standard are often referred to as “best management practices” or “BMPs.”

As EPA staff noted in comments on this very Permit, the “maximum extent practicable” requirement applies *in addition to* the overarching requirement to meet water quality standards under CWA section 301, 33 U.S.C. § 1311(a). E. 309. This is confirmed by the legislative history of the 1987 amendments. *See* H.R. Rep. No. 99-1004, at 38 (1987), reprinted in 1987 U.S.C.C.A.N. 5, 38. The Conference Report explained that Congress established a temporary reprieve from the permit requirement for smaller sources “in order to provide a sufficient period of time to develop and implement methods for managing and controlling discharges from municipal storm sewers.” *Id.*, discussing 33 U.S.C. § 1342(p)(2).⁵ However, after that point, “all municipal separate storm sewers are subject to the requirements of sections 301 and 402.” *Id.*

EPA has consistently interpreted the “maximum extent practicable” requirement as a technology-based standard that applies in addition to the Clean Water Act’s longstanding mandate under § 301 of the Act requiring permits to ensure compliance with water quality standards. When EPA promulgated rules in 1999 to implement the “maximum extent practicable” standard, the agency confirmed that under its existing regulations, “[40 C.F.R.] Sec. 122.44(d) is a general requirement that each NPDES permit shall include conditions to meet water quality standards.” EPA, “*National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*,” 64 Fed. Reg. 68,722,

⁵ The temporary suspension of permitting requirements was afforded only to small municipal storm sewer systems serving a population of fewer than 100,000 people. 33 U.S.C. § 1342(p)(2)(D).

68,770 (Dec. 8, 1999).⁶ EPA's Environmental Appeals Board again confirmed this construction of the statute in 2002, in a challenge to a permit for the District of Columbia's storm sewers issued by EPA's Region 3. *See In Re: Gov't of the Dist. of Columbia, MS4 System*, 10 E.A.D. 323, 335, 342-43 (2002) (discussed further below).

Several months before EPA finalized its 1999 rulemaking discussed above, a ruling had issued from the U.S. Court of Appeals for the Ninth Circuit. *See Defenders of Wildlife v. Browner*, 197 F.3d 1035 (9th Cir. 1999). The case involved a challenge to a permit issued by EPA for discharges from several municipal storm sewer systems in Arizona, where EPA retained NPDES permitting authority. Significantly, both EPA and the environmental group petitioners in that case *agreed* that municipal storm sewer permits *must* ensure compliance with state water quality standards. EPA argued that “[t]he Clean Water Act requires that NPDES permits contain effluent limitations as stringent as necessary to meet state water quality standards.” 1999 WL 33607153, *16. EPA explained that this “interpretation avoids an implicit repeal of other sections of the Clean Water Act and the preemption of state law, while furthering the goals of the Act.”

⁶ In an earlier rulemaking published in 1990, EPA stated that “the new Act makes significant changes to the permit standards for discharges from municipal storm sewers.” EPA at no point suggested that these changes displaced § 301. *See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 47,993 (Nov. 16, 1990).

*Id.*⁷ Nonetheless, the Ninth Circuit reached out to issue a ruling that rejected the statutory interpretation adopted by the expert federal agency, instead ruling that the “maximum extent practical” standard for municipal storm sewers in § 402(p)(3)(B) replaced the generally-applicable requirement to meet water quality standards in § 301. *Defenders of Wildlife v. Browner*, 191 F.3d at 1165. The court’s ruling makes no mention of the legislative history, instead citing an interpretation of the Act offered in an article published by the “Journal of Air Law and Commerce.” *Id.* At the same time, the Ninth Circuit held that NPDES permitting agencies have discretionary authority “to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants.” *Id.* at 1166.

In 2002 EPA’s Environmental Appeals Board affirmed that permits for municipal storm sewers must ensure compliance with water quality standards. *In Re: Gov’t of the Dist. of Columbia, MS4 System*, 10 E.A.D. at 323, 335, 342-43 (2002). In a challenge to a permit for the District of Columbia’s storm sewers issued by EPA’s Region 3, the Board held that where permit limitations take the form of required “BMPs,” the permitting authority must “show that the selected BMPs will be adequate to *ensure compliance with*

⁷ EPA’s brief in *Defenders of Wildlife v. Browner* is attached hereto as Appendix A). As the brief makes clear, the dispute between EPA and the petitioners in that case centered not on whether NPDES permits for storm sewers must include effluent limits needed to meet water quality standards, but on whether such effluent limits were appropriately expressed in the form of numeric limits versus “best management practices.” *See id.* *16-*18. *See also Defenders*, 197 F.3d at 1161 (“Petitioners raised only the legal question whether the Clean Water Act... requires numeric limitations to ensure strict compliance with state water-quality standards.”)

water quality standards.” (emphasis added). As the Board noted in its ruling, the Region declined to invoke its purported “discretion” to disregard water quality standards. *Id.* n.19 (explaining that the Board would not address “the Ninth Circuit’s statement in *Defenders of Wildlife v. Browner*... that ‘EPA... has authority to require less than strict compliance with state water quality standards,’ “because the Region has stated that it is not relying on this discretion identified in the Ninth Circuit’s analysis.” While acknowledging that the Region “intends this Permit to also satisfy water quality standards under section 301 of the Act,” the Board confirmed that “the Region must also determine... whether the conditions of this Permit ensure attainment of water quality standards as required by 40 C.F.R. § 122.4(d).” *Id.* at n.28.

The Court must reject the deeply flawed reasoning of the Ninth Circuit’s ruling in *Defenders of Wildlife v. Browner*, just as EPA itself has rejected that reasoning. As an initial matter, the ruling is not binding on this Court; decisions by federal circuit courts are not binding on Maryland courts, even with respect to questions of federal legislation. *French v. Hines*, 182 Md. App. 201, 262, at n.21 (2008) (“To be sure, we may consider persuasive the opinions of federal courts.... But, Maryland courts are not obligated to follow the decisions of the lower federal courts, even as to questions of federal law.”)⁸ Moreover, the Court’s ruling in *Browner* addressed only the permitting requirements

⁸ Indeed, the ruling is not even binding on federal courts outside of the Ninth Circuit. *Virginia Soc’y for Human Life, Inc. v. Fed. Election Comm’n*, 263 F.3d 379, 393 (4th Cir. 2001) overruled on unrelated grounds by *The Real Truth About Abortion, Inc. v. Fed. Election Comm’n*, 681 F.3d 544 (4th Cir. 2012).

applicable when EPA is the permitting authority; as such, the ruling has no bearing on the meaning or applicability of Maryland's own clean water law, which does not make any distinction between stormwater or municipal storm sewers and other types of point sources.

II. MDE ILLEGALLY AND ARBITRARILY FAILED TO SHOW HOW THE PERMIT WILL ENSURE COMPLIANCE WITH WATER QUALITY STANDARDS OR TMDLS

Because the Permit lacks clear requirements or schedules for attaining TMDL wasteload allocations and other pollution reduction requirements, it falls far short of the requirement to “ensure compliance with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. § 1311(a); Md. Code Ann., Envir. § 9-324. Not only does this violate statutory requirements, but MDE's decision to issue the Permit is also arbitrary and capricious because it was not supported by facts, or by a rational explanation of how the facts support MDE's choice or permit terms. Instead the Permit relies on Montgomery County to implement ongoing management programs, E. 77-81, to “restore” “twenty percent of the County's impervious surface area that is not restored to the [maximum extent practicable],” E. 83, and to develop TMDL implementation plans. E. 86. MDE's choice is unsupported by facts in the record.

The contents of the county's TMDL implementation plans are critical. They determine the “actions and deadlines by which those actions must be taken to meet the required pollutant load reduction benchmarks and [wasteload allocations] within the specified time frame.” Permit, § III.J. 2.a., E. 86. Under the Permit these plans are the *only* means specified in the record for MDE to ensure that the Permit's requirements are

“consistent with the assumptions and requirements of any available wasteload allocation” in TMDL, as required by 40 C.F.R. § 122.44(d)(1)(vii)(B). However, because MDE has not reviewed or approved the county’s TMDL implementation plans through a public process, this Court and members of the public have no way of knowing whether the county’s planned activities will achieve *any* net reduction in pollution discharges. Making matters worse, the Permit lacks any specific deadlines or compliance schedules for achieving pollution reductions or achieving TMDL wasteload allocations under these programs.

Similarly, the county’s impervious surface restoration plans determine whether existing stormwater controls are reducing pollutant discharges to the “maximum extent practicable.” Permit § III.G.2, E. 83. MDE failed to assess or otherwise demonstrate in the administrative record how the county’s restoration activities would ensure compliance with water quality standards or wasteload allocations in TMDLs. Instead, MDE offered only vague and wishful statements about the potential to make progress toward meeting water quality standards. *See, e.g.* Response to Comments, E. 110 (“Montgomery County’s permit will continue to push program implementation harder toward water quality improvement than any effort to date.”). As the Circuit Court correctly held, the Permit’s requirement to “restore” some unspecified proportion of impervious surface in the watershed is vague and unexplained, and therefore it is arbitrary and capricious.

MDE misleadingly states that “[b]est 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.” MDE Br. at 9. It further implies that best management practices under the permit will “restore the pollution reduction functions performed by undeveloped land.”

Id. at 8. However, the manual cited by MDE (E. 511-12, 523, 531-35) is not incorporated into the Permit.⁹ In fact, the Permit contains no specific criteria for restoration, but instead merely says that “[r]estoration 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. 83.

