No. _____

In the Supreme Court of the United States

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

Petitioner,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX
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[FILED AUGUST 6, 2019]

Circuit Court for Carroll County
Case No. 06-C-15-068141

Circuit Court for Frederick County
Case No. 10-C-15-000293

Argued: September 13, 2018

IN THE COURT OF APPEALS

OF MARYLAND

Nos. 5 & 7

September Term 2018

MARYLAND DEPARTMENT OF THE ENVIRONMENT

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

FREDERICK COUNTY, MARYLAND

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Barbera, C.J.,
*Greene
*Adkins
McDonald
Watts

Hotten
Getty,

JJ.

Opinion by McDonald, Jr.
Watts, Hotten, and Getty, JJ., dissent.

Filed: August 6, 2019

*Greene and Adkins, JJ., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Maryland Constitution, Article IV Section 3A, they also participated in the decision and adoption of this opinion.

In the quest to conserve a vital resource- the nation's waters -Congress has enlisted the federal, state, and local governments under the Clean Water Act ("the Act")[1] in a regulatory approach sometimes called "cooperative federalism." This effort involves a type of regulation that takes the form of a "permit" issued by a federal agency (or a state agency with federal oversight) at specified intervals to the regulated entity. Such permits authorize discharges of pollution into waterways, which the Act otherwise prohibits. When the targeted pollution is in stormwater, the permittee- *i.e.,* the regulated entity- is often a local government. Inevitably, as in any assignment of responsibility for solving a serious problem, there is disagreement as to the solution and the allocation of that responsibility. One way to resolve such disputes is through judicial review of the permit.

This consolidated appeal concerns judicial review of the most recent permits issued to Carroll County and Frederick County ("the Counties") under the Act and a parallel Maryland regulatory scheme. The permits regulate the discharge of polluted stormwater into waterways in the Chesapeake Bay watershed. The permits were developed and issued by the Maryland Department of the Environment ("Department") under the supervision of the United States Environmental Protection Agency ("EPA"), as part of an EPA-led, multi- state effort to restore the Chesapeake Bay in compliance with the Act.

Both Counties raise serious issues concerning the scope of the permits, the level of effort required of each County, the classification of the Counties

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[1] 33 U.S.C. §1251 through §1388.

(which affects certain conditions in the permits), and the absence or inclusion of certain terms in the permits. Ultimately, we hold that the Department did not exceed its authority under State and federal law when it issued the permits, nor did it act arbitrarily or capriciously in including the challenged terms in the permits.

I.

Background

A. The Clean Water Act and Stormwater Controlsfor the Chesapeake Bay

The Chesapeake Bay lies between the western and eastern shores of Maryland and Virginia. As a recent federal court opinion has noted, its name derives from the Algonquin word for "great shellfish bay." *Norfolk Southern Railway Co. v. City of Roanoke,* 916 F.3d 315,323 (4th Cir. 2019) (Wilkinson, J., concurring). While the Bay once hosted a quantity of fish and shellfish described as "unbelievable, ... indescribable, and ... incomprehensible," that is no longer the case and "[i]nstead of fish, we quantify phosphorus, nitrogen, sediment, and other pollutants" that threaten the health of the Bay's marine life. *Id.*

The watershed of the Chesapeake Bay – the land from which water drains into it – covers about 64,000 square miles in six states and the District of Columbia ("the Bay States"), and extends from Cooperstown, New York, to Norfolk, Virginia. Pollution from that region contaminates the waters that feed the Bay and ultimately the Bay itself. "Restoring damaged waters like the Chesapeake Bay requires

sustained effort, entailing cooperation and coordination among the federal government, state and local governments, the enterprise of the private sector, and all the people who make this region their home." *Norfolk Southern,* 916 F.3d at 323 (internal quotation marks and citation omitted).

Federal, state, and local governments have spent decades devising programs to reduce the pollution that enters the Bay. This appeal concerns one such program. In any effort to describe a complex regulatory regime, overseen by various government agencies, one inevitably must become familiar with the concepts, jargon, and acronyms that define that effort. We begin with an overview of the key elements pertinent to this appeal.

Where Pollutants Come From -Point and Nonpoint Sources

An important distinction for purposes of the Clean Water Act is the difference between "point sources" and "nonpoint sources" of water pollution. Point sources are discrete and localized, like a pipe carrying discharges from a factory or wastewater treatment plant.[2] Nonpoint source pollution, by contrast, comes from dispersed areas like farms or fields where water runs off the land without being collected or channeled into a point source.[3] This distinction matters for purposes of

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[2] A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or other types of conveyance], from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

[3] "Nonpoint source" is not defined in the Act. The EPA regards a "nonpoint source" as "any source of water pollution

the Act because the federal statute regulates point sources of water pollution but does not directly regulate nonpoint sources.

Discharge Permits

The Act generally prohibits "any person"[4] from discharging pollutants from a point source into a waterway.[5] 33 U.S.C. §13ll(a). Accordingly, the statute requires a permit for the discharge of pollutants into a water body from a point source under specified conditions. The Act establishes the National Pollution Discharge Elimination System ("NPDES") to govern such permits. 33 U.S.C. §1342. The EPA is authorized to issue and enforce these permits. 33 U.S.C. §§1319, 1342(a)(1). The EPA may also delegate that authority to a state so long as the state's law establishes a parallel permitting program consistent with the Act. 33 U.S.C. §1342(b). The EPA has delegated such authority to most states, including Maryland.[6]

Each discharge permit in Maryland is issued under the Act and under a parallel State program. *See*

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that does not meet the legal definition of 'point source' in [the Act]." *See* EPA, *Basic Information about Nonpoint Source (NPS) Pollution,* https://perma.cc/QPW5-LADC.

[4] Under the Act, "person" includes "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §1362(5).

[5] "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source [or] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. §1362(12).

[6] *See* EPA, *NPDES Permits Around the Nation,* https://perma.cc/2VF2-C7MK.

Maryland Code, Environment Article ("EN"), §9-322 *et seq.;* COMAR 26.08.04.07. Under Maryland law, the Department is the agency designated to issue and enforce these permits. EN §9-253; COMAR 26.08.04.01. Permits are generally issued for fixed terms of five years or less, subject to renewal. *See* 33 U.S.C. §1342(b)(1)(B); EN §9-328(b). As a general rule, the Act prohibits subsequent permits from containing "less stringent" conditions than the conditions in the previous permit- sometimes referred to as the "anti-backsliding prohibition" in the Act. 33 U.S.C. § 1342(o).

The Act does not require permits for nonpoint sources or otherwise directly regulate them. Accordingly, the EPA does not regulate those sources of water pollution. States may do so through their own regulatory programs, as Maryland has done.[7] The Act authorizes federal grants to assist the states in such efforts. 33 U.S.C. §1288.

Pollution Controls in Permits - Water Quality Standards and Effluent Limitations

Under the Act, "water quality standards" are the benchmark for clean water. For each water body covered by the Act, states submit water quality

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[7] The State relies on a "wide array of nonpoint source pollution control programs [to combat] these varied pollution sources." Maryland Department of the Environment, *Nonpoint Source Program (319) Management and Financial Assistance,* https://perma.cc/X6ZV -6T5E. Such programs include septic system upgrades, erosion and sediment control on farms, fertilizer application management, and many others. *See* Maryland Department of the Environment, *Maryland's 2015-2019 Nonpoint Source Management Plan* (updated August 4, 2016), *available at* https://perma.cc/RR5K-6EMB.

standards to the EPA for review and approval.[8] The standards are to be based on the water body's "designated use" *(e.g.,* public water supply, fishing, recreational use) and include criteria necessary to support that use *(e.g.,* specific limits on certain pollutant concentrations). *See* 33 U.S.C. §1313(c)(2)(A); 40 CFR §§130.3, 131.6; COMAR 26.08.02.01-.03.

To achieve water quality standards, the Act requires that discharge permits include pollution controls for point sources. 33 U.S.C. §13ll(b). The Act calls these controls "effluent limitations " – "effluent" being the material discharged by a point source.[9] Effluent limitations may be "technology based" or "water quality based." *See* EPA, *NPDES Permit Limits,* https://perma.cc/L4G6-24K9; *Natural Resources Defense Council v. EPA,* 808 F.3d 556, 563 (2d Cir. 2015).

Technology based effluent limitations are generally the first round of controls in the effort to achieve water quality standards. *See* 33 U.S.C. §13ll(b)(l)(A). They "represent the minimum level of control that must be imposed in a permit[.]" 40 CFR §125.3(a). But even the most stringent technology

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[8] If the EPA does not approve a state-authored water quality standard, the EPA must establish the standard itself. 33 U.S.C. §1313(c)(4).

[9] The term "effluent" is not defined in the Act. However, the Act defines "effluent limitation" as "any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. §1362(11).

based effluent limitations have not achieved water quality standards in thousands of the nation's waterways.[10] Congress anticipated this possibility in 1972 by retaining water quality standards "as a supplementary basis for effluent limitations ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200,205 n.12 (1976). If technology based limitations do not achieve the water quality standards, permits may include "any more stringent limitation ... necessary to meet water quality standards" – *i.e.*, "water quality based effluent limitations." 33 U.S.C. §1311(b)(l)(C); 40 CFR §130.7(c).[11] Thus, regardless of whether a waterway is over-polluted due to point sources, nonpoint sources, or some mixture of both, the Act authorizes the imposition of water quality based controls on point sources, in addition to the most stringent technology based controls.[12]

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[10] See American Farm Bureau Federation v. EPA, 792 F.3d 281, 289-91 (3d Cir. 2015).

[11] *Cf* COMAR 26.08.03.01C(2)(b) ("Best available technology shall be required as the minimum for all permitted discharges. If it is determined that compliance with the established water quality standards will not be achieved through [best available technology], additional treatment shall be [required].").

[12] A core premise of water quality based effluent limitations in general is that permitting agencies may require point sources to go beyond their existing capabilities to achieve further pollution reductions. *See Natural Resources Defense Council v. EPA,* 915 F.2d 1314, 1316-17 (9th Cir. 1990).

These two types of effluent limitations differ in their reference point and in their strategies for reducing pollution.[13] For technology based limitations, the reference point is the source, and the strategy is to deploy pollutant-reducing technology at that source regardless of its contribution of pollutants to the waterway. By contrast, for water quality based effluent limitations, the reference point is the waterway, and the strategy is for the point source to implement any additional actions (beyond the already required technologies) necessary to achieve the applicable water quality standard.[14]

The Point Sources Here- Municipal Separate Storm Sewer Systems (MS4s)

This appeal concerns permits for a type of point source known as a "municipal separate storm sewer system" ("MS4").[15] An MS4 is a network of

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[13] *See* Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits,* 24 Ecology L.Q. 393, 399 (1997) ("Technology-based standards are based on the source's technological capacity to control pollution, while water quality-based standards are based on the environmental effect of the discharged pollution.").

[14] *See* EPA, *NPDES Permit Writer's Manual* (September 2010) ("EPA Permit Writer's Manual"), *available at* https://perma.cc/P8BX-MNUY, at 5-1 (Technology based effluent limitations "are developed independently of the potential impact of a discharge on the receiving water, which is addressed through water quality standards and water quality- based effluent limitations[.]").

[15] Shortly after the passage of the Clean Water Act in the 1970s, the question of whether – and if so, how – to treat MS4s as point sources under the Act generated regulations and litigation. The EPA initially adopted regulations exempting MS4s from the Act's permit requirement. That exemption was challenged and held invalid in *Natural*

conveyances (including storm drains, gutters, and other drainage systems) designed to carry only stormwater (as opposed to a "combined sewer system" that conveys both sanitary sewage and stormwater). 40 CFR §122.26(b)(8).

MS4s differ from typical "end-of-pipe" point sources m certain respects. A common point source, such as a pipe that discharges waste from a factory, usually discharges a known and finite set of pollutants from a specific location. By contrast, stormwater picks up various pollutants as it flows across widely dispersed areas, including paved (or "impervious") surfaces, on its way to one of the many conveyances that make up an MS4, and then into a waterway. The quantity of stormwater that flows through these conveyances into a waterway can vary unpredictably depending on the weather, any development of the land *(e.g.,* whether the land is paved), and other activities on the land *(e.g.,* litter, use of lawn fertilizers).

Given these differences between an MS4 and a typical point source like a factory, a discharge permit for an MS4 differs from that for a typical point source. A discharge permit for a typical end-of-pipe point source usually sets numeric limits as effluent limitations for the known set of pollutants discharged from that pipe.[16] Using that same approach for an MS4 would

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Resources Defense Council v. Costle, 568 F.2d 1369, 1372-73 (D.C. Cir. 1977). Ultimately, Congress enacted the Water Quality Act of 1987, which explicitly established a discharge permit requirement for MS4s. *See* 33 U.S.C. §1342(p).

[16] EPA Permit Writer's Manual , *supra* note 14, Ch. 5 (explaining in detail a permitting agency's process for developing technology based effluent limitations); *Natural Resources Defense Council v. EPA,* 808 F.3d 556, 567 (2d Cir. 2015) (A discharge permit

entail setting effluent limitations for each conveyance within the stormwater drainage system, which would be administratively, technically, and financially burdensome.[17] Instead, an MS4 permit generally requires the permittee to implement flexible management programs designed to reduce the pollution introduced into stormwater, thereby limiting the amount of pollution discharged into the waterway. [18] In the language of the Act, an MS4 permit is to include "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 [EPA] or the State determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B)(iii).

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imposes effluent limitations on a point source "based on how much technology is able to reduce the amount of a pollutant at issue").

[17] *See* EPA, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges,* 55 Fed. Reg. 47990, 48037-38 (November 16, 1990) ("EPA Preamble to 1990 Phase I MS4 Rule"). The discussion of the background of the regulations that appears together with the notice announcing the EPA 's final adoption of the regulations is sometimes informally referred to as a "preamble" to the regulations. However, it is not itself part of the regulations and does not appear in the Code ofFederal Regulations. *See* James T. O'Reilly, Administrative Rulemaking §10:1 (2019 ed.).

[18] *See* EPA Preamble to 1990 Phase I MS4 Rule, 55 Fed. Reg. at 48037-38; *Natural Resources Defense Council v. New York State Dep't of Envtl. Conservation,* 34 N.E.3d 782, 787 (N.Y. 2015).

Implementation of the MS4 Permit Requirement-Phase I and Phase II

The Act and related EPA regulations have applied the permit requirement to MS4s in two phases. The first phase ("Phase I") took effect during the period 1987-94 and included stormwater systems that were serving more heavily populated areas – dubbed "large" and "medium" MS4s – and those that were contributing to the failure of a water body to meet water quality standards, irrespective of the size of the population served. *See* 33 U.S.C. §1342(p)(2); 40 CFR §122.26(b). Subsequently, a second phase ("Phase II") covered "small" MS4s. *See* 33 U.S.C. §1342(p)(5)-(6); 40 CFR §122.34. As a general rule, permits for MS4s included in Phase I have been subject to an earlier timetable and more stringent conditions than permits for MS4s included in Phase II.

Total Maximum Daily Load (TMDL)

An important element in determining the conditions that appear in a discharge permit is what is known as the "total maximum daily load" – or "TMDL." The Clean Water Act does not define this phrase, but describes it as the "level" of a pollutant that a water body can tolerate without violating applicable water quality standards. 33 U.S.C. §1313(d)(l)(C). In practice, the acronym "TMDL" has come to refer to more than just a numeric measure of a pollutant. It has also come to refer to the process and calculations used to determine that level of a pollutant and its allocation among sources of the pollutant. The document in which an agency calculates the TMDL, in the sense of a numeric measure of a pollutant, and allocates that level among various sources of pollution is also sometimes referred

to as a "TMDL." A singularly complex example pertinent to this case is what is referred to as the Chesapeake Bay TMDL ("Bay TMDL"),[19] which is discussed in greater detail below.

The EPA has elaborated on the meaning of TMDL as a numeric measure of pollution in its regulations. The term "load" refers to a measure of water pollution. *See* 40 CFR §130.2(e) (defining "load" as "[a]n amount of matter or thermal energy that is introduced into a receiving water"). The phrase "total maximum daily load" or "TMDL" is defined in regulation as "the sum of' amounts of the relevant pollutant emanating from various point and nonpoint sources together with a "natural background" amount of the pollutant and a "margin of safety." 40 CFR §§130.2(i), 130.7(c)(l). A TMDL, in this sense, "can be expressed in terms of either mass per time, toxicity, or other appropriate measure ...." 40 CFR §130.2(i). To understand this definition of TMDL as a numeric measure requires an understanding of the TMDL process.

The TMDL process is based on the direction in the Act that each state identify waterways for which technology based effluent limitations are not achieving water quality standards.[20] 33 U.S.C. §1313(d)(l)(A). If water quality standards are not being met in a waterway due to excess levels of a

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[19] EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (December 29, 2010), *available at* https://perma.cc/RWM2-Y22N.

[20] As indicated above, when technology based effluent limitations are inadequate to achieve water quality standards, discharge permits may include water quality based effluent limitations.

particular pollutant, the state is to determine the maximum amount of that pollutant that the waterway can receive without violating water quality standards – *i.e.,* the TMDL for that pollutant as to that waterway. 33 U.S.C. §1313(d)(l)(C). The resulting TMDL – as a cap on the pollutant- is sometimes referred to as a "pollution budget" or "pollution diet." *E.g., Norfolk Southern,* 916 F.3d at 324; *Conservation Law Foundation v. EPA,* 964 F. Supp. 2d 175, 179 (D. Mass. 2013).

The EPA's regulations recognize that, in order for a state to calculate the maximum level of a pollutant that a waterway can tolerate without violating water quality standards, a state agency must conduct a complex scientific analysis. The state agency must consider, among other things, the relationship between the water quality standards and the level of the pollutant in the waterway, the various sources of the pollutant, and the extent to which each source contributes to the violation of water quality standards. *See* 40 CFR §130.7(c). As indicated earlier, in developing the TMDL for that pollutant, the agency must also factor in "seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. §1313(d)(1)(C).

Once the agency produces its best estimate of the maximum pollutant level consistent with water quality standards – *i.e.,* the TMDL in the sense of a numeric measure of pollution – it must then apportion that amount to the relevant sources of that pollution while allowing for the margin of safety required by the Act. *See* 40 CFR §§130.2(i), 130.7(c). The portion assigned to each relevant point source

is called a "wasteload allocation." 40 CFR §130.2(h). The portion assigned to each nonpoint source is called a "load allocation." 40 CFR §130.2(g). In all, therefore, the TMDL- in the sense of a numeric amount – for a given pollutant for a particular waterway is the sum of the wasteload allocations, the load allocations, the natural background, and the margin of safety. 40 CFR §§130.2(i), 130.7(c)(1). After a state has determined a TMDL for a particular pollutant with respect to a particular waterway, it is to be submitted to the EPA for approval. 33 U.S.C. §1313(d)(2).

When a state submits a TMDL to the EPA, the state provides not only the maximum pollutant amount, but also the various wasteload allocations and load allocations, together with an explanation of the calculations that resulted in that maximum amount and the allocations. EPA, *Water Quality Planning and Management,* 50 Fed. Reg. 1774, 1775 (January 11, 1985) ("it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve [water quality] standards without evaluating component [wasteload and load allocations] and how these loads were calculated"). As indicated earlier, an example of a document that contains the separate TMDLs (in the sense of numeric amounts) for relevant pollutants, explains the reasoning and calculations underlying those caps, and allocates those totals among the relevant sources of pollution is the Bay TMDL.

A TMDL such as the Bay TMDL is neither self-implementing nor directly enforceable. Rather, it serves as an informational tool that the EPA and the states use in seeking to achieve the specified pollutant levels – and the applicable water quality standards -by means of discharge permits and other regulatory tools. *See American Farm Bureau Federation v. EPA,* 984 F.

Supp. 2d 289, 297-98 (M.D. Pa. 2013), *aff'd,* 792 F.3d 281 (3d Cir. 2015). To enforce the TMDL limits and corresponding water quality standards, agencies that issue discharge permits seek to ensure that the total pollution discharged by point sources does not exceed the wasteload allocations in the relevant TMDLs. The combined pollution allotted to all of the point sources should equal the sum of the wasteload allocations in a TMDL. Therefore, the discharge permit for each point source is to contain water quality based effluent limitations consistent with the "assumptions and requirements" of the wasteload allocation for that source in any applicable TMDL. 40 CFR §122.44(d)(1)(vii)(B).

A discharge permit may incorporate provisions related to several TMDLs. The permits at issue in this case incorporate provisions not only from the Bay TMDL, but also from TMDLs, developed by the Department and approved by the EPA, for certain waterways.[21] Appendices to the Counties' MS4 permits list the approved TMDLs applicable to each County. One example, which will be discussed later in this opinion, is the TMDL for fecal bacteria in Double Pipe Creek, whose watershed spans both Counties.

Chesapeake Bay TMDL and Maryland Watershed Implementation Plan (WIP)

In 2009, after decades of multilateral efforts aimed at restoring the Chesapeake Bay[22] the EPA began the development of a Chesapeake Bay-wide

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[21] *See* Maryland Department of the Environment, *Approved TMDLs,* https://perma.cc/99S9-C7Q3.

[22] For a summary of Bay clean-up efforts over the past several decades, *see Farm Bureau,* 984 F. Supp. 2d at 298-303.

TMDL.[23] After publishing a draft for a period of public review, the EPA adopted the Bay TMDL in late 2010.[24] The Bay TMDL establishes limits for three pollutants- nitrogen, phosphorus, and sediment - that threaten marine life by feeding large algae blooms that block sunlight and reduce oxygen levels in the water.[25] Bay TMDL at 2-6, 2-7. Specifically, the Bay TMDL pollutant caps are designed to satisfy water quality standards involving "aquatic life uses"

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[23] The EPA "established the Chesapeake Bay TMDL pursuant to a number of existing authorities, including the [Clean Water Act] and its implementing regulations, judicial consent decrees requiring EPA to address certain [waters in the Chesapeake Bay watershed that were failing to meet water quality standards], a settlement agreement resolving litigation brought by the Chesapeake Bay Foundation, the 2000 Chesapeake Agreement [between certain Bay states], and Executive Order 13508." *See* Bay TMDL at 1-16. That Executive Order directed the EPA to "mak[e] full use of its [Clean Water Act] authorities to lead a collaborative and effective federal and state effort to meet the Bay's nutrient and sediment goals." *Id.* at 1-17.

[24] *See* EPA, *Clean Water Act Section 303(d): Preliminary Notice ofTotal Maximum Daily Load {TMDL) Development for the Chesapeake Bay,* 74 Fed. Reg. 47792 (September 17, 2009); EPA, *Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load (TMDL)for the Chesapeake Bay,* 76 Fed. Reg. 549 (January 5, 2011) (stating that the EPA established the Bay TMDL on December 29, 2010).

[25] More precisely, the Bay TMDL divides waterways in the Chesapeake Bay watershed into 92 "segments," and establishes individual TMDLs- in the sense of numeric amounts – for each segment for each of the three pollutants .Thus, the Bay TMDL is "an assemblage of 276 TMDLs: individual TMDLs for each of the 3 pollutants – nitrogen, phosphorus, and sediment- for each of the 92 segments (3 x 92 = 276)." Bay TMDL, at xiii & 2-7.

and criteria such as water clarity and dissolved oxygen levels. *Id.* at 3-1, 3-2.

Given the breadth and complexity of the Bay TMDL, the EPA established a unique accountability framework to achieve its goals. Bay TMDL at ES-8. Although the Act generally does not require an implementation plan for a TMDL, the EPA directed each Bay State to create a "Watershed Implementation Plan" ("WIP") to reduce pollution to the levels set by the Bay TMDL. Each Bay State's WIP serves two basic purposes- to break down the EPA's statewide Bay TMDL pollutant allocations among geographic areas and among point and nonpoint sources within the state, and to identify the programs and policies that the state will use to achieve those pollutant reductions. The Maryland WIP was developed by the Department together with the Departments of Planning, Agriculture, and Natural Resources. Maryland's Final Phase I Watershed Implementation Plan (Dec. 3, 2010), *available at* https://perma.cc/8CMV-ENCB ("Maryland WIP").[26] Like the other Bay State WIPs, the Maryland WIP functions as a "roadmap" for how and when the State will reach the pollution reduction goals set forth in the Bay TMDL. *Maryland*

[26] The EPA anticipated that each state would write its WIP in three phases. The State has published the first two iterations of its WIP and a draft version of the third iteration. *See* Maryland Department of the Environment, *Watershed Implementation Plans,* https://perma.cc/J985- WQ65. Citations in the text are to the first iteration of the WIP, often referred to as the Phase I WIP. The "phases" of the WIP should not be confused with the two phases of the MS4 permitting program, which will be discussed in some detail in Part II.D. of this Opinion.

Department of the Environment v. Anacostia Riverkeeper, 447 Md. 88, 109 (2016).

Implementing the Maryland WIP in MS4 Permits

The Maryland WIP listed several requirements to be included in the then-upcoming round of Phase I MS4 permits in Maryland. Two of these requirements correspond to terms in the Counties' permits that are part of the dispute in this litigation.

First, a commitment in the Maryland WIP involves restoration of impervious surfaces- *i.e.,* areas that have been paved or otherwise developed, as opposed to natural, undeveloped areas. Natural areas allow stormwater to soak into the ground, where pollutants are filtered to some extent. Impervious surfaces prevent that filtration process. Instead, stormwater that encounters an impervious surface rushes over it, collecting pollutants along the way. To "restore" an impervious surface is to make it function more like a natural terrain that absorbs and filters rain water. Doing so accomplishes the same end as a direct pollutant control, like a filter or other cleansing mechanism attached to a conveyance. The less impervious surface that exists, the less polluted stormwater will run across it and into the conveyances of the MS4. Thus, as is true in general for stormwater management programs in MS4 permits, an impervious surface restoration requirement serves as a surrogate for direct pollution controls. *See Anacostia Riverkeeper,* 447 Md. At 122-23. The Maryland WIP called for "[c]ompletion of restoration efforts for twenty percent of the [Phase I MS4] counties' impervious surface area that is not already restored to the

maximum extent practicable." Maryland WIP at 5-30.

Second, another provision of the Maryland WIP refers to many applicable local TMDLs with stormwater wasteload allocations. For example, for the Counties, the relevant local TMDLs are compiled, as mentioned above, in appendices to their MS4 permits. The Maryland WIP requires the creation of"[s]tormwater watershed implementation plans for each EPA approved stormwater wasteload allocation" in the relevant local TMDLs. Maryland WIP at 5-30. Such local watershed implementation plans are distinct from the overall Maryland WIP.

Maryland Stormwater Management Act

In addition to the permitting program, the State Stormwater Management Act has, since the mid-1980s, required local jurisdictions to implement stormwater management programs "to reduce as nearly as possible the adverse effects of stormwater runoff." EN §4-201. Each county and municipality is to adopt ordinances necessary to implement such a program consistent with State law. EN §4-202. The Legislature directed the Department to adopt regulations governing such programs that would, among other things, indicate that the primary goal is "to maintain after development, as nearly as possible, the predevelopment runoff characteristics." EN §4-203(b)(1); *see also Anacostia River keeper,* 447 Md. at 110-13. The statute authorizes jurisdictions to impose and collect stormwater remediation fees and other charges to carry out such programs. EN §§4-202.1, 4-204; *see also* 96 *Opinions of the Attorney General 61* (2011). Such fees provide "important revenue needed to offset the costs of building and

maintaining municipal gutters and drains, monitoring pollution levels, policing illegal discharges of polluted water, and educating the public on proper environmental practices." *Norfolk Southern,* 916 F.3d at 325 (referring to similar local stormwater fee in Virginia).

The Carroll County and Frederick County MS4 Permits

The Department first issued MS4 permits to Carroll County and Frederick County during the 1990s as part of Phase I of the MS4 permitting process, and has renewed those permits several times since then. The permits that are the subject of this case are Carroll County's fourth and Frederick County's third round of MS4 permits, which were both issued in December 2014. In accordance with State law, the Department first issued draft permits for public comment. *See* EN §1-604(a). In each case, the Department held a public hearing and accepted comments on the draft permit. After considering those comments, the Department made a Final Determination to issue each permit together with a document entitled "Basis for Final Determination" that provided an explanation for its action. EN §1-604(b).

Pertinent to this case, the Maryland WIP commitment involving impervious surface restoration is incorporated into Part IV.E.2.a of each permit. This provision has two components. First, it requires each County to submit to the Department an "impervious surface area assessment" consistent with guidelines provided by the Department. That assessment, if approved by the Department, "shall serve as the baseline for the restoration efforts"

required by the permit. Second, by the end of the permit term, each County "shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in [a Department guidance document] that has not already been restored to the" maximum extent practicable.

Part IV.E.2.b of each permit includes a provision based on the commitment in the Maryland WIP concerning local TMDLs. This provision requires each County to submit to the Department for approval a plan to implement each stormwater wasteload allocation in each relevant, EPA-approved local TMDL. Each plan must include a final date for "meeting applicable [wasteload allocations] and a detailed schedule for implementing all [necessary] structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives." Upon approval by the Department, the plans become enforceable conditions of the permits.

Two other aspects of the permits are at issue here. The first is Part VI.B of each permit, which requires the Counties to cooperate with other State agencies in the development of elements of the Counties' comprehensive growth plans that involve stormwater management. The second contested aspect of the permits is the absence of an authorization for "water quality trading."[27] As relevant here, such trading would allow the Counties

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[27] "Water quality trading" is sometimes referred to as "nutrient trading."

to earn credit for pollution reduction by paying others (whether point or nonpoint sources) to take pollution-reducing actions. A County might consider water quality trading in situations where paying another party to achieve a pollution reduction costs less than the County's own efforts to achieve a similar reduction.

B. Procedural History

In January 2015, Carroll County sought judicial review of its 2014 MS4 permit in the Circuit Court for Carroll County. At the request of the parties, the matter was stayed for more than a year while the parties pursued settlement and while challenges to similar permits by environmental advocates were being litigated.[28] After the stay expired, the Circuit Court issued an opinion dated June 26, 2017, agreeing with the County on some of its claims and with the Department on others. The court remanded the County's permit to the Department. The Department appealed that ruling and the County filed a cross-appeal.

In January 2015, Frederick County sought judicial review of its 2014 permit in the Circuit Court for Frederick County. As in the Carroll County case, the matter was stayed pending settlement discussions and other litigation. After the stay expired, the Circuit Court issued an opinion dated July 14, 2017, that largely rejected the County's arguments, but remanded the permit to the Department to address what the court believed were ambiguities and

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[28] This Court resolved that litigation in *Maryland Department of the Environment v. Anacostia Riverkeeper,* 4471V,Id. 88 (2016).

inconsistencies in the permit's wording. Frederick County appealed that ruling.

The Court of Special Appeals consolidated the two appeals for argument. Prior to argument and decision in the Court of Special Appeals, the Counties asked this Court to grant a writ of *certiorari* in their respective cases. The Department agreed that the Counties' petitions should be granted. This Court granted the two petitions and consolidated the cases for argument.

II

Discussion

Both Counties challenge conditions set forth in their most recent MS4 permits, although some of the bases for their challenges differ.

Two of the alleged flaws in the permits concern the impervious surface restoration requirement. First, Frederick County argues that the Department exceeded its authority under the Clean Water Act by failing to consider "practicability" when it included the impervious surface restoration requirement in its permit. Frederick County bases this argument on a provision of the Act that requires MS4 permits to include controls to reduce pollution discharges "to the maximum extent practicable" - what is sometimes called the MEP standard. Frederick County further argues that, even if the Act allows the Department to set the restoration requirement without regard to the MEP standard, the Department arbitrarily and capriciously failed to consider the County's

contention that compliance with the degree of restoration required by the permit is impossible.

Second, both Counties assert that the Department exceeded its authority under the Act by including in the permit an impervious surface restoration requirement in which the baseline for measuring compliance with the requirement relates to the unrestored impervious surface throughout the *entire* County, rather than only the area served by the County's MS4.

Both Counties argue that the Department has unlawfully treated them as Phase I jurisdictions for purposes of their MS4 permits- thereby subjecting them to more stringent permit terms required of Phase I jurisdictions than those later required of Phase II jurisdictions – because it incorrectly classified them in the early 1990s as "medium" jurisdictions based on population. Carroll County also argues that its inclusion in Phase I of the MS4 permitting program was arbitrary and capricious.

Both Counties argue that the Department arbitrarily and capriciously failed to include water quality trading as a compliance mechanism in their permits.

Finally, Carroll County argues that a provision in its permit that requires the County to cooperate with other State agencies in the development of stormwater-related aspects of the County's comprehensive growth plan unlawfully imposes new obligations on the County.

We first discuss the standards that govern our consideration of these arguments. We then consider the substantive issues raised by the Counties.

A. What and How We Review

The General Assembly has provided for judicial review of permits issued by the Department, such as the MS4 permits issued to the Counties. EN §1-601(a)(3), (c). Such review is based on an administrative record that includes the various items set forth in EN §1-606(c).[29] Judicial review begins in the circuit court pursuant to the Maryland Rules. *See* Maryland Rule 7-201 *et seq.* (goveming judicial review of administrative actions when a statute provides for judicial review).

In an appeal of the circuit court's review of an agency action, an appellate court reviews the agency's action itself rather than the decision of the circuit court. *Hollingsworth v. Severstal Sparrows Point, LLC,* 448 Md. 648, 654 (2016). Thus, while the circuit court decisions here set the stage for our review and determined who would be appellant and appellee in our Court, we are not assessing the merits of those court decisions. Rather, we directly review the permits in light of the issues raised by the Counties.

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[29] Among other things, the record may include the permit application and any accompanying data, documents contained in the supporting file for the draft permit, comments submitted to the Department from the public, responses to those comments, the tape or transcript of any public hearings, and the Department's statement of the basis for its determinations with respect to the permit.

1. Standards for Review of Discharge Permits

a. General Standards for Review o(Agency Action

The standards for judicial review of a discharge permit – and their corresponding levels of deference to the agency – vary depending on whether the court is reviewing an agency's fact findings, discretionary decisions, or legal conclusions. *See Anacostia Riverkeeper,* 447 Md. at 118-21.

Review of Fact Findings

For fact findings, a reviewing court applies the "substantial evidence" standard, under which the court defers to the facts found and inferences drawn by the agency when the record supports those findings and inferences. *Anacostia Riverkeeper,* 447 Md. at 120. In particular, with respect to factual issues that involve scientific matters within an agency's area of technical expertise, the agency is entitled to "great deference." *!d.*

Review of Matters Committed to the Agency's Discretion

With respect to matters committed to agency discretion, a reviewing court applies the "arbitrary and capricious" standard of review, which is "extremely deferential" to the agency. *Harvey v. Marshall,* 389 Md. 243, 296-99 (2005); *Spencer v. Md. State Bd. of Pharmacy,* 380 Md. 515, 529 (2004). This standard is highly contextual, but generally the question is whether the agency exercised its discretion "unreasonably or without a rational basis." *Harvey,* 389 Md. at 297; Arnold Rochvarg, Maryland Administrative Law, §4.38 at 128 (2011).

For guidance, a reviewing court may look to case law applying the similar standard in federal

administrative law. *See Anacostia River keeper,* 447 Md. at 120-21; *Office of People's Counsel v. Public Service Commission,* 461 Md. 380, 399 (2018).[30] Under this standard, a reviewing court is not to substitute its own judgment for that of the agency and should affirm decisions of "less than ideal clarity" so long as the court can reasonably discern the agency's reasoning. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285-86 (1974).

Review of the Agency's Legal Conclusions

With respect to an agency's legal conclusions, a reviewing court accords the agency less deference than with respect to fact findings or discretionary decisions. *Anacostia Riverkeeper,* 447 Md. at 122. In particular, a court will not uphold an agency action that is based on an erroneous legal conclusion. *!d.* However, in construing a law that the agency has been charged to administer, the reviewing court is to give careful consideration to the agency's interpretation.

In construing a statute, a reviewing court applies the oft-stated approach to statutory construction. That is, the court seeks to ascertain legislative intent – whether that of the General Assembly or

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[30] Under the federal standard, the reviewing court may consider whether: (1) the agency's choice was rationally connected to the facts found; (2) the agency considered the relevant factors; (3) the agency made a clear error of judgment; (4) the agency relied on factors the legislature did not intend for it to consider; (5) the agency failed to consider an important aspect of the problem; (6) an explanation for the decision runs counter to the evidence; and (7) the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Office of People 's Counsel,* 461 Md. at 399 n.16.

of Congress. That endeavor begins with the plain meaning of the text, keeping in mind that the plainest language is controlled by the context in which it appears. *Kaczorowski v. Mayor & City Council of Baltimore,* 309 Md. 505, 514 (1987). The legislative history of the statute may then be reviewed to understand the purpose of the legislation, resolve ambiguities, and confirm the apparent meaning of the text. Past case law construing a provision is, of course, also helpful. Throughout, the court must be mindful that the purpose is not to discern "purely judicial notions of public policy," but rather *legislative* intent. *BAA, PLC v. Acacia Mutual Life Ins. Co.,* 400 Md. 136, 157 (2007).

When a party challenges the agency's interpretation of the statute the agency administers, the court must assess how much weight to accord that interpretation, keeping in mind that it is "always within [the court's] prerogative to determine whether an agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Nat. Res.,* 385 Md. 534, 554 (2005). The weight given an agency's interpretation of a statute it administers depends on several factors. *Baltimore Gas & Electric Co. v. Public Service Commission,* 305 Md. 145, 161 (1986). More weight is appropriate when the interpretation resulted from a process of "reasoned elaboration" by the agency, when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rule making. *Id.* at 161-62.

b. Effoct of the Clean Water Act's Scheme of Cooperative Federalism

In our consideration of the Department's interpretation and application of the Clean Water Act, we must take into account the extent to which the EPA's administrative interpretation and federal case law set parameters for the Department's actions. The shared implementation of a federal policy or program by federal and state agencies is sometimes referred to as "cooperative federalism." *See Anacostia Riverkeeper,* 447 Md. at 101. It can affect how a state court reviews that implementation when the state agency's actions are limited by federal policies. In general, a state agency that is delegated the administration of the discharge permitting program under the Act is "bound to follow EPA's interpretation of the [Act]." *Natural Resources Defense Council v. New York State Dep't of Envtl. Conservation,* 34 N.E.3d 782, 794 n.l6 (N.Y. 2015) (declining to entertain a challenge to an EPA regulation interpreting the Act and state agency's compliance with that interpretation).[31]

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[31] *See also BellSouth Telecommunications, Inc. v. Sanford,* 494 F.3d 439, 449 (4th Cir. 2007) (state's authority over telecommunications issue is part of deliberately constructed model of "cooperative federalism" under which state agency applies expertise and experience "subject to the boundaries set by Congress and federal regulators"); *Perry v. Dowling,* 95 F.3d 231, 236-37 (2d Cir. 1996) (a state agency's interpretation of the federal Medicaid statute "warrants deference" when "the state has received prior federal- agency approval to implement its plan, the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute"); Aaron Saiger, *Chevron and Deference in State Administrative Law,* 83 Fordham L. Rev. 555, 581 (2014) ("State officials who deal with the environment, education, or antiterrorismare enmeshed in a system of

Under the Act's cooperative federalism scheme, the EPA has delegated the administration of the Act's discharge permitting program in Maryland to the Department. Nonetheless, the EPA reviews and has the right to object to the Department's draft discharge permits. 40 CFR §123.44 ("EPA review of and objections to State permits"); *see also* Memorandum of Agreement between EPA and Department (May 18, 1989), *available at* https://perma.cc/3UNE-4CLN (explaining that the EPA will review all State-prepared permits and may object to them). In addition, the EPA has overseen Maryland's efforts (as well as those of the other Bay States) to achieve the goals of the Bay TMDL- *i.e.,* efforts to develop and carry out the WIPs. *See Farm Bureau,* 984 F. Supp. 2d at 323-24.

c. Deference Owed to the EPA's Construction of the Clean Water Act

In assessing the weight to be accorded the EPA's construction of the Act, we look to the deference that would be accorded such interpretations under federal case law. In general, when an agency exercises authority to "make rules carrying the force of law" – *i.e.,* rulemaking, adjudications, or other actions involving similarly extensive administrative procedures- the agency's interpretation warrants deference under *Chevron US.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Less formal agency action may also merit *Chevron* deference depending on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the

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regulatory federalism that often very substantially deprives them of freedom of action.").

statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart v. Walton,* 535 U.S. 212, 222 (2002).

Under *Chevron,* a federal court first determines "whether Congress has directly spoken to the precise question at issue" in the pertinent statute – in this case, the Clean Water Act. 467 U.S. at 842. If the Congressional intent is clear, the court "must give effect to [that] unambiguously expressed intent." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must decide "whether the [EPA's] answer is based on a permissible [or reasonable] construction of the statute." *Id.* at 843- 44.

Even if the particular agency interpretation does not meet the criteria for *Chevron* deference, a reviewing court may defer to that interpretation based on the persuasiveness of the agency interpretation, considering factors such as "the thoroughness evident in its consideration, the validity of its reasomng, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (Jackson, J.).[32]

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[32] If those factors sound familiar, perhaps it is because *Skidmore* is a direct ancestor of the leading case of this Court concerning the degree of judicial deference accorded to state agency actions . *See Baltimore Gas & Electric Co. v. Public Service Commission,* 305 Md. 145, 161-62 (1986), citing and relying on *Comptroller v. John* C. *Louis Co.,* 285 Md. 527, 544 (1978), which cites and relies upon *Skidmore.*

This Court has assessed the validity of State agency actions consistent with a federal agency's regulations or interpretations of a federal statute in light of these principles. *See Anacostia Riverkeeper ,* 447 Md. at 142 & n.61 (citing federal administrative deference case law and finding an EPA policy memorandum "instructive" on interpretation of federal regulation under the Clean Water Act); *Sugarloaf Citizens ' Ass 'n v. Department of the Environment,* 344 Md. 271, 313 (1996) (affirming Department action based in part on EPA interpretation of the federal Clean Air Act, which was entitled to deference under *Chevron); Koons Ford of Baltimore, Inc. v. Lobach,* 398 Md. 38, 54 (2007) (applying *Chevron* and adopting the FTC's interpretation of a federal statute that the FTC administers); *Montgomery Cty. v. Glenmont Hills Associates Privacy World at Glenmont Metro Ctr.,* 402 Md. 250,271-72 (2007) (citing *Chevron* in adopting HUD's interpretation that a federal statute did not preempt local agency action that the Court affirmed).

2. Reviewability of Permit Terms Derived from TMDLs and WIP

Incorporation of TMDLs and the Maryland WIP in the Counties' MS4 Permits

The MS4 permits at issue in this appeal incorporate or reference elements of the Bay TMDL, the Maryland WIP, and certain local TMDLs. That raises the question whether this litigation is the appropriate forum for what amounts to a challenge to those prior administrative actions.

The Appropriate Forum for Challenging Permit Provisions Derived from a TMDL

Carroll County argues that provisions of a TMDL that are implemented in a permit must be reviewable in the context of judicial review of that permit – *i.e.,* in an action like this one. The County reasons that, because Maryland statutory law does not provide for judicial review of State-authored TMDLs and because the TMDLs themselves are not self - executing, the only viable mode of judicial review is a challenge to a permit.

The County is correct that the Maryland Code does not provide for judicial review of a TMDL. The County is also correct that a TMDL is not self-executing. *Farm Bureau,* 792 F.3d at 291 n.4. However, the absence of a statutory mechanism for review of a TMDL in State court does not mean it is not reviewable in any court. The EPA's approval of a state-submitted TMDL "is an act taken pursuant to the [Clean Water Act] and thus is subject to challenge [in federal court] under the [federal Administrative Procedure Act.]" *Anacostia Riverkeeper, Inc. v. Jackson,* 798 F. Supp. 2d 210, 222 (D.D.C. 2011). For example, the major case challenging the validity of the Bay TMDL was held to be ripe for judicial review in federal court because the "parties present[ed] a purely legal dispute on a well-developed record about the EPA's process of promulgating a TMDL." *Farm Bureau,* 792 F.3d at 293-94. Similarly, parties challenging other state-prepared, EPA-approved TMDLs have obtained judicial review of the EPA's approval of those TMDLs in federal court. *See, e.g., Friends of Earth, Inc. v. EPA,* 446 F.3d 140 (D.C. Cir. 2006); *Natural Resources Defense Council v. Muszynski,* 268 F.3d 91 (2d Cir. 2001); *City of Kennett v. EPA,* 887 F.3d 424 (8th Cir. 2018).

To the extent that the Counties are challenging decisions previously made or actions taken in adopting an EPA-approved TMDL, judicial review of those decisions or actions was available in federal court. Unsurprisingly, as this Court has previously indicated, an action for judicial review of a discharge permit in State court is not the forum for raising belated challenges to a TMDL that the challenger could have raised elsewhere.*See Anacostia Riverkeeper,* 447 Md. at 129 n.46.[33] Thus, in an action by a permittee

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[33] In *Anacostia Riverkeeper,* this Court cited *In re City of Moscow, Idaho,* 10 E.A.D. 135, 2001 WL 988721 (EAB July 27, 2001) to illustrate this principle. *Moscow* was an opinion of the Environmental Appeals Board ("Board"), the EPA's final decisionmaker of administrative appeals under the statutes that the EPA administers. In *Moscow,* a municipality pursued an administrative appeal of a discharge permit for its sewage treatment plant issued by the EPA. The municipality challenged, among other things, a term in the permit that was derived from a state-prepared TMDL for the water body into which the plant discharged pollutants. 2001 WL 988721 at *1, *16. The permit term established a "seasonal constraint" on phosphorus discharges (between May and October, the "normal growing season months" of algae blooms, which are fed in part by phosphorus). *Id.* at *16 n.53.

The municipality argued, among other things, that the EPA's decision to adopt the TMDL's seasonal growth period as part of the permit was arbitrary and capricious, but the Board disagreed. The Board observed that the TMDL clearly specified the growth period and that federal regulations required that the municipality's permit be consistent with the "assumptions and requirements" of the treatment plant's wasteload allocation established by the TMDL. 2001 WL 988721 at *16.

The municipality also claimed that the TMDL's seasonal growth period was inaccurate. The Board also rejected that argument, holding that the administrative appeal of the permit terms was not the appropriate forum for raising that claim. 2001 WL 988721 at * 17. The Board reasoned that it was authorized to review "contested permit conditions" but not the validity of

under EN §1-601 challenging a permit term derived from a TMDL, the permittee may not base that challenge on a decision that was previously made in the development of the TMDL.[34]

"prior, predicate regulatory decisions that are reviewable in other fora," and that the TMDL was a prior predicate regulatory decision reviewable in a federal district court under the federal Administrative Procedure Act. *Id.* at * 18. The Board concluded that the municipality's claim was essentially a belated challenge to determinations previously made in the TMDL and the EPA's earlier decision to approve the TMDL - which were reviewable elsewhere.

As this Court indicated in *Anacostia Riverkeeper,* that reasoning applies in actions to review discharge permits in Maryland courts. In Maryland, State courts are authorized to review a discharge permit issued by the Department, but not a TMDL on which parts of the permit may be predicated. Specifically, although the General Assembly has provided for judicial review of discharge permits in EN §1-601(c), it has not authorized judicial review of State-prepared TMDLs (which are not final until they receive EPA approval). Instead, as noted in the text, the EPA's approval of such a TMDL- necessary for it to be effective -may be challenged in federal court.

[34] Of course, just because something is mentioned in a TMDL does not mean that it would be ripe for a challenge in federal court. For example, when an environmental group challenged an alleged "authorization" of water quality trading in the Bay TMDL in federal court, the court held that the claim was not ripe because the Bay TMDL only "expected" or "encouraged" trading without making a final decision about it - let alone "authorizing" it in a permit. *See Food & Water Watch v. EPA,* 5 F. Supp. 3d 62, 73-86 (D.D.C. 2013). In other words, the challenger failed to identify a final, concrete decision in the TMDL that was suitable for judicial review. That case illustrates that the principle identified in *Anacostia Riverkeeper* applies only to provisions of a TMDL that reflect a reviewable final action taken in the TMDL.

Consistent with the principle recognized *inAnacostia Riverkeeper,* we conclude that claims concerning a discharge permit that are essentially challenges to a governing TMDL and that could have been raised in an action for judicial review of the EPA's approval of that TMDL cannot be raised in a judicial review action under EN §1-601.[35] Accordingly, as explained further below, we will not entertain some of the Counties' arguments that are essentially challenges to provisions in EPA-approved TMDLs.[36]

B. Whether the Impervious Surface Restoration Permit Term Unlawfully Exceeds the MEP Standard or is Arbitrary and Capricious

The Clean Water Act, in describing provisions to be included in an MS4 permit, refers to a

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[35] We need not, and do not, address whether a State court would have authority to directly review a TMDL prepared by the Department pursuant to an administrative mandamus action, Maryland Rule 7-401 *et seq.,* or otherwise.

[36] Carroll County argues that the Department is "estopped" from arguing that the County may not challenge a provision of a TMDL incorporated in its permit. The County's basis for this argument is that, in a 2003 case, the Department successfully argued that a discharger cannot claim to have been aggrieved by a TMDL until the Department proposes to issue a discharge permit that includes effluent limitations based on the TMDL. *See In re Wicomico River TMDL,* No. 22-C-01-000623 (Wicomico Cty. Cir. Ct. June 13, 2003). The County's argument is not without some force as the Department's position here appears to contradict its argument in *Wicomico River*. However, the reviewability of a permit term is a legal question, not subject to an estoppel argument. For the reasons set forth in the text, it is our view that permit terms that directly implement a decision made in an EPA-approved TMDL are not subject to review in an action in State court challenging the permit.

standard of "maximum extent practicable" – often denominated by the acronym "MEP." 33 U.S.C. §1342(p)(3)(B)(iii). Whether the MEP standard governs all provisions in an MS4 permit, or only certain provisions, is a matter of debate – a debate that we shall wade into presently. Frederick County's flagship argument in its appeal is that the Department unlawfully disregarded the MEP standard and therefore exceeded its authority when it included the impervious surface restoration requirement in the County's permit. The County further argues that, even if the Act allows the Department to include provisions in the permit without reference to the MEP standard, the impervious surface restoration requirement is impossible to achieve and that the Department acted arbitrarily and capriciously in including it in the permit. Carroll County does not join either of these arguments, although its permit includes an identical impervious surface restoration requirement.

1. The MEP Standard

Congress did not define the MEP standard in the Act and the EPA has explicitly declined to define it as well.[37] The phrase *"maximum* extent practicable" suggests a standard that is, or is close to, the most stringent standard in a hierarchy of possible standards under the Act. However, in the context

[37] The EPA has explained that it "intentionally [has] not provided a precise [regulatory] definition of MEP to allow maximum flexibility in MS4 permitting." EPA, *National Pollutant Discharge Elimination System – Regulations for Revision of Water Pollution Control Program Addressing Storm Water Discharges,* 64 Fed. Reg. 68722, 68754 (December 8, 1999).

of the Act's standards for pollution controls, that is not the case.[38] To understand why, it is helpful to review the dichotomy between technology based and water quality based effluent limitations for point sources and then consider how the MEP standard relates to those limitations.

The Clean Water Act's Hierarchy of Pollution Controls

In principle, the most that a regulatory agency can require of a point source is to do what is necessary to reduce pollutants to a level such that the waterway satisfies water quality standards. Thus, the most stringent level of control- for any point source- is strict compliance with water quality standards for the pertinent waterway. Given the difficulty of calculating and enforcing such standards, Congress in the Act chose not to "make the perfect the enemy of the good" and authorized the use of technology based effluent limitations for typical, end-of-pipe point sources. 33 U.S.C. §13ll(b)(l)(A). Such controls achieve some pollution reduction, although often not enough to achieve water quality standards for the pertinent waterway. As explained above, technology based effluent limitations are designed from the perspective of the discharger while

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[38] *See Jones Creek Investors, LLC v. Columbia County, Ga.,* 98 F. Supp.3d 1279, 1300 n.4 (S.D. Ga. 20 15) (In the MS4 context, "[t]he phrase 'maximum extent practicable' is a term of art, and should not be attributed the ordinary meaning usually applied to those words."); National Research Council, Urban Stormwater Management in the United States (The National Academies Press 2009) at 60 ("[T]he [MEP] standard for MS4s ... [is] a floor, not a ceiling, for permit requirements when receiving waters are impaired.").

controls based on water quality standards – water quality based effluent limitations – are designed from the perspective of the waterway.

MEP Standard versus Water Quality Based Standard

The MEP standard is analogous to a technology based effluent limitation in that its reference point is the MS4 operator rather than the waterway.[39] A water quality based effluent limitation is more stringent than an MEP-level control just as such a limitation is more stringent than a technology based control. Despite this analogy, water quality based effluent limitations operate differently in end-of-pipe point source permits than they do in MS4 permits. With an end-of-pipe point source, a technology based effluent limitation is typically a numeric level of pollution and the point source must install technology to ensure that the amount of pollution emitted from the pipe is below the specified level. A water quality based effluent limitation may simply ratchet down that numeric level, requiring the point source to come up with ways to reduce pollution further.

With MS4s, however, there generally is no corresponding numeric cap on the amount of pollution discharged by each conveyance within an MS4.[40]

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[39] National Research Council, *supra* note 38, at 60 (grouping the MEP standard with "other technology-based requirements" for stormwater permittees); *see also Jones Creek Investors,* 98 F. Supp.3d at 1300 n.4 (MEP standard defined in the pertinent MS4 permits as "the technology-based discharge standards and controls necessary for the reduction of pollutants discharged from [an MS4]").

[40] *See Upper Missouri Waterkeeper v. Montana Dep't of Envtl. Quality,* 438 P.3d 792,799 (Mont. 2019) (noting that MS4 permits generally have included best management practices

Instead, the MS4 operator must implement the various MEP-level management programs required by its permit. In that context, a water quality based control is a program *in addition to* the MEP- level programs. To say that water quality based controls are "more stringent" than or "beyond" MEP-level controls simply means that the MS4 operator must comply with the water quality based control in addition to the MEP-level controls. For example, Frederick County's permit lists six management programs under the MEP standard. *See* Frederick County Phase I MS4 Permit MD0068357, Part IV.D.l-6. In addition to those programs, and under a separate section of the permit, the County is to comply with the impervious surface restoration requirement. *Id.,* Part IV.E.2.a.

The County and the Department appear to agree that the impervious surface restoration requirement in the County's permit is a water quality based control that is in addition to those provisions included under the MEP standard. However, the County asserts that the Department may not include such a term in the permit if it "goes beyond" the MEP standard.

