IN THE COURT OF SPECIAL APPEALS OF MARYLAND

MARYLAND DEPARTMENT OF THE ENVIRONMENT, et al., Appellants, v. ANACOSTIA RIVERKEEPER, et al. Appellees.	Case No. 2199 Sept. Term, 2013

OPPOSITION TO THE MOTION OF THE MARYLAND ASSOCIATION OF COUNTIES, ET AL. FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

For the reasons stated below, Appellees Anacostia Riverkeeper, *et al.* hereby oppose the motion of Maryland Association of Counties, *et al.* ("MACO, et al.") for leave to file an amicus curiae brief in support of Appellants. MACO, *et al.* have failed to provide a reason why their proposed brief is desirable, as required by Md. Rule 8-511(b)(1)(B). As explained below, their proposed brief will not aid the Court in resolving the questions presented in this case.[1]

[1] As the motion notes, Appellees took no position on the motion for leave to file an amicus brief. *See* MACO, *et al.* Motion at 4. In taking no position, Appellees did not consent to the filing of the proposed brief (which counsel for Appellees had not yet seen at the time they were contacted), nor did Appellees waive their right to oppose the filing of a brief that violates the rules and improperly seeks to place new issues and extensive non-record material before the Court, much of which is false and misleading.

Appellees do not intend that this opposition take the place of a reply brief. As allowed by Rule 8-511(f), they intend to file a reply within ten days of the filing of MACO, *et al.*'s proposed brief.

I. THE PROPOSED BRIEF IS MISLEADING AND WILL NOT AID THE COURT'S DECISION.

The motion for leave to file an amicus brief does not meet the prerequisite in Rule 8-511(b)(1)(B), which requires putative amici to state the reasons why their brief is desirable. The closest MACO, *et al.* come to meeting this requirement is their claim that "County amici put [the] legal arguments in practical context by explaining the significant technical and financial implications this case will have for other [municipal stormwater] localities throughout the state." MACO, *et al.* Motion at 4. However, because the proposed brief blatantly mischaracterizes the holding of the Circuit Court and the claims raised by Appellees, its claims about the purported implications of this case will not aid the Court.

The proposed brief is rife with factual misinformation. Among other things, the motion and brief falsely claim that Appellees seek to force compliance with Maryland's water quality standards "within a single five-year permit term." MACO, *et al.* Motion at 2; *see also* MACO, *et al.* Proposed Br. at 2, 3, 5, 6. That MACO, *et al.* fail to cite any basis for their contention is unsurprising. Nothing in the Montgomery County Circuit Court's decision mandates or even suggests that the County must comply with all applicable water quality standards within five years. E. 20-22. Nor have Appellees made such a claim in this litigation. Rather, Appellees argue that the Permit fails to ensure compliance with water quality standards; their argument in no way addresses the timing of compliance. In fact Appellees' public comments on the Montgomery County permit correctly recognized the role of compliance schedules in addressing water quality-based

effluent limitations that cannot be attained by the end of a permit term, both under Maryland's regulations and federal law. E. 436 (citing COMAR 26.08.04.02. and 40 C.F.R. § 122.47(a), and noting that the Permit "must require compliance by the end of the permit term for those pollutants identified as at risk of violating water quality standards and which are not covered by other compliance schedules or TMDLs.") (Emphasis added.) In raising the issue of timing of compliance, MACO, *et al.*'s brief improperly raises an issue not presented by the parties and therefore this Court should reject it. *See Poku v. Friedman,* 403 Md. 47, 54 n.8 (2008), citing *Levitt v. Fax.com, Inc.*, 383 Md. 141, 144 n.3 (2004). ("Amici are not permitted to raise other issues.")

MACO, *et al.* also seek to mislead the Court with assertions regarding the costs of compliance. MACO, *et al.* Proposed Br. at 5. Citing extensive materials from outside of the administrative record, MACO offers its own fantastical cost projections which it derives by compressing various cost estimates *into a five-year schedule. Id.* at 5-7. Again, because neither the Montgomery County Circuit Court nor Appellees have claimed that the county must achieve compliance with all applicable water quality standards in five years, MACO, *et al.*'s cost estimates are irrelevant.

