Supreme Court, Westchester County
Index No. 16132/10

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent-Respondent.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-RESPONDENT THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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February 18, 2015

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STATE OF NEW YORK

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In the Matter of the Application of

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

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-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent-Respondent.

NOTICE OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICICURIAE* IN APPEAL

Westchester County Clerk's Index No. 16132/19

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PLEASE TAKE NOTICE that pursuant to the attached motion and proposed *amici curiae* brief, dated February 18, 2015, the City of New York ("the City"); the State of New Hampshire; the State of Wyoming; Nassau County, New York; Onondaga County, New York; the New York Conference of Mayors ("NYCOM"); the New York State Association of Counties ("NYSAC"); the Stormwater Coalition of Albany County; the Water Environment Federation ("WEF"); the National Association of Clean Water Agencies ("NACWA"); the National Association of Flood and Stormwater Management Agencies ("NAFSMA"); the American Water Works Association ("AWWA"); the New York Section of the American Water Works Association ("NYSAWWA"); the

New York State Association of Regional Councils ("NYSARC"); and the New York Water Environment Association ("NYWEA") move this Court located at 20 Eagle Street, Albany, New York, 12207, on March 2, 2015, or as soon thereafter as counsel may be heard, for an order, pursuant to Rule of Practice 500.23(a)(1) of this Court: (1) to appear in the above appeal as *amici curiae* in support of respondent-respondent the New York State Department of Environmental Conservation ("NYSDEC"), and (2) such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 18, 2015

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COURT OF APPEALS
STATE OF NEW YORK

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AFFIRMATION IN SUPPORT OF MOTION

Westchester County Clerk's Index No. 16132/10

AMY MCCAMPHILL affirms the truth of the following under penalty of perjury:

1. I am an attorney in the office of Zachary W. Carter, Corporation Counsel of the City of New York, attorney for the City of New York ("the City").

2. I am familiar with the facts and circumstances herein set forth and submit this affidavit in support of the motion of the City to appear, together with the State of New Hampshire; the State of Wyoming; Nassau County, New York; Onondaga County, New York; the New York Conference of Mayors ("NYCOM"); the New York State Association of Counties ("NYSAC"); the Stormwater

Coalition of Albany County; the Water Environment Federation ("WEF"); the National Association of Clean Water Agencies ("NACWA"); the National Association of Flood and Stormwater Management Agencies ("NAFSMA"); the American Water Works Association ("AWWA"); the New York Section of the American Water Works Association ("NYSAWWA"); the New York State Association of Regional Councils ("NYSARC"); and the New York Water Environment Association ("NYWEA"); as *amici curiae* in the above-captioned matter for the limited purpose of supporting the New York State Department of Environmental Conservation ("NYSDEC") as respondent-respondent in this proceeding.

3. The participation of the City of New York and the other undersigned parties as *amici curiae* would be of assistance to the Court, as required by in 22 N.Y.C.R.R. § 500.23(a)(4)(iii). The City has great interest in the issues presented on this appeal because, as set forth in greater detail in Appendix A to the annexed proposed *amici curiae* brief, the City is a regulated municipal separate storm sewer ("MS4") operator under the New York State Department of Environmental Conservation's ("NYSDEC") State Pollutant Discharge Elimination System ("SPDES") General Permit for Stormwater Discharges from MS4s, Permit No. GP-0-10-002, in Westchester and Putnam counties, where the City operates facilities in connection with its water supply. The City also has great interest in the

operation of the MS4 general permit since the efforts of all the regulated MS4s in its East of Hudson Watershed to manage municipal stormwater discharges are important to protecting and improving the quality of the City's drinking water. Finally, the City is interested in this litigation because the City is currently negotiating the terms of an individual MS4 permit, with requirements similar to those in the Statewide MS4 general permit, with NYSDEC.

4. More broadly speaking, all of the proposed *amici* are or represent states, local governments, public utilities, and water management agencies. *Amici* have direct roles in ensuring that the water in New York State and throughout the nation is clean and safe. As explained further in the attached Appendix A to the proposed attached *amici curiae* brief, the *amici* here represent a broad range of governmental perspectives on the regulation of MS4s from both within New York and outside of it. Thus, the *amici* include (1) MS4s and associations representing MS4s in New York that are regulated under NYSDEC's MS4 general permit; (2) municipalities and associations representing municipalities in New York that rely on NYSDEC's general permit to protect and improve the cleanliness of critically important local water bodies; (3) groups representing regulated MS4s from outside of New York that operate under regulatory programs similar to NYSDEC's MS4 general permit; and (4) other state governments tasked, as NYSDEC is, with regulating MS4s pursuant to the federal Clean Water Act ("CWA").

5. The diverse *amici* represented here all are united in the position that NYSDEC's MS4 general permit reflects NYSDEC's reasonable and appropriate implementation of the United States Environmental Protection Agency's program to regulate stormwater discharges from MS4s. *Amici* support NYSDEC's MS4 general permit's regulation of stormwater discharges by small municipalities as an effective strategy for reducing pollutant loading from municipal separate storm sewer systems to the maximum extent practicable.

6. Based on our extensive experience, the City and other *amici* seek to invite this Court's attention to law and arguments that may not be briefed by the parties but which we believe will be of assistance to the Court. In particular, *amici* request this Court affirm the Second Department's ruling that the MS4 general permit is not required to ensure strict compliance with section 301 of the Clean Water Act, 33 U.S.C. § 1311, for the reasons explained in the annexed proposed *amici curiae* brief. While Respondent NYSDEC argues that the MS4 general permit should be upheld because, *inter alia*, it ensures compliance with Clean Water Act section 301, *amici* assert that the Second Department was correct to hold that petitioners claim on this issue fails because such compliance is not required. Instead, the MS4 general permit must—and does—comply with section Section 402 of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), by requiring the reduction of discharge of pollutants to the maximum extent practicable.

7. A copy of the proposed *amici curiae* brief, including Appendix A which provides detailed descriptions of *amicis'* interests, is annexed hereto. If this motion is granted, the City of New York will serve and file the requisite number of copies of the brief within the time set by the Court.

8. The proposed *amici* here (with the exception of the Albany County Stormwater Coalition) sought to file a substantively identical brief when this case was previously pending before the Court. The parties to the appeal did not oppose that motion. The Court dismissed that appeal on jurisdictional grounds on January 15, 2015, and also denied our motion for leave to file an amicus brief as academic.

9. The proposed *amici* understand that, after granting leave to appeal for the second time in this case on February 12, 2015, the Court has calendared the case for oral argument on March 24, 2015. Although this motion has been served and filed promptly after the grant of leave, it does not satisfy the general deadlines for amicus filings set forth in 22 NYCRR § 500.23(a)(1)(iii). Given the compressed schedule in this appeal, and the fact that the parties have long had notice both of our request to participate as *amici* and of the substance of our proposed brief, we respectfully request that the Court grant our present motion.

WHEREFORE, the City respectfully requests that it and the other *amici* be permitted to appear as *amici curiae* in these proceedings and file the attached proposed brief.

Dated: New York, New York
February 18, 2015

Respectfully submitted,

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL

By: _____

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BRIEF FOR *AMICI CURIAE* THE CITY OF NEW YORK; THE STATE OF NEW HAMPSHIRE; THE STATE OF WYOMING; NASSAU COUNTY, NEW YORK; ONONDAGA COUNTY, NEW YORK; THE NEW YORK CONFERENCE OF MAYORS; THE NEW YORK STATE ASSOCIATION OF COUNTIES; THE STORMWATER COALITION OF ALBANY COUNTY; THE WATER ENVIRONMENT FEDERATION; THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES; THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES; THE AMERICAN WATER WORKS ASSOCIATION; THE NEW YORK SECTION OF THE AMERICAN WATER WORKS ASSOCIATION; THE NEW YORK STATE ASSOCIATION OF REGIONAL COUNCILS; AND THE NEW YORK WATER ENVIRONMENT ASSOCIATION IN SUPPORT OF RESPONDENT-RESPONDENT THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, *amici curiae* the New York Conference of Mayors, the New York State Association of Counties, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the New York State Association of Regional Councils state that they have no parent corporations, subsidiaries, or affiliates.

Amicus curiae the Stormwater Coalition of Albany County has the following affiliates: Albany County, City of Albany, Village of Altamont, Town of Bethlehem, City of Cohoes, Town of Colonie, Village of Colonie, Village of Green Island, Town of Guilderland, Village of Menands, Town of New Scotland, City of Watervliet, and the State University of New York at Albany.

Amicus curiae the American Water Works Association is the parent of *amicus curiae* the New York Section of the American Water Works Association. The following sections of the American Water Works Association are additional affiliates of these two proposed *amici curiae*: Alabama-Mississippi Section, Alaska Section, Arizona Section, Atlantic Canada Section, British Columbia Section, California-Nevada Section, Chesapeake Section, Connecticut Section, Florida Section, Georgia Section, Hawaii Section, Illinois Section, Indiana Section,

Intermountain Section, Iowa Section, Kansas Section, Kentucky-Tennessee Section, Mexico Section, Michigan Section, Minnesota Section, Missouri Section, Montana Section, Nebraska Section, New England Water Works Association, New Jersey Section, North Carolina Section, North Dakota Section, Ohio Section, Ontario Water Works Association, Pacific Northwest Section, Pennsylvania Section, Puerto Rico Section, Quebec Section, Rocky Mountain Section, South Carolina Section, South Dakota Section, Southwest Section, Texas Section, Virginia Section, West Virginia Section, Western Canada Section, and Wisconsin Section.

Amicus curiae the Water Environment Federation has the following member associations, which include *amicus curiae* New York Water Environment Association as a North American Member Association: *North American Member Associations* – Alabama's Water Environment Association, Alaska Water Wastewater Management Association, Arizona Water Association, Arkansas Water Environment Association, Atlantic Canada Water and Wastewater Association, British Columbia Water and Waste Association, California Water Environment Association, Central States Water Environment Association, Chesapeake Water Environment Association, Federal Water Quality Association, Florida Water Environment Association, Georgia Association of Water Professionals, Hawaii Water Environment Association, Illinois Water Environment

Association, Indiana Water Environment Association, Iowa Water Environment Association, Kansas Water Environment Association, Kentucky/Tennessee Water Environment Association, Louisiana Water Environment Association, Michigan Water Environment Association, Mississippi Water Environment Association, Missouri Water Environment Association, Montana Water Environment Association, Nebraska Water Environment Association, Nevada Water Environment Association, New England Water Environment Association, New Jersey Water Environment Association, North Carolina Water Environment Association, North Dakota Water Environment Association, Ohio Water Environment Association, Oklahoma Water Environment Association, Water Environment Association of Ontario, Pacific Northwest Clean Water Association, Pennsylvania Water Environment Association, Puerto Rico Water & Environment Association, Réseau Environnement, Rocky Mountain Water Environment Association, Water Environment Association of South Carolina, South Dakota Water Environment Association, Water Environment Association of Texas, Water Environment Association of Utah, Virginia Water Environment Association, Western Canada Water Environment Association, West Virginia Water Environment Association, Illinois Association of Water Pollution Control Operators, Kentucky Water and Wastewater Operators Association, Maritime Provinces Water and Wastewater Association, Missouri Water and Wastewater

Conference, Texas Water Utilities Association, Wisconsin Wastewater Operators' Association; *Latin America Member Associations* – AIDIS Argentina, Associação Brasileira de Engenharia Sanitária E Ambiental, Chile - AIDIS, Asociación Colombiana de Ingeniería Sanitaria y Ambiental, Sociedad Mexicana de Aguas, A.C. (SMAAC), Sociedad Mexicana de Aguas de Occidente, A.C. (SMAO), Sociedad Mexican de Aguas de Oriente, A.C. (SMADO), Asociación Venezolana de Ingeniería Sanitaria y Ambiental; *Asia/Pacific Member Associations* – China-Water Industry Association, China Civil Engineering Society, Chinese Taiwan Environmental Engineering Association, Indian Environmental Association, Japan Sewage Works Association, Korean Water Pollution Control Association, Water New Zealand, Water Environment Association of the Philippines, Environmental Engineering Society of Singapore, Environmental Engineers Association of Thailand, Indonesian Society of Sanitary and Environmental Engineers; *Europe, Middle East, and Africa Member Associations* – Hungarian Professional Water Environment Association**,** Italian Water Pollution Control Association, Nederlandse Vereniging Voor Waterbeheer, Associação Portuguesa de Engenharia Sanitária e Ambiental, Asociación para la Defense de las Calidad de la Aguas, Foreningen Vatten, Swedish Association for Water, Water Environment Association of Turkey, Chartered Institute of Water and Environmental Management, Bulgarian National Association on Water Quality, Vesiyhdistys

R.Y., DWA German Association for Water, Wastewater and Waste, Norsk Vannforening, Verband Schweizerische Abwasserfachleute, Egyptian Society for Water Environment Affairs, Israeli Water Association (IsWA), Palestinian Water Environment Association, Saudi Arabian WEA, and Water Institute of Southern Africa.

INTERESTS OF *AMICI CURIAE*

Amici curiae are or represent state and local governments, public utilities, and local water management agencies that have direct roles in ensuring that the water in New York State and throughout the nation is clean and safe. *Amici* submit this brief in support of respondent New York State Department of Environmental Conservation ("NYSDEC"), seeking affirmance of the decision of the Appellate Division, Second Department, which upheld NYSDEC's general permit for stormwater discharges from municipal separate storm sewer systems ("MS4s").

As explained further in the attached Appendix A to this Brief, the *amici* here represent a broad range of governmental perspectives on the regulation of MS4s from both within New York and outside of it. The New York *amici* include MS4s and associations representing MS4s across the State that are regulated under NYSDEC's MS4 general permit, as well as New York municipalities that rely on NYSDEC's general permit to protect and improve the cleanliness of critically important waterbodies. The New York *amici*, representing localities across all corners of the State, include: the City of New York; Nassau County; Onondaga County; the New York Conference of Mayors; the New York State Association of Counties; the Stormwater Coalition of Albany County; the New York Section of the American Water Works Association; the New York State

Association of Regional Councils; and the New York Water Environment Association. Each of these *amici* present detailed statements of interest in Appendix A.

The *amici* here also include other state governments that are tasked, as NYSDEC is, with regulating MS4s pursuant to the federal Clean Water Act ("CWA"), as well as groups representing regulated MS4s from outside of New York that operate under regulatory programs similar to NYSDEC's MS4 general permit. These national *amici* include the States of New Hampshire and Wyoming which, like New York State, implement regulatory programs for municipal separate storm sewer systems in urbanized areas through general permits. The national amici also include the Water Environment Federation; the American Water Works Association; the National Association of Clean Water Agencies; and the National Association of Flood and Stormwater Management Agencies. All of these *amici*, too, present detailed statements of interest in Appendix A.

The diverse *amici* represented here all are united in the position that NYSDEC's MS4 general permit reflects NYSDEC's reasonable and appropriate implementation of the United States Environmental Protection Agency's program to regulate stormwater discharges from MS4s. The focus of the MS4 general permit, as prescribed by the CWA and the New York State Environmental Conservation Law ("ECL"), is the development and implementation of stormwater

controls to the "maximum extent practicable." *Amici* strongly urge this Court to affirm the Second Department's decision which recognizes the need for regulatory flexibility, within a framework of minimum required stormwater controls, given the inherent complexity of controlling stormwater runoff in diverse environments.

Amici support NYSDEC's MS4 general permit as an effective strategy for reducing pollutant loading from MS4s to the maximum extent practicable. *Amici* owning or operating MS4s in New York, or representing regulated MS4s, can attest from experience that NYSDEC's MS4 program requires covered municipal entities to adopt rigorous measures to reduce the discharge of pollutants from MS4s, while still affording those entities needed flexibility to develop and implement site-specific stormwater management programs based on local assessments of land use, watershed conditions, water quality, and economic conditions. As noted, NYSDEC's MS4 general permit is similar to permitting approaches outside of New York State, including those administered in *amici* States of New Hampshire and Wyoming.

NYSDEC's MS4 general permit appropriately reflects the reality that stormwater discharges from MS4s are fundamentally different from other point sources regulated under the CWA and the ECL in that the municipal owner or operator of the MS4 has a limited ability to control the quantity and quality of the discharge. Unlike other regulated discharges, rainfall is naturally occurring, cannot

be stopped, and can be controlled only to a limited degree. In contrast to an MS4, wastewater treatment plants have fairly predictable influents, and are designed and built to provide mechanical and biological treatment to remove contaminants. Controls for MS4s are also unlike stormwater management from industrial or construction sites, where activities are wholly within the control of the sites' owner or operator. Instead, an MS4 receives stormwater runoff from vast developed areas that often consist of mostly private property—that is, property not directly controlled by the MS4 itself. This structure inherently limits the ability of the municipal owner or operator to manage a large portion of the stormwater entering the MS4.