2. Whether an MS4 Permit Term May "Go Beyond" the MEP Standard

At first blush, this Court's decision in *Anacostia Riverkeeper* seems to resolve this issue in the Department's favor.[41] In a background section of that opinion, the Court stated:

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rather than numeric limits).

[41] The Dissenting Opinion of Judge Watts contends that the Court's holding in *Anacostia Riverkeeper* is an "obstacle" to the Department's position in this case and that the permit term in question is "incompatible" with *Anacostia Riverkeeper*.

> MS4s are subject to the MEP standard[.] [They] are not, however, required to [achieve] effluent limitations necessary to meet water quality standards. [But the Act] still requires Maryland to set water quality standards and TMDLs – subject to the EPA's approval. Flowing from this obligation is the requirement that MS4s are subject to effluent limitations that are consistent with [wasteload allocations] ofEPA-approved TMDLs.

447 Md. at 104. In other words, an MS4 permit may include, as needed, effluent limitations consistent with TMDL wasteload allocations, in compliance with the EPA regulation that requires a discharge permit for a point source to contain such effluent limitations. *See* 40 CFR §122.44(d)(l)(vii)(B). Given that the impervious surface restoration requirement is such an effluent limitation,

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Watts Dissenting slip op. at 4-5. The Dissenting Opinion appears to have the mistaken belief that *Anacostia Riverkeeper* somehow supports Frederick County's challenge to this permit term. In fact, in that case, the Court considered a permit term that appears in Phase I MS4 permits of five other jurisdictions and that is *identical* to the permit term that Frederick County challenges here. The Court held that the term was valid and authorized by the Clean Water Act. 447 Md. at 122-26. If we were simply to recite the holding of *Anacostia Riverkeeper* and stop, Frederick County loses. But, in fairness to Frederick County and as indicated in the text, the holding in *Anacostia Riverkeeper* was in response to a challenge from a different perspective. Environmental groups argued that the permit term was inadequate to comply with the MEP standard. Here, Frederick County argues, from the opposite perspective, that the permit term unlawfully exceeds that standard. However, for the reasons explicated in the text, we disagree and reach the same outcome that *Anacostia Riverkeeper* did – that the permit term is valid and authorized by the Act.

Anacostia Riverkeeper seems to answer the question raised by Frederick County – *i.e.,* that the 20 percent impervious surface restoration requirement in the permit is valid and authorized by the Clean Water Act. However, in *Anacostia Riverkeeper,* the Court was addressing a question somewhat distinct from the one posed in this case. In that case, the question was whether the impervious surface restoration requirement *satisfied* the MEP standard whereas in this case the question is whether it *unlawfully exceeds* it. The resolution of this question requires statutory construction of the provision in which the MEP standard appears- 33 U.S.C. §1342(p)(3)(B)(iii)- which we shall refer to as clause (B)(iii) for ease of reference.

Construing Clause (B)(iii) - Statutory Language

The Clean Water Act specifically addresses municipal and industrial stormwater discharges in 33 U.S.C. §1342(p), which consists of six paragraphs. Paragraph 3 of that subsection sets forth "permit requirements."[42] That paragraph reads as follows:

(3) Permit requirements

(A)Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable

[42] Paragraphs 1 and 2 concern the timing of the requirement to obtain certain stormwater discharge permits. Paragraph 4 concerns the application requirements for those permits. Paragraph 5 authorizes the EPA to conduct a study on other stormwater discharges not covered by those permits. Paragraph 6 authorizes the EPA to adopt regulations based on the study required by paragraph 5. 33 U.S.C. §1342(p)(l)-(2), (4)-(6).

provisions of [section 1342] and section 1311 of this title.

(B) Municipal discharge

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-stormwater 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 [EPA] Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. §1342(p)(3). Subparagraph (A) relates to permit requirements for discharges by industrial sources such as factories, landfills, construction sites, and power plants that have operations exposed to rain water or snow melt. Subparagraph A does not directly relate to the requirements in MS4 discharge permits.[43]

Our focus is on Subparagraph (B) concerning the requirements for MS4 permits. The first two clauses

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[43] *See* 40 CFR §122.26(b)(l4) ("Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.").

concern the geographic scope of an MS4 permit (clause (B)(i)) and the separation of stormwater discharges from other discharges (clause (B)(ii)), but do not include a reference to the MEP standard.

Clause (B)(iii) concerns the controls and provisions required to reduce the discharge of pollutants from MS4s. As is evident, the MEP standard appears in this clause. The Department and the County disagree as to the role that the MEP standard plays in clause (B)(iii).

To construe clause (B)(iii) we begin, of course, with the plain language of the statute. As this case illustrates, however, statutory language is not always "plain" in the sense that it may take on different meanings, depending on how one parses a series of words or clauses. The Department and Frederick County tabulate clause (B)(iii) in slightly different ways to support their contrary interpretations. We apply an editorial pen below to illustrate these different interpretations.

Frederick County's favored construction of clause (B)(iii) can be illustrated as follows:

> Permits for discharges from municipal storm sewers -
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including (1) management practices, (2) control techniques and system (3) design and engineering methods, and (4) such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants.

Under the County's construction, the "controls" subject to the MEP standard are listed in a series following the word "including" – a series of four categories that includes (1) management practices, (2) control techniques and systems, (3) design and engineering methods, and (4) such other provisions as the permitting agency deems appropriate. In that view, there are four categories of pollution controls that might be required by an MS4 permit, including a final catchall category, and all four fall under the MEP umbrella. As indicated above, to support its preferred tabulation and avoid a phrase in the middle of the series of clauses ("system methods") that the County claims is nonsensical, the County asserts that the word "system" is the result of a "typographical error" in the statute that needs to be corrected to "systems."[44]

In contrast, the Department's construction opts for a different tabulation, but does not require revision of the language of the statute. That interpretation can be illustrated as follows:

> Permits for discharges from municipal storm sewers -
>
> (iii) shall require (1) controls to reduce the discharge of pollutants to the maximum extent practicable, including (a) management practices, (b) control techniques and .(c) system, design and engineering methods, and (2) such other provisions as the [EPA]

[44] In support of its contention that the statute contains a typographical error, the County notes that the word "systems" appears in various documents related to stormwater discharge permits, including two statements made while the legislation was debated in Congress.

> Administrator or the State determines appropriate for the control of such pollutants.

Under this construction of the statute, the three categories of controls enumerated in the initial series- *i.e.,* certain "practices," "techniques," and "methods"- are subject to the MEP standard while "other provisions" that the permitting agency deems appropriate under the final clause are not limited by the MEP standard. The Department's construction does not require revision of the text itself, and groups items that could comfortably fit within the category of "controls" separately from the final clause's vaguer and seemingly broader reference to "appropriate ... provisions."

Confronted with similar competing grammatical arguments concerning the application of the MEP standard in clause (B)(iii), a state appellate court in California concluded that "[a]lthough it is not the clearest way of articulating the concept, the language of [clause (B)(iii)] does communicate the basic principle that the EPA [or an authorized state] retains the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of [MEP]." *Bldg. Indus. Assn. of San Diego Cty. v. State Water Res. Control Bd.,* 124 Cal. App. 4th 866, 882-83 (2004) *("BIA* case").[45] That court upheld requirements in an MS4 permit based on water quality standards in the face

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[45] *See also* John H. Minan, *Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards?,* 42 San Diego L. Rev. 1215, 1241-42 (2005) (discussion of grammatical argument *inBIA* case by law professor who served on the permitting agency in that case).

of a contention, similar to that of Frederick County in this case, that those provisions unlawfully exceeded the MEP standard.

Thus, the statement in *Anacostia Riverkeeper* in a somewhat different context and the assessment of the *BIA* court in a similar context both favor the Department's construction of clause (B)(iii). We also consider what legislative history exists and the administrative construction of this federal statute by the federal agency charged with administering it -the EPA.

Legislative History of Clause (B)(iii)

When Congress was considering the legislation that added the MS4 permit requirements to the Act, legislators often spoke in general terms about achieving water quality standards without elaborating on the MEP standard or addressing whether that standard should apply to every pollutant control in an MS4 permit. Some statements suggested that water quality based standards- *i.e.,* standards other than MEP- would be part of MS4 permits. For example, one senator stated that MS4 permit pollution control "requirements are to contain control technology or other techniques to control these discharges and should conform to water quality requirements ." 133 Cong. Rec. S733-02, 1987 WL 928615 (January 14, 1987) (statement of Senator Chafee). On the other hand, another senator paraphrased clause (B)(iii) in language that mirrors the County's interpretation, including substituting the plural "systems" for "system." *ld.* (statement of Senator Durenberger). Yet another member of Congress both alluded to the goal of controlling stormwater discharges "to protect the quality of the

Nation's waters" and in paraphrasing the legislation, used the word "systems." 133 Cong. Rec. H168-03, 1987 WL 928356 (January 8, 1987) (statement of Representative Roe). In the end, what legislative history exists is "not especially illuminating" on the role of the MEP standard.[46]

EPA's Administrative Construction of Clause (B)(iii)

The EPA's position for many years was that an MS4 permit, like any discharge permit, must achieve compliance with water quality standards.[47] Indeed, when it adopted regulations for Phase I MS4 permits, the agency described the controls that would be required by such permits as follows: "[MS4] permits are to establish controls to the maximum extent practicable[,] effectively prohibit non-storm water discharges to the [MS4] *and, where necessary, contain applicable water quality-based controls."* EPA, *National Pollutant Discharge Elimination System Permit Application Regulations*

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[46] Minan, *supra,* note 45, at 1243-44.

[47] EPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits,* 61 Fed. Reg. 43761 (August 26, 1996); EPA, *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality- Based Effluent Limitations in Storm Water Permits,* 61 Fed. Reg. 57425 (November 6, 1996); EPA, *Memorandum from E. Donald Elliott, Assistant Administrator and General Counsel, EPA, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems* (January 9, 1991) at 1; *see also* Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program,* 28 Envtl. L. Rep. 10415, 10428 (1998) (discussing the EPA's interpretation); Minan, *supra,* note 45, at 1245-46 (same).

for Storm Water Discharges- Final Rule, 55 Fed. Reg. 47990, 47995 (November 16, 1990) ("EPA Preamble to 1990 Phase I MS4 Rule") (emphasis added).

The EPA partially backed away from this view after the United States Court of Appeals for the Ninth Circuit held that MS4 permits need not include water quality based effluent limitations. *See* EPA, *National Pollutant Discharge Elimination System – Regulations for the Water Pollution Control Program Addressing Storm Water Discharges -Final Rule,* 64 Fed. Reg. 68722, 68753 (December 8, 1999) ("EPA Preamble to 1999 Phase II MS4 Rule") (recognizing that a Ninth Circuit decision "disagree[d] with EPA's interpretation of the relationship between" §1311 and §1342(p)). Specifically, in *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1164 (9th Cir. 1999), the Ninth Circuit held that §1342(p)(3) "unambiguously demonstrates that Congress did not require [MS4s] to comply strictly with" §131l(b)(1)(C), which requires that discharge permits contain water quality based effluent limitations as needed.[48] On the other hand, the court also stated that the final provision of clause (B)(iii) gives the EPA (and thus a state permitting agency) the discretion to "determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants [or] to require less than strict compliance with state water quality

[48] As noted earlier, while clause (A) of§1342(p)(3) requires industrial stormwater dischargers to comply with all of§1311 *(i.e.,* with both technology based and water quality based effluent limitations), clause (B) lays out different requirements for MS4s without mentioning §1311. The Ninth Circuit reasoned that, for MS4 permits, clause (B)(iii) "replaces" *both* the technology and water quality based effluent limitation requirements in §1311. 191F.3dat1165.

standards." 191 F.3d at 1166.[49] Thus, while the Ninth Circuit did not agree with the EPA's existing construction, it nevertheless recognized that a permitting agency had discretion to include permit terms based on water quality standards.[50]

In any event, after the *Defenders of Wildlife* decision, the EPA modified its administrative interpretation of clause (B)(iii). Whereas the agency had taken the view that MS4 permits, like all discharge permits, must contain water quality based effluent limitations as needed, after the Ninth Circuit decision the EPA viewed such limitations as

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[49] A related question – which is not raised here and which, therefore, we do not address – is whether MS4 permits may require strict compliance with water quality standards. That question is at issue in two cases in the United States Court of Appeals for the District of Columbia Circuit that are currently in settlement proceedings. *Center for Regulatory Reasonableness v. EPA,* Case Nos. 17-1060 & 16-1246 (D.C. Cir.). The challengers in those cases argue that certain Phase II MS4 general permits issued by the EPA violate clause (B)(iii) by requiring compliance with water quality standards. The situation here is different in that no party claims that the Counties' permits expressly require compliance with water quality standards.

[50] Other courts have pointed to *Defenders of Wildlife* as setting forth the discretion that the EPA (and state permitting agencies) have in drafting MS4 permit terms to require pollution controls that satisfy the MEP standard or a more demanding water quality based standard. *See Natural Resources Defense Council v. New York State Dep't Envtl Conservation,* 994 N.Y.S. 2d 125, 135 (N.Y. App. 2014), *aff'd,* 34 N.E.3d 782 (N.Y. 2015); *Conservation Law Foundation, Inc. v. Boston Water and Sewer Commission,* 2010 WL 5349854 at *5-6 (D. Mass. 2010); *Tualatin Riverkeepers v. Oregon Dep't Envtl Quality,* 230 P.3d 559, 563-64 & n.10 (Ore. App. 2010); *City of Arcadia v. State Water Resources Control Board,* 135 Cal. App. 4th 1392, 1429 (2006).

permissible, but not mandatory, in MS4 permits. It cited *Defenders of Wildlife* as support for the proposition that clause (B)(iii) "specifically preserves the authority for EPA or [authorized states] to include other provisions determined appropriate to reduce pollutants in order to protect water quality." EPA Preamble to 1999 Phase II MS4 Rule, 64 Fed. Reg. at 68788. Accordingly, the Phase II regulation provides that "[a]s appropriate, the permit [for a small MS4] will include [m]ore stringent terms and conditions, including permit requirements ... based on an approved [TMDL] or equivalent analysis, or where the [EPA or state] determines such terms and conditions are needed to protect water quality." 40 CFR §122.34(c)(l). Although the 1999 preamble and rule concern Phase II MS4 permits, the EPA's views on water quality based limitations generally apply to all MS4 permits. For example, the *Defenders of Wildlife* decision upheld Phase I MS4 permits issued by the EPA that included water quality based limitations.[51]

The EPA has maintained that position through at least the time period relevant for this litigation. In other words, since 1990, the EPA has held the view that the Act at least authorizes water quality based effluent limitations in MS4 permits.[52] For example,

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[51] *See In re: Arizona Municipal Storm Water NPDES Permits for City ofTucson, Pima County, City of Phoenix, City of Mesa, and City of Tempe,* 1998 WL 284966, at *2 n.1 (EAB May 21, 1998) (stating, in the administrative decision that was reviewed in *Defenders of Wildlife,* that the permittees were properly classified as operators of MS4s requiring Phase I permits).

[52] In its critique of the impervious surface restoration term of the Frederick County MS4 permit, the Dissenting Opinion of

in a letter to the Department concerning Frederick County's permit that appears in the administrative record, the EPA made clear that permitting agencies may include water quality based effluent limitations in MS4 permits: "Where the [permitting] authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion as [the Department] has done in this case, EPA recommends that the ... permitting authority exercise its discretion to include appropriate narrative and/or numeric water quality-based effluent limitations ... as necessary to meet water quality standards." EPA Letter to Maryland Department of the Environment re Supplemental Comments on Frederick County Phase I MS4 Permit (September 23, 2014). The EPA also stated that the requirement of consistency between TMDLs and permits applies to MS4s as it does to all point sources: "Pursuant to 40 CFR 122.44(d)(l)(vii)(B), where there is an applicable [TMDL] approved or established by EPA, a [discharge] permit must include effluent limitations that are consistent with the wasteload allocation ...in the TMDL. This includes MS4 permits." *Id.*

Judge Watts discounts the EPA's interpretation of the Clean Water Act which, as indicated in the text, follows the interpretation of the Act by the Ninth Circuit in *Defenders of Wildlife*. *See* Watts Dissenting slip op. at 11-12 & n.7. Given the ambiguity in clause (B)(iii), the EPA's interpretation-which is consistent with the construction of the statute by the federal courts – is entitled to deference under *Chevron* (and even if the *Chevron* did not apply, under *Skidmore).*

Harmonizing MS4 Permit Terms with the TMDL Process

Clause (B)(iii) is to be read harmoniously with the Act as a whole, including the TMDL process. *See King v. St. Vincent's Hospital,* 502 U.S. 215, 221 n.10 (1991) (when construing statute, court should read statute as a whole and harmonize its provisions); *Condon v. State of Maryland-Univ. of Maryland,* 332 Md. 481,491 (1993) (same). In our view, the EPA's and Department's interpretation of clause (B)(iii) is more consistent with the Act as a whole than the alternative proposed by Frederick County.

The EPA's regulations require that a water quality based effluent limitation be derived from the applicable water quality standard, without referring to a practicability test. Permitting agencies "shall ensure that [t]he level of water quality to be achieved by [water quality based effluent limitations] on point sources ... is derived from, and complies with, all applicable water quality standards." 40 CFR §122.44(d)(l)(vii)(A). The EPA's rationale is that"[d]eriving water quality-based effluent limits from water quality standards is the only reliable method for developing water quality-based effluent limits that protect aquatic life and human health." EPA, *National Pollutant Discharge Elimination System; Surface Water Taxies Control Program- Final Rule,* 54 Fed. Reg. 23868, 23879 (June 2, 1989) (preamble to publication of the EPA's rule that, in part, adopted 40 CFR §122.44(d)(l)(vii)). Importantly, this rationale does not distinguish between types of point sources, *i.e.,* whether the discharger is a factory, a wastewater treatment plant, an MS4, or

any other kind of point source. The process of implementing TMDLs via discharge permits "results in effluent limits that protect aquatic life and human health because the limits are derived from water quality standards." *Id.* In other words, when translating TMDL wasteload allocations to effluent limitations in a permit, the pertinent water quality standard remains the touchstone. Thus, when an entity discharges to a waterway subject to a TMDL, its permit must contain effluent limitations consistent with the "assumptions and requirements" of the corresponding wasteload allocation in the TMDL. 40 CFR §122.44(d)(l)(vii)(B).

When the final provision of clause (B)(iii) is read to encompass water quality based effluent limitations, MS4 permits are treated like any other discharge permit for purposes of implementing TMDLs. This interpretation harmonizes clause (B)(iii) with the TMDL provisions insofar as the latter likewise do not distinguish between types of point sources. By contrast, if permitting agencies must constrain all TMDL based effluent limitations in MS4 permits by some sort of practicability analysis, there would be tension with the basic tenet that water quality based effluent limitations must derive from water quality standards.

Summary

In including the impervious surface restoration requirement in Frederick County's permit, the Department acted consistently with the EPA's interpretation of clause (B)(iii) -that is, that the Act authorizes permitting agencies to include water quality based effluent limitations in MS4 permits without reference to the MEP standard. As

explained earlier, clause (B)(iii) is ambiguous. A federal court reviewing the EPA's interpretation of an ambiguous federal statutory provision under *Chevron* would defer to the agency's reasonable construction of that language. In our view, the EPA's interpretation of clause (B)(iii) is a reasonable construction that is consistent with the rest of the Act and accords with the Ninth Circuit decision in *Defenders of Wildlife* and other applicable court decisions. Even under the less deferential *Skidmore* standard of review, a federal court would likely defer to the agency's interpretation in light of its consistent view that MS4 permits are subject to standards emanating from TMDLs. Moreover, the Department was "bound to follow EPA's interpretation" in light of the Clean Water Act's scheme of cooperative federalism. *Natural Resources Defense Council v. New York State Dep't of Envtl Conservation, supra.* Accordingly, we hold that the Department did not act unlawfully in including a water quality based effluent limitation (the impervious surface restoration requirement) not subject to the MEP standard in the County's permit.[53]

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[53] Because we hold that the Act authorizes the impervious surface restoration requirement in the County's permit, we need not address the Department's alternative argument that Maryland law allows such a condition as consistent with the federal Act's provision allowing for more stringent state-set permit conditions. *See* 33 U.S.C. §1370.

3. Whether the Inclusion of the Impervious Surface Restoration Requirement in Frederick County's Permit was Arbitrary and Capricious

Frederick County also argues that, regardless of whether the Act authorizes the Department to include an impervious surface restoration requirement in MS4 permits without reference to the MEP standard, the Department acted arbitrarily and capriciously when it included such a provision in the County's permit. The County notes that, during the comment period on the draft permit, it submitted to the Department a report that purportedly demonstrated that compliance with the permit's requirements within five years was financially and logistically impossible.[54]

As noted earlier, when agency action is challenged as arbitrary and capricious, the question is whether there was a rational basis for that action. *See* Part II.A. of this Opinion. In answering that question, a reviewing court is to be "extremely deferential" to the agency and not to substitute its own judgment for that of the agency. To assess whether the Department acted arbitrarily and capriciously in its consideration of Frederick County's objection to the permit term, we review

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[54] As described above, the General Assembly authorized counties to charge a stormwater remediation fee to help finance stormwater management and restoration required by MS4 permits. *See* EN §4-202.1. Frederick County adopted a fee of 1¢; at oral argument before this Court, the County explained that it had elected to use general funds to finance its obligations under the Clean Water Act.

both the procedure that the Department followed and the substance of its action.

Procedure

Consistent with EN §1-604(a), the Department first issued a "tentative determination" together with the draft permit on June 28, 2014. A public comment period followed, during which the Department received many comments on the draft permit. After consideration of those comments, the Department published a "final determination" on December 10, 2014, along with the final permit, consistent with EN §1-604(b). *See* Basis for Final Determination to Issue Frederick County's NPDES MS4 Permit MD0068357 (December 2014) ("Basis for Final Determination- Frederick County").

In general, the Environment Article gives the Department broad discretion in replying to comments when the agency takes final action on a proposed permit. The Department is not obliged to respond to all public comments, but rather may "pick and choose" the comments it addresses. *Kor-Ko Ltd.* v. *Maryland Dep't of the Env't,* 451 Md. 401, 422 n.18 (2017). The fact that an agency does not change a proposed action or regulation in light of comments requesting a change does not mean that the process lacked a meaningful opportunity for comment or that the agency failed to consider those comments. *See Fogle* v. *H & G Rest., Inc.,* 337 Md. 441, 463 (1995).

Substance

In its comments on the draft permit, Frederick County voiced its concerns about the feasibility of compliance with the impervious surface restoration

requirement. The Department addressed Frederick County's concerns about cost and feasibility, as well as a number of other issues in the Basis for Final Determination that the Department published with the final version of the permit.[55] Basis for Final Determination- Frederick County at 18. The Department noted that the County believed that the 20 percent restoration requirement "exceeds an MEP level of effort and that compliance would be financially and operationally infeasible." *Id.* at 22. The Department responded to those concerns by explaining that the restoration requirement was necessary for consistency with the Bay TMDL and the Maryland WIP. *!d.* The Department also stated that the EPA had reviewed the permit for such consistency and was "satisfied" that the permit achieved it based, in part, on the impervious surface restoration requirement. *!d.* Although the Department's response may not have amounted to a point-by-point refutation of every detail of the County's comments, it did address the significant issues raised by the County. We cannot say that the Department failed to respond in a reasoned manner.

In particular, the Department had a rational basis for saying that the restoration requirement is necessary for consistency with the Bay TMDL and the Maryland WIP. As this Court recognized in *Anacostia Riverkeeper,* the EPA relied on the Maryland WIP, which included the impervious surface restoration requirement, when developing the Bay TMDL and the restoration requirement was a

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[55] In the same document, the Department also addressed similar cost and feasibility "estimates" submitted by Charles County and Harford County. Basis for Final Determination-Frederick County at 18.

"key element" in securing EPA's endorsement of the Maryland WIP. 447 Md. at 128.

It was reasonable for the Department to respond to the County's claim of impossibility by explaining that the restoration requirement derives from the Bay TMDL and the Maryland WIP. The Bay TMDL and Maryland WIP were the result of significant deliberation among various stakeholders together with the EPA and the Department. For example, the record shows that Frederick County and the Department had been discussing practicability and feasibility since at least 2012.

In our view, the Department was not arbitrary or capncious m including the impervious surface restoration requirement in Frederick County's MS4 permit.

C. Whether the Permits Exceed the Appropriate Geographic Scope of an MS4 Permit

Both Counties assert that their permits exceed the appropriate scope of an MS4 permit. The Counties focus on Part IV.E. of their permits. That section of the permit requires the County to (1) conduct a detailed watershed assessment for the entire County; (2) complete restoration of 20 percent of the impervious surface area in the County; (3) develop and implement restoration plans for meeting applicable stormwater wasteload allocations in EPA-approved TMDLs; (4) conduct public outreach and encourage public participation in the watershed assessments, restoration plans, and achievement of the TMDL limits and water quality standards; and (5) evaluate and document

its progress in meeting stormwater wasteload allocations in EPA-approved TMDLs.

The Counties argue that the Department exceeded its authority under the Clean Water Act in its specification of the impervious surface restoration condition and in requiring compliance with stormwater wasteload allocations in applicable EPA-approved TMDLs. To some extent, these arguments are based on making a distinction between the permittee – in these cases, Frederick and Carroll Counties – and the activity that is authorized by the permits – the discharge of pollutants by the MS4s operated in each County.

1. Jurisdiction-Wide versus System-Wide Permits

The Clean Water Act provides that "[p]ermits for discharges from municipal storm sewers may be issued on a system - or jurisdiction-wide basis." 33 U.S.C. §1342(p)(3)(B)(i). The EPA's regulations reiterate that a permitting authority such as the EPA or the Department may issue permits for Phase I MS4s on a system-wide or jurisdiction-wide basis. *See* 40 CFR §122.26(a)(l)(v) (in exercising residual designation authority to require Phase I permit, state or EPA may make designation on system-wide or jurisdiction-wide basis), 40 CFR §122.26(a)(3)(ii) (permit for a large or medium MS4 may be issued on system-wide basis or on a number of other bases, including with reference to the "jurisdiction"). Neither the statute nor the regulations elaborate on what it means for an MS4 permit to be issued on a "jurisdiction-wide" basis- as opposed to a "system-

wide" basis.[56] The explanation offered by the EPA at the time it adopted these regulations indicates that it was concerned with ensuring that permitting authorities had the necessary flexibility to adapt permits to local conditions such as existing administrative systems, police powers, and land use authority. EPA Preamble to 1990 Phase I MS4 Rule, 55 Fed. Reg. at 48043.

The permits that are the subject of this appeal are each issued to a County – a jurisdiction- in its capacity as the operator of an MS4- a system.[57] But the challenges raised by the Counties cannot be resolved by the descriptive label attached to their MS4 permits. The Counties contend that, regardless of whether a permit is issued on a system- wide or jurisdiction-wide basis, the scope of the regulatory conditions in the permit must relate to the discharges authorized by the permit. They argue that the baseline calculation for the impervious surface restoration requirement effectively makes the Counties responsible for pollutants carried by stormwater that does not flow

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[56] The EPA regulations suggest that - at least with respect to a Phase I MS4 that is classified as "large" or "medium" - a "jurisdiction-wide" permit may cover only a portion of the corresponding system. *See* 40 CFR §122.26(a)(3)(ii) (authorizing the issuance of either a system-wide permit "covering all discharges from [the MS4]" or "distinct permits for appropriate categories of discharges *within* [the MS4] including, but not limited to ... discharges located within the same jurisdiction ...") (emphasis added). This provision does not concern residually designated Phase I MS4s.

[57] The Carroll County permit also includes, as co-permittees, all of the incorporated municipalities in the County and thus pertains to several jurisdictions and several systems. *See* 40 CFR §122.26(a)(3), (b)(l).

into their MS4s. The Counties further argue that permit provisions related to stormwater wasteload allocations in local TMDLs also do so.

2. The Impervious Surface Restoration Requirement

Impervious surface restoration requirements have been part of MS4 permits issued by the Department since at least 1999. Maryland WIP at 2-26. The previous generation of each County's permit included an impervious surface restoration requirement of 10 percent of each County's unrestored impervious surface.[58]

The Impervious Surface Restoration Condition in the Current Permit

With respect to impervious surface restoration, the current permit provides:

> Within one year of permit issuance, [the] County shall submit an impervious surface area assessment consistent with the methods described in the [Department] document "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits" (MDE, June 2011 or subsequent versions). Upon approval by [the Department], this impervious surface area assessment shall serve

[58] The general permit applicable to Phase II small MS4s also includes an impervious surface restoration term, although it differs from the one included in the permits of Phase I MS4s like the Counties. The current Phase II general permit requires restoration of 20 percent of the unrestored impervious surface in each permittee's urbanized area by 2025.

> as the baseline for the restoration efforts required in this permit.
>
> By the end of this permit term, [the] County shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the [Department] document cited in [this section] that has not already been restored to the MEP. Equivalent acres restored of impervious surfaces, through new retrofits or the retrofit of pre-2002 structural [best management practices], shall be based upon the treatment of the WQv criteria and associated list of practices defined in the *2000 Maryland Stormwater Design Manual*. For alternate [best management practices], the basis for calculation of equivalent impervious acres restored is based upon the pollutant loads from forested cover.

Carroll County Phase I MS4 Permit MD0068331, Part IV.E.2.a; Frederick County Phase I MS4 Permit MD0068357, Part IV.E.2.a.

On its face, this provision does not require the County to undertake impervious surface restoration outside the geographic area that drains to the MS4, as it does not dictate where such restoration must take place.[59] But the permit provision uses unrestored

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[59] Some permit terms specify actions within the MS4 service area. For example, Part IV.D. of the permit requires the County to implement certain management programs in "areas served by [the] County's MS4." Some required programs involve actions that are necessarily conducted on a county-wide basis, including outside the service area of the MS4- *e.g.,* an "acceptable stormwater management program" under EN §4-201 *et seq.,* an "acceptable erosion and sediment control

impervious surface throughout the *entire County* – not just within the MS4 service area – as a starting point, or baseline, for calculating the required restoration.[60] (In the case of both Counties, the County's MS4 serves only a portion of the County's geographic area).

The Counties do not contend that the inclusion of an impervious surface restoration requirement itself is beyond the scope of an MS4 permit. Rather, they argue that the reference to a county-wide measure of impervious surface as the baseline for the requirement in the permit exceeds the Department's authority. They assert that the reference to that baseline in a permit has the effect of making the County responsible for pollutants that never enter the County's MS4.

Anacostia Riverkeeper

This Court considered the validity of an impervious surface restoration requirement in

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program" under EN §4-101 *et seq*. and a "public education and outreach program to reduce stormwater pollutants." MS4 Permits, Part IV.D. 1, 2, 6. If the permits are modified (as sought by the Counties) to allow water quality trading as a compliance method, the pollution reductions for which a County would receive credit would not necessarily occur within the County, much less within its MS4 service area. *See* Part II.E. of this Opinion.

[60] In particular, the permit term refers to restoration of 20 percent of the County's impervious surface area consistent with the methodology in the Department's guidance document. That methodology involves a calculation of the impervious surface area throughout the entire County (after excluding certain areas that are not directly at issue here). *See* Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated (August 2014) at 1, 6-10.

Anacostia River keeper. In that case, the Phase I MS4 permits in question included an identical term requiring the permittee counties to restore 20 percent of the unrestored impervious surface over the five-year period covered by their permits. The requirement was challenged by environmental advocacy groups as "too opaque" to satisfy the Act's direction that MS4 permits include provisions to reduce pollutants that satisfy the MEP standard.[61] They also argued that the Department had failed to adequately explain its use of the 20 percent restoration condition or how that level of restoration would achieve the Bay TMDL.

This Court concluded that impervious surface restoration, as carried out in accordance with the Department's Stormwater Design Manual (incorporated by reference in the permit term), is a stormwater management practice that functions as a "surrogate" for direct reduction of pollutants in stormwater and that satisfies the MEP standard. 447 Md. at 122-23. Noting that the 20 percent restoration requirement was consistent with the Maryland WIP, the Court further held that the Department's decision to include that requirement in the permits under review was supported by substantial evidence and was not arbitrary and capricious. *!d.* at 128-29. The Court also upheld the temporal baseline selected by the Department for measuring compliance with the 20 percent requirement. In particular, it held that the Department had not erred in using the measure of unrestored impervious surface in the counties in 2002 as the baseline. *Id.* at 132.

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[61] The MEP standard is discussed in Part II.B. of this Opinion.

In this case, the Counties also challenge the baseline used for the impervious surface restoration requirement. However, in contrast to *Anacostia Riverkeeper,* the basis of that challenge is geographic rather than temporal.[62] It is rooted in the notion that MS4 permits under the Act regulate discharges of pollutants only from an MS4 itself. *See* 33 U.S.C. §1342(p)(3) (setting forth permit requirements for "permits for discharges from [MS4s]"). In the Counties' view, use of a county-wide baseline violates that principle because some of the impervious surface included in that baseline is associated with pollution that never enters the MS4.[63] According to the Counties, to be consistent

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[62] The Counties point out that the use of 2002 as the baseline year for assessment of the County's impervious surface- instead of 1985, the baseline year in the Maryland WIP -would effectively increase the target amount of restoration. Use of 2002 as the baseline year would increase the baseline amount of impervious surface by including development between 1985 and 2002. *(In Anacostia Riverkeeper,* environmental groups had argued that a baseline year later than 2002 should have been used- *i.e.,* that use of the 2002 baseline was too lenient). However, in arguing that they are being held responsible for pollutant discharges that do not emanate from their MS4s, the Counties focus on the geographical element of the baseline calculation.

[63] This is based on the following reasoning. Obviously, rain can fall anywhere in a jurisdiction, such as a county, that operates an MS4. The rain will carry some pollutants into conveyances within the county's MS4 and, from there, into waterways. Other pollutants, however, may never encounter the MS4. Instead, they will run into waterways directly from fields, farms, parking lots, or other land uses in the county that are out of reach of the MS4. Under the Act, the pollutants carried through the MS4 constitute a form of point source pollution, and the pollutants *not* carried through the system are a form of nonpoint source pollution

with the Clean Water Act, an impervious surface restoration requirement must reference a baseline that includes only the MS4 service area.[64]

(often called "stormwater runoff'). Since MS4 permits under the Act authorize only discharges from point sources, such a permit may only include conditions related to stormwater and the accompanying pollutants that enter (and are discharged from) the MS4, not stormwater that never encounters the MS4. *See Envtl Def Ctr., Inc. v. EPA,* 344 F.3d 832, 841 n.8 (9th Cir. 2003).

[64] Carroll County also invokes the doctrine of offensive non-mutual collateral estoppel to argue that the Department is barred from using a county-wide baseline for impervious surface. In particular, the County cites a 2003 administrative decision by the Department's final decisionmaker, which struck certain provisions of wastewater discharge permits issued to three poultry processors. *Tyson Foods, Inc., et al. v. MDE,* OAH Case No. MDE-WMA-063-200200001 (June 12, 2003). The final decisionmaker concluded that, under State law, the permits could not include conditions that required the processors to undertake certain activities relating to chicken manure at the farms of those who raised chickens that were sold or otherwise provided to the processors, particularly when the growers were not co-permittees.

The *Tyson Foods* administrative decision did not involve an MS4 permit, much less an issue identical to the one in this case, and did not discuss the Clean Water Act, EPA regulations, or any other federal law, for that matter. Under those circumstances, the doctrine of offensive non-mutual collateral estoppel does not apply to determine the outcome of this case. *See Garrity v. Maryland State Board of Plumbing,* 447 Md. 359,369 (2016) (among other things, issue decided in prior adjudication must be identical for collateral estoppel to apply). The reasoning of the administrative decision in *Tyson Foods* may be analogous in some respects to the argument advanced by the Counties in this case, but it is not dispositive.

Origin of the 20 Percent Restoration Requirement

There is no question that the pollutant discharges that the permit authorizes are those from each County's MS4. As this Court noted in *Anacostia Riverkeeper* and as discussed in the previous section of this Opinion, the impervious surface restoration term is a water quality based effluent limitation authorized by 33 U.S.C. §1342(p)(3)(B)(iii). In particular, such a permit term is a numeric water quality based effluent limitation, as recognized by the EPA.[65]

Importantly, the amount of impervious surface to be restored is simply a surrogate or proxy for an amount of pollution to be reduced. The Department's guidance document incorporated in the permit term explains how to calculate loads of pollution reduced, given a certain kind and quantity of impervious surface restoration activity. Thus, when the Department is determining how a county should calculate the number of impervious surface acres to be restored, the Department is effectively determining a measure of pollution reduction.

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[65] *See* EPA, *Post-Construction Performance Standards & Water Quality-Based Requirements: A Compendium of Permitting Approaches* (June 2014) at 19 (including impervious surface restoration terms in Maryland MS4 permits in a list of examples of numeric water quality based effluent limitations); EPA, *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs)for Storm Water Sources and NPDES Permit Requirements Based on WLAs"* (November 26, 2014) at 10 (identifying an identical20% restoration term in the Prince George's County MS4 permit as a numeric water quality based effluent limitation).

As explained earlier, the EPA's regulations require that a water quality based effluent limitation be derived from applicable water quality standards, without reference to a practicability test. *See* 40 CFR §122.44(d)(1)(vii)(A). This is because "[d]eriving water quality-based effluent limits from water quality standards is the only reliable method for developing water quality-based effluent limits that protect aquatic life and human health." EPA, *National Pollution Discharge Elimination System: Surface Water Toxics Control Program - Final Rule,* 54 Fed. Reg. 23868, 23879 (June 2, 1989); *see also Natural Resources Defense Council v. Fox,* 909 F. Supp. 153, 156 (S.D.N.Y. 1995).

With respect to the baseline for the impervious surface restoration requirement, those regulations require a permitting agency to craft the numeric component of a water quality based effluent limitation by reference to "all applicable water quality standards." 40 CFR §122.44(d)(1)(vii)(A). Thus, when establishing how each County is to calculate the number of impervious surface acres to be restored- *i.e.,* the proxy for an amount of pollution to be reduced – the Act and EPA regulations direct the Department to focus on what is necessary to achieve water quality standards in the Bay and the waters that feed it.

In our view, the Department's use of a county-wide baseline as a reference point for calculating the impervious surface restoration condition does not exceed the Department's authority under the Act because the impervious surface restoration condition implements a stormwater wasteload allocation in a TMDL (specifically, the Bay TMDL) designed to achieve water quality standards. Since at least 1991

the EPA has determined in various contexts, including regulation, that permitting authorities may make trade-offs between pollutant allocations for point and nonpoint sources. The EPA's definition of TMDL contemplates such trade-offs. *See* 40 CFR §130.2(i) ("If ... nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.").

Given that the possibility of such trade-offs is inherent in the definition of TMDL, it is perhaps not surprising that the EPA has reiterated that concept when discussing how states are to develop TMDLs. *See* EPA, *Surface Water Toxics Control Program and Water Quality Planning and Management Program,* 57 Fed. Reg. 33040, 33048 (July 24, 1992) ("States have the flexibility to consider the relative costs of point and nonpoint source controls when preparing TMDLs, along with such other factors as reliability, relative effectiveness, and degree of assurance that nonpoint source controls will actually be implemented and maintained."); EPA, *Guidance for Water Quality-based Decisions: The TMDL Process* (1991) at 15 ("Under the [Act], the only federally enforceable controls are those for point sources through the NPDES permitting process. In order to allocate loads among both nonpoint and point sources, there must be reasonable assurances that nonpoint source reduction will in fact be achieved. Where there are not reasonable assurances, under the [Act], the entire load reduction must be assigned to point sources.").

This long-established EPA policy is a reasonable interpretation of the Act and is entitled to deference

under *Chevron.* Even if the EPA policy were not entitled to *Chevron* deference under federal law, we would defer to the agency under *Skidmore* and our own standards of review. As explained at the outset of this opinion, the Act requires the establishment of TMDLs when an existing regime of point source pollution controls is inadequate to achieve water quality standards. TMDLs reflect pollutant levels necessary to achieve those standards in compliance with the Act. The EPA has reasonably concluded that permitting authorities must have the discretion to allocate pollutant loads between point and nonpoint sources as needed to achieve the TMDL limits, including potentially ratcheting up the requirements on point sources when necessary. *See Farm Bureau,* 984 Supp.2d at 326 (in a case concerning the Bay TMDL, describing how a permit writer may apportion pollutant amounts – "loads" – among point and nonpoint sources m accordance with EPA guidance).[66]

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[66] In practice, the broad discretion to allocate TMDL-established pollutant amounts between point and nonpoint sources means that permitting agencies may impose a level of pollution reduction on point sources in part to help offset nonpoint source pollution. *See* Michael M. Wenig, *How "Total" Are "Total Maximum Daily Loads"? -Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act,* 12 Tul. Envtl. L.J. 87, 117 & n.131 (1998)(recognizing that TMDL allocations can require point sources to "bear the brunt of pollution reductions necessary to achieve" TMDLs); Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program,* 28 ELR 10415, 10420 (August 1998) (recognizing permitting agencies' option of "ratcheting down further on point sources" when setting wasteload allocations).

Thus, nonpoint source pollution reduction may be assigned to point sources- *i.e.,* through wasteload allocations in the development of TMDLs. At bottom, it is this assignment of pollutant reductions to their wasteload allocations that is the essence of the Counties' objection to the impervious surface restoration requirement in their permits.[67] The Department's use of a county-wide baseline for the impervious surface restoration condition is thus related to the broad discretion of the states and the EPA, in drafting a TMDL, to assign an amount of nonpoint source pollution reduction to point sources.

Moreover, federal regulations require that point source permits contain effluent limitations consistent with the "assumptions and requirements" in wasteload allocations in applicable TMDLs. *See* 40 CFR §122.44(d)(l)(vii)(B). As this Court noted in *Anacostia Riverkeeper,* this standard is flexible. 447 Md. at 135. In this case, the impervious surface restoration term in the Counties' permits is consistent with the underlying premise of the Bay TMDL (by way of the Maryland WIP) that Maryland's Phase I MS4 permits will include a corresponding impervious surface restoration requirement.

That provision underwent significant development before reaching its final form in the permits. For example, in accordance with the EPA

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[67] The Maryland WIP states that the impervious surface restoration "strategy" *(i.e.,* 30% cumulative restoration for Phase I MS4s) is associated with a particular "load reduction," *i.e.,* a certain quantity of pollution reduction. Maryland WIP at 5-30.

regulations governing discharge permits and a related memorandum of understanding with the Department, the EPA formally objected to the Counties' draft permits because, among other things, the impervious surface restoration requirement was "not adequately expressed" and did not achieve compliance with the Bay TMDL. *See* EPA, Specific Objection to Carroll County Phase I MS4 Permit MD0068331 (September 20, 2012); EPA, Specific Objection to Frederick County Phase I MS4 Permit MD0068357 (September 20, 2012). In response to such objections and to comply with the requirement of consistency between TMDLs and discharge permits, the Department adjusted the impervious surface term in the Counties' permits to a form acceptable to the EPA. The EPA found the consistency requirement to be satisfied in the final version of the permits and withdrew its objection. EPA, Supplemental Comments on Carroll County Phase I MS4 Permit (September 23, 2014); EPA, Supplemental Comments on Frederick County Phase I MS4 Permit (September 23, 2014).

Summary

The impervious surface restoration term in the Counties' MS4 permits is a numeric water quality based effluent limitation corresponding to Maryland's stormwater wasteload allocation within the Bay TMDL. As such, when crafting that limitation, the Department was authorized to focus on what would be necessary to achieve water quality standards, and the Department determined that the baseline calculation method it chose was necessary to achieve applicable water quality standards for the Bay. The Department did not exceed its authority under the

Clean Water Act when it directed calculation of the impervious surface using a county-wide baseline.[68]

3. Restoration Requirement Related to Local TMDLs

Both Counties point to certain permit conditions that require the Counties to adopt restoration plans and provide reports concerning compliance with stormwater wasteload allocations set forth in EPA-approved TMDLs for waterways in the Counties. They argue that these provisions unlawfully make the Counties responsible for discharges of third parties. These provisions appear in Part IV.E. of each County's permit and read as follows:

> 2. Restoration Plans
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> * * *
>
> b. Within one year of permit issuance, [the] County shall submit to [the Department] for approval a restoration plan for each stormwater [wasteload allocation] approved by EPA prior to the effective date of the permit. The County shall submit restoration plans for subsequent TMDL [wasteload allocations] within one year ofEPA approval. Upon approval by [the Department], these restoration plans shall be enforceable under this permit. As part of the restoration plans, [the] County shall:

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[68] Given this conclusion, we need not address whether the impervious surface restoration requirement is permissible as a State-determined effluent limitation that is "more stringent" than what the Act requires.

i. Include the final date for meeting applicable [wasteload allocations] and a detailed schedule for implementing all structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives necessary for meeting applicable [wasteload allocations];

ii. Provide detailed cost estimates for individual projects, programs, controls, and plan implementation;

iii. Evaluate and track the implementation of restoration plans through monitoring or modeling to document the progress toward meeting established benchmarks, deadlines, and stormwater [wasteload allocations]; and

iv. Develop an ongoing, iterative process that continuously implements structural and nonstructural restoration projects, program enhancements, new and additional programs, and alternative [best management practices] where EPA approved TMDL stormwater [wasteload allocations] are not being met according to the benchmarks and deadlines established as part of the County's watershed assessments.

* * *

4. TMDL Compliance

[The] County shall evaluate and document its progress toward meeting all applicable stormwater [wasteload allocations]

included in EPA approved TMDLs. An annual TMDL assessment report with tables shall be submitted to [the Department]. This assessment shall include complete descriptions of the analytical methodology used to evaluate the effectiveness of the County's restoration plans and how these plans are working toward achieving compliance with EPA approved TMDLs. [The] County shall further provide:

a. Estimated net change in pollutant load reductions from all completed structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives;

b. A comparison of the net change in pollutant load reductions detailed above with the established benchmarks, deadlines, and applicable stormwater [wasteload allocations];

c. Itemized costs for completed projects, programs, and initiatives to meet established pollutant reduction benchmarks and deadlines;

d. Cost estimates for completing all projects, programs, and alternatives necessary for meeting applicable stormwater [wasteload allocations]; and

> e. A description of a plan for implementing additional watershed restoration actions that can be enforced when benchmarks, deadlines, and applicable stormwater [wasteload allocations] are not being met or when projected funding is inadequate.

Carroll County Phase I MS4 Permit MD0068331, Part IV.E.2.b, IV.E.4; Frederick County Phase I MS4 Permit MD0068357, Part IV.E.2.b, IV.E.4.

The Counties assert that these permit terms are overbroad because some EPA- approved local TMDLs assign *nonpoint* source pollution to the Counties' MS4s, which are point sources. Carroll County specifically cites the fecal bacteria TMDL for Double Pipe Creek- one of the EPA-approved local TMDLs incorporated by reference in Attachment B to the Carroll County permit.[69]

The Double Pipe Creek TMDL assigns certain nonpoint source pollution- namely, "contributions [of fecal bacteria] from domestic animal and [septic system] sources"- to a stormwater wasteload allocation, which includes pollution budgeted to Carroll County's MS4.[70] Because the permit requires the County to develop "restoration plans" to achieve the stormwater wasteload allocations of relevant local TMDLs, the County argues that the permit makes the County responsible for addressing nonpoint pollution from third parties that never enters the County's

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[69] The Double Pipe Creek watershed includes parts of both Counties and is also incorporated in Frederick County's permit.

[70] The Double Pipe Creek TMDL distributes this nonpoint source pollution between Carroll County's and Frederick County's MS4s.

MS4. The County uses the Double Pipe Creek TMDL as an example, but this argument would apply to any EPA-approved local TMDL that assigns nonpoint source pollution to stormwater waste load allocations. [71]

This dispute concerns not so much the incorporation ofEPA-approved local TMDLs in the permit, as the decisions that were made in the development of those TMDLs. In the case ofthe Double Pipe Creek TMDL, Carroll County is questioning a decision made when the EPA approved the Double Pipe Creek TMDL – namely, the decision to allocate pollution from nonpoint sources to the Counties' MS4s by way of a stormwater wasteload allocation in the TMDL.

Frederick County argues that, like the impervious surface restoration term, the restoration planning requirement "unlawfully regulates stormwater beyond the scope" of the Department's authority. The County bases this argument on the assertion that the local TMDLs "cover[] areas that do not drain to the County's MS4." The County provides little explanation for this argument, but as far as we can tell, it derives from the same concern raised by Carroll County- *i.e.,* the decision made by the Department at the local TMDL development stage to include nonpoint source pollution within the stormwater wasteload allocation.

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[71] This issue is somewhat distinct from the issue discussed in the previous section of this Opinion concerning impervious surface restoration in that the allocations at issue there derived from the EPA's reliance on the Maryland WIP in devising the Bay TMDL, rather than directly from the EPA-approved TMDL itself.

For the reasons outlined earlier in this Opinion,[72] the Counties should have raised these arguments in a challenge to the EPA's approval of the Double Pipe Creek TMDL and other, similar local TMDLs. *See, e.g., City of Kennett v. EPA,* 887 F.3d 424 (8th Cir. 2018) (municipal challenge to EPA-approved TMDL that would affect municipality's wastewater permit). Therefore, we will not entertain these arguments here. *See Anacostia Riverkeeper,* 447 Md. at 129 n.46.

D. Whether the Counties are Appropriately Classified as Phase I Jurisdictions

Frederick County first received an MS4 permit as a Phase I jurisdiction in 1994. It subsequently applied for and received a Phase I permit in 2002. In 2006, it applied for the Phase I permit at issue in this appeal. It first contested its status as a Phase I jurisdiction during the public comment period following the Department's publication of its draft permit in 2014 and reiterated those arguments when it sought judicial review of the final 2014 permit.

Carroll County first received an MS4 permit as a Phase I jurisdiction in 1995. It subsequently applied for and received Phase I permits in 2000 and 2005. Unlike Frederick County, it did not question its status as a Phase I jurisdiction during the administrative process for its most recent permit, which was issued in 2014, but first contested its status as a Phase I jurisdiction when it sought judicial review of that permit.[73]

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[72] *See* Part II.A.2 of this Opinion.

[73] The Department argues that Carroll County may not now challenge its Phase I classification because, unlike Frederick County, it failed to raise the issue during the public comment

Both Counties argue that the Department has unlawfully treated them as Phase I jurisdictions because it has incorrectly classified them as "medium" (and therefore Phase I)- as opposed to "small" (and therefore Phase II)-MS4 jurisdictions since the time when they first applied for and received their first MS4 permits in the early 1990s. This distinction matters because, as indicated earlier, Phase I jurisdictions have generally been subject to earlier and more stringent permit requirements than Phase II jurisdictions. In particular, the Counties point to the impervious surface restoration requirement in their Phase I permits.[74] As relief, both Counties seek to be re-classified as Phase II jurisdictions with their permit terms conformed to those that apply to Phase II MS4s.

1. Application of the MS4 Permit Requirement in Phases

Phase I MS4 Permits

In 1987, when Congress added the permit requirement for MS4s to the Clean Water Act, it did not require permits for all MS4 discharges immediately. Instead, it adopted a staggered approach.[75] This

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period on its draft 2014 permit. However, given that Frederick County did challenge the classification during the administrative process for its permit and that the issue is essentially the same for both Counties, we will not avoid the issue on the basis of lack of preservation.

[74] The impervious surface restoration requirement is more stringent in Phase I MS4 permits than a similar term in Phase II MS4 permits, in three ways: larger baseline (county wide vs. urbanized areas), earlier deadline (2019 vs. 2025), and higher percentage of area to be restored (30% vs. 20%).

[75] Congress created this staggered approach in the Water Quality Act of 1987 by explicitly recognizing that all MS4 discharges were subject to the Act's permit requirement, establishing a moratorium on that requirement until 1994, and

approach started with applying the permit requirement first to discharges from systems with the greatest potential to pollute waterways, which was referred to as Phase I. These MS4s included those serving larger populations, because areas with larger and denser populations tend to have more developed land with impervious surface and, as a result, generate more stormwater pollution.[76] Also included in the first round were MS4s determined by the EPA or a state to be significant contributors of pollutants, regardless of the size of the population served by those MS4s. This statutory authority to issue permits based on water quality impact (as opposed to the proxy of population served) is often referred to as the "residual designation authority" of the EPA and the states.

For our purposes, the relevant Phase I categories[77] are the following:

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then exempting certain discharges from that moratorium at various intervals. *See* 33 U.S.C. §1342(p)(1)- (2). As a result, the permit requirement was imposed on MS4s in stages.

[76] Population served as a proxy for the amount of pollution in stormwater because "discharges from [MS4s] serving larger populations are thought to present a higher potential for contributing to adverse water quality impacts.... [P]ollutant loads from urban runoff strongly depend on the total area and imperviousness of developed land, which in tum is related to population." EPA Preamble to 1990 Phase I MS4 Rule, 55 Fed. Reg. at 48038.

[77] In all, Phase I covered five categories of MS4 stormwater discharges. *See* 33 U.S.C. §1342(p)(1)-(2). The other two Phase I categories are discharges for which a permit had been issued before 1987 and discharges associated with industrial activity - neither of which is at issue in this appeal. 33 U.S.C. §1342(p)(2)(A)-(B).

(1) *Large MS4.* A discharge from an MS4 serving a population of 250,000 or more, referred to in the statute as a "large MS4." 33 U.S.C. §1342(p)(2)(C), (p)(4)(A).

(2) *Medium MS4.* A discharge from an MS4 serving a population of 100,000 or more but less than 250,000, referred to in the EPA's regulations as a "medium MS4." 33 U.S.C. §1342(p)(2)(D); 40 CFR §122.26(a)(1)(iv).

(3) *Residually Designated MS4.* A discharge for which the EPA or a state "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. §1342(p)(2)(E).

The EPA adopted regulations in 1990 setting forth the permit requirements for Phase I jurisdictions. EPA, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges- Final Rule,* 55 Fed. Reg. 47990 (November 16, 1990), *codified in* 40 CFR §122. Other than establishing different deadlines for the submission of permit applications by large and medium jurisdictions, the regulations generally did not distinguish among these three categories of Phase I MS4s. *See* 40 CFR §122.26(d).

Thus, in the early 1990s, an MS4 operated by a local government, like those of the Counties, would be required to obtain a Phase I permit if: (1) the MS4 served 100,000 or more people based on census figures, or (2) the EPA or the state had classified the MS4 as a Phase I jurisdiction under the residual designation authority.