Likewise, MDE’s incorrectly asserts throughout its brief that the permit requires the County to “implement or install best management practices on 20 percent of the impervious surfaces within the County.” MDE Br. at 8, 10, 17. In fact, the Permit only requires the county to “restore” twenty percent of “impervious surface area that is *not restored to the [maximum extent practicable]*.” Permit, E. 83 (emphasis added); *Cf.* MDE Br. at 22. But the Permit provides no criteria for determining what has been “restored to the [maximum extent practicable],” nor did MDE explain on the record how that determination would be made. *Id.*; E. 113. This means that at the time MDE issued the Permit, MDE had no way of assessing vital information needed to determine the

⁹ Contrary to statements in MDE’s brief, MDE’s 2000 stormwater manual is not incorporated into the Permit. Permit § III.E.1.b., E. 77. Moreover, the cited excerpts of MDE’s stormwater manual refer only to requirements for new construction or redevelopment, not for retrofit of existing land and buildings. Even if the manual were generically incorporated into the Permit, it would not cure the defects in MDE’s action because the manual does not state how the measures it identifies will be implemented (if at all) in Montgomery County. MDE’s argument is akin to a claim that referencing a medical encyclopedia is enough to show how a doctor should treat a specific patient.

sufficiency of the county's proposed activities. Counsel for MDE now state that "the County already has in place a mechanism for calculating the total acreage of land that does not have stormwater controls." MDE Br. at 22. However, because this explanation did not appear in MDE's decision rationale, the Court must reject it as *post hoc* rationale. *See* E. 113.¹⁰

It is not enough for MDE to rely on the mere potential that the county's activities will result in progress toward meeting water quality standards at an undefined future date. As EPA's Environmental Appeals Board observed, a "determination that the specified [best management practices] are 'reasonably capable' of achieving water quality standards" does not fully comport with 40 C.F.R. § 122.4(d), which prohibits issuing a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." *In Re: Gov't of the Dist. of Columbia, MS4 System*, 10 E.A.D. at 11 (emphasis in original).

Finally, the Court should disregard MDE's suggestion that the U.S. EPA has "approved" the Permit or that "EPA determined that the Montgomery County permit at issue here included appropriate controls on the discharge of pollutants in stormwater." MDE Br. at 1, 8, 17. In fact, EPA staff simply submitted comments along with

¹⁰ In any event MDE's discussion does not provide facts to support MDE's decision. The referenced document is an annual report submitted in March 2008. MDE Br. at 22, citing E. 406. It states that, of the "total acres developed under county responsibility for stormwater development," "about 52%... has some sort of stormwater management." E. 406. This opaque statement provides no factual basis or explanation for MDE's apparent agreement that "some sort of stormwater management" is sufficient.

recommended language to MDE prior to MDE's publication of the draft permit. E. 307-27. For example, the comments requested that MDE add mandatory permit language to reflect the requirement in Clean Water Act § 301 that "discharges meet applicable [water quality standards]..." and in 40 C.F.R. § 122.44(d)(1)(vii)(B) "that [best management practices] and programs... must be consistent with applicable [total maximum daily loads]" E. 309, 320. In large part MDE *rejected* the changes that EPA requested. The final permit contains hortatory language stating that the goal of the permit is to "show progress toward meeting... [total maximum daily loads] and contribute to the attainment of water quality standards." E. 86. The EPA staff person later sent an e-mail to MDE stating that MDE's language "satisfies our questions and proposed changes." E. 284. The note did not purport to "approve" the final permit, but instead merely stated the view of an individual staff member, without explanation of the basis for their statement. Indeed, EPA does not have a process for "approving" state NPDES permits.

III. THE PERMIT UNLAWFULLY ALLOWS NEW PERMIT REQUIREMENTS TO EVADE MANDATORY PUBLIC NOTICE AND COMMENT AND JUDICIAL REVIEW REQUIREMENTS

The Clean Water Act requires that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [Environmental Protection Agency] or any State under this [Act] shall be provided for, encouraged, and assisted by the [Environmental Protection Agency] and the States." 33 U.S.C. § 1251(e). The term "effluent limitation" is defined broadly to include "any restriction established by a State... on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are

discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11) (emphasis added).

EPA has adopted regulations to carry out the Act’s command for public participation. Under 40 C.F.R. § 122.62 (which is applicable to the States under *id.* § 123.25), when any new or revised effluent limitations are added to a Permit, they must be incorporated through a formal (“major”) permit modification that fully complies with public participation requirements:

If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of § 124.5(c).... If a permit modification satisfies the criteria in § 122.63 for “minor modifications” the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in part 124 (or procedures of an approved State program) followed.

40 C.F.R. § 122.62. “Cause” in the foregoing provision includes “new information,” such as the information that would be contained in a proposed TMDL implementation plan. *Id.* Except for certain narrow exceptions allowed for “minor” permit modifications, which are not applicable here,¹¹ “part 124” referenced in this regulation requires that any permit modifications must be subject to the same procedural requirements as new or re-issued permits. *See* 40 C.F.R. §§ 124.5-124.15. The Maryland Code also requires that a “final

¹¹ Minor modifications are narrowly defined under 40 C.F.R. § 122.63. For stormwater permits, the only permissible minor modifications are those needed to correct typographical errors, require more frequent monitoring or reporting by the permittee, change an interim compliance date in a schedule of compliance, allow for changes in ownership or operational control of a facility (as long as no other changes are needed), or to terminate a discharge outfall. *Id.*

determination by the Department on the issuance, denial, renewal, *or revision* of any permit... is subject to judicial review.” Md. Code Ann., Envir. § 1-601(c) (emphasis added).

Under both the federal and Maryland provisions, MDE must undertake a formal public process to revise a permit when it approves new requirements under the permit. As discussed in section II above, the Permit unlawfully allows MDE to approve new requirements under the Permit in a manner that evades mandatory public process and judicial review. Specifically, it requires the County to develop impervious surface restoration plans described above, E. 83, and TMDL implementation plans, E. 85, which are approved by MDE behind closed doors long after the Permit was issued. MDE refused to approve or incorporate the TMDL implementation plans into the Permit through the mandatory process for permit modification. This undermines public participation rights and judicial review, making it impossible for the Court and members of the public to assess whether the Permit’s requirements meet applicable laws, and violates the mandatory procedural requirements discussed above. Finally, because MDE does not challenge the Circuit Court’s ruling on this score, any objection to that ruling is waived.

IV. THE PERMIT’S MONITORING REQUIREMENTS DO NOT MEET MINIMUM FEDERAL REQUIREMENTS.

Federal rules mandate that stormwater permits require monitoring to enable members of the public, Montgomery County, and MDE to obtain representative data about discharges from the system, and to assess the success or failure of the county’s

actions in achieving pollution reductions and restoring healthy conditions in receiving waters. “Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance.” *Champion Int’l Corp. v. E.P.A.*, 648 F. Supp. 1390, 1395 (W.D.N.C. 1986), *vacated on other grounds*, 850 F.2d 182 (4th Cir. 1988).

As the Montgomery County Circuit Court held, the Permit’s requirement to conduct monitoring for the term of the Permit in only one tributary, and the requirement that permittee’s submit annual reports to MDE, is insufficient to meet monitoring requirements. E. 21. MDE argues that specific federal requirements for monitoring apply only to applications for permits, but not to permits themselves, *see* E. 25. This construal is refuted by the plain text of the regulations.

A. The Permit Must Require Representative Monitoring, and Monitoring to Ensure Compliance With Permit Requirements.

Under the Clean Water Act, “State-issued NPDES permits must mandate, *inter alia*, compliance with the inspection, reporting, and monitoring requirements of the Act as outlined in 33 U.S.C. § 1318.” *Menzel v. Cnty. Util. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983) (citing 33 U.S.C. § 1342(b)(2)). All NPDES permits must specify the “type, intervals, and frequency sufficient to yield data which are representative of the monitored activity,” as well as any other monitoring conditions necessary to “assure compliance with permit limitations.” 40 C.F.R. §§ 122.48(b), 122.44(i)(1). In addition, permits must comply with requirements for monitoring in EPA’s “regulations setting forth the permit application requirements for stormwater discharges.” 33 U.S.C. § 1342(p)(4)(A).

The regulations for monitoring storm sewers are codified at 40 C.F.R. § 122.26. For large municipal systems like Montgomery County's, the regulations require the County to submit a "proposed monitoring program for representative data collection for the term of the permit." 40 C.F.R. § 122.26(d)(2)(iii)(D). The types of data that must be collected under this requirement are specifically described in the regulations, and include sampling for organic pollutants, toxic metals, total suspended solids, total dissolved solids, biochemical oxygen demand, oil and grease, fecal coliform, and other substances capable of harming humans or aquatic wildlife. *Id.* § 122.26(d)(2)(iii)(A)(3). The regulations also require a "program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste," and other sites that "are contributing a substantial pollutant loading" to the storm sewer system. 40 C.F.R. § 122.26(d)(2)(iv)(C).

The regulations make clear that the application requirements are to be carried through "*for the term of the permit.*" *Id.* § 122.26(d)(2)(iii)(D) (emphasis added). If this were not clear enough, in adopting the rule EPA explained that it establishes "a permit scheme where the collection of representative data is primarily a task that will be accomplished through monitoring programs during the term of the permit." *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 48,049 (Nov. 16, 1990) (stating that "[t]oday's rule requires that some quantitative data will be collected to ensure the system discharges can be appropriately represented by the various existing data bases *and to provide a basis for developing a monitoring plan to be implemented as a permit condition.*") (Emphasis

added.) Thus, the “proposed monitoring program for representative data collection” must be effectuated as a condition of the permit. *Id.* at 48,050.

B. The Permit is Legally Deficient Because it Does Not Require a Program of Representative Monitoring, or Other Monitoring Needed to Assure Compliance With Permit Conditions.

The Permit lacks anything resembling a representative monitoring program. For the nearly 500-square-mile Montgomery County storm sewer system containing thousands of pollution outfalls, the Permit requires monitoring at only one pollution outfall and one corresponding monitoring station in the receiving stream in Lower Paint Branch of the Anacostia River. Permit III.H.1, E. 83. MDE does not claim that this location is representative of the entire 500-square mile Montgomery County storm sewer system, as required by 40 C.F.R. § 122.26(d), nor is there anything in the record to support such a farfetched claim. MDE also failed to show how these limited monitoring data would assure compliance with the Permit’s requirements, as required by *id.* § 122.48(b).