Moreover, regulated MS4s are in populated, urbanized areas[1] which, in most instances, have already been developed with large areas that are impervious to absorption of stormwater directly into the ground, and without stormwater controls. For the most part, storm sewers were originally constructed to prevent or alleviate flooding, not to provide treatment of the water passing through them. In many cases, there may not be adequate available space to incorporate water quality treatment infrastructure for stormwater in densely developed areas. The control measures described below, which regulated MS4s are successfully employing to control stormwater pollution, include both physical

[1] *See* 40 C.F.R. § 122.32(a)(1).

stormwater management practices and also policy and public education changes to reduce pollutants in stormwater runoff.

Regulated MS4s need the flexibility, provided within the framework of required controls under New York State's MS4 general permit, to apply the "maximum extent practicable" standard to develop stormwater management plans tailored to local or regional circumstances. Such stormwater management plans are intended to serve as a "blueprint" for MS4 activities and will change dynamically over time as stormwater infrastructure is created and modified, and as the science underlying stormwater pollution control evolves. *Amici* provide additional detail concerning the development, implementation, enforcement, and impacts of stormwater management programs in Appendix A to this Brief.

BACKGROUND: OVERVIEW OF MS4 PERMIT REQUIREMENTS

The MS4 general permit establishes a rigorous framework through which regulated MS4s must reduce pollutants in stormwater discharges to the maximum extent practicable. Specifically, the MS4 general permit establishes six "Minimum Control Measures" that all regulated MS4s must implement, which can be tailored to address specific concerns and site limitations by each regulated MS4.

Regulated MS4s must conduct an annual evaluation of their programs to ensure that they are reducing the discharge of pollutants to the maximum extent

practicable.[2] MS4s' annual reports must be presented to the public, which must be given an opportunity to ask questions and comment on the report.[3] MS4s are required to include a summary of comments received and intended responses in the final annual report submitted to NYSDEC, and describe any changes made to the stormwater management plan in response to the comments.[4]

The six Minimum Control Measures required by the MS4 general permit are:

1. Public Education and Outreach:[5] The MS4 general permit requires the regulated MS4 to develop and implement a program to identify and disseminate information about individual or group behaviors which can contribute to stormwater pollution. A Public Education and Outreach program identifies target audiences, waterbodies of concern, and pollutants of concern, and describes steps that individuals or groups can take to reduce pollutants in stormwater runoff.[6] While contributions from individual residents, businesses, and other groups to

[2] MS4 Permit V(A); A271.

[3] MS4 Permit VII(A)(2)(d)(i)-(iii); A284-85.

[4] MS4 Permit VII(A)(2)(d)(iv); A285.

[5] *See* MS4 Permit VII(A)(1); Administrative Record A281-83 (subsequent references to the Administrative Record include only the page numbers, *e.g.*, A281). The MS4 general permit includes Minimum Control Measure provisions for addressing "traditional land use controls MS4s" such as cities, towns, and villages, *see* MS4 Permit VII(A), A281-301, and analogous provisions for "traditional non-land use control MS4s" and "non-traditional MS4s" such as schools, transportation agencies, fire districts, and federal and State facilities, *see* MS4 Permit VIII(A), A302-20. As these provisions are largely identical, *amici* focus on, and only cite to, Part VII of the MS4 general permit, addressing "traditional land use controls MS4s."

[6] MS4 Permit VII(A)(1)(a)-(b); A281-82.

impairment are typically small, when aggregated across the entire population served by an MS4, these contributions may have a significant impact on local waters. Providing education and outreach to reduce pollutants to the "maximum extent practicable" requires an iterative program to identify target audiences and further tailor messaging and marketing to change behaviors and practices that can contribute to stormwater pollution.

2. Public Participation and Involvement:[7] Regulated MS4s must also implement a program to solicit and facilitate direct input from local stakeholders in developing the MS4s' stormwater management plans. This Minimum Control Measure is the natural extension of Public Education and Outreach: in connection with educating its target audiences on the impacts of their actions, the MS4 must engage stakeholders in its plans to control stormwater pollution to the maximum extent practicable. Specifically, the MS4 must identify and publish a local point of contact concerning all stormwater and MS4 permit-related issues[8] and an annual report of activities for that permit year,[9] and make publicly available the MS4's stormwater management plan.[10] The stormwater management plan describes, in

[7] MS4 Permit VII(A)(2); A283-86.

[8] MS4 Permit VII(A)(2)(c); A284.

[9] MS4 Permit VII(A)(2)(d); A284-85.

[10] MS4 Permit VII(A)(2)(d)(v); A285.

detail, the MS4's plans for implementing all the required controls to the maximum extent practicable.[11]

3. Illicit Discharge Detection and Elimination:[12] Regulated MS4s must also develop a program to detect and eliminate non-stormwater discharges to the MS4. Among other things, this program requires the MS4 to:

- map all MS4 outfalls within the MS4's jurisdiction;[13]
- adopt and enforce a local law prohibiting the discharge of, or activities which result in, non-stormwater discharges to the MS4;[14]
- field verify all outfalls identified in the regulated MS4's outfall inventory;[15] and
- educate the public and target audiences of the impacts and hazards of illicit discharges to the MS4.[16]

As non-stormwater and other illicit discharges can be a major source of water quality impairment, identifying and eliminating such discharges to the maximum extent practicable can have a significant impact on the water quality of the receiving waterbodies.

4. Construction Runoff Control:[17] Regulated MS4s must also develop and implement a program to control stormwater runoff from construction activities.

[11] MS4 Permit IV(A); A267.

[12] MS4 Permit VII(A)(3); A287-89.

[13] MS4 Permit VII(A)(3)(b); A287.

[14] MS4 Permit VII(A)(3)(f)-(g); A287-88.

[15] MS4 Permit VII(A)(3)(c); A287.

[16] MS4 Permit VII(A)(3)(h); A288.

[17] MS4 Permit VII(A)(4); A289-93.

The MS4 must adopt, administer, and enforce a local law which, at a minimum, provides the equivalent standard of protection as the NYSDEC State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities (either GP-02-01, GP-0-08-001, or GP 0-10-001).[18] This Construction Activities general permit embodies NYSDEC's implementation of Clean Water Act requirements for large construction projects; regulated MS4s must take an active role in ensuring appropriate stormwater controls for such projects. At a minimum, the regulated MS4 must regulate all construction projects disturbing one acre or more of soil.[19] The MS4 is responsible for ensuring that all construction projects that meet or exceed the land disturbance threshold prepare a stormwater pollution prevention plan, which, at a minimum, details the control of erosion and off-site sediment transport.[20] Under certain conditions, as noted immediately below, the stormwater pollution prevention plan must also contain post-construction stormwater controls to address stormwater runoff once the project is completed. The MS4 is required to maintain an inventory of active sites within its jurisdiction, inspect active sites, and enforce where a stormwater pollution prevention plan is being violated. [21]

[18] MS4 Permit VII(A)(4)(a)(i); A290.

[19] MS4 Permit VII(A)(4)(a)(ii); A290.

[20] MS4 Permit VII(A)(4)(a)(iii); A290.

[21] MS4 Permit VII(A)(4)(a)(viii), (ix), (xii); A291-92.

5. Post-Construction Runoff Control:[22] The MS4 must develop, implement, and enforce a program addressing post-construction stormwater runoff from certain new and redevelopment projects (*see* description of Minimum Control Measure 4, Construction Runoff Control, above).[23] This program must include a combination of management practices designed and implemented in accordance with the New York State Stormwater Management Design Manual.[24] The MS4 must establish and maintain an inventory of post-construction stormwater management practices within the MS4's jurisdiction.[25] MS4s are also required to oversee the effective long-term operation and maintenance of these management practices, and are subject to inspection to ensure that the practices are performing properly.[26]

6. Good Housekeeping and Pollution Prevention:[27] Regulated MS4s must also implement a program to reduce stormwater pollution from municipal operations and facilities, including, but not limited to:

- Street and bridge maintenance;
- Winter road maintenance;
- Storm sewer system maintenance;

[22] MS4 Permit VII(A)(5); A293-98.

[23] MS4 Permit VII(A)(5)(a); A293.

[24] MS4 Permit VII(A)(5)(iv); A293.

[25] MS4 Permit VII(A)(5)(a)(vi); A295.

[26] MS4 Permit VII(A)(5)(a)(vii); A296

[27] MS4 Permit VII(A)(6); A298-301.

- Vehicle and fleet maintenance;
- Park and open space maintenance;
- Solid waste management; and
- Hydrologic habitat modification.[28]

This Minimum Control Measure requires MS4s to look comprehensively at the interconnected operations of the entire municipality—a task well beyond the operations of the agency that typically handles water pollution controls. For example, in New York City, fifteen City agencies are coordinating in the Citywide effort to develop a Good Housekeeping and Pollution Prevention Program. The maximum extent practicable standard is essential to balance the demands of this program with the core functions of these agencies, which include, among others, the Fire and Police Departments, the Department of Education, and the Department of Corrections.

ARGUMENT

THE SECOND DEPARTMENT CORRECTLY RECOGNIZED THAT THE "MAXIMUM EXTENT PRACTICABLE" STANDARD GOVERNS CLEAN WATER ACT COMPLIANCE FOR MS4s

The Second Department's unanimous ruling should be affirmed. In upholding NYSDEC's MS4 general permit, the Second Department correctly recognized that the federal CWA and the New York State ECL establish a clear legal standard for MS4s, calling for permits that "require controls to reduce the

[28] MS4 Permit VII(A)(6)(a)(i); A289.

discharge of pollutants to the maximum extent practicable" ("MEP").[29] This ruling is well supported by the plain language of the statutes, CWA legislative and regulatory history, and prior case law. The MEP standard, which compels significant improvements to water quality, is eminently appropriate for MS4s, because of their unique features as regulated point sources. The MEP standard allows regulated MS4s to develop appropriate stormwater controls based on site-specific conditions, providing the opportunity and obligation to identify appropriate controls iteratively as municipal stormwater management infrastructure is developed and altered, and as the science underlying stormwater pollution control evolves.

Petitioners wrongly assert that NYSDEC's MS4 general permit is inadequate because it fails to ensure compliance with water quality standard requirements under section 301 of the CWA. NYSDEC's brief shows that the general permit at issue here does in fact require that regulated MS4s comply with section 301.[30] But *amici* stress here that, as the Second Department's ruling recognizes, petitioners' argument fails on the more fundamental ground that the

[29] *Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 120 A.D.3d 1235, 1246 (2d Dep't 2014); *see* 33 U.S.C. § 1342(p)(3)(B)(iii); N.Y. ECL § 17-0808(3)(c)

[30] An entirely separate issue, and one not before the Court, is what discretion permitting authorities have to include limitations based on strict compliance with water quality standards in MS4 permits. Regardless of this question, neither the CWA nor the ECL requires water quality standard compliance for MS4 permits, and thus petitioners' allegation that the MS4 general permit unlawfully fails to ensure such compliance fails as a matter of law.

CWA does not require that MS4s comply with effluent limitations based on water quality standards in accordance with section 301. While the CWA requires that other types of permits ensure attainment with such standards, the Act specifically exempts MS4 permits from such a requirement, relying instead on the MEP standard as the measure of CWA compliance.[31]

Thus, in upholding the MS4 general permit, and rejecting petitioners' contention that the permit is unlawful because it does not ensure compliance with State water quality standards, the Second Department correctly noted that Congress "specifically provided that permits for *municipal dischargers* with respect to municipal separate storm sewers 'shall require controls to reduce the discharge of pollutants to the maximum extent practicable,' without reference to any numerical limitation established under the Clean Water Act in connection with any particular effluent."[32] Thus, "Congress, rather than imposing specific effluent limitations,"

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[31] Although the issue is not before the Court on this appeal given the Second Department's modification of its decision on reargument, *amici* also note that, for similar reasons to those discussed in the text of this Brief, compliance schedules are also not required for MS4s regulated under the MS4 general permit. Such schedules "specify a schedule of compliance leading to compliance with CWA and regulations," and "may, when appropriate," be included in CWA permits. 40 C.F.R. § 122.47(a); *see also* N.Y. ECL § 17-0813 ("permits issued pursuant hereto *may* contain compliance schedules" (emphasis added)). Compliance schedules are appropriate when they can help regulated entities meet "applicable effluent limitations." N.Y. ECL § 17-0813(1). But for MS4s, CWA compliance is based on the MEP standard, rather than on effluent limitations based on water quality standards pursuant to section 301. Thus, compliance schedules are simply not relevant to MS4s, where the applicable standard is MEP rather than attainment of water quality standards.

[32] *Natural Res. Def. Council, Inc.*, 120 A.D.3d at 1246 (quoting 33 U.S.C. § 1342(p)(3)(B)(iii)) (emphasis in original).

for MS4s, "vested the EPA and the States with discretion in imposing pollution controls," and did not require such controls to "incorporate effluent limitations."[33] The Second Department rightly recognized that in the realm of MS4s, the correct legal standard, in accordance with the plain language of the CWA, is the MEP standard, and the MS4 general permit appropriately requires compliance with this standard.

Because the Second Department correctly ruled that MEP is the appropriate standard for MS4s, its decision should be affirmed.

A. The distinctive "Maximum Extent Practicable" standard for regulation of MS4s is demanding, while still affording needed local flexibility in municipal stormwater management.

Municipal stormwater is regulated differently from other point sources under the CWA because it inherently *is* different. Unlike other regulated discharges, rainfall is naturally occurring, cannot be stopped, and can be controlled only to a limited degree. Moreover, the underlying sources of pollutants to MS4s are largely impervious surfaces on private property from which stormwater runs off—that is, sources not directly controlled by the municipality itself. To the extent that municipal land is the source of stormwater runoff, often these roads, parking lots, and buildings cannot be easily modified or altered to incorporate stormwater management controls without disrupting municipal operations or

[33] *Id.*

expending exorbitant amounts of money. And due to the complexity of stormwater discharge—which may contain a wide variety of chemical and biological substances and debris, and enter public water through thousands of point sources—tracing back the original source of pollutants can be extremely difficult or impossible.

For some stormwater controls, determining the "maximum extent practicable" is straightforward. For instance, while the resources required to develop, administer, and enforce a regulatory program for construction and post-construction stormwater controls are significant, as noted above, the parameters of such a program, based on a longstanding State and federal program to regulate construction stormwater, are well established. In contrast, determining appropriate best management practices for pollution prevention and good housekeeping at municipal facilities requires a far more complex application of the MEP standard, taking into account local site conditions, water quality concerns, and economic feasibility.

The experience of the *amici* here illustrates these points. For example, approximately 72% of New York City's 305 square miles in land area is covered with impervious surfaces, such as rooftops, streets, and sidewalks, which prevent stormwater generated from rain and melting snow from being absorbed

into the ground.[34] New York City manages the hundreds of billions of gallons of stormwater that enter its sewer system each year, and has invested $10 billion in infrastructure over the past decade to improve water quality in the New York Harbor.

The scale of the City's stormwater system underscores the importance of practicability in developing a stormwater management program. In 2013, the New York City Department of Environmental Protection performed 61,690 inspections of stormwater catch basins, and cleaned 36,593 catch basins.[35] The New York City Department of Sanitation street cleaners sweep over 9,000 miles of City streets weekly, sweeping up an average of 122 tons of street litter a day.[36] Even as the City begins to develop a stormwater management program under its forthcoming permit,[37] the City is already engaged in robust stormwater controls.

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[34] The City is currently operating its MS4 pursuant to requirements incorporated into the permits for its fourteen wastewater treatment plants. The City is negotiating the terms of an individual MS4 permit, with requirements similar to those in the Statewide MS4 general permit, with NYSDEC. *See* Draft State Pollutant Discharge Elimination System ("SPDES") Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems owned or operated by the City of New York (Feb. 5, 2014), *available at http://www.dec.ny.gov/docs/water_pdf/ms4nycdraft.pdf*. The forthcoming permit will require significant enhancements to the City's stormwater management program to protect and improve water quality in the MS4's receiving waters.

[35] New York City Department of Environmental Protection, Best Management Practices: Annual Report for the Period January 1, 2013 – December 31, 2013 (April 2014), *available at http://www.nyc.gov/html/dep/html/harborwater/spdes_bmp_report_2010.shtml*, at p. 26. This report covers catch basins in both the separately sewered areas and the portions of the City served by combined sewers.

[36] Unpublished data from the City's 2014 Fiscal Year, available upon request.

[37] *See supra* n. 34.

