In the Matter of Chaney Enterprises Limited, et al	*	**IN THE**
	*	**CIRCUIT COURT**
For Judicial Review of the Decision of the State of Maryland, Department of the Environment	*	**FOR ANNE ARUNDEL COUNTY**
In the Case of: State of Maryland, Department of the Environment's Notice of Final Determination To Issue General Permit for Discharges from Mineral Mines, Quarries, Borrow Pits, and Concrete and Asphalt Plants, State Permit No. 10 MM, National Pollution Discharge Elimination System No. MDG49	*	**CASE NO.: C-10-151440**
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BACKGROUND

This matter came before the Court on November 22, 2010, regarding Chaney Enterprises, Limited and Lafarge Mid-Atlantic, LLC's (collectively Petitioners) Petition for Judicial Review of the Maryland Department of the Environment's (Respondent, when referring to the Party, otherwise, MDE) Notice of Final Determination To Issue General Permit for Discharges from Mineral Mines,

Quarries, Borrow Pits, and Concrete and Asphalt Plants, State Permit No. 10 MM, National Pollution Discharge Elimination System No. MDG49.

Chaney Enterprises, Limited (Chaney) owns 14 concrete manufacturing plants in Maryland covered by the current permit. Two of the plants are located in Anne Arundel County. Chaney also owns 15 mining operations covered by the current permit. Lafarge Mid-Atlantic, LLC (Lafarge) owns 14 facilities in Maryland. Five of the facilities are concrete plants, one of which is located in Anne Arundel County.

A discharge permit is needed in order to legally discharge pollutants into the State's surface waters. The National Pollutant Discharge Elimination System (NPDES) is the regulatory program central to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1972), popularly known as The Clean Water Act (CWA). CWA Section 301(a) prohibits the discharge of any pollutant without a permit issued by the Environmental Protection Agency (EPA).

The EPA, pursuant to the CWA, has the authority to delegate the permit program to state governments. The MDE has been approved by the EPA as meeting the requirements of federal law to implement the permit program in Maryland. The MDE is authorized to issue both State discharge permits and federal permits under the NPDES. COMAR 26.08.04.07.

The MDE issues individual discharge permits, which are specific to an individual discharge. It also issues general discharge permits for the purpose of regulating certain categories or classes of discharges that are susceptible to regulation under common terms and conditions. The General Permit for Discharges from Mineral Mines, Quarries, Borrow Pits, and Concrete and Asphalt Plants, State Permit number 10 MM (NPDES number MDG49), the subject of this challenge, is a general discharge permit.

The first permit for Petitioners' facilities was issued in 1995. Upon expiration, it was replaced with the current permit, which expired in 2005. The new permit replaces the current permit.

On November 6, 2009, Respondent's notice of Tentative Determination was published in the Maryland Register, and on November 6 and November 13, 2009 in daily and weekly newspapers of general circulation in 14 Maryland counties. These notices contained statements regarding the 30 day period to submit written comments and the availability of a public hearing upon written request.

A public hearing was held on December 7, 2009 and Respondent received comments adverse to Respondent's tentative determination. Respondent also received written comments on the draft permit from the public and industry until the close of the notice and comment period on December 13, 2009.

Following consideration of the written comments and transcribed oral comments, Respondent published a notice of final determination. This notice explained changes or updates between the prior general discharge permit and Respondent's final determination consisting of toxicity testing, more stringent total suspended solids, wet weather permit limits and applicable parameters, the insertion of a definition for "freeboard" to clarify the prevention of sediment pond overflows, and other revisions.

Respondent's Motion to Strike Additions to the Record

Pursuant to Md. Code Ann., Envir. § 1-601(d)(1):

> Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:
>
> (i) The objections were not reasonably ascertainable during the comment period; or
>
> (ii) Grounds for the objections arose after the comment period.