Phase II MS4 Permits

The Phase II round of MS4 permits covered stormwater discharges other than the Phase I categories. 33 U.S.C. §1342(p)(6). Included in Phase II are MS4s serving fewer than 100,000 people, referred to as "small" MS4s. In 1999, the EPA adopted regulations setting forth permit requirements for small MS4s. *See* EPA Preamble to 1999 Phase II MS4 Rule; *see also* 40 CFR §122.34.[78] Those regulations provided deadlines for initial Phase II permit applications at various intervals during the early 2000s.

2. Population Classification for Purposes of Phase I

As noted above, the Clean Water Act classifies MS4s according to the population served by the MS4. The statute does not define what it means for an MS4 to "serve" a population of a given size. In carrying out its statutory charge to adopt regulations on MS4 permit requirements,[79] the EPA defined "medium" MS4s as falling into one of four subcategories. The most relevant here included systems comprising storm sewers that are:

(i) Located in an incorporated place with a population of 100,000 or more but less than

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[78] For reasons not relevant here, the 1999 small MS4 regulations were remanded and reissued in 2016. *See Envtl. Def Ctr., Inc. v. EPA,* 344 F.3d 832 (9th Cir. 2003) (remanding the 1999 regulations); EPA, *National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule,* 81 Fed. Reg. 89320 (December 9, 2016).

[79] 33 U.S.C. §1342(p)(4).

> 250,000, as determined by the latest Decennial Census by the Bureau of the Census (appendix G); or
>
> (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties;

40 CFR §122.26(b)(7)(i)-(ii) (as adopted in 1990). Like the statute, the regulations on their face appear to use as a reference point the total population of the particular jurisdiction without attempting to refine that number according to the portion of the population that lives or works within the area "served" by the MS4.

Appendix I, referenced in the second subcategory of the regulation, listed 32 counties and was entitled "Counties With *Unincorporated Urbanized Areas* Greater Than 100,000, But Less Than 250,000 According to the Latest Decennial Census by the Bureau of the Census" (emphasis added). As is evident, the title of Appendix I refers not only to "unincorporated" areas, but also to "urbanized" areas – a term that does not appear in the statute or otherwise in the EPA's regulations.

In explanatory material that accompanied the 1990 publication of the Phase I regulations – what is sometimes referred to informally as a "preamble" to such a publication[80] -the agency elaborated on its conception of the second subcategory. It stated that the second subcategory was meant to capture MS4s in "counties having areas that are designated as urbanized areas by the

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[80] See note 17 above.

latest decennial Bureau of Census estimates and where the population of such areas exceeds 100,000 [but is less than 250,000], after the population in the incorporated places, townships or towns within such counties is excluded." EPA Preamble to 1990 Phase I MS4 Rule, 55 Fed. Reg. at 48039.[81] As defined by the Census Bureau, the term "urbanized" generally refers to "high density development." *Id.* at 48041 n.5.

In its initial iteration in connection with the regulations adopted in 1990, Appendix I listed jurisdictions in the second subcategory based on figures from the 1980 census – at that time "the latest decennial census"- as did Appendix G with respect to jurisdictions in the first subcategory. In 1999, at the same time that the EPA adopted regulations governing Phase II MS4 permits, the agency also updated Appendix I (as well as Appendix G) based on the 1990 census – which was then "the latest decennial census." But the EPA also amended the regulation concerning "medium" population jurisdictions to refer specifically to the 1990 census and deleted the reference to the "latest" census. The agency stated that it would not continue to update those appendices based on later decennial censuses. In the preamble to the publication of those regulations and amendments,

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[81] An EPA guidance document issued shortly after adoption of the Phase I regulations similarly stated the "medium" MS4 category included "Counties with *census designated urbanized* areas that have a population greater than [or] equal to 100,000 but less than 250,000 after incorporated areas, towns, and townships within such counties are excluded." EPA, Guidance Manual for the Preparation of Part 1 of MS4 Permit Applications (April 1991) at 9 (emphasis added).

the EPA explained that it was "freezing" the regulatory definition and listing based on the 1990 census because all the covered MS4s had already applied for permits and "the deadlines from the existing regulations have lapsed."[82] EPA Preamble to 1999 Phase II MS4 Rule, 64 Fed. Reg. at 68838, 68848-49. The EPA further explained that MS4s that later met the definition of a "medium" jurisdiction could be made subject to the Phase I requirements by the permitting agency, alluding to the agency's residual designation authority under the Act. *!d.* at 68749 ("the permitting authority can always require more from operators ofMS4s serving 'newly over 100,000' populations'); *see also* EPA, *National Pollutant Discharge Elimination System - Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges,* 63 Fed. Reg. 1536-01, 1567 (January 9, 1998).

3. Residual Designation Authority

Factors for Designation and Procedural Requirements

As indicated above, the Act authorizes the EPA, or the pertinent state agency, to require that an MS4 obtain a Phase I permit if the agency "determines that the [MS4] contributes to a violation of a water quality standard or is a significant contributor of pollutants ...." 33 U.S.C. §1342(p)(2)(E). In its Phase I permit regulations, the EPA identified the following factors that could affect such a

[82] As noted earlier, at that time, Carroll and Frederick Counties were among those operators of MS4s that, at the behest of the Department, had already applied for, and received, Phase I permits, although they were not listed in Appendix I.

determination: the location of the discharge, the size of the discharge, the nature and quality of the pollutants, and "other relevant factors." 40 CFR §122.26(a)(1)(v). Those regulations also specified certain procedures that would be followed by the EPA when the EPA itself made such a determination (as well as other types of case-by-case determinations). *See* 40 CFR §124.52.[83] No particular procedure was required of a *state* agency that made such a determination.[84] The parties have not presented – and we have not been able to identify – any further procedural or other requirements that a state must follow when designating an MS4 as a Phase I permittee.[85]

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[83] In the context of a citizen petition to the EPA to exercise its residual designation authority, the EPA may issue a formal document concerning the water quality impacts by a stormwater discharger. *See Conservation Law Foundation, Inc. v. Pruitt,* 881 F.3d 24, 32 (1st Cir. 2018). However, the EPA's practice in that context does not establish any particular requirement for state agencies.

[84] The regulation requires the EPA Regional Administrator to send written notice of a designation by the Regional Administrator to the MS4, accompanied by an application form for a Phase I permit. The regulations further provide that the propriety of the designation remains open for consideration during the notice and comment period relating to the permit.

[85] As was the case with clause (B)(iii) concerning the application of the MEP standard, see Part II.B. of this Opinion above, the legislative history of §1342(p)(2)(E), which established the residual designation authority, is not particularly illuminating.

Prior to adoption of those regulations, a memorandum of the EPA's Office of Water Enforcement and Permits had appeared to indicate that state agencies would be expected to follow the same procedure. Memorandum of the Director of the EPA Office of Water Enforcement and Permits to Water Management

Use of Residual Designation Authority to Expand the Phase I Universe

The vast majority of the MS4s subject to the Phase I permit requirements have been brought into Phase I under the residual designation authority, rather than on the basis of population. In a 2000 report to Congress, the EPA stated that, of the 1,017 MS4s that were part of the Phase I program at that time (including Carroll and Frederick Counties), only 216 had been listed in the appendices to the 1990 and 1999 regulations, while 670 were co- permittees with a larger MS4 or had been designated separately for inclusion in the program. *See* EPA, Report to Congress on the Phase I Stormwater Regulations (2000), at 3-5, *available at* https://perma.cc/BJG3-TPWP. Thus, despite the fact that the listing of large and medium MS4s required to obtain Phase I permits in the appendices to the Phase I regulations was "frozen" based on the 1990 census, that universe has been significantly expanded under the statutory designation authority. *See id.* at 3-2 n.7.[86]

Division Directors, et al. concerning Designation of Storm Water Discharges for Immediate Permitting (August 8, 1990), *available at* https://perma.cc/4NFA-NCXL, at 11. (Of note, that memorandum also suggested that discharges from the area around Chesapeake Bay would be appropriate for such a designation. *Id.* at 8-9). However, the regulations as adopted by the EPA set forth procedures solely for a designation by the EPA itself.

[86] *See also* EPA, *Stormwater Phase II Final Rule: Who's Covered? Designation and Waivers of Regulated Small MS4s* (revised June 2012), at 2, *available at* https://perma.cc/7WFA-VTYG ("Phase I MS4s were *automatically* designated nationwide as medium MS4s ... or as large MS4s [based on population.] Many MS4s in areas below 100,000 in population, however, have been individually brought into the Phase I program [by]

4. Classification of Frederick County and Carroll County in the 1990s

Neither Frederick County nor Carroll County was included in the listing of jurisdictions deemed "medium" based on population in Appendix I to the EPA regulations either in the initial version of that listing based on the 1980 census or in the amended version based on the 1990 census. Rather, the Department asked the Counties to apply for Phase I MS4 permits in the early 1990s, and the Counties did so. It is inevitably difficult to reconstruct events from the vantage point of30 years later, but the parties have provided some correspondence from that era that suggests how the Department and the Counties came to accept the Counties' status as Phase I jurisdictions.[87]

After Congress added the MS4 permit requirement to the Act and the EPA first adopted the Phase I regulations in 1990, the Department began corresponding with the Counties about whether they had to apply for a permit. At first, the Department told the Counties it was "unclear" whether they would need to do so. Each County responded that its unincorporated population was

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permitting authorities.") (emphasis added)

[87] This correspondence appears in appendices to the parties' briefs. There is no documentation in the administrative record of these permits as to how either County came to be treated as a Phase I jurisdiction in the 1990s. In the explanatory document that the Department issued with the final version of the most recent Frederick County permit, it indicated that it had not needed to exercise its residual designation authority to classify the County as a Phase I jurisdiction in the 1990s because the County had agreed to apply for a Phase I MS4 permit.

below the statutory threshold of 100,000. Carroll County also emphasized its "primarily rural character."[88] Both Counties apparently asked the Department to refrain from including them in Phase I, or at least to delay the application of the Phase I requirements. The Department acceded to the latter request and postponed the deadlines for both Counties to submit a Phase I permit application. Both Counties eventually submitted applications for Phase I permits, apparently without further protest.

As best we can tell from the available correspondence, neither the Department nor the Counties focused on *urbanized* population in their correspondence when they discussed the relevant population in the early 1990s. This is perhaps unsurprising because neither the federal statutory nor regulatory text refers to "urbanized" areas.[89] Instead, in their correspondence, both the Counties and the Department discussed only total population and the population in unincorporated areas with respect to whether the Counties were "medium" MS4 jurisdictions that should apply for a Phase I permit.

In the correspondence available to us, the Department did not explicitly invoke the statutory

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[88] The fact that a county may have a large rural area does not necessarily affect whether it should be classified as a Phase I MS4 jurisdiction. *See* EPA Preamble to 1990 Phase I MS4 Rule, 55 Fed. Reg. at 48041 ("some of the counties addressed by [the Phase I regulations] have, in addition to areas with high unincorporated urbanized populations, areas that are essentially rural or uninhabited and may not be the subject of planned development").

[89] As explained above, that criterion was explained in the preamble to the publication of the 1990 Phase I regulations, but did not appear in the actual text of the regulations.

residual designation authority with respect to either County. However, the EPA has at least twice included Carroll County and Frederick County in lists of permittees as residually designated jurisdictions. EPA, *Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities,* 60 Fed. Reg. 50804, 51272 (September 29, 1995); EPA, *Storm Water Discharges Potentially Addressed By Phase II of National Pollutant Discharge Elimination System Storm Water Program: Report to Congress* (March 1995) at A-14; *see also* EPA, Report to Congress on the Phase I Storm Water Regulations (February 2000), at Apx. A (including Carroll County and Frederick County in Table A-2 listing "Additional MS4s Participating in Phase I MS4 Program"- *i.e.,* "additional" to Table A-l listing the Phase I MS4 permittees named in the population-based appendices to the regulations).[90] There are also other indications, outlined below, that the Counties were regarded as residually designated Phase I jurisdictions in the 1990s.

5. Analysis

The Counties assert that they are not properly classified as Phase I MS4s because they are not "medium" jurisdictions and were not otherwise designated as Phase I jurisdictions by the Department in the early 1990s. They contend that they should not be considered "medium" jurisdictions. In their view, the list of jurisdictions in Appendix I to the Phase I

[90] Similarly, the version of the Maryland WIP issued in 2010 stated that Carroll County had been designated by the Department as a Phase I MS4 under the residual designation authority in the early 1990s. *See* Maryland WIP at 2-30.

regulations is the exclusive list of medium MS4 counties and neither County appears on that list. Moreover, the Counties assert that their unincorporated, *urbanized* populations never reached 100,000, either in the 1990s or recently.[91] They argue the Department did not exercise its residual designation authority in the 1990s, and Carroll County argues it is unlikely the Department even could have done so. In addition, Carroll County argues that the decision to include it as a Phase I jurisdiction was arbitrary and capricious.

So far as we can tell, the Counties' challenge to their MS4 classification as Phase I jurisdictions raises novel issues for this or any court. We have not found- nor have the parties cited- any case that involves a county's challenge to its classification as a Phase I MS4.

Whether it is Unlawfulfor the Department to Treat the Counties as Phase I MS4s

If the Counties had raised the question of their classification as Phase I jurisdictions in the early 1990s, we might well have agreed that they should not have been brought into Phase I as "medium" jurisdictions. However, the argument that Appendix I to the Phase I regulations is the exclusive list of "medium" Phase I jurisdictions is without merit, as the EPA itself has recognized that jurisdictions not listed could later quality.[92] However, given

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[91] Carroll County also claims that the Clean Water Act did not authorize the Department's use of population *projections* in the 1990s. We do not consider this argument separately because we do not see it as materially distinct from the County's other population-based arguments.

[92] As discussed above, the EPA "froze" the list in Appendix I in 1999 based on the 1990 census because the deadlines set for Phase I permit applications had expired and the pertinent jurisdictions had already applied (as had Carroll and Frederick

the EPA's interpretation of its own regulations expressed in the preamble to the publication of the Phase I regulations in 1990, neither County likely met the EPA's contemporaneous interpretation of the medium category. In retrospect, it appears that neither County had a population at that time above 100,000 in unincorporated, *urbanized* areas.[93]

But we are not addressing this question in 1991.[94] We decline to hold that today, after nearly three decades as part of the Phase I permitting program, the Counties should instead be relegated to a Phase II general permit with less stringent pollutant controls. We reach this conclusion for several reasons:

- The approach taken by the Department in calculating the relevant population of the Counties in the early 1990s was arguably consistent with the statutory text and the text of the regulations, although it deviated from the EPA's interpretation of those

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Counties). The agency recognized that jurisdictions that later qualified as medium jurisdictions could be brought into the Phase I program through the residual designation authority. In any event, the agency could not, by regulation, negate a legislative determination that MS4s serving populations of a certain size were subject to the permit requirement.

[93] In 1990, Frederick County's "urbanized area" population was 58,393, and its total "urban" population was 86,686; for Carroll County, the numbers were 0 and 38,418, respectively. There is no need not explore the difference between "total urban" and "urbanized area," at least for 1990, since both figures were under 100,000 with respect to each County.

[94] Even if we could purport to be examining this issue from the perspective of the early 1990s, it is not entirely clear that we have a complete record from that period.

regulations, as articulated in the preamble to the publication of the regulations.[95]

- When the Counties were originally treated as Phase I jurisdictions in 1991, neither County (nor apparently anyone else) questioned the method that the Department used to assess the relevant population.
- Both Counties stipulated, as recently as 2014, that they satisfy the statutory definition of a medium Phase I MS4 in consent orders that they entered into with the EPA concerning violations of earlier MS4 permits.[96]
- In the case of the Carroll County permit, all of the incorporated municipalities in

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[95] The Dissenting Opinion of Judge Getty suggests that we have deferred excessively to the EPA's and the Department's application of the Phase I classification, in contravention of the "plain language" of the Clean Water Act and the EPA's regulations concerning the classification of MS4s. Getty Dissenting slip op. at 8. However, neither the statutory nor regulatory text concerning Phase I jurisdictions refers to "urbanized" populations- the key language on which the Dissenting Opinion relies. *See* 33 U.S.C. §1342(p)(2); 40 CFR §122.26(a)(l)(iv). As explained in the text, that language appears solely in the title of an appendix and in explanatory material prepared by the agency (the preamble to the 1990 publication of the regulations).

[96] In the Matter of Carroll County, Maryland, *Consent Agreement and Final Order* (United States Environmental Protection Agency June 6, 2014) at ¶¶ 7, 14, 15; In the Matter of the Board of County Commissioners of Frederick County, Maryland, *Consent Agreement and Final Order* (United States Environmental Protection Agency November 25, 2014) at ¶¶ 8, 15, 16. Both orders recite that the pertinent County's "MS4 serves a population of at least 100,000," which is verbatim the language of the Clean Water Act defining medium Phase Ijurisdictions. *See* 33 U.S.C. §1342(p)(2)(D).

the County are included as co-permittees on the County's Phase I permit, which thus regulates discharges of MS4s serving those populations. *See* Carroll County Phase I MS4 Permit MD0068331, Part LB.; *see also* 40 CFR §122.26(a)(3).

- The record before us does not include any document in which the Department explicitly exercised its residual designation authority to designate the Counties as Phase I jurisdictions independent of their status as medium jurisdictions. However, this is presumably because the Counties agreed to, or at least acquiesced in, their treatment as medium MS4s which may have foreclosed any need to invoke the Department's residual designation authority.
- There are noteworthy indications that the Department and EPA believed that the Counties were appropriately designated as Phase I jurisdictions:[97]

[97] Carroll County asserts that, if the Department had acted under its residual designation authority, it was required to notify the County of its determination in writing and send an application form with that notice under 40 CFR §124.52. However, as discussed above, the cited regulation applies only to a Regional Administrator of the EPA, not a state agency. Even if the notification requirement applied to the Department, Carroll County does not explain why the Department's correspondence with the County in 1991 would not satisfy the requirement. The regulation only requires that the permitting authority shall notify the permittee of the decision to require a permit and "the reasons for it."

- The Maryland WIP refers to Carroll County as a residually designated Phase I jurisdiction. Maryland WIP at 2-30.
- The fact that the Department agreed to delay the Counties' designation as Phase I jurisdictions suggests that it was acting, at least in part, under the residual designation authority, as the Phase I regulations refer to an agency authorizing a delay in the submission of an application only in the case of a residually designated Phase I jurisdiction.[98]
- Given that TMDLs exist for waterways in both Counties- which indicates that water quality standards are being violated – there is a sound basis for concluding that discharges from each County's MS4 contribute to violations of water quality standards, thus triggering the exercise of the residual designation authority to include them as Phase I MS4 jurisdictions.
- As indicated above, the EPA referred to the Counties as residually designated Phase I jurisdictions in publications in 1995 and 2000. A contemporaneous guidance document issued by the EPA identified jurisdictions in the Chesapeake Bay watershed as examples of appropriate

[98] *See* 40 CFR §122.26(e)(5).

exercise of residual designation authority. See note 84 above.

- Relegating the Counties from a Phase I permit to a Phase II permit with less stringent requirements at this juncture risks a violation of the anti-backsliding prohibition in the Clean Water Act.[99] *See* 33 U.S.C. §1342(o).

The limited evidence of the Department's decision-making process in classifying these Counties as Phase I jurisdictions in 1991 may reflect the difficulty of responding to challenges raised more than 20 years after the fact. The delay by the Counties in raising this issue has also posed difficulties for this Court in evaluating the parties' arguments and the EPA's views of the issue. There is not a clear picture of how the Department's population-based reasoning in 1991 translated into the EPA's stated view in 1995 that the Department had used its residual designation authority.

What is clear, however, is that the Department had authority to classify the Counties as Phase I jurisdictions and, at least in the EPA's view, it did so. The Counties, in turn, have at the very least acquiesced in that classification since the 1990s. There is thus no question that the agencies charged with administering the Clean Water Act have

[99] The EPA had objected to earlier drafts of both permits on the basis that simply keeping the same terms of the Counties' prior Phase I permits "would constitute impermissible backsliding" in violation of the Act. *See* EPA, Specific Objection to Carroll County Phase IMS4 Permit MD0068331 (September 20, 2012) at 3; EPA, Specific Objection to Frederick County Phase IMS4 Permit MD0068357 (September 20, 2012) at 3.

consistently regarded the Counties as Phase I MS4s and that there is a reasonable basis for doing so. The Counties' delay in challenging their Phase I designation perhaps means that the Department did not exercise its designation authority more formally in the past, but that does not require that we direct that they now be treated as Phase II jurisdictions.

Whether Carroll County's Classification is Arbitrary and Capricious

As indicated in Part II.A. of this Opinion, the Department's exercise of discretion in crafting permit terms is subject to the "arbitrary and capricious" standard of review. The Department's decisions survive challenge under this standard so long as the Department had a rational basis for its actions.

Carroll County asserts that the Department acted arbitrarily and capriciously in classifying it as a Phase I MS4 jurisdiction. Its argument is largely based on comparing itself to other jurisdictions in Maryland that have been designated as Phase I and Phase II MS4s. Carroll County claims its treatment as a Phase I MS4 subjects it to the same effluent limitations as larger urban jurisdictions in Maryland, while other counties similar to it in population size and land use are subject to less stringent regulation as Phase II jurisdictions. In particular, it draws a comparison to Washington County, which has been designated as a small (Phase II) MS4 jurisdiction. Carroll County asserts that it is not challenging the population categories in the Clean Water Act, but rather the different treatment of two similarly situated counties.[100]

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[100] In terms of the impervious surface restoration requirement, the Department designed the Phase I MS4

In our view, the Department had a rational basis for making the impervious surface restoration terms more stringent for Phase I MS4s than for Phase II MS4s, even accounting for similarities between the smallest medium MS4s and the largest small MS4s. The Department notes that the population of Carroll County exceeded that of Washington County by a significant amount (when incorporated areas were excluded) at the time that the Department began to treat the counties as Phase I or Phase II jurisdictions. In addition, the Department's discretion in crafting MS4 permit terms is bounded by the Bay TMDL, the Maryland WIP, and the EPA.

In the Maryland WIP, the Department committed to including impervious surface restoration terms in MS4 permits similar to the ones the Department in fact included in the permits it issued after the EPA incorporated the Maryland WIP into the Bay TMDL. Moreover, the 30 percent restoration requirement for Phase I permittees inherently takes account of differences in the population size of those permittees. As the Department explained when it issued the Carroll County permit, "larger, more densely developed jurisdictions will have more impervious area and medium jurisdictions will have less impervious area that will require restoration." Basis for Final Determination to Issue Carroll County's NPDES MS4 Permit MD0068331 (December 2014) at 29. Finally, in an objection to an earlier draft of the Carroll County permit, the EPA advised the Department that the impervious surface restoration

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permits to be more stringent than Phase II MS4 permits in three ways: larger baseline (county-wide vs. urbanized areas), earlier deadline (2019 vs. 2025), and higher percentage of area to be restored (30% vs. 20%).

term in the Carroll County permit should align with that in Prince George's County's permit, in order to comply with the Bay TMDL. EPA, Specific Objection to Carroll County Phase I MS4 Permit MD0068331 (September 20, 2012) at 3. Thus, the Department had a rational basis for the differences in permit terms between the Phase I and Phase II counties, even if some of them are close in population size and share some similar characteristics.

E. Whether the Permits Should Have Provided for Water Quality Trading

"Water quality trading" is a method for complying with discharge permits that uses market forces to reduce overall pollution at lower cost by shifting pollution reduction activities from one entity to another. In particular, an entity subject to a pollution limit may take credit for a pollution reduction accomplished by another entity that it compensates for that privilege.[101] 101 Such trading presumably happens only if the other entity is able to accomplish the pollution reduction at less cost than the entity subject to the pollution limit. Thus, if water quality trading is available as a compliance method in a permit, a permittee might satisfy part of its obligations under the permit by purchasing pollutant reduction credits from other entities that take certain pollutant-reducing actions.

The permits that are the subject of this appeal do not include water quality trading as a compliance method. The Counties wanted their permits to

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[101] *See* EPA, *Water Quality Trading Evaluation* (October 2008), *available at* https://perma.cc/KT3P-WXRS, at 1-1; EPA, *Water Quality Trading Toolkit for Permit Writers* (updated June 2009), *available at* https://perma.cc/866S-M4V4, at 4.

include water quality trading as a compliance option and contend that the Department's decision not to allow for water quality trading in the permits when they were issued in 2014 was arbitrary and capricious.

As the Counties point out, both the Department and the EPA support water quality trading as an option in discharge permits. Over the past several years, the Department has been developing a water quality trading program in Maryland. In December 2017, the Department proposed regulations to establish such a program. *See* 44:25 Md. Reg. 1189-95 (December 8, 2017). Following the requisite notice and comment period, the Department adopted those regulations, which became effective July 16, 2018. *See* 45:14 Md. Reg. 698-702 (July 6, 1018), *codified at* COMAR 26.08.11. In addition, on April27, 2018, the Department issued a Phase II MS4 general permit,[102] effective October 31, 2018, which includes a term that conditionally allows water quality trading.[103] The

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[102] While permits applicable to Phase I MS4s are usually customized for each jurisdiction, the Department has developed a less rigorous general permit for Phase II MS4s. *See* Maryland Department of the Environment, *Maryland's NPDES Municipal Separate Storm Sewer System (MS4) Phase II General Permits,* https://perma.cc/MLX2- 5NDU; EPA, *Stormwater Discharges from Municipal Sources,* https://perma.cc/UBS6- NDK3.

[103] In pertinent part, the Maryland Phase II MS4 general permit provides: "[The Department] supports trading as a cost-effective means for achieving pollutant load reductions[,and t]herefore, trading with other source sectors may be an option after formal regulatory procedures are satisfied." National Pollutant Discharge Elimination System General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (No. 13-IM-5500), at B-10.

Department did so because it anticipated that the final water quality trading regulations would be adopted in 2018, as indeed they were. *See* Basis for Final Determination to Issue the General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (April 27, 2018) at 25.

The Counties argue that the Department also should have conditionally approved water quality trading in their permits, and that the failure to do so was arbitrary and capricious. We disagree. The Department issued these permits to the Counties in 2014, just a year after it had convened a stakeholder group charged with examining several fundamental issues about trading and making recommendations for a draft trading policy. The Department explicitly mentioned that ongoing review when it explained in the Basis for Determination as to each permit why the permit did not include water quality trading as a compliance mechanism. By 2018, however, when the Department was completing the Phase II MS4 general permit, it had already proposed trading regulations and reasonably anticipated that those regulations would be adopted by the time that permit was effective. The Department therefore had a rational basis for conditionally approving water quality trading in the Phase II MS4 general permit but not in the permits issued four years earlier to the Counties. *See Harvey v. Marshall,* 389 Md. at 297-99 (a "reasonable or rationally motivated" administrative decision is not "arbitrary or capricious.").

Carroll County points out that, in order to add water quality trading to its permit now, it must pursue a permit modification and undergo what it characterizes as "a lengthy public participation

process." But the County has not shown that any burden associated with the permit modification process would warrant a finding that the Department's decision *in 2014* not to include water quality trading was arbitrary and capricious.[104]

F. Effect of Permit Reference to Statutory Responsibilities of Other Entities

One provision of the permits contains language that, in the view of Carroll County, impermissibly transfers statutory obligations of other governmental entities to the Counties. In particular, Part VI.B of each County's permit provides as follows:

> [The] County shall cooperate with other agencies during the completion of the Water Resources Element (WRE) as required by the Maryland Economic Growth, Resource Protection and Planning Act of 1992 (Article 66B, Annotated Code of Maryland). Such cooperation shall entail all reasonable actions authorized by law and *shall not be restricted by the responsibilities attributed to other entities by separate State statute, including but not*

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[104] At least six other counties- including Frederick County- have requested that the Department modify their Phase I MS4 permits to incorporate the new water quality trading program as an option for complying with an impervious surface restoration requirement. We take judicial notice that the Department accepted those proposals and issued final determinations in December 2018 modifying the permits for Anne Arundel, Prince George's, and Baltimore counties; in July, the Department issued tentative modification determinations for Charles, Harford, and Frederick counties. *See* Maryland Department of the Environment, *Maryland's NPDES Municipal Separate Storm Sewer System (MS4) Permits,* https://perma.cc/KFY9-VBDU.

limited to reviewing and approving plans and appropriating funds.

(emphasis added).

The law referenced in this part of the permits concerns how counties plan their future development. Now codified in Title 3 of the Land Use Article ("LU") of the Maryland Code, the pertinent provisions of the Economic Growth, Resource Protection and Planning Act, as amended, direct each county to develop a comprehensive plan that includes, among other things, "a water resources element." *See* LU §§3-101(a), 3-102(a)(l)(viii).[105] As part of the water resources element, a county must identify "suitable receiving waters and land areas to meet stormwater management and wastewater treatment and disposal needs of existing and future development." LU §3-106(a)(2).

Only Carroll County raises an issue on appeal concerning this provision of the permits.[106] In doing

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[105] The Economic Growth, Resource Protection and Planning Act of 1992 was originally codified in Article 66B. Chapter 437, Laws of Maryland 1992. In 2006, the General Assembly enacted the "water resources element" requirement in Article 66B, §1.03(iii). Chapter 381, Laws of Maryland 2006. In 2012, the Legislature re-codified various provisions of Article 66B, including those concerning the water resources element requirement, as part of the new Land Use Article. Chapter 426, Laws of Maryland 2012.

[106] Frederick County challenged the same provision in its permit in the Circuit Court. The Circuit Court ruled that the Department could lawfully incorporate the cooperation requirement of the Land Use Article into the permit. It also held that the language italicized above seemed to require the County to disregard other State

so, Carroll County contests only the language italicized in the quotation above. The County concedes that the EPA allows states to coordinate federal and state permitting requirements, as the Department attempts to do in requiring cooperation with other agencies in this permit term.[107] The County argues, however, that the italicized language "seems to purport that the comprehensive planning provision overrides all other State statutes and relieves other entities of responsibilities attributed to them by State statute, instead imposing those responsibilities on the County."

Although the Department admits that the language is opaque, it asserts that the purpose of the final clause of this permit term "is to make clear that the County, when formulating the water resources element of its comprehensive plan, may not decline to cooperate with another agency because that agency, and not the County, has statutory responsibility for a specific governmental activity, whether it be reviewing and approving plans or appropriating funds." In that view, this provision only precludes the County from relying on other

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statutes, which would impermissibly amend the Land Use Article. The Department did not contest that ruling. For the reasons set forth in text, we agree that the permit term may not amend the Land Use Article and may not be construed to do so or to require the Counties to disregard any other laws.

[107] *See* EPA Preamble to 1999 Phase II MS4 Rule, 64 Fed. Reg. at 68739 (discharge "permits may incorporate the requirements of existing State ... programs, thereby accommodating State[s] ... seeking to coordinate the storm water program with other programs").

agencies' specific responsibilities as a reason not to coordinate with those agencies.

In our view, the County's interpretation is not a reasonable reading of the permit provision. Some ambiguity arguably exists in the closing phrase of the permit provision: "including but not limited to reviewing and approving plans and appropriating funds." At least in terms of grammar, what "including" modifies is not obvious. It could modify the County's "cooperation," its "reasonable actions," or the other entities' "responsibilities." By the last antecedent rule, however, "including" would ordinarily be understood to modify "responsibilities." *See McCree v. State,* 441 Md. 4, 21 (2014) ("Under the last antecedent rule, a qualifying clause ordinarily is confined to the immediately preceding word or phrase") (internal quotations omitted). That reading makes the most sense here.

The provision says only that other entities' statutory requirements "shall not ... restrict" the County's obligation under State law to cooperate with those entities. This permit term has no effect on statutory requirements pertaining to other entities, nor does it transfer those obligations to the County. In other words, the permit term provides that the responsibilities of other entities under State law to take such actions as "reviewing and approving plans [or] appropriating funds" do not restrict the County's obligation to cooperate with those entities. Reasonably read, the permit term incorporates existing State law without imposing new requirements on the County or relieving other entities of their obligations under State law.

III

Conclusion

For the reasons set forth above, we hold:

(1) The Department may lawfully include an impervious surface restoration requirement in an MS4 permit without reference to the MEP standard. The Department's decision to do so in Frederick County's most recent permit was not arbitrary or capricious.

(2) The Department may lawfully include an impervious surface restoration requirement in an MS4 permit in which the required amount of restoration is based on the amount of unrestored surface throughout the county that operates the MS4 when the amount of restoration derives from commitments made in the Maryland WIP as part of the development of the Chesapeake Bay TMDL. To the extent that the Counties challenge restoration provisions in their permits that derive from EPA-approved local TMDLs, such challenges should have been made when the local TMDL was approved by the EPA and are not appropriately part of judicial review of an MS4 permit in State court.

(3) The Department had authority to treat Frederick County and Carroll County as Phase I jurisdictions for purposes of their MS4 permits. It was not arbitrary or capricious for the Department to classify Carroll County as a Phase I jurisdiction without also including Washington County in that category.

(4) Although the Department later elected to include "water quality trading" as a compliance method for MS4 permittees, it was not arbitrary or

capricious for the Department to refrain from doing so in the Counties' 2014 permits because it had not yet finally adopted regulations it had proposed concerning that compliance method.

(5) A somewhat ambiguous provision in the Carroll County MS4 permit that requires it to cooperate with other agencies in the development of the water resources element of the County's comprehensive plan under LU §3-101 *et seq*. did not- and could not -transfer the responsibilities of those agencies to the County.

After all the jargon, technical analysis, and regulatory provisions have been digested and applied, it seems fitting to conclude with the words of Judge Wilkinson in a recent case concerning the operation and financing of an MS4 in the Chesapeake Bay region:

"No one is so naive as to believe that the Chesapeake Bay [and its tributaries] can be restored to the pristine condition ... in which this country's earliest inhabitants found them. We would be fortunate to preserve a wholesome fraction of what once there was. This case is but a tiny chapter in the story of our nation's effort to reconcile the just demands of development with the imperative of preserving an environment that can help make productive enterprise worth having.... We happily accepted the abundance that came down from our forebears. How then can we impoverish the environment for those who come after?"[108]

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[108] *Norfolk Southern,* 916 F.3d at 325 (Wilkinson, J., concurring).

IN N0. 5, JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE SPLIT EVENLY BETWEEN THE PARTIES.

IN N0. 7, JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE SPLIT EVENLY BETWEEN THE PARTIES.

Circuit Court for Carroll County
Case No. 06-C-15-068141

Circuit Court for Frederick County
Case No. 10-C-15-000293

Argued: September 13, 2018

IN THE COURT OF APPEALS

OF MARYLAND

Nos. 5 & 7

September Term 2018

MARYLAND DEPARTMENT OF THE ENVIRONMENT

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

FREDERICK COUNTY, MARYLAND

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Barbera, C.J.,
*Greene
*Adkins
McDonald
Watts

Hotten
Getty,

JJ.

Dissenting Opinion by Watts, J., which Hotten and Getty, JJ., joins

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Filed: August 6, 2019

*Greene and Adkins, JJ., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Maryland Constitution, Article IV Section 3A, they also participated in the decision and adoption of this opinion.

Respectfully, I dissent. Although I agree with the Majority that it was not arbitrary and capricious for the Maryland Department of the Environment ("the MDE") not to include water quality trading as a compliance method in the municipal separate storm sewer system ("MS4") permits of Carroll County and Frederick County, I disagree with the Majority as to the other issues. See Maj. Slip Op. at 97-98. I would hold that the MDE was not authorized to set forth in Frederick County's MS4 permit requirements that exceed the "maximum extent practicable" standard, that the MDE lacked the authority to require the Counties to restore 20% of the impervious surfaces[1] throughout the entirety of each county, and that the MDE misclassified the Counties' MS4s as medium rather than small.[2]

Under 33 U.S.C. § 1311(a)-part of the Clean Water Act, 33 U.S.C. §§ 1251-1388-generally, it is illegal to discharge pollutants into navigable waters. That said, the Environmental Protection Agency ("the EPA")--or, under certain circumstances, a

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[1] "'Impervious surface' means a surface that does not allow stormwater to infiltrate into the ground." Md. Code Ann., Env't (1987, 2013 Repl. Vol.) ("EN")§ 4-201.1(d)(1). "'Impervious surface' includes rooftops, driveways, sidewalks, or pavement." EN § 4- 201.1(d)(2).

[2] Because I agree with Frederick County that the MDE was not authorized to set forth in Frederick County's MS4 permit requirements that exceed the "maximum extent practicable" standard, there is no need to address Frederick County's alternative argument that its MS4 permit's requirements are impossible to fulfill. Similarly, although I disagree with the Majority as to the issue regarding Carroll County's cooperation with other State agencies, it is not necessary to go into detail in light of my positions on the other issues.

State environmental agency, such as the MDE-may issue a permit for the discharge of pollutants into navigable waters. See 33 U.S.C. § 1342(a)(1), (b). For example, the MDE may issue to a county a permit for an MS4. See 33 U.S.C § 1342(p)(3)(B). 33 U.S.C. § 1342(p)(3)(B) states:

> 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-stormwater 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 [EPA] or the State determines appropriate for the control of such pollutants.[3]

On brief, the MDE does not deny that it set forth in Frederick County's MS4 permit requirements that exceed the "maximum extent practicable" standard. To the contrary, the MDE contends that it was

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[3] Consistent with 33 U.S.C. § 1342(p)(3)(B)(iii), 40 C.F.R. § 122.26(d)(2)(iv) states that "[a] proposed management program" to control pollutants from an MS4 "shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate."

authorized to impose on Frederick County requirements that go beyond the "maximum extent practicable" standard.

I disagree, and would conclude that 33 U.S.C. § 1342(p)(3)(B)(iii)'s plain language establishes that the MDE is authorized only to require Frederick County "to reduce the discharge of pollutants to the maximum extent practicable[.]" In other words, in 33 U.S.C. § 1342(p)(3)(B)(iii), the "such other provisions" language does not authorize the MDE to impose on Frederick County requirements that exceed the "maximum extent practicable" standard. In 33 U.S.C. § 1342(p)(3)(B)(iii), every single item in question-namely, "management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] or the State determines appropriate for the control of such pollutants"-is part of a list of "controls to reduce the discharge of pollutants to the maximum extent practicable[.]" In short, in 33 U.S.C. § 1342(p)(3)(B)(iii), the "such other provisions" language is subject to the "maximum extent practicable" standard. Nothing in 33 U.S.C. § 1342(p)(3)(B)(iii) indicates that the "such other provisions" language grants the MDE freewheeling authority to impose on the Counties whatever requirements that it deems "appropriate[,]" no matter how onerous or costly.[4]

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[4] After an examination of a statute's language, it is permissible to consider the statute's "legislative history as a confirmatory process." Gomez v. Jackson Hewitt, Inc., 427 Md. 128, 160, 46 A.3d 443, 462 (2012) (citation omitted). But, as the Majority notes, "what legislative history exists is not especially illuminating on the role of the [maximum extent practicable] standard." Maj. Slip Op. at 44 (cleaned up).

This interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) is warranted not only by its plain language, but also by our case law. Just three years ago, in Md. Dep 't of Env't v. Anacostia Riverkeeper, 447 Md. 88, 126, 134 A.3d 892, 915 (2016), this Court unanimously held that the requirement to restore 20% of impervious surfaces in multiple counties' MS4 "[p]ermits complies with the [maximum extent practicable] standard" under 33 U.S.C. § 1342(p)(3)(B)(iii). In so holding, this Court rejected environmental groups' contention "that the 20% restoration requirement is too opaque to comply with 33 U.S.C. § 1342(p)(3)(B)(iii), the [maximum extent practicable] standard." Id. at 123, 134 A.3d at 913. This Court pointed out "that **MS4s are subject to the [maximum extent practicable] standard** under 33 U.S.C. *§* 1342[(p)(3)(B)(iii)]." Id. at 104, 134 A.3d at 901 (emphasis added). Similarly, this Court noted that 33 U.S.C. § 1342(p)(3)(B)(iii) **"requires 'controls to reduce the discharge of pollutants' to the [maximum extent practicable.]"** Id. at 177, 134 A.3d at 945 (emphasis added). And, this Court stated that "stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program **reduces the discharge of pollutants to the maximum extent practicable."** Id. at 157, 134 A.3d at 933 (cleaned up) (emphasis added).

This Court's holding in Anacostia Riverkeeper, id. at 126, 134 A.3d at 915, was premised on the principle-expressed multiple times throughout the opinion-that MS4 permits are subject to the

"maximum extent practicable" standard under 33 U.S.C. § 1342(p)(3)(B)(iii). Accordingly, Anacostia Riverkeeper forecloses the MDE's contention that 33 U.S.C. § 1342(p)(3)(B)(iii) allows it to impose on Frederick County requirements that exceed the "maximum extent practicable" standard. Ifthe MDE's position were valid, then this Court's holding in Anacostia Riverkeeper, id. at 126, 134 A.3d at 915, would have been completely meaningless; after all, if the MDE were free to ignore the "maximum extent practicable" standard when issuing MS4 permits, why would this Court have bothered to determine whether the MS4 permits complied with the "maximum extent practicable" standard?

Seeking to get around the obstacle that Anacostia Riverkeeper poses to its position, the MDE sets forth a novel theory-namely, that the "maximum extent practicable" standard is a "floor" rather than a "ceiling," and that Anacostia Riverkeeper does not indicate that the MDE may not impose requirements that go beyond the "maximum extent practicable" standard. The Majority essentially goes along with the MDE's interpretation of Anacostia Riverkeeper, reasoning that, in Anacostia Riverkeeper, "the question was whether the impervious surface restoration requirement *satisfied* the [maximum extent practicable] standard whereas in this case the question is whether it *unlawfully exceeds* it." Maj. Slip Op. at 39 (emphasis in original). The view of the Majority and the MDE is simply incompatible with this Court's holding inAnacostia Riverkeeper, 447 Md. at 126, 134 A.3d at 915, which, to reiterate, was squarely based on the principle that MS4 permits must comply with the "maximum extent practicable" standard. If MS4 permits did not need to comply with

the "maximum extent practicable" standard, this Court would have had no reason to determine that the requirement to restore 20% of impervious surfaces in multiple counties' MS4 "[p]ermits complies with the [maximum extent practicable] standard" under 33 U.S.C. § 1342(p)(3)(B)(iii). Anacostia Riverkeeper, 447 Md. at 126, 134 A.3d at 915.[5]

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[5] Perplexingly, the majority opinion states that, in Anacostia Rlverkeeper, 447 Md. at 122-26, 134 A.3d at 912-15:

> [T]he Court considered a permit term that appears in Phase I MS4 permits of five other jurisdictions and that is *identical* to the permit term that Frederick County challenges here. The Court held that the term was valid and authorized by the Clean Water Act. If we were simply to recite the holding of *Anacostia Riverkeeper* and stop, Frederick County loses.

Maj. Slip Op. at 38 n.41 (cleaned up) (emphasis in original). Essentially, after asserting that, in Anacostia Riverkeeper, this Court answered a question that is not at issue in this case, oddly, the majority opinion asserts that, under the holding of Anacostia Riverkeeper, Frederick County would "lose[.]" Maj. Slip Op. at 38 n.41. In actuality, the circumstance that, in Anacostia Riverkeeper, this Court considered a permit term that is identical to a term in the permit that Frederick County challenges informs the outcome of this case. In Anacostia Riverkeeper, 447 Md. at 126, 134 A.3d at 914-15, this Court concluded that the challenged permit term complied with the "maximum extent practicable" standard.In Anacostia Riverkeeper, id. at 123-26, A.3d at 913-15, there was no allegation that the permit term exceeded the "maximum extent practicable" standard Frederick County would not "lose[]" under this Court's holding in Anacostia Riverkeeper, Maj. Slip Op. at 38 n 41; rather, this Court's holding in that case clearly demonstrates that MDE has exceeded its authority.

To be sure, as Frederick County acknowledges, its interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) indicates that the statute contains a typographical error-namely, the word "system" should be "systems" so that it, like the immediately preceding noun "techniques," is plural. It is not unheard of for a statute to contain a typographical error. Indeed, another sentence within 33 U.S.C. § 1342 contains three such errors; 33 U.S.C. § 1342(1)(3)(C) erroneously refers to "Section 1365(a) of this title" (in which "Section" should be lowercase), and, in two instances, erroneously omits the word "section" before referring to a certain provision "of this title[.]"

Helpfully, the Majority sets forth illustrations of how each party parses the sentence within 33 U.S.C. § 1342(p)(3)(B)(iii). See Maj. Slip Op. at 41-43. As the Majority notes, Frederick County parses that sentence, in pertinent part, as follows: "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including (1) management practices, (2) control techniques and system, (3) design and engineering methods, and (4) such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." Id. at 41 (alterations in original). Meanwhile, the MDE parses the sentence, in pertinent part, as follows: "shall require (1) controls to reduce the discharge of pollutants to the maximum extent practicable, including (a) management practices, (b) control techniques and (c) system, design and engineering methods, and ill such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." Id. at 42 (alterations in original). The Majority adopts the MDE's interpretation of 33

U.S.C. § 1342(p)(3)(B)(iii), reasoning that it "does not require revision of the text itself, and groups items that could comfortably fit within the category of 'controls' separately from the final clause's vaguer and seemingly broader reference to 'appropriate ... provisions.'" Maj. Slip Op. at 42-43 (ellipsis in original).

The Majority fails to address three matters that demonstrate that the MDE's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) is incorrect. Specifically, the MDE's interpretation renders most of the sentence at issue nugatory, leads to an illogical result, and indicates that the sentence has not one, but two glaring errors. These circumstances violate the rules of statutory interpretation, under which a court must read a statute "as a whole so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless[,] or nugatory[,]" and must read the statute "to avoid an illogical result." Gomez v. Jackson Hewitt, Inc., 427 Md. 128, 143, 156, 46 A.3d 443, 452, 460 (2012) (cleaned up).

If, as the MDE asserts, 33 U.S.C. § 1342(p)(3)(B)(iii) directs it to "require ... such other provisions as [it] determines appropriate for the control of such pollutants[,]" then the rest of the provision is nugatory. Under the MDE's interpretation, the "such other provisions" language allows it to impose on the Counties whatever provisions it "determines appropriate[,]" without reference to the "maximum extent practicable" standard. That begs the question: If the MDE may freely ignore it, what is the point of the "maximum extent practicable" standard? In fact, what is the point of the list of items that begins with

"management practices"? Simply put, there would be no reason for either the "maximum extent practicable" standard or the list ofitems if 33 U.S.C. § 1342(p)(3)(B)(iii) directs the MDE to impose whatever requirements it deems fit, whether "practicable" or not.

The MDE volunteers a possible reason for the "maximum extent practicable" standard-but that reason reveals an internal inconsistency in the MDE's contentions. The MDE reasons that the "maximum extent practicable" standard is a "floor" rather than a "ceiling." In other words, according to the MDE, the "maximum extent practicable" standard sets forth the minimum that the MOE must require of Frederick County, not the maximum that it may require ofFrederick County. That argument, however, is inconsistent with the MOE's assertion that the "such other provisions" language is not subject to the "maximum extent practicable" standard. If, as the MDE maintains, the "such other provisions" language is independent of the "maximum extent practicable" standard, then the "maximum extent practicable" standard is neither a floor nor a ceiling-it is meaningless, as the MDE is free to impose whatever requirements it deems fit, whether practicable or not.

The Majority refers to the "such other provisions" language as the "final clause[.]" Maj. Slip Op. at 43. I agree with the Majority that the "such other provisions" language is the final clause-and, moreover, it is clear that the final clause is a catchall clause that supports Frederick County's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii), not the MDE's. Under Frederick County's position, there are four groups of controls that may be included in

an MS4 permit, including a final catchall category-the "such other provisions" clause-that are all governed by the "maximum extent practicable" standard. Under the MDE's position, the "such other provisions" language is an all-encompassing blank check that sidesteps the "maximum extent practicable" standard and allows the MOE to impose any requirement that it "determines appropriate[.]" Because the MOE's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) renders most of the statutory provision nugatory, I cannot endorse it.

Additionally, the MDE's interpretation of33 U.S.C. § 1342(p)(3)(B)(iii) leads to an illogical result. As the Majority notes, under Frederick County's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii), the list of items includes "control techniques and system " and "design and engineering methods[.]" Maj. Slip Op. at 41 (alteration in original). This explanation is logical, as the term "control systems" makes as much sense as the term "control techniques[.]" By contrast, under the MDE's interpretation, the list of items includes "control techniques" and "system, design and engineering methods[.]" Id. at 42. I am unable to fathom what exactly "system methods" are. The Majority acknowledges that Frederick County refers to the term "system methods" as "nonsensical[,]" id. at 42, yet the Majority makes no effort to explain what the term means. Simply put, the term "system methods" is indeed nonsensical, in sharp contrast to the terms "design methods" and "engineering methods[.]" Adopting Frederick County's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) avoids the illogical result of construing the statute to refer to "system methods"-an incomprehensible term.

Finally, the MDE's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) indicates that the sentence has not one, but two glaring errors. Specifically, under the MOE's position, the sentence would be missing two serial commas:[6] one after the word "techniques[,]" and one after the word "design[.]" To be sure, as noted above, it is not unheard of for a statute to contain a typographical error; and, the inclusion of serial commas is a matter of style rather than a grammatical necessity. Even so, independent of 33 U.S.C. § 1342(p)(3)(B)(iii), the rest of the statute includes fourteen serial commas in all. See 33 U.S.C. § 1342(a)(1), (a)(2), (b)(l)(A), (b)(2)(B), (b)(9), (f), (g) (twice, counting the title), (k), (1)(2) (twice, counting the title), (q)(l) (title), (q)(3), (s)(3)(A)(ii). And, unlike the practice of including the lowercase word "section" when drafting a statute that refers to other statutes, see 33 U.S.C. § 1342(1)(3)(C), the practice of including a serial comma is not unique to legal writing, and is often a habit that becomes ingrained as a result of years of day-to-day writing. Accordingly, it is difficult to believe that 33 U.S.C. § 1342(p)(3)(B)(iii)'s drafters simply forgot to include a serial comma in not one, but two instances.

Without meaningfully addressing the fatal flaws in the MDE's interpretation of 33 U.S.C § 1342(p)(3)(B)(iii) and its conflict with this Court's

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[6] Also known as a Harvard comma or an Oxford comma, a serial comma is "a comma [that is] used to separate the second-to-last item in a list from a final item [that is] introduced by the conjunction *and* or *or[.]"* Serial Comma, Merriam-Webster, https://www.merriam-webster.com/dictionary/serial%20comma [https://perma.cc/3KGX-2LJC] (italics in original). For example, the phrase "red, white, and blue" includes a serial comma. Id.

holding in Anacostia Riverkeeper, 447 Md. at 126, 134 A.3d at 915, the Majority quotes an opinion by one of California's six intermediate appellate courts. See Maj. Slip Op. at 43. In Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd., 124 Cal. App. 4th 866, 882-83 (2004), the Fourth District Court of Appeal of California reasoned that the "such other provisions" language in 33 U.S.C. § 1342(p)(3)(B)(iii) directs State environmental agencies to impose whatever requirements they determine appropriate, without reference to the "maximum extent practicable" standard. The California Court agreed with the contention of State water boards and environmental organizations that, "given the absence of a comma after the word 'techniques,'" and "because the word 'system' [] is singular, it necessarily follows from parallel-construction grammar principles that the word 'system' is part of the phrase 'system, design and engineering methods' rather than the phrase 'control techniques and system.'" Id.

The California Court's logic is unpersuasive for several reasons. First and foremost, the California Court treated the lack of a comma after the word "techniques" as an indication that the words "techniques" and "system" do not go together-when, in fact, the exact opposite is true; *i.e.,* the lack of a comma between the words "techniques" and "system" indicates that, indeed, the words go together. On a related note, for all its concern about the lack of a comma after the word "techniques[,]" the California Court failed to acknowledge that its interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) meant that there should P-ave been a serial comma after the word "techniques"-as well as a serial comma

after the word "design[.]" Also, the California Court did not mention the possibility that the word "system" is singular due to a typographical error. Nor did the California Court acknowledge that its interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) renders most of the sentence, including the "maximum extent practicable" standard, nugatory. Nor did the California Court mention that its interpretation of33 U.S.C. § 1342(p)(3)(B)(iii) indicates that the statute includes the nonsensical term "system methods"-much less attempt to explain what that term means.

In addition to quoting Bldg. Indus. Ass'n of San Diego Cty., the Majority gives deference to the EPA's interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii), under which the MDE may impose on Frederick County requirements that exceed the "maximum extent practicable" standard. See Maj. Slip Op. at 50-51. Although a court should give some deference to an administrative agency's interpretation of a statute that it administers, the court is not obligated to adopt a statutory construction that renders most of the statute meaningless and leads to an illogical result. In a nutshell, even after giving some deference, I would decline to adopt the EPA's strained interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii).[7]

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[7] In a futile attempt to bootstrap deference to the EPA's interpretation of the Clean Water Act, the Majority relies on case law that does not apply-Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984)-and an opinion from the United States Court of Appeals for the Ninth Circuit-Defs. of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999)-that does not address the issue that is before this Court. See Maj. Slip Op. at 48 n.52. As to Defs. of Wildlife, the

Majority states: "[W]hile the Ninth Circuit did not agree with the EPA's existing construction, it nevertheless recognized that a permitting agency had discretion to include permit terms based on water quality standards." Maj. Slip Op. at 46-47. As the Majority appears to recognize, the relevant question before the Ninth Circuit was whether the Clean Water Act authorized the EPA to "require strict compliance with [S]tate water-quality standards[.]" Defs. of Wildlife, 191 F.3d at 1166. The Ninth Circuit answered that question in the affirmative, explaining that 33 U.S.C. § 1342(p)(3)(B)(iii) "gives the EPA discretion to determine what pollution controls are appropriate." Id. Significantly, nowhere in Defs. of Wildlife did the Ninth Circuit indicate that 33 U.S.C. § 1342(p)(3)(B)(iii) authorizes the EPA-or a State environmental agency-to impose whatever requirements it determines appropriate, without reference to the "maximum extent practicable" standard. Indeed, in two instances, the Ninth Circuit recognized that, under 33 U.S.C. § 1342(p)(3)(B)(iii), local governments that manage MS4s must "reduce the discharge of pollutants to the maximum extent practicable[.]" Id. at 1165 (internal quotation marks omitted).