MDE instead points to various generic *assessment* and reporting requirements in the Permit. MDE Br. at 24-25. However, *monitoring* (*i.e.* chemical monitoring, biological monitoring, and physical monitoring as described in Part H.I. of the Permit), is required only for Lower Paint Branch. E. 84-85. In contrast, the assessment requirements in the permit call for a “long-term schedule” for conducting one-time snapshot assessments. E. 81-82. Requirements for these assessments are largely unspecified, but require the county to determine “current water quality conditions,” and include activities like “visual watershed inspection.” *Id.* The Permit also requires limited “physical monitoring” to

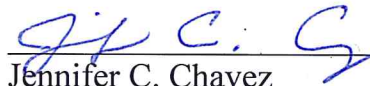
assess erosion (“aggradation and degradation”) in one area called the Clarksburg Special Protection Area. E. 83, 85. While valuable, these other types of assessments will not produce the type of data identified in 40 C.F.R. § 122.26(d)(2)(iii)(A)(3).

Finally, MDE argues that the permit’s extremely limited monitoring requirement is reasonable and supported by substantial evidence.” E. 25. However, because MDE entirely failed to implement the regulatory requirements, its decision was based on an error of law for which no deference is appropriate. The Court must remand the Permit for failure to meet this important requirement.

CONCLUSION

The judgment of the Circuit Court should be upheld and the Permit remanded to MDE for further action consistent with the Clean Water Act and Maryland law.

Respectfully submitted this 1st day of August, 2014 by counsel for Appellees:



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RULE 8-504(a)(9) STATEMENT

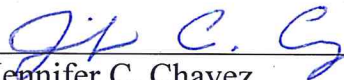
This brief was printed utilizing proportionally spaced font. The body and footnotes are printed in Times New Roman, 13 Point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2014, two copies of the foregoing Appellees' Reply Brief were delivered via First Class U.S. Mail to:

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STATUTORY SECTION

Prepared in accordance with Maryland Rule 8-504(8)

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33 U.S.C. § 1251

§ 1251(e). Congressional declaration of goals and policy.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

33 U.S.C. § 1318

§ 1318. Records and reports; inspections.

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to

- (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter;
- (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance;
- (3) any requirement established under this section; or
- (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title—
 - (A) the Administrator shall require the owner or operator of any point source to
 - (i) establish and maintain such records,
 - (ii) make such reports,
 - (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods),
 - (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and
 - (v) provide such other information as he may reasonably require; and
 - (B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials—
 - (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and
 - (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or

information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(c) Application of State law

Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

33 U.S.C. § 1370

§ 1370. State Authority.

Except as expressly provided in this chapter, nothing in this chapter shall

- (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce
 - (A) any standard or limitation respecting discharges of pollutants, or
 - (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or

other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or

- (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Md. Code Ann., Envir. § 1-601

§§ 1-601(c), (d)(1). Application of subtitle.

(c) A final determination by the Department on the issuance, denial, renewal, or revision of any permit listed under subsection (a) of this section is subject to judicial review at the request of any person that:

- (1) Meets the threshold standing requirements under federal law; and
- (2)(i) Is the applicant; or
- (ii) Participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided.

(d)(1) Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:

- (i) The objections were not reasonably ascertainable during the comment period; or
- (ii) Grounds for the objections arose after the comment period.

Md. Code Ann., Envir. § 9-302

§ 9-302(a). Declaration of policy.

(a) The purpose of this subtitle is to establish effective programs and to provide additional and cumulative remedies to prevent, abate, and control pollution of the waters of this State.

Md. Code Ann., Envir. § 9-314

§ 9-314(c). Water quality and effluent standards.

- (c) Effluent standards set under this section shall be at least as stringent as those specified by the National Pollutant Discharge Elimination System.

40 C.F.R. § 122.4

§ 122.4(d). Prohibitions.

- (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States

40 C.F.R. § 122.44

§ 122.44(d)(1)(vii)(B). Water quality standards and State requirements.

- (B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information

§ 122.44(i)(1). Monitoring Requirements.

- (1) To assure compliance with permit limitations, requirements to monitor:
- (i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;
 - (ii) The volume of effluent discharged from each outfall;
 - (iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.
 - (iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants or another method is required under 40 CFR

subchapters N or O. In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR subchapters N or O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants.

40 C.F.R. § 122.48

§ 122.48(b). Requirements for recording and reporting of monitoring results.

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring

40 C.F.R. § 122.62

§ 122.62. Modification or revocation and reissuance of permits.

When the Director receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see § 122.41), receives a request for modification or revocation and reissuance under § 124.5, or conducts a review of the permit file) he or she may determine whether or not one or more of the causes listed in paragraphs (a) and (b) of this section for modification or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of § 124.5(c), and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See § 124.5(c)(2). If cause does not exist under this section or § 122.63, the Director shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in § 122.63 for “minor modifications” the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in part 124 (or procedures of an approved State program) followed.

(a) *Causes for modification.* The following are causes for modification but not revocation and reissuance of permits except when the permittee requests or agrees.

(1) *Alterations.* There are material and substantial alterations or additions to the permitted facility or activity (including a change or changes in the permittee's sludge use or disposal practice) which occurred after permit

issuance which justify the application of permit conditions that are different or absent in the existing permit.

NOTE:

Certain reconstruction activities may cause the new source provisions of § 122.29 to be applicable.

(2) **Information.** The Director has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. For NPDES general permits (§ 122.28) this cause includes any information indicating that cumulative effects on the environment are unacceptable. For new source or new discharger NPDES permits §§ 122.21, 122.29), this cause shall include any significant information derived from effluent testing required under § 122.21(k)(5)(vi) or § 122.21(h)(4)(iii) after issuance of the permit.

(3) **New regulations.** The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

(i) For promulgation of amended standards or regulations, when:

(A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards, or the Secondary Treatment Regulations under part 133; and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after *Federal Register* notice of the action on which the request is based.

(ii) For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated regulations or effluent limitation guidelines, if the remand and stay concern that portion of the regulations or guidelines on which the permit condition was based and a request is filed by the permittee in accordance with § 124.5 within ninety (90) days of judicial remand.

- (iii) For changes based upon modified State certifications of NPDES permits, see §124.55(b).
- (4) **Compliance schedules.** The Director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case may an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory deadline. See also § 122.63(c) (minor modifications) and paragraph (a)(14) of this section (NPDES innovative technology).
- (5) When the permittee has filed a request for a variance under CWA section 301(c), 301(g), 301(h), 301(i), 301(k), or 316(a) or for “fundamentally different factors” within the time specified in § 122.21 or § 125.27(a).
- (6) **307(a) toxics.** When required to incorporate an applicable 307(a) toxic effluent standard or prohibition (see § 122.44(b)).
- (7) **Reopener.** When required by the “reopener” conditions in a permit, which are established in the permit under § 122.44(b) (for CWA toxic effluent limitations and Standards for sewage sludge use or disposal, see also § 122.44(c)) or 40 CFR 403.18(e)(Pretreatment program).
- (8)
 - (i) **Net limits.** Upon request of a permittee who qualifies for effluent limitations on a net basis under § 122.45(g).
 - (ii) When a discharger is no longer eligible for net limitations, as provided in §122.45(g)(1)(ii).
- (9) **Pretreatment.** As necessary under 40 CFR 403.8(e) (compliance schedule for development of pretreatment program).
- (10) **Failure to notify.** Upon failure of an approved State to notify, as required by section 402(b)(3), another State whose waters may be affected by a discharge from the approved State.
- (11) **Non-limited pollutants.** When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).
- (12) **Notification levels.** To establish a “notification level” as provided in § 122.44(f).
- (13) **Compliance schedules.** To modify a schedule of compliance to reflect the time lost during construction of an innovative or alternative facility, in the case of a POTW which has received a grant under section 202(a)(3) of CWA for 100% of the costs to modify or replace facilities constructed with a grant for innovative and alternative wastewater

technology under section 202(a)(2). In no case shall the compliance schedule be modified to extend beyond an applicable CWA statutory deadline for compliance.

(14) For a small MS4, to include an effluent limitation requiring implementation of a minimum control measure or measures as specified in § 122.34(b) when:

- (i) The permit does not include such measure(s) based upon the determination that another entity was responsible for implementation of the requirement(s); and
- (ii) The other entity fails to implement measure(s) that satisfy the requirement(s).

(15) To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

(16) When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under section 402(a)(1) of the CWA and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline).

(17) **Nutrient Management Plans.** The incorporation of the terms of a CAFO's nutrient management plan into the terms and conditions of a general permit when a CAFO obtains coverage under a general permit in accordance with §§ 122.23(h) and 122.28 is not a cause for modification pursuant to the requirements of this section.

(18) **Land application plans.** When required by a permit condition to incorporate a land application plan for beneficial reuse of sewage sludge, to revise an existing land application plan, or to add a land application plan.

(b) **Causes for modification or revocation and reissuance.** The following are causes to modify or, alternatively, revoke and reissue a permit:

- (1) Cause exists for termination under § 122.64, and the Director determines that modification or revocation and reissuance is appropriate.
- (2) The Director has received notification (as required in the permit, see § 122.41(1)(3)) of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer (§ 122.61(b)) but will not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

40 C.F.R. § 122.63

§ 122.63. Minor modifications of permits.

Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of part 124. Any permit modification not processed as a minor modification under this section must be made for cause and with part 124 draft permit and public notice as required in § 122.62. Minor modifications may only:

- (a)** Correct typographical errors;
- (b)** Require more frequent monitoring or reporting by the permittee;
- (c)** Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or
- (d)** Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.
- (e)**
 - (1)** Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.29.
 - (2)** Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.
- (f)** [Reserved]
- (g)** Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in 40 CFR 403.11 (or a modification thereto that has been approved in accordance with the procedures in 40 CFR 403.18) as enforceable conditions of the POTW's permits.
- (h)** Incorporate changes to the terms of a CAFO's nutrient management plan that have been revised in accordance with the requirements of § 122.42(e)(6).