In addition, § 1-606 specifies the contents of the record to which any judicial review shall be limited. § 1-606(c) states:

> [a]ny judicial review of a determination provided for in accordance with § 1-601 of this subtitle...shall be limited to a record compiled by the Department or Board, consisting of:
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> (1) Any permit or license application and any data submitted to the Department or Board in support of the application;

> (2) Any draft permit or license issued by the Department or Board;
> (3) Any notice of intent from the Department or Board to deny the application or to terminate the permit or license;
> (4) A statement or fact sheet explaining the basis for the determination by the Department or Board;
> (5) All documents referenced in the statement or fact sheet explaining the basis for the determination by the Department or Board;
> (6) All documents, except documents for which disclosure is precluded by law or that are subject to privilege, contained in the supporting file for any draft permit or license;
> (7) All comments submitted to the Department or Board during the public comment period, including comments made on the draft application;
> (8) Any tape or transcript of any public hearings held on the application; and
> (9) Any response to any comments submitted to the Department or Board.

The statute unambiguously states which documents and records shall constitute the record.

During oral arguments, Respondent urged the Court to consider only those comments and/or objections made specifically by Petitioners during the permit issuance process and to disregard comments made by other entities at the public hearing or through written comments submitted to Respondent. However, Md. Code Ann., Envir. §1-606(c)(7) specifically indicates "[a]ll comments submitted to the Department or Board during the public comment period, including comments made on the draft application" shall be part of the record. As a result, the Court will not limit its review of comments or objections to those of Petitioners.

Petitioners filed an 'Addition to the Record' on November 17, 2010, seeking to include in the record for review a Notice of Tentative Determination (dated 11/06/09) and a Notice of Final Determination (dated 03/26/09). Respondent filed a motion to strike these additions on December 6, 2010.

The Court will not allow the addition of the notice of tentative determination because it is not listed as a permitted part of the record under §1-606(c).

Pursuant to COMAR 26.08.04.08(I)(2)(a)-(d), the Department shall prepare a final determination if:

> (a) Written comments adverse to the tentative determination were received by the Department within 30 days after publication of the notice of tentative determination;
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> (b) Comments adverse to the tentative determination were received in writing at, or within 5 days after, a public hearing held under the provisions of § H of this regulation;
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> (c) Comments adverse to the tentative determination were received orally at the public hearing conducted under this section and the Department prepared a transcript of the comments made at the hearing; or
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> (d) The final determination is substantively different from the tentative determination and person who may be aggrieved by the final determination have not waived, in writing, their right to request a contested case hearing.

In this case, a Notice of Final Determination to Issue the permit was prepared and published. This notice indicated the MDE made the decision to reissue the permit with "significant revisions from the tentative determination..."

Curiously, § 1-606(c) does not provide either for the notice of final determination or the final permit itself to be included in the record for review. The precise language of § 1-606(c) "limits" the record to the documents listed in (1)-(9). Although the Court will not consider the notice of final determination, the Court must review the final permit in order to render a decision and determine whether objections to certain permit provisions were reasonably ascertainable during the public comment period.

Standard of Review

Md. Code Ann., Envir. § 1-606 applies to judicial review of decisions regarding permits to discharge pollutants to waters of the state.[1] At the hearing, the Court inquired whether the Administrative Procedure Act (APA) applies to this case. Respondent stated the APA would apply if not trumped by Title 1, Subtitle 6 of the Environment Article. Title 1, Subtitle 6 does not refer to any standard by which the court shall review decisions regarding permit issuance, denial, or renewal. Furthermore, the 2009 amendments to the statute eliminated the contested case hearing process. § 1-601(b) explicitly states "[f]or permits listed under subsection (a) of this section, a contested case hearing may not occur."[2]

[1] See Md. Code Ann., Envir. § 1-601(a)(3) & § 9-323, *et seq.*

[2] Because § 1-601(a)(3) describes "[p]ermits to discharge pollutants to waters of the State issued pursuant to § 9-323 of this article," § 1-601(b) applies in this case. Although the statute contains the word "may" instead of the word "shall," the Court determines the intent was to completely preclude contested hearings.

As the contested case hearing process has been eliminated for permit decisions such as this, the Court will not apply the APA for purposes of determining the appropriate standard of review because the judicial review provision, pursuant to Md. Code Ann., St. Gov't § 10-222, only applies in contested cases. However, Maryland case law indicates the standard for judicial review is essentially the same whether proceeding under the APA or the court's inherent power to review administrative decisions.