The City is prepared to increase these controls as necessary in connection with its stormwater management program, but the breadth of such controls must be gauged against the statutory standard of practicability.

More broadly, the experience of *amici* across the State demonstrates that NYSDEC's MS4 program encourages a proactive, locally led approach to addressing stormwater management in urbanized areas. NYSDEC has both identified required actions under each of the six Minimum Control Measures that every MS4 must include in its stormwater management plan and preserved critical discretion for MS4s in choosing the specific management practices implemented to meet these requirements. This flexibility has been essential to effectively addressing the unique geophysical and anthropocentric conditions within each regulated MS4. Such flexibility is critically important not only from a water quality improvement perspective, but from an economic perspective as well. MS4s that are afforded the flexibility to target their implementation dollars where they will be most effective generate greater positive results than those that are held to a more prescriptive management scheme. In the absence of such flexibility, adaptive management is much more difficult, and bad decisions become long-term budget drains and obstacles to efficient allocation of resources.

Moreover, local conditions evolve over time, and the MS4 must re-evaluate and update its stormwater management plan to address current conditions.

For instance, under an adaptive management approach, water quality monitoring of selected representative discharge locations may be useful in assessing whether any of the Minimum Control Measures in an MS4's stormwater management plan should be adjusted or revised to more effectively address sources of impairment.

Amici have further observed that the MEP standard also prompts regional collaboration, when useful and practicable. Stormwater coalitions have formed across New York State, enabling communities with dissimilar development patterns, technical resources, staff capacities, and land use regulations to consult and to reach consensus on a number of land use and development decisions, and to develop complementary responses to shared problems. Working together at the watershed level, MS4s are jointly achieving stormwater management objectives, including a reduction in stormwater runoff volumes and the discharge of storm water pollutants of concern. Working in coordination has allowed MS4s to become more efficient, cutting costs by eliminating duplicative efforts and sharing services.

The experience of *amici* confirms that the MEP standard is demanding, yet retains needed flexibility for local governments, and thus is appropriately tailored to the regulation of MS4s.

B. The text and history of the Clean Water Act show that Congress specifically chose the "Maximum Extent Practicable" standard to address the distinctive challenges posed by municipal stormwater.

The centrality of the MEP standard to the regulation of MS4s is clear from the plain language and history of the CWA. The same sources directly refute petitioners' contention that the CWA mandates the incorporation of water quality based effluent limitations under section 301 of the Act in MS4 permits.

Section 402 (p)(3)(B) of the CWA specifically provides that "[p]ermits for discharges from municipal storm sewers *shall require controls to reduce the discharge of pollutants to the maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[38] The plain text of section 402(p)(3)(B)(iii) thus both explicitly adopts the MEP standard and vests permitting authorities with discretion in implementing that standard.

The MEP standard embodied in the text of section 402(p)(3)(B)(iii) contrasts sharply with the standard that applies to industrial stormwater discharges.

[38] 33 U.S.C. § 1342(p)(3)(B)(iii)(emphasis added). In New York State, the CWA's National Pollutant Discharge Elimination System ("NPDES") permitting program is administered by the State, as the State Pollutant Discharge Elimination System ("SPDES") permitting program. New York State law is identical to the federal CWA with respect to the standard for MS4s. N.Y. ECL § 17-0808(3)(c); *see also id.* § 17-0811(1) (requiring that "effluent limitation" be included in SPDES permits "where applicable"); *cf. Tualatin Riverkeepers v. Or. Dep't of Envtl. Quality*, 230 P.3d 559, 566 (Or. Ct. App. 2010) (noting Oregon State law "does not itself make state water quality standards applicable to storm water dischargers. Instead, it simply requires compliance with 'applicable' federal and state water quality standards").

The CWA requires industrial stormwater discharges to "meet all applicable provisions of [section 402] and section 301."[39] Section 301, "Effluent Limitations," prohibits the discharge of pollutants absent compliance with effluent limitations as necessary to achieve water quality standards.[40] Thus, permits for industrial stormwater discharges must include limitations developed in accordance with section 301 of the Act, to ensure attainment of water quality standards. In contrast, for MS4s, the MEP standard, rather than restrictions developed to ensure attainment of applicable water quality standards, is the governing statutory requirement.

The history of the Clean Water Act and its implementation underscores that the adoption of the MEP standard for regulation of municipal stormwater was a deliberate choice by Congress, made in light of the distinctive challenges posed by such regulation. When the CWA was enacted in 1972, section 301(b)(1)(C) was designed to require whatever effluent controls were necesseary to attain water quality standards "without regard to the limits of practicability."[41] But this requirement proved particularly difficult to implement in the regulation of stormwater pollution in general and the regulation of MS4s in particular.

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[39] *Id.* § 1342(p)(3)(A).

[40] *Id.* §§ 1311(a), (b)(1).

[41] S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, at 3710 (1971); *see* 33 U.S.C. § 1311(b)(1)(C) (requiring "any more stringent limitations, including those necessary to meet water quality standands, . . . established pursuant to any State law or regulations, . . . or required to implement any applicable water quality standard established pursuant to this Act").

The United States Environmental Protection Agency ("EPA") struggled for well over a decade to regulate stormwater under the CWA as initially enacted. EPA originally exempted most stormwater discharges that were not contaminated by industrial or commerical activity from CWA permitting requirements,[42] but this exemption was subsequently struck down in *Natural Resources Defense Council v. Costle*.[43] EPA had argued that "certain characterics of runoff pollution,"[44] made promulgation of effluent limitations difficult:

> The major characteristic of the pollution problem which is generated by runoff . . . is that the owner of the discharge point . . . has no control over the quantity of the flow or the nature and amounts of the pollutants picked up by the runoff. The amount of flow obviously is unpredictable because it results from the duration and intensity of the rainfall event, the topography, the type of ground cover and the saturation point of the land due to any previous rainfall. Similar factors affect the types of pollutants which will be picked up by that runoff, including the type of farming practices employed, the rate and type of pesticide and fertilizer application, and the conservation practices employed . . . .[45]

The D.C. Circuit nevetheless held that EPA did not have the discretion to exempt stormwater discharges, and expressed optimism that EPA could feasibly regulate such discharges "[w]ith time, experience, and technological development."[46]

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[42] 38 Fed. Reg. 18000, 18003 (July 5, 1973).

[43] 568 F.2d 1369 (D.C. Cir. 1977).

[44] *Id.* at 1377.

[45] *Id.* at 1377-78 (quoting Federal Appellants' Memorandum on "Impossibility," at 7-8).

[46] *Id.* at 1379.

In 1979, EPA issued revised CWA permitting regulations, including revised regulations for stormwater discharges;[47] EPA's new regulations were immediately challenged.[48] The following year, EPA issued regulations consolidating permitting under several federal laws, including the CWA; these regulations also included revisions to EPA's 1979 CWA stormwater regulations.[49] Challenges to EPA's 1980 regulations were consolidated into the pre-existing litigation.[50] Following a settlement, EPA proposed new regulations in 1982, which limited the scope of CWA permitting of stormwater systems and also reduced many permit application requirements for such systems.[51] These regulations, in EPA's words, "attempted to balance the environmental concerns associated with

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[47] 44 Fed. Reg. 32854 (June 7, 1979).

[48] *See Natural Res. Def. Council, Inc. v. U. S. Envtl. Prot. Agency*, 673 F.2d 392, 396 (D.C. Cir. 1980). The D.C. Circuit specifically noted how contentious EPA's regulations were:

> EPA anticipated that petitioners seeking review of these regulations . . . would "race to the courthouse," . . . . To deal with the anticipated problem, the agency published racing regulations and a "trigger" time: the regulations were to become ripe for judicial review at 1:00 p. m., Eastern Daylight Time (EDT), seven days after their appearance in the Federal Register. Thus, on June 14, 1979, various petitioners did indeed race to the courthouse, and petitions were eventually filed in the Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits.

Id.

[49] *Id.* at 395-36 (discussing regulatory history, noting that EPA's 1980 regulations "extensively revise[d] and supersede[d]" its 1979 NPDES regulations).

[50] *Id.*

[51] *See* 47 Fed. Reg. 52073 (Nov. 18, 1982) (noting EPA's belief that "[i]n many cases, . . . extensive testing and reporting . . . would not be necessary in order to issue adequate permits" for stormwater discharges).

storm water discharges, the practical limitations of the NPDES permit as a tool for regulating storm runoff, and the realities of limited government resources."[52]

Nevertheless, despite "[i]ts protracted gestation and thoughtful preparation," EPA's proposed stormwater regulations "generated more comment and controversy than almost any other section" of EPA's proposed 1982 CWA permitting regulations.[53] EPA concluded that "the best approach to deal with storm water related pollution problems, and the approach most consistent with the CWA, clearly falls between the extreme positions of not regulating any storm water discharges through the permit process," or using "permits to control all storm water which may potentially contain any pollutants," and accordingly tried to strike a balance in the final regulations.[54] Nevertheless, these regulations were again challenged in court, and further revised by EPA.[55]

This regulatory struggle was eventually resolved in 1987 by Congress's enactment of amendments to the CWA. These 1987 CWA amendments specifically adopted the distinctive "maximum extent practicable" language that today supplies the governing standard for municipal stormwater regulation. Specifically, Congress amended the CWA to establish the MS4-

[52] 49 Fed. Reg. 37998 (Sept. 26, 1984).

[53] *Id.*

[54] *Id.*

[55] *See id.*; 50 Fed. Reg. 9362 (Mar. 7, 1985); 50 Fed. Reg. 32548 (Aug. 12, 1985).

specific MEP compliance standard requiring that permits for MS4s "shall include controls to reduce the discharge of pollutants to the maximum extent practicable."[56] For MS4s, the MEP standard modifies the CWA's section 301(b)(1)(C) requirement to ensure compliance with water quality standards—which remains directly applicable, without explicit reference to practicability, to industrial stormwater, industrial wastewater, and municipal wastewater discharge.[57]

Congress's intent that MEP provide the governing legal standard for MS4s, and afford municipalities some vitally needed leeway in controlling stormwater pollution, is clear in the legislative history. For example, during a Senate debate on January 14, 1987, Senator Durenberger described the amendments as "afford[ing] municipal and nonindustrial dischargers some relief from the 1972 permit application requirements."[58] Specifically, "[a] permit for a municipal separate storm sewer . . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable."[59] And "[s]uch controls include management practices, control techniques and systems, design and engineering

[56] 33 U.S.C. § 1342(p)(3)(B)(iii).

[57] *Id.* § 1311(b)(1)(C).

[58] 133 Cong. Rec. 1260, 1280 (1987).

[59] *Id.*

methods, and other such provisions."[60] Similarly, Senator Burdick, the primary Senate sponsor of the 1987 amendments, noted that the proposed legislation "provides an improved and less burdensome process for control of discharges of stormwater, particularly for municipalities."[61]

During the House debate on January 9, 1987, Representative Roe, introduced as "the prime architect of this legislation,"[62] explained that the proposed bill "establishes a mechanism to address the major problems associated with discharges from storm sewers through a permitting procedure and the development and implementation of management practices, control technologies, and design and engineering methods."[63] Roe reiterated that MS4 permits "must require controls to reduce the discharge of pollutants to the maximum extent practicable."[64]

Following the 1987 amendments, EPA has expressly recognized that the MEP standard is the governing CWA standard for MS4s and distinguished MEP from the standards that apply to other permits issued under the Act. Thus, EPA has noted that "[t]he CWA requires, *with the exception of MS4s,* that NPDES permits contain technology-based effluent limits and water quality-based effluent limits (WQBELs) when the technology-based limits alone do not adequately

[60] *Id.*

[61] *Id.* at 1260 (1987).

[62] 133 Cong. Rec. 976, 1005 (1987).

[63] *Id.* at 1006.

[64] *Id.*

protect water quality."[65] In sharp contrast, "[t]he CWA standard for MS4s is that the permit must require controls to reduce the discharge of pollutants to the MEP [maximum extent practicable] to protect water quality."[66] Petitioners here are mistaken in trying to compel NYSDEC to impose requirements beyond MEP in the regulation of municipal stormwater, when Congress specifically rejected the application of any such standards to municipal stormwater regulation.

C. A substantial body of legal precedent supports the Second Department's ruling.

Courts have consistently recognized that the MEP standard, rather than strict compliance with effluent limitations developed under section 301 of the CWA, is controlling with respect to MS4s. For example, the Ninth Circuit, reviewing the legislative history of the CWA, correctly explained: "Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge."[67] In rejecting the petitioners' challenge to EPA's stormwater

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[65] EPA, *TMDLs to Stormwater Permits Handbook*, at 10 (Nov. 2008), *available at http://www.epa.gov/owow/tmdl/pdf/tmdl-sw_permits11172008.pdf* (emphasis added).

[66] *Id.*

[67] *Natural Res. Def. Council v. U. S. Envtl. Prot. Agency*, 966 F.2d 1292, 1308 (9th Cir. 1992).

regulation, the Ninth Circuit concluded in 1992 that "Congress could have written a statute requiring stricter standards, and it did not."[68]

Similarly, in *Defenders of Wildlife v. Browner*, the Ninth Circuit reiterated that "Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311 [CWA section 301], but not to include the same requirement for municipal discharges, must be given effect."[69] Petitioners had argued that the CWA was ambigious regarding whether municipalities must strictly comply with section 301, but the court found no ambiguity in the statutory language. Pointing to the clear difference in standards for MS4s and industrial stormwater discharges in section 402, and how section 402 "*replaces*" the requirements of section 301 for MS4s, the court concluded: "the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with [section 301]."[70] The court also noted that "[c]ontextual clues" support the plain meaning of section 402: because the CWA "contains other provisions that undeniably exempt certain discharges from the permit requirement altogether," and thus from section 301, "Congress' choice to exempt municipal storm-sewer discharges from strict compliance with [section

[68] *Id.* The Ninth Circuit also noted, with respect to the petitioners' challenge to EPA's sampling regime, that the court "must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices." 966 F.2d at 1308.

[69] 191 F.3d 1159, 1165 (9th Cir. 1999).

[70] *Id.* (emphasis in original).

301] is not so unusual that we should hesitate to give effect to the statutory text, as written."[71]

State and federal courts across the country are in accord on this issue. For example, in *Mississippi River Revival, Inc. v. City of St. Paul*, the United States District Court for the District of Minnesota recognized that "unlike industrial storm water discharges, the CWA does not require water quality-based standards for municipal storm water discharges."[72] Instead, Congress required MS4s to meet the MEP standard, which "does not incorporate the water-quality based requirements" of section 301.[73] "While [the] CWA requires permits to contain conditions that ensure that water quality standards are met, the CWA specifically exempts municipal stormwater regulated MS4s from that requirement."[74] The court thus rejected plaintiff's allegations that defendant city was violating water quality standards, finding that compliance with such standards was not required under the MS4 permit at issue.[75]

State courts in Oregon and Maryland also agree that the MEP standard is the controlling CWA standard for MS4. In *Tualatin Riverkeepers v. Oregon*

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[71] *Id.* at 1166.

[72] 2002 U.S. Dist. LEXIS 25384, at *15 (D. Minn. Dec. 2, 2002).

[73] *Id.* at *16.

[74] *Id.* at *19.

[75] *See also Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 437-38 (Minn. Ct. App. 2003) (citing *Miss. River Revival* with approval).

Dep't of Environmental Quality,[76] the Oregon Court of Appeals observed that while "[f]ederal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards . . . . dischargers of municipal storm water are not subject to that requirement" and instead are subject to the MEP standard. The court rejected petitioners' assertion that the MS4 permits at issue unlawfully failed to ensure compliance with water quality standards, holding that the regulating agency had discretion under both federal and State law to instead require best management practices to reduce the discharge of pollutants to the maximum extent practicable.[77] Similarly, in *Chesapeake Bay Foundation v. Maryland Department of the Environment*, a Maryland intermediate court recently held that "the Clean Water Act does not require strict compliance with water quality standards for municipal storm water sewer system permit."[78] The court further held that Maryland law, which requires compliance with "all applicable state and federal water quality standards and effluent limitations" for CWA permitting, also does not require MS4 permits to ensure strict compliance with water quality standards.[79] Another Maryland intermediate court likewise upheld an MS4 permit that does not require strict compliance with CWA Section

[76] 235 Ore. App. 132, 141 n.10 (Or. Ct. App. 2010).

[77] *Id.* at 138-43.

[78] No. 02-C-14-186144 (Md. Cir. Ct., Anne Arundel Cnty. Dec, 2, 2014), at 18-19 (attached to this brief in Appendix B).

[79] *Id.* at 19.

