KENNETH T. BOSLEY, ET AL.	*	**IN THE**
	*	**CIRCUIT COURT**
Petitioners,		
	*	**FOR**
v.		
	*	**BALTIMORE COUNTY**
MARYLAND DEPARTMENT OF THE ENVIRONMENT, ET AL.	*	**CASE NOS.: 03-C-14-5417**
		03-C-14-10780
	*	**03- C-14-7760**
Respondents.		**03-C-14-7759**
	*	**03-C-14-10741**
		03-C-14-5438

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

ORDER

This matter came before this Court on six consolidated Petitions for Judicial Review. This Court considered the Petitioners' Memoranda, the Respondents' Opposition Memoranda and the Petitioners' Reply Memoranda thereto, the case files, the Record, and the Hearing before this Court. For reasons more fully set forth in this Court's Memorandum Opinion, it is this 30th day of April, 2015, by the Circuit Court for Baltimore County; hereby,

ORDERED, that this case is remanded to MDE for compliance with Section 204(b) of the Environment Article; and further,

ORDERED, that this case is remanded in order for MDE to revise the Permit to comply with State water quality regulations and the Clean Water Act; and further,

ORDERED, this case is remanded in order for MDE to comply with the Maryland Historical Trust Act.

JUSTIN J. KING, JUDGE
CIRCUIT COURT FOR BALTIMORE COUNTY

True Copy Test
JULIE L. ENSOR, Clerk
Per _____
Assistant Clerk

FILED MAY 4 2015

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MEMORANDUM OPINION

INTRODUCTION

This matter comes before the Court on six consolidated Petitions for Judicial Review[1] challenging Maryland Department of the Environment's (hereinafter "MDE") decision to issue NiSource, Inc. and Columbia Gas Transmission, LLC (hereinafter "Columbia") a Nontidal Wetlands and Waterways Permit, number 12-NT-0433/201261660 (hereinafter "the Permit"), and a Water Quality Certification, number 12-NT-0433/201261660 (hereinafter "Certification").

Columbia proposed extending an existing 26-inch natural gas pipeline, Line MB, approximately 21.1 miles from the Owings Mills Metering and Regulating Station in Baltimore County to the Rutledge Compressor Station in Harford County (hereinafter "Project").[2] As the Project involves a natural gas pipeline, the Federal Energy Regulatory Commission's (hereinafter

[1] On May 21, 2014, Petitioners Bosley, Hayfield, and Gunpowder Riverkeeper filed Petitions for Judicial Review in the Circuit Court for Baltimore County. Petitioners Bosley and Riverkeeper also filed identical Petitions in the Circuit Court for Harford County. On July 21, 2014, Petitioner Merryman filed a Petition for Judicial Review in the Circuit Court for Baltimore County. The Harford County Petitions were transferred to the Circuit Court for Baltimore County. By court Order on October 23, 2014, the six cases were consolidated into one case, 03-C-14-5417.

[2] R. at 3.

"FERC") approval of the route is needed.[3] In addition, the Project impacts nontidal wetlands—identified as critical natural resources[4] —and thus requires approval from the United States Army Corps of Engineers (hereinafter "Army Corps")[5] and the Maryland Department of the Environment[6] (hereinafter "MDE"). Ultimately, Columbia was successful in attaining all required approvals.

After review of the Maryland Department of the Environment's decision to issue the Permit and Water Quality Certification, this Court finds the Permit sets forth general rather than specific requirements, rendering it impossible for this Court to determine whether the Permit complies with State and federal water quality regulations. In addition, the Permit fails because it did not afford a meaningful opportunity for public notice and comment. Finally, there is not substantial evidence on the record to support MDE's determination that the Maryland Historic reviewed the Project and determined that there would be no adverse impacts on historic properties. For reasons more fully explained below, this Court will remand the Permit to MDE to be revised to comply with State water quality regulations, the Clean Water Act, the Maryland Historical Trust Act, and the public notice and comment procedures of the Environment Article.

FACTUAL & PROCEDURAL HISTORY

On October 22, 2012, Columbia applied to FERC for a Certificate of Public Convenience and Necessity, which provides approval of the natural gas pipeline route and authority to acquire private property by eminent domain. Columbia's project involves constructing a pipeline to

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[3] Natural Gas Act, 15 U.S.C. § 7(c).
[4] Nontidal wetlands are more "commonly referred to as marshes, swamps, bogs, and bottomland forests." Patuxent Riverkeeper v. Md. Dep't Envir., 422 Md. 294, 296 n.3 (2011).
[5] The Clean Water Act charges Army Corps with administering the federal program for activities that impact the navigable waters of the United States. Clean Water Act, 33 U.S.C. § 1344(a).
[6] The 1977 amendments to the Clean Water Act give states the option of providing state permits for activity impacting the waters of the state. Maryland's General Assembly charges MDE with the authority to administer the State's comprehensive program to protect the waters of the State.

connect two portions of Line MB, which already exists south of the Owing Mills Metering and Regulating Station and north of the Rutledge Compressor Station. The Project would close that gap, by constructing and installing a pipeline running between the two already existing portions. The pipeline will run parallel to Line MA and add an element of redundancy for Columbia's natural gas customers. In addition, the Project involves (1) construction of two 26 inch mainline valves on Line MB, to be installed parallel to the existing mainline valves; (2) installation of a bi-directional pig launcher and receiver; and (3) installation of a second bi-directional pig launcher/receiver at the Rutledge Compressor Station.[7] Columbia proposed to cross all waterways along the route using open-cut trenching.[8] FERC issued the Certificate on November 21, 2013, approving the route proposed by Columbia.[9]

During the pendency of the FERC application, Columbia filed a Joint Application (hereinafter "Application") to MDE and Army Corps on November 13, 2012, requesting approval to conduct regulated activity in nontidal wetland buffers, the 100-year nontidal floodplain, and streams. After reviewing Columbia's application for completeness, MDE issued

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[7] R. at 5.

[8] Open-cut trenching (also called "dry ditch") involves clearing a pathway for the pipeline and excavating a trench under the wetland or waterbody and placing the pipeline within the trench, then backfilling the trench and restoring the affected area. R. at 687.

[9] R. at 7031. The FERC Certificate explains:

> While Columbia has not proposed HDD [horizontal directional drilling], Columbia is still consulting the Army Corps of Engineers, the Maryland DE [MDE], and the Maryland DNR about using HDD at specific waterbody crossings. The Army Corps of Engineers states that, in consultation with the Maryland DNR and the Maryland DE, it is currently evaluating the practicability of trenchless construction (e.g. HDD) at several crossings location and that the Clean Water Act's Section 404 probably requires HDD at certain streams/wetlands. Thus, although Columbia's proposed waterbody crossing and mitigation plans are consistent with our policies, the Army Corps of Engineers and the Maryland DE might require additional measures. If these agencies require Columbia to complete certain waterbody/wetland crossing using HDD, Columbia must file a variance request pursuant to Appendix B's Environmental Condition 1.