40 C.F.R. § 124.5

§ 124.5(c). Modification, revocation and reissuance, or termination of permits.

(c) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA)*). (1) If the Director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.62 (NPDES), 144.39 (UIC), 233.14 (404), or 270.41 (other than § 270.41(b)(3)) or § 270.42(c) (RCRA), he or she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, other than under 40 CFR 270.41(b)(3), the Director shall require the submission of a new application. In the case of revoked and reissued permits under 40 CFR 270.41(b)(3), the Director and the permittee shall comply with the appropriate requirements in 40 CFR part 124, subpart G for RCRA standardized permits.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) “Minor modifications” as defined in §§ 122.63 (NPDES), 144.41 (UIC), and 233.16 (404), and “Classes 1 and 2 modifications” as defined in § 270.42 (a) and (b) (RCRA) are not subject to the requirements of this section.

40 C.F.R. § 130.2

§§ 130.2(f)-(i). Establishing limitations, standards, and other permit conditions.

(f) **Loading capacity.** The greatest amount of loading that a water can receive without violating water quality standards.

(g) **Load allocation (LA).** The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

- (h) **Wasteload allocation (WLA).** The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
- (i) **Total maximum daily load (TMDL).** The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

Md. Code Regs. 26.08.04.02

26.08.04.02.A(1). Requirements for the Issuance and Reissuance of Discharge Permits.

- A. General. The Department shall issue or reissue a discharge permit upon a determination that:
- (1) The discharge or proposed discharge specified in the application is or will be in compliance with all applicable requirements of:
 - (a) Effluent limitations,
 - (b) Surface and ground water quality standards,
 - (c) The Federal Act,
 - (d) State law or regulation,
 - (e) Best available technology, and
 - (f) Federal effluent guidelines

Md. Rules § 7-209

§ 7-209. Disposition.

Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above.

APPENDIX A

1999 WL 33607153 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners,
v.
Carol M. BROWNER, Administrator, United States Environmental Protection Agency, et al., Respondents,
CITY OF TUCSON, ARIZONA, et al., Intervenor-Respondents.

No. 98-71080.
March 22, 1999.

On Petition for Review of Final Agency Action by the United States Environmental Protection Agency

Brief for the Respondents

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***1 STATEMENT OF JURISDICTION**

This case concerns the United States Environmental Protection Agency's ("EPA") issuance of National Pollutant Discharge Elimination System ("NPDES") permits for storm water discharges from five Arizona municipalities.

EPA took final action regarding the NPDES permits challenged in this petition for review pursuant to its authority under sections 402(a) and 402(p)(4) of the Clean Water Act, [33 U.S.C. § 1342\(a\) and \(p\)\(4\)](#).

This Court has jurisdiction over this petition for review of EPA's issuance of the permits pursuant to section 509(b)(1)(F) of the Clean Water Act, [33 U.S.C. § 1369\(b\)\(1\)\(F\)](#).

The Administrator's action was final for purposes of judicial review in this matter on May 21, 1998. *See* [40 C.F.R. § 23.2 \(1998\)](#). Defenders of Wildlife and the Sierra Club (collectively "Defenders") filed their petition for review on September 18, 1998, within the 120 day period authorized by section 509(b) of the Clean Water Act, [33 U.S.C. § 1369\(b\)](#).

STATEMENT OF ISSUES

A. Whether the Clean Water Act requires that NPDES permits for municipal storm water discharges contain effluent limitations as stringent as necessary to meet state water quality standards?

***2** B. Whether the Clean Water Act allows NPDES permits for municipal storm water discharges to contain effluent limitations consisting of best management practices, or whether it requires numeric limitations?

C. Whether EPA's decision to include, in the NPDES permits for municipal storm water discharges for the Arizona municipalities, best management practices, rather than numeric limitations, to meet state water quality standards was arbitrary or capricious?

D. Whether Defenders are precluded from challenging the adequacy of the best management practices included in the NPDES permits for municipal storm water discharges for the Arizona municipalities because they did not raise a factual challenge to the adequacy of the practices during the administrative proceeding?

E. If Defenders can challenge the adequacy of the best management practices, whether EPA's determination as to the adequacy of the best management practices was arbitrary or capricious?

STATEMENT OF THE CASE

A. INTRODUCTION

This case presents for review the difficult issue of how to limit pollutants in municipal storm water discharges effectively in the arid western portion of the United States. Municipal storm water runoff consists of rainfall, melted snowfall *3 and the pollutants picked up by the water while flowing to gutters and storm drains throughout a municipality. EPA has tried for over 20 years to address regulatory issues associated with municipal storm water runoff. The difficulty of devising an appropriate regulatory approach is compounded in the arid west, where storm events are relatively infrequent but severe, and storm water discharges often flow into water courses that have little or no flow except during storm events.

Congress recognized these regulatory difficulties when enacting requirements for addressing discharges of storm water. Congress gave EPA significant flexibility in establishing the required controls for reducing the discharge of pollutants from storm water. In the case of the NPDES permits for municipal storm water discharges challenged by Defenders, EPA required implementation of best management practices to reduce pollutants in municipal storm water discharges. These best management practices include structural controls, such as retention basins and infiltration ponds, as well as non-structural measures, such as programs to minimize illicit discharges and construction site runoff into the storm sewer systems.

EPA did not establish in the NPDES permits any numeric limitations to meet state water quality standards. EPA determined that the data it possessed regarding the biological and chemical impacts of the storm water discharges on the receiving *4 waters was inadequate as a basis upon which to establish rational numeric limits on the quantity of pollutants that may be present in such discharges without adversely affecting water quality. Therefore, EPA also established monitoring requirements in the NPDES permits to acquire the information necessary to determine if additional or modified permit limitations are required during the term of the permits or in future permits.

B. THE CLEAN WATER ACT

1. The NPDES Permit Program

The Clean Water Act (the "Act") was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). To achieve this goal, Congress prohibited the "discharge of pollutants" from a "point source," into the waters of the United States unless that discharge complies with the Clean Water Act. 33 U.S.C. §§ 1311(a), 1342. For most dischargers, compliance may be achieved by obtaining and adhering to the terms of a NPDES permit issued under Section 402 of the Act. 33 U.S.C. § 1342.¹

Footnotes

*5 NPDES permits typically contain "effluent limitations" that restrict the amounts of pollutants that may be discharged into navigable waters. See 33 U.S.C. § 1362(11). "Effluent limitations" are any restriction on the quantities, rates and concentrations of discharged constituents and include schedules of compliance. 33 U.S.C. § 1362(11). Effluent limitations implement two complementary standards.

First, NPDES permits implement technology-based standards, which generally represent the degree of control that can be achieved by point sources using various levels of pollution control technology. 33 U.S.C. §§ 1311, 1314; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-36 (1977).

Second, the Clean Water Act directs the states, with federal approval and oversight, to establish water quality-based standards to assure protection of the quality of state waters. 33 U.S.C. § 1313(a), (b), and (c)(1). The state standards designate uses for waters (e.g. public water supplies, propagation of fish and wildlife) and establish water quality criteria to protect such uses. 33 U.S.C. § 1313(c)(2)(A). If necessary to meet applicable water quality standards, NPDES permits must contain water quality-based effluent limitations more stringent than limitations that would be required to comply with the applicable technology-based *6 standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.1(f); 123.1(i); see *Arkansas v. Oklahoma*, 503 U.S. 91, 104-05 (1992).²

¹ The Administrator of EPA is, with certain explicit exceptions not relevant here, responsible for administering the NPDES permit program, and for issuing permits that contain conditions that implement the various requirements of the Act. 33 U.S.C. § 1342(a)(1).

In essence, an NPDES permit transforms generally applicable technology-based control standards and state water quality standards into obligations of the individual discharger. See 40 C.F.R. § 122.4. As part of the permit process, the permittee must provide EPA with a certification from the state in which the discharge originates. 33 U.S.C. § 1341. By its certification, the state certifies that, if the permittee discharges in accordance with the limitations and conditions contained in the permit and the certificate, applicable water quality requirements standards will be met. See 33 U.S.C. § 1341(a); 40 C.F.R. § 124.53(e). The certificate may specify any additional effluent limitations or other permit conditions required to ensure compliance with the state's water quality standards or other appropriate requirements of state law. *Id.*

2. The Regulation of Storm Water Discharges.

In 1987, Congress amended the Clean Water Act to address municipal and industrial stormwater discharges. 33 U.S.C. § 1342(p). In the 1987 amendments, *7 Congress directed EPA to establish regulations setting forth the permit application requirements for stormwater discharges from municipal separate storm sewer systems serving populations over 100,000. *Id.* § 1342(p)(4).

Congress also provided direction regarding the nature of permit requirements for discharges from municipal separate storm sewers. *Id.* § 1342(p)(3)(B). The permits must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. *Id.* § 1342(p)(3)(B)(ii). The permits must also 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)(iii).

EPA established regulations setting forth the permit application requirements for municipal separate storm water discharges. *Id.* § 1342(p)(3)(B); see *Natural Resources Defense Council ("NRDC") v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (upholding regulations in relevant part). The regulations divided the permit process into two parts. See 40 C.F.R. § 122.26(d). Part 1 of the application requires general information about the applicant, including data on the sources, volume and quality of storm water runoff and a description of existing management programs to *8 control pollutants. 40 C.F.R. § 122.26(d)(1). Part 1 also requires a discharge characterization plan, pursuant to which the applicant samples the discharges from five to ten outfalls and analyzes them for certain pollutants. *Id.* § 122.26(d)(1)(iv).