As a matter of fact, contrary to the Majority's assertion that "[o]ther courts have pointed to *Defenders of Wildlife* as setting forth the discretion that the EPA (and state permitting agencies) have in drafting MS4 permit terms to require pollution controls that satisfy the ['maximum extent practicable'] standard or a more demanding water quality based standard[,]" that is not the case. See Maj. Slip Op. at 47 n.50. Although the Ninth Circuit's opinion in Defs. of Wildlife was mentioned in each of the cases that the Majority identifies, none of those cases relied on Defs. of Wildlife as a basis for concluding that the EPA or State environmental agencies have the discretion to issue MS4 permits that contain requirements that exceed the "maximum extent practicable" standard. In actuality, in each of those cases, the courts relied on Defs. of Wildlife for other propositions. See Nat. Res. Def. Council v. New York State Dep't of Envtl. Conservation, 994 N.Y.S. 2d 125, 135 (N.Y. App. 2014) (The New York Supreme Court relied on Defs. of Wildlife for the specific proposition that permits issued for "industrial dischargers" must comply with the effluent limitations set forth in 33 U.S.C. § 1311.);

In addition to wrongfully setting forth in Frederick County's MS4 permit requirements that exceed the "maximum extent practicable" standard, the MDE improperly required the Counties to restore 20% of the impervious surfaces throughout the entirety of each county, as opposed to 20% of the impervious surfaces in the Counties' urbanized areas-i.e., the areas that the Counties' MS4s serve. As noted above, 33 U.S.C. § 1342(p)(3)(B)(iii) provides that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices,

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Conservation Law Found., Inc. v. Boston Water and Sewer Comm 'n, 2010 WL 5349854, at *5-6 (D. Mass. 2010) (unreported) (The U.S. District Court for the District of Massachusetts relied on Defs. of Wildlife for the proposition that the EPA has the authority to "determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants" and the proposition that the EPA has the authority to "require less than strict compliance with state water-quality standards."); Tualatin Riverkeepers v. Oregon Dep't of Envtl. Quality, 230 P.3d 559, 562 n.8 (Ore. App. 2010) (The Court of Appeals of Oregon relied on Defs. of Wildlife for the proposition that permits providing for discharges of municipal storm water "need not require strict compliance with state water quality standards."); City of Arcadia v. State Water Res. Control Bd., 135 Cal. App. 4th 1392, 1429 (2006) (The Court of Appeal for the Fourth District of California relied on Defs. of W'ildlife for the proposition that the EPA has the discretion to '"determine that ensuring strict compliance with state water- quality standards is necessary to control pollutants'" and that the EPA also has the authority to '"require less than strict compliance with state water-quality standards[.']" (Quoting Defs. of Wildlife, 191 F.3d at 1166-67)). Nowhere in any of these cases did the various courts conclude that Defs. of Wildlife established the EPA's-or State environmental agencies '-authority to issue MS4 permits that contain requirements exceeding the "maximum extent practicable" standard.

control techniques and system, design and engineering methods, and such other provisions as the [EPA] or the State determines appropriate for the control of such pollutants." Pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii), see Anacostia Riverkeeper, 447 Md. at 151 n.71, 134 A.3d at 930 n.71, on December 3, 2010, multiple State agencies, including the MDE, submitted to the EPA "Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Total Maximum Daily Load[.]" University of Maryland et al., Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Total Maximum Daily Load at 1 (Dec. 3, 2010), available at https://mde.maryland.gov/programs/Water/TMDLDocuments/www.mde.state.md.us/assets/document/MD_Phase I Plan_12_03_2010_Submitted_Final.pdf [https://perma.cc/XV7P-P3VT] ("the WIP"). In the WIP, under the heading "Additional Program, Practices and Policies to Meet the 2017 Goal for Non-Point Source Urban Stormwater[,]" and under the subheading "Increase [National Pollutant Discharge Elimination System ('NPDES')] Watershed Restoration Requirements for MS4 Phase I County permits, including [State Highway Administration,]" the State agencies stated:

> The following key elements of the strategy support reasonable assurance of the implementation of this element of the [WIP]: [] Establish impervious acreage treatment requirements in NPDES []MS4[] permits to achieve specific reductions in sediment, phosphorus and nitrogen consistent with this [WIP]. These permits will require the development of a detailed watershed

> restoration strategy that contains the following elements: ... Completion of restoration efforts for twenty percent of the counties' impervious surface area that is not already restored to the maximum extent practicable[].

WIP at 5-30 (paragraph breaks omitted).

Consistent with the WIP, in 2014, the MDE issued to the Counties MS4 permits "requiring compliance with the Chesapeake Bay [total maximum daily load] through the use of a strategy that calls for the restoration of twenty percent of previously developed impervious land with little or no controls within this five[-]year permit term as described in" the WIP. MDE, National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit [for Carroll County] at 15, available at https://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/Carroll%20 Final%20Permit%20with%20attachments.pdf[https://perma.cc/FL5D-6UPU]; MDE, National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit [for Frederick County] at 15, available at https://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/Signed%20Frederick%20 Permit%20with%20Attachments.pdf [https://perma.cc/XC4Y-8EMY].

From my perspective, the MDE lacked the authority to require the Counties to restore 20% of the impervious surfaces throughout the entirety of each county; in other words, the Counties' MS4 permits simply require the Counties to restore 20% of the impervious surfaces in urbanized areas-i.e., the areas that the Counties' MS4s serve. Just as the

urbanized areas of each county determined whether the county's MS4 was small, medium, or large, see 40 C.P.R. § 122.26(b)(4)(i), (b)(7)(i); 40 C.P.R. Pt. 122, App. I, so, too, do the urbanized areas of each county determine the extent of the county's responsibility to restore 20% of impervious surfaces. It makes sense that each county should be responsible only for restoring 20% of impervious surfaces in urbanized areas; in other words, the areas that each county's MS4 serves should be the same as the areas in which the county's MS4 permit makes the county responsible for restoring 20% of impervious surfaces.

In addition to improperly requiring the Counties to restore 20% of the impervious surfaces throughout the entirety of each county, the MDE misclassified the Counties' MS4s as medium rather than small. Generally, before October 1, 1994, the EPA and the MDE could "not require a permit … or discharges [that were] composed entirely of stormwater." 33 U.S.C. § 1342(p)(l). But, this exception to the permit requirement did not apply to "[a] discharge from a[n MS4] serving a population of250,000 or more[,]" 33 U.S.C. *§* 1342(p)(2)(C), or "[a] discharge from a[n MS4] serving a population of 100,000 or more but [fewer] than 250,000[,]" 33 U.S.C. *§* 1342(p)(2)(D). An MS4 that serves a population of at least 250,000 is known as a "large" MS4, 40 C.F.R. § 122.26(b)(4)(i); an MS4 that serves a population of at least 100,000, but fewer than 250,000, is known as a "medium" MS4, 40 C.F.R. § 122.26(b)(7)(i); and, generally, an MS4 that is neither large nor medium is known as a "small" MS4, 40 C.F.R. *§* 122.26(b)(16)(ii). In short, "[p]ermits

must be obtained for all discharges from large and medium [MS4]s." 40 C.F.R. *§* 122.26(a)(3)(i).

Whether an MS4 is large, medium, or small depends on the population of the incorporated place that the MS4 served according to the 1990 Decennial Census. See 40 C.F.R. § 122.26(b)(4)(i), (b)(7)(i). The EPA promulgated an appendix that listed the counties that, according to the 1990 Decennial Census, had "[u]nincorporated urbanized population[s]" of at least 100,000, but less than 250,000. See 40 C.P.R. Pt. 122, App. I. The only Maryland county that the appendix listed was Howard County. See id. In other words, according to the EPA, Howard County's MS4 was Maryland's only medium MS4. See id.

The Majority correctly observes that, in 1990, neither Carroll County nor Frederick County had a population of at least "100,000 in unincorporated, urbanized areas[,]" and that, accordingly, neither Carroll County nor Frederick County "likely met the EPA's contemporaneous interpretation of the medium [MS4] category[.]" Maj. Slip Op. at 85 (cleaned up). Yet, the Majority "decline[s] to hold that[,] today, ... the Counties should instead be" considered to have had small MS4s. Id. at 85-86. I am unpersuaded by the reasons that the Majority gives for declining to right the wrong that has evidently occurred-namely, the misclassification of the Counties' MS4s as medium rather than small. See id. at 85-89. Nor would I find merit in the MDE's contentions, such as its argument that the Counties are equitably estopped from challenging the misclassification. In my view, the Counties' mere "acquiesce[nce]" to the misclassification, id. at 89, is neither a reason to refrain from addressing the merits of their contention, nor a basis for

concluding that the MDE properly exercised its authority to classify the Counties' MS4s as medium. The MDE, not the Counties, has been in the driver's seat when it comes to classification and permitting. Ifthere is any question as to whether a misclassification has occurred, the fault lies with the MDE, not the Counties.

Without a doubt, government protection of the environment has a sustaining and welcome purpose. Indeed, protecting and fostering the health of the environment is an important goal in today's society, now more than ever. But, the government must follow the statutes and regulations that it establishes. Misapplication of environmental statutes and regulations serves no purpose and will result in diminishment of regard for the law.

For the above reasons, respectfully, I dissent.

Judge Hotten and Judge Getty have authorized me to state that they join in this opinion.

Circuit Court for Carroll County
Case No. 06-C-15-068141

Circuit Court for Frederick County
Case No. 10-C-15-000293

Argued: September 13, 2018

IN THE COURT OF APPEALS

OF MARYLAND

Nos. 5 & 7

September Term 2018

MARYLAND DEPARTMENT OF THE ENVIRONMENT

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

FREDERICK COUNTY, MARYLAND

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Barbera, C.J.,
*Greene
*Adkins
McDonald
Watts

Hotten
Getty,
JJ.

Dissenting Opinion by Getty

Filed: August 6, 2019

*Greene and Adkins, JJ., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Maryland Constitution, Article IV Section 3A, they also participated in the decision and adoption of this opinion.

I join the dissent written by Judge Watts and agree with her analysis that the Maryland Department of the Environment ("the Department") exceeded its authority by (1) issuing permit requirements that exceed the "maximum extent practicable" standard; (2) requiring the Counties to restore 20% of all impervious surfaces county-wide; and (3) classifying each County's municipal separate storm sewer system (MS4) as medium rather than small. Dis. Slip Op. at 1.

I write separately to express my concern with this Court's tradition of granting broad deference to an agency's interpretation of statutes and regulations. Under the facts of this case, I .would scale back the agency deference doctrine as recognized in Maryland.

The Majority cites to *Chevron US.A. v. Nat. Res. Def Council,* 467 U.S. 837 (1984), for the broad principle that this Court must defer to an agency's interpretation of its controlling statutes. However, *inAuer v. Robbins,* 519 U.S. 452 (1997), the Supreme Court held that deference is only owed to an agency's *reasonable* interpretations of its *ambiguous* regulations. At a minimum, I would adopt the constraints of *Auer* deference -that the agency's regulation be ambiguous and its interpretation reasonable to merit judicial deference. Absent such determinations , this Court has a duty to exercise its best judgment and resolve the issues at hand, else we "deny the people who come before us the neutral forum for their disputes that they

rightly expect and deserve." *Kisor v. Wilkie,* 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring).[1]

The pressing need for such constraints is best illustrated by the Majority's deference to the Department's improper classification of each County's MS4 as medium rather than small. The Clean Water Act and its corresponding regulations are not ambiguous-in fact, the Majority has already acknowledged that "neither County likely met the EPA's contemporaneous interpretation of the medium category," under "the EPA's interpretation of its own regulations." Maj. Slip Op. at 85. Rather than correct this error, the Majority upholds a flawed agency decision that has subjected two rural counties to a burdensome regulatory scheme intended for densely populated jurisdictions such as Montgomery County and Baltimore City.[2]

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[1] In *Kisor v. Wilkie,* the Supreme Court clarified that *Auer* deference requires that (1) the regulation is "genuinely ambiguous"; (2) the agency's reading is "reasonable," or within the zone of ambiguity; and (3) the "character and context of the agency interpretation entitles it to controlling weight." *!d.* at 2414-16 (2019). As *Kisor* was decided on July 26, 2019, it was not briefed or argued by either party. I include it in this dissent not as controlling precedent, but to further illustrate the contours of *Auer* deference, and to highlight the persuasive concurrence calling for a more constrained, moderated view of agency deference.

[2] The EPA promulgated its Phase I implementing regulations in 1990 with the intent of regulating MS4s servicing "urbanized" areas, characterized by the Census Bureau as "high- density development ... a central city (or cities) with a surrounding closely settled area." *See* EPA, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges,* Final Rule, 55 Fed. Reg. 47990, 48041, 48050 n.5 (Nov. 16, 1990).

As described by the Majority, the Water Quality Act of 1987 extended the Clean Water Act's effluent permit requirements to encapsulate point-source pollution contained in municipal stormwater. *Nat'! Res. Def Council, Inc. · EPA,* 966 F.2d 1292, 1296 (9th Cir. 1992). The Act proscribed a timetable for the implementation of these requirements, proceeding in two phases based on the size and perceived impact of each stormwater system. 33 U.S.C. § 1342(p)(2)-(4). As relevant, between 1987 and 1994 ("Phase I" of the permitting program) state agencies could only require permits for MS4s that (1) serve a population of 250,000 or more (a "large MS4"); (2) serve a population of more than 100,000 but less than 250,000 (a "medium MS4"); or (3) are designated "a significant contributor of pollutants to waters of the United States." § 1342(p)(2)(C)-(E). The substantive requirements contained in MS4 permits were left entirely to the discretion of the EPA and state regulatory bodies. *See* § 1342(p)(3)(B) ("Permits for discharges from municipal storm sewers ... shall require controls to reduce the discharge of pollutants ... as the Administrator or the State determines appropriate").

The EPA has issued implementing regulations to further define its Phase I classifications. Rules promulgated in 1990 governing Phase I permits establish that the "medium" category encompasses (i) MS4s serving between 100,000 and 250,000 people in an incorporated municipality; and (ii) a list of jurisdictions enumerated in Appendix I of the regulatory text.[3] 40 CPR§ 122.26(b)(7)(i)-(ii). In 1999,

[3] Appendix I listed counties with at least 100,000 people in *urbanized unincorporated areas,* a threshold satisfied by neither County. As of the 1990 census, Frederick County had a total population of 150,208 with only 58,393 residing in urbanized

once all permitting deadlines had passed, the EPA elected to freeze these classifications based on each jurisdiction's population as reported in the 1990 census. EPA, *National Pollutant Discharge Elimination System -Regulations for Revision of Water Pollution Control Program Addressing Storm Water Discharges,* Final Rule, 64 Fed. Reg. 68772, 68748-49 (Dec. 8, 1999).[4] These regulations contain "no minimum criteria or performance standards," instead encouraging the permitting agency to develop pollution controls for each permit on a case by case basis. *Nat'/ Res. Def Council,* 966 F.2d at 1308.

Under this statutory and regulatory framework, neither County satisfied the requirements for a "medium MS4" during the Phase I permit period. As acknowledged by the Majority, "neither County likely met the EPA's contemporaneous definition of the medium category," as neither County had a population of 100,000 in an incorporated area, and neither County was enumerated in Appendix I. Maj. Slip Op. at 85; *See Nat. Res. Def Council, Inc.* v. *New York State Dep 't of Envtl. Conservation,* 34 N.E.3d 782, 794 n.16

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areas -while Carroll County was home to 123,372 people, with no urbanized population. *See* Maryland Department of Planning, *Urban and Rural Population in Maryland: 2000 and 1990* (May 2002),*availableat:* http://planning.m aryland.gov /MSDC/Documents /Census/Cen2000 /urban rural/ua rural2 k cnty.pdf

[4] As the EPA suggested in the preamble to its 1999 regulations, state agencies may use their residual designation authority to "require more from operators of MS4s serving 'newly over 100,000' populations." *!d.* at 68749. This commentary does not expand the scope of the residual authority, which remains predicated on the determination that "storm water discharge from the source contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States." *!d.* at 68781.

(N.Y. 2015) (holding that state agencies administering programs under the Clean Water Act are "bound to follow [the] EPA 's interpretation"). Although the Department may, notwithstanding population, designate jurisdictions as "significant contributor[s] of pollutants to the waters of the United States," contemporaneous reports and correspondence by the Department demonstrate that the Counties were classified based solely on their projected population growth.[5] Therefore, by nonetheless requiring permits of both Counties during Phase I, the Department contravened the unambiguous requirements of the Clean Water Act.

No statutory, regulatory, or judicial authority requires we adhere to this result. Contrary to the assertions of the Department and the conclusion of the Majority, reclassification would not implicate the anti-backsliding provision of the Clean Water Act. *See* 33 U.S.C. §1342(o)(l) ("[A] permit may not be renewed, reissued, or modified …to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit"). This provision is inapplicable, as the Act contains an explicit exception for permits issued on the basis of "technical mistakes

[5] These reports and correspondence are detailed in appendices to the parties' briefs. *See, e.g.,* MDE, *Basis for Final Determination to Issue Frederick County's NPDES MS4 Permit* at 30 (Dec. 2014) ("MDE did not make a claim under its RDA [residual designation authority] that Frederick County must apply as a Phase I. ...MDE had no need to ...make a determination based on water quality violations or impairments"); MDE, *Maryland's NPDES Municipal Stormwater Monitoring* at 1 (1997) ("MDE used projections from the Maryland Office of Planning (MOP) to designate Carroll, Charles, Washington, and Frederick counties when their populations surpassed 100,000").

or mistaken interpretations of law." 33 U.S.C. §1342(o)(2)(b)(ii). Absent the legally inaccurate designation of Carroll and Frederick County stormwater systems as "medium MS4s," the Department would not have been authorized to require a permit of either County during the Phase 1 period. *See* 33 U.S.C. §1342(p)(l) (providing that, beyond the MS4 categories enumerated in §1342(p)(2), "the Administrator or the State ... shall not require a permit under this section for discharges composed entirely of stormwater").

Similarly, the Counties' "acquiescence" to their MS4 classification is entirely irrelevant to the question of reclassification. The Majority relies heavily on the notion that the Counties have operated within the Phase I permitting program for three decades without protest. *See* Maj. Slip Op. at 88-9 (reasoning that the Counties "have at the very least acquiesced [to Phase I] classification since the 1990s;" that "neither County (nor apparently anyone else) questioned the method that the Department used to assess the relevant population;" and that their acquiescence "may have foreclosed any need to invoke the Department's residual designation authority"). In the 1990s, the Counties dipped their toes in the water, so to speak, with the altruistic goal of doing their fair and proportionate share to achieve Maryland's clean water objectives. Their agreement and voluntary participation in the permitting program has no bearing on whether their classification was ever correct, as the Clean Water Act outright prohibited states from requiring a Phase I permit of jurisdictions that do not meet the requirements of §1342(p)(2). Moreover, no established precedent suggests that historical acquiescence or administrative reliance have

foreclosed the Counties' right to challenge their designation.[6]

Lacking any legal justification for refusing the Counties' request for reclassification, the Majority nonetheless defers to the *post hoc* judgment of the EPA, concluding that "the agencies charged with administering the Clean Water Act have consistently regarded the Counties as Phase I MS4s and that there is a reasonable basis for doing so." Maj. Slip Op. at 89. Granting an agency controlling authority over the interpretation of its own governing regulations amounts to an abdication of this Court's essential duty to interpret and apply the law. *See* Kisor, 139 S. Ct. at 2425 (Gorsuch, J., concurring) (arguing deference "requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading").

Such absolute deference is improper even under the Majority's stated standard of review. Although an agency's factual findings are entitled to

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[6] This argument appears to implicitly evoke the Department's claim of equitable estoppel. MDE insists that Maryland's Watershed Improvement Plan (WIP) relies on the Counties' Phase I commitments. Equitable estoppel results from (1) a party's voluntary action, (2) inducing good faith reliance, (3) resulting in a detrimental change in position. *Permanent Fin. Corp. v. Montgomery Cty.,* 308 Md. 239, 247 (1986). At a very minimum, the Department has not suffered a detrimental change in position, as the Counties are on track to meet their Phase I commitments during the current permit cycle. *E.g.* Carroll County, *2017 NPDES MS4 Permit Annual Report* at 10 (Dec. 15, 2017), *available at* http://ccgovemment.carr.org/ccg/npdes/20 17_NPDES_Annual_ Report.pdf. Moreover, any reliance was arguably in bad faith, as the Department, not the Counties, is responsible for interpreting its governing regulations.

deference when supported by "substantial evidence," *Md. Dep 't of the Env 't v. Anacostia Riverkeeper,* 447 Md. 88, 120 (2016), the Majority openly acknowledges that the record contains "limited evidence of the Department's decision-making process in classifying these Counties as Phase I jurisdictions in 1991." Moreover, "it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Nat. Res.,* 385 Md. 534, 554 (2005); *See also Auer,* 519 U.S. at 461 (deference not warranted where agency interpretation is "plainly erroneous or inconsistent with the regulation."). The legal sufficiency of the Counties' Phase I permits, governed entirely by the Clean Water Act and its corresponding regulations, falls squarely within the purview of this Court.[7]

Applying *Auer* deference, an agency's interpretation of its own regulations is only entitled to deference "if [the] regulation is genuinely ambiguous ... even after a court has resorted to all the standard tools of interpretation." *Kisor,* 139 S. Ct. at 2414. "[I]f the law gives an answer-if there is

[7] The substantive terms of an MS4 permit are at the discretion of the Department, and therefore subject to an "arbitrary and capricious" standard of review. *See Harvey v. Marshall,* 389 Md. 243, 296-99 (2005). The Majority fails to identify any rational basis for tying pollution controls categorically to the scheduling requirements of the Clean Water Act-for example, requiring all Phase I counties to restore 30% of their total surface area by 2019, while requiring Phase II counties to restore 20% of their *urbanized* area by 2025. Rather, as discussed *supra,* the Clean Water Act and EPA regulations encourage states to develop substantive permit terms on a case by case basis. *See* 33 U.S.C. § 1342(p)(3)(B); *Nat'! Res. Def Council,* 966 F.2d at 1308.

only one reasonable construction of a regulation-then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *ld.* at 2415. Nowhere does the Majority identify any ambiguity in the plain language of the Clean Water Act or the implementing regulations promulgated in 1990 and 1999. Rather, as the Majority acknowledges, the law provides a clear answer: Neither County's population, as reported in the 1990 Census, authorized their classification as "medium" MS4s under established law.

Allowing the Department to issue Phase I permits notwithstanding would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *ld.* (quoting *Christensen* v. *Harris County,* 529 U.S. 576, 588 (2000)). Moreover,

> [w]hen we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power.

Kisor, 139 S. Ct. at 2439 (Gorsuch, J. concurring).

In the simplest terms, the Majority acknowledges that the Department's construction of its unambiguous regulatory mandate was incorrect, finds little evidence on record to support this interpretation, identifies no legal authority that

bars judicial review, and yet defers regardless. By nonetheless "affording 'controlling weight' to [the Department's] post-promulgation views" of its governing regulations, our ruling today perpetuates a longstanding inequity, and risks foreclosing judicial review to litigants seeking to challenge administrative overreach. *Id.* at 2446 (Gorsuch, J. concurring).

For the foregoing reasons, I respectfully dissent.

[ENTERED June 27, 2017]

IN THE MATTER OF	*	IN THE
COMMISSIONERS OF	*	CIRCUIT COURT
CARROLL COUNTY,	*	FOR
MARYLAND	*	CARROLL COUNTY

* *

OPINION

On January 27, 2015, County Commissioners of Carroll County, Maryland (hereinafter the "County") filed a petition for judicial review of the December 29, 2014, decision of the Maryland Department of the Environment (hereinafter "MDE") issuing National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit, Permit Number ll-DP-3319, MD006833 l (hereinafter the "Final Permit"). This matter was subsequently stayed at the request of the parties, in part to determine the outcome of pending litigation relating to substantively similar permits issued to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County. *See* Maryland Dept. of Env't v. Anacostia Riverkeeper, 477 Md. 88, 97 (2016) (hereinafter *"Anacostia Riverkeeper").* Following the Court of Appeals of Maryland's decision in *Anacostia Riverkeeper,* this matter was brought before this Court on March 9, 20 l7, for judicial review hearing.

The County contends that the Final Permit far exceeds applicable statutory authority and jurisdiction, imposes unlawful requirements, and exposes the County to excessive compliance costs,

enforcement actions, and substantial monetary penalties. MDE contends that the Clean Water Act authorizes MDE to incorporate obligations, in addition to those explicitly required by the Clean Water Act, into the Final Permit. MDE essentially argues that the Clean Water Act sets a floor, not a ceiling, for the requirements MDE is authorized to incorporate into the Final Permit. The County's contentions and supporting arguments, and MDE's response thereto present four issues before the Court:

1. Whether the regulated permit area as set forth by the Final Permit, and as explained in the Final Determination, is greater in scope than what is authorized by the federal NPDES program?

2. Whether MDE erred in its designation of the County as a medium municipal separate storm sewer system jurisdiction?

3. Whether MDE decision to not allow the County to fulfill its Permit obligations by using water quality trading as a compliance method was arbitrary and capricious?

4. Whether section B of Part VI of the Final Permit (titled "Comprehensive Planning") unlawfully incorporates an amended version Section 3-102 of the Land Use Article into the Permit?

BACKGROUND

The Problem of Stormwater Pollution

Though rain can be a good thing, it can also lead to dire consequences. *Compare* Luke Bryan, *Rain is a Good Thing,* on Doin' My Thing (Capitol Nashville 2010)(explaining the positive impact rain has on agriculture), *with* A. Beljame, *Rain Rain Go Away,*

in the First English Reader, p. 109 (Librairie Hachhete, Paris, France 1882)(stating reasons underlying the narrator' s request for the rain to go away). Stormwater pollution results from rain or snowmelt running over surfaces and picking up pollutants before ultimately being discharged into waterways. *Anacostia Riverkeeper,* 477 Md. at 97. Rainfall is typically absorbed and retained by the soil or evapotranspirated by the vegetation in undeveloped areas. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., URBAN STORMWATER MANAGEMENT IN THE UNITED STATES, 3-6 (National Academic Press 2009)(hereinafter "URBAN STORMWATER MANAGEMENT"). However, as land *is* developed into more urban landscapes-such as buildings, parking lots, and roads-these processes of water absorption and retention, and evapotranspiration are diminished. URBAN STORMWATER MANAGEMENT at 3-6. This is because the development of land leads to the creation of impervious surfaces. This imperviousness leads to an increase in the velocity and volume of water discharged during storm events, which, in turn, leads to an increase in the pollutants picked up by the stormwater and ultimately discharged into waterways. URBAN STORMWATER MANAGEMENT at 3-6.

Municipal Separate Storm Sewer Systems

Municipal separate storm sewer systems (hereinafter "MS4s"), such as Carroll County's, are designed to collect and convey stormwater in order to protect property from flooding and erosion when rain falls or snow melts. "[MS4s] often cover many square miles and comprise numerous, geographically scattered and sometimes uncharted sources of pollution, including streets, catch basins, gutters,

man-made channels, and storm drains." Nat. Res. Def. Council v. Cnty. of L.A., 725 F.3d 1194, 1208-09 (9th Cir. 2013).

Under the Clean Water Act, an entity discharging pollutants into the Nation's waterways is generally required to obtain a permit for such discharges under the National Pollutant Discharge Elimination System program. MS4s differ from other entities permitted under that program in four major ways. First, the degree of control that can be exerted over stormwater discharges is limited in comparison to other types of discharges-such as industrial factory discharges due, in part, to the fact that stormwater discharges are caused by precipitation, a naturally occurring event that is intermittent, variable, and unstoppable. Additionally, past decisions regarding the planning and development of an area often play an integral role in how and where stormwater flows. Second, the primary generators of the pollutants discharged from an MS4 are typically citizens and businesses engaged in legal activities, not the owner and/or operator of the MS4. Third, because MS4s discharge through hundreds or thousands of individual outfalls into waterways, the contribution of a particular MS4 to the quality of a particular body of water is difficult to ascertain or regulate with any precision. *See* Nat Res. Def. Council v. N.Y. Dep't of Envtl. Conserv., 34 N.E.3d 782, 801-02 (N.Y. 2015). Finally, local political dynamics play a major role in the ownership and operation of MS4s, as well as the division of responsibilities and costs. As discussed in greater detail below, because of the unique circumstances surrounding MS4s, Congress saw fit to offer more flexibility in the requirements set

forth in and the issuance of MS4 permits under the federal National Pollutant Discharge Elimination System program.

Maryland Law

In 1982, the Maryland Legislature (hereinafter the "Legislature") enacted laws "to reduce as nearly as possible the adverse effects of stormwater runoff." *See Anacostia Riverkeeper,* 447 Md. at 111. The 1982 legislation authorized the Department of Natural Resources to issue regulations establishing minimum control requirements and design criteria for the counties and municipalities. *Id.* Counties and municipalities were required to adopt ordinances implementing a stormwater management program in accordance with those regulations. *Id* Section 4-202 of the Environment Article prohibits the development of land without the county or municipality first approving a stormwater management plan for development since 1984.

Section 9-322 of the Environment Article prohibits the discharge of pollutants into the waters of Maryland without obtaining a discharge permit. Accordingly, Section 9-323 of the Environment Article requires a person to hold a discharge permit issued by MDE before discharging pollutants into the waters of the State. Accordingly, MDE is authorized to issue a discharge permit if it finds the discharge will comply with all applicable State and federal water quality standards and effiuent limitations. MD. CODE ANN., ENVIR. § 9-324(a)(1).

The Federal Clean Water Act

The Clean Water Act (hereinafter the "CWA") generally prohibits the "discharge of any pollutant"

from a "point source" into the navigable waters of the United States. *See* Defs. of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999)(citing 33 U.S.C. §§ 131l (a), 1362(12)(a)). The CWA, however, establishes the National Pollutant Discharge Elimination System (hereinafter "NPDES") program through which either the Environmental Protection Agency (hereinafter the "EPA") or an EPA-approved state, such as Maryland, may issue permits exempting a discharger from CWA's prohibition. *See Anacostia Riverkeeper,* 477 Md. at 96, 134 A.3d at 896 (citing 33 U.S.C. § 1342). MDE is the authority in Maryland that administers the NPDES program. *Id* (citing MD. CODE REGS. 26.08.04.07).

NPDES permits do not give permittees absolute immunity from the CWA's proscription against discharging pollutants into the Nation's waterways. NPDES permits generally impose effluent limitations on the type and quantity of pollutants that can be discharged. Effluent limitations are restrictions, established by EPA or EPA-approved state, "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). The type of pollutant discharged determines the limitations the permit is required to impose upon the permittee. *Anacostia Riverkeeper,* 477 Md. at 96, 134 A.3d at 297.

Stormwater discharges were initially exempt from the NPDES program under the federal regulations originally promulgated by the EPA to implement the federal program. *See* Nat'l Res. Def. Council v. EPA, 996 F.2d 1292, 1295 (9th Cir. 1992).

After the Court of Appeals for the District of Columbia invalidated that regulation, the EPA issued proposed and final rules for stormwater discharges throughout the 1980s which were challenged at the administrative level and in the courts. Recognizing the environmental threat posed by stormwater runoff, Congress ultimately enacted the Water Quality Act (hereinafter the "WQA") in 1987, amending the CWA to address the problem of stormwater pollution. *Id.* at 1295-96. The WQA amendments were applied in two phases.

During Phase I of the WQA amendments, prior to October 1, 1994, the EPA or an approved state could not require most entities to obtain a NPDES permit for stormwater discharges. 33 U.S.C. § 1342(p)(1). However, the WQA amendments did require a NPDES permit for stormwater discharges during Phase I with respect to permits issued under the NPDES program before February 4, 1987, stormwater discharges associated with industrial activity; stormwater discharges from a municipal separate storm sewer system serving a population of 250,000 or more (referred to as a "large MS4 jurisdiction"), stormwater discharges from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000 (referred to as a "medium MS4 jurisdiction"), and stormwater discharges for which the EPA or approved state determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2).

Phase II regulations of the WQA amendments were to be issued by EPA designating stormwater

discharges, not included in Phase II, to be regulated in order to protect water quality. Phase II regulations were ultimately issued in 1999, and discharges from MS4s serving a population of less than 100,000 (referred to as a "small MS4 jurisdiction") were amongst the designated discharges.[1]

If a permit is required for stormwater discharges, the WQA sets two different standards. Permits for discharges associated with industrial activity must meet all applicable provisions of the CWA and WQA, including effluent limitations. However, because the nature of MS4s differentiates them from other entities regulated under the NPDES program, MS4 permits offer more flexibility. MS4s are subject to the "maximum extent practicable"(hereinafter the "MEP") standard, and are not generally subjected to effluent limitations necessary to meet water quality standards which are required in non-MS4 permits. *Anacostia Riverkeeper,* 477 Md.at 104.

The Chesapeake Bay Total Maximum Daily Load and Maryland's Watershed Implementation Plan

Total maximum daily loads (hereinafter "TMDLs") serve as informational tools. *Anacostia Riverkeeper,* 477 Md. at 100-101 (citations omitted). The CWA requires jurisdictions to develop, with EPA approval, a list of waterways that are impaired by pollutants and do not meet applicable water quality standards (hereinafter "WQSs") every two years.

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[1] Herein, "NPDES program" refers to the federal program authorizing the EPA to issue discharge permits, "NPDES permit" refers to a discharge permit issued in accordance with the NPDES program, and "MS4 permit" specifically refers to a NPDES permit issued to a municipality.

WQSs are established by first designating a particular "use" for a waterway-such as recreation or fishing-and then developing criteria to protect those designated uses and ensure "that higher quality waters do not degrade to minimally accepted standards." *Anacostia Riverkeeper,* 447 Md. at 101 (internal citations omitted). Effluent limitations are then established in NPDES permits as the primary method by which states meet the applicable WQSs. Effluent limitations are particularly effective as they restrict the discharge of pollutants. *See* 33 U.S.C. § 1362(11).

A TMDL must then be developed for those waterways for which effluent limitations are not stringent enough to implement the applicable WQS. *Anacostia Riverkeeper,* 447 Md. at 100- 04 (citing 33 U.S.C. § 1313(d)(l)(A)-(B)). TMDLs provide the maximum amount of a specific pollutant that a waterway can bear and still meet WQS, which is often referred to as a "diet." ENVTL. PROT. AGENCY, CHESAPEAKE BAY TMDL § 1.1, pp. 1–2 (2010)(hereinafter the "Bay TMDL"). A TMDL is the "sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R § 130.2(i).

Waste load allocations (hereinafter "WLAs") are "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h). WLAs are based upon the portion of a waterway's TMDL for a pollutant that is allocated to a particular point source. As such, the aggregate of the WLAs for all the point sources covered by a NPDES permit act similar to an effluent limitation. It is critical to note,

and of particular significance in this matter, that though MS4s are subject to the more flexible MEP standard and are not generally subject to effluent limitations, MS4s are subject to effluent limitations that are consistent with WLAs of EPA-approved TMDLs. *Id.* at 104.

On December 29, 2010, after extensive collaboration with the Chesapeake Bay (hereinafter the "Bay") watershed states,[2] the EPA issued the BAY TMDL for Nitrogen, Phosphorus, and Sediment The Bay TMDL calls for Maryland and the other watershed states to limit nitrogen, phosphorus, and sediment discharges as part of a watershed-wide plan to improve water quality in the Bay by 2025. The Bay TMDL sets an interim goal to have 60% of the reductions needed to meet the overall 2025 goals by 2017.

To effectuate the necessary pollutant reductions, Maryland established a Watershed Implementation Plan (hereinafter "WIP") as part of the development of the Bay TMDL. Maryland's final Phase I WIP, which the EPA reviewed and incorporated into the Bay TMDL, states that a portion of the necessary reductions will be achieved through conditions in MS4 permits. Bay TMDL § 8-21.

On October 26, 2012, Maryland set forth its Phase II WIP to articulate more specific strategies for pollution reductions. The Phase II WIP explains that the primary "Interim Target" strategy for reducing pollution from stormwater discharge is to accelerate treatment of land that was previously

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[2] The Chesapeake Bay watershed covers parts of Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia.

developed with little or no stormwater controls, *i.e.*, retrofitting. This strategy specifically calls for requiring, as a condition for renewal of MS4 permits, twenty percent of previously developed impervious land with little or no controls be retrofitted within the next five year permit term. MDE, PHASE II WATERSHED IMPLEMENTATION PLAN FOR THE CHESAPEAKE BAY TMDL 14 (October 26, 2012).

Carroll County's MS4 Permit

The Final Permit is the County's fourth generation MS4 permit. The County was issued an initial MS4 permit in November 1993. In its application and in the initial permit, the County was designated as a Phase I medium MS4 jurisdiction. The County was reissued its MS4 permit in May 2000, and again in July 2005.

The County submitted its application for a fourth generation permit in September, 2009. From 2009 to 2014, MDE conducted extensive discussions with the EPA, the County, and environmental groups in order to develop a draft permit. In its Final Determination,[3] MDE states that these discussions "resulted in the addition of more significant conditions to Carroll County's Draft Permit, in large part due to a growing regional focus on restoring [the] Chesapeake Bay." R. at 53. MDE sent a revised draft permit to the EPA on June 22, 2012, which the EPA objected to on September 20, 2012. Following additional correspondences with the EPA, new

[3] The "Final Determination" refers to the document issued by MDE prior to issuing the Final Permit in which MDE gives notice of its final determination to issue the Final Permit and provides explanations for including or excluding specific provisions within the Final Permit.

language was added requiring the County to implement a stormwater management program to attain applicable waste load allocations for each approved TMDL and stating that the permit "is requiring compliance with the Chesapeake Bay TMDL through the use of a strategy that calls for the restoration of [twenty percent] of previously developed impervious land with little or no controls within this five year permit term." R. at 59.

MDE sent EPA the revised permit on June 28, 2013. EPA lifted its objection to the County's draft permit on January 16, 2014. Notice of MDE's tentative determination to issue the County's permit was published on June 27, 2014, and on June 30, 2014. The County participated in a hearing held on September 18. 2014, and submitted written comments on September 29, 2014. EPA submitted comments on the draft permit on September 23, 2014, stating that it considers "the effluent limit (i.e., 20 percent reduction in impervious surface area) as supplemented by [the other] requirements discussed" within the permit to be "consistent with the reductions called or in both Maryland WIP and [Chesapeake Bay Program] 2017 interim goals." R. at 87. On December 29, 2014, MDE issued notice of its final determination to issue the County's permit.

STANDARD OF REVIEW

Section 1-601 of the Environment Article allows for direct judicial review of agency permitting decisions without a prior contested case hearing. *Anacostia Riverkeeper,* 447 Md. At 118. A reviewing court applies the substantial evidence and/or the arbitrary and capricious standards when a matter is brought before that court under that statute. *Id*

An agency's decisions based upon conclusions of law are reviewed under the substantial evidence standard. Under this standard, the reviewing court first determines whether an agency's decision is based upon an erroneous conclusion of law. *See* Shwartz v. Dep't of Nat. Res., 385 Md. 534, 554 (2005); Bd. of Physician Quality Assurance v. Banks, 354 Md.59, 67-68 (1991). A reviewing court grants a "degree of deference" to the agency's construction of a statute it administers. Motor Vehicle Admin. v. Sanner, 434 Md. 20, 31 (2013); Howard Cnty. Citizens for Open Gov. v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 615-16 (2011). However, this deference does not extend to purely legal issues, and special weight is not afforded to an agency's legal positions and practices merely because they are longstanding. *See* People's Counsel for Balt. Cnty. v. Loyola Coll., 406 Md. 54, 67-69 (2008); Md. Aviation Admin. v. Noland, 386 Md. 556, 572 (2005). The reviewing court must vacate those agency decisions that are based upon erroneous legal conclusions made by the agency.

If, however, the reviewing court finds the agency's decision to be legally correct, the court must determine if the decision is supported by substantial evidence. *Sanner,* 434 Md. at 31. The reviewing court does not "substitute its judgment for the expertise of those persons who constitute the administrative agency" in applying the substantial evidence test. *Id.* The test is one "of reasonableness, not rightness[,]" and the reviewing court cannot disturb an agency's factual findings if they are supported by substantial evidence. Bd. of Physicians Quality Assurance v. Mullan, 381 Md. 157, 173 (2004).

The arbitrary and capricious standard is applied to the discretionary decisions of an agency. In applying the arbitrary and capricious standard, the reviewing court grants great deference to the administrative agency. *Anacostia Riverkeeper,* 477 MD. at 120 ("We have characterized the arbitrary and capricious standard of review as one that is 'extremely deferential.'")(citations omitted). In *Anacostia Riverkeeper,* the Court of Appeals of Maryland adopted the Second Circuit Court of Appeals elaboration of the arbitrary and capricious standard as it is applied to review of the issuance of a NPDES permit:

> To determine whether the agency's actions were "arbitrary and capricious," we consider whether the agency 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'

447 Md. at 121 (quoting Nat. Res. Def. Council, Inc. v. EPA, 808 F.3d 556, 569 (2d Cir. 2015) (other citations and quotation marks omitted). *Anacostia Riverkeeper* further elaborates upon the Second Circuit's elaboration that a reviewing court "must be satisfied from the record that the agency . . . examined the relevant data and articulated a satisfactory explanation for its action." *Id.* (internal citations and quotations omitted). Further, a reviewing court "afford[s] the agency's decision greater deference regarding factual questions involving scientific matters in its area of technical

expertise." *Id.* (internal citations and quotations omitted).

DISCUSSION

The Final Permit is Greater in Scope than that which is Lawful Under the Federal NPDES Program

The Court first addresses the issue of whether the regulated permit area set forth by the Final Permit and explained in the Final Determination is greater in scope than what is authorized by the federal NPDES program. Part LB of the Final Permit sets forth the permit area to be regulated as:

> **Permit Area**
>
> This permit covers all stormwater discharges from [MS4] owned or operated by Carroll County, Maryland. This permit covers all stormwater discharges from [MS4] owned or operated by Carroll County, Maryland (permittee), and the following incorporated municipalities: the Towns of Hampstead, Manchester, Mount Airy, New Windsor, Sykesville, Union Bridge and the Cities of Taneytown, and Westminster (co-permittees).

However, in Section IX of the Final Determination, MDE sets forth the following definition for regulated permit area:

> The argument to limit regulated permit area takes a myopic view of the MS4 system and ignores the language set forth in 40 C.F.R. § 122.26(a)(1)(v). This section states that MDE may require an NPDES stormwater permit for discharges that ". . . contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the

> United States." Section 40 C.F.R. § 122.26.(a)(1)(v) further provides that MDE may ". . .designate discharges from municipal separate storm sewer systems on a system-wide or jurisdiction-wide basis." Therefore, MDE will continue to define the regulated permit area as jurisdiction-wide and considers all provisions of this permit to apply to the geographic area of Carroll County.

The County maintains that the regulated area of a jurisdiction-wide MS4 permit issued under the NPDES program only includes those areas served by MS4s owned or operated by the municipality. Thus, while the County agrees with the definition of regulated permit area as defined by Part I.B of the Final Permit, it contends that Section IX of the Final Determination unlawfully defines the regulated permit area to include the entire geographic area of Carroll County. MDE maintains that the scope of the regulated area of the Final Permit includes the entire geographic area of the County, arguing that the plain language of the CWA makes clear that the regulated area of a MS4 permit issued on a jurisdiction-wide basis covers the entire geographic area for which the municipality can exercise its jurisdiction.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. In ascertaining legislative intent, we first examine the plain language of the statute, and if the plain language of the statute is unambiguous and consistent with the statute's apparent purpose, we give effect to the statute as it is written." Mayor of Oakland v. Mayor of Mountain Lake Park, 392 Md. 301, 316 (2006). As MS4 permits are a subset of

NPDES permits, determining the scope of the latter will aid in determining the scope of the former. The federal regulations that implement the NPDES program (hereinafter the "NPDES Regulations") set forth its purpose and scope. 40 C.F.R. § 122.1.

The NPDES Regulations mandate that "[t]he NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into the 'waters of the United States." 40 C.F.R. § 122.1(b)(1). "Point source" is defined therein as "any discernible, confined, and discrete conveyance [. . .] from which pollutants are or may be discharged." 40 C.F.R. § 122.2.[4] Thus, NPDES permits are required for the discharge of pollutants from any discernible, confined, and discrete conveyance into the waters of the United States.

As noted above, the WQA amended the CWA to address the problem of stormwater pollution by including permits for stormwater discharges within the NPDES program. NPDES permits for stormwater discharges are required for municipal and industrial stormwater discharges. 33 U.S.C. § 1342(p). NPDES permits for "discharges from [MS4s] may be issued on a system- or jurisdiction-wide basis[,] shall include a requirement to effectively prohibit non-stormwater discharges into storm sewers[,] and shall require controls to reduce the discharge of pollutants to the [MEP]" 33 U.S.C. § 1342(p)(3)(B). Thus, the permit regulates discharges from MS4s.

The NPDES Regulations define a MS4 as "a conveyance or system of conveyances [. . .] *[o]wned or*

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[4] "Polluntants" and "waters of the United States" are also defined by the NPDES Regulations. Those definitions, however, are not dispositive of this issue.

operated by a [municipality,] [d]esigned or used for collection or conveying storm water[,w]hich is not a combined sewer[,] and [w]hich is not part of a Publicly Owned Treatment Works[.]" 40 C.F.R. 122.26(b)(8) (emphasis added). Thus, a MS4 permit under the NPDES program regulates stormwater discharge of pollutants from any point source—i.e., conveyance or system of conveyances—owned or operated by a municipality that is designed or used for collection or conveying storm water.

Of great import to this issue is the first portion of the applicable statue, which states that "[p]ermits for discharges *from* municipal storm sewers may be issued on a system- or jurisdiction-wide basis[.]" 33 U.S.C. § 1342(p)(3)(B)(i) (emphasis added). MDE argues that the plain language of the CWA is unambiguous and authorizes MDE to issue a jurisdiction-wide MS4 permit that applies county-wide. MDE correctly states that the plain meaning of "jurisdiction" is "[a] geographic area within which political or judicial authority may be exercised." Black's Law Dictionary 855 (7th Ed. 1999). MDE, however, leaves the crucial language "from municipal storm sewers" out of its reading of the applicable provision. Read in its entirety, the plain language makes clear that a jurisdiction-wide MS4 permit is limited in its scope to the regulation of discharges from MS4s owned or operated by the permittee-municipality that are within the geographic area over which the permittee-municipality may exercise its jurisdiction. Because discharges from a MS4 can only originate from stormwater in areas served by that MS4, MS4 permits can only be applied to those areas served by the MS4(s) for which the permit is issued.

The CWA authorizes jurisdiction-wide MS4 permits for administrative convenience, not to widen the scope of the NPDES program. Congressional intent confirms this interpretation:

> [...] Without these stormwater runoff provisions, the Environmental Protection Agency will be under a Federal court order to adopt stonnwater regulations which may require thousands of cities and counties to obtain separate permits for every single one of their stormwater discharge points-and there are millions of them.
>
> Every one of those permits would require an engineering study and exhaustive paperwork. It would cost a medium-size city like Macon, GA, in my own Eighth District of Georgia, many millions of dollars to comply. It would be financially devastating to many of our local governments.
>
> [...]
>
> [...] When this bill becomes law, a carefully crafted Stonnwater Control Program will go into effect with provisions that will allow communities to obtain far less costly single jurisdiction-wide permits.

133 Cong. Rec. H515-06, 1987 WL 930040 (statement of Rep. Rowland)(referring to the jurisdiction-wide permit provision). The statements made by Representative Rowland provide clear evidence that administrative convenience was the primary purpose behind allowing for the issuance of jurisdiction-wide MS4 permits was administrative convenience.

As the plain language of the applicable statute is consistent with its apparent purpose, the Court gives effect to the statute as written. *See Mayor of Oakland,* 301 Md. at 316. A MS4 permit may be issued on a jurisdiction-wide basis for the areas served by MS4(s) owned or operated by the permittee-municipality which are located within the geographic area over which the permittee-municipality may exercise its jurisdiction.

MDE further contends that the regulated permit area is properly based on the County's jurisdiction-wide authority to regulate stormwater and land use. In support of this contention, MDE maintains that because the broad authority Maryland counties have in regulating land use and stormwater management, the County is likely to approve new development, roads, and stormwater infrastructure during the permit term. Therefore, MDE argues, issuing a permit on a county-wide basis allows the County to develop new infrastructure without requiring a modification of the Permit and encourages the County to ensure that new development incorporates stormwater controls consistent with the intent of the CWA and state law to reduce stormwater pollution.

The NPDES Regulations set forth the causes for which modification of NPDES permits is necessary. 40 C.F.R. § 122.62. Development of new infrastructure would not automatically require modification of the Final Permit. MDE argues that permit modifications must go through public review and a comment process unless the modification qualifies as a minor modification, and maintains that an expansion of the regulated permit area is not a minor modification. As explained above, a jurisdiction-wide MS4 permit covers those areas served by the MS4(s) owned or

operated by the municipality. As such, new development of infrastructure that includes the extension or addition of a MS4 falls within the regulated permit area of a jurisdiction-wide MS4 permit as it will be owned or operated by the permitted municipality. *See* Final Permit, Part I.B. Further, a county-wide regulated permit area does not foreclose on the possibility that the Final Permit will require modification. For example, permit modification may be required when "[t]he standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued." 40 C.F.R. § 122.62(a)(3).

As to MDE's encouraging the County reasoning, Section 4-202 of the Environment Article prohibits the development of land prior to the County approving a stormwater management plan for development. As such, new development is subject to the County-approved stormwater management plan for development. Further, the expansion of the County's MS4s due to new development is automatically covered by the regulated permit area as defined by Part I.B of the Final Permit. Ultimately, though the regulated permit area is the area served by the County's MS4s, the scope to which the regulated permit area may be expanded, through expansion of the County's MS4s, is only limited by the jurisdiction of the County. Therefore, MDE cannot justify that the regulated permit area should include the entire geographic area of the County on the basis that infrastructure development will require modification of the Permit or that a county-wide permit area will ensure compliance of new development with CWA.Additionally, the issue is not what the County has

the legal authority to do, but what MDE has the authority to regulate through a MS4 permit issued under the NPDES program.[5]

For the forgoing reasons the Court concludes that the "regulated permit area" of a jurisdiction-wide MS4 permit issued under the federal NPDES program is those areas served by the MS4(s) owned or operated by the permittee-municipality that are within the geographic area over which the permittee-municipality may exercise its power (i.e., jurisdiction).

Determination of what constitutes the regulated permit area has significant repercussions on the County's obligations under the Final Permit. The impact is most consequential as related to Part IV.E(2) of the Final Permit (hereinafter the "Restoration Plans Provision"), which requires the County "commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area[.]" The County is required to "submit an impervious surface area assessment consistent with the methods described in the MDE document 'Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits'[(hereinafter the "Guidance")]" to serve as the baseline for the restoration efforts required in the Final Permit. The Guidance sets forth the calculations to be used in determining the baseline impervious surface area:

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[5] For this reason, the Court dismisses MDE's argument that the County has the legal authority to comply with the Final Permit without further discussion.

> **5. Total Impervious Acres Not Treated to the MEP**
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> A jurisdiction's total impervious area that has not already been treated or restored to the MEP is subject to the twenty percent restoration requirement. The analysis performed according to Section II. I - 4, above, shall be used to determine the baseline impervious acres not treated. This can be done by subtracting the total impervious area considered treated from a jurisdiction's total impervious area. The resulting area will serve as the baseline for determining the twenty percent impervious surface area required to be restored to the MEP as described in Part IV.E.2.a of the permit.

The Guidance at p. 9 (2014).

The County argues that the twenty percent restoration requirement in the Restoration Plans Provision compels the County to calculate the impervious surface area of the County and to restore twenty percent of the total surface area acreage. The County notes that though the Guidance allows the County to exclude certain areas, there is no provision that allows the County to exclude impervious surface areas that do not generate discharges from point sources owned or operated by the County. The County maintains that only the stormwater discharged from the County's storm sewer system is discharged from a point source owned by the County and properly regulated under the CWA. The County essentially argues that because the twenty percent restoration requirement, as applied to the County in the Final Permit, is

based on the county-wide jurisdiction as opposed to the area served by the County's MS4s, the Final Permit is invalid because it is greater in scope than that of the federal NPDES program.

MDE contends that it can impose a county-wide restoration requirement as a "more stringent" effluent limitation even if the federal NPDES program limits the regulated permit area to those areas served by the County's MS4s. In support of this contention, MDE argues that because "states are free to treat the EPA's pollution limits as a floor and impose more stringent requirements" in administering the NPDES programs, MDE could require the County to submit a restoration plan for each EPA-approved waste load allocation as a more stringent effluent limitation. *See* West Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 162 (4th Cir. 2010). In support of this argument MDE quotes the NPDES Regulations which state, "[n]othing in this part precludes a State from [. . .] [a]dopting or enforcing requirements which are more stringent or more excessive than those required under this part." 40 C.F.R. § 123.1(i)(1). MDE also quotes Subsection 9-314(c) of the Environment Article, which states the "[e]ffluent standards [established by MDE] shall be at least as stringent as those specified by [NPDES]." MDE concludes that the requirements set forth in the Restoration Plans Provision are precisely the type of "more stringent" effluent limitation authorized by both federal and state law.[6]

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[6] Noting that doing something which is "more stringent" than the maximum extent practicable is *practically* impossible, the Court nevertheless continues its analysis if this contention

In the Final Determination, MDE also maintains:

> [T]hat compliance with the twenty percent restoration requirement is necessary in order for the permit to be consistent with the Chesapeake Bay TMDL and Maryland's WIP. The importance of using the twenty percent requirement to meet the Chesapeake Bay TMDL was underscored in the EPA September 23, 2014 letter, which stated: "EPA had previously objected to the June 2012 draft permit because it: (1) failed to explicitly state what actions the permittee had to take to meet the Chesapeake Bay TMDL. . ." In addition, "EPA has reviewed this permit and considers the effluent limit (i.e., 20 percent reduction of impervious surface area). . . consistent with the reductions called for in both Maryland's WIP and CBP 2017 interim goals. EPA is satisfied that this permit is consistent with the overall assumptions and requirements of the Chesapeake Bay TMDL WLA and the CBP goal of 2025."

The Court of Appeals of Maryland explained the role of effluent limitations regarding MS4 permits in *Anacostia Riverkeeper:*

> [. . .] MS4s are subject to the [maximum extent practicable] standard under 33 U.S.C. § 1342. MS4s are not, however, required to impose effluent limitations necessary to meet water quality standards. The CWA still requires Maryland to set water quality standards and TMDLs—subject to EPA's approval. Flowing from this obligation is the requirement that MS4s are subject to effluent

> limitations that are consistent with WLAs of EPA-approved TMDLs.