Columbia Gas Transmission, LLC, 145 FERC ¶ 61,153 at 20 (2013).

a 45-day letter[10] to Columbia on December 20, 2012.[11] The letter informed Columbia that their Application was incomplete and additional information was required to complete the Application. MDE required "additional evidence the regulated activity will not cause or contribute to a degradation of water quality standards,"[12] as required by the Code of Maryland Regulations (hereinafter "COMAR"),[13] and an erosion and sediment control plan. Specifically, MDE requested that Columbia incorporate the *2011 Maryland Standards and Specifications for Soil Erosion and Sediment Control* (the SESC Standards Manual) and *Maryland's Waterway Construction Guidelines* into its application material.[14] Columbia provided this information on January 31, 2013.[15] In addition, throughout the Application review period, MDE requested Columbia prepare comparisons of the horizontal directional drilling method (hereinafter "HDD")[16] at some of the stream crossings compared to Columbia's proposed method of open-cut trenching.[17]

Columbia and Army Corps provided notice of the Project, by personal service or by certified mail, to contiguous property owners and public officials.[18] MDE published the Public Notice on its website from April 15, 2013 to May 14, 2013.[19] Public notices were also published

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[10] The letter is called a "45-day letter" because the applicant has 45 days in which to respond with additional information. Resp't Columbia Opp'n to Gunpowder Riverkeeper's Pet. for Judicial Review at 2–3 (hereinafter cited as "Resp't Columbia Mem. Riverkeeper").
[11] R. at 3958–67.
[12] R. at 3958.
[13] R. at 4520; MD. CODE REGS. 26.23.0.D(21); Resp't Columbia Opp'n to Bosley's Pet. for Review at 3 (hereinafter cited as "Resp't Columbia Mem. Bosley").
[14] R. at 3960.
[15] R. at 4338 & 4342.
[16] HDD is trenchless construction to install pipelines under streams, which involves excavating an entry and exit point beneath waterways. R. at 3745.
[17] *See supra* note 8 defining open-cut trenching.
[18] MD. CODE ANN., ENVIR. § 5-204(b) (hereinafter cited as "ENVIR.") "Applicants shall ascertain the names and addresses of all current owners or property contiguous to the parcel upon which the proposed activity will occur and personally or by certified mail service notice upon each owner." *Id.*
[19] R. at 4933.

in *The Baltimore Sun* on April 18, 2013; *The Aegis* on April 20, 2013; *The Jefferson* on April 23, 2013; and *The Avenue* on May 2, 2013.[20] In addition, MDE mailed notices to the interested persons list[21] for this Application and the general subscription mailing list maintained by the Department.[22] The notices advised a public comment period would run from April 15, 2013 to June 7, 2013,[23] and that two public informational hearings would be held—one on May 21, 2013 at Fallston High School[24] and one on May 23, 2013 at Stevenson University.[25] The notices briefly described the Project's purpose, location, the work involved, and the laws applicable to MDE's review of the Application.[26] The Public Hearings were held jointly by MDE and Army Corps, and between the two hearings, approximately 100 people attended. During the comment period, MDE received 30 written comments.[27] After the public comment period closed on June 7, 2013, MDE continued to accept and consider comments received through March 2014.[28]

In order for Army Corps to issue the Section 404 Permit, MDE must grant a water quality certification, declaring the Project has no adverse impacts on State water quality. MDE issued the Water Quality Certification on April 17, 2014. The Certification was contingent on the

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[20] R. at 5028–34; ENVIR. § 5-204(b)(4) ("Upon substantial completion of an application the Department shall draft a public notice.").

[21] The interested persons list consists of "all contiguous property owners, appropriate local officials, and individuals that comment on, request hearings, or make inquiries about an application during any phase of the Department's review." ENVIR. § 5-204(b)(9). MDE compiles this list and after the public notice is issued and only those on this list receive future notices about the application. § 5-204(b)(4)(iv).

[22] R. at 5023–27.

[23] R. at 4933.

[24] R. at 5138–90.

[25] R. at 5195–234.

[26] R. at 5023–34. Notably, the Public Notice informed: "The project will involve crossing all waterways and wetlands using open trench construction methods resulting in a total of 5,238 linear feet/57,152 square feet of temporary stream impact." The transcripts from the Public Hearings reveal that the Project was described as to be completed using the open-cut method to cross all streams. *See e.g.*, R. at 514 & 5198.

[27] R. at 6.

[28] R. at 6.

receipt of the Nontidal Wetlands Permit.[29] Upon issuance of the Permit, the conditions of the Permit would be incorporated into the Certification.[30]

MDE issued the Permit to Columbia on April 21, 2014 and provided Notice of Decision to Issue Nontidal Wetlands & Waterways Permit, Number 12-NT-0433/201261660.[31] In addition, MDE sent the Notice of Permit Decision and its Summary of the Basis for its Decision (hereinafter "Summary Opinion") to contiguous property owners, public officials, and MDE's interested persons list.[32]

The Permit allows Columbia "to conduct a regulated activity in a nontidal wetland, buffer or expanded buffer, and/or to change the course, current or cross-section of waters of the State in accordance with the attached plans approved by the administration on April 18, 2014 . . . ."[33] The Permit set forth a number of special conditions, including:

> Permittee shall implement the use of the HDD stream crossing method for the following stream crossings:
>
> a. Stream Crossing #3-Un-named tributaries to North Branch Hones Falls, a Use III waterway;
> b. Stream Crossing #8-Gunpowder Falls, a Use III-P Waterway; and,
> c. Stream Crossing #9-Little Gunpowder Falls, a Use III Waterway.[34]

The Permit's General Condition 10 requires all work be performed in accordance with the Conditions of the Water Quality Certification.[35] In addition, the Permit attached the Best Management Practices for Working in a Nontidal Wetlands, Wetlands Buffers, Waterways, and

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[29] R. at 33–35.
[30] R. at 33–35. Although the Certification is dated April 14, 2014, there is no evidence MDE made its decision public until MDE issued the Permit on April 21, 2014.
[31] R. at 1.
[32] R. at 34.
[33] R. at 25.
[34] R. at 27. Columbia proposed to cross all streams using the open-cut trench method; therefore, no special condition was included to address the remaining stream crossings, as they would be crossed in accordance with Columbia's proposal.
[35] R. at 29.

100-Year Flood Plains;[36] the Water Quality Certification; maps of the impacted plats; and MDE's Summary Opinion.[37] The Permit also attached and incorporated the Certification's conditions into the Permit.[38]

The Petitioners oppose certain aspects of MDE's decision and filed Petitions for Judicial Review on May 21, 2014.[39] A Hearing was held on the Petitions on February 18, 2015, at which time arguments were heard from all parties. In addition, this Court has received and considered the Petitioners' written Memoranda, the Respondents Opposition Memoranda and the Petitioners' Reply Memoranda thereto, the case files, and the Record.[40]

STANDARD OF REVIEW

On judicial review of an administrative agency decision, the scope of review is quite narrow.[41] The court's role in reviewing an administrative agency "is limited to determining if there is substantial evidence in the record as a whole[42] to support the agency's findings and

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[36] R. at 31–32.
[37] R. at 36–436.
[38] R. at 29.
[39] *See supra* note 1. Petitioners Merryman and Hayfield were dismissed with prejudice by Order dated December 28, 2014.
[40] The Record in this case is 8,915 pages.
[41] Mayor of Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 395 (1979).
[42] ENVIR. § 1-606. The Record is prepared by MDE and consists of:

(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.

conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law."[43]

With respect to the agency's factual findings, the standard of review is whether there is substantial evidence in the record as a whole to support the agency's decision.[44] In applying the substantial evidence test, the reviewing court must affirm the agency decision if, after reviewing the evidence in a light most favorable to the agency, the court finds "a reasonable person could come to more than one conclusion. In such a situation, the issue is to be considered to be 'fairly debatable,' and the reviewing court may not substitute its judgment for that of the agency."[45]

In reviewing the law, the court "is under no constraints in reversing an administrative agency decision which is premised solely upon an erroneous conclusion of law."[46] Unlike factual determinations, the agency's interpretation of the law does not enjoy a presumption of correctness.[47] However, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected."[48] However, "When an agency acts in a 'discretionary' capacity, we will overturn its decision only upon a finding that its action is 'arbitrary and capricious.' "[49]

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[43] Assateague Coastkeeper v. Md. Dep't Envir., 200 Md. App. 665, 690 (2011) (quoting Najadi v. Motor Vehicle Admin., 481 Md. 164 173–74 (2011)).
[44] Motor Vehicle Admin. v. Lindsay, 309 Md. 557, 563 (1987).
[45] Relay Improvement Assoc. v. Sycamore Realty Co., 105 Md. App. 701, 714 (1995) (citations omitted) (citing Columbia Road Citizen's Ass'n v. Montgomery Cnty., 98 Md. App. 695, 698 (1994)).
[46] People's Counsel for Balt. Cnty. v. Md. Marine Mfg. Co., 316 Md. 491, 497 (1989).
[47] Najadi v. Motor Vehicle Admin., 418 Md. 164, 173 (2011).
[48] *Id.* at 174.
[49] Assateague Coastkeeper v. Md. Dep't Envir., 200 Md. App. 665, 691 (2011).

