

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY  
MARYLAND

ANACOSTIA RIVERKEEPER, *et al.*

Petitioners,

v.

MARYLAND DEPARTMENT OF THE  
ENVIRONMENT, *et al.*, and  
MONTGOMERY COUNTY, MARYLAND

Respondents.

Case No. 339466-V

\* \* \* \* \*

OPINION AND ORDER

This case is before the Court on remand from the Court of Special Appeals, to address the merits of a final determination by the Maryland Department of the Environment (MDE) concerning its issuance of the "National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit No. 06-DP-3320 MD0068349." The permit states that its purpose is to regulate discharges to and from the storm drain systems owned and operated by Montgomery County and other municipalities named in the permit.

The Court conducted a hearing under Rule 7-208 on November 20, 2013. The following disposition is entered under Rule 7-209.

Standard of Review

1. The scope of judicial review of an administrative agency's action is narrow, and the agency's action is entitled to a presumption of validity. When the matter is within the expertise of the agency, the agency's interpretation and application of its own rules are given considerable deference. However, when the agency's decision is predicated on an error of law, deference is not appropriate.

Merits

2. For the reasons stated below, the Court concludes that the permit does not comport with Maryland law, the federal Clean Water Act, and federal regulations implementing the Clean Water Act.

3. MDE issued the permit pursuant to its authority under Maryland Code, Environment Article §§ 9-323 and 9-324, which provide MDE with the authority to issue a water pollution discharge permit when it determines that the terms of the permit comply with all applicable state and federal water quality standards and effluent limitations. While the authority to issue permits was delegated to the state of Maryland by the federal government, the Clean Water Act and federal regulations also continue to apply to permits issued by MDE.

**ENTERED**

DEC 04 2013

Clerk of the Circuit Court  
Montgomery County, Md.

4. The Court concludes that the permit must include requirements needed to meet water quality standards, under Environment Article § 9-324, Clean Water Act §§ 301 and 402, and federal regulations, 40 C.F.R. § 122.44(d).

5. Under Environment Article § 9-324, the terms of the permit are crucial because the Court must look to those to determine whether the permit comports with applicable laws. Specific, enforceable standards, benchmarks, and deadlines for meeting applicable requirements must be stated in the permit. 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.

6. After reviewing the permit and the administrative record, the Court is unable to understand why MDE adopted the terms in the permit, or how those terms meet the requirements of the law. The permit does not state with clarity what the permittees will do, how they are to do it, what standards apply, or how one will measure compliance or noncompliance. The permit lacks ascertainable metrics for meeting water quality standards that can either be met or not met.

7. The Court finds that it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports on their activities. Manuals and policies that exist outside of the permit change frequently, and do not inform the public or the Court of what the permit specifically requires. While it is allowable for the permit to require best management practices, specific requirements for meeting water quality standards must be stated in the permit.

8. The Court finds that the permit's requirement to restore 20% of impervious surface is simply too general to show how the permittees will meet water quality standards. It does not explain what the permittee is to do or how its performance is to be measured.

9. Federal regulations require that the permit include a monitoring program for representative data collection for the term of the permit, including a program to monitor and control pollutants in storm water discharges from sites that are contributing a substantial pollutant loading. 40 C.F.R. § 122.26(d). The permit requires monitoring in one tributary, and requires the permittees to submit an annual report to MDE regarding all activities under the permit. The Court finds that these requirements are not sufficient to meet the applicable requirements for monitoring.

#### **Timeliness of the Petition**

10. The Court finds that the petition was timely filed on July 24, 2009, by delivery to a court clerk. The later payment of appearance fees did not affect timeliness. Because the petition specifically identified the matter under judicial review, it complied, or at least substantially complied, with applicable procedural requirements.

**ENTERED**

DEC 04 2013

Clerk of the Circuit Court  
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**Conclusion**

11. The Court hereby remands this matter to MDE for further proceedings to allow the agency to comply with Maryland law, the Clean Water Act, and federal regulations consistent with the above discussion.



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JUDGE RONALD B. RUBIN  
CIRCUIT COURT FOR MONTGOMERY COUNTY

12-3-13

**ENTERED**

DEC 04 2013

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Clerk of the Circuit Court  
Montgomery County, Md.

DEC 13 2013