447 Md. at 104. In *Anacostia Riverkeeper,* the various "Water Groups"[7] maintained that the twenty percent restoration requirement did not comply with requirements set forth by the NPDES program. In that case, the Court of Appeals of Maryland declared that the twenty percent restoration requirement is a surrogate TMDL target:

> The Permits require, by the end of the five-year term, that the Counties restore 20% of the impervious surface areas in their watersheds that have not been restored to the MEP. This requirement "uses percent impervious cover in a watershed as a surrogate TMDL target." ENSR, Pilot TMDL Applications Using the Impervious Cover Method § 1.0, at 1–1 (2005). Like so much of this case, we must unpack the science before we analyze the parties' arguments.
>
> As we develop on land, science has shown us that we profoundly impact our waters. Consider, for example, when "[t]rees, meadow grasses, and agricultural crops that had intercepted and absorbed rainfall are removed...." CWP & MDE, Manual, § 1.1, at 1.3. Problematically, "[c]leared and graded sites erode, are often severely compacted, and can no longer prevent rainfall from being rapidly converted into stormwater runoff." *Id.* These kinds of sites are known as impervious

[7] The "Water Groups" in that case consisted of various environmental groups that challenged the validity of MS4 permits issued by the MDE.

> surfaces, surfaces "that do[ ] not allow stormwater to infiltrate into the ground," such as "rooftops, driveways, sidewalks, or pavement." EN § 4-201.1(d). "Impervious surfaces accumulate pollutants deposited from the atmosphere," pollutants which are "rapidly delivered to downstream waters" during storms. CWP & MDE, Manual, § 1.1., at 1.5. The purpose of the 20% restoration requirement, then, is to use stormwater management practices to restore the natural, beneficial processes in our environment that we have changed by developing impervious surfaces.
>
> In other words, the 20% restoration requirement is a surrogate because the requirement does not control pollution reduction directly. *See* ENSR, Pilot TMDL Applications Using the Impervious Cover Method § 1.0, at 1-1. Rather, it is through restoring impervious surfaces with management practices that the Counties will reduce pollution. *See, e.g.,* CWP & MDE, Manual, § 1.2, at 1.13 ("[Management practices] shall be designed to remove 80% of the average annual post development total suspended solids load (TSS) and 40% of the average annual post development total phosphorus load (TP).").

Id. at 122-23.

The Water Groups made three major arguments in support of their contention that the twenty percent restoration requirement did not comply with the NPDES program: (1) The twenty percent

restoration requirement was too opaque to comply with the maximum extent practicable (hereinafter "MEP") standard; (2) That MDE did not explain why it selected twenty percent as the restoration goal or how the restoration provisions in the MS4 permits at issue would promote necessary pollution reduction, and that the requirement is insufficient as it does not relate to other TDMLs; and (3) The Water Groups objected to MDE's method of calculating impervious surface area not restored to the MEP.

As to the Water Groups first argument, the *Anacostia Riverkeeper* Court determined that the CWA does not impose a specific performance standard upon MS4s, and that "the concepts of restoration and impervious surface 'not restored to the MEP' are sufficiently clear as to the controls that the Counties must install[.]" *Id.* at 127 (citing 33 U.S.C. § 1342(p)(3)(B)(iii). Therefore, Court of Appeals of Maryland held that the twenty percent restoration requirement in the MS4 permits at issue did comply with the MEP Standard. *Id.*

As to the Water Groups second argument, the *Anacostia Riverkeeper* Court concluded that MDE's decided to include the restoration requirement in the MS4 permits based upon substantial evidence and that decision was not arbitrary and capricious. *Id.* at 129. The Court of Appeals of Maryland further concluded that the requirement in the MS4 permits to submit plans regarding WLAs for all EPA-approved TMDLs ensured that the permits addressed all applicable TDMLs. *Id.*

In support of their third argument, the Water Groups contended that the Guidance "is flawed because MDE arbitrarily selected 2002 as the

baseline for measuring impervious surface area." *Id.* at 130. As to this argument, the Court held that "MDE reasonably [justified] its decision based on the accurate determination that 2002 marked a significant milestone in the State's treatment of water quality." *Id.* Regarding the twenty percent restoration requirement, *Anacostia Riverkeeper* ultimately holds that "the MS4 permits issued by MDE for the counties' municipal storm sewer system appropriately [did] incorporate by reference publicly available materials[which makes] the requirement for restoration of 20% of pre-2002 developed impervious surfaces specific, measurable, and enforceable[;] [and that] MDE's final decision to issue the permits with a [twenty percent) restoration requirement [was] based upon the State's Chesapeake Bay TMDL strategies, and a reporting requirement to establish strategies to address wasteload allocations, [was] supported by substantial evidence" and was not arbitrary and capricious. *See Id* at 117.[8]

In *Anacostia Riverkeeper,* the Court of Appeals of Maryland upheld MDE's decision to issue the MS4 permits at issue in that case. This Court notes the twenty percent restoration requirements in those MS4 permits are identical, or nearly identical, to the

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[8] The Court of Appeals of Maryland also addressed whether "provisions of the MS4 permits that require that the public have an opportunity to review and comment on restoration plans intended to meet the wasteload allocations established for the permittees under applicable total maximum daily loads satisfy public participation requirements," and whether "the provisions of the MS4 permits satisfy federal monitoring requirements. " However, the holding as to these issues do not pertain to any of the issues or arguments raised by the parties and addressed herein.

twenty percent restoration requirement in the Final Permit. However, the County's objections to that requirement and the issues presented before this Court are substantively different than the objections raised in, and the issues addressed by, *Anacostia Riverkeeper*.[9] Therefore, notwithstanding the foregoing holdings in *Anacostia Riverkeeper,* this Court is now called upon to address the question *sub judice* as to the validity that requirement in the Final Permit: Is the requirement to calculate the impervious surface area of the County and to restore twenty percent of the total surface area acreage to the MEP greater in scope than that which is lawful under the NPDES program, or does the CWA authorize MDE to impose a county-wide restoration requirement as an effluent limitation? The Court answers that the requirement is greater in scope than what is lawful under the NPDES program for the following reasons.

Though MDE has the authority to include more stringent regulations as part of the NPDES program, MDE does not have the authority to include programs that are beyond the scope of coverage of the NPDES program. 1999 Stormwater Regulations, 64 Fed. Reg. 235, 68739 (Dec. 8, 1999)(to be codified at 40 C.F.R. pts. 9, 122, 123, 124). In the 1999 Stormwater Regulations, the EPA states:

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[9] The Court notes that MDE did not cite *Anacostia Riverkeeper* in support of their contention that it had the authority to require the twenty percent requirement as a more stringent effluent limitation. Rather, MDE relied on state statutes authorizing MDE to impose more stringent requirements. However, the issue is the scope of the federal NPDES program, and state law cannot broaden that scope.

> EPA also believes that sources regulated pursuant to a State designation are part of (and regulated under) a federally approved State NPDES program, and thus subject to enforcement under CWA sections 309 and 505. Under existing NPDES State program regulations, State programs that are 'greater in scope of coverage' are not part of the federally-approved program. By contrast, any such State regulation of sources within this 'reserved category' will be within the scope of the federal program because today's rule recognizes the need for such post-promulgation designations of unregulated point sources of stormwater. Such regulation will be 'more stringent' than the federal program rather than 'greater in scope of coverage[.]"

64 Fed. Reg. at 68781. Therein, the EPA explained one of the new rules that the federal agency promulgated in 1999. This then-new rule authorized approved-states to designate a category of point sources, not regulated by current federal law and/or rules, at a local level. EPA determined that approved states and regional administrators were best situated to decide whether a category of unregulated point sources existed within their locality, the regulation of which would protect water quality. The NPDES program "requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'" 40 C.F.R. § 122.1(b)(1). As such, a local regulation designating a category of point sources, not regulated under the federal program, which discharge pollutants into the waters of the United States constitutes a more stringent local

regulation, not a regulation greater in scope of coverage than the federal NPDES program.

Thus, while MDE is authorized to designate a category of presently unregulated point sources as "more stringent" regulations, it is not authorized to impose requirements that include areas outside of those areas served by the permitted MS4(s). The federal regulations implementing the CWA support this conclusion by declaring "[i]f an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2) (The regulation notes, as an example, that "if a State requires permits for discharges into publically owned treatment works, these permits are not NPDES permits.").

The Court notes that, pursuant to the holding in *Anacostia Riverkeeper,* the twenty percent restoration requirement is sufficiently clear to constitute an effluent limitation and that the requirement is a surrogate TMDL target. However, as-applied in the Final Permit, the twenty percent restoration requirement holds the County responsible for a regulated permit area that is greater in scope of coverage than the federal NPDES program. Therefore, the twenty percent requirement within the Restoration Plans Provision, as it presently stands, cannot be included in any NPDES permit, MS4 or otherwise.

MDE Erred in its Designation of the County as a "Medium" MS4 Jurisdiction

As discussed above, the WQA amendments to the CWA designate municipalities as either a small, medium, or large MS4 jurisdictions. Large and

medium MS4 jurisdictions are considered Phase I MS4s, as they were required to obtain permits during the first phase of the WQA amendments. Small MS4 jurisdictions are referred to as Phase II MS4s as the permit requirement for small MS4 jurisdictions did not take effect until the second phase of the WQA amendments. Generally, Phase I MS4s are covered by more stringent individual permits and Phase II MS4s are covered by less stringent general permits.[10] It is important to note that the requirements set forth in Maryland's WIP often distinguish between the obligations required of Phase I MS4 jurisdictions and those required of Phase II MS4 jurisdictions.

Before further discussion, the Court first addresses MDE's contention that the issue of designation does not fall within the limited scope of judicial review. MDE maintains that the County should be barred from contesting MDE's its designation as a medium MS4 jurisdiction. MDE argues that Maryland law limits judicial review to the administrative record before the permitting agency and to the objections raised during the public comment period, and that the County failed to raise this issue during the public comment period. *See* MD. CODE ANN., ENVIR. § 1-601(d)(1). Indeed, a reviewing court is restricted to the administrative record and may not rule on issues raised for the first time upon

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[10] "The minimum control measures applicable to discharges from smaller MS4s are described with slightly more generality than under the Phase I permit application regulations for larger MS4s, thus enabling maximum flexibility for operators of smaller MS4s to optimize efforts to protect water quality." 1999 Stormwater Regulations, 64 Fed. Reg. 235, 68739 (Dec.8, 1999)(to be codified at 40 C.F.R. pts.9, 122, 123, 124).

judicial review. Dep't of Health & Mental Hygiene v. Campbell, 364 Md. 108, 123 (2001). However, a reviewing court may pass upon issues that are "encompassed in the final decision of the administrative agency." *Id.* Designation of the County's MS4 jurisdiction was encompassed in the MDE's Final Determination. This is evidenced in the Final Determination, wherein MDE explicitly states that "[b]ased on 1990 census data, Carroll County was considered a Phase I medium municipality due to its population of over 120,000 at the time."

Further, prior to issuing a permit to the County, MDE must first determine whether the County is a small, medium, or large MS4 jurisdiction. This threshold question plays a significant role in MDE's Final Determination and, ultimately, the Final Permit. As noted above, for example, the strategies and requirements set forth in Maryland's WIP differentiate between Phase I and Phase II permits. *See* BAY TMDL § 8-21 (stating that "[r]enewal of Phase I MS4 permits to require nutrient and sediment reductions equivalent to urban stormwater treatment on [thirty] percent of the impervious surface that does not have adequate urban stormwater controls[,]" while "[r]enewal of Phase II MS4 permits to require nutrient and sediment reductions equivalent to urban stormwater treatment on [twenty] percent of the impervious surface that does not have adequate urban stormwater controls"). Additionally, as evidenced in the Final Determination, the permit developed for Prince George's County, a Phase I MS4 jurisdiction, was used as a template for the County's Final Permit. As such, the issue of designation of the County's MS4 jurisdiction was

encompassed in MDE's Final Determination and had a direct effect on the Final Permit issued to the County. Further, as a practical matter, MDE determines, or should determine, the size of the permitted jurisdiction in order to tailor the MS4 permit in a way that will allow the municipality to reach the MEP standard. Therefore, MDE's designation of the County as a medium MS4 jurisdiction falls within the limited scope of judicial review in accordance with *Campbell*.

The CWA defines medium MS4 jurisdictions as those MS4s "serving a population of 100,000 or more but less than 250,000." 33 U.S.C. § 1342(p)(2)(D). However, the CWA does not specify how the population served by an MS4 is to be calculated. The NPDES Regulations sets out when a large or medium MS4 designation is appropriate. 40 C.F.R. § 122.26. Under Subparagraph 122.26(b)(7)(ii) of the NPDES Regulations, a county is designated as a medium MS4 jurisdiction if it is listed in Appendix I to Part 122 of Title 40 of the Code of Federal Regulations (hereinafter "Appendix I) Appendix I is a list of those counties with unincorporated urbanized areas greater than 100,000 but less than 250,000 according to the 1990 Decennial Census by the Bureau of the Census.

Carroll County, Maryland, however, is not amongst those counties listed in Appendix I, nor is there any evidence to suggest that the County was qualified to be on that list. In its Final Determination, MDE generally states that "[b]ased on 1990 census data, Carroll County was considered a Phase I medium municipality due to its population of over 120,000 at the time." Based on this, MDE maintains that the County was required to, and did,

submit a two-year, two- part application for a Phase I MS4 permit. The County was subsequently issued its initial MS4 permit in November of 1993. It is unclear whether the 1990 "population of over 20,000" constitutes the entirety of Carroll County or the unincorporated urbanized areas within the County. As such, there is no guidance for the Court to determine whether MDE used the proper statutory formula in determining the applicable population. *See* 33 U.S.C. § 1342(p)(2)(D). Thus, because Carroll County, Maryland is not amongst the enumerated counties in Appendix I and MDE provides no evidence that the County qualified to be on that list, the County cannot be designated as a medium MS4 jurisdiction under Subparagraph 122.26(b)(7)(ii).

MDE argues that it was authorized to designate the County as a Phase I MS4 under its residual designation authority. The CWA authorizes MDE to designate stormwater discharges requiring a NPDES permit if MDE "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E). MDE, however, erroneously designated the County as a Phase 1 MS4 jurisdiction based on having a population of over 120,000 in 1990. MDE cannot ameliorate its prior error by now offering a new basis upon which it could have, but did not, base its decision to designate the County as a Phase I jurisdiction.[11]

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[11] The NPDES Regulations set forth factors to consider in determining whether stormwater discharges contribute to a violation requiring a NPDES permit. MDE does not present any analysis of those factors or are any other basis upon which the County could have been designated as a Phase I MS4.

Moreover, MDE's residual designation authority stems from Congressional recognition of the need for permitting authorities "to retain authority to regulate unregulated *point sources* of storm water under the NPDES permit program." 1990 Stormwater Regulations, 64 Fed. Reg. at 68,781 (emphasis added). Thus, the residual designation authority allows MDE to retain authority to regulate unregulated point sources of storm water that do not fall within the scope of other CWA provisions, it does not act as a post-final determination justification for a prior erroneous designation.

MDE further argues that even if the County were designated as a small MS4 jurisdiction, it could impose the same requirements as those that apply to medium MS4 jurisdictions. Though Phase II permits generally have less stringent restrictions than Phase I permits, MDE is authorized to "require more from operators of MS4s" designated as small MS4 jurisdictions. 1990 Stormwater Regulations, 64 Fed. Reg. at 68,749. The issue before this Court, however, is whether MDE erred in its designation of the County as a medium MS4 jurisdiction. As discussed above, MDE erred by designating the County as a medium MS4 jurisdiction based on a population of over 120,000. This legal error cannot be overlooked because the CWA authorizes MDE to possibly impose the same requirements on the County whether it is designated as a small MS4 or medium MS4 jurisdiction.

MDE also argues that because the County has

Rather, MDE simply states that its residual designation authority could have allowed it to designate the County as a Phase I MS4 jurisdiction

historically been designated as a medium MS4 jurisdiction in all prior generations of its MS4 permits, changing its designation to a small MS4 jurisdiction in the Final Permit will result in a violation of the anti-backsliding provision of NPDS. 33 U.S.C. § 1342(o). The Court notes that this argument cannot be reconciled with MDE's contention that the same requirements could be imposed on the County whether it is designated as a small MS4 or medium MS4 jurisdiction. Nevertheless, the Court will assume [12] *in arguendo* that a small MS4 jurisdiction does face less stringent requirements than a medium MS4 jurisdiction, and proceed in its analysis.

The anti-backsliding provision prohibits the renewal of a permit with effluent limitations that are less stringent than comparable effluent limitations found in the prior generation of that permit. MS4s are generally not subject to effluent limitations except that MS4s are subject to effluent limitations that are consistent with WLAs of EPA-approved TMDLs. *Anacostia Riverkeeper,* 477 Md. at 104. Page 21 of Section 8 of the Bay TMDL expressly states that, in accordance with Maryland's WIP renewal of Phase I permits will require 30% reduction of impervious surface area, while renewal of Phase II permits will only require 20% reduction of impervious surface area. Thus, shifting the County from a medium Phase I MS4 jurisdiction to a small Phase II MS4 jurisdiction could, arguably, impose a less stringent effluent limitation than those imposed in the County's third generation MS4

[12] The Court's assumption is assumed for the limited purpose of analysis of MDE's anti-backsliding argument.

permit.[13] However, technical mistakes or mistaken interpretations of law made by MDE when issuing the County's permit would exempt it from the anti-backsliding provision. *See* 33 U.S.C. § 1342(o)(2) (enumerating exceptions to the general prohibition on backsliding). Thus, the anti-backsliding provision does not preclude the County from being designated as a small MS4 jurisdiction.[14]

MDE also maintains that the County represented it was a medium MS4 jurisdiction when it applied for a Phase I permit [15] and, after MDE approval, has been operating under a Phase I permit since November 17, 1993. As such, MDE argues that the doctrine of equitable estoppel precludes the County from challenging MDE's designation of the County as a medium MS4 jurisdiction. Equitable estoppel has three elements: voluntary conduct or representation, good faith reliance, and detriment. *See* Mona Elec. Co. v. Shelton, 377 Md. 320, 334, 833 A.2d 527, 535 (2003). As previously discussed, Maryland is an EPA-approved state under the NPDES permit program, and MDE is the authority in Maryland that administers the NPDES permit program. As such, MDE knew, or should have

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[13] The previous, third generation, MS4 permit required the County to restore thirty percent of the impervious surface area in order to reach. The Final Permit requires an additional twenty percent restoration in order to reach the total thirty percent restoration requirement set forth in the WIP

[14] The Court notes that it is unclear whether issuing a Phase II permit in lieu of a fourth generation Phase I permit constitutes the renewal of a NPDES permit. Thus, it is unclear whether the anti-backsliding provision would applicable in this situation.

[15] It is unclear whether application or designation requiring application came first.

known, the applicable law regarding MS4 permits such as the statutory provisions and EPA regulations surrounding the designation of MS4s jurisdictions. Further, because MDE is the agency charged with implementing the NPDES program in Maryland, it is ultimately responsible for erroneously requiring the County to obtain a Phase I MS4 permit. Therefore, MDE cannot claim good faith reliance upon the County applying as a medium MS4 jurisdiction on its initial permit application. Thus, MDE cannot assert that the County is estopped from challenging MDE's designation of the County as a medium MS4 jurisdiction.

MDE contends that the County has never before raised issue to its designation as a medium MS4 jurisdiction, and allowing the issue to be raised now would circumvent the permit application process put in place by MDE. MDE was in the best position to determine that the population served by the County's MS4(s) did not meet the requisite threshold to designate it as a medium MS4 jurisdiction. This is not to say the County could not have been designated a medium MS4 under Subparagraphs 122.26(b)(iii)-(iv); however, MDE did not base its designation on those Subparagraphs and did not conduct the proper inquiry in its designation of the County. It seems that it was the MDE's permit application process that ultimately allowed the County to be permitted as a medium MS4 jurisdiction. Further, the issue is whether MDE erred in its designation of the County as a medium MS4 jurisdiction, not whether the process put in place by MDE will be impeded upon if MDE is held accountable for its error.

MDE's Discretionary Decision to not allow Water Quality Trading was not Arbitrary and Capricious

Water quality trading allows permittees to acquire pollutant reduction credits from third parties, or other permitted facilities, in order to meet pollution reduction requirements. This market-based approach creates an environment in which permittees can meet their respective permit requirements at the lowest overall cost for all parties involved. The County contends that MDE's decision to not allow for water quality trading as a compliance method in the Final Permit was arbitrary and capricious.

The County points out that the EPA has recognized that water quality trading allows permittees to meet pollutant reduction requirements at the overall lowest costs for all involved, and has endorsed this approach in the Chesapeake Bay TMDL. The County also quotes Maryland's Phase II WIP for the following statements made in support of trading: "It is true that costs per pound for stonnwater nutrient reductions are high . . . . [V]arious trading approaches can reduce the burden significantly if local governments wish to pursue those options." Md. Phase II Watershed Implementation Plan Cmt. Resp. Doc. 6 (Oct. 2012); "If a locality can reduce costs by paying farmers for example, for additional nutrient reductions instead of accomplishing the same reduction by stormwater at higher costs, they should propose specific scenarios." *Id.* at 36; and, "The urban retrofit costs, compared to other sectors (specifically WWTP), are extremely expensive versus the benefit expected. The commenter believes that this approach will lead to further economic constraints and suggests trading

may provide proper balancing methodology . . . We agree that trading is the proper balancing methodology." *Id* at 38. Finally, the County maintains that the Chesapeake Bay Commission has concluded Bay nutrient reduction compliance costs could be reduced as much as 82% if MS4s were included in the water quality trading program. Ches. Bay Comm'n, Nutrient Credit Trading for the Chesapeake Bay: An Economic Study 2 (Exec. Summary) (May 2012).

The County concludes that, in light of MDE's decision to impose "beyond MEP" conditions, it was unreasonable for MDE to summarily reject a compliance method it publicly supports and which the EPA, Maryland, the Chesapeake Bay Commission, along with various other interested parties have recognized as a method which could substantially reduce the costs associated with compliance of the requirements set forth in the Final Permit. At a minimum, the County contends, MDE could have conditionally approved trading pending finalization of a trading policy, which MDE should have completed in a timely manner.

The EPA's stance on water quality trading as part of the Bay TMDL is set forth in Subsection 10.2 of the Chesapeake Bay TMDL:

> **10.2 Water Quality Trading**
>
> EPA recognizes that a number of Bay jurisdictions already are implementing water quality trading programs. EPA supports implementation of the Bay TMDL through such programs, as long as they are established and implemented in a manner consistent with the CWA, its implementing regulations, and

> EPA's 2003 *Water Quality Trading Policy* (USEPA 2003e) and 2007 *Water Quality Trading Toolkit for NPDES Permit Writers* (USEPA 2007d). An assumption of this TMDL is that trades may occur between sources contributing pollutant loadings to the same or different Bay segments, provided such trades do not cause or contribute to an exceedance of WQS in either receiving segment or anywhere else in the Bay watershed. EPA does not support any trading activity that would delay or weaken implementation of the Bay TMDL, that is inconsistent with the assumptions and requirements of the TMDL, or that would cause the combined point source and nonpoint source loadings covered by a trade to exceed the applicable loading cap established by the TMDL.

Section VII.D of the Final Determination sets forth the basis upon which MDE decided to not include a water quality trading program in the Final Permit:

> **D. MS4 Trading Policies**. A number of the MS4 counties believe that the Draft Permit should be modified to authorize trading. One county commented that "MS4s would benefit greatly from an open and transparent State trading program. According to a study performed by the Chesapeake Bay Commission, allowing significant point sources and urban water sources to trade could potentially reduce compliance costs. . ." MDE agrees with the counties, however, because these trading policies have not been finalized, it would be premature to include them in the Final Permit.

> According to the State's WIP, MDE is charged with developing an Accounting for Growth (AFG) policy ". . .to help offset new or increased discharges, and provide alternatives for achieving greater environment protection than through existing regulatory programs." However, extensive outreach and public comment regarding the AFG policy revealed that there was a lack of consensus on many of the fundamental issues. A work group was established in 2013 that was comprised of various stakeholders to find common ground, clarify areas of disagreement, and make recommendations for a draft AFG policy. MDE is amenable to considering trading as an option for meeting stormwater WLAs once an official trading policy is established. However, no changes will be made to the permit at this time.

Reading the relevant sections of the Chesapeake Bay TMDL and the Final Determination makes clear that both the EPA and MDE recognize the significant benefits associated with the water quality trading. It is similarly clear, however, that both the EPA and MDE recognize the importance of ensuring that any implemented water quality trading program is set-up in a manner that will not detract the fundamental goals and principles of the Bay TMDL, as well as the CWA. Further, following extensive outreach and public comments, MDE established a work group to address those fundamental issues of the AFG policy for which there was a lack of consensus and make recommendations to MDE. MDE states that it is amenable to including water quality trading for

meeting stormwater WLAs once an official policy is in place. For these reasons, the Court finds that not allowing for water quality trading in the Final Permit when there was no official water quality trading policy in place does not constitute an arbitrary and capricious decision.

Legality of the Comprehensive Planning Provision in the Final Permit

The County contends that the Final Pennit unlawfully usurps local legislative discretion under Section 3-106 of the Land Use Article by mandating the County take "all reasonable ' actions authorized by law" related to the water resource element. MDE maintains that the provision's requirement that the County cooperate with other agencies in developing the water resources element of its comprehensive plan is consistent with state and federal law. The relevant provision in the Final Permit, Section B of Part VI, reads:

> **Comprehensive Planning**
>
> Carroll County shall cooperate with other agencies during the completion of the Water Resources Element (WRE) as required by the Maryland Economic Growth, Resource Protection and Planning Act of 1992 (Article 66B, Annotated Code of Maryland). Such cooperation shall entail all reasonable action authorized by law and shall not be restricted by the responsibilities attributed to other entities by separate State statute, included but not limited to reviewing and approving plans and appropriating funds.

The County contends that because this purely state planning requirement is completely independent of the CWA, it cannot be shoehorned into the permit. The EPA allows states to incorporate the requirements of existing state programs into NPDES permits to accommodate states "seeking to coordinate the stormwater program with other programs, including those that focus on watershed-based nonpoint source regulation." 1999 Stonnwater Regulations, 64 Fed. Reg. 235, 68739 (Dec. 8, 1999). MDE is allowed to incorporate the requirements of existing state law into an NPDES permit. Therefore, the Court will not strike the Comprehensive Planning provision based upon the County's contention that it is purely a state planning requirement independent of the CWA.

The County also raises three arguments as to the specific language of the Comprehensive Planning provision in support of its contention: (1) MDE amended the state law incorporated into the Permit to order the County to cooperate with other unnamed agencies during the completion of the WRE; (2) The requirement that the County's cooperation must "entail all reasonable actions authorized by law" is a vague but sweeping mandate that usurps local legislative discretion at the heart of comprehensive planning by requiring the County to take all reasonable actions rather than exercising its judgment in such matters; and, (3) The requirement that the County's cooperation "shall not be restricted by the responsibilities attributed to other entities by separate state statue, including but not limited to reviewing and approving plans and appropriating funds "essentially acts as an override of other unnamed state statutes.

As part of its comprehensive plan, the County is required to adopt a WRE intended to identify "drinking water and other water resources that will be adequate" and "suitable receiving waters and land areas to meet stormwater management and wastewater treatment and disposal needs of existing and future development." MD. CODE, LAND USE §§ 3-102(a)(1)(viii), 3-106(a). In developing the WRE, the County must take data made available by MDE into consideration, and MDE is to provide technical assistance upon request and to "review the [WRE] to determine whether the proposed plan is consistent with the programs and goals of [MDE] reflected in the general water resources program required under § 5-203 of the Environment Article." MD. CODE ANN., LAND USE § 1-306. Subsection 5-203(b) of the Environment Article mandates that the general water resources program "shall recognize and be consistent with functions of other State units."

Because the County's WRE must be consistent with the programs and goals of the general waters resources program and the general waters resources program must recognize and be consistent with functions of other State agencies, the County's WRE must, *ipso facto,* recognize and be consistent with functions of other State agencies. Additionally, the cooperation with other agencies in that sentence is limited to that which is required by the Maryland Economic Growth, Resource Protection and Planning Act of 1999. As such, the first sentence of the Comprehensive Planning provision constitutes the incorporation of valid state law into a NPDES permit

The second sentence of the Comprehensive Planning provision, however, raises concern. The first portion of the second sentence stating that

"[s]uch cooperation shall entail all reasonable actions authorized by law" does not, as the County argues, unlawfully usurp local legislative discretion. Essentially this language amends the first sentence to read "Carroll County shall [take all reasonable lawful actions to] cooperate with other agencies during the completion of the [WRE] as required by the Maryland Economic Growth, Resource Protection and Planning Act of 1992[.]" The requirement to take lawful actions cannot, as a practical matter, be considered unlawful. Further, what is reasonable is to be determined by the County. The County must consider local circumstances and local issues in determining what constitutes as reasonable for the County. Further, the County's determination is as to reasonableness is afforded great deference. Therefore, the first portion of the second sentence does not usurp local legislative discretion.

The concluding language of the second sentence, however, raises concern. That language mandates that the cooperation with other agencies "shall not be restricted by responsibilities attributed to other entities by separate State statue, including but not limited to reviewing and approving plans and appropriating funds." This language seems to purport that the Comprehensive Planning provision in the Final Permit overrides all other State statutes. Further, it seems to relieve other entities of responsibilities attributed to them by State statute, and shoehorn those responsibilities upon the County. Therefore, the Court finds that the Comprehensive Planning provision of the Final Permit is unlawful to the extent that it mandates the cooperation of the County with other agencies described within the provision "shall not be restricted by the

responsibilities attributed to other entities by separate State statute, including but not limited reviewing and approving plans and appropriating funds[,]" and to the extent that it does not hold the County responsible for areas outside of the lawfully regulated permit area as defined herein. Thus, MDE may incorporate requirements from existing state programs into a MS4 program so long as such requirements do not go beyond the scope of the federal NPDES program and/or the authority granted to MDED by the applicable state statue.

CONCLUSION

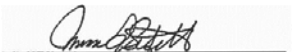
The parties have presented a flurry of arguments in support of their respective positions. The parties pleading and arguments at hearing were flooded with federal and state statutes, cases, and agency regulations, as well as Congressional and legislative records. Having collected the storm of information provided by the parties and conveyed its analysis thereof herein, the Court discharges the following conclusion.

A MS4 permit may be issued on a jurisdiction-wide basis for the areas served by MS4(s) owned or operated by the permittee-municipality which are located within the geographic area over which the permittee-municipality may exercise its jurisdiction. The Court finds that the Final Permit and Final Determination contain provisions that are greater in scope than the federal NPDES program. Specifically, though the twenty percent restoration provision constitutes a valid "more stringent" effluent limitation, it also constitutes an invalid requirement that is greater in scope than the federal NPDES program. The Court further finds that MDE erred by

designating the County as a medium MS4 jurisdiction based on a population of over 120,000 according to 1990 census data. Carroll County, Maryland is not amongst Appendix I's exhaustive list, and MDE offers no evidence that the County qualified to be on that list. Additionally, the Court finds that though MDE's decision to not include water quality trading in the Final Permit makes it difficult to reach the MEP standard, it was not arbitrary and capricious. Finally, the Court finds that MDE is only authorized to incorporate requirements of existing state programs into a NPDES permit that are more stringent, not greater in scope, than those of the federal program. Thus, the Comprehensive Planning Provision is valid in part, and invalid in part as discussed above, that MDE is only authorized to implement requirements

The Court will enter an order remanding this matter for MDE to revise the Final Permit in accordance with the views expressed therein and the views expressed herein.

Date: *June 26, 2017*



THOMAS F. STANSFIELD, JUDGE

IN THE MATTER OF	*	IN THE
COMMISIONERS OF	*	CIRCUIT COURT
CARROLL COUNTY,	*	FOR
MARYLAND	*	CARROLL COUNTY

* *

ORDER OF THE COURT

In accordance with the attendant Opinion, it is this *26th*, day of June, 2017, by the Circuit Court for Carroll County, hereby

ORDERED, that the case shall be remanded to the Maryland Department of the Environment for proceedings not inconsistent with this Order and the attendant Opinion; and it is further

ORDERED, costs shall be paid by the Maryland Department of the Environment.

THOMAS F. STANSFIELD, JUDGE

Entered June 27, 2017

Maryland Department of the Environment
Water Management Administration

Basis for Final Determination to Issue Carroll County's National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit

MD0068331 11-DP-3319

Entered December 2014

Introduction

The Maryland Department of the Environment (MDE) made a Tentative Determination to issue Carroll County a National Pollutant Discharge Elimination System (NPDES) municipal separate storm sewer system (MS4) permit (Draft Permit) on June 27, 2014. The Draft Permit established specific conditions for regulating discharges from Carroll County's storm drain system. Public notices of MDE's Tentative Determination appeared in The Carroll County Times on June 27, 2014, and June 30, 2014, as required by Maryland's Administrative Procedures Act (APA). Additionally, MDE maintains an interested party list for the County's Draft Permit that includes federal, State, and local municipal officials, and numerous citizens of Carroll County and Maryland. Individuals on this list were notified of the Tentative Determination on June 30, 2014.

Subsequent to the notification of the Tentative Determination, MDE received a request for a public hearing regarding Carroll County's Draft Permit. The request was submitted on July 18, 2014 by Mr. Tom Devilbliss, representing Carroll County Government, Department of Land Use Planning and Development, staff to the Patuxent River

Commission. In response, MDE held a hearing on September 8, 2014, to accept testimony and comment regarding the Draft Permit. Two individuals representing Carroll County testified at the hearing. The official transcript of the proceedings has been furnished by Al Betz & Associates, Inc. and is available on MDE's website.

After the hearing, MDE received a request from Mr. Devilbliss of Carroll County for a 60 day comment period extension for Carroll County's Draft Permit. Carroll County's MS4 Draft Permit remained open until September 29, 2014, to accept further comment in accordance with the APA. Numerous comments were received during this time from Carroll County, the United States Environmental Protection Agency (EPA), and environmental advocacy groups. In aggregate, the comments offered various and often contrary perspectives on the major tenets of Carroll County's Draft Permit. This Basis for Final Determination explains MDE's rationale for finalizing the requirements in the permit being issued today (Final Permit), and addresses the major concerns submitted to MDE during the public comment period.

Background

Maryland has been delegated the authority by EPA to administer the federal NPDES permit program through a Memorandum of Agreement (MOA) signed in 1974 and recodified on May 18, 1989. Final stormwater regulations, adopted by EPA in November 1990, and found in 40 Code of Federal Regulations (CFR) § 122.26, required certain owners of storm sewer systems to apply for Phase I NPDES MS4 permits. Based on 1990 census data, Carroll

County was considered a Phase I medium municipality due to its population of over 120,000 at the time. Carroll County submitted a two-year, two-part application and was issued an initial MS4 permit in November, 1993. The County's MS4 permit was reissued in May, 2000 and again in July, 2005. This permit action is to issue a "fourth-generation" NPDES permit to Carroll County to regulate the discharge of stormwater runoff from its storm drain system.

This Final Permit represents another step forward for Carroll County's MS4 program. In 1993, the County's initial permit laid the foundation for a comprehensive approach to controlling runoff. This first permit required the County to maintain legal authority to control storm drain system pollution; develop geographic information system (GIS) mapping on a watershed basis; use a combination of chemical, physical, and biological monitoring to characterize urban stormwater; develop management programs to address runoff from new and significant redevelopment, construction site discharges, illegal storm drain system connections, and road maintenance operations; and provide education and outreach regarding stormwater pollution. This approach complied with the maximum extent practicable ("MEP") standard established under the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii).

Carroll County's MS4 Permit was reissued in May, 2000 and again in July, 2005. In these permits, MDE used an iterative permitting approach where the assessment of water quality on a watershed basis was used to establish additional retrofitting requirements, including ten percent of the County's

impervious area in each five-year permit term. An application for a fourth permit was submitted in September, 2009 as part of the County's fourth year annual report. This annual report served as the County's application to re-issue the permit that is being currently considered.

Since the early drafting of this Final Permit, MDE has held numerous meetings with county government officials, environmental advocates, and EPA. These meetings resulted in the addition of more significant conditions to Carroll County's MS4 Draft Permit, in large part due to a growing regional focus on restoring Chesapeake Bay. Conditions of this Final Permit require the County to possess the legal authority to control storm drain system pollutants, continue mapping its storm sewer system, monitor stormwater discharges, develop and implement comprehensive management programs, and provide education and outreach regarding stormwater pollution. New requirements under the Final Permit include increasing impervious area treatment, supporting litter reduction strategies, and implementing environmental site design (ESD) technologies for new and redevelopment projects to the MEP. The County will also be required to develop and implement plans to address wasteload allocations (WLAs) established under EPA approved total maximum daily load (TMDL) estimates. As discussed under Issue V. of this document, MDE has established these restoration plans as annual reporting requirements under this Final Permit.

The Final Permit for Carroll County is based on a "template" permit developed for Prince George's County with the input of EPA, MDE, Carroll and other Maryland counties, and environmental groups.

The permit negotiation process for Prince George's County is discussed in EPA's letter to MDE on October 22, 2013 (see Attachments). In the letter, EPA concluded that the Prince George's County permit is "…an excellent template to advance the stormwater program…" and that it "…meets regulatory requirements, is enforceable, and achieves the water quality objectives of the Clean Water Act (CWA)."

In its letter to MDE dated September 23, 2014, EPA notes that MDE made several substantive changes to earlier versions of the draft of Carroll County's Final Permit to address EPA and stakeholder concerns regarding water quality standards language, Chesapeake Bay TMDL compliance, backsliding, and water quality monitoring (see Attachments). Furthermore, EPA concluded that the Carroll County permit "…is consistent with the [Prince George's County MS4 permit] 'template'…", which "…establishes clear enforceable requirements through the incorporation of implementation schedules for structural and nonstructural controls." EPA also stated that the Carroll County permit "…is satisfactory for purposes of the CWA and NPDES permit regulations."

More information on the MS4 permitting process in Maryland and MDE's iterative approach over the past several permit terms can be found in Carroll County's MS4 Permit Fact Sheet, which is available on MDE's website. In addition, an EPA letter dated November 29, 2012, provided relevant information about the Draft Permit development, the negotiation process for the Prince George's County's template, and the public comments received (see Attachments). These documents summarize a clear process that

engaged stakeholders and EPA in order to develop a permit that will meet the water quality goals of the CWA by implementing measures to make further progress towards water quality standards (see Final Permit under PART III).

The following is a discussion of the most substantive comments received and MDE's response to each. The issues receiving the most comments included water quality standards and TMDLs, restoration criteria, monitoring, stormwater program requirements, regulated permit area, annual reporting, and the 2014 MDE document titled "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated" (MS4 Guidance). MDE's response is broadly divided into the comments received by environmental advocacy groups (Issues I. through V.) and the comments from Phase I medium counties (Carroll, Charles, Frederick, Harford, and Howard) that are affected by NPDES MS4 permits (Issues VI. through XI.). A summary is then provided of MDE's Basis for Final Determination on this Final Permit.

I. Water Quality Standards and Total Maximum Daily Loads.

The goals of Carroll County's MS4 permit are to control stormwater pollutant discharges, to improve water quality within the County's urban watersheds, and to work toward meeting water quality standards (WQS). In alignment with these goals, § 402(p)(3)(B)(iii) of the CWA requires the County to implement "…controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and

such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." The Final Permit (see PART IV.) also requires the development of restoration plans to achieve stormwater WLAs where there are EPA approved TMDLs. In this manner, compliance with the permit will result in a reduction of pollutant discharges from the County's storm drain system and a framework for achieving WQS.

A. Water Quality Standards. A majority of the comments received on the Draft Permit referred to compliance with State and federal WQS. A common claim of environmental groups was that the Draft Permit authorizes discharges that do not meet existing WQS or that may contribute pollutants to impaired waters, and therefore cannot be legally issued by MDE. For example, one environmental advocacy group declared that "[t]he permit must contain a stated prohibition against discharges which cause or contribute to the violation of water quality standards for receiving waters." This advocacy group also noted that NPDES permits issued by the State must require that discharges authorized under these permits "…will be in compliance with all applicable requirements of: …surface and ground water quality standards…" [Code of Maryland Regulations (COMAR) § 26.08.04.02(A)(1)]. Another environmental advocacy group noted that federal regulations [40 CFR § 122.44(d)(1)(i)] require each NPDES permit to place limitations on all pollutants or pollutant parameters that "…are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard."

The argument that the issuance of an MS4 permit violates the CWA is based on a citation of federal regulations regarding Prohibitions Applicable to State NPDES Programs [40 CFR § 122.4(d) and (i) and § 123.25]. Section 40 CFR § 122.4 prohibits the issuance of an NPDES permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." Other commenters referenced 40 CFR § 122.4(i) to suggest that the Draft Permit must comply with WQS. The first sentence of 40 CFR § 122.4(i) reads "[n]o permit may be issued…[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards."

The case that MS4 permits must comply with WQS was rejected by the U.S. Court of Appeals for the Ninth Circuit and several other state and federal courts[1]. In *Defenders of Wildlife v. Browner* [191

[1] The Defenders decision has been followed in various state and federal courts. *e.g.*, *Conservation Law Found., Inc. v. Boston Water & Sewer Comm'n*, 2010 U.S. Dist. LEXIS 134838, 73 ERC (BNA) 1282 (D. Mass. 2010); *Miss. River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384, 56 ERC (BNA) 1114, 33 Envtl. L. Rep. 20131 (D. Minn. 2002); *City of Arcadia v. State Water Resources Control Bd.*, 135 Cal. App. 4th 1392 (Cal. App. 4th Dist. 2006); *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866 (Cal. App. 4th Dist. 2004); *Matter of Natural Resources Defense Council, Inc. v. New York State Dept. of Envtl. Conservation*, 120 A.D.3d 1235, (N.Y. App. Div. 2d Dep't 2014) *cert. granted*, 23 N.Y.3d 901 (2014); *see also Tualatin Riverkeepers v. Or. Dep't of Envtl. Quality*, 230 P.3d 559, 563 n. 8 (2010) (discussing *Defenders* to explain why environmental groups only challenged an MS4 permit's failure to comply with water quality standards under state law and not the CWA). Indeed, no court

F.3d. 1159, 1164 (9th Cir. 1999)], the Ninth Circuit Court found that WQS are not applicable to municipal stormwater discharges. In its decision, the Court reasoned that Congress expressly required industrial stormwater dischargers to comply with water quality standards, but specifically "…chose not to include a similar provision for municipal storm-sewer discharges." *Id*. at 1164-1165. The Court concluded that "…the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the [CWA] as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)." However, EPA has the discretion to require this compliance if warranted.

To support their assertion that the Draft Permit must comply with WQS, an environmental advocacy group points to an administrative opinion, *In Re: Government of the District of Columbia, Municipal Separate Storm Sewer System,* 10 E.A.D. 323 (2002) where WQS were applied to the District of Columbia's MS4 permit. In this case, EPA used the discretion recognized in *Defenders of Wildlife,* 191 F.3d at 1166, to require that the District of Columbia's permit comply with WQS. In its decision, the Environmental Appeals Board clarified that the CWA does not mandate compliance with WQS. In this specific case, EPA exercised its discretion and intended that the District of Columbia permit would satisfy them.

Because of the number of Phase I MS4 permits, MDE and EPA agreed to develop a single permit, which

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has reported an opinion specifically rejecting the logic set forth in the *Defenders* decision.

when approved, would serve as a template for the remaining Phase I jurisdictions, including Carroll County. In its letter dated November 29, 2012, EPA objected to the June 2012 version of that template because the language prohibiting discharges that would cause or contribute to a violation of WQS was inadequate. In response to this concern, MDE submitted revised language in subsequent draft permits (see PART III.). Despite EPA's initial suggestions, this language does not require strict compliance with WQS, but establishes WQS and WLAs in approved TMDLs as goals. In its September 23, 2014 letter providing supplemental comments on the Draft Permit, EPA noted that this language resolved the 2012 objection because "…it contains enforceable objective and measurable elements." EPA also noted the other parts of the Draft Permit (e.g., PARTs IV.D., and VII.A. and C.) "…further strengthen protections for the water quality of receiving streams…" As a result, EPA considers the language and provisions found in the Draft Permit "…satisfactory for purposes of the CWA and applicable NPDES requirements."

With respect to State law, under Section 9-324(a)(1) of the Environment Article, MDE may only issue a permit if it complies with "[a]ll applicable State and federal water quality standards and effluent limitations." MDE has interpreted the use of "applicable" to be consistent with the CWA and the *Defenders of Wildlife* case, which specifically exempt discharges from MS4 systems from compliance with WQS. Therefore, WQS are not applicable to MS4 permits unless MDE requires them. Here, MDE has not required strict compliance with WQS.

That State and federal law do not require the Draft Permit to meet WQS was affirmed recently in the decision of Judge Stringer in *Blue Water Baltimore v. MDE* [Case No. 03-C-14-000761]. That case dealt with the MS4 permit issued to Baltimore County on December 23, 2013, which is based on the same template. In a ruling from the bench, Judge Stringer concluded that "…the Clean Water Act does not require compliance with the water quality standards." Judge Stringer further stated that Maryland law does not require the MS4 permit to meet WQS "…because there is no applicable Federal or State law requiring it." Therefore, the Court ruled that "…the permit complies with 33 U.S.C. § 1342(p)(3)(B) of the Clean Water Act."

In summary, several environmental advocacy groups have argued that State and federal law and regulations require that the Draft Permit comply with WQS. However, this interpretation of the CWA has been rejected by U.S. Court of Appeals for the Ninth Circuit in the *Defenders of Wildlife* case; MS4 stormwater discharges are specifically exempted from compliance with WQS. Similarly, Maryland law and regulations do not make WQS applicable to stormwater discharges. Rather, MS4 permits are required to comply with legal standards that another source (e.g., federal law) makes applicable to them. Because there is no applicable federal or State legal standard, the Final Permit does not need to comply with WQS. Any argument that is founded on the premise that the Final Permit must comply with WQS is incorrect.

B. TMDLs and WLAs. There were also many comments regarding the lack of specific WLAs in Carroll County's Draft Permit. For example, one

environmental advocacy group stated that the Draft Permit must contain requirements "…consistent with the assumptions and requirements of any available wasteload allocation." [40 CFR § 122.44(d)(1)(vii)(B)]. This group also commented that "[d]espite the clear legal requirement for the Draft Permit to ensure compliance with WQS and TMDL WLAs, it does not do so." Another environmental advocacy group similarly stated that "[u]nder the terms of this Draft Permit, the County must attain applicable WLAs for each TMDL for each receiving water body." This group added that "[t]he Permit must include a quantification of the current loading of nitrogen, phosphorus and sediment from all identified sources…to assess progress towards applicable WLAs…" Another common argument from the environmental community has been that EPA's own guidance [see Wayland and Hanlon, "Establishing TMDL WLAs for Storm Water Sources…", (11/22/2002), and Hanlon and Keehner, "Revisions to the November 22, 2002 Memorandum…" ,(11/12/2010)] recommends that "…where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so."

As discussed above, the Draft Permit is not required to comply with WQS or any TMDL WLAs. However, the permit does establish the twenty percent restoration requirement (see PART IV.E.2.) as a numeric effluent limit to achieve the Chesapeake Bay and local TMDL WLAs. The County is required

to "…commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area…that has not already been restored to the MEP" [see PART IV.E.2.a.]. In support of this, the Final Permit requires within one year of issuance that the County submit an impervious surface area assessment that serves as the baseline for restoration efforts. The permit also requires additional planning, reporting, and assessment components including assessments and detailed restoration plans for all watersheds, and stormwater implementation plans for each EPA approved TMDL.

In its September 23, 2014 letter, EPA states that this numeric effluent limit (i.e., twenty percent restoration of impervious surface area) is "…consistent with the reductions called for in both Maryland's WIP [Watershed Implementation Plan] and CBP [Chesapeake Bay Program] 2017 interim goals…" and that "EPA is satisfied that this permit is consistent with the overall assumptions and requirements of the Chesapeake Bay TMDL WLA and the CBP goal of 2025." EPA also found "…this approach satisfactory with regard to other applicable TMDL WLAs identified in the permit…" EPA offers that the effluent limit "…is consistent with EPA's regulations and guidance" and "…is designed to reduce nutrient and sediment discharges in a way that is consistent with the MDE Phase II WIP…" Finally, EPA's recent guidance [see Sawyers and Best-Wong, "Revisions to the November 22, 2002 Memorandum…" (11/26/2014)] uses the twenty percent restoration requirement as an example of "…a specific, quantifiable performance requirement that must be achieved within a set timeframe."

Therefore, the twenty percent restoration requirement described in PART IV.E.2. is an EPA approved effluent limit consistent with, and satisfactory for addressing both the Chesapeake Bay and other applicable TMDL WLAs. The Final Permit also requires an initial impervious surface area assessment (see PART IV.E.2.a.) that serves as a quantification of the existing conditions that is used to assess progress toward meeting those WLAs. Finally, EPA has confirmed that not only is this effluent limit acceptable for meeting TMDL WLAs, it is also consistent with regulations and guidance as set forth in EPA's 2002 Wayland, 2010 Hanlon, and 2014 Sawyers Memos. Consequently, the Final Permit does contain requirements that are consistent with the assumptions and requirements of any available TMDL WLAs.

C. Enforceable Plans and Deadlines. In addition to the want for meeting WQS and WLAs, there was a collective concern from environmental advocates that the Draft Permit did not require enforceable plans with interim and final deadlines for meeting WLAs. For example, one organization stated that "[t]he Permit fails to require the numeric benchmarks or interim standards or milestones in the implementation plan to be quantified as defined in Maryland law and under the federal Clean Water Act regulations." This organization added that the CWA "… requires that compliance with MS4 permits be 'expeditiously as practicable'…" Another commenter argued that the Draft Permit must require the County to "…prepare plans as enforceable permit requirements to implement approved TMDL and WLA with compliance schedules containing the final date for meeting applicable WLAs…" Additionally,

another environmental advocacy group commented that compliance schedules and pollution reduction milestones "…are necessary for the County to attain [WLAs]…" and that "…only these types of requirements can ensure compliance with [WQS], in accordance with the [CWA] and Maryland law."

Federal regulations governing the use of compliance schedules in NPDES permits state that "[t]he permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations." [40 CFR § 122.47]. By the terms of these regulations, a compliance schedule is used to address an ongoing violation of the CWA or federal regulation. According to the CWA and Maryland law, the County's permit does not need to comply with WQS. Likewise, MDE has not made compliance with WQS a condition of the Draft Permit. For these reasons, there are no ongoing violations of WQS to address and compliance schedules are not applicable.

With respect to WLAs, MDE offers that TMDLs generally do not include deadlines for meeting respective WLAs. One exception to this rule is the Chesapeake Bay TMDL, which, according to the Chesapeake Bay Watershed Agreement, must be met by 2025. As discussed above, EPA has determined that the Draft Permit is consistent with the requirements of the Chesapeake Bay TMDL WLA. Similarly, EPA has also stated that the requirements for restoration plans described in PART IV.E.2.b. of the Draft Permit are acceptable for addressing other applicable TMDL WLAs. Therefore, the Draft Permit is not in violation and compliance schedules for meeting applicable WLAs are not required.

While they are not enforceable as effluent limitations, the Final Permit does set forth WQS and WLAs as goals that the County must work toward meeting. To ensure that there is progress toward meeting these goals, the Final Permit requires that the County submit restoration plans for each stormwater WLA approved by EPA. Provisions for these restoration plans can be found under PART IV.E. (Restoration Plans and Total Maximum Daily Loads). This section of the Final Permit requires Carroll County to conduct systematic assessments and develop detailed restoration plans for all watersheds within the County. For all EPA approved TMDLs, these restoration plans must include "...a detailed schedule for implementing all structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives for meeting applicable WLAs…[that]…specify pollutant load reduction benchmarks and deadlines…[and]…include the final date for meeting applicable WLAs…" Also included in PART IV.E. are public notification and participation procedures, and requirements for the County to address any material comments from the public regarding the restoration plans before submitting to MDE for review and approval. Once approved, these plans, schedules, benchmarks and deadlines, and final date for meeting stormwater WLAs become enforceable under the permit.

D. Restoration Criteria. The restoration of twenty percent of the County's impervious area that has little or no stormwater controls is a major requirement in the Draft Permit. Numerous comments from environmental advocacy groups

emanded that ESD be used as the standard for acceptable impervious area restoration. The central argument was that federal MEP standards mandate the use of ESD in MS4 permits. Additionally, it was argued that State law mandates the use of ESD to the MEP when implementing stormwater management. Therefore, the Draft Permit must be revised to require that ESD be used to meet the twenty percent restoration requirement.

One environmental advocacy group commented that the CWA requires MS4 permittees to "…develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants…to the *maximum extent practicable*" [40 CFR § 122.34(a)] (emphasis in original). This group also offered that "... Maryland law states that ESD should be used in stormwater management programs whenever possible…" Another group commented that "…this permit must institute or impose *all* the controls and the *highest* levels of management and treatment that are capable of *being put into practice* – most decidedly not standard practices" [*NC Wildlife Federation v. NC Division of Water Quality*, 5 E.H.R. 2055, 6 E.H.R. 0164] (emphasis in original).

MDE's review of the federal regulations and the *NC Wildlife* decision found that these refer to post-construction stormwater controls for new development and are not applicable to restoration activities. Also, the *NC Wildlife* decision did not require ESD; rather, it specified conditions for the use of *structural stormwater controls* for new development activities (emphasis added). Regarding Maryland law, with the passage of the original Stormwater Management Act (Act) in 1982 and its

subsequent revisions in 2007 and 2012, the General Assembly intended to "…reduce as nearly as possible the adverse effects of stormwater runoff…" [§ 4-201, Annotated Code of Maryland]. However, the Act addresses the installation of stormwater management to serve future development and specifies that "…a person may not develop any land for residential, commercial, industrial, or institutional use without submitting a stormwater management plan…" [§ 4-204, Annotated Code of Maryland]. The standard for new development stormwater management is to reduce runoff to reflect forested conditions. Therefore, new development should not contribute to increased stormwater flows.