STATUTORY BACKGROUND

The United States Congress enacted the federal Clean Water Act (hereinafter "CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[50] Congress identified nontidal wetlands as a "critical natural resource,"[51] and "the federal scheme, laid out in the CWA requires a developer to obtain a permit from the United States Army Corps of Engineers before filling wetlands areas."[52] The 1977 amendments to the CWA "delegate[d] to state governments an option of permitting authority for discharge of dredging or fill materials into the navigable waters and wetlands within the state's jurisdiction."[53]

As a result of the 1977 amendments, Maryland's General Assembly enacted the Maryland Nontidal Wetlands Protection Act (hereinafter the "Nontidal Wetlands Act").[54] The Act creates a comprehensive nontidal wetland program to protect waters of the State, prevent further degradation and losses of state waters, and regulate activity to the extent degradation or losses are unavoidable.[55] In order to enforce the State's comprehensive nontidal wetland program, MDE has the duty to "evaluate proposed activity and grant or deny permits or other approvals of proposed activities."[56] The Act requires persons who seek to conduct certain

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[50] Clean Water Act, 33 U.S.C. § 1251(a).
[51] Richard H. McNeer, *Nontidal Wetlands Protection Maryland and Virginia*, 51 MD. L. REV. 105, 106 (1992).
[52] Para v. 1691 Ltd. P'ship, 211 Md. App. 335, 343 (2013) (citing McNeer, *supra* note 51).
[53] *Id.* at 344 (discussing 33 U.S.C. § 1344(g)).
[54] ENVIR. §§ 5-901 to 5-911.
[55] §§ 5-902(b)–(c).
[56] § 5-903(a)(4).

regulated activities[57] within nontidal wetlands apply to MDE for a permit in order to lawfully conduct those activities.[58]

Pursuant to the CWA, Army Corps administers the federal program to protect the navigable waters of the United States. When a project involves the discharge of dredged, excavated, or fill material in wetlands, streams, rivers, or other waters, CWA Section 404 requires a permit from the Army Corps to lawfully conduct that activity.[59] The Section 404 permit triggers the requirement for a state water quality certification pursuant to CWA Section 401.[60] The state water quality certification declares to Army Corps that the project will not violate State water quality standards.[61] Recognizing the potential for states to frustrate the federal approval process, the CWA also specifies:

> If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.[62]

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[57] Regulated activity is defined as:

> [A]ny of the following activities in a nontidal wetland or within a 25 foot buffer of the nontidal wetland:
> (i) The removal, excavation, or dredging of soil, sand, gravel, minerals, organic matter, or materials of any kind;
> (ii) The changing of existing drainage characteristics, sedimentation patterns, flow patterns, or flood retention characteristics;
> (iii) The disturbance of the water level or water table by drainage, impoundment, or other means;
> (iv) The dumping, discharging of material, or filling with material, including the driving of piles and placing of obstructions;
> (v) The grading or removal of material that would alter existing topography; and
> (vi) The destruction or removal of plant life that would alter the character of a nontidal wetland.

ENVIR., § 5-906(b).

[58] ENVIR. § 5-906(b).

[59] Clean Water Act, 33 U.S.C. § 1344(a).

[60] 33 U.S.C. § 1341(a)(1); *see* Para v. 1691 Ltd. P'ship, 211 Md. App. 335, 343 (2013).

[61] 33 U.S.C. § 1341(a)(1).

[62] *Id.*

Thus, if the state fails to act on a request for a water quality certification, the state waives its right to issue the certification and Army Corps may grant the permit without the state certification.[63] In issuing a certification, the state:

> [S]hall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, standard of performance, or prohibition, effluent standard, or pretreatment standard and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.[64]

In Maryland, MDE is the appropriate authority to issue a Section 401 water quality certification.[65] Columbia's project required a permit from Army Corps, a Water Quality Certification from MDE, and a Nontidal Wetlands Permit from MDE.

STANDING & JURISDICTION

I. NONTIDAL WETLANDS PERMIT

In order to bring a matter for judicial review, the petitioner must have standing. MDE's decision to issue this Nontidal Wetlands Permit is a final decision;[66] and therefore, "subject to judicial review at the request of any person that: (1) Meets the threshold standing requirements under federal law; and (2) is the applicant or participated in a public participation process . . . ."[67]

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[63] As Petitioner Bosley notes, MDE failed to issue the Certification within the statutory one year time period; however, contrary to Bosley's argument, waiver does not necessarily render the Certification invalid but instead allows Army Corps to issue a Section 404 permit without certification from MDE. *See* AES v. Sparrows Point v. Wilson, 589 F.3d. 721 (4th Cir. 2009).

[64] 33 U.S.C. § 1341(a)(1).

[65] *See* ENVIR. § 9-302(b)(5) (Explaining it is the State's policy "pursu[ant] [to] the goal of the Clean Water Act to end discharge of pollutants . . . ."); "The Department shall cooperate with local governments, agencies of other states, and the federal government in carrying out the objectives of subsection (b)." ENVIR. § 9-302(c).

[66] R. at 2 (Explaining that pursuant to 2009 legislation passed by the General Assembly the notice and comment process for certain MDE permits changed, eliminating the right for a contested case hearing. Instead, permit decisions are challenged by direct judicial review in the circuit court for the county where the activity authorized will occur.).

[67] ENVIR. § 5-204(f).

Filing a petition for judicial review "with the circuit court for the county where the application for the permit states that the proposed activity will occur" commences an action for judicial review.[68] The petition for judicial review must be filed "within 30 days after the publication of a notice of final determination."[69]

To satisfy the threshold federal standing requirements,[70] a petitioner must show (1) "an injury in fact," (2) causation, and (3) redressability.[71] An injury in fact is one that is "concrete and particularized and actual or imminent, not 'conjectural' or 'hypothetical.' "[72] To establish causation, the Plaintiff's injury must "be 'fairly traceable to the challenged activity.' "[73] Finally, redressability requires that it is " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a fair decision.' "[74]

An organization has standing, "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[75] An alleged injury to a member's aesthetic, recreational, and economic interests as an avid paddler and mapmaker is a sufficient injury to bring an action for judicial review of MDE's decision to issue a nontidal wetlands permit.[76]

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[68] § 5-204(i).
[69] § 1-605(b).
[70] The federal standing requirement is broader than state law and the Maryland General Assembly expressly adopted this broader standard when it enacted Section 5-204(f). Patuxent Riverkeeper v. Md. Dep't Envir., 422 Md. 294, 297–300 (2011).
[71] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
[72] *Id.* (citations omitted) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).
[73] *Id.* at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
[74] *Id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).
[75] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 181 (2000).
[76] Patuxent Riverkeeper v. Md. Dep't of Envir., 422 Md. 294, 309 (2011) (The Maryland Court of Appeals recognized "[a]t the time the new standing test was embraced by the Maryland Legislature, not only had the Supreme Court spoken, but other federal appellate courts had an opportunity to interpret the tenents of the Supreme Court cases." These courts found environmental groups satisfied the federal standing threshold. *Id.* at 301.).