Part 2 of the application builds upon the information submitted in Part 1, and requires a greater level of detail for the subject

matters covered by Part 1. In addition, the Part 2 application requires a proposed storm water management program, a proposed monitoring program, and an estimate of the effectiveness of storm water controls. 40 C.F.R. § 122.26(d)(2). The proposed storm water management program is the discharger's proposal for satisfying the statutorily mandated levels of pollutant control in the municipal separate storm sewer system's discharge. *Id.* § 122.26(d)(2)(iv). The storm water management program required by the regulations contains four key elements: (1) a program to reduce pollutants from commercial and residential areas, (2) a program to control illicit connections and illegal dumping, (3) a program to reduce pollutants in landfill and industrial discharges, and (4) a program to reduce pollutants in construction site runoff. *Id.*

The Part 2 application also includes an estimate of the reductions in pollutants from discharges from municipal separate storm sewer systems expected as a result of the storm water management program. *Id.* § 122.26(d)(2)(v). In addition, the applicant submits a fiscal analysis of the necessary capital and operation and *9 maintenance expenditures necessary to accomplish the activities of the program. *Id.* § 122.26(d)(2)(vi).

3. Procedures for Permit Issuance

The NPDES permitting process is initiated when the discharger files a permit application providing the information required by the regulations. 40 C.F.R. § 124.3; *see also* 40 C.F.R. §§ 122.26, 124.53(e). Based upon the application, EPA issues a draft permit, provides public notice of its proposed action and invites public comment. During the public comment period, "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate ... must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position" *Id.* § 124.13. The Regional Administrator determines whether a final permit should be issued based on the administrative record compiled during the permit proceedings, including public comments submitted and any water quality certification received from the state. 40 C.F.R. §§ 124.15, 124.53.

After the Regional Administrator issues a final permit decision, an interested party may request an evidentiary hearing to reconsider or contest the resolution of any legal or factual question raised in the prior proceedings. *Id.* § 124.74. The request must specifically identify the legal and factual issues and their relevance to *10 the permit decision. *Id.* § 124.74(b)(1). The Regional Administrator will grant an evidentiary hearing if there exists a genuine issue of material fact. *See Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600, 605 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

If the Regional Administrator denies a request for an evidentiary hearing, a requesting party may petition EPA's Environmental Appeals Board for review of the denial. *Id.* § 124.91. An order by the Environmental Appeals Board denying further administrative review or a decision on the merits if review is granted constitutes the final EPA action on the permit. 40 C.F.R. § 124.91(e), (f).

C. FACTUAL BACKGROUND

In 1992 and 1993, Pima County, Arizona and the Arizona cities of Tucson, Phoenix, Mesa, and Tempe (the "Municipalities"), which own and operate municipal separate storm sewer systems,³ submitted Parts 1 and 2 of the required NPDES permit application for storm water discharges from their municipal separate storm sewer systems. *See, e.g.*, E.R. 29, 58, 74.⁴

² Congress utilized water quality standards "as a supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976).

³ The Clean Water Act does not regulate the municipalities as municipalities, per se, but rather only to the extent they own and operate separate storm sewer systems that discharge pollutants into waters of the United States. The prohibition against unpermitted pollutant discharges is a federal requirement of general applicability.

*11 EPA prepared draft permits for each of the Municipalities based upon their applications and supplemental materials requested by EPA. E.R. 113.⁵ EPA published the draft permits and solicited public comments. S.E.R. 367-69. The draft permits did not specify any limitations addressing compliance with Arizona water quality standards. E.R. 115.

⁴ EPA cites materials contained in Defenders' Excerpt of Record as "E.R." EPA has included, pursuant to Ninth Circuit Rule 30-1.6, certain additional materials not included in the Defenders' Excerpt of Record in a Supplemental Excerpts of Record, which is cited as "S.E.R." To avoid confusion, the pages of EPA's Supplemental Excerpts of Record are numbered commencing with 300, the number following the last page of Defenders' Excerpts of Record.

Defenders commented upon the draft permits. E.R. 136. Of relevance to the issues in this case, Defenders challenged the absence of effluent limitations or other requirements to enforce the State water quality standards. E.R. 137. Defenders argued that the permits "must contain numeric limits to assure compliance with receiving water standards" E.R. 137. In addition, the State of Arizona determined that the draft permits were not acceptable for state certification under section 401 of the Act, [33 U.S.C. § 1341](#), E.R. 207.

*12 Based upon the comments received and changes in Arizona's water quality standards, EPA revised the terms of the permits. With regard to water quality standards, the revised permits contained the following provision at paragraph I.A.4:

To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, title 18, Chapter 11, Article 1), the permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in this permit. The timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

See, e.g., E.R. 231. The State of Arizona, pursuant to Section 401 of the Act, certified that adherence to the provisions and requirements of the revised permit will protect the water quality of the receiving water. S.E.R. 465-74.

On February 14, 1997, EPA issued the final NPDES permits for discharges of municipal storm water from each of the Municipalities' storm sewer systems. *See, e.g.*, S.E.R. 475-96. Each of the permits requires the municipality to implement the Storm Water Management Program submitted in its final application. S.E.R. 476. All of these Storm Water Management Programs contain structural controls, such as storm water detention ponds, retention basins or infiltration ponds, to settle pollutants out of storm water flows and reduce storm water discharges to receiving *13 waters. S.E.R. 328 (infiltration ponds); S.E.R. 343 (retention basins); S.E.R. 336 (retention basins); S.E.R. 461-63 (detention and retention ponds); S.E.R. 432 (detention and retention ponds). All of the Storm Water Management Programs also contain non-structural controls, such as programs to minimize illicit discharges and construction site runoff. *See, e.g.*, S.E.R. 433-55.

EPA also established certain additional pollution control measures that EPA believed were needed to ensure compliance with the Act and applicable regulations. *See, e.g.*, S.E.R. 476. These additional requirements are contained in Appendix 1 to each permit. S.E.R. 476, 494-95. Each of the permits also requires the municipalities to implement the monitoring requirements contained in their Storm Water Monitoring Program. S.E.R. 476.

In the fact sheet accompanying each of the permits, EPA stated that the Municipalities' proposals for storm water management programs, monitoring programs and other program elements, combined with the additional requirements included by EPA in the appendices, complied with applicable regulations. *See, e.g.*, E.R. 196. EPA determined that best management practices included in the permits made the permits consistent with Arizona water quality standards. *See, e.g.*, E.R. 204. EPA also determined that the timely implementation of the requirements *14 of the permit constitutes a schedule of compliance authorized by Arizona's water quality standards. S.E.R. 477; E.R. 207-08.

Defenders requested an evidentiary hearing to contest the permit decisions. E.R. 240. In their request for evidentiary hearing, Defenders stated that "[a]ll of the issues that we are raising are legal, not factual." E.R. 240. Defenders asserted that a

fact-finding hearing was not necessary for resolution of the legal arguments they sought to raise, but that they were requesting an evidentiary hearing in order to exhaust administrative remedies before pursuing an appeal to the Environmental Appeals Board and the courts. E.R. 240. Accordingly, the Regional Administrator denied Defenders request for an evidentiary hearing on whether the Clean Water Act required that numeric effluent limitations be included in the permits because the issue raised was purely legal and did not present a genuine issue of material fact. E.R. 246.

Defenders subsequently sought review of the final permits before EPA's Environmental Appeals Board. E.R. 249. Again, Defenders asserted that "[a]ll of the issues that [Defenders] are raising are legal, not factual." E.R. 249. Among its issues, Defenders asserted that the permits contain no effluent limitations to meet applicable water quality standards. E.R. 251. In order to comply with the Clean Water Act, Defenders argued that the permits must be revised to include numeric *15 effluent limitations to assure compliance with Arizona's numeric water quality standards. E.R. 251.

The Board denied the petition for review. E.R. 255. In response to Defenders' contention that the permits must contain numeric effluent limitations, the Board held that numeric limitations were not necessary to ensure compliance with the Clean Water Act, applicable NPDES regulations or Arizona's water quality standards. The Board found that the lack of sufficient information upon which to base numeric limitations made such numeric limitations infeasible to derive and, therefore, EPA's regulations authorized the use of best management practices. E.R. at 269. The Board found that Defenders had not demonstrated that EPA's determination -- that numeric limitations were not feasible in the context of these permits -- was unlawful or inappropriate. E.R. 273.

Defenders sought reconsideration of the Board's decision. *See* E.R. 280. Defenders suggested for the first time that the best management practices contained in the permits would not, as a factual matter, ensure compliance with state water quality standards. *See* E.R. 280, 283. The Board denied Defenders' request for reconsideration. E.R. 280. Specifically, on the issue of numeric effluent limitations, the Board noted that the request for reconsideration consisted largely of new *16 arguments not raised in the original petition and not properly raised in the form of a motion to reconsider. E.R. 283-84.

SUMMARY OF THE ARGUMENT

The Clean Water Act requires that NPDES permits contain effluent limitations as stringent as necessary to meet state water quality standards. The statutory provision governing municipal storm water discharges does not expressly address whether municipal storm water NPDES permits must contain limitations as stringent as necessary to meet state water quality standards. EPA has reasonably interpreted this ambiguous provision to require any such additional limitations. This interpretation avoids an implicit repeal of other sections of the Clean Water Act and the preemption of state law, while furthering the goals of the Act.

The Municipalities' NPDES permits contain effluent limitations as stringent as necessary to meet Arizona's water quality standards. Effluent limitations do not need to be numeric. The Act, EPA's regulations and relevant case law all confirm that best management practices are appropriate effluent limitations when derivation of numeric effluent limitations is not feasible.

In the case of the Municipalities' NPDES permits for storm water discharges, EPA reasonably determined that derivation of numeric effluent limitations was infeasible. Congress, the State of Arizona and EPA have all recognized that the *17 unique circumstances presented in regulating municipal storm water discharges support the use of best management practices as effluent limitations. This Court previously affirmed EPA's non-numeric approach to gathering information about storm water discharges.