During the Baltimore City tentative determination process, the City noted in its comments in September 2012 that the legislative history of the Act does not mention MS4 permit requirements and that "…no one who commented on the legislation…suggested that the [Act] would result in a requirement that…permittees be required to implement [ESD] as part of MS4 compliance." Clearly, Maryland's law and regulations have historically imposed stormwater management for new development and there is nothing in either that suggests otherwise.

A common theme in many of the environmental advocacy groups' comments is that the Draft Permit allows the use of stormwater management practices that are less effective to be used for restoration activities. For example, one group offered "…recognizing that ESD is not appropriate for all projects, areas, and circumstances, the preference for ESD should simply require that such measures are evaluated before less efficient, structural measures

are implemented." Another stated that the Draft Permit's restoration requirements "…fall short of MEP because they do not require or prioritize the use of [ESD] techniques."

MDE believes that there are incentives to utilize ESD practices for restoration in both the Draft Permit and the MS4 Guidance. The Draft Permit states that restoration of impervious surfaces shall be based on the treatment of the water quality volume (WQ_V) criteria and associated list of practices defined in the *2000 Maryland Stormwater Design Manual* (Manual). While this allows structural treatment practices such as wet ponds, wetlands, infiltration, and filtration, the MS4 Guidance clearly shows that ESD practices will be given greater pollutant load reductions than other acceptable water quality treatment practices. In addition, impervious areas draining to practices like dry detention, dry extended detention, or hydrodynamic structures will not be considered treated and will be required to be restored to the MEP. By granting greater pollutant reduction credit for ESD, and allowing flexibility to use other acceptable water quality treatment facilities, restoration efforts in Carroll County will be consistent with EPA incentives and other national programs. In its November 29, 2012 letter, EPA removed prior objections to the Draft Permit and supported MDE's MS4 Guidance. Therefore, this letter clearly shows that the permit conforms to EPA recommendations.

In February 2010, MDE issued an NPDES Permit to Montgomery County (MD0068349) that does not require the use of ESD to satisfy restoration requirements. Similarly, the most recent version of the Los Angeles County NPDES permit (NPDES NO.

CAS004001, November 5, 2012), includes requirements for local low impact development (LID) ordinances for new and redevelopment but not for restoration or retrofitting. It is important to note that the requirements and performance standards for these LID ordinances are similar to those required by Maryland. While EPA encourages its use, there is no federal mandate that ESD shall be used to meet NPDES permit requirements.

In summary, Carroll County's Final Permit does provide incentive to use ESD for restoration. However, ESD may be used in conjunction with other proven water quality practices in order to achieve the clean water objectives of the Final Permit. MDE believes that this allows a balanced approach where the County can set priorities based on local water quality conditions, while offering flexibility to implement various strategies based on site specific opportunities to achieve watershed restoration objectives.

II. MDE MS4 Guidance.

As discussed above, a major provision in Carroll County's Draft Permit is the restoration of twenty percent of the County's impervious surfaces that have little or no stormwater management. MDE has provided for how this requirement can be met in the MS4 Guidance. During the public comment period for Carroll County's Draft Permit, MDE received many, varied and often conflicting comments regarding the MS4 Guidance document. MDE's reasoning and answers to the specific concerns from environmental groups are provided below.

Many environmental groups believed that the MS4 Guidance document does not meet the MEP

standard for restoration practice implementation because it allows the use of less effective best management practices (BMPs). One environmental advocacy group stated that BMPs such as extended detention practices "…are significantly less effective than ESD at controlling stormwater pollution because they fail to address the core problem: overall runoff volume. While reduction of pollutant loadings is important, it is secondary to the enormous runoff volumes that destroy aquatic life and mobilize sediments and nutrients by eroding stream banks." This group's primary support against the use of extended detention facilities comes from the 2008 draft of the National Research Council's (NRC) report *Urban Stormwater Management in the United States* (National Academies Press, 2009 and cited herein as the "NRC report") on stormwater that "…provides strong evidence – and a scientific consensus – that detention ponds fail to meet the full range of urban stream and watershed restoration objectives."

The NRC report describes this historical stormwater perspective on page 341: "Some way was needed to control the quantity of water reaching the end of pipes during a runoff event, and on- site detention…became the standard for accomplishing this. Ordinances started appearing in the early 1970s, requiring developers to reduce the peaks of different size storms, such as the 10- year, 24-hour storm. The ordinances were usually intended to prevent future problems with peak flows by requiring the installation of flow control structures, such as detention basins, in new developments." The NRC report succinctly points out on pages 421 and 422 that "[t]he problem with the traditional

approach is that (1) the majority of storms throughout the year are small and therefore pass through the detention facilities uncontrolled, (2) the criterion of reducing storm flow does not address the need for reducing total storm volume, and (3) the facilities are not designed to work as a system on a watershed scale. In many cases, the site-by-site approach has exacerbated downstream flooding and channel erosion problems as a watershed is gradually built out."

The NRC report suggests that a fundamental shift is needed in how stormwater management is implemented in order to achieve better water quality results. On page 535, the NRC report states that "[f]or MS4 operators, the concept of designing MS4s for both flood control conveyance (capital flood design) and for water quality protection (water quality design) involves a fundamental shift. Whereas flood control engineers design conveyance systems with return frequencies of two years (streets), ten years (detention basins), 50 years, and 100 years (channels), the water quality design storm event is for a return frequency of six months to a year. The water quality design implicitly focuses on treating the first flush of runoff, which contains the highest load and concentration of pollutants and which occurs in the first half to one inch of runoff. In contrast, flood control designs are built to convey tens of inches of runoff."

MDE strongly concurs with the NRC report and used the same hydrologic analysis to push through new regulations in Maryland in 2000 that specifically address stream channel erosion and degradation. The State's historical perspective described in the Manual, page 1.10, states that "[t]raditionally,

Maryland has attempted to provide some measure of channel protection by imposing the two-year storm peak discharge control requirement, which requires that the discharge from the two-year post development peak rates be reduced to pre development levels. However, recent research and experience indicate that the two-year peak discharge criterion is not capable of protecting downstream channels from erosion. In some cases, controlling the two- year storm may actually accelerate streambank erosion because it exposes the channel to a longer duration of erosive flows than it would have otherwise received."

The Manual was an effort to incorporate the significant experiences gained by the State's stormwater community and accommodate much needed improvements for managing urban runoff. Accordingly, MDE's regulations and the accompanying Manual were updated to require "…a unified approach for sizing stormwater BMPs in the State of Maryland to meet pollutant removal goals, maintain groundwater recharge, reduce channel erosion, prevent overbank flooding, and pass extreme floods." The ensuing criteria and treatment volumes correlate directly to the NRC's recommendations for the management of the smaller, more frequent storm events. Design features include the use of pre-treatment vegetation, wetland pockets and pools, flow reduction techniques, native plants, meadows, trees, permeable soils, and the creation of sinuous flow paths. These green techniques mimic the natural hydrologic process, soak up and store runoff, and improve water quality. Structural BMPs (e.g., dry ponds, detention ponds) that do not meet minimum water quality

treatment standards described in Maryland's Manual cannot be used to meet permit restoration requirements.

Many of the comments from environmental groups used the terms "detention facility", and "extended detention facility" interchangeably. Technically speaking, there are significant differences between a detention facility and an extended detention facility. These differences are noted in the NRC report (see pages 568 and 569), which defines detention as "[t]he temporary storage of stormwater runoff in a [BMP] with the goals of controlling peak discharge rates..." Conversely, the report confirms the utility of extended detention wet ponds as part of a systems approach to restoring urban watersheds. Page 395 of the NRC report states that: "[b]y holding a volume of stormwater runoff for an extended period of time, extended detention [BMPs] can achieve both water quality improvement and reduced peak flows. Generally the goal is to hold the flows for 24 hours at a minimum to maximize the opportunity of settling, adsorption, and transformation of pollutants. For smaller storm events (one- to two-year storms), this added holding time also greatly reduces the outflows from the [BMP] to a level that the stream channel can handle."

According to the NRC report, page 400, wet extended detention facilities that "…are designed with an aquatic bench around the edges to promote contact with plants…aids in reduction of flow velocities, provides growth surfaces for microbes, takes up pollutants, and provides filtering." Finally, when discussing unique opportunities for retrofitting in urban areas on page 459, the NRC report concludes that "[p]ublicly owned, consolidated [BMPs] should

be strongly considered as there may be insufficient land to have small, on-site systems. The types of [BMPs] that are used in consolidated facilities - particularly detention basins, wet/dry ponds, and stormwater wetlands - perform multiple functions, such as prevention of streambank erosion, flood control, and large-scale habitat provision."

Maryland's Manual requires all extended detention facilities to have wet pool storage and management of the one-year 24 hour storm as recommended in the NRC report. Thus, extended detention wet ponds are acceptable for stormwater restoration. Furthermore, MDE encourages the retrofit of detention facilities or dry ponds to extended detention wet pond facilities as a strategy for reducing pollutants to Chesapeake Bay and meeting MS4 permit obligations. Where these opportunities present themselves, they should be explored fully. Maryland's Manual for stormwater BMP design and MDE's approach to retrofitting under the municipal permit program are completely aligned with the NRC report.

III. Maryland Stormwater Program Requirements.

Carroll County's Draft Permit requires that the County maintain an acceptable stormwater management program in accordance with the Environmental Article, Title 4, Subtitle 2, Annotated Code of Maryland. This includes compliance with the minimum requirements specified under COMAR § 26.17.02. Some environmental groups provided recommendations related to stormwater program requirements in PART IV. D.1. of the Draft Permit. These

recommendations included specific language related to inspection and maintenance, documentation of stormwater management waivers and exemptions, and ESD code review and modifications. MDE believes that the suggested language changes are already addressed under Maryland's stormwater program requirements and reinforced in the Draft Permit. Because State stormwater management law and regulations are incorporated by reference, these provisions are required and enforced under the Final Permit.

The suggested language changes regarding stormwater maintenance included provisions that the County develop a maintenance plan for all County owned and operated stormwater management practices within 18 months of the effective date of the permit. This language is actually less stringent than State regulation. COMAR § 26.17.02.09.E.(5)(n) (Contents and Submission of Stormwater Management Plans) requires an inspection and maintenance schedule prior to final stormwater management plan approval. Because County owned and operated facilities need to meet State regulation, a maintenance plan is already required to be developed during the plan review process. Therefore, the suggested language is less stringent than COMAR and unacceptable.

Additional permit language recommendations specified that the County "…shall provide for the inspection of all practices at least once every three years…" and "…submit documentation in its annual reports identifying the practices inspected, the number of maintenance inspections performed, the County's inspection schedules, the actions used to

ensure compliance, and any other relevant information." This provision is already required in both the Draft Permit and inCOMAR § 26.17.02. For example, PART IV.D.1. of the Draft Permit requires the County to maintain construction inspection information, and "[d]ocumentation identifying the ESD systems and structural stormwater management facilities inspected, the number of maintenance inspections, follow-up inspections, the enforcement actions used to ensure compliance, the maintenance inspection schedules, and other relevant information shall be submitted in the County's annual reports." In addition, the content of inspection reports, documentation of activities, and the minimum inspection frequency of at least once every three years, are also provided in COMAR § 26.17.02. Therefore, the requirements specified in both the permit and State regulations meet the intent of the suggested language changes.

Another recommendation under maintenance of stormwater management practices specifies that the County "…shall develop accountability mechanisms to ensure maintenance of stormwater control measures on non-County property." The Draft Permit does specify that preventative maintenance inspections shall be performed and enforcement actions be used to ensure compliance according to COMAR. In addition, COMAR § 26.17.02.03.(c)(2) specifies that an acceptable stormwater management program shall have "…inspection and enforcement procedures that ensure the proper construction and maintenance of approved stormwater management measures." COMAR § 26.17.02.10.D. specifies that "[t]he county or municipality responsible for inspection and enforcement of approved stormwater

management plans may, for enforcement, use any one or a combination of the following actions…" These actions may include a notice of violation, a stop work order, a civil action, or criminal prosecution. Therefore, the County already has the enforcement authority and accountability mechanisms necessary to pursue appropriate action to ensure the proper maintenance of stormwater practices.

Another comment related to Maryland's stormwater management program recommended that the Draft Permit require full documentation and evaluation of all stormwater management exemptions and waivers to ensure that there are no adverse effects to stream quality. This documentation is required in the Draft Permit under PART IV.D.1.b.iii. and iv. These requirements specify the documentation of the "[n]umber of stormwater exemptions issued", and the "[n]umber and type of waivers received and issued, including those for quantity control, quality control, or both…" In addition, COMAR § 26.17.02.05.C. specifies that waiver policies for individual developments "…reasonably ensure that a development will not adversely impact stream quality;" and "…that the cumulative effects of the waiver policy are evaluated." Therefore, the suggested language related to waivers and exemptions are required under COMAR and reinforced in the Draft Permit.

Additional language recommendations were related to the modification of County codes and ordinances to eliminate any impediments to implementing ESD to the MEP. As a State regulatory requirement, all local jurisdictions were required to adopt local ordinances that comply with the Act by implementing ESD to the MEP for all new and

redevelopment. Under PART IV.D.1.a.ii., the Draft Permit requires "[t]racking the progress toward satisfying the requirements of the Act [Stormwater Management Act of 2007] and identifying and reporting annually the problems and modifications necessary to implement ESD to the MEP;" and "[r]eport annually the modifications that have been made or need to be made to all ordinances, regulations, and new development plan review and approval processes to comply with the requirements of the Act." In addition, COMAR § 26.17.02.08.B.(3) states that "[t]he use of ESD planning techniques and treatment practices specified in this section may not conflict with existing State law or local ordinances, regulations, or policies. Counties and municipalities shall modify planning and zoning ordinances and public works codes to eliminate any impediments to implementing ESD to the MEP according to the Design Manual." Therefore, the suggested language changes are already incorporated into the permit, and COMAR. The specific language in the Final Permit directing the County to make necessary modifications for the successful implementation of ESD to the MEP meets the intent of the recommended language changes.

IV. Stormwater Monitoring.

Many environmental groups commented that the requirement that one outfall and one in-stream location be monitored, according to PART IV.F.1. (Assessment of Controls) of the County's Draft Permit, is insufficient. One environmental group stated that "…the permit contemplates monitoring of just *one* small *sub*-watershed..." and that "[t]his sub-watershed is not sufficient to provide meaningful information about the larger watershed

in which it is located, much less provide information about the County as a whole."

MDE believes that the intent of the watershed monitoring found in PART IV.F.1. of the Draft Permit needs to be better explained, and that the extensive County-wide chemical, physical, and biological monitoring that numerous environmental groups requested can be found in other sections of the Draft Permit. PART IV.D.3. of the County's Draft Permit requires screening for illicit discharges to the municipal storm drain system. PART IV.E.1. describes watershed assessments on a County-wide scale to assess current water quality conditions and prioritize improvement projects. PART IV.E.2. requires monitoring to evaluate and track the implementation of restoration plans. Carroll County's Draft Permit contains Special Programmatic Conditions in PART VI. that include coordination with MDE's Watershed Implementation Plan (WIP) to comply with the Chesapeake Bay TMDL. PART IV.F.2. requires surveying through physical monitoring the effectiveness of Maryland's new stormwater law requiring ESD to the MEP.

MDE has previously noted during the Phase II WIP process that water quality monitoring cannot be tied directly to implementation. Rather the State has established parallel processes for tracking implementation and water quality monitoring. Although monitoring is required within the MS4 permits, it is specific monitoring designed as part of a larger State strategy. [Maryland Phase II WIP Comment Response Document at page 70.].

Focused monitoring in a small watershed as required in PART IV.F.1. is extremely important for determining the effectiveness of individual restoration practices, gathering the necessary feedback for adaptive management, and for calibrating models. This monitoring strategy is supported by the NRC's 2011 document, *Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay: An Evaluation of Program Strategies and Implementation*. Specifically, NRC recommends that "[t]argeted monitoring programs in representative urban and agricultural watersheds and subwatersheds would provide valuable data to refine BMP efficiency estimates, particularly at the watershed scale, and thereby improve Watershed Model predictions."

The focused watershed approach was first described for Maryland MS4 jurisdictions in the report, *Maryland's National Pollutant Discharge Elimination System Municipal Stormwater Monitoring* (MDE, 1997). While CFR specifically defines chemical monitoring procedures for MS4 permit *applications*, the regulations are silent on biological and physical monitoring. Maryland's local governments emphasized that in many instances, biological and physical monitoring results are better indicators of small stream health. MDE agreed with this approach, but maintained that chemistry is also important, especially for assessing Chesapeake Bay restoration goals. Therefore, MDE proposed long term monitoring requirements that were aligned with the CWA's goal to "…restore and maintain the chemical, physical, and biological integrity of the nation's waters…", a concept articulated as the "three-legged stool" approach (MDE, 1997).

Local governments also emphasized that infrequent chemical monitoring of numerous sites throughout a jurisdiction would not be as informative as intensive chemical monitoring of a few subwatersheds. While initial application requirements in CFR stipulated the monitoring of three storms per year from five sites located throughout a jurisdiction, MDE requires Carroll County to monitor eight storms per year at two monitoring sites. More intensive chemical, physical and biological monitoring in one watershed is recommended in MDE's 1997 report, which states: "[u]sing the overall goal of assessing water health as guidance, MDE believes that the most logical way to modify the MS4 long term monitoring program is to require all jurisdictions to contribute to the entire approach by providing all three legs of the monitoring stool. That is, each jurisdiction shall conduct chemical testing, biological, and physical stream assessment. Additionally, site selection will need to be orchestrated at the State level. As jurisdictions pare chemical monitoring sites for biological and physical assessments, it will be imperative to maintain an adequate number of residential, commercial, and industrial sites for State water chemistry needs."

In PART IV.F.1. of Carroll County's Final Permit, intensive monitoring will continue to be required in the Air Business Park watershed that includes physical, chemical, and biological sampling and analysis. In addition, the County is required to continue physical stream monitoring in the Air Business Park watershed to assess the implementation of the latest version of the Manual, especially regarding stream channel erosion. Physical stream monitoring protocols include an

annual stream profile and survey of permanently monumented cross- sections with baseline conditions for assessing areas of aggradation and degradation. As part of this assessment, a hydrologic and/or hydraulic model is required within the permit term to analyze the effects of rainfall, discharge rates, stage, and, if necessary, continuous flow on channel geometry.

Carroll County's 2013 annual report documented that two sites were monitored at outfall and in-stream locations for chemical, physical, and biological parameters in the Air Business Park Watershed, a subwatershed of the Liberty Reservoir watershed. In addition to these two sites, 17 watershed assessments were completed in reporting year 2013 and are being considered for watershed restoration. These watersheds include many subwatersheds of the Liberty Reservoir. Watershed assessments require the County to both determine the current water quality conditions and rank the water quality problems in the watershed. This monitoring plan has provided the framework for developing restoration strategies to improve water quality in the County's streams and rivers. As a continuation of these efforts, the County's 2013 annual report identifies numerous projects currently in the planning and design phase that will account for restoration of approximately 1,922 impervious acres.

Since the inception of the NPDES stormwater program, Maryland's MS4 jurisdictions have monitored more than 2,900 storm events along with an additional 1,698 sampling activities during

baseflow conditions[2]. These data allow a comprehensive characterization of the water chemistry of highway, commercial, industrial, and residential runoff. These data have been combined into a comprehensive statewide database and used for determining a parameter list of commonly found stormwater pollutants, calculating event mean concentrations (EMCs), supporting State objectives (MDE, 1997), and calibrating numerous TMDLs including the one for Chesapeake Bay. This information comprised a significant portion of the National Stormwater Quality Database. As of 2014, the database included 9,422 storms from across the nation to characterize urban runoff.

Maryland's MS4 jurisdictions implement restoration activities in the focused watersheds and have used the results from the monitoring data to develop BMP efficiencies. These have been extrapolated to other similar restoration projects across the jurisdiction. The CBP has used these data as well. For example, the CBP's Urban Stormwater Workgroup (USWG) relied heavily on Maryland's MS4 monitoring data to develop improved BMP efficiencies for street sweeping, stream restoration, stormwater treatment, and runoff reduction practices for inclusion in the CBP Bay Model. MDE believes that focused watershed monitoring is important for characterizing urban runoff and understanding the effectiveness of stormwater BMPs. It is also a fiscally prudent approach when combined and shared among all Phase I jurisdictions.

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[2] Bahr, R. Tagoe, A., & Arthur, M. (2014, November 21). M*aryland MS4 Monitoring*. Paper presented at the 20th Annual Maryland Water Monitoring Council Conference, Linthicum, MD.

In PART IV.D.3. of the Final Permit, an inspection and enforcement program is required to be implemented to ensure that all discharges to and from the storm sewer system that are not composed entirely of stormwater are either eliminated or issued a permit by MDE. Permit requirements include the field screening of at least 100 outfalls annually. In its 2013 annual report, the County documented field screening and outfall sampling at 102 outfalls. Of these 102 outfalls, three screenings required further investigation, and one was identified as a potential illicit discharge. Furthermore, the screenings resulted in 30 structural or maintenance issues being reported to the Carroll County Bureau of roads or relevant municipality. In addition, the County has a water quality pollution line (established in June 2012) to receive complaints associated with waste disposal, sediment, sewage, stormwater management maintenance, and other concerns. The County received three complaints in reporting year 2013 and performed site investigations for each of the complaints. All of the findings from complaint investigations were referred to the appropriate authority for further monitoring and/or enforcement.

Additional monitoring requirements in PART IV.E.2. of Carroll County's permit specify that the County shall systematically assess the water quality in all watersheds and use the resulting analyses to develop detailed restoration plans for meeting stormwater WLAs. Assessments must be performed at an appropriate watershed scale (e.g., Maryland's hierarchical eight- or twelve-digit sub-basins) and must be based on EPA's approved TMDL analysis or an equivalent and comparable County water quality

analysis. The assessments are to determine current water quality conditions; include the results of a visual watershed inspection; identify and rank water quality problems; prioritize all structural and nonstructural water quality improvement projects; and specify pollutant load reduction benchmarks and deadlines that demonstrate progress toward meeting all applicable stormwater WLAs.

Carroll County's Final Permit requires that all of the above data be submitted on an annual basis including: monitoring site locations; chemical monitoring results; TMDL pollutant load reductions; biological, habitat, and physical monitoring; illicit discharge detection and elimination sampling; and a narrative summary describing the results and coordinated analyses of the data. A reporting database that appears as "Attachment A" in Carroll County's MS4 Draft Permit was developed by MDE for the submittal of monitoring and program implementation data. The County's comprehensive monitoring plan comprised of all these programmatic elements has provided the framework for developing restoration strategies to improve water quality in the County's streams and rivers. Planning for candidate watershed restoration strategies has begun and a detailed list of projects has been developed. As a continuation of these efforts, the County's 2013 annual report identified 42 projects currently in the planning, design or construction phase for the fiscal year 2015.

Several organizations have also commented that the Draft Permit's monitoring requirements do not sufficiently assess the County's compliance with WQS. As discussed under Issue I., the Draft Permit does not mandate compliance with WQS, but does

require the County to implement programs that will make progress toward achieving WLAs and WQS goals. Therefore, monitoring requirements within Carroll County's Final Permit do not need to demonstrate that WQS are met. Instead, the required monitoring serves as a tool to evaluate best management practices designed to reduce the discharge of stormwater and pollution.

In summary, MDE believes that the stormwater monitoring provisions contained in Carroll County's Final Permit are sufficient for providing comprehensive water quality and TMDL assessments. The requirements include chemical, physical, and biological monitoring, and provide information to broadly assess the entire jurisdiction as well as contribute to the statewide aggregated data through focused, small scale watershed monitoring. Furthermore, the Final Permit's structure contributes the necessary feedback to allow permittees to make adaptive management decisions through an iterative process. As noted by EPA in its letter to MDE dated September 23, 2014, these requirements "…are consistent with Federal CWA and NPDES stormwater program requirements." Thus, MDE will not make the suggested changes to the Draft Permit language.

V. Annual Reports and Public Participation.

Restoration plans must be submitted within the first year of the permit term for MDE approval. Numerous environmental advocates believe that these plans are major permit modifications that are subject to public participation requirements under the CWA. Typical comments received stated that "[p]lans and schedules that are required under the

permit meet the legal definition of 'effluent limitations,' even when developed in the first instance by the County and submitted to MDE for approval. Therefore, they must be incorporated as enforceable permit terms through a major permit modification process."

In the Final Permit, the restoration of twenty percent of impervious areas that have not already been restored to the MEP is the EPA approved effluent limit for addressing both the Chesapeake Bay and other applicable TMDL WLAs (see Issue I.). MDE does not dictate how a permittee meets this effluent limit. This is consistent with MDE's approach for other NPDES permits (e.g., wastewater treatment plants). Each jurisdiction has the ability to tailor restoration activities to address unique local challenges and site specific water quality conditions by using the acceptable practices identified in the MS4 Guidance. The County is given flexibility to determine how it implements restoration. However, the County must also consider in its restoration plans how planned implementation addresses local TMDLs.

Neither the twenty percent restoration requirement nor the five-year permit term schedule is being modified through the submittal of local restoration plans. MDE believes that the development and submittal of restoration plans are annual reporting requirements under CFR § 122.42(c) and do not constitute major permit modifications. NPDES annual reports require the County to submit information on "…the status of implementing the components of the stormwater management program that are established as permit conditions." Numerous other conditions require the submittal of

information into MDE so that MS4 stormwater program implementation can be tracked, assessed, and enforced. MDE does, however, have the discretion as Director of the NPDES program in Maryland to "…modify or revoke and reissue the permit accordingly…" should evidence supporting a modification be presented through annual reporting, new information or regulations, alterations, or other conditions found in CFR § 122.62(a) and (b).

MDE believes that it is important to involve the public as much as possible during the development of local restoration plans and has incorporated language that will ensure this process in the Final Permit. For example, PART IV.E.3. requires Carroll County to provide copies of watershed assessments and restoration plans to the public, post notice of these assessments and restoration plans in local newspapers and the County's website, allow for a 30 day comment period before finalizing assessment and restoration plans, and provide a summary of how the County will address any material comment received from the public. One environmental advocate acknowledges this process stating that "…the current tentative draft permit provides for public participation during the development of watershed assessments and restoration plans, including the TMDL process…" Other commenters urged that "…MDE require the County to make its annual reports available online in order to better enable public participation…" MDE agrees and included language to PART V.A.1. that requires the County to "submit annual reports on or before the anniversary date of this permit and post these reports on the County's website."

VI. MEP Compliance Standard and TMDLs.

The comments from environmental groups suggested the Draft Permit needs to comply with State and federal WQS and TMDLs (see Issue I.). In contrast, several MS4 jurisdictions (including Carroll, Frederick, Charles, and Harford Counties) have concerns regarding references to WQS, TMDLs, and WLAs in the Draft Permit. In general, the counties suggested that there is no legal mandate to require strict compliance with WQS or TMDLs and that the MEP standard should be applied to all MS4 permits.

Some of the counties also cited Congress' 1987 decision to adopt MEP as the compliance standard for MS4 permits. MDE agrees that Congress' 1987 decision only required local governments to reduce discharges to a technologically practicable standard. Likewise, the Final Permit as written does not mandate compliance with WQS or TMDL WLAs. However, MDE does not agree with statements suggesting that there is no legal requirement to include references to WQS or TMDL WLAs. Therefore, MDE is granted broad authority under 33 U.S.C. § 1342(p)(3)(B)(iii), and the discretion to establish "…such other provisions as… the State determines appropriate for the control of pollutants." See also *Defenders of Wildlife*, 191 F.3d at 1166 (noting that 33 U.S.C. § 1342(p)(3)(B)(iii) gives a permitting authority discretion to determine if additional "pollution controls are appropriate").

While MDE has not exercised its broad authority to require County stormwater discharges to strictly comply with WQS or TMDL WLAs, the Final Permit does address long term water quality goals. The importance of addressing CWA goals is underscored

in EPA documentation. This is summarized in the EPA September 23, 2014 letter to MDE that outlines the history of MS4 permit negotiations in Maryland. In addition, EPA regulations, specifically 40 CFR § 122.44, require that BMPs and programs implemented to comply with this permit must be consistent with the assumptions of applicable WLAs developed under approved TMDLs.

Water quality goals are addressed in the Final Permit under PART III. Water Quality. This permit condition requires the County to establish management programs that will prohibit pollutants so that the County is capable of complying with WQS and will eventually attain WLAs. Furthermore, the language references the section of the CWA that sets forth the MEP standard. Thus, the County is not required to meet WQS, TMDLs, or WLAs, but must establish programs to make progress toward meeting those goals in a manner that is practicable over the permit term and in future permit terms.

The Final Permit further requires the County to submit watershed restoration plans that describe how it will implement control measures to eventually attain the WLAs set forth in TMDLs. While the Permit requires that these plans include deadlines for attainment, the County is also required to establish adaptive management strategies to continuously reassess the effectiveness of its programs. This adaptive approach is anticipated to take several permit terms for all MS4 jurisdictions, including Carroll County. Thus, MDE believes that these permit terms meet the intent of the CWA, because water quality goals will be achieved through implementation of long term plans and programs. This comports with an MEP standard of compliance.

In summary, MDE issues NPDES permits that carry both State and federal authority. MDE has legal authority for requiring consistency with WQS and TMDL WLAs in MS4 permits. However, the framework of the Final Permit requires programs and restoration plans that are designed to meet long term water quality goals without strictly requiring compliance with WQS. MDE will keep references to WQS, TMDLs, and WLAs in the permit.

A. Watershed Assessment and TMDL Restoration Requirements. Carroll, Howard, Charles, Harford, and Frederick counties have objected to PART IV.E.1.a. and PART IV.E.2.b. of the Draft Permit. These sections require the County to complete "detailed watershed assessments for the entire County" by the end of the permit term, and to submit restoration plans within one year for each stormwater WLA that was approved by EPA prior to permit issuance. The counties' reasoning for the objection and MDE's response follow:

1. MS4s Are Not Required to Address TMDL WLAs or Provide a Final Date for Meeting WLAs. Concerns by the counties stated that "…requiring that the County include in its TMDL plan a final date for meeting applicable TMDLs is legally inconsistent with the MEP standard. There is no legal requirement that MS4 permits include terms to address applicable TMDLs." In addition, "…it is very difficult to establish a final date…unknown factors could affect the implementation schedule, making any detailed schedule of questionable use." Furthermore, the "…provision also assumes that meeting the WLAs is technically feasible, financially affordable and generally practicable."

As discussed above, the Draft Permit does not require strict compliance with WQS. MDE has recognized, however, that further pollutant reductions from stormwater discharges are necessary to improve water quality pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii). Therefore, there is a legal basis to include permit requirements to address TMDLs. However, the goal is to show progress toward meeting TMDLs and this is expected to take several permit terms for all MS4 jurisdictions, including Carroll County. Due to the long term goal of achieving WLAs, the County may set its plans, schedules, and budgets in a manner that considers practicability.

With respect to establishing a final date for meeting applicable WLAs, this language was developed during long term negotiations between EPA and MDE. In recognizing that the CWA allows EPA the right to review and deny the issuance of a permit under 33 U.S.C. § 1342(d)(2), EPA has a critical role in how NPDES MS4 permits are drafted. As part of the permit negotiations, MDE and EPA compromised on language that established a final date for meeting WLAs as goals.

The EPA September 23, 2014 letter outlined comments on early versions of the Draft Permit related to TMDL WLAs. The letter specified that: "EPA considers whether the permit contains objective and measurable elements (e.g., schedule for BMP installation or level of BMP performance)…EPA expects that such objective and measurable elements will be included in permits as an enforcement provision." In addition, the letter stated "EPA had previously objected to the June 2012 draft permit because it: … did not includes [*sic*]

a final date for meeting applicable WLAs benchmarks required in the annual report."

As a result of these discussions with EPA, the Final Permit requires the County to propose restoration plans with a final date for meeting WLAs. This will allow a long term planning strategy to incorporate the ultimate goal of achieving WQS. This meets the intent of the CWA and is deemed satisfactory by EPA. However, the Final Permit as written allows an iterative process that will incorporate any necessary changes in strategies and adjustment in BMP implementation over potentially numerous permit terms.

2. The Assessment and Planning Sections Are Duplicative and Confusing. Carroll and other MS4 counties suggested that these sections need greater clarity so that detailed scheduling comes after prioritizing projects. While MDE expects that the initial assessments will set priorities for water quality improvement projects, the Final Permit is also structured so that an adaptive management process will dictate final scheduling and address site specific design challenges. It is expected that the restoration plans developed after one year will identify priority projects along with a schedule for implementation. However, MDE believes the Final Permit allows any fine tuning of schedules to address site specific concerns through the iterative process. Thus, the assessment and planning sections of the Draft Permit will remain as written.

3. The County Should Be Given a Reasonable Amount of Time to Complete Plans. The counties suggested that it is "…not possible to

complete the type of restoration plan called for by the Draft Permit in the time given. In particular, the Draft Permit requires that the County include detailed cost estimates for individual projects, programs, controls, and plan implementation with the restoration plan for each stormwater WLA. One year is not enough time to assess each individual watershed, much less to use that information to develop plans with specific BMPs and associated cost estimates. Also, conceptually, mandating a complete, enforceable plan within one year is contrary to adaptive management."

The restoration plans serve as a planning framework that establishes schedules for the County to eventually attain WLAs set forth in approved TMDLs. This planning framework is part of an ongoing process that was established since the County's original permit in 1993. The 1993 permit required the County to submit an implementation schedule for its proposed watershed evaluation/restoration projects and prioritize watersheds for the expansion of successful stormwater management practices. In addition, the County's second and third-generation permits required more detailed assessments, cost estimates, and implementation schedules. Therefore, this section of the Final Permit requires that Carroll County continue the process already initiated through prior permit requirements that began nearly 21 years ago.

Examples of current progress toward these efforts are noted with the "2014 Watershed Assessments and Planning" and other work described in Carroll County annual reports. For example, the summary on page 7 of the Carroll County's 2014 annual report states:

> The Bureau of Resource Management (BRM) is responsible for monitoring and watershed assessment efforts required under the NPDES MS4 permit. "These efforts include the survey and verification of existing conditions,…[t]he BRM's Watershed assessments support the development of Watershed Management Plans…"

Page 52 of the report provides more details and states that:

> "…Carroll County continues to vigorously apply its efforts at watershed restoration, i.e., impervious surface mitigation and water quality improvement. Projects are identified via the watershed assessment process. The current status of watershed planning can be found in figure 21." This figure identifies the watershed along with the status of stream corridor assessments, watershed assessments, and the development of watershed restoration plans."

The projects mentioned above show that the County has recognized the importance of initiating efforts to develop County-wide watershed and impervious area assessments. In addition, the Final Permit requirement to submit restoration plans within one year is intended to move forward and facilitate the planning efforts that have been initiated since the County's first permit in 1993. MDE believes that the permit history shows that adequate time is given for the development of these plans.

The counties also noted concerns that restoration plans are considered enforceable permit conditions. MDE expects that the iterative process will allow

long term adaptive management to address site specific challenges and needed modifications to schedules. MDE will consider all factors involved with successful implementation prior to taking enforcement action.

B. The Chesapeake Bay TMDL and Twenty Percent Restoration Requirement. Maryland's NPDES MS4 permits require coordination with its WIP and will be used as the regulatory backbone for controlling urban pollutants toward meeting the Chesapeake Bay TDML by 2025. The Draft Permit requires compliance with the Chesapeake Bay TMDL through the use of a strategy that calls for the restoration of twenty percent of previously developed impervious land that has little or no controls. However, Charles, Frederick, and Harford counties have opposed the requirement in the permit to "…commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area…" The counties believe this provision exceeds an MEP level of effort and that compliance would be financially and operationally infeasible. In addition, the counties believe that "MDE has no factual basis for concluding that the County is capable of implementing the kinds of substantial clean-up measures in the Phase I and Phase II WIPs by 2025."

MDE maintains that compliance with the twenty percent restoration requirement is necessary in order for the permit to be consistent with the Chesapeake Bay TMDL and Maryland's WIP. The importance of using the twenty percent restoration requirement to meet the Chesapeake Bay TMDL was underscored in the EPA September 23, 2014 letter, which stated: "EPA had previously objected

to the June 2012 draft permit because it: (1) failed to explicitly state what actions the permittee had to take to meet the Chesapeake Bay TMDL…" In addition, "EPA has reviewed this permit and considers the effluent limit (i.e., 20 percent reduction of impervious surface area)…consistent with the reductions called for in both Maryland's WIP and CBP 2017 interim goals. EPA is satisfied that this permit is consistent with the overall assumptions and requirements of the Chesapeake Bay TMDL WLA and the CBP goal of 2025."

As a result, MDE has used its discretion pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii) to set more specific pollutant reduction goals for urban stormwater discharges as part of the Chesapeake Bay TMDL that do not consider practicability. Although MDE has not established WQS or WLAs as effluent limitations, it has established the twenty percent restoration requirement as a water quality based effluent limitation that is beyond the MEP standard. Therefore, the EPA September 2014 letter articulated the need for consistency with the Chesapeake Bay TMDL, and this is satisfied through the twenty percent restoration strategy. Furthermore, this strategy will meet the necessary reductions for interim and long term Bay restoration milestones and is consistent with EPA and statewide initiatives to restore Chesapeake Bay.

VII. MDE's Stormwater Accounting Guidance Is Flawed.

Several other MS4 counties in Maryland commented that MDE's MS4 Guidance is flawed and should not be referenced in the Draft Permit. The counties list several reasons for why the MS4 Guidance is flawed

including, the Chesapeake Bay WIP, MS4 permits, and the MS4 Guidance are inconsistent; BMP efficiencies continue to change; ESD to the MEP should not be required for all restoration; and, MS4 trading policies are not allowed. For these reasons, the counties contend "…that the Stormwater Accounting Guidance should remain guidance and not be incorporated as a term in the MS4 permit."

A. Maryland's Chesapeake Bay WIP, MS4 Permits, and the Guidance Are Inconsistent. Several counties commented that Maryland's Chesapeake Bay WIP, MS4 permits, and the MS4 Guidance are not consistent with each other. Specifically, one county stated that "…the Permit is inconsistent with and more onerous than the WIP. The WIP applies the 20% restoration equivalency percentage to the pre-1985 impervious cover. In contrast, the Permit includes a far larger area – all of the untreated impervious area consistent with the methodology in MDE's Stormwater Accounting Guidance, which applies the restoration requirement to all pre-2002 development."

Maryland's WIP analysis estimated stormwater loads and reductions based upon Maryland Department of Planning land cover information and the date when stormwater management was first required statewide. Maryland first enacted a stormwater management law in 1982, and municipalities and counties were implementing the program by 1985. Consequently, Maryland's WIP analysis used 1985 as the baseline year for determining if land development occurred with or without stormwater management.

Through the years, Maryland's stormwater management program has undergone several updates. Initially, the State's stormwater management program focused on quantity management to control flooding. In 2000, Maryland's stormwater management regulations were updated to require that water quality be addressed. These regulations were implemented across the State by 2002. Accordingly, BMPs implemented between 1985 and 2002 provided very little if any water quality treatment. For this reason, there are numerous opportunities to improve stormwater management on land areas that were developed between the years of 1985 and 2002. For example, BMPs that were constructed primarily for flood control (e.g., dry ponds) may be retrofitted to provide water quality.

MDE has the discretion to develop permit conditions that it considers appropriate for meeting stormwater WLAs, even if they are more stringent than prior TMDL or WIP documents (see Issue VI. MEP Compliance Standard and TMDLs). Maryland's MS4 permits were written to incorporate when water quality treatment was required by the State's stormwater management regulations. Specifically, MDE established 2002 as the year for determining baseline impervious area criteria for restoration. As noted by the counties, changing the baseline date from 1985 to 2002 increases the impervious area that needs to be restored in comparison to the WIP analysis. MDE believes, however, that the increased impervious area and restoration requirements are part of the iterative plan process necessary for meeting stormwater WLAs established in the Chesapeake Bay TMDL by

2025. Therefore, MDE will maintain the existing language in the Final Permit.

B. BMP Efficiencies Continue to Change. A number of counties believe that numerous BMPs and efficiencies for meeting the Chesapeake Bay TMDL continue to change. The counties' concern is that "…MDE will reflect those changes in future versions of the *Stormwater Accounting Guidance*." Furthermore, one county opined, "[i]f BMP efficiency updates result in 'downgrading' of certain BMPs, these changes should not be held against the County, as we will have invested years and millions of dollars in their installation." MDE is sympathetic to this concern. However, because stormwater TMDL WLAs are goals, the counties will not be held accountable for fluctuations in BMP efficiencies. The counties will be held accountable to a much more stable criterion in the Final Permit, namely, the twenty percent restoration requirement.

It is likely that BMP efficiencies and pollutant loadings will continue to change as the Chesapeake Bay Model (Model) is recalibrated with better data. While these updates help to improve the accuracy of the Model, they do present some uncertainty for the counties as they work to show progress toward meeting TMDLs. This would be unfair if the stormwater TMDL WLAs were strict compliance standards in the MS4 permits, but they are not (see Issue I. Water Quality Standards and Total Maximum Daily Loads). The counties merely need to incorporate these new efficiencies into their accounting methods for showing progress toward meeting TMDLs and supporting adaptive management strategies.

MDE has established a much more precise measurement for complying with the MS4 permits. Specifically, MDE has established the twenty percent impervious area restoration requirement as an effluent limit for stormwater TMDL WLAs. The methods for calculating impervious area restoration are relatively clear and straightforward, and purposely, are not as susceptible to change over time. In fact, when Model Version 5.3.0 was recently updated to Version 5.3.2 and the pollutant loads changed, MDE did "…not believe that this change [was] significant enough to recalculate impervious acre equivalencies" (MS4 Guidance, 2014). Furthermore, MDE stated that "[a]nother important benefit of maintaining consistent equivalent impervious acre credits is…a higher level of predictability to local governments in the assessment and implementation of practices for meeting MS4 permit requirements." Therefore, MDE will keep the reference to the MS4 Guidance in the Final Permit.

C. ESD to the MEP Is Required for All MS4 Restoration. Several other MS4 counties commented that the Draft Permit requires that ESD be implemented to the MEP for all MS4 restoration. Specifically, they point to permit condition PART IV.E.2.a., which states, "[e]quivalent acres restored of impervious surfaces, through new retrofits or the retrofits of pre- 2002 structural BMPs, shall be based upon the treatment of the WQ_v criteria and associated list of practices defined in the 2000 Maryland Stormwater Design Manual. For alternate BMPs, the basis for calculation of equivalent impervious acres restored is based upon the pollutant loads from forest cover."

The counties contended that the Draft Permit language compels them to implement all of the requirements and criteria found in the Manual. These include the requirement that ESD to the MEP must be used before any structural controls may be implemented and that ESD to the MEP must be used for at least the WQ_v, or the volume from one inch of rainfall across a BMP's drainage area. The counties believe that requiring ESD to the MEP for restoration would "result in the skyrocketing of costs" because these practices are the most expensive to implement.

The Final Permit does not incorporate the Manual in its entirety for restoration projects, but selects a subset of criteria to follow from the Manual and the MS4 Guidance. For example, the stormwater management practices implemented must be either those found in the Manual or alternative BMPs as defined in the MS4 Guidance. For the BMPs that are found in the Manual, they must be sized to treat the WQ_v in order to receive impervious area credit. For alternative BMPs, pollutants must be treated so that the pounds reduced are equivalent to that of converting an acre of impervious surface to an acre of forest.

The list of practices from the Manual includes ESD to the MEP and more traditional stormwater management structures like stormwater ponds, wetlands, infiltration, filtering systems, and open channel systems. Acceptable alternative practices include impervious surface removal, street sweeping, catch basin cleaning, reforestation, stream restoration, outfall stabilization, shoreline management, and septic system enhancements. The Final Permit does not indicate a preference for the

use of these practices but allows each jurisdiction the flexibility to choose its preferred mix of BMPs for implementation. Because the Draft Permit does not explicitly require Carroll County to use ESD to the MEP for all MS4 restoration projects, MDE will retain PART IV.E.2.a. of the Draft Permit as written.

D. MS4 Trading Policies. A number of the MS4 counties believe that the Draft Permit should be modified to authorize trading. One county commented that "MS4s would benefit greatly from an open and transparent [S]tate trading program. According to a study performed by the Chesapeake Bay Commission, allowing significant point sources and urban stormwater sources to trade could potentially reduce compliance costs…" MDE agrees with the counties, however, because these trading policies have not been finalized, it would be premature to include them in the Final Permit.

According to the State's WIP, MDE is charged with developing an Accounting for Growth (AFG) policy "…to help offset new or increased discharges, and provide alternatives for achieving greater environment protection than through existing regulatory programs." However, extensive outreach and public comment regarding the AFG policy revealed that there was a lack of consensus on many of the fundamental issues. A work group was established in 2013 that was comprised of various stakeholders to find common ground, clarify areas of disagreement, and make recommendations for a draft AFG policy. MDE is amenable to considering trading as an option for meeting stormwater WLAs once an official trading policy is established. However, no changes will be made to the permit at this time.

VIII. Management Programs and Federalization of State Laws.

Various comments were received from the MS4 Phase I counties regarding the language contained in many of the management programs described in PART IV.D. of the Draft Permit. Comments expressed concern that the Draft Permit was mandating that counties be held responsible for the behavior of third-party individuals or companies. Additionally, the counties objected to conditions in the Draft Permit that require compliance with State laws and regulations as this federalizes State programs and opens counties up to enforcement actions by the EPA and possibly other entities for activities overseen by the State.

A. Federalization of State Laws. Several counties believe that PARTS IV.D.1. and IV.D.2. of the Draft Permit inappropriately incorporate State law requirements, and thereby, federalizes them. Comments received stated that each of these programs is a major undertaking with many associated activities and details, and what MDE and the County may view as improvement opportunities, EPA or other third parties may view and enforce as deficiencies and violations. This is of concern because federalization triggers federal enforceability and penalties, typically different and far beyond what was contemplated when the State requirements were established. This includes enhanced legal standing, which provides a greater opportunity for third-person citizen law suits.

MDE has had long standing programs for both stormwater management (established in 1982) and erosion and sediment control (established in 1972)

that meet or exceed federal regulations that were established in 1992. Provision for establishing a state program in lieu of a federal program is set forth in 40 CFR § 122.1(b). Because CFR allows qualifying local programs to be used in place of those required in federal regulations, MDE chose to incorporate both programs into NPDES MS4 permits.

MDE made the decision to incorporate State program requirements into the permit for three reasons. First, MDE believes that this approach is the most programmatically reasonable. Incorporating the State's erosion and sediment control and stormwater management programs into the permit eliminates the redundancy of having two separate State and federal programs. For example, there is bound to be overlap of activities if two similar programs, one State and one federal, are implemented. Second, this approach reduces the financial costs associated with having two separate programs. Third, in its letter dated November 29, 2012, EPA commented on the issue of backsliding. Because these programs have been a fundamental construct of the County's MS4 Permit since the 1990's, MDE believes that EPA would object to the removal of these elements from the MS4 Draft Permit. Thus, except as described in Issue VIII.D. below, MDE's decision is to keep the existing language in PARTS IV.D.1. and IV.D.2. of the permit.

B. Permit Makes County Accountable for Third-Party Behavior. Carroll County and other counties commented that the MS4 Draft Permit imposes potential liability on the County for third-party behavior. An example used was the introductory sentence of PART IV.D.3. Illicit Discharge Detection and Elimination that states "…

County shall continue to implement an inspection and enforcement program to ensure that all discharges to and from the MS4 that are not composed entirely of stormwater are either permitted by MDE or eliminated." The counties are concerned that this wording could hold the County responsible for the actions of another party and compared it to requiring a police department to guarantee that no crime will ever be committed.

It is evident from the five permit conditions that follow this introductory sentence that MDE acknowledges illicit discharges and other non-permitted activities may occur. Therefore, MDE requires an illicit discharge detection and elimination program that includes field screening of outfalls to locate illicit discharges, procedures for spill response, and appropriate enforcement procedures for investigating and eliminating illicit discharges. The Final Permit requires the County to manage programs designed to limit pollutant discharges to the MEP. Therefore, the expectation of MDE is not that illicit discharges will never occur but that an adequate program is in place to actively search for and eliminate illicit discharges. The Final Permit is consistent with this logic.

A similar comment was made with regard to PART IV.D.4. Litter and Floatables. While other counties questioned how they could document all litter control problems as well as demonstrate that an acceptable level of effort was undertaken to reduce litter, Carroll County objected to the inclusion of this section in the permit in the first place. Carroll County feels that the language: "Increases in litter discharges to receiving waters have become a growing concern nationally and within Maryland

and cannot be ignored" has no place in a discharge permit. Additionally, the County believes that since there is no CWA 303d listing for litter and /or floatables for Carroll County, this provision would misdirect limited County resources to a non-priority issue. MS4 permits are to prevent pollution. In its 2014 annual report, Carroll County documents that for pollution prevention, the County conducts street sweeping, inlet cleaning, and recycling efforts.

This section of the permit requires two main actions on the part of the County. First, the County must include in its watershed assessments an evaluation of litter problems in each particular watershed as well as document current litter control programs and opportunities for improvements. Thus, the question of what is expected will be answered on an individual watershed basis as described in the County's own watershed assessments and not through specific permit conditions.

Second, the permit requires the County, within one year of permit issuance, to develop, implement, and annually assess the effectiveness of an education and outreach program that educates the public on the importance of reducing, reusing, and recycling. The conditions described in this section are similar to the public education program required by PART IV.D.6. and should be easily incorporated into the required outreach efforts performed by the County. Any existing litter control programs that meet permit requirements should be documented in Carroll County's annual report. The intent of this permit section is to document implementation and, where there are shortfalls, to make program improvements. Thus, MDE has made no changes to these sections of the permit.

C. Good Housekeeping Requirements Are too Broad. Several of the counties had concerns regarding the requirement to ensure "…all County staff receive adequate training in pollution prevention and good housekeeping practices." The counties are concerned that "all" employees must receive this training. They have requested that MDE change the language to "appropriate" employees.

MDE agrees the training should be specific to professionals whose job directly relates to MS4 requirements. The Final Permit specifies that staff should receive "adequate" training. The intent is to allow the County to use discretion when directing training efforts to necessarypersonnel. MDE believes that the Final Permit addresses the counties' concern and no changes have been made.

D. Remove Requirement for RPC Classes. A request was made that PART IV.D.2.b. of the Draft Permit be removed. This section states "[a]t least two times per year, conducting Responsible Personnel Certification classes to educate construction site operators regarding erosion and sediment control compliance;…" MDE agrees that this section can be modified because an online web-based training course is now available through MDE for the required certification. Thus, PART IV.D.2.b. of the Final Permit now reads "[e]nsure that construction site operators have received training regarding erosion and sediment control compliance and hold a valid Responsible Personnel Certification as required by MDE."

IX. Regulated Permit Area.

Carroll County and three other jurisdictions that are subject to Phase I permits questioned the boundaries of the regulated permit area. Carroll County believes that language set forth in the permit exceeds the jurisdictional scope of applicable law because, restoration plans should only apply to watersheds that have WLAs set forth in approved TMDLs. The other three jurisdictions, objected "…to MDE's decision to expand the regulated permit area beyond the area served by the MS4 itself." The counties are concerned because "…other Phase I MS4s in the State have urban areas and rural areas, the latter of which may have no stormwater facilities or systems that feed into the municipally-owned MS4." Accordingly, these jurisdictions suggest that land outside of this defined conveyance system cannot be included in the MS4 permit.

Language set forth in Carroll County's permit states that "[t]his permit covers all stormwater discharges from the municipal separate storm sewer system owned or operated by Carroll County, Maryland." EPA in 40 CFR § 122.26(b)(8) defines a "municipal separate storm sewer system" as "…a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body…having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes…; (ii) Designed or used for collecting or conveying storm water…" This definition, along with other State and federal regulations, gives MDE the authority to issue this Draft Permit jurisdiction-wide.

Since the inception of the NPDES stormwater program, MDE has considered permit coverage to be jurisdiction-wide. This approach is based on specific permit provisions, such as erosion and sediment control and stormwater management programs, which are included in State statute, administered locally, and implemented jurisdiction-wide. All private development within the borders of Carroll County requires erosion and sediment control and stormwater management approval, and is subsequently inspected, maintained, and enforced under the County's authority. MDE believes that it is also logical that federal stormwater management regulations be implemented jurisdiction-wide.

Additionally, in the November 16, 1990 preamble to the NPDES stormwater regulations, EPA suggested that permit coverage may include areas where jurisdictions have control over land use decisions. MDE agrees and believes that the amount and quality of stormwater entering an MS4 are affected by planning and zoning decisions made by a jurisdiction. Accordingly, it is reasonable to base the scope of the permit on the entire jurisdiction.

The argument to limit regulated permit area takes a myopic view of the MS4 system and ignores the language set forth in 40 CFR § 122.26(a)(1)(v). This section states that MDE may require an NPDES stormwater permit for discharges that "…contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." Section 40 CFR § 122.26(a)(1)(v) further provides that MDE may "…designate discharges from municipal separate storm sewer systems on a system-wide or jurisdiction-wide basis." Therefore, MDE will continue to define the

regulated permit area as jurisdiction-wide and considers all provisions of this permit to apply to the geographic area of Carroll County.

X. Distinction Between Phase I Large and Medium Jurisdictions.

Comments were received by a number of counties objecting to treating all Phase I jurisdictions as if they have the same capacity to manage MS4 permit obligations. In the comments, the counties objected "…to treating all Phase I communities as if they have the same capacities to manage MS4 permit obligations. To suggest that the State's counties, with populations per the 2010 Census ranging from 146,551 (Charles County) to 287,085 (Carroll County) are in the same position financially and operationally as Baltimore County (805,029) or Prince George's County (863,420) is illogical. It also belies the concept of an individual permit, which should be tailored for each community." Most jurisdictions believe that there should be a distinction between an individual and a group permit and that MDE has effectively created a general permit with its template approach.

The content of the various MS4 permits being issued is based on a common template. The final version of this template is the result of months of negotiations between MDE, EPA, local jurisdictions, and various environmental groups. Because there is no requirement to issue distinctly different permits to each jurisdiction, MDE has opted to use a template based process to expedite the development of this generation of NPDES permits. This same process was used successfully to develop the previous permits.