Further, because MACO, *et al.*'s cost figures appear nowhere in the administrative record – and other members of the public had no opportunity to object and argue that the cost figures are inflated – they must be stricken. MACO, *et al.* also make wholly unsupported assertions about the supposed cost to counties other than Montgomery County, factual claims that are not supported in the record. Some of these claims relate to the costs of implementing TMDLs for the Chesapeake Bay. MACO, *et al.* fail to

acknowledge that when MDE made its final determination to issue the Permit in 2009, before the Chesapeake Bay TMDLs were finalized in 2010, substantial controls were already needed to protect local receiving waters from existing violations of water quality standards. *See* Response Br. of Appellees at 3, 5 (Aug. 1, 2014).

If issues of practicability and cost are relevant at all they can be addressed by making appropriate adjustments to Montgomery County's schedules for compliance with water quality standards and total maximum daily loads. These issues have no bearing on the question of whether MDE has the statutory duty and authority to ensure compliance with water quality standards. That is a purely legal question that can only be decided in accordance with the Clean Water Act and Maryland law.

II. MACO, *ET AL.* SEEK TO PRESS A LEGAL POSITION THAT CONTRADICTS THE STATED POSITION OF BOTH APPELLANTS MDE AND MONTGOMERY COUNTY.

MACO, *et al.*'s brief raises the question of whether MDE has the discretionary authority to require permit conditions needed to ensure compliance with water quality standards—an authority that both MDE and MACO's member Montgomery County have already expressly recognized. Proposed Br. at 4; *compare* Montgomery County Br. at 20. By asserting this argument, MACO, *et al.* are seeking to inject yet another issue into the case that has not been presented by the parties. This is not an appropriate role for amici.

Montgomery County has made no secret of its view that "Section 402(p) [of the Clean Water Act] contains a provision that grants the permitting authority the discretion to determine whether and to what degree strict compliance with water quality-based

standards is necessary." Montgomery County Br. at 20. *See* 33 U.S.C. § 1342(p)(3)(b)(iii).[2] Similarly, MDE in its briefs before the Circuit Court[3] argued:

> While the [Clean Water Act] does not mandate that municipal stormwater comply with 33 USC § 1311, [] it does not prohibit the EPA or the States from imposing more stringent requirements than [required under the maximum extent practicable standard]. '[T]he EPA has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.' The EPA also has the authority to require less than strict compliance with state water quality standards.' *Defenders of Wildlife, supra*, 191 F.3d at 1166.
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> while not strictly required by § 402(p), the Permit contains conditions that ensure achievement of these [wasteload allocations], and it is through achieving the stormwater portion of the [wasteload allocations] that the County will further protect water quality and that will in time result in the streams within its jurisdiction achieving water quality standards.

(Emphasis added).

As evidenced by the above explanation and the Permit itself, MDE has already exercised its authority to require compliance with water quality standards. However, MDE failed to ensure that the Permit's conditions are sufficient, and unlawfully deferred the development and approval of specific actions and schedules for compliance until after MDE issued the Permit. *See* Response Br. of Appellees at 25-31. MACO, *et al.*'s newly-

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[2] Indeed, both Montgomery County and MDE rely heavily on a 1999 decision by the U.S. Circuit Court of Appeals for the Ninth Circuit, which expressly ruled that "EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants" under that provision. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166, *opinion amended on denial of reh'g*, 197 F.3d 1035 (9th Cir. 1999). MACO, *et al.*'s brief incorrectly characterizes this as "dicta," however the court's ruling that the permitting authority could require compliance with water quality standards was integral to its overall interpretation of the statute.

[3] MDE Br. at 16-18 (July 26, 2013), excerpt attached hereto as Appendix A.

stated position is contradictory to the positions already taken in this litigation by both MDE and MACO's member Montgomery County.

CONCLUSION

For the reasons discussed above, Appellees respectfully request that the Court deny MACO, *et al.*'s motion for leave to file an amicus brief.

Respectfully submitted this 5th day of August, 2014 by counsel for Appellees:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2014, a copy of the foregoing Appellees' **Opposition to the Motion of the Maryland Association of Counties, et al. for Leave to File Amicus Curiae Brief in Support of Appellants** was delivered via First Class U.S. Mail to:

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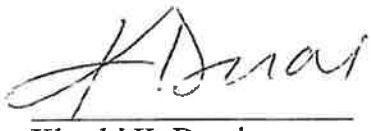

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APPENDIX A

II. The Terms and Conditions of the Permit Are Consistent With Wasteload Allocations And Include Pollution Reductions That Are Enforceable.