301, noting that "Section 402 . . . provides, . . . permit requirements for municipal [stormwater] discharge shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . . This section of the [CWA] does not require meeting water quality standards."[80]

Thus, persuasive legal precedent clearly supports the Second Department's correct determination that the governing legal standard for MS4 permits is MEP, not section 301 attainment of water quality standards.

In sum, the plain language of the CWA and the ECL, the statutory and regulatory history, persuasive legal precedent, and the essential characteristics of MS4s themselves all support the Second Department's ruling that MEP, rather than section 301, is the governing standard for MS4s. For this reason, the Second

[80] *Blue Water Baltimore v. Md. Dep't of the Env't*, No. 03-C-14-000761 (Md. Cir. Ct., Baltimore Cnty.), October 3, 2014 Transcript of Proceedings, at 5:8-5:21 (attached to this brief in Appendix C); *see also* Order (October 7, 2014) (attached to this brief in Appendix D).

Amici are aware of only one contrary reported decision, *Anacostia Riverkeeper v. Md. Dept. of the Env't*, No. 339466-V (Md. Cir. Ct., Montgomery Ctny. Dec. 4, 2013) (attached to this brief in Appendix E). There, the Judge noted during oral argument that he did not understand the permit at issue. *See* November 20, 2013 Transcript Excerpt at 48-49 (attached to this brief in Appendix F). Accordingly, he remanded the matter back to the state agency. The Judge specifically stated that he was "neither going to affirm it or reverse" the agency's determinations, and asked "petitioner's counsel" to draft "an appropriate order consistent with [his] oral opinion." *Id.* at 51. Although the proposed order then submitted by the petitioners contained specific legal determinations—including the determination that MS4 permits must comply with section 301 requirements—that were not consistent with the Judge's decision, the Judge nevertheless signed the order. That matter is currently before the Court of Special Appeals, *Md. Dept. of the Env't. v. Anacostia Riverkeeper*, No. 2199 (Sept. Term 2013). In light of these facts, this opinion has no persuasive value.

Department's holding that the MEP standard in the MS4 general permit is appropriate and consistent with applicable federal and State law must be affirmed.

CONCLUSION

The Second Department's Decision and Order should be affirmed.

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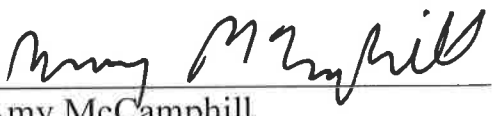
By: 
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Appendix A

APPENDIX A: STATEMENTS OF INTEREST FROM *AMICI*

A. The City of New York

Amicus the City of New York (the "City") is a political subdivision of the State of New York that both operates its own regulated stormwater sewer system,[1] and depends on the MS4 general permit to ensure the cleanliness of water in the City's watershed. Indeed, the efforts of all the regulated MS4s in the East of Hudson Watershed to manage municipal stormwater discharges are critical to protecting and improving the quality of the City's drinking water. Moreover, as a municipal entity operating water supply facilities in the East of Hudson Watershed and other areas subject to the MS4 general permit, the City's Department of Environmental Protection is a regulated MS4 in Westchester and Putnam Counties, and has sought and obtained coverage under the MS4 general permit.

The City is committed to continued compliance with its obligations under the Statewide MS4 general permit for its upstate operations. Additionally, under an individual MS4 permit that NYSDEC is currently working with the City to develop for its in-City separate storm sewer system, the City will continue to make improvements to stormwater management within the City. Both in its own operations and as a beneficiary of the East of Hudson watershed communities' efforts to reduce stormwater pollution, the City recognizes that investments in

[1] *See supra* Brief n. 34.

stormwater management need to be practical, taking feasibility and cost into consideration.

B. The States of New Hampshire and Wyoming

Like New York State, the States of New Hampshire and Wyoming are required under the Clean Water Act have in place regulatory programs for municipal separate storm sewer systems in urbanized areas. And as in New York State, these programs are operated in *amici* States through general permits. That model recognizes the need for regulatory flexibility given the inherent complexity of controlling urban stormwater runoff in diverse environments. The States have an interest in preserving that flexibility within a framework of minimum required stormwater management controls, as embodied by the maximum extent practicable standard.

C. Nassau County, New York

Amicus Nassau County, New York ("Nassau") is a political subdivision of the State of New York. Nassau occupies an area of 285.4 square miles (182,680 acres) located between New York City on the west, Suffolk County on the east, the Atlantic Ocean on the south, and the Long Island Sound on the north. The population of Nassau County based upon the 2001 census was 1,334,648. Two cities, three towns and sixty-two villages are located within the boundaries of Nassau County.

Stormwater within the county is discharged to the surface waters of the United States and to the groundwater. Nearly half of the land area in Nassau drains to surrounding surface waters. The current inventory of stormwater facilities within Nassau includes: 3,720 stormwater outfalls to the waters of the United States, 1,000 stormwater recharge basins, and approximately 57 miles of open stream corridors maintained by Nassau.

In addition to Nassau, various levels of government play a role in the management of stormwater within Nassau County's geographic area. Accordingly, the stormwater program in Nassau County is the result of inter-municipal cooperation. Nassau has developed a stormwater management plan that includes best management practices that will be implemented by Nassau and a coalition of local municipalities in order to achieve the regulatory standard of reducing pollutants in Nassau's stormwater to the maximum extent practicable.

Measurable goals and an implementation schedule have been developed for each of the BMPs in Nassau's stormwater management plan. The best management practices, measurable goals, implementation schedule, and initial stormwater management plan were developed by the Nassau County Department of Public Works with input from task groups. The task groups consisted of a combination of municipal officials, watershed protection committee members, and consulting engineers. The best management practices, measurable goals, and

implementation schedule were selected based on their ability to meet specific permit requirements and to reduce pollutants in Nassau's stormwater runoff to the maximum extent practicable. They were also selected based upon a general assessment of the best management practices' effectiveness, applicability to Nassau, and associated costs. Effectiveness of the selected best management practices and success in achieving the selected measurable goals will be reviewed annually and the plan will be modified, if necessary.

D. Onondaga County, New York

Amicus Onondaga County is a municipal corporation and a one of twenty-five MS4 permit holders within the County. The County played a key role in pushing for the establishment of the Central New York Stormwater Coalition, of which the County is a member. The Coalition was established, and is run by the Central New York Regional Planning and Development Board, in order to foster the exchange of information, to identify and promote the discussion of issues of mutual concern facing MS4 communities, and to foster cooperation among participating MS4 communities in addressing issues that are of mutual concern.

The County provides to interested MS4s within the County the following services through the Onondaga County Department of Water Environment Protection:

- Establish a centralized "Hotline" for citizens to report suspected illicit discharges, at no cost to other municipalities;

- Perform routine inspections of stormwater outfalls at no cost to other municipalities (just under 1,800 outfalls, of which approximately half are County outfalls);
- Assist in tracking down sources of potential illicit discharges to stormwater systems, at a fee of $55.00 per hour; and
- Share laboratory services at actual cost to the County.

In addition, the County has developed an award-winning green infrastructure program known as "Save the Rain," through which the County provides financial assistance to municipalities to plan and implement green infrastructure projects to manage stormwater. The County has also planned and implemented an extensive green infrastructure program that now captures an estimated two hundred fifty million (250,000,000) gallons of stormwater annually. A key objective of the Save the Rain program is avoidance, to the maximum extent practicable, of construction of costly end of pipe collection and stormwater treatment infrastructure.

Moreover, the County conducts an extensive ambient water quality monitoring program pursuant to which the County assesses the impact upon water quality of its long-term capital program to upgrade wastewater collection and treatment through a combination of gray and green infrastructure projects.

Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements. As an MS4 holder, the County is acutely aware of the

enormous complexity and potential financial impacts that would ensue from the need to comply with numeric end of pipe limitations and by implication rigid and costly infrastructure requirements that would be needed to assure compliance if the current MS4 permit is altered as urged by NRDC.

E. The New York Conference of Mayors

Amicus the New York Conference of Mayors ("NYCOM") is a not-for-profit, voluntary membership association consisting of 583 of New York State's 611 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the State and federal levels on issues of concern to local government. This case is of significant concern to the many NYCOM members that are required under State and federal law to seek coverage for the MS4 discharges.

F. The New York State Association of Counties

Amicus the New York State Association of Counties ("NYSAC") is a not-for-profit corporation incorporated pursuant to the laws of the State of New York. NYSAC is the only statewide municipal association representing the interests of county government, including elected county executives, county supervisors, legislators, representatives, commissioners, administrators, and other

county officials from all 62 counties of the State of New York, including the City of New York. NYSAC's activities involve providing support and guidance to county officials in furtherance of their essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the State of New York. This case is significant to the many New York counties that are required under State and federal law to seek coverage for MS4 discharges.

G. The Stormwater Coalition of Albany County

The Stormwater Coalition of Albany County is a self-funded governmental entity formed in 2008, which consists of thirteen regulated MS4s (eleven towns, villages, and cities; one county; and one public university). According to the Coalition's inter-municipal agreement ("IMA"), "the purpose of the Coalition is to foster cooperation and to provide for the provision of joint services related to compliance with the requirements of the MS4 program." Two staff members work full-time for the Coalition providing a range of services across all Minimum Control Measures named in the MS4 general permit. While the Coalition is not a permitted entity, nor a legally empowered corporation of any form, the Coalition work plan described in the IMA matches the Joint Coalition stormwater management plan and both documents point to tasks and measurable goals which name Coalition and individual MS4 staff as responsible parties. As

such the stormwater management plan highlights in detail the role of the Coalition and its relationship to member communities. Given the governance structure (quarterly Board and monthly Working Group meetings), the extensive number of shared efforts throughout the year, and significant dues, Coalition members have a strong sense of ownership about the work of the Coalition. It is not an outside organization doing work for members; it is instead an organization owned and managed by members which helps all members fulfill permit requirements. A strong value is placed on sharing information, solving problems, and helping each other address program gaps expeditiously.

Specific program initiatives span multiple years, dating back to 2005 prior to the formation of the Coalition when the same group of municipalities participated in two NYSDEC Stormwater Implementation grants. Collectively we have mapped outfalls; purchased outfall survey equipment; conducted outfall inventories; mapped storm system infrastructure; developed and funded a web-based GIS stormwater mapper; presented Project Wet programs to school groups; conducted creek studies; participated and organized WAVE macro-invertebrate sampling events; developed and distributed educational brochures; participated in billboard campaigns; organized targeted trainings with NYSDEC regional staff covering such topics as local law requirements, how to inspect a construction site, and what to look for in a facility self-audits; developed water quality scorecards

used by all members to review local laws, codes, and ordinances; developed model local law language related to green infrastructure; organized tours of local green infrastructure practices; conducted facility self-audits; created and maintained a Coalition website; filed Joint Annual Reports; wrote a Joint Coalition stormwater management plan; uploaded the same plan into a web-based program management software package; and participated in various public programs as guest speakers. Simultaneously, in addition to these collaborative activities, individual Coalition members continue to provide mandated oversight of all construction activities within their municipality, in particular reviewing stormwater pollution prevention plans, inspecting construction sites, inspecting and often maintaining post construction stormwater practices, troubleshooting enforcement issues, and record keeping. There is also ongoing program work internal to each municipality related to municipal operations, facility audits, education and outreach, and illicit discharge detection and elimination.

It is this front line experience over many years which compels the Coalition to seek affirmance of the decision of the Appellate Division, Second Department, upholding the NYSDEC's general permit for MS4s. Of concern is the potential to demand more of MS4s than is practicable. Coalition members understand what works in implementing the MS4 general permit and what does not work, and appreciate the many steps needed to create and maintain meaningful

permit compliance. Adding anything more to existing permit requirements could generate significant resentment and frustration at the local level. Furthermore, shifting precious tax dollars to stormwater program compliance when weighed against other demands is unlikely; there are too many other demands on municipal budgets, all competing now for limited resources, all functioning within the legislative and political constraints imposed by the property tax cap. We and other MS4s in New York State support reasonable, incremental program improvements, funded based on existing revenue streams.

Important as well, is the very real and highly respected authority of regulators to guide program development. For the Coalition, two recent EPA audits, each three days, galvanized the targeted municipalities to redouble their robust efforts to comply with the MS4 general permit and the stormwater management plan developed collaboratively in 2012. The thoroughness of these audits has had a ripple effect across all MS4s, at all levels within their own municipalities, from elected officials to top level management to field staff. They serve as proof positive that the current regulatory arrangement does work; that the language of the MS4 general permit is clear enough, with expectations explicit; and that the regulators, both EPA and NYSDEC, know what to look for and are prepared to use their full authority to require compliance.

H. The Water Environment Federation

Amicus the Water Environment Federation ("WEF") is a not-for-profit technical and educational organization under Section 501(c)(3) of the Internal Revenue Code whose mission is to preserve and enhance the global water environment. Founded in 1928, WEF has more than 33,000 individual members and 75 affiliated Member Associations representing water quality professionals worldwide, including in the United States and in the State of New York. Over 7,000 of those members consider stormwater management, including MS4 issues, a key professional focus. Over 1,800 WEF members reside in New York State. WEF members, Member Associations, and staff proudly work to achieve its mission to help its members meet the requirements of the Clean Water Act, including those related to MS4s, and provide bold leadership, champion innovation, connect water professionals, and leverage knowledge to support clean and safe water worldwide.

WEF is a leading organization in the dissemination of stormwater management and MS4 compliance information, technology, management, and policy best practices via books, journals, magazines, conferences, and professional committees. WEF, as an organization with stormwater practitioners and MS4 managers as members across the country in various climates and conditions, including in the State of New York, has an interest in preserving the flexibility

inherent in the MS4 (general and individual) permitting approach. Considering that the management and treatment of stormwater runoff is tied directly to rainfall distributions and volumes, soil conditions, nature and amount of impervious cover, and other site- and locally-based conditions, it is imperative that MS4s are provided the flexibility in addressing the impacts of stormwater runoff in a manner that is most appropriate and effective for local conditions. Clarification on the applicability of the "maximum extent practicable" standard is also of importance for WEF, as this standard impacts all MS4s both directly and significantly.

In conclusion, WEF members, many of which are employed by MS4s, support affirmance of the lower court decision which recognized the need for MS4 controls to be practicable.

I. The National Association of Clean Water Agencies

Amicus the National Association of Clean Water Agencies ("NACWA") represents the interests of nearly 300 of the nation's publicly owned wastewater and stormwater management agencies. NACWA has 8 public utility members in New York State, including the New York City Department of Environmental Protection. NACWA members serve the majority of the sewered population in the United States, collectively managing and treating more than 18 billion gallons of wastewater and stormwater each day. NACWA members operate their utilities under the stringent requirements of the Clean Water Act's

National Pollutant Discharge Elimination System ("NPDES") permit program, including state-issued permits developed under federally delegated Clean Water Act programs. NACWA has participated in litigation across the country before both federal and state courts regarding the appropriate regulatory requirements in NPDES permits for municipal wastewater and stormwater discharges. NACWA has an interest in this case to provide the court with a national perspective on the importance of the MEP standard for municipal stormwater discharges, and ensure to ensure the MEP standard is consistently and faithfully applied.

J. The National Association of Flood and Stormwater Management Agencies

Amicus the National Association of Flood and Stormwater Management Agencies ("NAFSMA") is a national not-for-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control and floodplain management, stormwater management, water conservation, and other water-related districts, bureaus, departments, and other instruments of local, regional, and state government. NAFSMA's member agencies serve a combined population of millions of people nationwide and are responsible for the protection of lives, property, and the environment from the impacts of storm and flood waters. NAFSMA has an interest in this litigation because its members are directly involved in the administration of stormwater agencies and utilities and the

implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act and by the state and federal regulations implementing that provision. Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements.

K. The American Water Works Association

Amicus the American Water Works Association ("AWWA") is an international nonprofit scientific and educational society dedicated to the improvement of drinking water quality and supply. AWWA's 50,000-plus members represent the full spectrum of the water community, including utility managers, plant operators, environmental advocates, state and federal regulators, scientists, academicians, and others who hold a genuine interest in water supply and public health. AWWA's membership includes approximately 4,800 local or regional drinking water utilities, which collectively provide safe drinking water to more than 80 percent of the American people. AWWA has an interest in this litigation because its members are directly engaged in stormwater management and regulation.

L. The New York Section of the American Water Works Association

Amicus the New York Section American Water Works Association ("NYSAWWA"), established in 1914, is a nonprofit organization dedicated to providing sustainable safe water through the advancement of management, education, science, and technology. NYSAWWA provides solutions to improve public health, protect the environment, and enhance our quality of life. With approximately 1,800 individual and utility members, NYSAWWA represents both public and private water utilities and is a leading resource on water issues in New York State. NYSAWWA has an interest in this litigation due to its potential impact upon the already stressed administrative, operational, and financial resources of water utilities throughout New York State. MS4s present unique challenges and features as regulated point sources and the establishment of specific effluent discharge limits would impose immense challenges and economic hardship upon municipalities, water utilities, and other entities forced to monitor and comply with specific limits. NYSAWWA supports the MEP standard, which allows regulated MS4s to develop and implement site-specific controls and measures which can be modified periodically as conditions and stormwater infrastructure change over time.