MDE believes that while similar language exists in all the MS4 permits, each draft permit is tailored to address the needs of the jurisdiction being issued the permit. For example, while large MS4s must screen for at least 150 outfalls, the medium jurisdictions must only screen for 100. Medium jurisdictions are required to monitor eight storms while large jurisdictions are required to monitor twelve storms. Litter and trash programs are tailored to address each MS4's needs, and TMDLs in each permit pertain to that jurisdiction only. Additionally, the twenty percent restoration of impervious surface area permit condition is based on each MS4's baseline impervious area. Consequently, larger, more densely developed jurisdictions will have more impervious area and medium jursdictions will have less impervious area that will require restoration. MDE believes that this is an appropriate scaling of the restoration requirements. Moreover, the twenty percent restoration requirement is based on MDE's Chesapeake Bay TMDL strategy. Therefore, it is a water quality based effluent limitation and does not consider practicability. The Final Permit will remain as written prior.

XI. Summary.

Carroll County and numerous environmental advocacy groups have not only commented on the Draft Permit but have submitted suggested language changes for MDE's consideration. The changes being recommended for the Final Permit repeat many of the arguments submitted during the commenting period regarding water quality standards and TMDLs, restoration criteria, monitoring, management program requirements, regulated permit area, annual reporting and public

participation, and the MS4 Guidance document. MDE appreciates the efforts of those involved in the Tentative Determination process. MDE has considered the many viewpoints and believes the Final Permit offers a balanced approach while meeting the intent of the CWA. Except for the changes described in Issue VIII.D. Regarding Responsible Personnel certification classes, no other Permit language changes have been made.

MDE believes that numerous meetings among local, State, federal, and environmental stakeholders leading up to the Tentative Determination were useful in developing an effective Draft Permit in compliance with State and federal laws. In its October 22, 2013 letter to MDE regarding the template permit, EPA stated that "...this permit and the MS4 program have been the subject of extensive discussions among EPA, MDE, County, and various stakeholder groups over the last two years. As a result of these discussions, numerous changes have been made to this MS4 permit to ensure that: it meets regulatory requirements; is enforceable; and achieves the water quality objectives of the Clean Water Act (CWA)." Furthermore, in its September 23, 2014 letter, EPA stated that "[w]e are pleased to note that the 2014 Draft Permit represents a significant improvement for Carroll County's municipal stormwater program and its receiving waters. EPA confirms that the 2014 Draft Permit is satisfactory for purposes of the CWA and NPDES permit regulations."

In summary, this Final Permit is a major step forward toward meeting the water quality objectives of the CWA. Prior permits have required Carroll County to possess adequate legal authority, monitor

stormwater discharges, and implement comprehensive management programs. New requirements in this permit include restoring twenty percent of the County's impervious area, reducing litter and floatables, and developing restoration plans to meet stormwater WLAs for impaired waters, including the Chesapeake Bay TMDL by 2025. MDE believes that this permit is both stringent enough to ensure water quality improvement and flexible enough for the development of practicable plans by the County. Therefore, on December 29, 2014, MDE has reached a Final Determination to issue this NPDES Final Permit to Carroll County for the control of storm drain system discharges. The public has 30 days to request a judicial review.

33 USCS § 1342

Current through Public Law 116-65,
approved October 9, 2019.

United States Code Service > TITLE 33. NAVIGATION AND NAVIGABLE WATERS (Chs. 1 — 54) > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL (§§ 1251 — 1388) > PERMITS AND LICENSES (§§ 1341 — 1346)

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [*33 USCS §§ 1328*, *1344*], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [*33 USCS § 1311(a)*], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [*33 USCS §§ 1311*, *1312*, *1316*, *1317*, *1318*, *1343*], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the

requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [*33 USCS § 407*], shall be deemed to be permits issued under this title [*33 USCS §§ 1341* et seq.], and permits issued under this title [*33 USCS §§ 1341* et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407*], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [*33 USCS §§ 1251* et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407*], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [*33 USCS § 407*], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a

permit program which will carry out the objective of this Act [*33 USCS §§ 1251* et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314(i)(2)*], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [*33 USCS § 1314(i)(2)*], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. Inaddition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal

counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [*33 USCS §§ 1311*, *1312*, *1316*, *1317*, *1343*];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [*33 USCS § 1318*] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [*33 USCS § 1318*];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [*33 USCS § 1317(b)*] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [*33 USCS § 1316*] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [*33 USCS § 1311*] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [*33 USCS §§ 1284(b)*, *1317*, *1318*].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314(i)(2)*]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314(i)(2)*].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program.

The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A)a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B)a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of

this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [*33 USCS §§ 1251* et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [*33 USCS §§ 1251* et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [*33 USCS § 1314(i)(2)*], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a

permit for discharges from a treatment works (as defined in section 212 of this Act [*33 USCS § 1292*]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [*33 USCS § 1319(a)*] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [*33 USCS § 1319*].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [*33 USCS §§ 1319*, *1365*], with sections 301, 302, 306, 307, and 403 [*33 USCS §§ 1311*, *1312*, *1316*, *1317*, *1343*], except any standard imposed under section 307 [*33 USCS § 1317*] for a toxic pollutant injurious to human health. Until

December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [*33 USCS § 1311*, *1316*, or *1342*], or (2) section 13 of the Act of March 3, 1899 [*33 USCS § 407*], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [*33 USCS § 407*], the discharge by such source shall not be a violation of this Act [*33 USCS §§ 1251* et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall

not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A)NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 [*33 USCS § 1344*], existing permitting requirements under section 402 [*33 USCS § 1342*], or from any other federal law.

(C) The authorization provided in Section 505(a) [*33 USCS § 1365(a)*] does not apply to any non-permitting program established under 402(p)(6) [*33 USCS § 1342(p)(6)*] for the silviculture activities listed in 402(l)(3)(A) [*33 USCS § 1342(l)(3)(A)*], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [*33 USCS § 1342(l)(3)(A)*].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [*33 USCS § 1292*]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [*33 USCS § 1314(a)(4)*] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [*33 USCS § 1317(b)(1)*]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [*33 USCS §§*

1317, *1319*], affect State and local authority under sections 307(b)(4) and 510 of this Act [*33 USCS §§ 1317(b)(4)*, *1370*], relieve such treatment works of its obligations to meet requirements established under this Act [*33 USCS §§ 1251* et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a

significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [*33 USCS § 1314(b)*] subsequent to the original issuance

of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [*33 USCS § 1311(b)(1)(C)* or *1313(d)* or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [*33 USCS § 1313(d)(4)*].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i)information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken

interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [*33 USCS § 1311(c)*, (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised

allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [*33 USCS §§ 1251* et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [*33 USCS § 1313*] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A)A discharge with respect to which a permit has been issued under this section

before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [*33 USCS § 1311*].

(B) Municipal discharge. 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-stormwater 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.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of

enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C)

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [*33 USCS §§ 1251* et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the

Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [*33 USCS §§ 1251* et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(s) Integrated plans.

(1) Definition of integrated plan. In this subsection, the term 'integrated plan' means a plan developed in accordance with the Integrated Municipal Stormwater and Wastewater Planning Approach Framework, issued by the Environmental Protection Agency and dated June 5, 2012.

(2) In general. The Administrator (or a State, in the case of a permit program approved by the Administrator) shall inform municipalities of the opportunity to develop an

integrated plan that may be incorporated into a permit under this section.

(3) Scope.

(A) Scope of permit incorporating integrated plan. A permit issued under this section that incorporates an integrated plan may integrate all requirements under this Act [*33 USCS §§ 1251* et seq.] addressed in the integrated plan, including requirements relating to—

(i) a combined sewer overflow;

(ii) a capacity, management, operation, and maintenance program for sanitary sewer collection systems;

(iii) a municipal stormwater discharge;

(iv) a municipal wastewater discharge; and

(v) a water quality-based effluent limitation to implement an applicable wasteload allocation in a total maximum daily load.

(B) Inclusions in integrated plan. An integrated plan incorporated into a permit issued under this section may include the implementation of—

(i) projects, including innovative projects, to reclaim, recycle, or reuse water; and

(ii) green infrastructure.

33 USCS § 1362

Current through Public Law 116-65,
approved October 9, 2019.

United States Code Service > TITLE 33. NAVIGATION AND NAVIGABLE WATERS (Chs. 1 — 54) > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL (§§ 1251 — 1388) > GENERAL PROVISIONS (§§ 1361 — 1377a)

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [*33 USCS §§ 1251* et seq.]:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [*33 USCS § 1288*].

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [*33 USCS § 1322*]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants,

including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [*33 USCS § 1313(c)*] by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include—

(i)inland waters; or

(ii)waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes—

(i)plastic;

(ii)aluminum cans;

(iii)wood products;

(iv)bottles; and **(v)**paper products

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel.

(A) In general. The term "recreational vessel" means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that—

(i)is engaged in commercial use; or

(ii)carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [*33 USCS § 1292*].

(27) Green infrastructure. The term "green infrastructure" means the range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates, stormwater harvest and reuse, or landscaping to store, infiltrate, or evapotranspirate stormwater and reduce flows to sewer systems or to surface waters.

History

HISTORY:

Act June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972, *P. L. 92-500*, § 2, *86 Stat. 886*; Dec. 27, 1977, *P. L. 95-217*, § 33(b), *91 Stat. 1577*; Feb. 4, 1987, *P. L. 100-4*, Title V, §§ 502(a), 503, *101 Stat.*

75; Nov. 18, 1988, *P. L. 100-688*, Title III, Subtitle B, § 3202(a), *102 Stat. 4154*; Feb. 10, 1996, *P. L. 104-106*, Div A, Title III, Subtitle C, § 325(c)(3), *110 Stat. 259*; Oct. 10, 2000, *P. L. 106-284*, § 5, *114 Stat. 875*; Aug. 8, 2005, *P. L. 109-58*, Title III, Subtitle C, § 323, *119 Stat. 694*; July 30, 2008, *P. L. 110-288*, § 3, *122 Stat. 2650*; June 10, 2014, *P. L. 113-121*, Title V, Subtitle B, § 5012(b), *128 Stat. 1328*; Jan. 14, 2019, *P.L. 115-436*, § 5(a), *132 Stat. 5561*.

Annotations

Notes

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40 CFR 122.26

This document is current through the October 23, 2019 issue of the Federal Register. Title 3 is current through August 2, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i)A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii)A discharge associated with industrial activity (see § 122.26(a)(4)); **(iii)**A discharge from a large municipal separate storm sewer system; **(iv)**A discharge from a medium municipal separate storm sewer system;

(v)A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator,

determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction- wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at *40 CFR 122.2*.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or

that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems.

(i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including

different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; thelocation of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate

storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See *40 CFR part 35*, subpart I, appendix A(b)H.2.j.

(9)

(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant

contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions.

(1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village

that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at *40 CFR 122.2*.

(9) Outfall means a point source as defined by *40 CFR 122.2* at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to

manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2018

No. 5

MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Appellant / Cross-Appellee,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY,

Appellee / Cross-Appellant,

On Appeal from the Circuit Court for Carroll County (Thomas F. Stansfield, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF APPELLEE/
CROSS-APPELLANT COUNTY
COMMISSIONERS OF
CARROLL COUNTY

STATEMENT OF THE CASE

The Commissioners of Carroll County ("Carroll County" or "County") disagree with the assertion made in the Maryland Department of the

Environment's ("Department" or "J\1DE") Statement of the Case that the County is challenging its municipal separate storm sewer ("MS4") permit because it is "too protective" of the environment. Appellant's Br. at 1. The basis of the County's challenge is that MDE has exceeded or improperly exercised its authority under federal and State law.

QUESTIONS PRESENTED

1. Does MDE's permit action unlawfully hold the County responsible for unregulated nonpoint source runoff and for stormwater discharges by independent third parties that never enter into or discharge from the County's MS4?

2 Has MDE unlawfully subjected the County to overly stringent requirements in the Permit by classifying the County's system as "Medium" rather than as "Small" and by subjecting it to the same requirements as "Large" systems?

3. Has MDE acted arbitrarily and capriciously by refusing to allow the County to fulfill its Permit obligations in part by using water quality trading as a compliance method?

4. Has MDE violated state law by incorporating and amending Md. Code Ann., Land Use, § 1-406 through the Permit?

STATUTORY AND REGULATORY FRAMEWORK

A. Federal Regulation of Stormwater Discharges

The Clean Water Act ("CWA") regulates discharges of pollutants from "point sources" to

navigable waters of the United States. *See* 33 U.S.C. § 1362(6), (7), and (14). A point source is defined in relevant part as a "discernible , confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit ... from which pollutants are or may be discharged," 33 U.S.C. § 1362(14). Under the CWA, the states are required to promulgate water quality standards for certain waters within their borders. *See* 33 U.S.C. § 1313. Such standards denote designated uses *(e.g.* recreation, public water supply) of particular bodies of water and establish numerical or narrative water quality criteria designed to protect those uses. *See* 40 C.F.R. §§ 131.l0(a), 131.11.

The CWA also requires states to identify waters within their boundaries that do not meet water quality standards. 33 U.S.C. § 1313(d)(l)(A). For each impaired waterway, a state must establish a "total maximum daily load" or "TMDL" for every pollutant that is preventing the water from meeting water quality standards. *Id.* at § 1313(d)(l)(C). A TMDL is the maximum amount of a pollutant, or "load" that a water body can receive and still meet water quality standards. *Id.* It is made up of the sum of pollutant loadings allocated to point sources, or "wasteload allocations" ("WLAs") and loadings allocated to non-point sources (such as agricultural stormwater), or "load allocations" ("LAs"), as well as natural background loadings. 40 C.F.R. § 130.2(i). TMDLs are primarily informational tools and are not self-executing. *See Am. Farm Bureau Fed'n v. EPA,* 792 F.3d 281, 291 n.4 (3d Cir. 2015) ("Our understanding of [TMDLs] as informational tools is supported by every case

and piece of scholarship to consider them as well as the language of the Chesapeake Bay TMDL itself."); *Pronsolino v. Nastri,* 291 F.3d 1123, 1129, 1140 (9th Cir. 2002) (noting "there is no pertinent statutory provision otherwise requiring implementation of § 303 [TMDL] plans or providing for their enforcement").

Stormwater discharges were initially exempted from the CWA's National Pollutant Discharge Elimination System ("NPDES ") permitting program. In 1987, Congress amended the CWA to specifically address stormwater discharges by passing the Water Quality Act ("WQA"). *See Natural Res. Def Council v. EPA,* 966 F.2d 1292, 1296 (9th Cir. 1992). The WQA provides a more lenient regulatory standard for municipal stormwater discharges than for industrial stormwater discharges. While industrial dischargers are expected to meet effluent limitations established by EPA pursuant to 33 U.S.C. § 1311, discharge permits for MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . as [EPA] or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii); *see also Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163-66 (9th Cir. 1999).

Congress created a phased approach to municipal stormwater permitting in the WQA, depending on the size of the municipality. 33 U.S.C. § 1342(p)(2)(C), (D); *see also Env't Def Ctr., Inc. v. EPA,* 344 F.3d 832, 841-42 (9th Cir. 2003). In Phase I, from 1987 until October 1, 1994, EPA and the states were prohibited from requiring permits for stormwater discharges except for limited

categories of discharges. *See* 33 U.S.C. § 1342(p)(l). Among the discharges that could be regulated were (1) stormwater discharges from municipal separate storm sewer systems *serving* populations of 250,000 or more (referred to as "large" MS4 jurisdictions) ; and (2) stormwater discharges from municipal separate storm sewer systems *serving* populations of 100,000 or more, but less than 250,000 (referred to as "medium " MS4 jurisdictions). *Id.* § 1342(p)(2)(C), (D) (emphasis added).

When EPA promulgated application regulations for large and medium municipal separate storm sewer system permits in 1990 (the "Phase I regulations"), it stated that:

> Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges.
>
> ***
>
> Consistent with the intent of Congress, this rule sets out permit application requirements that are sufficiently flexible to allow the development of site- specific permit conditions.

See National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,990, 48,037-38 (Nov. 16, 1990). The EPA regulations for large and medium municipal storm sewer

systems contain no minimum criteria or performance standards and do not require MS4 permittees to reduce pollutants by specific amounts. *See Natural Res. Def Council,* 966 F.2d at 1308 and n. 17.

EPA deliberately chose not to define maximum extent practicable ("MEP") in the regulations "in order to allow the permitting authority and regulated MS4s maximum flexibility in their interpretation of it as appropriate." EPA, EPA 833-R-00-002, Storm Water Phase II Compliance Assistance Guide 4-17 (Mar. 2000), *available at* http://www.epa.gov/npdes/pubs/comguide.pdf. EPA recognized that the pollutant reductions that represent MEP may be different for each MS4 permittee; "[t]herefore, each permittee will determine appropriate [best management practices ("BMPs")] ... through an evaluative process." National Pollutant Discharge Elimination System Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999) (preamble to Phase II stormwater regulations).

B. State Regulatory Authority

The Maryland Department of the Environment is the sole State agency with authority to implement the CWA in Maryland. Md. Code Ann., Envir. § 9-253 .MDE exercises the authority delegated to it by EPA through the statutory framework provided at Title 9, Subtitle 3, of the Maryland Environment Article. Section 9-322 prohibits the discharge of any pollutant to waters of the State unless authorized by section 9-323 of

the Environment Article. Section 9-323 requires that:

> (a) A person shall hold a discharge permit issued by the Department before the person may construct, install, modify, extend, alter, or operate any of the following if its operation could cause or increase the discharge of pollutants into the waters of this State:
>
> (1) An industrial, commercial, or recreational facility or disposal system;
>
> (2) A State-owned treatment facility; or
>
> (3) Any other outlet or establishment.
>
> (b) By rule or regulation, the Department may require a discharge permit for any other activity.

C. County Regulatory Authority

Maryland law requires counties and municipalities to adopt grading and building ordinances necessary to carry out the provisions of the State sediment control law and to adopt ordinances necessary to implement a stormwater management program. Md. Code Ann., Envir. §§ 4-103(b), 4-202. MDE oversees the implementation of these programs by local governments. Md. Code Ann., Envir. §§ 4-103(b), 4-203. MS4 jurisdictions are required to implement and maintain acceptable programs as a condition of their permits.

STATEMENT OF THE FACTS

MDE began issuing MS4 permits to Maryland's largest jurisdictions (Anne Arundel, Baltimore, Prince George's, and Montgomery Counties and

Baltimore City) in 1993.[1] These jurisdictions were identified in EPA regulations as having populations over 250,000 according to the 1990 decennial census. *See* 40 C.F.R. Pt. 122, Apps. F & H. In 1991, MDE directed Carroll County and several other counties to submit applications for MS4 permit coverage, despite their not having been identified by EPA as requiring permits. App. at 20; 40 C.F.R. Pt. 122 at App. I. At MDE's direction, Carroll County submitted Part 1 of its application in May of 1993 and Part 2 of its application in May of 1994. App. at 25, 28. The County's MS4 permit was first issued in 1995[2] and was reissued in 2000, 2005, and 2014. (E. 48, 370.)

The obligations imposed by MDE in MS4 permits increased steadily over time. For example, the initial MS4 permits contained no obligations to restore impervious areas. However, by 2005, Carroll County's permit included a requirement that the County complete watershed restoration projects for controlling stormwater discharges from 10% of the County's impervious surface area in order to reduce the discharge of nutrients and sediments to the Chesapeake Bay. *(See* E. 91-92, 97, 2005 Carroll County Permit, Parts III.F.2, III.G.l, and V.) This requirement was part of Maryland's voluntary effort to reduce nutrients discharged to the Chesapeake Bay.[3]

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[1] *See* http://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Pages/storm_gen_permit.aspx under "NPDES Phase I Permits"

[2] MDE states incorrectly that the County's initial permit issued in 1993. Appellant's Br. at 10.

[3] *See* Chesapeake Bay Program, Bay Program History, *available at* https://www.chesapeakebay.net/

On December 29, 2010, the EPA promulgated the Chesapeake Bay TMDL ("Bay TMDL") through the notice-and-comment rulemaking process of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553; *Am. Farm Bureau,* 792 F.3d at 292. The Bay TMDL is based on Watershed Improvement Plans ("WIPs") developed by each of the states in the Bay watershed, including Maryland. It sets target dates by which each state will complete proposed actions, with all pollution control measures to be in place by the year 2025. *Id.*

In support of the Bay TMDL, Maryland's October 15, 2012 Phase II WIP proposed that MS4 Phase I permits would include:

> ... reductions in nutrients and sediments equivalent to retrofitting 30% of the pre-1985 impervious cover for Maryland 's ten largest counties and the State Highway Administration ... [s]pecifically, the strategy calls for requiring, in renewed federal NPDES stormwater permits, the retrofitting of 20% of previously developed land with little or no controls within the next five year permit term … [p]revious Phase I permits required retrofitting of 10% of impervious area not controlled to the maximum extent practica[ble] .[4]

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who/bay_program_history

[4] *See* MDE, Maryland's Phase II WIP at A-10 (Oct. 15, 2012), *available at* http://www.mde.state.md.us/programs/Water/TMDL/TMDLimplementation/Pages/FINAL_PhaseII_WIPDocument_Main.aspx.

MS4 permits issued to Maryland's 10 largest jurisdictions beginning in 2012, including the Carroll County permit at issue here (the "2014 Permit"), contained increased impervious area restoration requirements as proposed by Maryland in the Phase II WIP. *See* 2014 Permit, Part IV.E.2.a (hereinafter "Impervious Area Restoration Requirement") at E. 55, 61-62. However, the restoration obligations contained in permits issued beginning in 2012 went well beyond the impervious area restoration proposed in the Phase II WIP. (E. 123.) Although Maryland committed in its 2012 Phase II WIP to retrofitting 30% of the land developed in Phase I MS4s *prior to 1985,* the permits issued after 2012 required that MS4 jurisdictions calculate "baseline" impervious area using more stringent MDE Accounting for Stormwater Guidance. *(See e.g.,* 2014 Permit, Part IV.E.2.a at E. 55, 205.) This guidance, "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits" (hereinafter "MDE Accounting for Stormwater Guidance"), applies the impervious area restoration requirement to all *pre-2002* development, dramatically increasing the amount of restoration required in jurisdictions that may have experienced significant growth between 1985 and 2002. (E. 177, 185.)

The 2014 Permit also included a requirement that the County "submit to MDE for approval a restoration plan for each stormwater WLA approved by EPA prior to the effective date of the permit." (E. 55.) Thus, in addition to substantial impervious area restoration requirements

associated with the Bay TMDL, the permit requires the County to develop restoration plans and detailed restoration schedules to address "local" TMDLs (hereinafter "Local Watershed Restoration Requirement"). (E. 55, 84.)

The 2014 Permit and MDE's Basis for Final Determination to Issue Carroll County's MS4 Permit (the "Final Determination ") provide conflicting and confusing descriptions of the County MS4 "Permit Area". Part LB of the 2014 Permit states in relevant part that it "covers all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Carroll County, Maryland." (E. 48.) Part IV.D identifies numerous management programs to be implemented in "areas served by Carroll County's MS4" (E. 50.) Part IV.E.2.a requires completion of restoration efforts for twenty percent of the county's impervious surface area (E. 55) using MDE Accounting for Stormwater Guidance, which states that "each MS4 jurisdiction is responsible for any stormwater discharge *that passes through its storm drain system"* but also provides that the "total impervious surface *within a jurisdiction's regulated permit area* should be evaluated[.]" (E. 185, emphasis added.) Part IV.E.1 of the permit requires the performance of watershed assessments for the *entire* County (E. 54) and the Final Determination states that "it is reasonable to base the scope of the permit on the *entire* jurisdiction" (E. 129, emphasis added.)

How "permit area" is interpreted has significant ramifications for the County. If the County must restore 20% of all impervious areas developed anywhere within its boundaries prior to 2002 in

order to satisfy the Impervious Area Restoration Requirement (Part IV.E.2.a) of the permit, regardless of whether those areas actually discharge to the County's MS4, the amount of impervious area to be restored increases exponentially. Similarly, if the County must develop restoration plans and schedules for each stormwater WLA approved by EPA – many of which are for impaired watersheds located in rural areas of the County – in order to satisfy the Local Watershed Restoration Requirement (Part IV.E.2.b) of the permit, it will be forced to implement structural and nonstructural water quality improvement projects for pollution from sources owned by third parties that do not discharge to County storm sewers.

STANDARD OF REVIEW

On appellate review of an administrative agency decision, the court "determine[s] if there is substantial evidence in the record as a whole to support the agency's findings and conclusions" and "determine[s] if the administrative decision is premised upon an erroneous conclusion of law." *Najafi v. Motor Vehicle Admin.,* 418 Md. 164, 173-74 (2011). Appellate courts "look[] through the circuit court's . . . decision[] applying the same standards of review, and evaluate[] the decision of the agency." *People's Counsel for Baltimore Cnty. v. Surina,* 400 Md. 662, 681 (2007).

Agency legal conclusions receive little, if any, deference and are "review[ed] *de nova* for correctness" *Schwartz v. Md. Dep 't of Natural Res.,* 385 Md. 534, 554 (2005) (citing *Spencer v. Md. State Bd. of Pharmacy,* 380 Md. 515, 528 (2004)). While a "limited degree of deference" is afforded to agency

interpretations of their enabling statutes, "the appropriate deference is finite." *Howard Cnty. Citizens for Open Gov't. v. Howard Cnty. Bd. of Elections*, 201 Md. App. 605, 615-16 (2011) (citing *People's Counsel for Baltimore Cnty. v. Loyola College in Md.*, 406 Md. 54, 67 (2008)). An agency's legal positions and practices are entitled to no special weight merely because they are longstanding. *See Md. Aviation Admin. v. Noland,* 386 Md. 556, 572 (2005). Accordingly, "[e]rroneous interpretations of law are never binding upon the courts." *Spencer,* 380 Md. at 529 n. 3. Nor are agency interpretations that are not "the product of adversarial proceedings or formal rules promulgation." *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.,* 346 Md. 437, 447 (1997).

Agency factual conclusions are reviewed "under the substantial evidence and arbitrary and capricious standards of review." *Maryland Dep't of Env't v. Anacostia Riverkeeper,* 447 Md. 88, 119 (2016). An agency action is only proper under the substantial evidence standard if "a reasoning mind reasonably could have reached the factual conclusion the agency reached" *Id. (quoting Najafi*, 418 Md. at 173). On the other hand, a decision is arbitrary and capricious if it "relied on factors which [the legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation . . . that runs counter to the evidence before the agency, or is . . . implausible." *Id.* (citing *Natural Res. Def Council v. EPA,* 808 F.3d 556, 569 (2d Cir. 2015)). Likewise, an agency conclusion will be set aside under the arbitrary and capricious standard if it is "not supported by facts, . . . not within the scope of

delegated authority, or is . . . unreasonable." *Baltimore Import Car Serv. & Storage, Inc. v. Md. Port Auth.,* 258 Md. 335, 342 (1970) (citations omitted).

ARGUMENT

I. MDE LACKS THE AUTHORITY TO IMPOSE RESPONSIBILITY ON CARROLL COUNTY FOR POLLUTANTS THAT DO NOT ENTER INTO AND ARE NOT DISCHARGED FROM THE COUNTY MS4.

A. The Department Misreads the Federal Stormwater Statute and Regulations.

The County does not dispute that the CWA allows MS4 permits to be issued on a "system-wide" or "jurisdiction -wide" basis. However, nothing in the CWA or its implementing regulations allows MDE to issue permits that "cover all discharges throughout the jurisdiction" as MDE claims. Appellant's Br. at 16. As the circuit court correctly noted, MDE's reading of the statute ignores the plain language of 33 U.S.C. § 1342(p)(3)(B). *See Mayor of Oakland v. Mayor of Mountain Lake Park,* 392 Md. 301, 316 (2006) (courts must "first examine the plain language of [a] statute, and if the plain language of the statute is unambiguous and consistent with the statute's apparent purpose, [] give effect to the statute as its written"). CWA section 1342(p)(3)(B) allows "[p]ermits for discharges *from* municipal storm sewers" to be issued on "a system- or jurisdiction-wide basis." (E. 15-16, emphasis in original.) The fact that the permits may be "system- wide" or "jurisdiction-wide " does not change where the discharge must

originate. It must still come from a municipal separate storm sewer system.[5] To be a medium or large MS4, a system must *serve* a population of over 100,000 or 250,000 people, respectively. 33 U.S.C. § 1342(p)(2)(C), (D).

The legislative intent behind the CWA's statutory provision is also clear. Its purpose was to avoid a regulatory program where, as a result of a federal court order, "thousands of cities and counties [must] obtain separate permits for every single one of their stormwater discharge points ...". 133 Cong. Rec. H515-06, 1987 WL 930040 (Feb. 3, 1987) (statement of Rep. Rowland). Instead, the provision avoided an administrative nightmare for regulators and "allow[ed] communities to obtain far less costly single *jurisdiction wide* permits." *Id.* (emphasis added.) Nothing in the language of section 1342(p)(3)(B) or its legislative history allows MDE to regulate *all* of the discharges occurring within a jurisdiction in an MS4 permit, let alone when those discharges never enter the municipal separate storm sewer system.

Nor do EPA regulations support MDE's erroneous reading of the law. The stormwater rule

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[5] Contrary to MDE's suggestion, it proves nothing that Part IV.D.1 and 2 of the permit requires Carroll County to maintain stormwater management and erosion and sediment control programs and Part IV.D.6 requires a public education program. *See* Appellant's Br. at 18. The County is already required to implement stormwater and erosion and sediment control programs as a condition of State law. Md. Code Ann., Envir. §§ 4-103(b), 4-202. The purpose of the public education and outreach program is simply to reduce stormwater pollutants. It would be nonsensical to limit a public outreach program *(e.g.* one using radio, television and other media) to urbanized areas.

allows the use of system-wide permits instead of requiring individual permit applications for *each* outfall located in a designated urban area, as was required under previous EPA regulations. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49,416, 49,449 (Dec. 7, 1988). The stormwater rule "only addresses conveyances that are part of a separate storm sewer system that discharges stormwater into waters of the United States." 55 Fed. Reg. at 48,036. The regulations define "municipal storm sewer system" as a "conveyance or system of conveyances" ... "owned or operated by a ... public body" and "designed or used for collecting or conveying stormwater...". 40 C.F.R. § 122.26(b)(8).

Although the rule allows multiple entities to apply as co-permittees for system-wide permits when appropriate, such as when their storm drain systems are interconnected, EPA also recognized that "[i]n some cases, it may be undesirable for all municipal entities with stormwater responsibility within a municipal system to be co-permittees ...". 55 Fed. Reg. at 48,043. In those circumstances, several permits could be issued "to cover various subdivisions [i.e., jurisdictions] of a single municipal system." *Id.* The universe of discharges regulated by "system-wide" permits and "jurisdiction-wide" permits is the same: each type of permit covers a *publicly owned system for the conveyance of stormwater.* The only difference between the two types of permits is whether they name a single permittee or multiple co-permittees. Based on the foregoing, the Department's reading of "jurisdiction-wide" is not

supported by the plain language of the CWA or its implementing regulations.

B. The County Cannot Be Held Responsible For Discharges That Do Not Pass Through Its MS4.

Part IV.E.2 of the 2014 Permit improperly holds Carroll County responsible for discharges of pollutants that originate from third parties and never enter the County storm sewer system. Federal and state law are clear that individual dischargers are responsible for their *own* discharges, and must be permitted accordingly. *See* 40 C.F.R. § 122.21(a)(l) ("[a]ny person who discharges or proposes to discharge pollutants or who owns or operates" the discharge is responsible); Code of Maryland Regulations ("COMAR") 26.08.04.01-IA(l) ("[p]ersons engaged or planning to engage in activities requiring a discharge permit … shall file a complete application"); *see also* 40 C.F.R. § 122.26(a)(3)(iii) ("[t]he operator of a discharge from a [MS4] which is part of a large or medium [MS4]" must apply to be a co-permittee or submit a distinct permit application). The 2014 Permit improperly transfers responsibility for third parties' pollution to Carroll County in two ways.

First, the Impervious Area Restoration Requirement (Part IV.E.2.a) requires the County to restore 20% of all impervious areas developed anywhere in the County prior to 2002, even though half of the land in the County is in agricultural use and the County has little stormwater infrastructure in rural areas.[6] Second, the Local Watershed

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[6] Carroll County has a total area of 287,900 acres. In 2017,

Restoration Requirement (Part IV.E.2 .b) requires the County to develop restoration plans and schedules for Local TMDLs that assign responsibility to the County for nonpoint source pollution that originates from privately-owned sources. This transfer of responsibility occurs simply because the 2014 Permit applies county wide and without regard to whether these discharges pass through the County's storm sewer system.[7]

The impact of applying these two restoration requirements county wide can be illustrated by examining the Double Pipe Creek Watershed, a

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141,934 acres (49.3 percent) were used for agriculture, with 70,091 of those acres permanently preserved for agricultural use. The majority of the active farms in the County are on lands currently zoned Agricultural or Conservation. *See* Carroll County, Land Preservation, Parks and Recreation Plan at 4 and 57 (June 2017), *available at* http://dnr.maryland .gov/land/Documents/Stewardship/Carroll-County _2017_Final-LPPRP .pdf. Voluminous information from the County's stormwater database and regarding stormwater management facilities is contained in the Administrative Record at 2129. A visual representation of the storm drain system for Carroll County and its co- permittees is available at: http://ccgovemment.carr.org/ccg/npdes/Interim%20CCMS4%20 Map.pdf?x=l 526336202222.

[7] *See, e.g.,* MDE, Total Maximum Daily Loads of Fecal Bacteria for the Double Pipe Creek Basin in Carroll and Frederick Counties, Maryland at 17-18 (Oct. 2009), *available at* http://www.mde .maryland.gov/programs/Water/TMDL/ ApprovedFinalTMDLs/Documen ts/www.mde.state.md.us/assets/document/Double _Pipe_Bacteria_TMDL_Final.pdf (stating that, because Double Pipe Creek watershed is covered by MS4 permits, "nonpoint source contributions from domestic animal and human sources will be categorized as point sources and assigned to the Stormwater WLA").

predominantly rural watershed which is located in both Carroll and Frederick Counties. The watershed consists of crop land (44.2%), forest (30.9%), and pasture (8.1%), and is only 16.4% regulated urban land (land that is under construction, already developed, or used for mining).[8]

The overbreadth of the first requirement, the Impervious Area Restoration Requirement (Part IV.E.2.a) is demonstrated by a 2013 study prepared by Carroll County of the impervious areas located within Eastern Double Pipe Creek Watershed (a subarea of Double Pipe Creek). Apx. at 9-43. (E. 357-359; Record ("R.") 1386-1424.) The Eastern Double Pipe Creek study area contained 260 acres, with a total of 20.28 impervious acres. Of the impervious acreage, 7.46 acres were devoted to publicly owned roads/common use drives and 12.82 acres were on private property. Apx. at 37. (R. 1418.) Under the Impervious Area Restoration Requirement, the amount of impervious area Carroll County must restore, based on the total impervious area in the Eastern Double Pipe Creek study area, is inflated by more than 70% because the County must account not only for *publicly* owned roads (many of which fall outside the scope of the stormwater rule[9]) but also for *privately*

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[8] *See* MDE, Total Maximum Daily Load of Phosphorus in the Double Pipe Creek Watershed in Carroll and Frederick Counties, Maryland at 6-7 (Aug. 2012), *available at* http://mde.maryland.gov/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/Double_Pipe_Creek_NutTMDL_08-08-12_fa.pdf.

[9] The County does not concede that its rural roads are properly included in the 20% restoration area requirement.

owned impervious area. The 2014 Permit imposes this burden despite the fact that Carroll County has limited stormwater management infrastructure in these areas into which privately owned impervious areas can discharge.[10] *See supra* footnote 6. The Impervious Area Restoration Requirement has nothing to do with how the private lands in rural areas drain; MDE's sole stated justification for making the County responsible for treating pollution from impervious areas on rural private property is that they are located within Carroll County.[11] This county wide approach is particularly unreasonable because

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Many of Carroll County's rural roads are not covered by the rule because they lack drainage systems and do not discharge to surface waters. *See* 55 Fed. Reg. at 48036.

[10] MDE's comparison of the Impervious Area Restoration Requirement to mitigation requirements in wetlands permits is inapposite. *See* Appellant's Br. at 21-22. Federal and state wetlands regulations require a permittee to mitigate for their *own* impacts, not those of third parties. 40 C.F.R. § 230.93(a)(l) ("[c]ompensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular [Department of the Army] permit."); COMAR 26.23.04 .02B(2) ("[t]he Department shall require a permittee, as a condition of a permit, to mitigate or monetarily compensate for nontidal wetland losses *caused by regulated activities* ..." (emphasis added).

[11] MDE does not claim that all impervious areas in the County actually drain to the County MS4. Ifdrainage area were relevant to MDE's analysis, the State Highway Administration ("SHA") should also be obligated to restore impervious areas on private lands that drain to *its* MS4. MDE imposed no such requirement. *See* MDE, NPDES MS4 Discharge Pennit for SHA (Oct. 9, 2015), *available at* http://mde.maryland.gov/programs/water/stormwatermanagement program/documents/SHA%20Final%20Permit%20complete%2010 _9_2015 .pdf

MDE does not follow it with the six counties (Calvert, Cecil, Queen Anne's, St. Mary's, Washington, and Wicomico) that are subject to the recently issued General Permit for Discharges for Small Municipal Separate Storm Sewer Systems ("Small MS4 Permit"). Those counties "may determine baselines according to the impervious surfaces within the *urbanized* area of [the] jurisdictions." [12]

The overbreadth of the permit's second restoration requirement, the Local Watershed Restoration Requirement (Part IV.E.2.b), is demonstrated by the fecal bacteria TMDL for Double Pipe Creek, which is incorporated by reference in the permit. (E. 84.) This TMDL expressly acknowledges that a portion of the fecal bacteria load to Double Pipe Creek comes from *nonpoint* sources, with surface runoff transporting bacteria over land and *directly* to waterways during rain events, *not via the storm sewer system*. *See supra* footnote 7, at 17. Simply because the Double Pipe Creek Basin is located within counties that are subject to MS4 permits, this TMDL assigns the *entire* fecal bacteria load from domestic animals and septic systems to the MS4s permittees. *Id.* The 2014 Permit then makes Carroll County responsible for developing restoration plans and schedules to address bacterial pollution from third parties that never

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[12] *See* MDE, NPDES General Pennit for Discharges from Small MS4s, App. B, at B-10 (Apr. 27, 2018), *available at* http://mde .maryland .gov/programs/Water/ StormwaterManagementProgram/Documents/ NPDES%20PII%20FINAL/Muni%20PII%20permit%20final%2 0042018.pdf

enters the County's municipal storm sewer system. *Id.* at 18.

While MDE lacks the authority to make the County responsible for third party discharges that never enter the MS4, it has ample authority to require private owners of impervious surfaces to treat their *own* stormwater runoff if that is necessary to meet the Bay TMDL. *See* 40 C.F.R. § 122.26(a)(9)(i)(D) (allowing EPA or the states to designate additional categories of dischargers as subject to permit requirements where their discharges contribute to violations of water quality); Md. Code Ann., Envir. § 9-323(b) (in addition to the categories of dischargers listed in § 9-323(a), the Department may "[b]y rule or regulation, ... require a discharge permit for any other activity."); COMAR 26.08.04.08B(2)(a) (stormwater discharges are a class of discharge that may be regulated by general permit).[13] Owners of certain types of industrial property are already required to apply for permit coverage and, under the terms of a general

[13] The County's authority is far more limited than MDE suggests. *See* Appellant's Br. at 17-18. While the County has authority to require that erosion and sediment controls and stormwater management plans be implemented with *new* development or redevelopment (Md. Code Ann., Envir. § 4-103(a), (b); § 4-204(a)), it does not have the authority to require property owners to install additional stormwater controls at already developed property in the absence of a grading or building permit application. *Id.* Nor does the County have the authority to regulate discharges to State waters. *See Perdue Farms, Inc. v. Hadder,* 109 Md. App. 582 (1996) (state discharge permit program preempts county's effort to limit nitrogen in wastewater discharge).

permit issued by MDE, must restore 20% of their impervious area in order to meet the Bay TMDL.[14]

MDE can also directly regulate the sources of pollution that contribute to the impairment of local waterways. For example, if fecal bacteria loads from septic systems needs to be reduced in the Double Pipe Creek watershed, MDE has the authority to require owners of septic systems to obtain discharge permits. The Department currently exercises that authority only for systems that discharge over 5,000 gallons per day. COMAR 26 .04.02.0SQ. MDE can also provide funding for septic system upgrades. Md. Code Ann., Envir. § 9-1605.2(i)(2)(xi); COMAR 26.03.13.04. Furthermore, MDE has authority to take enforcement action against failing systems. *See, e.g.,* Md. Code Ann., Envir. § 9-220 (Secretary may order the owner in charge of a sewerage system to correct improper conditions); Md. Code Ann., Envir. § 9-221 (Department may order the owner of a sewerage system that is a menace to health or comfort or causing a nuisance to alter, extend, or replace the system). Instead of exercising its own ample authority, MDE improperly assigned responsibility for third party discharges to the County via the restoration provisions of the MS4 permit.

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[14] *See* MDE, General Permit for Discharges from Stormwater Associated with Industrial Activities, at 5 (Jan. 1, 2014), *available at* http://mde.maryland.gov/programs/Pennits/WaterManagementPermits/Documents/GDP%20Stormwater/12_SW_CompleteFinalPermit.pdf.

C. MDE is Estopped from Holding the County Responsible for Third Parties' Discharges that Never Enter the MS4.

MDE is barred by collateral estoppel from imposing responsibility on Carroll County for third party discharges that never enter the MS4. In *Tyson Foods, et al., v. MDE,* the Department's Final Decision Maker rejected the agency's attempt to regulate independent third parties in similar fashion. *See* 2003 Final Decision and Order, Apx. 44. In *Tyson Foods,* MDE issued wastewater discharge permits to several poultry processing facilities ("Processors"). Apx. at 47-52. Certain conditions in those permits required the Processers, the only parties named on the permits, to take action at hundreds of poultry farms ("Growers") throughout Maryland. Apx. at 51-52. Most of the farms were independently owned and none directly or indirectly discharged to any of the processing facilities owned and operated by the Processors. *Id.* MDE's Final Decision Maker determined that MDE could not regulate third party Growers through Processors ' permits. Apx. at 56-59. While MDE could have directly regulated the Growers or listed them as co-permittees with the Processors if they all were part of an integrated poultry production "disposal system", the Department had chosen not to. *Id.* The Department's Final Decision Maker determined that, if MDE wanted to regulate the nutrient pollution discharge from Growers' farms, it had to do so directly. It could not indirectly regulate Growers via Processors' permits or hold the Processors partially responsible for the Growers ' discharges. Apx. at 59.

MDE is collaterally estopped by its decision in *Tyson Foods* from now asserting that it has the authority to hold a permittee responsible for the discharges of third parties that do not enter the County MS4. Under Maryland law, collateral estoppel attaches to earlier agency decisions where the agency acted in a judicial capacity, the issue was fully litigated, and resolution of the issue was necessary to the agency's decision. *See Garrity v. Md. State Bd. of Plumbing,* 447 Md. 359, 380 (2016). All three criteria are met here: MDE's final decision maker was acting in a judicial capacity, the scope of MDE's permitting authority was clearly and definitively litigated, and the final decision maker's decision depended on resolution of that question. Neither the federal nor the State authority undergirding MDE's discharge permitting scheme has changed since *Tyson Foods. See Calvert Cnty. Planning Comm'n v. Howlin Realty Mgmt.,* 364 Md. 301, 325 (2001) ("some new or different factual situation [] that justifies [a] different conclusion," more than "mere change of mind," required for agency reconsideration or policy change). Therefore, MDE is collaterally estopped from asserting that it has the authority to regulate third parties through the County's MS4 permit.

D. The Bay TMDL Provides No Justification for MDE to Exceed its Permitting Authority.

MDE portrays the County's appeal as an attack on the Chesapeake Bay TMDL. Appellant's Br. at 19-24. That is simply not the case -Carroll County fully supports the use of impervious area restoration as a surrogate effluent

limitation in MS4 permits. What the County objects to is being held responsible for pollutants that it neither generates nor discharges, contrary to federal and State law, an issue that was not addressed by this Court when it considered the 20% restoration requirement for large MS4s in *Anacostia Riverkeeper,* 346 Md. at 437.

It is a fallacy that Maryland will be unable to meet the commitments it made in its Phase II Watershed Implementation Plan if it cannot impose county wide restoration requirements. First, the County is on track to exceed its restoration obligation.[15] Second, the Department has the authority to require private property owners to reduce their own pollution loads, rather than making the County responsible for third party discharges that never enter the MS4. Third, the Department has gone well beyond the commitments made in the Phase II WIP and inflated the acreage that the County is required to restore. MDE did this by changing the date by which "baseline" impervious area would be determined, moving it from 1985 to 2002 and thus increasing the impervious area to be addressed. (E. 123.)

Furthermore, the commitments made in the WIP are not written in stone. The Bay TMDL "nowhere prescribes any particular *means* of pollution reduction . . . ." *Am. Farm Bureau,* 792 F.3d at 303 (emphasis in original). MDE clearly

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[15] *See* Carroll County, 2017 NPDES MS4 Permit Annual Report at 10 (Dec. 15, 2017), *available at* http://ccgovernment.carr.org/ccg/npdes/2017_NPDES_Annual_Report.pdf?x=1525386937969.

recognized this because it deviated from the Phase II WIP when it issued the Small MS4 Permit by allowing the six "small" counties to determine baseline according to the surfaces located only in urbanized areas. *Compare* Small MS4 Permit at B-10 *with* Phase II WIP at 11, 14, and A-15, *supra* fn 4.

Finally, the fact that MDE made commitments in the Phase II WIP does not deprive Carroll County of the right to challenge the Bay TMDL as applied. When the City of Salisbury attempted to directly challenge a TMDL for the Wicomico River in the Circuit Court for Wicomico County, MDE moved to dismiss on the grounds that "[a] discharger cannot claim to have been aggrieved by a TMDL until [MDE] proposes to issue a discharge permit that includes effluent limits based on the TMDL." MDE's Mot. to Dismiss at 11, *In re Wicomico River TMDL,* No.: 22-C-01-000623 (Wicomico Cnty. Cir. Ct. June 13, 2003), Apx. 79. The circuit court agreed and granted MDE's motion. *See* Case Summary, *In re Wicomico River TMDL,* No.:22-C-01-000623 (Wicomico Cnty. Cir. Ct. June 13, 2003), Apx. 83. MDE is therefore estopped from taking a contrary position here. *See Garrity,* 447 Md. at 369-71 (2016) (offensive non-mutual collateral estoppel available under Maryland law); *see also Corby v. McCarthy,* 154 Md. App. 446, 481 (2003) (unreported decisions "may be cited only [] when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel").

II. MDE ERRED IN ITS DESIGNATION OF THE COUNTY AS A PHASE I MEDIUM MS4 JURISDICTION.

A. The County is Not a Phase I Medium System Under the Clean Water Act Regulations.

The Department misclassifies and over-regulates the County by designating it as a Phase I medium municipal storm sewer system. Congress created a phased approach to municipal stormwater permitting depending on the size of the municipality. 33 U.S.C. § 1342(p)(2)(C), (D). The federal MS4 permitting scheme was intended to first address municipal separate storm sewer systems *serving* populations of 250,000 or more (referred to as "large" MS4 jurisdictions) and municipal separate storm sewer systems *serving* populations over 100,000 but less than 250,000 (referred to as "medium" MS4 jurisdictions) . *Id.* (emphasis added.) Jurisdictions with populations less than 100,000 could not be required to obtain a permit prior to October 1, 1994 unless there was a determination that their discharge contributed to a violation of a water quality standard or was a significant contributor of pollutants to the waters of the United States. *See* 33 U.S.C. § 1342(p)(l) and (2)(E).

"Medium municipal storm sewer system" is a defined term under the Clean Water Act regulations and all medium MS4 cities and counties are specifically listed in Appendix I to Part 122 of Title 40 of the Federal Regulations. 40 C.F.R. § 122.26(b)(7); *see also* 64 Fed. Reg. at 68748. As MDE explained in its brief,

> [T]he [CWA] regulations define 'medium municipal separate storm sewer system' by reference to an Appendix I, which lists the counties that, at that time, contained 'unincorporated urbanized areas [with a population] greater than 100,000, but less than 250,000 according to the 1990 decennial census.'

Appellant's Br. at 30. Carroll County does not appear on Appendix I. *Id.;* 40 C.F.R. Part 122, App. I. In fact, the only medium MS4 listed for Maryland is Howard County. *See id.*

Carroll County was properly excluded from Appendix I. As conceded by MDE, the County's unincorporated population as of the 1990 decennial census was only 93,791, below the 100,000 person threshold for designation as a Phase I medium MS4 jurisdiction.[16] *See* Appellant's Br. at 30 (citing App. 25). Equally important, Carroll County did not contain *any* urbanized areas[17] as of the 1990

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[16] In 1990, Carroll County had a total population of 123,372, with approximately 38,000 people living in incorporated towns. The majority of the population, 84,954 persons, or 68% of the population, lived in rural areas. *See* Maryland Department of Planning, *Urban and Rural Population in Maryland: 2000 and 1990* (May 2002), *available at* http//planning.maryland.gov/MSDC/Documents/Census/Cen2000/urban_rural/ua_rural2 k_cnty .pdf.

[17] The 2010 census defined "urbanized area" as one or more places ("central place ") and the adjacent densely settled surrounding territory ("urban fringe") that together have a minimum of 50,000 persons. The urban fringe generally consists of contiguous territory having a density of least 1,000 persons per square mile. *See* https://www.census .gov/prod/cen1990/cph2/cph-2-22.pdf.

census.[18] According to the 1990 census, the largest incorporated area within Carroll County was the City of Westminster with a population of 13,068. (App. 22-23.) All other incorporated towns had less than 4,000 people. *Id.* Therefore, under the plain language of the regulations, the County should not have been classified as a Phase I medium MS4 jurisdiction.

EPA issued corrections to its lists of medium and large MS4s as part of its 1999 stormwater regulations. *See* 64 Fed. Reg. at 68,748-49. In 1999, EPA corrected the content of Appendix I by adding "those incorporated places and counties whose 1990 population caused them to be defined as a 'medium' or 'large' MS4." *Id.* Importantly, EPA explained that Appendix I "will not need to be revised again because today's rule 'freezes' the definition of 'medium' and 'large' MS4s at those that qualify based on the 1990 census." *Id.*

The Department argues that the although EPA's 1999 stormwater regulations froze the list of medium jurisdictions in Appendix I, states could continue classifying counties as Phase I medium jurisdictions once their population exceeded 100,000. Appellant's Br. at 32. EPA directly addressed this argument in the preamble to the 1999 stormwater regulations, recognizing that under the regulations municipalities that reach the medium or large threshold after the 1990 census could be subject to fewer permitting requirements compared to those that were already at the population thresholds when the existing storm water regulations took effect. 64 Fed. Reg. at

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[18] *See supra* fn 16.

68,749. EPA noted that the deadlines from the existing regulations had lapsed and that "the permitting authority can always require more from operators of MS4s serving 'newly over 100,000' populations." *Id.* Contrary to MDE's suggestion, this does not mean it could classify Carroll County as a Phase I medium MS4 based on future population projections.

B. The Department Cannot Retroactively Apply its Residual Designation Authority to Correct its Prior Erroneous Designation.

The Department now contends that it used its residual designation authority to designate Carroll County as a "medium" Phase I jurisdiction in the early 1990s because of the system's contribution to water quality impairments. Appellant's Br. at 29, 33. This *post hoc* justification is contrary to the Department's Final Determination as well as all contemporaneous evidence in the record. The circuit court correctly held that "MDE cannot ameliorate its prior error by now offering a new basis upon which it could have, but did not, base its decision to designate the County as a Phase I jurisdiction." (E.. 30.)

The County agrees with the Department that the Clean Water Act *authorizes* MDE to designate stormwater discharges for coverage under a NPDES permit if MDE "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E); *see also* 40 C.F.R. § 122.26(a)(l)(v); 40 C.F.R. § 124.52. While the CWA

allows MDE to designate an MS4 system for permit coverage based on contributions to water quality impairments, there is no suggestion in the record[19] that the Department made this determination when it issued the County's initial permit in 1995. The CWA regulations state that if MDE were to make a case-by-case determination that Carroll County required an individual permit due to the contributions of its MS4 system to water quality impairments, it needed to notify the County of its determination in writing and send an application form with that notice. *See* 40 C.F.R. § 124.52. This simply did not occur.

Maryland had only three EPA-approved TMDLs by September 1999 and none of these TMDLs were for waterbodies in Carroll County. *Sierra Club* v. *EPA,* 162 F. Supp. 2d 406, 417 (D. Md. 2001). Moreover, the first TMDLs for the County were not approved until 2003. (E. 84, 172-76.) Therefore, not only is the record devoid of any correspondence from the early 1990s suggesting the Department used its residual designation authority, but it is also unlikely, given the lack of TMDLs and WLAs for Carroll County, that the Department could have used its residual designation authority to designate the County as a Phase I jurisdiction due

[19] The Department points to language in Maryland's 2010 Phase I WIP for the Chesapeake Bay TMDL as evidence that it exercised its residual authority to designate the County as a Phase I jurisdiction in the early 1990s. Appellant's Br. at 34. Given that the correspondence between the Department and the County from the early 1990s unequivocally states that the Department's Phase I designation was based solely on the County's expected population growth, the reference to residual authority in the 2010 Phase I WIP should be disregarded.

to the contributions of its MS4 to water quality impairments.

The record demonstrates that MDE's decision to regulate Carroll County as a Phase I medium jurisdiction was based solely on the County's 1990 population and its expected population growth without any regard to whether that population was served by the MS4.[20] In December 1991, the Secretary of the Department informed the County that because its population was under 100,000 after incorporated places are excluded, "MDE does not intend to designate Carroll County as a medium municipality at this time." (App. 25.) MDE explained that "it is our intention to require an application and subsequent stormwater permit in Carroll County when its incorporated population exceeds 100,000. Data provided by the Maryland Office of Planning indicates that this will occur in 1994." (App. 25.) The Department's contemporaneous explanation is consistent with a 1997 MDE municipal stormwater monitoring report stating that "MDE used projections from the Maryland Office of Planning (MOP) to designate Carroll, Charles, Washington , and Frederick counties [as Phase I medium municipalities] when their populations surpassed 100,000." Apx. at 6, R. 414.

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[20] In the Final Determination, MDE erroneously stated that it designated the County as a Phase I MS4 jurisdiction based on having a population of over 100,000 in 1990. (E. 102.) However, the 1991 correspondence between MDE and the County added to the record at App. 20-30 clarifies that MDE's decision to designate the County as a Phase I medium jurisdiction was based on projections from the Maryland Office of Planning that the County's population would exceed 100,000 in 1994.