MDE issued the Permit, Notice of Permit Decision, and its Summary Opinion on April 21, 2014.[77] Petitioners filed the instant Petitions on May 21, 2014, meeting the 30-day time frame.

A. Petitioner Gunpowder Riverkeeper

Petitioner Gunpowder Riverkeeper (hereinafter "Riverkeeper") is a nonprofit organization "with approximately 175 members who live, work, and recreate in the Gunpowder River Watershed."[78] Riverkeeper further explains "[t]he primary purposes of Gunpowder Riverkeeper are to protect the Gunpowder River and to educate the public about environmental threats to the river."[79] Riverkeeper participated in the public process through the organization's executive director, Mr. Le Gardeur, who submitted written comments and gave oral arguments at the Fallston Public Hearing.[80] Riverkeeper claims its members will suffer recreational, aesthetic, and economic injuries as a result of MDE's decision to grant this Permit.[81] Riverkeeper claims the injuries it suffered are capable of being redressed by remanding the Permit to MDE for modifications.[82]

Riverkeeper's standing to bring this action for judicial review is uncontested. This Court will therefore address the merits of Riverkeeper's challenges to the Permit.

B. Petitioners Bosley

Petitioners, Kenneth Bosley, Phyllis Bosley, and Balama Farms Inc., (hereinafter "Bosley") challenge the Permit based on the adverse impacts to their property resulting from the

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[77] R. at 1–24.
[78] Pet'r Riverkeeper Mem. in Support of Review at 7 (hereinafter cited as "Pet'r Riverkeeper Mem.").
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Pet'rs Bosley Mem. in Support of Pet. for Review of MDE's Issuance of a Nontidal Wetlands and Waterways Permit at 8 (hereinafter cited as "Pet'rs Bosley Mem.").

imposition of MDE's special conditions requiring HDD and geotechnical surveys. As a result of those special conditions, Columbia changed its route and will now use the Bosley property for one or more bore holes. Columbia has occupied Bosley's property to conduct geotechnical investigations and surveys. Bosley argues they meet the statutory prerequisites because they participated in the public comment process,[83] will suffer an injury, and timely filed this Petition for judicial review.

The injury Bosley alleges is the invasion of their property for HDD surveys and geotechnical tests resulting from the issuance of the Permit.[84] In addition, Bosley alleges HDD will require blasting one or more holes 320 feet deep in the middle of the Balama Farm cornfield.[85] Further, the extension of the pipeline will run across Bosley's property to reach the HDD entry point, and will destroy trees on the Bosley properties.[86] Bosley believes these activities will cause "potential risk of frack-outs [sic][87] and release of toxic fluids, as well as hydrologic changes leading to movement of . . . pollutants"[88] from an abutting property previously designated as a "brownfield."

The Respondents argue that Bosley lacks standing because the injury alleged is not directly related to nontidal wetlands, but rather Bosley's real estate; and therefore, Respondents claim the jury is not fairly traceable to the Project.[89] Columbia asserts that "the Project does not contemplate impacts to either nontidal wetlands or waterways at the Bosley Property, and

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[83] *Id.* at Ex. 1.
[84] *Id.* at 12.
[85] *Id.* at Ex. 1.
[86] *Id.* at 2–3.
[87] *Id.* at 2 n.1 (" 'Frack-out' [sic] is defined as an unintended return of drilling lubricant that may occur during HDD, and has been recognized by MDE as a 'critical potential impact.' *See e.g.*, MDE 5038 [R. at 5038]." *Id.*).
[88] Pet'rs Bosley Mem. at 2.
[89] Resp't Columbia Mem. Bosley at 10.

because the Permit inherently concerns only nontidal wetlands and waterways, the Bosleys' alleged injury cannot said to be 'fairly traceable' to MDE's decision to issue the Permit."[90] Essentially, the Respondents argue that in order to have standing, the injury alleged must be an injury to nontidal wetlands or waterways, because the Permit only applies to nontidal wetlands and waterways.

This Court rejects the Respondents narrow interpretation of the federal standing requirements. The plain langue of federal standing requires "a concrete imminent injury traceable to the challenged action."[91] But for the issuance of the Permit requiring HDD be used, there would not be a hole on the Bosley property or the related occupancy of the property by Columbia for such an extended period of time. Therefore, this Court finds Bosley has standing to seek judicial review of the Permit. Accordingly, the Court will address the merits of both Petitioners' challenges.

II. WATER QUALITY CERTIFICATION

Respondents argue that MDE's issuance of the Water Quality Certification is not properly before this Court for two reasons: (1) The Petitioners have failed to exhaust their administrative remedies and (2) the Petitioners have no standing to appeal the Certification.[92]

Riverkeeper requests this Court find the cross-conditioning between the Certification and Permit makes the Certification reviewable as ancillary to the Permit.[93] As evidence, Riverkeeper argues the Certification is "inextricably entwined with the Permit: the same factual record, many

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[90] *Id.*

[91] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[92] Bosley did not address the Certification in their Memorandum in Support of Judicial Review; however, in Reply to MDE's Joint Answering Memorandum, Bosley argued that the issuance of the Certification is invalid because MDE issued it outside of the statutory one-year time frame. Respondent Columbia filed a Motion to Strike portions of both Riverkeeper's and Bosley's Reply Memoranda. This Court did not rule on the Motion and allowed the issue to be addressed during oral arguments.

[93] Pet'r Riverkeeper Mem. at 4.

of the same applicable standards, and the same combined administrative proceedings."[94] Alternatively, Riverkeeper urges this Court find "the enactment of § 5-204(f) [which consolidated the notice and hearing requirements] impliedly revoked or repealed COMAR 26.08.02.10(F)(4) to the extent that it is inconsistent."[95] Riverkeeper further argues this Court "has inherent jurisdiction 'to review actions by an administrative agency that are arbitrary, illegal, or unreasonable.' "[96]

In issuing the Certification, MDE cites its authority from Section 401 of the CWA and Title 9 of the Environment Article.[97] Pursuant to COMAR,

> (a) A person aggrieved by the Department's decision concerning a water quality certification may appeal the decision of the Department. The appeal shall:
>
> (i) Be filed within 30 days of the publication of the final decision with the hearing office; and
>
> (ii) Specify, in writing, the reason why the final determination should be reconsidered.
>
> (b) A further appeal shall be in accordance with the applicable provisions of State Government Article, §10-201 *et seq.*, Annotated Code of Maryland.[98]

Respondents argue that, unlike the Nontidal Wetlands Permit, the Certification is not directly appealable[99] and the Petitioners must exhaust their administrative remedies through the contested case process.[100]

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[94] Pet'r Riverkeeper Reply Mem. at 2 in Support of Pet. for Judicial Review at 3 (hereinafter cited as "Pet'r Riverkeeper Reply Mem.").
[95] Pet'r Riverkeeper Mem. at 4.
[96] Pet'r Riverkeeper Reply Mem. at 2 (citing Harvey v. Marshall, 389 Md. 243, 275–76 (2005)).
[97] 33 U.S.C. §1344(g); ENVIR. §§ 9-301 to 9-323.
[98] MD. CODE REGS. 26.08.02.10.
[99] It must be noted it appears to the Court that the COMAR regulations have not caught up to the 2009 legislation, changing the process for challenging certain decisions of MDE. As of "January 1, 2010, the 'contested case' process no longer applies to final decisions for direct judicial review in the Circuit Court for the county where the activity authorized by the permit will occur." R. at 2. Despite this change, the COMAR provision applicable to nontidal wetlands permit still provides "[a] person who has legal rights, duties, interests, or privileges different from the general public which are adversely affected by the Department's decision . . . may request a contested case hearing." MD. CODE REGS. 26.23.02.03.B(1).
[100] MD. CODE ANN., STATE GOV'T §§ 10-201 to 10-227.