M. The New York State Association of Regional Councils

Amicus the New York State Association of Regional Councils ("NYSARC") is composed of nine locally created Regional Councils representing 45 of the 62 counties throughout New York State. Regional Councils are public organizations created to foster coordination among neighboring counties and to provide a regional approach for addressing multi-jurisdictional concerns. NYSARC provides a range of services to its member counties including water resource management, land use planning, economic development, and energy use planning and development.

NYSARC has been active in water resources management for over forty years, with the goal of promoting high quality water resources throughout New York State. In its water resources program, NYSARC serves as a key liaison between NYSDEC and the local governments it serves, providing valuable staff services that supplement NYSDEC's efforts to establish, administer, and deliver statewide water quality programs at the local level, including the MS4 general permit.

Since 2002, NYSARC has served as a liaison between NYSDEC and the regulated MS4 communities to ensure effective two-way communication and to promote clear understanding of, and appropriate compliance responses to, new and evolving stormwater requirements. NYSARC provides MS4s with regionally

coordinated, direct, local assistance necessary for planning and implementing the six minimum control measures required in the MS4 general permit, including:

- Providing information and guidance on Clean Water Act requirements, compliance strategies, and permit renewals;
- Providing planning assistance in support of developing and implementing stormwater management plans that advance statewide water quality priorities including identification of priority pollutants of concern, developing measurable goals, and selecting appropriate best management practices and operating procedures;
- Facilitating incorporation of stormwater management concepts into land use regulations and comprehensive planning documents;
- Providing local law gap analysis assistance needed to meet initial construction, post-construction, and Illicit Discharge Detection and Elimination local law requirements, and preparing local law updates as needed to comply with evolving regulatory requirements and standards;
- Facilitating and coordinating intermunicipal cooperation and consistent stormwater program implementation among neighboring MS4s;
- Facilitating sustainable funding mechanisms for long-term stormwater management program implementation;
- Conducting and coordinating training workshops on issues related to erosion and sediment control practices and site inspection procedures in the areas of construction, post-construction, and appropriate pollution prevention practices;
- Providing permit-specific mapping and priority stormwater management area identification and data collection assistance including outfall mapping, sewershed delineation, and promotion of consistent mapping standards;
- Providing guidance for conducting annual program effectiveness evaluations, documenting program compliance activities and procedures, and annual reporting procedures;
- Conducting one-on-one follow up with MS4s as needed to strengthen and improve stormwater management plans and overall regulatory

compliance in response to MS4 stormwater program audits conducted by NYSDEC Regional Offices; and

- Conducting training, education, and outreach programs for elected officials and municipal staffs, the general public, developers and contractors, and soliciting feedback from user groups and stakeholders on municipal stormwater management efforts.
- Providing modeling and data analysis assistance to assess and address pollutant loading to impaired water bodies through the development of watershed improvement strategies.

N. The New York Water Environment Association

Amicus the New York Water Environment Association ("NYWEA") was founded in 1929 by professionals in the field of water quality as a nonprofit educational organization, and has over 2,500 members statewide who historically have helped lead the way for state and national clean water programs. NYWEA promotes sustainable clean water quality management through science, education, and training, and has a mission to educate and assist those involved in water environment industry in New York State. NYWEA administers the New York State wastewater operator certification program, and its members include technical and policy experts willing to offer objective scientific based information and facts regarding environmental legislation. The members of the organization are responsible for MS4s and CSO (combined sewer overflow) programs and offer expertise to government officials about the implications of environmental laws on local municipalities. NYWEA frequently includes stormwater management and MS4 permitting as key topics in its technical conferences and in its quarterly

magazine *Clear Waters*. Through specialized committees and task forces (consisting of public and private industry experts in the field), NYWEA members routinely engage with municipal leaders to address stormwater management issues common to MS4s, including training, treatment, and compliance.

Appendix B

THE CHESAPEAKE BAY FOUNDATION, ET AL., *Petitioners*	*	IN THE
	*	CIRCUIT COURT
	*	FOR
v.	*	ANNE ARUNDEL COUNTY
MARYLAND DEPARTMENT OF THE ENVIROMENT, ET AL., *Respondents*	*	
	*	CASE NO.: 02-C-14-186144

* * * * * * * * * * * *

ORDER

Upon consideration of the Petitioner's Petition for judicial review of Maryland Department of the Environment's February 10, 2014 decision to re-issue a National Pollutant Discharge Elimination System Storm Water Permit to Anne Arundel County, Maryland, Respondent's Answer and upon consideration of oral arguments and review of the file, it is this 2nd day of December, 2014, by the Circuit Court for Anne Arundel County, hereby,

ORDERED, that the decision of the Maryland Department of the Enviroment to re-issue the NPDES Permit No. 11-DP-3316, MD0068306 to Anne Arundel County is hereby **AFFIRMED**.

2014 DEC 04 P 4:51

LAURA S. KIESSLING, Judge
Circuit Court for Anne Arundel County

Copies To:

All Parties and Counsel

Kelley

THE CHESAPEAKE BAY FOUNDATION, ET AL., *Petitioners*	*	IN THE
	*	CIRCUIT COURT
	*	FOR
v.	*	ANNE ARUNDEL COUNTY
MARYLAND DEPARTMENT OF THE ENVIROMENT, ET AL., *Respondents*	*	
	*	CASE NO.: 02-C-14-186144

* * * * * * * * * * * * *

MEMORANDUM OPINION

On February 10, 2014, the Maryland Department of the Environment, Water Management Division ("MDE") re-issued a National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit ("NPDES permit") to Anne Arundel County, Maryland for water pollution discharges from the county's municipal separate storm sewer system.[1]

On March 14, 2014, the Chesapeake Bay Foundation ("CBF"), West/Rhode Riverkeeper, Inc. and Magothy River Association filed a timely Petition for judicial review of MDE's February 10, 2014 decision.[2] On April 10, 2014, the MDE, by and through its attorney Paul N. De Santis, filed a response to the Petition and stated that it intended to participate in the action and oppose the petition. On May 2, 2014, Anne Arundel County, by and through its attorney

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[1] The Permit is a Phase I MS4, a permit issued to jurisdictions with a population of 100,000 or more. Anne Arundel County has an estimated population of 537,656. The Permit Number is 11-DP-3315, MD0068306. *See* Maryland Department of the Environment, National Pollutant Discharge Elimination System, Municipal Separate Storm Sewer System Discharge Permit for Anne Arundel County, *available at* http://www.aacounty.org/DPW/Watershed/AAC_Final_NPDES_MS4_Permit_2014_incl_Attachments.pdf.

[2] Petitioners assert they have standing pursuant to MD. CODE ANN., ENVIRO. § 1-601(c)(1) & (2)(ii), because they participated publically in the decision through the submission of written comments. MD. CODE ANN., ENVIRO. § 1-601(c)(1) & (2)(ii) states: (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.

Kelly Phillips Kenney, likewise filed a response and stated that it intended to participate in the action.

On November 10, 2014, this Court heard oral arguments from CBF, MDE and the County on Petitioner's request for judicial review of MDE's decision to re-issue the permit. Upon review of the file, written memorandum, applicable statutes and regulations, and upon consideration of the oral arguments presented on November 10, 2014, this Court will **AFFIRM** MDE's decision to re-issue the NPDES permit to Anne Arundel County.

BACKGROUND

In its' Petition, CBF argues that the approved plan with the Anne Arundel County NPDES storm water permit is inadequate and does not comply with state and federal law and regulations. CBF asks that the Court reverse the decision of MDE and order an evaluation and revision of the Permit in accordance with all applicable federal and state law. MDE, in response, argues that its final decision to issue the Permit without mandating strict compliance with water quality standards was legally correct and should be affirmed.

Petitioners address five (5) issues with the Permit in their Petition for Review. The crux of the issue, however, is whether the Clean Water Act and accompanying state law & regulations mandate "strict compliance" with water quality standards (set numeric effluent/pollutant limitations) or whether the Permit only requires the County to comply with water quality standards "to the maximum extent practicable."

QUESTIONS PRESENTED

(1) Does the Permit violate Federal or State law by not ensuring compliance with water quality standards?

(2) Does the permit violate public participation procedures required by law?

APPLICABLE LAW

The Clean Water Act

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act established a National Pollutant Discharge Elimination System ("NPDES") permitting program (codified as Section 1342) which allows the issuance of national or state permits to discharge pollutants from point sources under certain circumstances.[3] Section 1342 states:

> (b) **State permit programs**
> [T]he governor of each State desiring to administer its own permit program for navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer...
>
> (1) [And] to Issue Permits which:
>
> (A) apply, and insure compliance with, any ***applicable requirements*** of sections 1311, 1312, 1316, 1317 and 1343 of this title;
> (B) are for fixed terms not exceeding five years;
>
> [...]
>
> (2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or
> (B) To inspect, monitor, enter and require reports to at least the same extent as required in section 1318 of this title...

33 U.S.C. § 1342(b)(2)(A) (emphasis added).

The Water Quality Act, an amendment to the Clean Water Act, is codified as 33 U.S.C. § 1342(p) of the CWA. In enacting the Water Quality Act, Congress specifically required permits for industrial storm water discharge. For municipal storm water discharges, however, the Water Quality Act specified a different requirement:

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[3] A "point source" is any "discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock... from which pollutants are or may be discharged." 40 C.F.R § 122.2.

Permits for discharges from municipal storm sewers--

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

33 U.S.C. 1342(p)(3)(B) (emphasis added).

State Law

The EPA authorized Maryland to issue NPDES permits. Per the regulations, Maryland via the MDE can issue or re-issue a NPDES permit after a determination that the discharge or proposed discharge in a given permit application will be in compliance with all applicable requirements of effluent limitations; surface and ground water quality standards; the federal Clean Water Act; state law and regulation, and best available technology. COMAR 26.08.04.02.A(1)(a). The rest of Maryland's statutory framework replicates the provisions of the federal Clean Water Act.

Chesapeake Bay Total-Maximum-Daily-Load ("TMDL")

On December 29, 2010, the EPA issued the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (the "Bay TDML").[4] The Bay TDML calls for Maryland and all bay jurisdictions to limit the pollutant discharge as part of a watershed-wide scheme to improve the water quality of the Bay by 2025.

Maryland Watershed Implementation Plan ("WIP")

Maryland also established a Watershed Implementation Plan to achieve the reductions required in the Bay TMDL. The WIP calls for a reduction of the pollutants in the storm water

[4] A TDML is the maximum amount of pollutant a body of water can receive and still meet water quality standards.

discharge by requiring nutrient and sediment reductions on 20% of the impervious surface that does not have urban storm water controls.

STANDARD OF REVIEW

The options available to this Court are set forth in the Administrative Procedure Act., MD. CODE ANN., STATE GOV'T §10-101, et seq. (1984, 1999 Repl. Vol.). The Circuit Court may remand the case for further proceedings, affirm the final decision, or reverse or modify the decision. Reversals and modifications of administrative proceedings are governed by the Maryland Code:

> In a proceeding under this section, the Court may:
> (1) remand the case for further proceedings;
> (2) affirm the final decision; or
> (3) reverse or modify the decision if any substantial right of the Petitioner may have been prejudiced because a finding, conclusion, or decision:
> (i) is unconstitutional;
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
> (iii) results from an unlawful procedure;
> (iv) is affected by any other error of law;
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
> (vi) is arbitrary or capricious.

MD. CODE ANN., STATE GOV'T §10-222(h), et seq. (1984, 1999 Repl. Vol.).

In reaching its decision, the Court is limited to considering only those issues that have been raised and decided at an administrative level. *See State Retirement and Pension Systems v. Martin*, 75 Md. App. 240, 248, 840 A.2d 488 (1988). The Circuit Court cannot raise, develop, or rule on issues not presented by the parties or considered by the agency because a reviewing Court is restricted to the record made before the administrative agency. *Prince George's County Health Dep't v. Briscoe*, 79 Md. App. 325, 341, 556 A.2d 742 (1989), aff'd in part and remanded in part, 323 Md. 439, 593 A.2d 1109 (1991).

In its review, the Circuit Court must determine whether the administrative agency made an error of law. *Baltimore Lutheran High School v. Employment Security Administration*, 302 Md. 649, 662, 449 A.2d 701 (1985). The administrative agency's interpretation of law enjoys no presumption of correctness on review; a reviewing Court is not constrained in reversing an administrative decision that is based on an erroneous conclusion of law. *Montgomery County v. Buckman*, 333 Md. 516 519 at n.1, 636 A.2d 448 (1994). Upon determination that the administrative agency applied the correct standards prescribed by a statute at issue, the agency's conclusions are tested by the substantial evidence test. *Id.*

In a Circuit Court review of an administrative agency decision, substantial evidence means more than a "scintilla of evidence," such that a reasonable person could come to more than one conclusion. In such a situation, the issue to be considered is "fairly debatable" and the reviewing Court may not substitute its judgment for that of the agency. *Realty Improvement Ass'n v. Sycamore Realty Co., Inc.*, 105 Md. App. 701, 714, 661 A.2d 182 (1995).

ARGUMENT

1. *Petitioner's First Issue: The Permit Lacks Specific Terms and Does Not Ensure Compliance with Water Quality Standards*

Petitioner first argues that the NPDES Permit must comply with water quality standards because it is subject to federal and state laws and regulations. Petitioner contends that the Permit does not contain the necessary language and specific terms to ensure that restoration plans (and working towards achieving water quality standards) will be met on a firm schedule.

a. MDE Asserts that Federal Law Does not Require Strict Compliance with Water Quality Standards

Respondent counters that the Clean Water Act states that MS4 permits must include "controls to reduce the discharge of pollutants to the *maximum extent possible*." 33 U.S.C. §

1342(p)(3)(B)(iii). In Respondent's view, "maximum extent possible" does not mean strict compliance with water quality standards. Rather, the CWA specifically exempts MS4 permits from strict compliance with water quality standards and gives permitting authorities the discretion to establish water quality standards when it deems necessary.

MDE also asserts that it *has* established conditions to improve overall water quality and to eventually meet water quality standards – it just has not established the specific water quality standards, waste load allocations or pollutant limitations that Petitioner deems absolutely necessary.

Specifically, the Permit requires the County to: identify sources of pollutants in storm water runoff and link the pollutants to potential water quality impacts; manage programs designed to limit pollutant discharges to the maximum extent possible; maintain a storm water management program to ensure land is developed to produce natural sheet flow and reduce pollutant discharge; maintain an erosion and sediment control program to ensure constructive projects progress in a manner that prevents the discharge of sediment and pollutants to waters of the State; maintain a program to detect and eliminate illicit discharges; to Prohibit non-storm water discharges through the MS4 unless permitted by the Department; establish a program to reduce discharge of litter and floatables; ensure that County-owned properties are properly permitted and maintained to address pollutants in storm water discharges; implement a public outreach program to help educate the public regarding the appropriate means of reducing pollutant discharges to the County.

Respondent argues that the MDE programs listed above establish a regulatory framework in which land is developed and redeveloped using the most effective storm water designs and control techniques to best control sediment runoff. This in turn allows the County to control

storm water discharge to the maximum extent possible. The Permit also established a pollutant limit whereby the County must restore within the next 6 years 20% of the County's impervious land that does not control storm water discharge.

Respondents also cite *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). In *Defenders*, the Ninth Circuit held that the CWA does not require MS4 discharges to comply with water quality standards. 191 F.3d at 1166-67. The Court stated that Congress set two different standards: (1) industrial storm water discharge, which must comply with the water quality standards of 33 U.S.C. § 1311; and (2) municipal storm water discharge, which is exempt from "strict compliance" with water quality standards and which must instead comply "*to the maximum extent possible.*" *Id.* at 1166 (quoting 33 U.S.C. § 1342(p)(3)) (emphasis in original). Respondent contends that *Defenders* interpretation of the CWA has been accepted for 15 years.

In sum, Respondent states that Petitioners' interpretation of the law regarding water quality standards is simply incorrect. MDE drafted the Permit in cooperation with the EPA and the EPA has concluded that the Permit issued was consistent with EPA regulatory requirements, including enforceability considerations, and that the Permit adheres to the EPA's strategy of implementing "best management practices" to make significant progress to the attainment (but not strict compliance with) water quality standards.