Furthermore, in its Basis for Final Determination to Issue Frederick County's MS4 Permit (hereinafter "Frederick Final Determination"), also issued in December 2014, MDE addressed Frederick County's contention that it was incorrectly designated as a Phase I MS4 in its 1994 permit.[21] The Frederick Final Determination explains that Frederick County, like Carroll County, did not meet the minimum population threshold of 100,000 required to be defined as a Phase I medium MS4 jurisdiction. *See* Frederick Final Determination at 29-30. Consistent with its instructions to Carroll County, the Department required Frederick County to submit a Phase I MS4 application in 1993 based on population projections from the Maryland Office of Planning. *Id* In explaining its 2014 decision to continue to regulate Frederick County as a Phase I medium jurisdiction, MDE conceded that "[t]he County is correct that MDE did not make a claim under its RDA [residual designation authority] that Frederick County must apply as a Phase I." *Id.* at 30. MDE concluded that because Frederick County "agreed to apply for a Phase I MS4 permit" in 1993, there was no need to "make a determination based on water quality violations or impairments." *Id.* Given that Carroll County also applied for a Phase I permit in 1993 and was issued a permit in 1995, there is no evidence that MDE

[21] MDE, Basis for Final Determination to Issue Frederick County's NPDES MS4 Permit (Dec. 2014), *available at* http://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/Basis%20for%20Final%20Determination-Frederick%20with%20attachments.pdf.

treated Carroll County any differently from Frederick County.

C. MDE Did Not Exercise its Authority under State Law.

The County agrees that MDE has authority under state law to require Carroll County to obtain an individual MS4 permit. *See* Appellant's Br. at 35-36. However, an MS4 permit issued under state law would not be part of the federal NPDES program and therefore would not be a Phase I permit. Appellant's Br. at 36. Additionally, the Department did not rely on its state law authority in issuing the County's MS4 permit. The fact that the Department could issue an individual permit under state law does not negate its responsibility to properly classify the County as a Phase II MS4 based on EPA regulations and to treat similarly situated counties in a comparable fashion.

D. The Equitable Estoppel Doctrine is Inapplicable to the Facts of this Case and the Department Should be Held Accountable for Improperly Designating the County as a Phase I Medium MS4.

The thrust of the Department's equitable estoppel argument is that the Department "relied on the County's agreement to accept Phase I status as it developed the plans and programs that were incorporated into the Bay TMDL." Appellant's Br. at 27. The facts do not support MDE's equitable estoppel argument. The doctrine of equitable estoppel, if it were to apply, would apply only to the commitments Maryland made in the Phase II WIP for the Chesapeake Bay TMDL. The County is on

track to exceed the 20% restoration obligation by the end of the current permit term. *See* 2017 NPDES MS4 Permit Annual Report at 10, *supra* fn. 15. Because the County will meet the 20% impervious area restoration requirement in its current permit, properly classifying Carroll County as a Phase II small MS4 would not "undermine Maryland's federal-law commitment to achieve the goals of the Bay TMDL." *See* Appellant's Br. at 28. Furthermore, MDE would not need to revise its Phase II WIP if it were to reclassify the County as a small MS4.

Nor can the Department satisfy the elements of the equitable estoppel defense. Equitable estoppel has three elements: voluntary conduct or representation, good faith reliance, and detriment. *Mona Elec. Co. v. Shelton,* 377 Md. 320, 334 (2003). While the Department attempts to portray itself as relying in good faith on the County's acceptance of Phase I medium status in 1995, it was MDE, as the regulatory authority, that should have been familiar with the CWA and accompanying EPA regulations surrounding the designation of Phase I medium jurisdictions. As the Circuit Court correctly held,

> . . . because MDE is the agency charged with implementing the NPDES program in Maryland, it is ultimately responsible for erroneously requiring the County to obtain a Phase I MS4 permit. Therefore, MDE cannot claim good faith reliance upon the County applying as a medium MS4 jurisdiction on its initial permit application.

(E. 33.)

The Department also cannot make a detrimental reliance claim. It is a fallacy for MDE to claim that reclassifying the County's MS4 would require it to revise the Phase II WIP. The County's 2014 Permit goes well beyond the commitments made in the Phase II WIP and MDE greatly inflated the acreage that the County must restore for the Bay TMDL. *See supra* at 22-23. MDE did this by changing the date by which "baseline" impervious area would be determined, moving it from 1985 to 2002, thereby dramatically increasing the impervious area to be addressed. (E. 123.) Therefore, when the County completes the 20% restoration requirement of the 2014 Permit, it will have gone well beyond the restoration obligation assumed in the Phase II WIP.

Finally, the fact that MDE made commitments in the Phase II WIP does not deprive Carroll County of the right to challenge its Phase IMS4 permit. *See supra* at 23-24. For all of these reasons, the County is not estopped from contesting its designation as a medium Phase I jurisdiction.

E. The Anti-Backsliding Rule Does Not Apply.

The anti-backsliding rule prevents the Department from issuing a permit that "contain[s] effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C § 1342(0). Effluent limitations are limits on the type and quantity of pollutants that can be released into the nation's waters. *See* 33 U.S.C. § 1362(11) (defining an effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and

concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance"). The Department incorrectly states that designating the County as a small MS4 "risks" backsliding. Appellant's Br. at 36. The anti-backsliding rule is inapplicable to the facts of this case for several reasons.

First, MDE's argument is premature. Reclassifying Carroll County as a small MS4 will not automatically result in the Department issuing a permit with less stringent effluent limitations. It will be the Department's responsibility to ensure that the provisions of the reissued permit are no less stringent than comparable effluent limitations in the County's previous permit. The County's 2005 MS4 permit is the relevant permit for purposes of the anti-backsliding provision. (E. 86 – 100.) If MDE determines that the effluent limitations in the recently issued Phase II General Permit are less stringent than the effluent limitations in the County's 2005 permit,[22] then the Department can craft an individual permit for the County that does not violate the anti-backsliding rule. *See* Appellant's Br. at 36 (explaining that MDE can require a separate individual permit for a

[22] Part III.G. of the County's 2005 Permit required the County to implement "watershed restoration projects for controlling stormwater discharges from 10% of the County's impervious surface area." (E. 92.) The County has satisfied this effluent limitation and is on track to meet the 20% restoration obligation in the 2014 permit by the end of the current permit term. *See supra* fn. 15.

county that would otherwise be covered by the Phase II general permit). Therefore, there is no reason to assume that the anti-backsliding rule creates an impediment to reclassifying the County as a Phase II small MS4 jurisdiction.

Second, the anti-backsliding rule would not be violated even if the revised effluent limitations were less stringent than the effluent limitations in the County's 2005 permit. The anti-backsliding rule does not apply if the previous permit was based on "mistaken interpretations of law." 33 U.S.C § 1342(o)(2)(B)(ii).[23] Here, MDE's misclassification of the County's MS4 as a medium system is a mistaken interpretation of the CWA and EPA regulations. *See id.* Similarly, the County's designation as a "medium" is not an effluent limitation so reclassifying the county as "small" would not, in and of itself, run afoul of the anti-backsliding rule.

F. The County's Challenge to its Designation as a "Medium" Jurisdiction is Properly Before the Court and the Department Fully Considered this Issue Prior to Finalizing the 2014 Permit.

The County exhausted its available administrative remedies by participating in the public comment period and receiving a final agency decision from MDE. The Department's Final

[23] Even if an exception to the anti-backsliding rule applies, a reissued or modified permit cannot contain a less stringent effluent limitation that leads to a violation of a Maryland water quality standard. *See §* 1342(0)(3); 40 C.F.R. § 122.44(1)(2)(ii).

Determination provides the basis for its misclassification of the County's MS4. *See* E. 102 (stating that the Department classified the County as a Phase I medium municipality based on its 1990 census population of over 120,000). Therefore, the County seeks to challenge an issue "encompassed in the final decision of the administrative agency." *See Dep 'tof Health & Mental Hygiene* v. *Campbell,* 364 Md. 108, 123 (2001).

Relying on Md. Code. Ann., Envir. § 1-60l(d)(l), the Department argues that the County is barred from contesting its status as a medium MS4 jurisdiction because it did not raise the issue during the public comment period. Appellant's Br. at 24. However, MDE also acknowledges that this Court has "held consistently, that questions . . . that could have been but were not presented to the administrative agency may not *ordinarily* be raised for the first time in an action for judicial review." Appellant's Br. at 24-25 (citing *Bd. of Physician Quality Assurance* v. *Levitsky,* 353 Md. 188, 207 (1999) (emphasis added)). Therefore, the requirement to raise an issue before an administrative agency is not absolute, and here the rule's purpose is not served by barring review of the Department's misclassification of the County's MS4. *Cf* Md. Rule 8-131(a) (the Court may decide an issue not raised or decided by the trial court "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal"); *Jones v. Maryland,* 379 Md. 704, 713-715 (2004) (an appellate court has discretion to excuse a waiver or procedural default and to consider an

issue even though it was not properly raised or preserved by a party).

The circumstances of this case are sufficiently out of the ordinary to justify the Court's consideration of whether the Department properly designated the County as a Phase I medium MS4 jurisdiction. It is firmly in the interest of judicial economy to resolve this issue because (1) the Department will issue the County's next permit in 2019 and the County could contest its Phase I medium status at that time; (2) the record in this case contains all documents relevant to MDE's decision to designate Carroll County as a Phase I medium jurisdiction and MDE explained the basis for its designation in the Final Determination; and (3) as discussed below, this identical issue is also before the Court in the Frederick County permit appeal. *See Frederick County v. Maryland Dep't of the Env't,* No. 7, Sept. Term 2018.

The issue of whether the counties were properly designated as Phase I medium jurisdictions in the early 1990s was raised and fully considered by the Department in Frederick County's permit challenge. Frederick County's comments on the draft permit included an extensive discussion of why Frederick County believed it had been misclassified as a Phase I medium jurisdiction.[24] Moreover, Frederick

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[24] Frederick County, Frederick County Comments Draft MS4 Permit ("Frederick Comments"), Sept. 29, 2014, p. 3-7, *available at* http//www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/Frederick%20County%20Comments/FREDERICK%20C0%20COMMENTS%209-29-14.pdf.

County argued that MDE improperly designated *"several of the medium-sized systems,"* as Phase I permittees based on estimates of future population growth for the entire county rather than urbanized areas. *See* Frederick Comments at 7 (emphasis added). The Department fully responded to Frederick County's comments in Section XI of the Frederick Final Determination, ultimately declining to reclassify Frederick County as a small MS4.[25] Therefore, the Department was fully aware, prior to finalizing the 2014 Permit, that several of the medium-sized systems were misclassified as Phase I jurisdictions.

Because all of the 2014 Phase I MS4 permits were based on the same template permit (E. 129), Carroll County's final permit and final determination are largely identical to Frederick County's final permit and final determination.[26] To that end, both final determinations respond to comments received from all of the Phase I medium counties -- Carroll, Charles, Frederick, Harford, and Howard -- that are affected by MS4 permits. *(See, e.g.,* E. 103, 118, 120, 122.) Critically, the Carroll County Final Determination explicitly states that the

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[25] MDE, Basis for Final Determination to Issue Frederick County's NPDES MS4 Permit, at 29-30, (Dec. 2014), http://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/Basis%20for%20Final%20Determination -Frederick%20with%20attachments .pdf.

[26] *Compare* E. 101-31 to Frederick Final Determination at fn. 25. *See also* Appellant's Br. at 1 (explaining that the Department issued "nearly identical" permits to the medium and large jurisdictions).

Department considered *all* of the comments submitted by the Phase I medium counties, including the comments submitted by Frederick County, in issuing Carroll County's permit. (E. 103.)

Therefore, MDE has had ample opportunity to consider whether Carroll County was properly designated as a Phase I medium jurisdiction and judicial review of this issue would not undermine the efficiency of administrative proceedings.

G. The Department's Unlawful Classification Has Led to Disparate Treatment Among Predominately Rural Maryland Counties with Almost Identical Populations and Land Use.

It is arbitrary and capricious to classify Carroll County, a predominately rural agricultural county,[27] as a Phase I medium jurisdiction while other Maryland counties with almost identical populations and land use are classified as small MS4s. The Department's unlawful classification of Carroll County has the effect of unfairly and arbitrarily subjecting the County to the same effluent limitations as Maryland's largest urban jurisdictions.

At MDE's direction, Carroll County submitted Part 1 of its application in May of 1993 and Part 2 of its application in May of 1994. App. at 25. In

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[27] Carroll County has eight incorporated municipalities in which future growth is planned. The County has maintained its rural character outside of its growth areas through its extensive Agricultural Preservation Program and agricultural land accounts for over 49% of land use. *See supra* at 15-16 and fn. 6.

the early 1990s, it was not apparent to the County or to MDE that the consequence of being labeled a Phase I medium jurisdiction would be a regulatory burden that is significantly greater than that borne by similarly situated counties. Moreover, the County could not have anticipated that the Department would later develop a single "template" permit for all large and medium

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2018

No. 5

MARYLAND DEPARTMENT OF THE ENVIRONMENT,
Appellant / Cross-Appellee,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY,
Appellee / Cross-Appellant.

On Appeal from the Circuit Court for Carroll County
(Thomas F. Stansfield, Judge)
Pursuant to a Writ of Certiorari to the Court of
Special Appeals of Maryland

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April 16, 2018

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* * *

facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.'" *Motor Vehicle Admin. v. Shepard*, 399 Md. 241, 252 (2007) (citation omitted).

An agency's discretionary decisions are examined to determine if the agency's action is "arbitrary or capricious." *See Spencer v. Board of Pharmacy*, 380 Md. 515, 529- 31 (2004). Under this deferential standard, an agency's discretionary decisions must be upheld if they are justified by some rational basis. *Dep't of Human Res., Baltimore City Dep't of Soc. Servs. v. Hayward*, 426 Md. 638, 647 (2012) (noting "[a]n agency's actions will be classified as arbitrary and capricious if they are 'unreasonabl[e] or without a rational basis'" (quoting *Harvey v. Marshall*, 389 Md. 243, 297 (2005)).

II. THE DEPARTMENT HAS THE LEGAL AUTHORITY TO USE THE IMPERVIOUS SURFACE AREA OF THE ENTIRE COUNTY AS THE BASELINE FOR THE PERMIT'S RESTORATION REQUIREMENT.

A. The Permit's County-Wide Coverage Is Consistent with the Clean Water Act.

Municipal stormwater permits are not like traditional source-specific NPDES permits. Unlike traditional NPDES permits, which govern discharges from a single source, MS4 permits cover discharges from hundreds of separate sources, more than a thousand in Carroll County's case. (E. 331.) The federal definition underscores the complexity of MS4 systems:

> *Municipal separate storm sewer* means a conveyance or a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes . . .;
>
> (ii) Designed or used for collecting or conveying storm water[.]

40 C.F.R. § 122.26(b)(8). Due to their unique features, "[m]unicipal separate storm sewer systems often cover many square miles and comprise numerous, geographically scattered and sometimes uncharted sources of pollution, including streets, catch basins, gutters, man- made channels, and storm drains." *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1208-09 (9th Cir. 2013).

The diffusion of municipal stormwater systems presents regulatory difficulties that traditional NPDES permits do not. Municipal stormwater systems are not inspected, monitored, or permitted in the same way as industrial facilities. "Because of the nature of municipal stormwater discharges," Congress, in the 1987 Water Quality Act, "adopted a flexible approach to the control of pollutants in MS4s." *Anacostia Riverkeeper*, 447 Md. at 98. As explained in the legislative history of the 1987 Act, that flexibility goes to the very nature of the MS4-permitting program:

> Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:
>
> These are not permits in the normal sense we expect them to be. *These are actual programs.* These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. S16424-02 (Oct. 16, 1986) (Statement of Sen. Stafford; emphasis added).

To accommodate the programmatic aspect of MS4 permits, the 1987 amendments to the Clean Water Act added language specifically providing that "[p]ermits for discharges from municipal storm sewers . . . may be issued on a system- or jurisdiction-wide basis." 33 U.S.C. § 1342(p)(3)(B). Although the statue does not define the term "jurisdiction- wide," the regulations describe a "system-wide" permit as one potentially "covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system." 40 C.F.R. § 122.26(a)(3)(ii). If "system-wide" permits cover all discharges throughout the system, it stands to reason that "jurisdiction-wide" permits cover all discharges throughout the jurisdiction. That would be

consistent with the commonly understood definition of "jurisdiction" as "[a] geographic area within which political or judicial authority may be exercised." *Black's Law Dictionary* 855 (7th Ed. 1999). By contrast, limiting "jurisdiction-wide" MS4 permits to only the constituent systems themselves would give the terms "system-wide" and "jurisdiction-wide" the same meaning, which canons of statutory construction forbid. *Drew v. First Guar. Mortg. Corp.*, 379 Md. 318, 332 (2003); *Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001).

EPA guidance on the application of the Clean Water Act's municipal stormwater program confirms the states' ability to issue MS4 permits on a jurisdiction-wide basis. In the 1990 Federal Register notice announcing its municipal-stormwater regulations, EPA discussed the options it considered for how best to define the scope of MS4 permit coverage. The options included defining systems "in terms of the municipal entity which owns or operates storm sewers within municipal boundaries of the requisite population" and defining "municipal systems on a geographic basis," including "systems within the boundaries of counties." 55 Fed. Reg. 47990, 48039 (Nov. 16, 1990). Given the "diversity of arguments and rationales" for the different approaches and the "geographic, climatic, and institutional differences around the country," EPA was "convinced that the definition of municipal separate storm sewers should possess elements of several of the options enumerated above" and provide "a mechanism that enables States or EPA Regions to define a system that best suits their various political and geographical conditions." *Id.* Accordingly, the definition

ultimately adopted (1) "targets areas that have the necessary police powers and land use authority to implement the program," (2) allows for permitting throughout the "watershed," and (3) "accommodate[s] existing administrative frameworks and storm water programs." *Id.* at 48043.

Under Maryland law, counties have broad police powers to regulate land use and stormwater management throughout their jurisdictions. Counties have the authority to build and maintain roads, bridges, and culverts, Md. Code Ann., Local Gov't § 10-319(a)(1), and enact local laws "relating to zoning and planning" that provide for "the financing, construction, and maintenance of storm drainage projects" and "the regulation of storm drainage facilities." *Id.* §§ 10-321, 10-324(a)(1). Counties are required to "adopt ordinances necessary to implement a stormwater management program" more generally, Envir. § 4-202, and to "adopt grading and building ordinances necessary to carry out" state erosion and sediment control requirements, *id.* § 4-103(b). Counties must also adopt regulations that require environmental site design to the maximum extent practicable, *id.* § 4-203(b)(5), and state law prohibits them from issuing building or grading permits before approved erosion control and stormwater-management-control plans are in place. *Id.* §§ 4-103(a), (b), 4-204(a). The Department has determined that the Phase I MS4 permit, applied on a jurisdiction-wide basis, "best suits," 55 Fed. Reg. at 48039, the broad land use and stormwater control powers that the counties exercise within their boundaries.

The permit at issue here reflects the programmatic nature of MS4 permits. Although the permit

authorizes only "stormwater discharges from the municipal separate storm sewer system owned or operated by Carroll County" (E. 48 ¶ I.B), many of its conditions require pollution control measures that, almost by definition, are implemented county-wide. For example, the permit requires Carroll County to maintain an "acceptable stormwater management program," an "acceptable erosion and sediment control program," and a "public education and outreach program to reduce stormwater pollutants." (E. 50-53 (permit terms D.1, 2, and 6).) None of these "programs" is implemented with respect to a single outfall or even a single catchment area for a specific MS4 system; these programs are instead implemented throughout the County's jurisdiction. Incorporating these jurisdiction-wide programs into the MS4 permit reflects congressional intent that the municipal-stormwater-permitting program sweep broadly to cover more than just the specific outfalls through which the system discharges. Because of the many ways in which the permit operates throughout the County's political jurisdiction, the Department "will continue to define the regulated permit area as jurisdiction-wide" and it "considers all provisions of th[e] permit to apply to the geographic area of Carroll County." (E. 129.)

* * *

IN THE CIRCUIT COURT
FOR CARROLL COUNTY

PETITION OF:

COUNTY COMMISSIONERS
OF CARROLL COUNTY, MARYLAND

FOR JUDICIAL REVIEW OF THE DECISION OF
Maryland Department of the Environment Water Management Administration

IN THE CASE OF
National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit No.: 11-DP-3319, MD0068331

Case No.: 06-C-15-068141

* * * * * * * *

CARROLL COUNTY'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

The County Commissioners of Carroll County, Maryland (the "County"), by counsel, respectfully submits this Memorandum in support of its Petition for Judicial Review of the National Pollutant Discharge Elimination System ("NPDES") Municipal Separate Storm Sewer System Discharge Permit No.: 11-DP-3319; MD0068331 (the "Permit") issued by the Maryland Department of the Environment ("MDE").

INTRODUCTION

The County regrets the necessity of this appeal. Notwithstanding the County's good faith efforts to resolve this matter at the agency level, the County is now faced with an unlawful and unreasonable NPDES Permit that far exceeds applicable statutory authority and jurisdiction, imposes unlawful requirements, and exposes the County to excessive compliance costs, enforcement actions, and substantial monetary penalties.

The County fully appreciates that the Permit must address the County-owned stormwater drainage system, which is properly subject to regulation as a "point source" under 33 U.S.C. § 1342(p)(3)(B) and 40 C.F.R. § 122.26(b)(8). This appeal challenges MDE's decision to make the County responsible for two additional sources of stormwater to state waters. First, the Permit transfers responsibility to the County for "***nonpoint***" source runoff that seeps into state waters independent of the County-owned system. Second, it also imposes responsibility on the County (and the co-permittee municipalities) for ***third-party*** owned and operated point source discharges.

The County does not own or operate these additional sources. Nor are they received into the County's system, conveyed by it, or discharged from it. But the Permit treats these sources as if they were somehow part of the regulated County-owned system and, through that fiction, imposes large-scale, costly "restoration" (i.e., corrective action) obligations on the County.

To compound matters, MDE mischaracterized and over-regulated the County system as a

"Medium" system (rather than as a "Small" system) and applied the same permit template as "Large" systems resulting in other excessive requirements, Basis for Final Determination 3, 29 (Dec. 2014), AR 54, 80 ("Final Determination"), and MDE imposed burdens on the County that MDE admits are ***beyond*** the "maximum extent practicable" compliance standard, *id*. at 22, AR 73.

As a matter of good government, the County should not be expected to play along and accept an unlawful Permit, especially given that any subsequent noncompliance would expose the County to legal enforcement actions by environmental groups and other citizen suit plaintiffs, 33 U.S.C. § 1365, the U.S. Environmental Protection Agency ("EPA"), *id*. § 1319, and MDE, Md. Code Envir. § 9-342, with the possibility of substantial monetary penalties and costly injunctive remedies, *see also* Permit Pt. VII.D (outlining civil and criminal penalties for noncompliance with the Permit). For these reasons, the County is compelled to file this appeal.

QUESTIONS PRESENTED FOR REVIEW

I. Does MDE's permit action unlawfully hold the County responsible for unregulated nonpoint source runoff and for stormwater discharges by independent third parties?

II. Has MDE improperly subjected the County to overly stringent requirements in the Permit by classifying the County's system as "Medium" rather than as "Small" and subjecting it to the same requirements as "Large" systems?

III. Has MDE acted arbitrarily and capriciously by refusing to allow the County to fulfill its Permit obligations using water quality trading as a compliance method?

IV. Has MDE violated state law by incorporating and amending Md. Code Land Use § 3-102 through the Permit?

MUNICIPAL SEPARATE STORM SEWER SYSTEMS GENERALLY

To protect property from flooding and erosion when rain falls or snow melts, drainage systems of pipes, swales and ditches are commonly used to direct stormwater from roofs, roads, and parking lots away to nearby streams. The County's municipal separate storm sewer system, or MS4,[1] is such a system. It functions to capture stormwater within certain areas of the County for safe conveyance and eventual discharge from the MS4's point source outfalls into surface waters. Other stormwater never enters the County's MS4 and instead reaches surface waters either as diffuse nonpoint source surface flow or as point source discharges from MS4s owned by other entities (e.g., the State Highway Administration) and from non-MS4 drainage structures owned by other persons. Along this journey, stormwater can pick up pollutants such as sediment, litter, and road salt. The management and reduction of pollutants carried by stormwater is the basic purpose of an NPDES permit for discharges from an MS4.

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[1] " Municipal separate storm sewer system" and "MS4" are defined in the federal regulations at 40 C.F.R. § 122.26(b)(18) & (19)

MS4s differ in three major ways from other NPDES permitted facilities such as factories that discharge into state waters. First, unlike industrial factory discharges, stormwater discharges are caused by precipitation, which is naturally occurring, intermittent and variable, and cannot be stopped. Second, the MS4 is not the primary generator of the pollutants being discharged; rather, the sources typically are citizens and businesses engaged in legal activities and the activities of daily life. Past decisions about the location, design, and construction of roads, parking lots, and residential and commercial buildings often play a major role in determining how and where stormwater flows. Third, MS4s discharge through hundreds or thousands of individual outfalls into surface waters, so an MS4's contribution to instream water quality is difficult to ascertain and to regulate precisely. *See Natural Res. Def. Council v. N.Y. Dep't of Envtl. Conserv.*, 34 N.E.3d 782, 801–02 (N.Y. 2015); *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, 2008 WA ENV LEXIS 30, *15–17 (Wash. Pollution Ctrl. Hrgs. Bd. 2008); *see also MDE v. Anacostia Riverkeeper*, 447 Md. 88, 97–98, 134 A.3d 892, 987–98 (2016).

Accordingly, Congress amended the Clean Water Act in 1987 to create a unique permitting program for MS4s. *See* 33 U.S.C. § 1342(p)(3)(B). This amendment required cities, counties, and other governmental entities that met certain population thresholds to obtain NPDES discharge permits for the stormwater conveyances that they own or operate. *Id.* § 1342(p)(2); 40 C.F.R. §§ 122.26 & 122.32. Rather than imposing strict limits on the amount of pollutants that could be discharged from

MS4s, Congress mandated that NPDES permits for regulated MS4s instead require measures to reduce the discharge of pollutants "to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). The "maximum extent practicable" standard—often called the "MEP standard"—is the exclusive standard governing MS4 permits. *See Anacostia Riverkeeper*, 447 Md. at 124, 134 A.3d at 913. There are two key elements to the MEP standard. First, it gives the permitting authority flexibility to establish "controls for MS4s to reduce the discharge of pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). Second, it sets the level of effort for those controls: the permittee must reduce discharges to the "maximum extent practicable." *See id*.

STATEMENT OF FACTS

The County owns and operates a municipal separate storm sewer system that serves only discrete areas of Carroll County. *See* Carroll County Comments on Draft Carroll County NPDES MS4 Stormwater Permit 3 (Sept. 2014), AR 1174 ("Cnty. Cmts."). MDE misclassified the County's system as a "Medium" MS4, which resulted in the County being issued a Permit based on the same template as large urban localities, such as Baltimore City and Montgomery and Prince George's Counties, and imposing requirements that are inappropriate for Carroll County.

MDE made a Tentative Determination to issue the Permit and provided a draft permit for public comment on June 27, 2014. The County filed detailed comments objecting to specific aspects of the draft permit on September 29, 2014, Cnty.

Cmts., AR 1172, and provided testimony at a public hearing on September 8, 2014, Tr. of Pub. Hrg., AR 1208 (statement of Phillip Hager), AR 1212 (statement of Thomas Devilbiss).

MDE issued the final Permit on December 29, 2014. The Permit will drive a multi-year study, planning, budgeting, implementation, and construction program process that will consume tens of millions of dollars of County funds over a short five-year permit period.

One key element of the Permit—the definition of the regulated "Permit Area"—is particularly relevant to this appeal. The County's Permit and associated documents provide contradictory definitions of the regulated "Permit Area." "Permit Area" is defined in the Permit as being limited to *the portion of the County served by the County's storm sewer system*. Permit Pt. I.B, AR 15 (defining "Permit Area" as "all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Carroll County, Maryland"); *see also id*. Pt. IV.D, AR 17 (properly limiting Management Programs to "areas served by Carroll County's MS4"); MDE, Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits 6 (Aug. 2014), AR 136 (incorporated by reference into the permit by Part IV.E.2.a) (describing "Permit Area" by reference to 40 C.F.R. § 122.26(b)(8) as the "storm drain system" that the County "owns or operates"). However, the Final Determination MDE issued with the Permit takes the completely contradictory position that the "regulated permit area" extends to the entire "geographic area of Carroll

County." Final Determination, at 29, AR 80.[2] By the same token, several other Permit provisions purport to apply to the entire County. *See, e.g.*, Permit Pts. IV.E & IV.E.1.a, AR 21.

This definition is a question of Clean Water Act jurisdiction with multi-million dollar consequences. For example, Part IV.E.2.a of the Permit compels the County to install expensive stormwater controls for 20% of the total untreated impervious acreage in the Permit Area. A critical issue is whether the "Permit Area" is (1) the *entire* County or (2) only the parts of the County served by the County's regulated storm sewer system. Similarly, the Permit subjects the County to the onerous requirements of stormwater wasteload allocations under Total Maximum Daily Loads (discussed further below)— many of which apply *outside* of the areas served by the County's MS4 system. Permit Pt. IV.E.4, AR 23.

MDE has expressed in communications subsequent to the issuance of the Permit that it believes that the broad description of the regulated Permit Area in the Final Determination background document controls rather than the Permit Area definition of the Permit itself. Permit Pt. I.B, AR 15. Accordingly, for the sake of argument, this Memorandum assumes that the Permit Area encompasses the entirety of Carroll County, but correcting that clear legal error is a primary purpose of this appeal.

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[2] The Final Determination is a document that must accompany the final permit. Md. Code Envir. § 1-604(b); COMAR 26.08.04.01-3. Errors of law or fact in the final determination are subject to review. COMAR 26.08.04.01-3(C)(3)(b)(ii).

The County timely filed a petition for judicial review in this Court in accordance with Md. Code Envir. § 1-605 and Md. Rule 7-202 on January 28, 2015.

STANDARD OF REVIEW

An agency's legal conclusions are reviewed de novo. *Schwartz v. Dep't of Natural Res.*, 385 Md. 534, 554, 870 A.2d 168, 180 (2005). "[I]t is always within [the Court's] prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong." *Id.* Although in some cases a "degree of deference" may be given to an agency's construction of a statute it administers, this deference is very limited. *Howard Cnty. Citizens for Open Gov. v. Howard Cnty. Bd. of Elections*, 201 Md. App. 605, 615–16, 30 A.3d 245, 252 (2011). This limited deference does not extend to "purely legal issue[s]," such as the interpretation of case law or other legal authorities. *People's Counsel for Balt. Cnty. v. Loyola College*, 406 Md. 54, 67–68, 956 A.2d 166, 174 (2008). It also does not extend to agency positions that were not developed through "contested adversarial proceedings [or] formal rule promulgation." *Balt. Gas & Electric Co. v. Pub. Serv. Comm'n*, 305 Md. 145, 162, 501 A.2d 1307, 1315 (1986). Furthermore, an agency's legal positions and practices are entitled to no special weight merely because they are longstanding. *See Md. Aviation Admin. v. Noland*, 386 Md. 556, 572, 873 A.2d 1145, 1155 (2005).

When an agency exercises its discretion, its action must be overturned if it is found to be arbitrary and capricious. *Assateague Coastkeeper v. MDE*, 200 Md. App. 665, 691, 28 A.3d 178, 194

(2011). An agency's actions are arbitrary and capricious if the "decision is not supported by facts," *Balt. St. Parking Co., LLC v. Mayor & City Council*, 194 Md. App. 569, 600, 5 A.3d 695, 713 (2010) (internal quotation marks omitted), or if the decision was "unreasonable or without a rational basis," *Balt. City Dep't of Soc. Servs. v. Hayward*, 426 Md. 638, 647, 45 A.3d 224, 229 (2012) (internal quotation marks omitted). Agency action also is arbitrary and capricious if the agency's reasoning is "internally inconsistent and inadequately explained." *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987).

ARGUMENT

I. MDE'S PERMIT ACTION IS UNLAWFUL BECAUSE IT IMPOSES RESPONSIBILITY ON THE COUNTY FOR STORMWATER THAT DOES NOT ENTER INTO AND IS NOT DISCHARGED FROM THE COUNTY'S SYSTEM

As discussed above, the County's MS4 exists only in pockets throughout Carroll County. Operating this storm sewer system requires an NPDES discharge permit under the federal Clean Water Act. *See* 33 U.S.C. §§ 1311(a), 1342(p). The Permit is simply the County's license to discharge stormwater ***from the regulated MS4*** that the County owns and operates. 40 C.F.R. § 122.26(a) (requiring permit for "[a] discharge from a . . municipal separate storm sewer system"), (b)(8) (defining a "[m]unicipal separate storm sewer system" as those parts of the system "[o]wned or operated" by the governmental entity). MDE has no authority to use this Permit to force the

County to control all precipitation that falls anywhere within Carroll County. In particular, MDE cannot impose on the County responsibility for third-party point sources that discharge to state waters without ever entering the County's system. 40 C.F.R. § 122.26(b)(8). Furthermore, "nonpoint" source runoff, meaning diffuse stormwater runoff that is not channeled through a storm sewer, pipe, ditch, or other conveyance that makes up part of a storm sewer system, is not regulated under the NPDES permit program. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009). MDE completely lost sight of the purpose and scope of the NPDES permit program when it claimed in the Final Determination that it would use the Permit for the County's system to impose legal responsibility for the entire "geographic area" of the County. Final Determination, at 29, AR 80.

EPA has authorized Maryland to issue NPDES discharge permits as required by 33 U.S.C. § 1342(b). Final Determination, at 2, AR 53. The General Assembly instructed MDE in plain terms to implement the federal requirements. *See* Md. Code Envir. § 9-253 (granting only those "powers that are necessary to comply with and represent this State under the [Clean Water Act]"); COMAR 26.08.04.01.A (empowering MDE to "issue State discharge permits or NPDES permits [i.e., MS4 permits] . . . to satisfy the regulatory requirements of the [Clean Water Act]"). Under the Clean Water Act, NPDES permits for MS4s regulate "*discharges composed entirely of storm water*" from "*municipal separate storm sewers*" that are "*owned or operated by*" a county or other governmental entity. 40 C.F.R. § 122.26(a), (b)(8)

(emphasis added); *see also* 33 U.S.C. § 1342(p). Nothing in federal or state law authorizes MDE to use an NPDES permit to regulate other areas, property, or systems that are not part of or served by the County storm drainage system.[3] *See* 64 Fed. Reg. 68722, 68750 (Dec. 8, 1999) ("Today's rule does not regulate the county, city, or town. Today's rule regulates the MS4.").

Nevertheless, MDE claims the authority under the federal regulations to make the County's Permit apply "jurisdiction-wide." Final Determination, at 28–29, AR 79–80 (citing 40 C.F.R. § 122.26(a)(1)(v)). MDE misconstrues what "jurisdiction-wide" means in the regulation. A county may operate hundreds or thousands of stormwater pipe outfall points and multiple unconnected storm sewer systems within its jurisdiction. *See Anacostia*, 447 Md. at 98, 134 A.3d

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[3] Neighboring states have in effect NPDES stormwater permits, with EPA approval, but without the expanded jurisdictional reach MDE attempts to exercise here. *See, e.g.*, Pa. Dep't of Envtl. Protection, PAG-13 NPDES General Permit for Stormwater Discharges (authorizing "the discharge of stormwater from regulated small municipal separate storm sewer systems (MS4s) to surface waters"), *available at* http://www.dep.pa.gov/Business/Water/PointNonPointMgmt/StormwaterMgmt/Stormwater/Pages/default.aspx#c hange (emphasis added); 46 Pa. Bull. 2910 (June 4, 2016) (notice of availability of PAG- 13 for "regulated small MS4s for discharges of stormwater to surface waters"); Va. State Water Control Bd., General VPDES Permit for Discharges of Stormwater from Small MS4s, 9VAC25-890-40 § I.A. (authorizing the permittee to discharge "from the small [MS4] identified in the registration statement into surface waters") and § I.C.1 (requiring Chesapeake Bay TMDL-related pollutant reductions for lands "served by the MS4".

at 897. The regulation gives agencies like MDE the flexibility to group all pipes, all outfalls, and all systems operated by a locality into a single "jurisdiction-wide" permit rather than issue separate permits for each outfall or each system. *See* 40 C.F.R. § 122.26(a)(3)(ii). This provision is simply for administrative convenience, not for the massive jurisdictional expansion (nonpoint source runoff and third-party discharges) and liability transfer that MDE seeks. *See NRDC v. Cnty. of Los Angeles*, 725 F.3d 1194, 1209 (9th Cir. 2013); 55 Fed. Reg. 47990, 48023 (Nov. 16, 1990); 133 Cong. Rec. 522 (daily ed. Feb. 3, 1987) (statement of Rep. Rowland) (stating that "communities [could] obtain far less costly single jurisdictionwide permits" rather than permits for each of thousands of stormwater discharge points).

A. MDE's "Jurisdiction-wide" Permit Regulates Nonpoint Source Stormwater Runoff that Is Beyond the Jurisdiction of the Clean Water Act

The Clean Water Act does not regulate every drop of rain that falls to the Earth; it regulates only stormwater that is "discharged" from a "point source"—which means stormwater that has been collected into a storm sewer, ditch, or pipe that conveys it to a waterway. *See* 55 Fed. Reg. at 47996 (stating that the MS4 permit requirement "only covers storm water discharges from point sources"); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013) (stating blackletter law that the Clean Water Act only regulates discharges from point sources). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,

channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Discharge" also is a defined term meaning the "addition of any pollutant to navigable waters from a point source." *Id*. § 1362(12) & (16).

Rainwater that sheet flows off a parking lot or a field and into a stream are examples of *nonpoint* sources that would not be within the jurisdiction of the Clean Water Act and its NPDES permit program. *See Cordiano*, 575 F.3d at 221 ("[S]urface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the [Clean Water Act] permit requirement."); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 841 n.8 (9th Cir. 2003) ("Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation."). However, if the Permit requirements in Part IV.E to develop watershed restoration plans for impaired waters apply to the entire geographic area of the County, then the County would be responsible for stormwater from parking lots, roads, and rooftops that does not enter the County's system. These *nonpoint sources* of stormwater runoff are not regulated under the Clean Water Act and may not lawfully be included in the County's Permit as the basis for a control requirement.

B. MDE's "Jurisdiction-wide" Permit Holds the County Responsible for Stormwater Discharges by Independent Third Parties Who Are Legally Responsible for Their Own Discharges

Many commercial and residential properties that do not drain into the County's system instead drain through privately owned ditches, swales, or pipes leading to state waters. By law, the "person" who "owns or operates" the discharge is responsible and must obtain a discharge permit if one is necessary.[4] 40 C.F.R. § 122.21(a)(1), (b); *see also* 40 C.F.R. § 122.26(a)(3)(iii) (requiring the "operator of a discharge" from an MS4 to obtain a permit); COMAR 26.08.04.01-1.A(1) (requiring "[p]ersons engaged . . . in activities requiring a discharge permit" to apply for one). Consistent with how the Clean Water Act assigns responsibility for discharges, a "municipal separate storm sewer" subject to the MS4 permit requirement is defined to include only stormwater conveyances that are "*owned or operated*" by the locality. 40 C.F.R. § 122.26(b)(8) (emphasis added). Likewise, the County's Permit expressly applies to "all stormwater discharges from the municipal separate storm sewer system (MS4) *owned or operated* by Carroll County." Permit Pt. I.B, AR 15 (emphasis added). However, the Final Determination purports to hold the County responsible for private third parties' discharges, not to mention stormwater discharges from other municipal, state, or federal

[4] Not all stormwater discharged from a point source is regulated under the Clean Water Act. *See* 40 C.F.R. § 122.26(a)(1) (listing categories of dischargers subject to the permitting requirement).

governmental entities in the County that do not hold their own MS4 permits, and similar references are made in discrete provisions of the Permit. The County is responsible for discharges from the MS4 it owns or operates, and MDE has no lawful authority to include third parties' discharges in the County's MS4 permit as obligations of the County simply because they happen to occur within the County's political boundaries. MDE's error in doing so has the same effect as its error regarding nonpoint sources in terms of massively increasing the scope of the County's permit obligation by, for example, multiplying the acreage subject to the Permit's restoration plan requirement in Part IV.E.

C. MDE's "Jurisdiction-wide" Permit Obligates the County to Exercise Authority It Does Not Have Over Private Property

A number of waterbodies throughout the County are subject to total maximum daily loads ("TMDL"). A TMDL is essentially a "pollution budget" for a waterbody that sets the maximum amount of pollutants of concern allowable for a waterbody and then allocates that total among the various sources of that pollutant (e.g., bacteria, nutrients, sediment). *Conserv. Law Found. v. EPA*, 964 F. Supp. 2d 175, 179–80 (D. Mass. 2013). For many TMDLs, a portion of the pollution budget, or "wasteload allocation," is assigned to regulated stormwater. In most cases, that means that pollutant discharges from stormwater (and other sources addressed in the TMDL) have to be reduced from the currently excessive levels that triggered the development of the TMDL budget for the pollutant of concern. Pollutants from such discharges can be reduced by making changes to land use (e.g., converting a parking lot to a forest) or by

implementing stormwater control measures (e.g., constructing a pond to collect and treat runoff). In either case, it is obvious that reducing pollutants from stormwater necessitates taking some measure of control over the land on which that stormwater flows.

The Permit purports to require the County to develop detailed "watershed restoration plans" to comply with stormwater wasteload allocations for all applicable TMDLs throughout the County, including TMDLs outside of the County's MS4 service area. Permit Pts. IV.E & IV.E.4, AR 21, 23; *see also id*. Pt. III.2, AR 15. In addition to unlawfully regulating stormwater beyond the scope of MDE's NPDES permit authority as discussed above, this condition presumes the County has authority over the use of private property that it does not. MDE justifies this requirement by stating that the County has authority to control erosion and sediment and stormwater from "[a]ll private development within the borders of Carroll County." Final Determination, at 28, AR 79. Although the County has statutory authority to mandate stormwater control measures for ***new*** development and redevelopment projects, *see* Md. Code Envir. §§ 4-103, 4-204, neither the County nor MDE has the same statutory authority over ***existing*** development, such as established neighborhoods and operating shopping malls. The County cannot, for example, order the owner of a thirty-year-old shopping center to convert part of its parking lot into a stormwater management pond to stop stormwater-carried pollutants from discharging to an adjacent stream subject to a TMDL.

It makes no sense for the County to be directed to comply with stormwater TMDLs outside of its MS4 service area where it neither has any stormwater discharges of its own nor has the authority to order private landowners of existing development to control discharges from their properties. The County lacks the authority necessary to implement this requirement. Moreover, this provision violates the controlling standard for MS4 NPDES discharge permits that they need only reduce discharges from the owner's stormwater system to the maximum extent practicable. This is yet another reason why the Clean Water Act sensibly limits an MS4 permittee's obligations to discharges from the MS4 system it actually owns or operates.

II. MDE MISCLASSIFIES AND OVER-REGULATES THE COUNTY BY DESIGNATING ITS SYSTEM AS A "MEDIUM" MS4

MDE has made a serious error in its regulation of the County's system. The Clean Water Act regulations make a distinction between "Small," "Medium," and "Large" MS4s. 40 C.F.R. § 122.26(b)(4), (7), (16). For all practical purposes, Large and Medium MS4s are subject to the same permitting standard, *id.* § 122.26(d), whereas Small MS4s are subject to a more streamlined and less onerous general permit that reflects their size and capacity to implement management measures, *id.* § 122.32.[5] The cities and counties designated as

[5] *See* MDE, NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems, *available at* www.mde.state.md.us/assets/document/NPDES%20Phase%20II%20General%20Permit.pdf.

Medium and Large MS4s are specifically listed in EPA's regulations. The only Medium MS4 listed for Maryland is Howard County, and the listed Large MS4s are Anne Arundel, Baltimore, Montgomery, and Prince George's Counties, as well as Baltimore City. *See id.* § 122.26(b)(4), (7); *id.* Pt. 122, Apps. F, H & I (attached hereto as Attachment A). In 1999, EPA "corrected" its list of Medium and Large MS4s and determined that the lists "will not need to be revised again" because EPA was "freez[ing]" the list of Medium and Large MS4s. 64 Fed. Reg. at 68748–49.

MDE has misclassified the County as a Medium (or Phase I) MS4.[6] Final Determination, at 2, AR 53 ("Carroll County was considered a Phase I medium municipality due to its population . . . ."). But this is contrary to the controlling federal regulation which reflects EPA's determination in its original 1990 lists of Medium and Large MS4 counties, 55 Fed. Reg. at 48074, and its "corrected" lists in 1999, 40 C.F.R. Pt. 122, Apps. H & I.

MDE disregards the NPDES regulation with the erroneous assertion that the County is a Medium MS4 because it exceeded the "Medium" population threshold of 100,000 in 1990. Final Determination, at 2, AR 53. MDE's first legal error is its disregard for EPA's regulatory determination. All counties that triggered the population-based threshold for

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[6] The record contains references to "Large," "Medium," and "Small" MS4s, as well as "Phase I" and "Phase II" MS4s. For the sake of clarification, it is worth noting that Large and Medium MS4s are sometimes referred to collectively as Phase I MS4s. Regulated Small MS4s are often referred to as Phase II MS4s.

Medium MS4 status are specifically listed in the federal regulations, ***but Carroll County is not listed***. *See* 40 C.F.R. § 122.26(b)(7) (citing appendices of cities and counties that were designated as Medium MS4s based on their 1990 population). MDE's second legal error is that the population threshold for counties regulated as a Medium MS4 is *not* based on the total county population. It is triggered only if, as of 1990, more than 100,000 people living in parts of a county that were (1) unincorporated *and* (2) designated by the Census Bureau as "urbanized areas" were served by the county-owned MS4. *See* 55 Fed. Reg. at 48041; *see also* 33 U.S.C. § 1342(p)(2)(D).

MDE's misclassification has the effect of regulating Carroll County as if it were the same as large urban centers like the City of Baltimore, Montgomery County, or Prince George's County. The County's Permit is based on the same permit template as those Large MS4s. This classification is a plain error of law.

III. MDE'S REFUSAL TO ALLOW WATER QUALITY TRADING IS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Water quality trading is a market-based compliance method that allows permittees to acquire pollutant reduction credits from third parties or other permitted facilities to meet pollutant reduction requirements of their permits "at the overall lowest cost to society, and for all parties involved." EPA, Water Quality Trading

Evaluation 1-1 (Oct. 2008).[7] This approach to reducing pollutants in the Chesapeake Bay watershed has been endorsed by EPA in the Chesapeake Bay Total Maximum Daily Load 10-3 (Dec. 2010) ("An assumption of this TMDL is that trades may occur between sources contributing

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[7] *Available* at https://www.epa.gov/sites/production/files/2015-09/documents/epa-water- quality-trading-evaluation.pdf.

MARYLAND DEPARTMENT OF THE ENVIRONMENT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEMMUNICIPAL SEPARATE STORM SEWER SYSTEM DISCHARGE PERMIT

PART I. IDENTIFICATION

A. Permit Number: 11-DP-3319 MD0068331

B. Permit Area

This permit covers all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Carroll County, Maryland. This permit covers all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Carroll County, Maryland (permittee), and the following incorporated municipalities: the Towns of Hampstead, Manchester, Mount Airy, New Windsor, Sykesville, Union Bridge and the Cities of Taneytown, and Westminister (co-permittees).

C. Effective Date: December 29, 2014

D. Expiration Date: December 28, 2019

PART II. DEFINITIONS

Terms used in this permit are defined in relevant chapters of Title 40 of the Code of Federal Regulations (CFR) Parts 122-124 or the Code of Maryland Regulations (COMAR) 26.08.01, 26.17.01, and 26.17.02. Terms not defined in CFR or COMAR shall have the meanings attributed by common use.

PART III. WATER QUALITY

The permittee must manage, implement, and

enforce a stormwater management program (SWMP) in accordance with the Clean Water Act (CWA) and corresponding stormwater National Pollutant Discharge Elimination System (NPDES) regulations, 40 CFR Part 122, to meet the following requirements:

1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with Maryland's receiving water quality standards;
2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with Title 33 of the U.S. Code (USC) §1342(p)(3)(B)(iii); 40 CFR §122.44(k)(2) and (3); and
3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with all the conditions contained in PARTs IV through VII of this permit shall constitute compliance with §402(p)(3)(B)(iii) of the CWA and adequate progress toward compliance with Maryland's receiving water quality standards and any EPA approved stormwater WLAs for this permit term.

PART IV. STANDARD PERMIT CONDITIONS

A. Permit Administration

Carroll County shall designate an individual to act as a liaison with the Maryland Department of the Environment (MDE) for the implementation of this permit. The County shall provide the

coordinator's name, title, address, phone number, and email address. Additionally, the County shall, in its annual reports, submit to MDE an organizational chart detailing personnel and groups responsible for major NPDES program tasks in this permit. MDE shall be notified of any changes in personnel or organization relative to NPDES program tasks.

B. Legal Authority

Carroll County shall maintain adequate legal authority in accordance with NPDES regulations 40 CFR Part 122.26 throughout the term of this permit. In the event that any provision of its legal authority is found to be invalid, the County shall notify MDE within 30 days and make the necessary changes to maintain adequate legal authority. All changes shall be included in the County's annual report.

C. Source Identification

Sources of pollutants in stormwater runoff countywide shall be identified and linked to specific water quality impacts on a watershed basis. The source identification process shall be used to develop watershed restoration plans. The following information shall be submitted annually for all County watersheds within the permit area in geographic information system (GIS) format with associated tables as required in PART V of this permit:

1. Storm drain system: all infrastructure, major outfalls, inlets, and associated drainage areas delineated;

2. Industrial and commercial sources: industrial and commercial land uses and sites that the County has determined have the potential to contribute significant pollutants;
3. Urban best management practices (BMPs): stormwater management facility data including outfall locations and delineated drainage areas;
4. Impervious surfaces: public and private land use delineated, controlled and uncontrolled impervious areas based on, at a minimum, Maryland's hierarchical eight-digit sub-basins;
5. Monitoring locations: locations established for chemical, biological, and physical monitoring of watershed restoration efforts and the *2000 Maryland Stormwater Design Manual*; and
6. Water quality improvement projects: projects proposed, under construction, and completed with associated drainage areas delineated.

v. Improving lawn care and landscape management (e.g., the proper use of herbicides, pesticides, and fertilizers, ice control and snow removal, cash for clippers, etc.);

vi. Residential car care and washing; and

vii. Proper pet waste management.

c. Provide information regarding the following water quality issues to the regulated community when requested:

i. NPDES permitting requirements;

ii. Pollution prevention plan development;

iii. Proper housekeeping; and

iv. Spill prevention and response.

E. <u>Restoration Plans and Total Maximum Daily Loads</u>

In compliance with §402(p)(3)(B)(iii) of the CWA, MS4 permits must require stormwater controls to reduce the discharge of pollutants to the MEP. By regulation at 40 CFR §122.44, BMPs and programs implemented pursuant to this permit must be consistent with applicable WLAs developed under EPA approved TMDLs (see list of EPA approved TMDLs attached and incorporated as Attachment B).

Carroll County shall annually provide watershed assessments, restoration plans, opportunities for public participation, and TMDL compliance status to MDE. A systematic assessment shall be conducted and a detailed restoration plan developed for all watersheds within Carroll County. 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 BMP and programmatic implementation to meet stormwater WLAs included in EPA approved TMDLs.

1. <u>Watershed Assessments</u>

a. By the end of the permit term, Carroll County shall complete detailed watershed assessments for the entire County. Watershed assessments conducted during previous permit cycles may be used to

comply with this requirement, provided the assessments include all of the items listed in PART IV.E.1.b. below. Assessments shall be performed at an appropriate watershed scale (e.g., Maryland's hierarchical eight or twelve-digit sub-basins) and be based on MDE's TMDL analysis or an equivalent and comparable County water quality analysis.

b. Watershed assessments by the County shall:

i. Determine current water quality conditions;

ii. Include the results of a visual watershed inspection;

iii. Identify and rank water quality problems;

iv. Prioritize all structural and nonstructural water quality improvement projects; and

v. Specify pollutant load reduction benchmarks and deadlines that demonstrate progress toward meeting all applicable stormwater WLAs.

2. Restoration Plans

a. Within one year of permit issuance, Carroll County shall submit an impervious surface area assessment consistent with the methods described in the MDE document "Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge

Elimination System Stormwater Permits" (MDE, June 2011 or subsequent versions). Upon approval by MDE, this impervious surface area assessment shall serve as the baseline for the restoration efforts required in this permit.

By the end of this permit term, Carroll County shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the MDE document cited in PART IV.E.2.a. that has not already been restored to the MEP. Equivalent acres restored of impervious surfaces, through new retrofits or the retrofit of pre-2002 structural BMPs, shall be based upon the treatment of the WQ_v criteria and associated list of practices defined in the *2000 Maryland Stormwater Design Manual*. For alternate BMPs, the basis for calculation of equivalent impervious acres restored is based upon the pollutant loads from forested cover.

b. Within one year of permit issuance, Carroll County shall submit to MDE for approval a restoration plan for each stormwater WLA approved by EPA prior to the effective date of the permit. The County shall submit restoration plans for subsequent TMDL WLAs within one year of EPA approval. Upon approval by MDE, these restoration plans will be enforceable under this permit. As part of the restoration plans, Carroll County shall:

i. Include the final date for meeting applicable WLAs and a detailed schedule for implementing all structural and nonstructural water quality improvement projects, enhanced stormwater management programs, and alternative stormwater control initiatives necessary for meeting applicable WLAs;

ii. Provide detailed cost estimates for individual projects, programs, controls, and plan implementation;

iii. Evaluate and track the implementation of restoration plans through monitoring or modeling to document the progress toward meeting established benchmarks, deadlines, and stormwater WLAs; and

iv. Develop an ongoing, iterative process that continuously implements structural and nonstructural restoration projects, program enhancements, new and additional programs, and alternative BMPs where EPA approved TMDL stormwater WLAs are not being met according to the benchmarks and deadlines established as part of the County's

3. Public Participation

Carroll County shall provide continual outreach to the public regarding the development of its watershed assessments and restoration plans. Additionally, the

County shall allow for public participation in the TMDL process, solicit input, and incorporate any relevant