Arguing the Certificate is not properly before this Court, MDE relies on "the dual doctrines of administrative finality and administrative exhaustion," and explains that "the salutary purpose of the finality requirement is to avoid piecemeal actions in the circuit court seeking fragmented advisory opinions with respect to partial or intermediate agency decisions."[101]

This Court recognizes it is problematic that this Certification was incorporated into the Permit. One application was filed for both and one written decision applied to both; yet, Respondents argue there are two separate processes for appealing MDE's decision.[102]

Neither Petitioner timely filed an appeal for a contested case with the hearing office; however, MDE stated at the Hearing, that it will not oppose the belated filing of an appeal. Therefore, this Court rejects Riverkeeper's request that this Court exercise "ancillary jurisdiction" over the Certification.[103] Section 5-204 specifies the provisions of the Environment Article to which the consolidated notice and hearing procedures applies and a water quality certification is not one of those provisions. This Court likewise rejects Riverkeeper's argument that the enactment of Section 5-204 overruled the COMAR regulations. As the Petitioners have not exhausted their administrative remedies, the challenges to the Certification are not properly before this Court and this Court will not address the merits of the challenges.[104]

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[101] Resp't MDE Mem. at 14 (MDE filed a Joint Memorandum addressing both Petitioners' challenges.).
[102] At the Public Hearings, MDE informed "this is not a hearing for water quality certification pursuant to COMAR 26.08.02.10." R. at 5140 & 5197. There is no evidence that a public hearing was held on the water quality certification.
[103] Pet'r Riverkeeper Mem. at 2. Although this Court will not address the merits of the Certification, water quality is an aspect for MDE's consideration in issuing a Nontidal Wetlands Permit, and this Court will address Riverkeeper's concerns therein. MDE is charged with "improv[ing], conserv[ing], and manag[ing] the quality of the waters of this State." ENVIR. § 9-302(b)(1). *See infra* notes 182–234 and accompanying text.
[104] ENVIR. § 5-204(a).

QUESTIONS PRESENTED FOR JUDICIAL REVIEW

Bosley raises the following challenges to MDE's decision:

> (1) MDE notices of the permit application did not conform to Section 5-204(b) of the Environment Article, Maryland Code Annotated.
> (2) MDE's decision to permit horizontal directional drilling ("HDD") is not supported by substantial evidence. Conversely, Bosley argues that substantial evidence exists on the record demonstrating open-cut trenching is preferable.
> (3) MDE failed to consider evidence of the adverse impacts of HDD on Bosley's properties.
> (4) MDE's permit exceeds the scope of its own terms, which state that the permit does not authorize harm to property; and therefore, MDE's decision was arbitrary and capricious.

Riverkeeper raises the following challenges to MDE's decision:

> (1) MDE erred in concluding that soil erosion and sediment control plans and waterway construction guidelines are sufficient evidence to show no degradation of surface water.
> (2) It was arbitrary and capricious for MDE to conclude, in the absence of substantial evidence that the project will not cause or contribute to the degradation of groundwater or surface water.
> (3) MDE lacked evidence to determine that Little Gunpowder Falls and Otter Point Creek have remaining assimilative capacity.
> (4) MDE has no statutory authority to issue a water quality certification in satisfaction of CWA Section 401 certifications.
> (5) The Permit and 401 Certification violate state and federal law by failing to require monitoring necessary to assure compliance with water quality standards.

The Court will address the applicable statutes governing MDE's issuance of the Nontidal Permit and will address each of the Petitioners' challenges as they pertain to the statutes. The Court will not address the Petitioners' challenges to MDE's issuance of the Certification, because it is not properly before this Court.[105]

[105] While the Court will not address the merits of this challenge, it is clear MDE has the authority to issue Water Quality Certifications. *See* AES Sparrows Point v. Wilson, 589 F.3d 721, 727 (2009).

STATUTORY AUTHORITY

This action for judicial review challenges MDE's decision to issue a Nontidal Wetlands Permit and Water Quality Certification to Columbia. Discussed more fully above,[106] the statutes pertinent to this matter are the Maryland Nontidal Wetlands Protection Act[107] and the Waterways Construction Act.[108] In addition, COMAR[109] sets forth criteria guiding MDE when applying the mandates of the statutes. MDE also reviewed the Permit for compliance with Maryland's water quality standards set forth under COMAR[110] and compliance with the Coastal Zone Management Program.[111]

I. NONTIDAL WETLANDS ACT

Before a nontidal wetlands permit may be issued, MDE must find the proposed activity meets four (4) criteria. The proposed project:

> (1) (i) Is water dependent and requires access to the nontidal wetland as a central element of its basic function; or
> (ii) Is not water dependent and has no practicable alternative;
> (2) Will minimize alteration or impairment of the nontidal wetland, including existing topography, vegetation, fish and wildlife resources, and hydrological conditions;
> (3) Will not cause or contribute to the degradation of groundwater or surface waters; and
> (4) Is consistent with any watershed management plan that may be developed in accordance with §5-908 of this subtitle.

A. Is Water Dependent and Requires Access to the Nontidal Wetland as a Central Element of its Basic Function; or is not Water Dependent and has no Practicable Alternative.[112]

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[106] *See supra* notes 50–65 and accompanying text.
[107] ENVIR. §§ 5-901 to 5-911.
[108] §§ 5-501 to 5-516.
[109] MD. CODE REGS. 26.23 (applies to the Nontidal Wetlands Act) & MD. CODE REGS. 26.17.04 (applies to the Waterways Construction Act).
[110] MD. CODE REGS. 26.08.02.01 to 26.08.02.13.
[111] Coastal Zone Management, 16 U.S.C. §§ 1451–66. "[A]s required by Section 307 of the Federal Coastal Zone Management Act of 1972." R. at 29.
[112] ENVIR. § 5-907(a)(1).

Columbia's project is not water dependent; therefore, MDE cannot issue this Permit without finding that Columbia has demonstrated no practicable alterative exists.[113] A "practicable alternative" exists if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose."[114]

The "practical alternative" analysis consists of two steps. First, the threshold inquiry is to define the purpose of the proposed project.[115] Defining the purpose of the project is stating "the principal reason for conducting all regulated activity and other activities on a project site."[116] Second, the applicant is required to demonstrate to MDE's satisfaction that practicable alternatives have been considered and that there are no practicable alternatives.

The second step in the "practicable alternative" analysis requires that MDE consider the following factors:

> (1) Whether the basic project purpose cannot be reasonably accomplished utilizing one or more other sites in the same general area that would avoid or result in less adverse impact on nontidal wetlands;
> (2) Whether a reduction in the size, scope, configuration, or density of the project as proposed and all alternative designs that would result in less adverse impact on the nontidal wetland would not accomplish the basic purpose of the project;
> (3) In cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, whether the applicant has made reasonable attempts to remove or accommodate these constraints; and
> (4) The economic value of the proposed regulated activity in meeting a demonstrated public need in the area and the ecological and economic value associated with the nontidal wetland.[117]

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[113] R. at 8.
[114] MD. CODE REGS. 26.23.01.B(69).
[115] MD. CODE REGS. 26.23.01.B(72); *see* Para v. 1691 Ltd. P'ship, 211 Md. App. 335 (2013).
[116] MD. CODE REGS. 26.23.01.B(72).
[117] ENVIR. § 5-907(b).