The record in this case firmly supports EPA's determination that it did not have sufficient information regarding the effects of the Municipalities' storm water discharges on the relevant receiving waters to derive appropriate numeric effluent limitations for the Municipalities' permits. EPA did not possess sufficient factual data to provide a basis to derive numeric effluent limitations. Defenders did not submit factual evidence that would enable the derivation of numeric effluent limitations. EPA's decision to adopt best management practices in the permits, rather than the numeric limits that Defenders propose, was not arbitrary or capricious.

Defenders are precluded from raising factual challenges to the efficacy of the narrative effluent limitations incorporated into the Municipalities' permits. Defenders not only failed to raise any factual challenges to the permits during the administrative

proceedings, they explicitly stated to the Regional Administrator and again before the Environmental Appeals Board that they were raising only legal issues. Defenders cannot now raise factual challenges in this reviewing court.

*18 Even if the Court reaches Defenders' factual challenges, EPA's use of narrative effluent limitations consisting of best management practices was not arbitrary or capricious. The best management practices required by the permits are effective in reducing pollution in storm water discharges. Defenders' contention that these practices will not meet Arizona water quality standards is directly contrary to the certification by the State of Arizona that the best management practices will protect the water quality of the receiving waters. In addition, Arizona's water quality standards expressly require the implementation of all reasonable and cost-effective best management practices in connection with storm water discharges. Thus, EPA reasonably determined that the permits included effluent limitations as necessary to meet the State's water quality standards.

STANDARD OF REVIEW

This Court's review of EPA's issuance of the Municipalities' NPDES permits is governed by the standard set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which establishes a deferential standard of review. EPA's action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *19 Rather, the Court must ensure that the decision was based upon relevant factors and not a "clear error of judgment." *Id.*; *NRDC v. EPA*, 966 F.2d at 1297. Greater deference is given to an agency with regard to factual questions involving scientific matters in its own area of technical expertise. *See Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983); *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989), *cert. denied sub nom. Truckee-Carson Irrigation Dist. v. United States*, 498 U.S. 817 (1990).

Judicial deference to an agency's decision extends to an agency's interpretation of a statute it administers. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). In reviewing an agency's construction of such a statute, this Court must first decide "whether Congress has directly spoken to the precise question at issue." *Id.* at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *NRDC v. EPA*, 966 F.2d at 1297. To uphold EPA's interpretation of the CWA, the court need not find that EPA's interpretation is the only permissible construction that EPA might have adopted, but only that EPA's interpretation is reasonable. *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *NRDC v. EPA*, 966 F.2d at 1297. When the interpretation involves reconciling conflicting policies committed by the *20 statute to an agency's expertise, deference is particularly appropriate. *Chevron, U.S.A.*, 467 U.S. at 844.

Moreover, EPA's interpretation of its own regulations governing the NPDES program are entitled to deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110, 112 (1992). In considering the lawfulness of such an interpretation, the interpretation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

ARGUMENT

I. THE CLEAN WATER ACT PROVIDES THAT NPDES PERMITS FOR STORM WATER DISCHARGES CONTAIN EFFLUENT LIMITATIONS AS STRINGENT AS NECESSARY TO MEET STATE WATER QUALITY STANDARDS.

EPA agrees with Defenders that the Municipalities' storm water NPDES permits must contain requirements as stringent as necessary to meet state water quality standards.⁶ Section 402(a)(1), which authorizes the issuance of NPDES permits, requires that all NPDES permits comply with the applicable provisions of *21 Section 301 of the Act. 33 U.S.C. § 1342(a)(1). Section 301's requirements include the incorporation into permits of any more stringent limitation necessary to meet water quality standards. *Id.* § 1311(b)(1)(C).

⁵ Because the permitting actions for each of the Municipalities were essentially identical for the issues relevant to this case, in this

brief EPA cites to only one of the five permit actions to support its statements applicable to all five permits.

Congressional enactment of Section 402(p)(3), however, created an ambiguity as to the applicability of water quality standards in the development of municipal storm water discharge permits. Congress, in section 402(p)(3)(A), expressly referenced the requirements of [sections 402 and 301](#) with respect to industrial storm water permits. [33 U.S.C. § 1342\(p\)\(3\)\(A\)](#). Congress did not expressly reference [section 301](#) or the need to incorporate more stringent limitations when necessary to meet water quality standards in the provision governing municipal separate storm sewer system permits. *Id.* [§ 1342\(p\)\(3\)\(B\)](#). Instead, Congress stated that municipal separate storm sewer system permits must contain such “other provisions as the Administrator or the State determines appropriate for the control of pollutants.” [33 U.S.C. § 1342\(p\)\(3\)\(B\)\(iii\)](#). Thus, inclusion of more stringent water quality-based limitations in municipal storm water permits is not directly addressed in the statute.

Because Congress has not directly spoken to this issue, the Court should defer to EPA’s permissible construction of the language of [section 402\(p\)\(3\)\(B\)](#) to require that NPDES permits for municipal storm water discharges include any more *22 stringent limitations necessary to meet applicable state water quality standards. E.R. 6-11. The reference in [section 402\(p\)\(3\)\(B\)](#) to “provisions the Administrator or the State determines appropriate” supports the reasonableness of EPA’s interpretation because it reflects Congressional intent that limitations in addition to those necessary to meet the “maximum extent practicable” standard may be determined by a State to be appropriate. Moreover, EPA’s interpretation is consistent with the 1987 amendments to the Clean Water Act, which reflect a Congressional desire to improve water quality and compliance with the water quality based requirements of the Act. *See* [33 U.S.C. § 1342\(p\)\(2\)\(E\)](#); *see also id.* [§§ 1313\(c\)\(2\)\(B\)](#); 1314(1), 1329, 1330, 1342(o). To exempt municipal storm water discharge permits from compliance with water quality standards undercuts the goals of the 1987 amendments and the Clean Water Act as a whole.

The alternative reading, *i.e.*, that effluent limits as necessary to meet water quality standards are not required for municipal storm water discharges, would necessitate an interpretation that Congress implicitly waived three requirements of the Clean Water Act. First, such a reading would ignore [Section 301\(b\)\(1\)\(C\)](#)’s requirement that permits include effluent limitations necessary to meet water quality standards. [33 U.S.C. § 1311\(b\)\(1\)\(C\)](#). Second, the alternative reading would be inconsistent with the state certification provisions of section 401 of the Act, *23 [33 U.S.C. § 1341](#). Third, displacement of “any more stringent” water quality-based effluent limitations, based upon water quality standards enacted under state law, would appear inconsistent with the savings provision of the Act. *See* [33 U.S.C. § 1370](#) (nothing in the Act shall preclude a State from adopting or enforcing any standard or limitation respecting discharges of pollutants). Because implied repeals of statutory provisions are generally disfavored, the alternative reading fails. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974).

Further, there is no irreconcilable conflict between the municipal storm water discharge permit provisions and the requirement that permits contain any more stringent limitation necessary to meet water quality standards. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982) (statute impliedly repealed only if later enacted provision is in “irreconcilable conflict” with earlier provision). [Section 301\(b\)\(1\)\(C\)](#) can be read as requiring “any more stringent limitation” necessary to meet a water quality standard in every NPDES permit, including permits for municipal storm water discharges. Nor is there any evidence in the Clean Water Act indicating a clear and manifest Congressional intent to preempt state water quality standards by enacting the municipal storm water discharge provisions. *See CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993) (presumption against finding preemption unless it is “the clear and manifest intent of *24 Congress” to displace state law); *Chemical Specialties Mfrs. Ass’n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992), *cert. denied sub nom. Chemical Specialties Mfrs. Ass’n, Inc. v. Book*, 506 U.S. 825 (1992) (same).

Rather than create conflict, EPA’s reading of 402(p)(3)(B) harmonizes that section with the general focus of the provisions of the Act. Therefore, EPA’s long-standing interpretation is reasonable and must be upheld. *See Chevron, U.S.A.*, 467 U.S. at 843; E.R. 6-11.

II. THE MUNICIPALITIES’ STORM WATER PERMITS CONTAIN EFFLUENT LIMITATIONS TO MEET WATER QUALITY STANDARDS.

Each of the Municipalities’ NPDES storm water permits contains the same effluent limitation to meet Arizona water quality

standards. *See* E.R. 231. In order to ensure that the Municipalities' storm water discharge permits include effluent limitations as stringent as necessary to meet applicable water quality standards, the permits require the Municipalities to implement the storm water management program, monitoring, reporting and other requirements of the permit in accordance with the time frames established in the management plan. *See, e.g.,* E.R. 231.⁷

⁶ Although Defenders do not challenge EPA's interpretation that the Municipalities' storm water NPDES permits must contain requirements as stringent as necessary to meet state water quality standards, counsel for Intervenor City of Phoenix has stated that it will likely challenge EPA's interpretation in this proceeding. Therefore, EPA addresses the issue in its brief.

***25** Implementation of the storm water management plan, reporting and other requirements of the permit is a proper effluent limitation notwithstanding the absence of numeric measures of performance. An effluent limitation is "*any* restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged ... including schedules of compliance." 33 U.S.C. § 1362(11) (emphasis added). Effluent limitations may include "best management practices"⁸ to control or abate the discharge of pollutants when numeric effluent limitations are infeasible. 40 C.F.R. § 122.44(k)(2).⁹

⁷ EPA included these water quality-related provisions because, based on available data, it assumed that the Municipalities' storm water discharges would cause, have a reasonable potential to cause, or contribute to an exceedance of a water quality standard, even though EPA lacked sufficient information to perform a quantitative "reasonable potential" calculation. *See, e.g.,* E.R. 200-201.

⁸ "Best Management Practices" are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.'" 40 C.F.R. § 122.2. Best Management Practices also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. 40 C.F.R. § 122.2.