In *Hurl v. Board of Education*, 107 Md. App. 286 (1995), the Court of Special Appeals explained, although the parties in that case did not view the State Board of Education's decision as a contested case, the standards of "judicial review of agency decisions are essentially the same whether proceeding under the APA or pursuant to our inherent power to review administrative actions."[3] Therefore, the Court of Special Appeals found it appropriate to look to cases decided under the APA for guidance regarding the proper standard of review.[4]

The court's role in reviewing the decision of an administrative agency is a narrow one.[5] When an agency's findings of fact are challenged, the evidence is

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[3] *See Hurl v. Board of Education*, 107 Md. App. 286, 305 (1995); *see also, Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 255-56 (1974) (stating "[n]evertheless, it is clear in Maryland that even 'where [a] statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious, or unreasonable.' (citation omitted)...Thus where the scope of review is not specified in the statute, the substantial evidence test has been followed" (citations omitted)).

[4] *Hurl*, 107 Md. App. at 305.

[5] *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 67 (1999).

reviewed under the substantial evidence test.[6] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support an agency's conclusion."[7] Agency decisions unsupported by substantial evidence are "not within the exercise of sound administrative discretion, but are arbitrary and illegal acts."[8] The court does not make its own findings of fact or substitute its own judgment for that of the agency, but may determine whether the agency made an error of law.[9] The court is "obligated to view the 'agency's decision in the light most favorable to the agency since its decisions are prima facie correct and carry with them the presumption of validity.'"[10]

Challenges to General Permit Provisions

Petitioner challenges five provisions of the general discharge permit: 1) reporting of concrete admixtures; 2) biomonitoring requirements; 3) biomonitoring at internal points; 4) one foot freeboard requirement; and 5) wet weather total suspended solids (TSS) levels.

1. Concrete Admixtures

Special Condition IV.C of the General Permit states:

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[6] *Hurl*, 107 Md. App. at 305.
[7] *Id.* (citing *Dept. of Human Resources v. Thompson*, 103 Md. App. 175, 190 (1995)).
[8] *Id.* at 306 (citing *Dept. of Health v. Walker*, 238 Md. 512, 523 (1965) and *Hackley v. Baltimore*, 70 Md. App. 111, 116 (1987)). *See also*, *Hurl*, 107 Md. App. at 306 (defining 'arbitrary' as "including something done 'without adequate determining principle,' 'nonrational,' and 'willful and unreasoning action, without consideration and regard for facts and circumstances presented.' (citing BLACK'S LAW DICTIONARY (6th ed. 1990)).
[9] *Baltimore Lutheran High School Ass'n. v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985). *See also*, *Anderson v. Dept. of Safety & Corr. Servs.*, 330 Md. 187 (1993).
[10] *Bereano v. State Ethics Comm'n.*, 403 Md. 716, 732 (2008) (citing *Anderson*, 330 Md. at 213 and *Bulluck v. Pelham Woods Apts.*, 283 Md. 505, 513 (1978)).

> 1. The applicant shall submit with the NOI the names of wastewater treatment additives and concrete admixtures currently in use at the facility and potentially discharging to surface water of the State, and facility specific estimates of concentrations of each that will exist in the effluent.
>
> 2. No later than 30 days before changing or adding any wastewater treatment chemicals or concrete admixtures, the permittee shall submit the names of the new products to the Department.
>
> 3. Accompanying the product list for wastewater treatment additives, except inorganic acids, aluminum potassium sulfate, and ferric chloride, shall be corresponding aquatic toxicity data, which may be found on http://cfpub.epa.gov/ecotox/, and manufacturer's information on chemical composition of the product.

Petitioners claim the new permit requirements are unreasonably burdensome because they must submit the names of wastewater treatment chemicals or additives and concrete admixtures currently used at their facilities that may potentially be discharged to surface waters of the State, and provide facility-specific estimates of concentrations of each chemical that will exist in the effluent.[11]

Furthermore, Petitioners claim the Department has acted arbitrarily and capriciously because the Department provides no rationale for such a requirement and lacks the authority to require the chemical and additive information.

[11] Effluent refers to the discharge, which is a mixture of water and other materials. The water body receiving the effluent is commonly referred to as the "receiving waters."