On the other hand, Petitioners urge this Court not to follow the *Defenders of Wildlife* case cited by Respondents. According to Petitioner, MDE and the County are incorrect in asserting that CWA Section 1342(P)(3)(B)(iii) replaces the requirements of Section 1311 with the "municipal storm exception" that municipal storm sewer permits need only "reduce the discharge of pollutants to the maximum extent possible." Petitioners state that there is no municipal storm water exemption to Section 1311 of the Act or to the need to meet water quality standards.

Section 301 expressly states that NPDES permits, such as those applicable to municipal storm water discharges issued by MDE under Section 402, require the application of "the best practicable control technology currently available" or "any more stringent limitation." 33 U.S.C. § 1311(b)(1)(C). In Petitioner's view, the "maximum extent practicable" standard therefore applies in addition to the fundamental requirements of Section 301, which means meeting water quality standards.

b. **MDE Argues that State Law Does Not Require Compliance with Water Quality Standards**

MDE issued a permit to Anne Arundel County in 1991, and re-issued it in 1999 and 2004. Neither the initial issue of the permit nor any subsequent re-issuance required the storm water discharges to comply with water quality standards. MDE in its final issuance of the February 2014 permit stated the goal for Anne Arundel County's storm water permit [is] to: "control storm water pollutant discharges, to improve water quality within the County's urban watersheds, and to ***work towards meeting water quality standards***." Respondent's Answer, at 23 (citing the MDE Final Determination of Anne Arundel County Permit, at 20).

MDE states that it is not required to mandate strict compliance with pollutant limitations or wasteload allocations incorporated into any TDML. The only requirement and necessary prohibition (as explained *infra*) is that the County must establish a management program that will effectively prohibit pollutants in storm water discharges or other unauthorized discharges.

In terms of overall water quality standards, counsel for MDE emphasizes that it would be physically impossible for the County to strictly control and comply with water quality standards because the County cannot control the actions of each and every individual residing in Anne Arundel County. What the County *can* do (and what the Permit requires) is for the County to enforce laws that prohibit pollutants, and to establish programs to meet proper wasteload

allocations to the maximum extent possible to make progress towards water quality standards in a practicable manner.

On the other hand, the Petitioners again cite MD. CODE, ENVIRO., Section 9-324, which states that the Department may issue a permit if it finds that the discharge meets "all applicable state and federal law quality standards and effluent limitations." The Court of Appeals has stated that "applicable" water quality standards means that a discharge permit "must comply with effluent limitations, receiving water quality standards, [and] ground water quality standards established by the state." *Northwest Land Corp v. Md. Dept. of Env't.*, 104 Md. App. 471, 479 (1995). Petitioner argues that even if the Court found *Defenders of Wildlife* persuasive, the case did not address Maryland law and is not authoritative.

c. **Anne Arundel County Asserts that the MS4 Permit Need Not Strictly Comply with Water Quality Standards**

The County agrees with MDE that the MS4 Permit issued to it complies with State and federal law regarding water quality standards, because there is no requirement in federal law that an MS4 permit contain specific discharge levels. Rather, the language in the Water Quality Act relied upon by Petitioners applies to industrial – not municipal -- storm water discharges. State law, as well, does not require the MS4 permit to comply with water quality standards.

The County also agrees that MDE's requirement in the Permit that the County's restoration of 20% of the County's impervious land within 5 years will reduce pollutant discharge and make progress towards compliance with water quality standards. Specific water quality requirements or benchmarks – as Petitioner's suggest – would be impractical, if not impossible for the County to meet. Furthermore, pollutant reading levels are not the way to measure the County's compliance at this time, due to the infrequency and variability of storm water discharge.

2. *Petitioner's Second Issue: The Permit Lacks Enforceable Benchmarks to Assess Progress*

Petitioners next argue that the Permit does not have any interim benchmarks, milestones, or progress tracking of any kind which is necessary if the date of the "compliance schedule" exceeds one year. [5] Benchmarks and milestones are essential in a permitting schedule to ensure that the strategy and practices are sufficient to meet the TDML (total-maximum-daily-load) and WLA (watershed allocation) requirements for the Bay. They are also critical to adoptive management – to learn what pollutant control practices are effective and how they could be changed, if needed.

While Respondent-MDE argues that the completion of 20% restoration before the five year permit term is an enforceable schedule, Petitioner states that permits could be extended for many additional years and the statute requires measurable performance and compliance *prior* to conclusion of the Permit. Furthermore, MDE has not shown how the 20% restoration would achieve any net reduction of pollutants in the storm water system. Ultimately, the Permit's "20% restoration plan" has no connection to water quality standards and does not relate to any measurable reduction of pollutants.

As a result of the County's failure to gauge the efficiency of the Permit's implementation programs, the County would also violated WLA (watershed allocation) requirements. CBF submits that it is "arbitrary, capricious and otherwise contrary to law for MDE to issue a permit to the County that does not address these legal requirements." *See* CBF Petition, at 11.

MDE responds that the Permit establishes a system of adaptive management where the County must and will continuously reassess the effectiveness of its strategies to reduce pollutant discharge, and that it will determine what additional practices or programs would be necessary to

[5] 40 C.F.R.§ 122.47(a)(3) states that "if a permit establishes a schedule of compliance that exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievements."

meet established wasteload allocations, and to modify its plans accordingly. Additionally, MDE reiterates its argument that strict compliance with water quality standards is not mandatory.

Respondents further state the EPA has established an interim policy for incorporated water quality-based pollutant limitations in its own NPDES storm water permits. Petitioners fail to explain why the EPA would develop a policy of their own if the compliance was a mandatory requirement. Rather, the EPA encourages states to adopt similar policies but again, does not make it a requirement. Additionally, benchmarks and compliance schedules are not mandatory. *See* 40 C.F.R. 122.47(a) ("a permit may, when appropriate, specify a schedule of compliance leading to compliance with [the CWA] and regulations").

3. ***Petitioner's Third Argument: The Permit Does not Ensure Compliance with the Prohibition on Illicit Discharges***

Petitioners argue that the Permit does not contain clear language and a requirement that illicit, unpermitted substances may not be discharged. Federal regulations require all NPDES permits to contain language prohibiting non-storm water discharges into storm sewers. All the permit has is a "program" for detecting illicit charges – but does not include any requirements of such a screening program. The Permit allows for a possible "alternative program" to identify, investigate and eliminate illegal connections in the drain, but such a program can only be administered through a formal permit modification subject to public notice and comment.

Again, Petitioners emphasize that for the illicit substance detection, there are no enforceable deadlines or comprehensive plan involved that would help actually address and remedy the illicit discharge issues. In sum, "the fashion in which illicit discharges are addressed in the Permit simply makes no sense." *See* CBF Petition, at 12.

MDE, on the other hand, states that the Permit *does* require the County to implement an illicit discharge detection and elimination program to eliminate all discharge that is not storm water.

While an industrial facility can control the discharge operations on its property, a municipal facility cannot have complete control over the individuals living in or passing through its jurisdiction. Petitioner's argument that illicit discharges can be identified and eliminated on set schedules dramatically over-simplifies the complexity of a municipal permit. Here, the County has established and implemented an illicit discharge program to meet the minimum standards set forth in the Permit: it produces an Illicit Discharge Detection and Elimination Annual Report documenting outfall inspections, field investigations, and compliance actions during a given calendar year. Additionally, illicit discharge into a storm drain is prohibited by County law.

The County agrees that the permit does contain an adequate requirement to prohibit non-storm water discharge into the storm sewers as required by 33 U.S.C. § 1342(P)(3)(b)(ii). The County likewise agrees with MDE that the Petitioners have oversimplified the complexities associated with County-wide illicit discharge elimination. The CWA, EPA and MDE recognize that complete elimination of illicit discharge is not feasible – and it is not required by law for a MS4 permit. The County does not have the ability to completely control the hundreds of thousands of individuals that live in the County to ensure strict compliance. However, having an illicit discharge detection and elimination program in place meets the requirements for a municipal MS4 permit as contemplated by the CWA.

4. ***Petitioner's Fourth Argument: The Permit Does not Require Adequate and Representative Waterbody Monitoring***

Petitioner's fourth issue with the NPDES permit relates to waterbody monitoring. Petitioner states that the monitoring required under the MS4 permit is legally inadequate because it only requires monitoring at one small outfall, one in-stream station and physical monitoring of only one watershed. Instead, Petitioner argues that the CWA regulations require all large MS4's to have a program in place to monitor and control pollutants in storm water discharges. Anne

Arundel County has seven impaired waterways and over 900 outfalls – the monitoring of one outfall is not representative of the entire system and watershed covered by the permit.

Additionally, Petitioner argues that federal regulations require MS4 permits to submit a proposed monitoring program for representative data collection that describes the screening points to be sampled in multiple locations. They also require MS4 permits to sample and assess discharge from landfills, facilities and hazardous waste sites that could emit a substantial pollutant.

Respondent states that Petitioner's waterbody argument is flawed because it again assumes that the Permit must strictly comply with water quality standards. The Permit requires the implementation of best management practices to reduce pollutant discharge, but it does not require specific numeric limits or specific standards because strict compliance is not required. In addition, the extraordinary scope of work suggested by Petitioners for monitoring would be unduly burdensome on the residents of Anne Arundel County, if not technically and physically impossible.

5. ***Petitioner's Fifth Argument: The Permit Does not Include Legally Required Public Participation Provisions***

Petitioner's final issue with the Permit is that it does not contain the requisite public participation requirements for making changes to the Permit. Maryland law requires that MDE comply with public participation requirements (published notice, and opportunities to attend a meeting, to comment, and to seek judicial review of any permit decisions) before issuing a discharge permit.

Petitioner argues that pollution control plans or programs that are enacted after the issuance of the Permit must be treated as major modifications to the Permit and should be subject to the full participation requirements under Maryland law. Otherwise, Petitioner asserts that the MDE

and the County could negotiate different terms outside of the formal permit issuance process with no opportunity for public involvement or comment.

Respondents counter that the programs and practices to help reduce and eliminate pollutants are necessary to help reduce and eliminate pollutants in accordance with the Permit's main goals. The implementation efforts are not specific pollutant/effluent limitations as Petitioner describes them, but rather, are *plans* to implement effluent limits.

MDE sets effluent limits in the NPDES permits that it issues, but it does not dictate how a permittee meets the limits. The CWA defines "effluent limitation" as a restriction established "by a State or the Administrator on quantities, rates, and concentrations of pollutants." 33 U.S.C. § 1362(11). Section 9-101 of the Environment Article of the Maryland Code defines the term in essentially the same way. Both definitions refer to a restriction/prohibition issued by the permitting authority and placed in a permit versus a restriction/prohibition established by the owner of the Permit in order to *work towards achieving the permit requirements.*

Respondent further states that the restoration plans are not effluent limitations, they are implementation plans to meet the requirements for planning improvement as the Permit requires. The Permit is designed as an iterative process to improve water quality. Anne Arundel County currently has 100 TDML's for waters within its borders and the goal of the permit is not to achieve compliance with wasteload allocations during the term of the Permit, but to force the County to complete plans for future compliance with watershed allocations and potentially water quality standards too. Because the implementation plans do not establish effluent limitations, the incorporation of the plans does not constitute a "modification" of the Permit requiring public participation.

Even assuming that the implementation plans are effluent limitations as Petitioner would want the Court to believe, Respondent argues that Petitioner's claim is not ripe for review because no County implementation plan has been reviewed or approved by the MDE under the terms of the Permit and it is unclear whether any will actually become an enforceable component of the Permit. The issues are "future, contingent, and uncertain" and therefore are not ripe for review and not justiciable.

ANALYSIS

In oral argument before the Court on November 10, 2014, both the Petitioner and the Respondent provided this Court with the rulings of other circuit courts in the State of Maryland on the issue before the Court today: the applicability of water quality standards to the issuance of municipal NPDES permits.

Petitioner presented the December 4, 2013 from the Circuit Court for Montgomery County. Judge Rubin considered the merits of a final determination by MDE to issue a NPDES municipal storm sewer system discharge permit to Montgomery County. The Court held that the Montgomery County NPDES Permit must include requirements to meet quarter quality standards under Environment Article § 9-324, Clean Water Act §§ 301 and 402 and federal regulations, 40 C.F.R. § 122.44(d). *See* Opinion and Order, *Anacostia Riverkeeper, et al. v. Md. Dept. of the Enviroment*, et al, Case No. 339466-V, at 2.

The Montgomery County case held that the permit lacks ascertainable metrics for meeting water quality standards that "can either be met or not met." *Id.* Additionally, the Court found that best management practices and annual reports were insufficient to inform the public or the Court of what the permit specifically requires, and that the permit's requirement to restore

"20% of the impervious surface is simply too general to show how the permittees will meet water quality standards." *Id.*

Respondents, on the other hand, presented the Court with a transcript of proceedings in the case of *Blue Water Baltimore, et al. v. Maryland Department of the Environment* from October 3, 2014 in the Circuit Court for Baltimore County, Case 03-C-14-000761. Judge Stringer, in the *Blue Water Baltimore* case, ruled that the Water Quality Act *does not* require meeting water quality standards, but rather,

> [P]ermit requirements for municipal discharge shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques... and such other provisions as the administrator or the State determines appropriate for the control of such pollutants.

Transcript of Proceedings, *Blue Water Baltimore v. Md. Dept. of the Enviroment*, Case No. 03-C014000761, at 5:13-19 (J. Stringer). Judge Stringer cited the Ninth Circuit *Defenders* case, where the Court found that there are two different permit standards under the Water Quality Act, one for industrial activities and a separate one for municipal discharge. *Id.* at 6:1-9. Judge Stringer again noted that "the [Ninth Circuit] said that the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm sewer discharges to comply strictly with 33 U.S.C. Section 1311(b)(1)(C)." *Id.* at 6:14-17. *See also Id.* at 7: 23-25; 8:1-2 ("At this time, EPA determines that water-quality based controls implemented through the iterative process, as described today, are appropriate for the control of such pollutants and will result in reasonable, further progress towards attainment of water quality standard").

Additionally, Judge Stringer also held that Maryland law did not require the MS4 permit to meet water-quality standards. *Id.* at 9:6-9. Rather, the Permit does not and need not comply with water quality standards or wasteload allocations, but the County's obligation is to establish

"a management program and best management practices" to help work towards the achivement of water quality standards. *Id.* at 9:18-22.

Neither opinion is binding on this Court. We do, however, find Judge Stringer's interpretation of the applicability of water quality standards to municipal NPDES permits to be in line with relevant case law and guiding regulations. Upon review of the relevant federal and state statutes and regulations, pertinent case law, the Department's Basis for Final Determination to Issue the NPDES Municipal Separate Storm Sewer System Discharge Permit to Anne Arundel County, the parties' oral argument and written memoranda, and the NPDES permit decisions of Montgomery County and Baltimore County, the Court will **AFFIRM** Maryland Department of the Environment's decision to re-issue the National Discharge Elimination System Permit to Anne Arundel County

Issue (1)

Contrary to Petitioner's contentions, the Court holds that the Clean Water Act does not require strict compliance with water quality standards for municipal storm water sewer system permits. There are two requirements: (1) that the permit effectively prohibit non-storm water discharges into the storm sewers; and (2) that the permit has controls in place to reduce the discharge of pollutants ***to the maximum extent practicable,*** including through the use of management practices, control techniques and system, design and engineering methods, and other provisions as the Administrator or the State determines appropriate for the control of such pollutants. 33 U.S.C. § 1342(p)(3)(B). Additionally, we adopt the holding of *Defenders of Wildlife v. Browner* which likewise held that Water Quality Standards are not applicable to municipal storm water discharges.

Under Maryland Law, Section 9-324(a)(1) of the Environment Article, the Department can only issue a permit if it complies with "all applicable state and federal water quality standards and effluent limitations." The Department has interpreted "applicable" to be consistent with the Clean Water Act and the *Browner* decision and stated in its permit determination memorandum that "water quality standards are not applicable to MS4 permits unless the Department requires them." The Court must give deference to the agency's interpretation of its own regulation. *Assateague Coastkeeper, et al. v. MDE*, 200 Md. App. 665, 714, (Md. Ct. Sp. App. 2011).

The Court of Special Appeals in *Assateague* found that a permit that results in a "net reduction of pollutants" is permissible under federal regulations. *Id.* Likewise, compliance in this case with the Permit's implementation plans will result in a net reduction of pollutant discharges and an appropriate framework to achieve water quality standards and is sufficient under federal and state law and regulations. Therefore, the "specific terms" and "clear requirements" insisted upon by Petitioners are not necessary to achieve water quality standards – the implementation plan in place achieves the desired goals and complies with federal and state law.