The federal courts have upheld EPA's use of best management practices in lieu of numeric limitations. In one of the earliest cases to address storm water discharge permits, the District of Columbia Circuit noted that, when numeric ***26** effluent limitations are infeasible, EPA may issue permits for storm water discharges with conditions designed to reduce the level of effluent discharges to acceptable levels. *NRDC v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977); *see also NRDC v. EPA*, 673 F.2d 400, 403 (D.C. Cir.) *cert. denied sub nom Chemical Mfrs. Ass'n v. EPA*, 459 U.S. 879 (1982). Thus, EPA reasonably interprets the term "effluent limitation" in the Act to authorize best management practices in lieu of numeric measures of performance.

III. EPA'S RELIANCE ON BEST MANAGEMENT PRACTICES AS EFFLUENT LIMITATIONS IS APPROPRIATE IN THE CONTEXT OF THE MUNICIPALITIES' NPDES PERMITS GOVERNING MUNICIPAL STORM WATER DISCHARGES.

A. Both the Federal and State of Arizona Approaches to Municipal Storm Water Discharges Reflect Acceptance of Best Management Plans as Effluent Limitations.

The unique circumstances presented in regulating storm water discharges from municipal separate storm sewer systems support the use of best management practices as effluent limitations. Congress, in enacting the storm water discharge provisions of the Clean Water Act, recognized these circumstances. The State of Arizona, in establishing its water quality standards, also did so, as did EPA in approving the Arizona standards. EPA, in its applicable regulations and guidance, ***27** recognized the difficulties in establishing numeric effluent limitations and the appropriateness of best management practices.

Municipal storm water discharges are significantly different from discharges from industrial and sewage treatment sources

traditionally regulated by NPDES permits. Municipal storm water discharges contain pollutants that are picked up off the ground by storm water runoff or that are discharged directly into the storm drain system by illicit connection or illegal dumping. 55 Fed. Reg. 47,990-92 (1990). Storm water discharges are intermittent and unpredictable, are usually characterized by very high flows occurring over relatively short time intervals, and carry a variety of pollutants whose nature and extent varies according to local land use activities. *Id.* at 48,038; 53 Fed. Reg. 49,416, 49,443 (1988). Also complicating the regulation of municipal storm water discharges is the fact that storm drain systems are usually designed with an extremely high number of discharge points, or outfalls, within a given municipality in order to reduce potential flooding. 55 Fed. Reg. at 48,038. Finally, the water quality impacts of such discharges are likely to be highly variable, and therefore unpredictable, for any particular water body at any given time. *See id.*

In view of these circumstances, Congress specified a new standard for NPDES permits issued for municipal storm water discharges. Congress required *28 permits for discharges from municipal separate storm sewer systems to reduce the discharge of pollutants to the “maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B). This new “maximum extent practicable” standard expressly includes management practices and control techniques. *Id.* The Congressional standard also contemplated that the municipal permits would contain such other provisions as the EPA or the State determines appropriate for the control of such pollutants. *Id.*

The State of Arizona, in promulgating its water quality standards, similarly recognized the unique circumstances associated with municipal storm water discharges. The Arizona water quality standards contain numeric and narrative criteria to protect the designated uses of Arizona’s waterways. S.E.R. 397-429. However, with respect to storm water discharges, the Arizona standards require the implementation of all “reasonable and cost-effective best management practices to control the discharge of pollutants in storm water.” Arizona Admin. Code, Title 18, Chapter 11, Article 1, Section R18-11-121(C), S.E.R. 426. The standards also provide that a schedule to bring a discharge of storm water into compliance with the water quality-based permit requirements may be established in an NPDES permit. *Id.*

*29 EPA’s regulations and guidance also reflect recognition of the unique factors associated with regulating storm water discharges. EPA’s implementing regulations require municipal storm water dischargers to develop storm water management programs to control pollutants in their discharges of storm water. 40 C.F.R. § 122.26(d)(2)(iv). With respect to meeting water quality standards, EPA issued guidance in 1996 that recommended that initial NPDES permits for municipal storm water discharge may appropriately rely on the development and implementation of best management practices to control storm water discharges and meet water quality standards until sufficient information concerning the effects of storm water and the quantifiable efficacy of the best management practices becomes available. E.R. 152, 155.

Comparing the permit application requirements for a typical NPDES permit with those for municipal storm water permits highlights the differing approaches for development of such permits. An application for an NPDES permit for a traditional discharger, such as an industrial outfall or treatment plant with continuous flow discharges or “batch” discharges of highly predictable effluent quality, must include detailed quantitative information about the characteristics of the effluent. *See* 40 C.F.R. § 122.21(g)(7). The application process does not require information about on-site management practices employed. *Id.* § 122.21(g). In contrast, the primary *30 component of an application for a municipal storm water NPDES permit is the storm water management program. *See id.* § 122.26. The application requires limited submission of data on effluent characteristics.

This Court recognized and affirmed this difference in approach when it previously addressed the regulations governing applications for municipal storm water discharge permits. In *NRDC v. EPA*, NRDC challenged EPA’s storm water NPDES permit application regulations because NRDC contended the regulations did not contain substantive standards for storm water control of municipal sources such as minimum criteria or performance standards. *NRDC*, 966 F.2d at 1308. This Court recognized that the standard Congress adopted for municipal storm water controls differed from traditional controls, and that “Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements.” *Id.* The Court recognized that Congress could have written stricter standards and did not. *Id.* Thus, the narrative effluent limitations included by EPA in the Municipalities’ permits are consistent with this Court’s prior recognition that municipal storm water discharges may be regulated differently than “typical” NPDES discharges.

31 B. EPA Reasonably Determined that Establishment of Numeric *Limitations for the Municipalities’ Permits Was Infeasible.

EPA did not have sufficient information regarding the effects of the Municipalities' storm water discharges or the efficacy of the municipal control measures to derive appropriate numeric effluent limitations for the Municipalities' permits.¹⁰ As discussed above, the issues of regulating storm water discharges from the Municipalities raise unique problems. All of the municipalities discharge into normally dry washes or effluent dominated ephemeral streams. *See* S.E.R. 457; E.R. 34; S.E.R. 333; S.E.R. 342; S.E.R. 431. EPA does not possess, and Defenders did not present, sufficient factual data regarding the effects of the Municipalities' storm water discharges on the relevant receiving waters. *See* E.R. 156-160.

⁹ EPA's regulations specify two additional bases for inclusion of best management practices that EPA does not rely upon in this matter. 40 C.F.R. § 122.44(k)(1) and (3).

Data compiled from nationwide studies cannot be used as a substitute for the lack of data relating to Arizona discharges. For example, the storm water sampling conducted by Pima County showed fewer pollutants present than expected based upon the results of the National Urban Runoff Program, and those pollutants *32 measured to be present occurred in lower concentrations. S.E.R. 458. Phoenix and Mesa found that existing water quality data did not indicate a serious problem with any of the listed pollutants. S.E.R. 327, 333; *see* S.E.R. 432 (removing sediment, which can be an undesirable component of storm water discharged to perennial streams, increases erosion in ephemeral streams). EPA reasonably determined that data collected from other nationwide locations raise issues concerning their use in permits for municipal storm water discharges in the arid west. S.E.R. 201-02. In fact, because of the unique nature of discharges in arid western conditions, EPA is currently funding a study of water quality issues in the arid west. *See* E.R. 202-03; S.E.R. 370-396.

In light of this uncertainty, EPA is still in the process of determining the most appropriate methods for establishing water quality-based effluent limitations for municipal storm water discharges. E.R. 201. In this area of factual and technical complexity, EPA was not arbitrary and capricious in determining that establishment of numeric effluent limitations was infeasible. *See Alpine Land & Reservoir Co.*, 887 F.2d at 213.

Moreover, EPA's action is fully supported by Arizona's certification of the Municipalities' permits. In Arizona's review to ensure compliance with state water quality standards, the State certified that adherence to the non-numeric limitations *33 would protect the water quality of the receiving water. S.E.R. 465-474. Defenders do not overcome this determination of compliance by the State nor did they challenge Arizona's certification of the non-numeric effluent limitations in the permit.¹¹

¹⁰ Contrary to Defenders' argument, Defenders' Brief at 21, EPA identified a lack of information necessary in order to set numeric standards during the permitting process. *See* E.R. 201-02, 205; E.R. 216 ("EPA is working to develop toxicity testing programs that will measure the effects of short-term periodic pollutant exposures which characterize municipal storm water discharges in arid environments"). The Municipalities' applications and EPA documents identify data gaps that prevent the setting of numeric limits. E.R. 201-02; E.R. 60; S.E.R. 459-60; S.E.R. 342.

Defenders suggest that the permits should have set numeric water quality-based effluent limitations equal to the state water quality criteria for the receiving water at the point of discharge. Defenders' Brief at 23 (relying on terms contained in permits for publicly-owned treatment works). This suggestion fails to recognize that the methods used to derive water quality standards are not comparable to the factual situation addressed by the Municipalities' storm water permits. The methodologies used to derive numeric water quality-based effluent limitations were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in the receiving water, such as the publicly owned treatment works cited by Defenders. E.R. 157- *34 59. These assumptions are not appropriate for municipal storm water discharges that are highly variable in terms of flow and pollutant concentrations. *Id.* The complex relationship between storm water discharges and water quality is further complicated in the case of the ephemeral water bodies receiving the Municipalities' infrequent storm water discharges. E.R. 157-58.

Defenders presented no factual evidence during the administrative proceeding below that would support derivation of numeric effluent limitations at the same level as Arizona's water quality criteria at the point of discharge.¹² As a result, EPA's decision to use non-numeric effluent limitations was reasonable.

¹¹ Arizona's water quality standards authorizing use of best management practices and its certification of the NPDES permits cannot be reviewed in this proceeding. Federal courts may not review the limitations and conditions imposed under state law or contained in a state's certification. See *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). Any defect in a state's water quality certification generally must be addressed in state court, rather than federal court, because a state law determination is involved. *United States v. Marathon Dev. Corp.* 867 F.2d 96, 102 (1st Cir. 1989); 40 C.F.R. § 124.55.