Petitioners argue any concentration of admixtures in the discharge would be extremely minute due to the processes involved in creating the concrete and washing out any concrete remaining in the trucks.

During oral argument, Petitioners added there would only be discharge in the event of a heavy storm and Respondent has not provided any evidence those chemicals are discharged into State waters. Other written objections submitted to Respondent claimed that facility-specific estimates would be "extremely difficult" to calculate because admixture usage is dependent on individual clients and is not consistent "throughout the day, week, season." (R. at 1977)

Respondent argues the identification and concentration requirements are a way to protect state water quality standards and ensure compliance with all permit conditions. In its written responses to comments regarding the burdensome nature of this requirement, the Department stated, "MDE does require similar information for additives that are likely to be present in discharges, even in very small quantities, from applicants for individual permits. It is MDE's responsibility to prevent the discharge of toxic wastewaters and make sure that permitted discharges do not cause toxicity in receiving streams." (R. at 2084)

In fashioning this requirement, Respondent analyzed provisions regarding reporting requirements in other states such as Washington, Virginia, and Wisconsin. (R. at 933, 1000, 1064, 1143, and 1398)

Despite the Court viewing Respondent's decision in the "light most favorable to the agency"[12] and despite Respondent having stated concrete additives can be toxic in very small amounts, the Court finds this is a general conclusory statement which is not sufficient to provide the type of substantial evidence needed in order to support Respondent's new requirements. Respondent has not provided data indicating which additives are present in Petitioners' discharge, the levels at which such additives are toxic to receiving waters of the State, or even an estimate of the amount of additives that may be present in the discharge. As a result, the requirement to report concrete admixtures is not supported by substantial evidence.

2. Biomonitoring Requirements

Petitioners are also challenging Special Condition IV, subsections D, E, and F of the General Permit. Those sections state:

> D. Concrete Admixtures
>
> 1. Any permittee using any concrete admixture and having a potential discharge shall collect a sample to perform biomonitoring at the last pond or holding basin prior to the effluent, as described in Part IV.E, if:
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> > a. The facility has discharged at least twice during the previous year; and
> > b. The facility will be in operation at least twenty days during the current year.
>
> A single company operating more than three concrete facilities within Maryland that meet (sic) these criteria

[12] *Bereano*, 403 Md. at 732.

may choose to perform biomonitoring at any three of those facilities and will not be required to perform the testing at more than three facilities.

2. A facility that recycles all of its wastewater is not considered to have a potential discharge.

E. Biomonitoring Program for Concrete Admixtures

1. Within three months of the effective date of the permit, the permittee shall submit to the Department for approval a study plan to evaluate wastewater toxicity which identifies an internal monitoring point for biomonitoring. The study plan should include at a minimum a discussion of: a. wastewater and production variability; b. sampling & sample handling; c. source & age of test organisms; d. source of dilution water; e. testing procedures/experimental design; f. data analysis; g. quality assurance/quality control; h. report preparation; i. testing schedule; j. additional steps such as pH stabilization to approximate treated effluent.

2. The testing program shall consist of acute testing during one quarter, and chronic testing during a different quarter of the first year of the permit, following the Department's acceptance of the study plan.

a. Each quarterly test shall include the Ceriodaphnia survival and reproduction test and the fathead minnow larval survival and growth test.

b. If the receiving water is estuarine the permittee shall substitute estuarine species for those species specified above. Approved estuarine species for chronic testing are sheepshead minnow, inland silversides, and mysid shrimp. In all cases, testing must include one vertebrate species and one invertebrate species.

3. (omitted)[13]

4. Test results shall be submitted to the Department within one month of completion of each set of tests.

5. Test results shall be reported in accordance with MDE/WMA "Reporting Requirements for Effluent Biomonitoring Data," 3/21/03.

6. As a minimum, the reported chronic results shall be expressed as NOEC, LOEC, ChV, and IC25.

7. If significant mortality occurs during the first 48 hours of the chronic tests, 48-hour LC50s shall be calculated and reported along with the chronic results.

8. If testing is not performed in accordance with the Department-approved study plan, additional testing shall be required by the Department.