Discussion:

The purpose of Columbia's Project is "to provide enhanced reliability and operational flexibility of Columbia's pipeline facilities, thereby greatly reducing the risk of interruptions to markets in the greater Baltimore area."[118] Due to the growth and development that has occurred since the installation of Line MA, Columbia needs the parallel line in order to maintain and upgrade the original line without interrupting service to its customers.[119] Line MB will run parallel to line MA and add an element of redundancy, increasing reliability to Columbia's customers by reducing risk of service interruptions.[120]

In determining whether practical alternatives existed, Columbia provided an alternative site analysis as part of its original application to MDE.[121] In addition, on August 2, 2013, MDE requested that Columbia conduct four additional evaluations, which Columbia completed and provided to MDE on September 18, 2013, October 28, 2013, and November 1, 2013.[122] On December 3, 2013, a Joint Agency Meeting was held to discuss the alternative routes.[123] After the meeting, MDE requested more detailed information "to directly compare the impacts of each alternative to the Proposed Route."[124] Columbia provided MDE with the revised analysis on December 13, 2013.[125]

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[118] R. at 5.
[119] R. at 6.
[120] R. at 5.
[121] R. at 9. Columbia initially provided this site analysis in its application to FERC application for a Certificate pursuant to the Natural Gas Act. Upon granting Columbia the Certificate, FERC concluded that "Columbia's Proposed Route constituted the most feasible alternative for accomplishing the demonstrated purpose and need for the project." R. at 8–9.
[122] R. at 6485–65; 6662–72; & 6737–7013.
[123] R. at 7066.
[124] R. at 9.
[125] R. at 9.

After reviewing all of the alternatives, MDE found "[n]one . . . resulted in significantly less impacts to wetlands or waterways, and, in fact, the wetland and waterway impacts from the four alternatives were similar to or greater than the proposed route."[126] In addition, MDE found the alternatives presented additional problems not applicable to the proposed route.[127] In concluding no practicable alterative exists, MDE stated:

> Given that the purpose of this Project is to increase system reliability and operational flexibility, that upgrading an aging segment of the existing natural gas supply pipeline will ultimately provide benefits to public safety and welfare, and that the alternative site analysis demonstrated that an alternative alignment would not result in less adverse impacts to wetlands and waterways, the Department determined that the proposed regulated activity has no practicable alternative.[128]

Accordingly, this Court finds there is substantial evidence on the record to support MDE's decision that no practicable alternative exists.

B. Will Avoid and Minimize Adverse Impacts to the Nontidal Wetlands.[129]

The second element required for MDE to issue a nontidal wetlands permit requires the applicant to demonstrate to "the Department's satisfaction that all necessary steps have been taken to first avoid and then minimize adverse impacts to nontidal wetlands. Losses of nontidal wetlands shall be permitted only when adverse impacts to nontidal wetlands are necessary and unavoidable."[130]

In considering Columbia's efforts to first avoid and then minimize adverse impacts to nontidal wetlands, MDE considered (1) Columbia's pre-application avoidance and minimization;

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[126] R. at 9.
[127] R. at 10.
[128] R. at 10.
[129] ENVIR. § 5-907(a)(2).
[130] MD. CODE REGS. 26.23.02.05.B(1).

(2) Columbia's avoidance and minimization during application review; and (3) horizontal directional drilling.[131]

Facts:

Although Columbia's Application proposed crossing all streams using open-cut trenching, MDE "pressed Columbia to further evaluate the use of HDD at certain stream crossings."[132] In the spring of 2012, during the pendency of the FERC review, Army Corps, MDE, FERC, and Columbia conducted site visits of the proposed route. During those visits, "the Department asked Columbia to evaluate HDD at six crossings. . . . After DNR provided input on the Project to MDE, this list was increased [to nine crossings]."[133] Columbia provided its initial evaluation on June 18, 2013, concluding there were no measurable benefits of HDD compared with open-cut.[134] On December 19, 2013, Columbia provided its revised evaluation, which also concluded open-cut was preferable.[135] In addition, FERC's staff conducted an Environmental Assessment (hereinafter "EA") of the Project, [136] which arrived at the same conclusion as Columbia—there were "no measurable benefits for HDD over the proposed dry-ditch method."[137]

At a meeting on February 20, 2014, MDE made a final determination to require Columbia implement HDD at three crossings: Unnamed tributaries to North Branch Jones Falls, Gunpowder Falls, and Little Gunpowder Falls.[138] As the Maryland Department of Natural Resources (hereinafter "DNR") was still urging the HDD method be used at all nine stream

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[131] R. at 11–13.
[132] R. at 11.
[133] R. at 11.
[134] R. at 5531–55.
[135] R. at 7230.
[136] R. at 4558.
[137] R. at 7030.
[138] R. at 7528–32.

crossings, DNR had a third-party consultant, Environmental Resources Management (hereinafter "ERM"), conduct "an additional independent analysis to re-assess [Columbia's] conclusion in [its] December 19, 2013 report."[139] DNR provided their re-assessments to MDE in February and March 2014.[140] ERM recommended HDD at the remaining six crossing, disagreeing with Columbia's reports. MDE considered ERM's assessments and "[a]fter analyzing all of the information provided, the Department determined that open-cut trenching is the most appropriate method to cross the remaining six crossings."[141] In disagreeing with ERM's evaluations and DNR's recommendations, MDE issued six Memoranda detailing their evaluation of ERM's assessments and their reasons for following Columbia's proposed method.[142]

Upon issuing the Permit, MDE set forth a brief statement in its Summary Opinion regarding its decision to require HDD at the three crossings, stating:

> [O]verall, the environmental benefits of HDD outweigh the negative impacts associated with HDD, including the need for larger workspaces, longer construction schedules, and increased noise, traffic, and costs. Specifically, HDD activities avoided multiple regulated resources (i.e., more than one stream and/or wetlands), HDD did not increase environmental impacts (i.e., additional forest clearing or wetland or waterway impacts due to entry and exit pits or pipe stringing and pull back areas), and HDD activities would have minimal impacts on residential properties.[143]

Addressing its decision to follow Columbia's proposed plan to use open-cut trenching at the remaining stream crossings, MDE explained:

> The Department did not require HDD at those six crossings because the negative impacts associated with HDD, including the need for larger workspaces, longer construction schedules, and increased noise, traffic, and costs outweigh the environmental benefits of HDD. HDD activities would have resulted in greater environmental impacts (i.e. additional forest clearing or wetland or waterway impacts due to entry and exit pits or pipe stringing and pull-back areas) than

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[139] R. at 12.
[140] R. at 7533–51 & 7557–75.
[141] R. at 12.
[142] R. at 7539–43; 7544–48; 7557–61; 7562–66; 7571–75; & 7600–04.
[143] R. at 13.

open-cut trenching. HDD activities at these locations would cause significant adverse impacts to residential properties.[144]

Bosley Challenge #1:

Bosley argues MDE's decision to require HDD at Gunpowder Falls was not based on substantial evidence. Bosley alleges Columbia's December 19, 2013 analysis "is the sole piece of evidence in the record in support of HDD, [which] concluded that open cut was preferable to HDD!"[145] Bosley explains MDE did not perform an independent analysis of the need for HDD, nor does it cite peer reports or DNR studies that may have been prepared."[146] Bosley then contends the basis for MDE's decision—Columbia's reports—do "not provide any [factual] basis for MDE's decision,"[147] because the reports arrive at the opposite conclusion.