Issue (2) & Issue (5)

In terms of the CBF's concern regarding compliance schedules and benchmarks, the Court finds that the Permit does have compliance schedules and enforceable benchmarks to assess the progress of the implementation programs, as laid out in Part IV of the Permit, Section E (Restoration Plans and Total Maximum Daily Loads) and Section F (Assessment of Controls) as well as in Section V: "Program Review and Annual Progress Reporting." Section IV requires the County to "conduct systematic assessments and develop detailed restoration plans for all watersheds in the County." *MDE Basis for Final Determination*, at 6.

This section of the Permit also includes "public notification and participation procedures, and requirements for the County to address any material comments from the public" before submitting a final version of the plan to MDE for review and approval. *Id.*

Issue (3)

The Permit *does* prohibit illicit pollutant discharge. MDE's memorandum states that the Permit has language that will "effectively prohibit pollutants in storm water discharges or other unauthorized discharges as necessary to comply with [Water Quality Standards]." *MDE Basis for Final Determination*, at 4. The Permit includes a program to detect and eliminate all discharges to and from the MS4 that are not either composed entirely of storm water or permitted by MDE, as stated in Part IV:D:3, as well as enforcement and penalties for non-compliance in Part VII.

Issue (4)

The Court finds that the Permit *does* have adequate tracking implementation and water quality monitoring – including long-term monitoring plans. *See MDE Basis for Final Determination*, "Issue 4: storm water Monitoring," at 14-17. Detailed and representative waterbody monitoring is laid out in Part IV: E and F, as well as in Part V of the Permit, "Program Review and Annual Progress Reporting." Finally, the Permit includes a provision for public participation in Part IV:E:3

In addition, MDE states that since the beginning of the NPDES program, the jurisdictions in the permit have significantly monitored storm events to create a comprehensive characterization of the water chemistry of highway, commercial, industrial and residential runoff. The data has been translated and combined into a comprehensive statewide database. In addition, MDE cites three pages of other monitoring systems it has in place throughout the MS4 jurisdictions.

The County's MS4 Permit need not strictly comply with water quality standards to the extent that the Petitioners allege they must. Upon review of the Permit's extensive implementation plans, the Court finds that compliance with the permit will result in a net reduction of pollutant discharge and a framework for eventually achieving Water Quality Standards.

In sum, Maryland Department of the Environment's decision to issue the NPDES permit to Anne Arundel County is NOT: (1) unconstitutional; (2) in excess of statutory authority; (3) the result of an unlawful procedure; (4) affected by an error of law; (5) unsupported by substantial evidence in the light of the entire record as submitted and finally, does not appear to be (6) arbitrary or capricious.

Therefore, the Department's decision to issue the Permit is hereby **AFFIRMED.**

Appendix C

BLUE WATER BALTIMORE, ET AL.
Petitioners
VS
MARYLAND DEPARTMENT OF THE ENVIRONMENT
Respondent

* IN THE
* CIRCUIT COURT FOR
* BALTIMORE COUNTY
* Civil Proceeding
* Case No.: 03-C-14-000761

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TRANSCRIPT OF PROCEEDINGS:
October 3, 2014

Judge Stringer, Presiding

KHUSHI K. DESAI, ESQ.
JENNIFER C. CHAVEZ, ESQ.
Counsel for Petitioners

PAUL N. De SANTIS, ESQ.
Counsel for Respondent

Debbie H. Eichner, transcriptionist

JUDGE STRINGER: All right. I'm calling the matter of the Petition of Blue Water of Baltimore, et al., case number C-14-761. (PAUSE)---

MR. DeSANTIS: Good morning Your Honor. (PAUSE) (JUDGE MUTED AT THE BENCH - INAUDIBLE)---

JUDGE STRINGER: All right. Good morning everyone. Counsel, could you please identify yourselves and spell your names for the record please?

MS. DESAI: Khushi Desai, K-H-U-S-H-I Desai, D-E-S-A-I on behalf of Petitioners. Good morning.

JUDGE STRINGER: Good morning.

MS. CHAVEZ: Jennifer Chavez, also on behalf of Petitioners. J-E-N-N-I-F-E-R C-H-A-V-E-Z.

MR. DeSANTIS: And Paul De Santis. Two words, D-E S-A-N-T-I-S, on behalf of Maryland Department of the Environment.

JUDGE STRINGER: All right. Good morning again counsel. You can have a seat.

MR. DeSANTIS: Good morning.

COUNSEL: Good morning.

JUDGE STRINGER: This matter is before the Court on the Petition for Judicial Review filed by the Petitioners, Blue Water of Baltimore, Gunpowder Riverkeeper, Natural Resources Defense Council, Sierra Club and Waterkeepers Chesapeake. We have held a hearing in which

counsel argued their cases and the parties have submitted Memoranda. And I thank you again for your Memoranda, and your argument and all the effort you've put into this case. So, is -- (PAUSE) (THE JUDGE CONFERRING WITH THE CLERK)---so, I've heard argument of counsel and I set the matter into today for the Court's decision from the bench. The, the parties have both accurately stated the standard of review and I will read from the Court of Appeals Decision in Motor Vehicle Administration versus Sanner, S-A-N-N-E-R, 434 Md. 20, 2013 (phonetic.) case. That Court cited the case of Maryland Aviation Administration versus Noland (phonetic.), in stating the proper standard of review for an adjudicatory decision by an administrative agency. And I will quote from the opinion. "A Court's role in reviewing an administrative agency adjudicatory decision is narrow. It is limited to determining if there's substantial evidence in the record as a whole to the support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law. In applying the substantial evidence test, a reviewing Court decides whether a reasoning mind reasonably could have reached the factual conclusions the agency reached. A reviewing Court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing Court must review the agency's decision in the light most

favorable to it. The agency's decision is prima facie, correct and presumed valid, and it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." Court says that a Court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute, which the agency administers, should ordinarily be given considerable weight by reviewing Courts. Furthermore, the expertise of the agency, in its own field, should be respected. (PAUSE)---The Petitioners have raised three issues in this case. Number one, whether the restoration plans constitute effluent limitations or a permit modification to which procedural requirements apply, such as, public participation, enforcement and judicial review. Number two, whether the permit violates regulations for monitoring pollution and compliance. And three, whether the permit violates requirements for compliance schedules. The parties have raised another issue preliminarily, and frankly, I'm not clear on what the Petitioners' argument is with respect to it and that is whether the Clean Water Act requires the MS4 discharge permits to comply with water quality standards. I mean, the -- all of the Memoranda go into detail concerning

this question, but it, it doesn't appear to me that the Petitioners are arguing that the permit must require that the permit provide that the permittees (phonetic.) comply with water quality standards, but frankly, I'm not clear on whether that's the Petitioners' position, but it's been briefed, so I'll at least consider that issue as well; and at the very least, it offers some backdrop to the other three issues that were clearly raised by the Petitioners. With respect to the question, whether the CWA requires MS4 discharge permits to comply with water quality standards, the Water Quality Act, which is part of the Clean Water Act, found at 33 U.S.C. Section 1342(p)(3)(B)(iii), which is Section 402 of the Act, provides, that for municipal and industrial stormwater discharges, permit requirements for municipal discharge shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques, and system design, and engineering methods and such other provisions as the administrator or the State determines appropriate for the control of such pollutants. This section of the Water Quality Act does not require meeting water quality standards. (PAUSE)---In Defenders of Wildlife versus Browner (phonetic.), 191 F.3d 1159, 1999 case from the 9th Circuit Court of Appeals, the Court of Appeals for the 9th Circuit was presented with the question, whether the Clean Water Act requires numeric limitations to insure strict

compliance with State water quality standards. The Court in Defenders stated, that when a permit is required for the discharge of stormwater, the Water Quality Acts sets two, different standards. There's a standard for industrial discharges, which requires that industrial activity shall meet all applicable provisions of Section 1311, which regards meeting water quality standards. But as to municipal discharge, there's a different standard and again, it cites (B) (iii). That's (B) (iii). And they cite the language, that it shall require -- the municipal discharge permit shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques, etcetera. Again, citing 33 U.S.C. Section 1342(p) (3)(B)(iii). The 9th Circuit Court of Appeals said that the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm sewer discharges to comply strictly with 33 U.S.C. Section 1311(b)(1)(C) (phonetic.). And they cite the distinction again between industrial stormwater requirements that must comply with 33 U.S.C. Section 1311. (PAUSE)---And must -- and the industrial discharges must comply strictly with stormwater quality standards, but the Court said that Congress chose not to include a similar provision for municipal storm sewer discharges. Instead, Congress required municipal, storm sewer discharges to quote, "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 determines appropriate for the control of such pollutants." The Court held, at 33 U.S.C. Section 1342(p)(3)(B)(iii) does not require municipal storm sewer discharges to comply strictly with 33 U.S.C. Section 1311(b)(1)(C). The Court noted that 1342(p)(3)(B)(iii), and that's the section we've (inaudible) municipal, stormwater discharge, replaces the requirements of Section 1311 with the requirement that municipal stormwater discharges reduce the discharge of pollutants to the maximum extent practicable. (PAUSE)---The E.P.A.'s interpretation of Section 402(p)(3)(B) is stated in -- or stated at 64 Federal Register, 68,731, which provides that Section 402(p)(3)(B) establishes M.P.D.E.S. permit standards for discharges from municipal, separate storm sewer systems or MS4s. M.P.D.E.S. permits for discharges from MS4s says, may be issued under a system or jurisdictional basis. Two, must include a requirement to effectively prohibit non-stormwater discharge into the storm sewers. And three, must require controls to reduce pollutant discharges to the maximum extent practicable, including best management practices, etcetera. At this time, E.P.A. determines that water quality-based controls implemented through the iterative (phonetic.) process, as described today, are appropriate for the control of

such pollutants and will result in reasonable, further progress towards attainment of water quality standards. As to the Baltimore County permit in question, the E.P.A. has approved the P.G. County, or Prince George's County, permit used as a template, which it found was consistent with E.P.A. regulatory requirements. That's at-- in the record at M.D.E. 81 (phonetic.). The Baltimore County permit is, I'm told by counsel at verbatim, practically verbatim to the Prince George's County permit. And based on these authorities, the Court concludes that the Clean Water Act does not require MS4 discharge permits to require compliance with the water quality standards. And I'm relying primarily on 33 U.S.C. Section 1342(p)(3)(B)(iii). The Maryland law, as set forth in the Environmental -- Environment Article of the Maryland Code, Section 9-324, which provides that the M.D.E. may issue a discharge permit if the department finds that the discharge meets applicable State and Federal water quality standards. The Department has enacted regulations at COMAR 26.08.04.02(A)(1) (phonetic.), which provides that the discharge, or proposed discharge specified in the application, is or will be in compliance with all applicable requirements of-- and it lists effluent limitations. B, service and groundwater quality standards. C, the Federal Act. C, -- D, rather, a State law or regulation. E, best available technology. F, Federal effluent guidelines. So, Maryland also

refers to the applicable requirements. This Court interprets the use of the term quote, "applicable term" -- quote, "applicable" end of quote, to be consistent with the terms of the Clean Water Act, which is not required in municipal stormwater discharges to comply with water quality standards. And therefore, this Court believes that Maryland law does not require the MS4 permit to meet water -- to require the discharge to meet the water quality standards because there is no applicable Federal or State law requiring it. The Petitioner argued, that even if the M.D.E. is not required by the Clean Water Act to provide that the MS4 discharges comply with water quality standards. The M.D.E. has provided in this permit, Section 3, that it would require a compliance with water quality standards in storm sewer discharges, as well as wasteload allocations. (PAUSE)---The County -- or actually, M.D.E. -- the -- I'm sorry. The M.D.E. argues that the permit does not mandate compliance with water quality standards or wasteload allocations; rather, the permit requires the County to establish a management program and best management practices that will prohibit pollutants and stormwater discharges as necessary to comply with Maryland's receiving water quality standards. And I'm referring to M.D.E. 19. Although the language in part 3 of the permit is somewhat ambiguous, I did believe that its provisions and its intent are that the County -- that the permit requires the County to

establish a management program that will reduce pollutants and attain applicable wasteload allocations; and the permit does not provide that the County stormwater discharges must comply with water quality standards or meet the W.L.A.s. Under the Water Quality Act, the standard is quote, "maximum extent practicable," end of quote. The County is not required to meet wasteload allocations now and it must have a -- but it must have a program with best management practices to reduce discharge (inaudible), and meet the wasteload allocations, and make adequate progress toward compliance toward the water quality standards and wasteload allocations for stormwater. And that is what the permit provides for. Therefore, this Court believes the permit complies with 33 U.S.C. Section 1342(p)(3)(B) of the Clean Water Act. Now, to get to the first, expressed issue raised by the Petitioners. The Petitioners argue, that because the County's restoration plans will be developed and approved after the permit has been issued, the plans constitute a modification of the permit to which procedural requirements apply, which would include opportunity for public comment and opportunity for judicial review. Then the Petitioners argue that the restoration plans are effluent limitations that must be included or incorporated in the permit to be enforceable and to ensure compliance with water quality standards. The term, effluent limitations, as defined by the Clean Water Act, is any restriction established

by a State or the administrator of the E.P.A. on quantities, rates, etcetera of pollutants which are discharged. And I'm citing 33 U.S.C. Section 1362 (11). There's a similar definition of effluent limitations in the Maryland Code Environmental Article Section 9101 (phonetic.), which defines effluent limitations as restrictions or prohibitions established under Federal law or a law of this State. (PAUSE)---The permit requirements in this present case do not cite a State or Federal law establishing the restoration plans or restrictions. The provisions of any program will be designed by Baltimore County, the permittee, to reduce pollution, pollution discharges. They're not established by State, or the M.D.E. or Federal law and therefore, do not fit the definition of effluent limitations under Federal or State law. Further, what must be included in the restoration plans is already included in the permit. The permit specifies what the plans must include. And for that, I cite the record M.D.E. 25 and 26, Section 4(E). And the section paragraph under Section 4(E) provides, that as required below, watershed assessments and restoration plans shall include a thorough water quality analysis, identification of water quality improvement opportunities and a schedule for B.M.P. (phonetic.) and programmatic implementations to meet stormwater W.L.A.s, W.L.A.s included in E.P.A.-approved T.M.D.L.s. And then, at 4 -- Section 4(e)(2)(A) and (B) (phonetic.), there are other provisions regarding what must be

included in the restoration plans. (PAUSE)---So, the -- and I'll, and I'll get to them again in a minute because it matters as to the modification question as well. But the provisions are -- that are in the permit are effluent limitations I believe, and they are in the permit, and are enforceable and are already the subject of public comment and procedures. (PAUSE)---So, I reviewed 40 C.F.R. Section 122.34. I don't believe either party cited this regulation. It refers to operators of regulated, small MS4s. Is this a small MS4?

MR. DeSANTIS: It is not Your Honor.

JUDGE STRINGER: Oh. It's not. Well, that's why you didn't cite it then. Okay. (PAUSE)---In any event, I believe that the permit, in, in those sections, do contain effluent limitations or the effluent limitations that would be required in the plans that will be submitted. The Petitioners also argue, that the approval of the restoration plans after the permit is issued constitutes a modification of the permit. Now, as to the question, whether approval of the restoration plans, after the permit is issued, constitutes a modification of the permit, again, I note that the permit specifically provides what the restoration plans must include. I just read from Section 4(E) at M.D.E. 25, which provides what restoration plans shall include. At M.D.E. 26, Section 4(E)(2) also provides further for what the restoration plans must include. (PAUSE)--- Section 4(E)(2)(a) (phonetic.) provides that the Baltimore

County shall commence and complete the implementation of restoration efforts for 20% of the County's impervious surface area, consistent with the methodology described in the M.D.E. document that they cite. And it goes on from there. At Section (E)(2)(b), the permit provides, that as part of the restoration plans, the County shall -- and then it goes on with include the final date, provide detailed cost estimates, evaluate and track the implementation of restoration plans, develop an ongoing, iterative process that continuously implements structural and non-structural, restoration projects. (PAUSE)---So, what is to be included in the restoration plans is already specified in the permit. The restoration plans that will be submitted will not modify the permit. The plans will be the, the manner in which the County complies with the permit, or implements the requirements in the permit, which is particularly in Sections 3 and 4. And the plans must follow the requirements provided in the permit for what must be included in the restoration plans. So, it, it is not a change in the permit. It's not a revision to the permit. I also, in trying to decide whether this -- whether the approval of the restoration plans, after the permit is issued, whether that's a modification, I consulted 40 C.F.R. Section 122.62, which provides that modification of permits can be made under certain circumstances or, or what, what, what are the causes for modification. And 40 C.F.R. Section 122.62 specifies what

causes there are for modification. One is alteration (PAUSE)---to the permitted facility or activity. It doesn't apply. Two, the director receives new information and permits be -- may be modified during that term. That doesn't apply. Three, new regulations. Not applicable. Four, compliance schedules. The director determines good cause exists for a modification of a compliant schedule, such as, an act of God, strike, flood or material shortage. That's not what we're talking about. That doesn't apply. And I, I went through the -- all of the causes here. None of them apply. 14 was for a small MS4, to include effluent limitations requiring implementation. But this is not a small MS4. Would you agree Ms. Desai?