9. Biomonitoring definitions (omitted)

F. Biomonitoring Results Evaluation

1. Biomonitoring Results – Depending on the level and frequency of acute and chronic toxicity outcomes, the Department may require through written notification without reopening the permit a second round of testing to be performed during the third year of the permit which does not exceed the first year's testing. The Department may also reopen the permit as a major permit modification to establish additional permit conditions regarding biomonitoring or toxicity reduction evaluation.

2. (omitted)

[13] Subsections were omitted in an attempt to save space and are in no way relevant to the Court's decision.

Petitioners claim Respondent has acted outside of its legal authority in its permit requirement that concrete facilities using concrete admixtures, and having a potential to discharge, must collect samples for the purpose of performing whole effluent toxicity (WET), also known as biomonitoring, at the last pond or holding basin prior to discharge.

Petitioners challenge the biomonitoring requirements because they believe Respondent has not met its burden of sufficiently proving there is a need for biomonitoring. They argue Respondent has not shown toxicity for the residual discharge waters and, therefore, the Petitioners should not be required to prove a negative; they should not be required to prove their discharge waters are non-toxic. Petitioners allege the biomonitoring requirement places an impossible burden on the industry to prove its materials are not toxic.

Petitioners suggest Respondent is obligated to prove that a permittee's effluent is toxic prior to establishing biomonitoring conditions in a discharge permit. Respondent contends biomonitoring is simply a method employed by the MDE to assess the potential, if any, for toxicity in a permittee's discharge or wastewater.

At the public hearing, Mr. Thornburg, (Thornburg) representing LaFarge North America, called into question the need to monitor "effluent containing extremely diluted concentrations of admixtures." (R. at 2067) In addition, he

questioned why the "Department determined it necessary and appropriate to conduct such monitoring under the terms and conditions of this proposed permit, when the historical use of such ingredients, including any suspected aquatic toxicity, has never been evaluated or discussed with the private sector as a Departmental concern." (R. at 2067)

He continued, stating "no studies or other evaluations have been undertaken to quantify or otherwise understand the concentrations of admixtures in the effluent of concrete production facilities after multiple dilution events," and, therefore, the industry can only conclude that the biomonitoring requirement for suspected aquatic toxicity is "based on subjective and arbitrary judgment alone." (R. at 2070) Thornburg described as "illogical," the fact that industry must bear the burden of proof to demonstrate non-toxicity. (R. at 2071)

Similar remarks were made in written comments and objections submitted to the MDE during the comment period. Representative of comments in this area include those made by Advantage Environmental Consultants, LLC (Advantage), a professional environmental consulting firm providing regulatory compliance services. Advantage explained the biomonitoring program would be virtually impossible because "each concrete mix uses a unique blend of cement, water, and chemical admixtures...too many variables exist to be able to test every combination of admixtures which are further combined with varying amounts of water and

cement...It would be impractical to complete such a study, since each day's effluent will vary from the previous days *ad infinitum*." (R. at 1964)

Moreover, Advantage explained any monitoring effort "without specific parameters to define 'non-toxic' will be inconclusive," will result in the loss of expenses and labor costs, and there will be "no guarantee that the MDE would accept the results and concur with the results of the study." (R. at 1964)

Respondent explains the purpose of such testing is not to establish effluent limitations, but to determine whether a discharge may present an unacceptable risk to the receiving stream.

Petitioner points to federal and state regulations stating before requiring bio-monitoring, the Department must make a determination that the effluent at issue contains the toxic pollutant and identify the chemicals of concern.[14]

However, COMAR 26.08.03.07(D)(1)(d) states:

> The Department shall require any permittee who has a discharge that falls into one of the following categories to perform biological or chemical monitoring for toxic substances:
>
> (d) *A discharger whose discharge the Department has reason to believe may cause toxicity as determined by an evaluation of manufacturing processes, indirect discharges, treatment processes, effluent or receiving water data, or other relevant information.* (emphasis added)

[14] *See* 40 C.F.R. 122.44, COMAR 26.08.03.07A(2)(A) & 26.08.04.07-09.