Nonetheless, the Permit is more stringent than required by § 402(p). While the CWA does not mandate that municipal stormwater comply with 33 USC § 1311, the it does not prohibit the EPA or the States from imposing more stringent requirements than MEP. "[T]he EPA has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water quality standards." *Defenders of Wildlife, supra,* 191 F.3d at 1166. Similarly, the States have the authority to impose standards more stringent than MEP for municipal stormwater discharges. The court in *Building Industry Assn of San Diego County v. State Water Resources Control,* 124 Cal.App.4th. 866, 883, 884 (2004) observed:

> ,"Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.
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> Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have pointed out, although Congress was reacting to the physical differences between municipal stormwater runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution."

Thus, while the CWA authorizes the issuance of a permit that imposes controls to reduce pollutants to the MEP, the MDE has committed under different programs to achieve greater reductions in pollutant loadings. These commitments include the goal to significantly reduce nutrients to the Chesapeake Bay under the Chesapeake Bay Program and to include stormwater permits in its implementation plans for meeting WLAs developed under the TMDL program.

Therefore, MDE has chosen to exercise its discretion to impose requirements that will lead to achieving WLAs. In any event, even without the additional pollutant reductions imposed to meet other program requirements, the Permit is fully compliant with the CWA MEP requirement for stormwater permits.

As part of a different program, the MDE established TMDLs for its streams. This process required MDE to monitor thousands of miles of streams within the State and to determine which of the streams were impaired. If a stream were impaired, then MDE identified the substance causing the impairment. For each impaired stream, MDE then determined the pollutant loadings in the stream from point and nonpoint sources of the impairing substance. These are commonly known as TMDLs. Permit, AR 37; 2006 *Maryland's 2006 TMDL Implementation Guidance for Local Governments* ("TMDL Guidance"), AR 1359. The TMDLs distinguish nonpoint sources of pollutants from point sources of pollutants and apportion the loads available to each source. All point sources – stormwater, municipal wastewater treatment plants, industrial wastewater treatment plants, concentrated animal feeding operations – should not exceed the waste load allocation (WLA) established by the TMDLs and nonpoint sources – diffuse runoff – of pollutants should not exceed the load allocation (LA). The TMDL identifies only broad aggregate WLAs and does not separate allocations for each point source. TMDL Guidance, AR 1370. In short, stormwater control efforts are an important tool for meeting WLA, and in turn, TMDLs help guide the development of stormwater management controls. Permit, AR 37.

Contrary to the assertion of Petitioners, and while not strictly required by § 402(p), the Permit contains conditions that ensure achievement of these WLAs, and it is through achieving the stormwater portion of the WLAs that the County will further protect water quality and that

will in time result in the streams within its jurisdiction achieving water quality standards[2]. The Permit conditions that will lead to achievement of the stormwater portion of the WLA are Permit Conditions III.F-J. AR 7-13. This Permit requires the County to install or implement all the BMPs necessary to reduce pollutants to the extent necessary to restore 20% of its impervious surfaces ("20% Restoration"). Permit III.G, AR 8-9.

Restoration is achieved by installing or implementing BMPs to the MEP to control runoff from impervious surfaces with little or no stormwater control. Permit,AR 9; Accounting Manual, AR 1290. These pollutant load reduction efficiencies and the associated impervious acreage controlled are calculated in accordance with the Design Manual and Accounting Manual. By meeting the 20% Restoration, the County's stormwater share of the WLA should be met. If the implementation of BMPs does not achieve compliance, then the Permit requires the use of additional or alternative stormwater controls. Stormwater science continues to evolve and technologies for controlling stormwater continue to improve. Therefore, as more advanced technologies are developed, they will be required as necessary to facilitate compliance with the pollution reduction required by 20% Restoration, and will be incorporated into the Design Manual. Permit III.J.4, AR 13.

Thus, the claims of Petitioners are unfounded – the Permit conditions do require an outcome, permit conditions are not vague, and MDE and CBP have analyzed the pollution reduction efficiencies of BMPs. The Permit condition requiring 20% Restoration is the required outcome and the Design Manual, CBP Manual and Accounting Manual include the pollution

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[2] Due to wildlife contributions of high fecal bacteria loads, WLAs may not be always be met. MDE is not at this time requiring the elimination of wildlife in order to meet WLAs. *Total Maximum Daily Loads of Fecal Bacteria for the Non-Tidal Rock Creek Basin in Montgomery County, Maryland.* AR 2404.