IV. DEFENDERS' CHALLENGE TO THE SUBSTANTIVE TERMS OF THE PERMIT IS BARRED BY THEIR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND, IN ANY EVENT, DEFENDERS FAIL TO ESTABLISH ANY ARBITRARY OR CAPRICIOUS ACTION.

In their brief, Defenders challenge the ability of the terms of the Municipalities' permits to meet water quality standards. Defenders' Brief at 23-25. This Court, in reviewing this final agency action, must not consider issues not raised in accordance with the relevant procedural requirements during the administrative process. Therefore, the threshold question is whether the Defenders are barred from ***35** challenging, on factual grounds, the adequacy of the permits' terms because their factual challenges were not raised, as required by NPDES procedural regulations, during the administrative proceedings. See 40 C.F.R. § 124.60(g) (any party who neglects or fails to seek review under the regulations waives its opportunity to exhaust administrative remedies); see also *id.* §§ 124.13, 124.74(b)(1), 124.76.

A. Because Defenders Did Not Raise Factual Challenges to the Adequacy of the Municipalities' Permits During the Administrative Proceeding, They Are Precluded From Raising Them in This Proceeding.

Absent exceptional circumstances, a party cannot challenge agency action on grounds not presented to the agency at the appropriate time during the administrative proceeding. *Marathon Oil Co. v. United States*, 807 F.2d 759, 767-68 (9th Cir. 1986). The Supreme Court explained the basis for this rule in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952):

Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id. at 37. The Supreme Court has further explained that it is incumbent upon parties who wish to participate in an administrative proceeding to alert the agency to the parties' position and contentions. ***36** *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Consistent with these principles, this Court has applied this rule strictly, holding that absent exceptional circumstances, it will not consider contentions that were not raised before the administrative agency at the appropriate time. *Marathon Oil*, 807 F.2d at 767-68; *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991), *cert. denied sub nom. Havasupai Tribe v. United States*, 503 U.S. 959 (1992); *Citizens For Clean Air v. EPA*, 959 F.2d 839, 846 (9th Cir. 1992).

This rule serves three relevant purposes. First, when an administrative agency is given an opportunity to address a party's objections, it can apply its expertise, exercise its informed discretion, and create a more finely tuned record for judicial review. Second, exhaustion of remedies in the administrative context promotes judicial economy. Third, exhaustion of administrative remedies protects an agency's autonomy by allowing it the opportunity to monitor its own mistakes and by ensuring that regulated parties do not simply turn to the courts as a tribunal of first resort. *Marathon Oil*, 807 F.2d at 768; *Adams v. EPA*, 38 F.3d 43, 50 (1st Cir. 1994).

In the administrative proceedings on the Municipalities' permits, Defenders never challenged, as a factual matter, whether the best management practices incorporated into the Municipalities' permits would meet water quality standards. EPA sought public comment on proposed permits for the Municipalities that did not ***37** specify additional effluent limitations necessary to meet Arizona water quality standards. S.E.R. 346; E.R. 113. Defenders objected to this proposal, claiming that the evidence showed that storm water discharges could lead to exceedances of water quality standards and that the permits must contain numeric effluent limitations to meet water quality standards. E.R. 137. In response to these comments and other

considerations, EPA revised the permits to include the requirement that, to meet water quality standards, the Municipalities must comply with the storm water management programs and other terms of the permits. E.R. 231.

Defenders challenged the final permits, but not on the ground that the best management programs would fail to achieve water quality standards as a matter of fact. Rather, as Defenders explicitly stated in their request for evidentiary hearing, “[a]ll of the issues that we are raising are legal, not factual.” E.R. 240. Defenders contended that the permits had to include numeric effluent limitations because the best management plans were not effluent limitations within the meaning of the rules. E.R. 241. Significantly, Defenders did not request an evidentiary hearing to present factual materials to support a challenge to EPA’s factual conclusions about the efficacy of the best management plans to reduce pollutants and to protect water quality. E.R. 240. Nor did they request an evidentiary hearing to establish the *38 factual proposition that only numeric limitations, and not any narrative standard, would be sufficient to meet Arizona water quality standards. *Id.* As stated in their request, “a fact-finding hearing is not necessary to resolve our concerns.” E.R. 240.

In their appeal to the Environmental Appeals Board, Defenders again asserted that all the issues being raised were legal, not factual. E.R. 249. Defenders again contended that the permits did not contain effluent limitations and that numeric limits had to be included in order to comply with the Clean Water Act. E.R. 251.

Throughout the administrative proceeding, Defenders never challenged the substance or sufficiency of the best management practices included by EPA in the permits as insufficient, as a factual matter, to meet Arizona water quality standards.¹³ If Defenders are allowed to challenge the efficacy of these standards for the first time in this proceeding, the important policies supporting the exhaustion of remedies doctrine would be defeated. *See supra* at 36. Therefore, Defenders should be precluded from raising its challenge to the substantive efficacy of the *39 narrative effluent limitations (in the form of best management practices) to meet Arizona water quality standards.

¹² EPA did not explain during the permit process why it did not adopt the numeric state water quality standards as numeric effluent limitations because no one made that suggestion during the permit proceeding. *Cf.* Defenders’ Brief at 24.

B. EPA’s Use of Best Management Practices in the Municipalities’ Permits to Achieve Water Quality Standards Was Not Arbitrary or Capricious.

EPA’s requirement that the Municipalities implement their storm water management programs, monitoring programs and other permit requirements in order to meet water quality standards was reasonable. Notwithstanding Defenders’ failure to raise its factual challenges below, EPA’s determination is fully supported by the record. The terms of the storm water management programs include structural and non-structural components shown to be effective in reducing pollution in storm water discharges. Arizona recognized that best management practices are appropriate ways to regulate municipal storm water discharges to meet water quality standards. Finally, the State of Arizona, through its certification of the permit, confirmed the appropriateness of these permit terms.

The structural best management practices incorporated into the permits include measures demonstrated to reduce pollutants in storm water. For example, all the storm water management plans include use of storm water detention ponds, retention basins or infiltration ponds. S.E.R. 328; S.E.R. 340, 343 (retention basins); S.E.R. 336 (retention basins); S.E.R. 461-63 (detention and retention *40 ponds); S.E.R. 432 (detention and retention ponds). Each of these structural measures enables pollutants to settle out of storm water flows before the flows reach receiving waters, thereby reducing the pollutant load into those waters.

Prior studies have shown these structural measures to be effective. Infiltration systems can remove 90% of the sediment and 60% of phosphorous and nitrogen. S.E.R. 328. Detention basins have been found to be a highly effective approach to control urban runoff quality. S.E.R. 301. Detention basins can remove 30-70% of suspended solids and 10-30% of phosphorous. S.E.R. 330; *see* S.E.R. 336-37 (showing estimated percentage of pollutants removed).

The best management plans also contain a number of non-structural programs designed to address the major sources of storm water pollutants. Illicit or illegal discharges to storm water systems is a primary contributor of [pollutants to storm water discharges](#). *See* 55 Fed. Reg. 47,990. All of the storm water management programs contain programs to reduce and ultimately

eliminate this source of pollutants. *See* 40 C.F.R. § 122.26(d)(2)(iv)(B). These programs involve the identification and investigation of illegal discharges through inspections and storm water monitoring activities, combined with enforcement of ordinances to prevent illicit discharges. *See, e.g.*, S.E.R. 433-45.

*41 Similarly, construction site runoff contributes significant quantities of pollutants to storm water. *See* 55 Fed. Reg. at 47,990 (sediment loading at construction sites is typically 10 to 20 times that of agricultural land). Each of the storm water management programs contains plans to minimize the contribution of pollutants from construction sites to storm water discharges within the jurisdiction of these Municipalities. *See* 40 C.F.R. § 122.26(d)(2)(iv)(D). These programs include procedures for site planning which incorporate consideration of potential water quality impacts, requirements for structural and non-structural best management practices, and inspection and enforcement measures. *See, e.g.*, S.E.R. 449-55.

In addition to the storm water management program, each of the permits contains a monitoring plan designed to collect data that will yield information on the effect and nature of the municipal discharges and experience in the implementation of the best management practices. *See, e.g.*, S.E.R. 303-26.

Defenders' assertion that these practices will not meet Arizona water quality standards is directly contrary to the certification by the State of Arizona that the best management practices will protect the water quality of the receiving waters. S.E.R. 465-74. Arizona water quality standards themselves require the implementation of all reasonable and cost-effective best management practices. *42 S.E.R. 426. Thus, Arizona's certification fully supports the State's belief that the implementation of best management plans will be sufficient to protect water quality in the receiving waters. S.E.R. 465-74.

The permits are also designed to account for improved information gathered during the permit period. The permits are intended to include effluent limitations that will continue to meet water quality standards through an on-going process by which storm water management programs are gradually upgraded as more information becomes available concerning the effectiveness of the best management practices. E.R. 205. The permits require annual reporting of the monitoring data and other information to assess the modification or upgrading of best management practices as necessary. *See* S.E.R. 478; E.R. 205. Thus, EPA's conclusion that the permits include effluent limitations as stringent as necessary to meet the State's water quality standards is neither arbitrary nor capricious.¹⁴

¹³ Defenders did raise some of their factual challenges in their motion for reconsideration of the Environmental Appeal Board's decision. *See* E.R. 283-84. However, the Board properly declined to consider these factual claims because they had not been timely raised in the administrative process. E.R. 283-84.

*43 CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Appendix not available.

¹⁴ Defenders also argue that EPA erred by not including a different narrative standard in the final permit. Defenders' Brief at 24-25. EPA's narrative standard ensures compliance with Arizona water quality standards in section I.A.4 of the final permit. *See supra* at 24-26. Defenders offers an alternative approach ("discharges authorized by this permit shall not cause or contribute to a violation of any applicable water quality standard of the State of Arizona") but fails to establish that EPA was required to include that specific narrative language. For the reasons set forth in this section, EPA did not act arbitrarily or capriciously by choosing the language in the final permits.