Respondent argues it is requiring such biomonitoring because the discharge that includes concrete additives used by Petitioners may be toxic. Respondent stated at the hearing, the burden may, in fact, be put on the permittee to show the discharge is not toxic. In addition, Respondent states the requirement of biomonitoring is within the Department's authority in this case because the mixed compounds can pose a hazard to aquatic life and the combined effects of multiple pollutants may also be problematic. (R. at 2085-06)

The Court does not agree with Petitioners' circular argument regarding conditions precedent to bio-monitoring requirements. Petitioners essentially argue Respondent cannot test for toxicity of discharge waters until Respondent proves the toxicity of discharge waters. COMAR 26.08.03.07(D)(1)(d) mandates biological or chemical testing when the Department of the Environment has reason to believe there may be a toxic discharge to the receiving waters of the State. The use of the word 'may' in this regard is significant. There is no regulatory requirement Respondent prove toxicity in order to require biological or chemical monitoring.

Even though Respondent need not prove toxicity in order to require biomonitoring, there must be some underlying reason to believe the discharge may have toxic effects on receiving waters, otherwise the more stringent requirements would be arbitrary. In the Court's view, the Material Data Safety Sheets included

in the record and Respondent's conclusion that certain additives may be toxic is not adequate to support Respondent's decision to require biomonitoring. Although it is certainly relevant to consider other states' requirements in fashioning permit provisions, Respondent has not provided substantial evidence to justify the new permit biomonitoring requirements.

3. Bio-monitoring at Internal Monitoring Points

In addition, Petitioners challenge Special Condition IV.D.1, (see pg. 13 above) the requirement that biomonitoring be done at internal monitoring points. Petitioners argue this requirement exceeds the scope of the MDE's authority and any measurements would not be representative of actual 'discharge.' Furthermore, Petitioners claim biomonitoring at internal points is a significant change from the proposed permit, and, therefore, their objections to this provision were 'not ascertainable.'

Respondent counters with the suggestion that internal monitoring points are relevant to WET testing and Petitioners have failed to cite any legal authority which prohibits the Department from using such areas for biomonitoring. Respondent argues COMAR 26.08.03.07(D)(1)(d) "suggests" monitoring points not discharging directly to waters of the state are appropriate for the Department to consider. However, this regulation merely states the Department can require biomonitoring if the Department has reason to believe the discharge "may cause

toxicity as determined *by an evaluation* of manufacturing processes, indirect discharges..." (emphasis added). The regulation contemplates an evaluation of indirect discharges, as one of multiple possible considerations, before requiring biological or chemical testing for toxic discharges by the permittee.

In any event, the draft permit does not specify an exact location where biomonitoring would be required to take place. As a result, Petitioners did not have an ability to comment or object to biomonitoring at internal monitoring points. Therefore, objections regarding the location of biomonitoring were not reasonably ascertainable during the comment period. As a result, pursuant to Md. Code Ann., Envir. § 1-601(d)(2), this objection shall be remanded to the MDE for consideration.

4. Freeboard Requirement

Special Condition IV.K. of the permit prescribes the manner in which Petitioners are required to maintain their settling ponds, basins, or sediment traps at their facilities. In relevant part, the final permit states:

> The permittee shall remove sediments from settling ponds, basins, or traps before the accumulation at the halfway point between the inlet and outlet reaches one half the depth of the basin. The permittee shall also maintain at least one foot freeboard in all basins and ponds at all times. The permittee shall establish a record of the design depth of the basin and provide a means to measure sediment accumulation.

As stated above, Md. Code Ann., Envir., § 1-601(d)(1) states:

> Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:
>
> (i) The objections were not reasonably ascertainable during the comment period; or
>
> (ii) Grounds for the objections arose after the comment period.

In this instance, the only comment concerning the freeboard requirement was raised by Barry L. Miller (Miller) of Redland Brick, Inc. Miller, in written comments submitted to Respondent, stated "'Freeboard' should be defined in the section with other defined terms." (R. at 2001) In response to this comment, Respondent stated "The following definition has been added: 'Freeboard' means the height above the water level and below the overflow level of a pond or other structure." (R. at 2092)

Petitioners argue the freeboard definition included in the final permit is a significant change to the permit. However, Petitioners were on notice of the one-foot requirement in Special Condition IV.J of the draft permit. That section indicated permittees "shall maintain at least one foot between the top of the sediment and the overflow point in all basins and ponds." (R. at 18) Although Petitioners described as "significant," the change from "top of the *sediment*," as indicated in the draft permit, to "top of the *water level*," as indicated in the 'freeboard' definition in the final permit, Petitioners have failed to explain why this

difference is significant. It is not clear what the respective measurements would be in either case.