MS. CHAVEZ: This is a large MS4.

MS. DESAI: Uh-hum.

JUDGE STRINGER: Okay.

MS. CHAVEZ: I'm sorry.

JUDGE STRINGER: So, none of those circumstances providing for causes of modification apply to the circumstances here regarding approval of plans, (PAUSE)---which I believe supports the (PAUSE)---conclusion of the M.D.E., that these are not -- approval of the restoration plans are not modifications of the permit. I note also, that the permit requires the County to submit the restoration plans to the M.D.E. before the permit is effective and approved by the

M.D.E. prior to the effective date. It's at M.D.E. 26 Section (E)(2)(b), which distinguishes this case somewhat from the Waterkeepers Alliance versus E.P.A. case, 399 F.3d 486 (phonetic.) that's relied on by the Petitioners. In that case, the Court noted that, that -- it's called a C.A.F.O., C-A-F-O Rule did not comply with the Clean Water Act. One of the problems with it -- the Court had with it was that it did not require the M.P.D.E.S. permit authorities to review the plans to assure that they reduced discharges. And they cited another case in the 9th Circuit where the failure to require the permitting authority to review the stormwater management plans violated the Clean Water Act. And the Court noted that, programs that are designed by regulated parties must, in every instance, be subjected to meaningful review by an appropriate, regulating entity to ensure that each program reduces the discharge of pollutants to the maximum extent practicable. The rule that they were analyzing in that case, they said by contrast, failed to require that the relevant, permitting authorities review the stormwater management plans to ensure that the measures -- that the operator of -- there was a small, municipal stormwater system decided to undertake, will in fact reduce discharges to the maximum extent practicable. Well, that's different than the permit in this case, which does require that Baltimore County submit the plans for approval to the M.D.E. They must not only submit the plans, they must be

approved by the M.D.E. before the effective date of the permit. I note also, that Section 4(E)(3) provides for public participation, including, notice and 30-day comment period and that the permit states that the restoration plans will be enforceable under the permit. That's Section 4(E)(2)(b) at M.D.E. 26. So, I believe these plans will be enforceable. The permit says they will be enforceable. And finally, one more factor regarding the, the contention that (PAUSE)---this permit violates the procedural requirements and ensures public participation. I believe the record, I know that at least I was informed by the M.D.E., that the County needs to establish 66 T.M.D.L.s to attain wasteload allocations for the different waterways and would -- that would require 66 implement -- or restoration plans. And the County's also required to have a system of adoptive management so it can modify its plans to use more efficient practices. And the, the, the permit refers to this iterative process. Having a right to judicial review of every plan and every subsequent modification to the plans, would I believe, would frustrate the process. If every modification of the plans, not of the permit now, but a modification of the plans, would be second-guessed or every decision might be second-guessed. The County or, or the M.D.E. argues that would be a disincentive for the County to use best management practices, maybe, maybe not, but I certainly believe it would be cumbersome and might even

(inaudible) significantly slow or grind efforts to reduce pollution to a standstill. I note also, that there has already been an opportunity for public comment and objections to the permit as it is now, and of course, we are -- the Petitioners are having their judicial review of the permit. So, there has been that process, including judicial review. (PAUSE)---So, again, as to the first issue, (PAUSE)---I do not believe that the plans will constitute effluent limitations, to which there must be these procedural requirements. And I do not believe that the plans constitute a modification of the permit, to which the procedural requirements apply. With respect to the second issue, whether the permit violates regulations for monitoring, the Petitioners contend that the permit does violate requirements and is arbitrary and capricious in that regard. The Petitioners cite as authority, in support of their contention, a number of regulations, 33 U.S.C. Section 1318 (phonetic.). Well, that's the statute. And regulations at 40 C.F.R. 122.48 (phonetic.). (PAUSE)---122.44(i) and 40 C.F.R. Section 122.26(d)(2)(iii)(D). That's the one regarding representation -- representative data collection. Certainly, regulations requiring monitoring apply to this permit to show a compliance with requirements of the permit. The Petitioners argue that monitoring at a single location is inadequate to gather representative data needed to determine compliance with Section 3 of the permit regarding water quality standards

and wasteload allocations or to determine progress toward the meeting pollution limits in all the County's watersheds. I refer to the basis for final determination to issue Baltimore County's permit by the M.D.E., which describes in detail the monitoring required by the permit and even response to the argument, that monitoring only one body of water is insufficient. I refer to M.D.E. pages 69 to 72, in which the stormwater monitoring is described in some detail. (PAUSE)---And I don't think it's necessary for me to read into the record all of the monitoring that's described there. I do note, however, that the, the monitoring requirements are found in other sections of the permit, not just Part F, which is what the, the Petitioners cited. (PAUSE)---And other assessments are described. And I'm looking at M.D.E. 25, which describes the watershed assessments. (PAUSE)---In any event, the Department of the Environment finds that the permit complies with M.P.D.E.S. Stormwater Program requirements. At page -- M.D.E. 72, the M.D.E. states that it stances that this permit is in compliance with Federal M.P.D.E.S. stormwater requirements. And again, they've described their review in -- and reasoning in detail. This Court can't say that the M.D.E.'s findings are arbitrary and capricious. The M.D.E. apparently, from the review of the record, has itself examined the data and articulated a detailed explanation for its determination. This Court can't say that there isn't substantial evidence to

substantiate them, and under the standard of review, I must defer to the agency's fact-finding and the agency's decision, as prima facie, correct. I believe that, given that, I must uphold the Petition with respect to the monitoring requirements. The third issue raised by the Petitioners is whether the permit violates requirements for compliance schedules. Petitioners contend that the permit violates the requirements for compliance schedules to achieve pollution reduction because there isn't a -- and because the Petitioners allege or contend that there is no compliance schedule. 40 C.F.R. 122.47(a) provides that a permit quote, "may, when appropriate, specify a schedule of compliance." COMAR 26.08.04.02(C)(1) provides that the Department of the Environment quote, "may impose a compliance schedule as a condition of a permit." And the way, the way this Court interprets those two regulations, under both Federal and State regulations, it is discretionary whether to impose a compliance schedule. The M.D.E. has not established a compliance schedule, and to go back to the very first issue, or for that matter, required compliance was water quality standards. And therefore, I do not find any violation of the State or Federal law with respect to the compliance schedules. The M.D.E.'s interpretation of the Clean Water Act and Maryland law I believe is a reasonable interpretation of the laws and I must give it deference. And this Court believes that the permit complies

with State and Federal law. And for all of these reasons; therefore, the Petition for Judicial Review is denied. I believe I've addressed the issues that have been raised. Counsel, again, thank you very much for the very thorough Memoranda and arguments you made in this case, okay?

MR. DeSANTIS: Thank you Your Honor.

JUDGE STRINGER: Thank you.

MS. DESAI: Thank you Your Honor.

JUDGE STRINGER: Thank you. That concludes this matter unless there's anything else Mr. De Santis?

MR. DeSANTIS: Nothing further from the State Your Honor.

JUDGE STRINGER: Ms. Desai, anything further?

MS. DESAI: No Your Honor.

JUDGE STRINGER: Okay.

MS. DESAI: Thank you.

JUDGE STRINGER: All right. Thank you for coming back. (OFF THE RECORD AT 11:22 A.M.)---

CERTIFICATE OF TRANSCRIBER

I hereby certify that the hearing in the matter of Blue Water Baltimore, et al. versus Maryland Department of the Environment, case number 03-C-14-000761 heard before the Circuit Court for Baltimore County, October 3, 2014 were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 20 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness thereof, I have affixed my signature this 15th day of October, 2014.

Debbie H. Eichner

Transcriber

Appendix D

PETITION OF BLUE WATER BLTIMORE, et al.	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE FINAL DECISION OF: MARYLAND DEPARTMENT OF THE ENVIRONMENT	*	FOR
	*	BALTIMORE COUNTY
IN THE CASE OF: MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT FOR BALTIMORE COUNTY, MD Permit No. 11-DP-3317, MD0068314	*	Case No: 03-C-14-000761

* * * * * * * * * * * * *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* filed by the Petitioners, Blue Water Baltimore, Gunpowder Riverkeeper, Natural Resources Defense Council, Sierra Club, and Waterkeepers Chesapeake, for judicial review of the determination of the Maryland Department of the Environment in re: Municipal Separate Storm Sewer System Permit for Baltimore County. Upon consideration of the petition, the parties' respective legal memoranda, the record, and arguments of counsel, and for reasons stated on the record in open court, it is this 7th day of October, 2014 by THE CIRCUIT COURT FOR BALTIMORE COUNTY, hereby

ORDERED, that the determination of the Maryland Department of the Environment is AFFIRMED.

H. Patrick Stringer, Judge

cc: Jennifer C. Chavez, Esquire
Khushi K. Desai, Esquire
Paul N. DeSantis, Esquire

Appendix E

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.

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.

JUDGE RONALD B. RUBIN
CIRCUIT COURT FOR MONTGOMERY COUNTY

12-3-13

Appendix F

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ANACOSTIA RIVERKEEPER, ET AL:		
Plaintiff,	:	
v.	:	Civil No. 339466
MARYLAND DEPARTMENT OF THE ENVIRONMENT	:	
Defendant.	:	

Rockville, Maryland

November 20, 2013

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE RONALD B. RUBIN, JUDGE

APPEARANCES:

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delay. The county wasn't -- neither the county nor MDE were required to do anything immediately after we filed the petition. The petition identifies the decision that we're appealing from; it identifies the relevant agencies involved. And counsel, sitting here at counsel table today, were notified personally that the petition would be filed. So there can be no claim of prejudice or failure to provide notice, and we've cited cases in our brief as the court has already alluded to which very simply state that if you misname a party, even if you misname a party, which we did not here, if you misname a party and they aren't prejudiced, you can change it. We didn't add a new cause of action so the concept of relation back has no place here whatsoever. It's just irrelevant as well as concepts of the mandatory nature of statutory limitations, of course, there's no question. But given that the paper was filed on the day it was required to be filed, that's the end of the question.

THE COURT: Thank you.

Mr. Clerk, this is my ruling.

JUDGE'S RULING

Case is back before the court on remand from the court of special appeals to address the merits of the claims presented. This hearing is conducted, among other things, under 7-208, and the disposition will be under rule 7-209, I believe.

As the court of special appeals noted, this case arises from a challenge to the issuance of a municipal -- a

separate stormwater permit to Montgomery County, Maryland and others by the Maryland Department of the Environment. Generally speaking, the purpose of the permit is to attempt to regulate the discharge of stormwater runoff from the storm system owned or operated by Montgomery County.

The challenge in this case, among other things, goes to the specificity of the permit, among other things. I am not going to recite the history of the Clean Water Act. It's been done many times by appellate courts, but here the Clean Water Act does apply and affects what the state does and why it does it. And while I understand that it's cooperative and the state has been delegated with the authority to implement the MPDES permit program, nonetheless, the permit still has to comply with federal law, and I know that Maryland law provides the MDE with the authority to issue discharge permit if it determines that. The terms of the permit comply with all applicable laws. And that's sort of the crux of the case. The terms of the permit, I think, as respecting in 9-324 of the Environmental Article. And I'll get to that in a minute.

I am persuaded that this appeal was timely filed. The fact that the Clerk involved more county, said I'm not going to do anything more or less until you give me some money, is fine, but I don't believe that affects, in my judgment, a timeliness issue.

With respect to the name, I do not see how what the

petitioner did here does not comport with the requirements. There are instances where the appellate courts have required strict compliance, and there are instances where the appellate courts have required substantial compliance. Here, for sure, there was substantial compliance, I find, with the appeal requirements. I see no reason to make these appeals sort of a game of either, tag-you're-it, or gotcha. But if the appellate courts deem that to be appropriate, that's certainly within their pervue in the sense that if they conclude that I'm incorrect about timing, that ends the case. But I conclude it was timely filed.

The landscape of this case has been changing by the general assembly largely for what you do and how you do it. We are here under the so called new law which applies retroactively even though nobody knew what to do at the time because the law hadn't been passed yet. So using our clairvoyant skills we're going to do that now.

In my view, I do not understand, and maybe it's my limits, what the agency did and why it did it. My questions to counsel were not hardballs; I was simply trying to elicit from them the standards of the permit. And it may be that permits of this nature may simply to a large extent incorporate by reference lots of other documents and pieces of paper that are either in place or will be in place. I do not see how that informs anybody, much less the public, about what the recipient

of the permit is supposed to do, how they're supposed to do it, and what, if any, standards apply, and how, if at all, does one measure compliance or not compliance. I allow for the possibility that I simply do not understand this area sufficiently, but I have tried mightily to understand what the agency did and why it did it, and my questions reflect my lack of clarity about what the county needs to do.

I simply don't understand and it does not seem to by compliant, in my judgment, with federal law, with a permit that says from the state to a county, listen, follow best practices because, you know, that's what we're doing. Well, that's fine in a sense, but I don't believe, as the second circuit stated, and I agree with their opinion, that that's sufficient clarity in the permit. Best practices change all the time. Every time there's a meeting or a conference somebody -- these are the new best practices. Now, it may be that's it's different in the environmental area, but I doubt it. And the specifics that are in there, the 20 percent and the other matter, in my judgment, are simply too general, and it is impossible, in my view, to clearly understand what the county is supposed to do, how they're supposed to do it, how their performance is or isn't to be measured, and how somebody, importantly, in my judgment, looking at it from the outside, i.e., not the government agencies, would know, it is, in my judgment, basically unknowable because the response would be, well, we implemented

best practices, and there you go.

I understand fully that it is not my job to tell the agency what to do, and I'm not going to do that, but both the county and the state, respectfully, must comply with the Clean Water Act and the regulations adopted by the federal agencies because they have to. And I certainly give deference to the interpretations of the law that are utilized by the state and its agencies certainly is more within their expertise than mine, and I don't question that. My problem is with clarity and it seems to me that the law -- the federal law requires specific standards, benchmarks in the permit, otherwise, it's not really a permit, it's a -- I'm not sure what it is.

Excuse me a second. I certainly agree that the scope of judicial review of the decisions by administrative agencies in Maryland and elsewhere is narrow, and the decisions made by such agencies, of course, and certainly are entitled to deference and a presumption of validity. And I also understand and have applied that the agency's interpretation and application of the statues and rules that the agency administers is accorded a considerable weight and deference by review in courts, particularly when the matter is within the expertise of the agency. However, my conclusion is that here there was a violation of the law, which is not something particularly within the expertise of the agency. And in addition, I do not know how and why the agency reached the decisions that it reached. It's

not, at least to me, understandable or clear.

I have looked at the record and all the data, but I think my discussion with counsel illuminate, at least for me, my lack of clarity as to what the permit requires or, no pun intended, permits. And I conclude that it lacks ascertainable metrics that can either be met or not met, and it seems to me that the notion that, well, we get a report from the county every year, we'll see how it goes, is probably not sufficient, and is not sufficient in my judgment to comply with the Clean Water Act.

But what I'm going to do is, I'm going to remand this case to the agency for further proceedings. I'm neither going to affirm it or reverse it. I'm going to remand it to allow the agency to explicate in a more clear way what the standards are in the permit, how they're measured, who does the measuring, and explicate what the agency did and why it did it. The fact that I get a piece of paper that's really long doesn't mean it's clear. And I will include in it the specific legal requirements because I agree with the petitioners that those requirements are part of the law and must be followed.

So, if petitioner's counsel will draft an appropriate order consistent with my oral opinion, I will sign it, and the clerk will docket it, and you all will go from there.

Thank you.

(The proceedings were concluded)

X Digitally signed by Melissa Drury

Digitally signed certificate

NATIONAL CAPITOL CONTRACTING, LLC hereby certifies that the foregoing pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County, in the matter of:

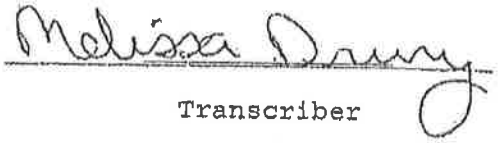
Civil No. 339466

ANACOSTIA RIVERKEEPER, ET AL

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

By:



Transcriber