As the draft permit contained a provision detailing a one foot requirement from the top of the sediment to the overflow point of basins and ponds, any objections to this requirement were reasonably ascertainable during the comment period. No substantive objections were raised during the requisite comment period and, therefore, the Court will not consider this objection pursuant to Md. Code Ann., Envir. § 1-601(d)(1)(i) & (ii).

5. Wet Weather Total Suspended Solids Levels

Petitioners argue the wet weather total suspended solids numeric effluent limitations established in Special Condition IV.L are not supported by data.

In written comments, Lafarge stated "MDE has not considered the improved settling systems currently in use nor has it offered any justification for changing the analytical methodology and new effluent limit." (R. at 1961) In addition, Lafarge explained the new effluent limits would have the unintended consequence of "requiring chemical additives, or mechanical removal to achieve" the new limits, resulting in "the use of technologies that will conflict with various other MDE initiatives," such as pollution control and greenhouse gas emissions. (R. at 1961)

Respondent argues substantial evidence exists in the form of a fact sheet describing the rationale and manner in which the MDE intended to regulate suspended solids. (R. at 122-24) Respondent explained there are no EPA effluent guidelines for TSS regarding discharges from concrete plants or asphalt plants. (R. at 122) Respondent reviewed general permits from other states that imposed TSS effluent limitations and the general permit's 70 mg/l limit is within the same range as other states. (R. at 123)

In the record, Respondent indicated the proposed effluent limitation guidelines (ELGs) for wet-weather TSS are "borrowed from the surface coal mining ELGs." (R. at 123) Respondent justifies this 'borrowing' because although "coal regions have their unique geology, with their shale and sandstone mix, they represent a good average between the solid rock of some limestone quarries and the unconsolidated clays and sands of the coastal plain." (R. at 123)

Respondent explains wet weather effluent limitations in the current permit, and some limits in the proposed permit, are derived from the 'Frontier' Report.[15] Respondent is proposing to end the practice of relying on the 'Frontier' Report because "the time is long overdue to either ensure reasonable settling capacity or begin working the quarries so that they can tolerate flooding for a few days while the water settles." (R. at 123)

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[15] *Suspended Solids Removal in the Crushed Stone Industry*, by Dolores Funke and P. Michael Terlecky, Frontier Technical Associates, Inc., (1981).

However, Respondent fails to provide support for its claim that the limits contained in the current permit are insufficient. Respondent points to no additional studies, models, or other data indicating the necessity or reasonableness of the new limits. Pointing to other states' levels does not constitute an adequate basis to justify the proposed changes and Respondent fails to explain why the practice of relying on the 'Frontier' Report should come to an end. Although this is a highly technical and specialized area, Respondent has failed to provide substantial evidence for the wet weather effluent TSS limitation changes proposed in the new permit.

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	*	

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

ORDER

In light of the foregoing, it is this 21st day of January, 2011, by the Circuit Court for Anne Arundel County, hereby

ORDERED that Special Condition IV.C is hereby REMANDED to the Maryland Department of the Environment for further proceedings consistent with the mandate of this opinion; and it is further

ORDERED that Special Condition IV.D and IV.E is hereby REMANDED to the Maryland Department of the Environment for further proceedings consistent with the mandate of this opinion; and it is further

ORDERED that Special Condition IV.D.1 is hereby REMANDED to the Maryland Department of the Environment for consideration of objections; and it is further

ORDERED that the MDE's permit provision Special Condition IV.K is AFFIRMED; and it is further

ORDERED that Special Condition IV.L is hereby REMANDED to the Maryland Department of the Environment for further proceedings consistent with the mandate this opinion.

PAMELA L. NORTH
JUDGE

c: Stephanie Cobb Williams, Esq.
Timothy R. Henderson, Esq.