Respondents argue there is substantial evidence on the record to support its decision. Columbia explains "the MDE did not 'hang its HDD hat' on Columbia's December 19, 2013 analysis as the 'sole piece of evidence . . . .' "[148] Columbia then cites to numerous documents contained in the Record,[149] supporting the proposition that substantial evidence exists.[150] MDE claims that "all of the information it considered during the review process, including the December 19, 2013 analysis, demonstrated to the Department that HDD would be appropriate at Gunpowder Falls."[151] MDE contends there is substantial evidence on the record to support its decision, because the evidence shows that HDD "would avoid impacts to 7 streams and one wetland; would avoid impacts to the Torrey C. Brown Trail; would result in a less total acres of

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[144] R. at 13.
[145] Pet'rs Bolsey Mem. at 20.
[146] *Id.* at 19.
[147] *Id.* at 22.
[148] Resp't Columbia Mem. Bosley at 21–22 (citing Pet'rs Bosley Mem. at 19–20).
[149] *Id.* at 21 n.20 (citing R. at 11–13; 5192; 5431–41; 5879–80; 5922–47; 7095; 7420; 7422; 7529; & 7630).
[150] *Id.* at 6–7.
[151] Resp't MDE Mem. at 31.

land affected . . . while at the same time would protect sensitive streams and aquatic habitats."[152] MDE also cites to numerous documents in the Record that it contends constitutes substantial evidence.[153]

Discussion:

A review of the Record indicates that there are numerous documents on which MDE could base its decision requiring HDD: Columbia's Initial HDD Evaluation,[154] First Revised Analysis,[155] and Second Revised Analysis;[156] DNR Report and Recommendation;[157] FERC EA;[158] various Memoranda from DNR's Science Service Administration (SSA);[159] ERM evaluations;[160] and comments from the public.

Columbia's reports conclude that the open-cut method is preferable at Gunpowder Falls, stating:

> The open-cut method would result in a limited amount of additional permanent forest clearing adjacent to existing, maintained ROWS. . . . utilization of HDD method results in negative impacts to other resources, including the forested and residential areas, which far outweigh the benefit [of the HDD] method. For example, the HDD method would result in noise impacts to the residences . . . as well as the clearing of new non-co-located permanent ROW, would result in unnecessarily extensive impacts to certain residences.[161]

Based on Columbia's evaluations and the EA, FERC approved the Project, using the proposed open–cut trench method for crossing all waterways.

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[152] *Id.* at 31.
[153] *Id.* at 30–31 (citing R. at 5094; 5431–41; 5879–80; 5922–47; 5729; & 7286).
[154] R. at 682–711.
[155] R. at 5512.
[156] R. at 4562.
[157] R. at 5056.
[158] R. at 599; 1010; 1819; & 2315.
[159] R. at 5043–53.
[160] R. at 7533–51 & 7557–75.
[161] R. at 7285. Notably, the HDD method results in an estimated cost of 14.5 million dollars as compared to 5.2 million dollars for the open-cut method.

In applying the substantial evidence test, "the inquiry is whether a 'reasoning mind could have reached the factual decision the agency reached.' "[162] This Court finds there is evidence in the record to support HDD and evidence in the record to support open-cut trenching; therefore, the issue is fairly debatable. Accordingly, this Court finds a reasoning mind could have concluded that HDD is preferable.

Bosley Challenge #2:

Bosley next challenges MDE's decision to require HDD because "MDE failed to consider evidence of the adverse impacts of HDD on the Bosley and Balama Farms properties."[163] Respondents argue "the Bosleys must demonstrate that the MDE's decision regarding the Permit both needed to, and did not, consider the Bosley Property concerns prior to issuing the Permit. The MDE was, of course, not required to consider such information unrelated to impacted nontidal wetlands and waterways."[164]

Discussion:

The record shows MDE considered the need for "larger workspaces, longer construction schedules, and increased noise, traffic, and costs. . . . [A]dditional forest clearing or wetland or waterway impacts due to entry and exit pits or pipe stringing and pull back areas." [165] In addition, MDE considered the fact that the "[d]rill will be located in somebody's backyard in close proximity to residential area. 24/7 Noise Impacts. Additional traffic due to water trucks."[166] The Public Notices issued by MDE informed, "[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts of the proposed activity

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[162] Assateague Coastkeeper v. Md. Dep't Envir., 200 Md. App. 665, 696 (2011) (citing Najafi v. Motor Vehicle Admin., 418 Md. 164, 173 (2011)).
[163] Pet'rs Bosley Mem. at 22.
[164] Resp't Columbia Mem. Bosley at 23.
[165] R. at 13.
[166] R. at 5477.

on the public interest."[167] Accordingly, this Court rejects Respondents argument that MDE only considered the impacts to nontidal wetlands in deciding to issue the Permit.

After considering the above impacts associated with HDD, MDE concluded "HDD activities would have minimal impacts on residential properties."[168] This Court finds there is substantial evidence on the record to support MDE's conclusion that HDD was preferable.

Bosley Challenge #3:

Bosley next alleges MDE's decision requiring HDD at Gunpowder Falls should be reversed because MDE did not comply with Section 5-204(b) of the Environment Article's notice and hearing requirements.[169] As a result, Bosley was denied a meaningful opportunity to comment. Bosley raises three objections: (1) The published notices were overly vague, (2) MDE's notices affirmatively misrepresented the scope of the project; and (3) Bosley was deprived of a meaningful opportunity to comment and defend their property.[170]

Respondents argue that the notices comported with all statutory requirements. In the alternative, the Respondents argue that to the extent that any notice was deficient, such error was harmless because Bosley had constructive and actual knowledge of the public hearings and participated in the public hearings.[171]

Facts:

Section 5-204 sets forth the notice and hearing requirement for a nontidal wetlands permit:

> (4) Upon substantial completion of an application, the Department shall draft a public notice that includes:
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> (i) The name and address of the applicant;

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[167] R. at 4933.
[168] R. at 13.
[169] ENVIR. § 5-204(b).
[170] Pet'rs Bosley Mem. at 13.
[171] Resp't Columbia Mem. Bosley at 16.

> (ii) A description of the location and nature of the activity for which application has been made;
> (iii) The name, address, and telephone number of the office within the Department from which information about the application may be obtained;
> (iv) A statement that any further notices about actions on the application will be provided only by mail to those persons on a mailing list of interested persons;
> (v) A description of how persons may submit information or comments about the application, request a public informational hearing, or request to be included on the mailing list of interested persons; and
> (vi) A deadline for the close of the public comment period by which information, comments, or requests must be received by the Department.[172]

The Public Notice was issued on April 15, 2013 and described the project as:

> The pipeline will have a typical construction right-of-way (ROW) width of 75 feet, with additional, but a minimal number of, temporary workspaces and staging areas where necessary. ***The project will involve crossing all waterways and wetlands using open trench construction methods*** resulting in a total of 5,238 linear feet/57,152 square feet of temporary stream impact.[173]

A vicinity map was attached to the notice. The notices further informed: "work will be completed in accordance with the enclosed plans."[174]

MDE's Summary Opinion addressed the sufficiency of the public notice, stating "the Department thoroughly evaluated the public notices contents and process under applicable State public participation requirements . . . The Department determined that the public notice contents and process complied with State law and regulations . . ." [175]

Discussion:

In *Maryland Department of the Environment v. Anacostia Riverkeeper*, the Court of Special Appeals addressed this same issue, holding in that case "the Permit falls short because it did not afford an appropriate opportunity for public notice and comment and it lacks critical

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[172] ENVIR. § 5-204(b)(1)(4).
[173] R. at 5023–34 (emphasis added).
[174] R. at 5023–34.
[175] R. at 22.

detail."[176] The Court of Special Appeals found obvious shortcomings in the permit process[177] and held: "[T]he Permit might have complied from a *technical* point of view (by, for example, posting the required notice at the required time), but it failed to comply from a *practical* point of view because it omits or obscures important elements . . . ."[178] The Court went on to say:

> [T]he process leading up to the Permit ostensibly allowed for several "public participation" opportunities. But the Permit deferred the process of defining important substantive provisions . . . until well *after* approval. This creates an obvious flaw: the public can't comment on a program that doesn't yet exist, and by the time the program *did* exist, the time for comment on it had passed.[179]

In remanding the matter to MDE, the Court cited the CWA's emphasis on the importance of "public policies of transparency [and] public participation."[180]

The situation at hand is analogous to the situation in *Anacostia*. The notices did not accurately state the nature of the activity as required by Section 5-204(b). The notices state that all streams will be crossed by the open-cut trench method; however, MDE required Columbia cross three streams using HDD. Columbia's decision occurred on February 20, 2014 nine (9) months after the public hearings were held and eight (8) months after the public comment period ended.[181] Therefore, no member of the public had notice or an opportunity to be heard as to the use of HDD. Further, the use of private property to achieve the Project was a concern for landowners; therefore, notification of the proper stream-crossing method may have led more landowners to participate in the public comment process. Accordingly, this Court finds the notices did not accurately describe the nature of the project as required by Section 5-204(b)(ii).

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[176] Md. Dep't Envir. v. Anacostia Riverkeeper, September Term 2013, No. 2199 (Filed April 2, 2015) Slip Op. at 30.
[177] *Id.* at 26.
[178] *Id.* at 23.
[179] *Id.* at 26.
[180] *Id.*
[181] The notices specified that the public comment period would run from April 15, 2013 to June 7, 2013. R. at 5023.

In addition, the notices did not accurately state the location of the activity as required by Section 5-204(b). The route for the Project was depicted on the vicinity maps attached to the Public Notice; however, the route changed throughout the process. Despite these changes, MDE never issued new notices or informed the public of the changes. Therefore, the notice and hearing process did not afford the public a meaningful opportunity to comment. Columbia's project involves laying a pipeline, in many cases on private property, obtained by eminent domain. The route of the pipeline is a significant aspect of the Project, about which members of the public were not afforded accurate notice or an opportunity to comment, violating Section 5-204(b)(ii). Accordingly, this Court finds the Public Notice does not accurately state the location of the project as required by Section 5-204(b)(ii).

This Court rejects the Respondents argument that Bosley's participation in the public hearings renders the defect in the Public Notice harmless error. Bosley did not participate in respect to HDD, because Bosley had no reason to know HDD would be required. Just as in *Anacostia Riverkeeper*, by the time MDE made its decision to require HDD, the time for comment had passed. Therefore, Bosley's participation cannot be considered meaningful participation. The use of one's land for purposes of HDD clearly entitles the property owner to a meaningful opportunity to raise objections specific to their property. Accordingly, this Court remands this matter to MDE to comply with the notice and comment procedure of Section 5-204(b).

C. Will not Cause or Contribute to a Degradation of Ground Waters or Surface Waters.[182]

The third element in determining whether to issue a Permit looks at whether the project causes or contributes to a degradation of surface or ground waters. Here, MDE considered (1)

[182] ENVIR. § 5-907(a)(3).

erosion and sediment control measures and storm water management practices; (2) a tier II anti-degradation review; (3) additional protections for Baisman Run watershed; (4) a frac-out contingency plan; (5) hydrostatic testing discharges; (6) drinking water wells; (7) septic systems and septic reserve areas; and (8) the downstream water supply.[183]

Riverkeeper argues MDE's conclusion "finding no degradation of ground and surface waters" should be reversed for two reasons. First, Riverkeeper argues the conclusion is premised on an erroneous conclusion of law. Second, Riverkeeper argues there is not substantial evidence on the record to support the decision.[184]

(1) Erroneous Conclusion of Law:

COMAR "requires that applications include 'evidence that the regulated activity will not cause or contribute to degradation of water quality standards.' "[185] Riverkeeper claims an email between MDE and Columbia requesting additional evidence as to "erosion and sedimentation controls and works standards,"[186] shows MDE only required half of what the statute and regulation call for, and "this misinterpretation [by the MDE] infected everything that followed."[187]

Respondents provide numerous references to the Record to demonstrate MDE interpreted and applied the law correctly.

Discussion

The COMAR regulation cited by Riverkeeper governs information required to constitute a complete nontidal wetlands application, not information that must be considered to make a

[183] R. at 13–18.
[184] Pet'r Riverkeeper Mem. at 24.
[185] *Id.* at 23 (citing MD. CODE REGS. 26.23.02.01.D(21)).
[186] *Id.* at 24 (corrected) (referencing R. at 4221).
[187] *Id.* at 24 (corrected).

finding of "no degradation."[188] The email Riverkeeper references is merely a follow-up from Columbia to MDE, inquiring into a specific portion of the 45-day letter Columbia received, which informed Columbia that its Application was incomplete and listed the information required to complete its Application.[189] The 45-day letter requested, "[e]vidence the regulated activity will not cause or contribute to a degradation of water quality standards,"[190] which is exactly what COMAR requires. Accordingly, this Court finds MDE did not erroneously interpret the law.

(2) Lacking Substantial Evidence:

Riverkeeper contends there is not substantial evidence to support MDE's finding that the pipeline will not cause or contribute to the degradation of surface waters for three reasons.[191] First, Riverkeeper asserts MDE did not comply with Maryland's water quality standards pursuant to COMAR 26.08.02.[192] Second, Riverkeeper argues there is not substantial evidence to support MDE's conclusion that Little Gunpowder Falls and Otter Point Creek have remaining assimilative capacity, as required by COMAR 26.08.02.04-1. Third, Riverkeeper alleges the Project does not satisfy the CWA, as required by to COMAR 26.08.02.04(2)(B).[193]

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[188] *Compare* MD. CODE REGS. 26.08.02.10.B (establishing what is required for a complete water quality certification application) *with* MD. CODE REGS. 26.089.02.04-1 (setting forth MDE's anti-degradation policy and review process).
[189] *See supra* notes 10–15 and accompanying text (discussing the 45-day letter).
[190] R. at 3961.
[191] Pet'r Riverkeeper Mem. at 25.
[192] *Id.* at 24 (corrected) (For clarity, this Court has restated Riverkeeper's argument.).
[193] Riverkeeper makes a fourth argument in support of no degradation alleging MDE's finding "that [t]he Project is consistent with State water quality standards" falls short of the statutory requirement, finding that the activity "will not cause or contribute to degradation." Pet'r Riverkeeper Mem. at 24 (corrected). However, this Court finds no merit in this allegation. The quotation Riverkeeper cites is found on page 3 of the Record, MDE's Noticeof Permit Decision. In MDE's Summary Opinion, Section C clearly states: "The Regulated Activity Does Not Cause or Contribute to a Degradation of Surface or Ground Waters," which is repeated in the Section C's conclusion. R. at 13 & 18.

(a) Maryland State Water Quality Standards:

Riverkeeper argues the Permit fails to adhere to State water quality standards. Respondents argue the Permit complies with State water quality standards for two reasons: (1) The Permit requires compliance with various industry manuals and (2) the Permit imposes Special Condition P, which requires post-construction monitoring at Little Gunpowder Falls.

Discussion

To make a finding that "the regulated activity will not cause or contribute to the degradation of ground or surface waters" as required by Section 5-907(a)(4), MDE must determine that the regulated activity does not:

> (1) Cause an individual or cumulative effect that degrades:
> (a) Aquatic ecosystem diversity, productivity, and stability;
> (b) Plankton, fish, shellfish, and wildlife;
> (c) Recreational and economic values; and
> (d) Public welfare; or
> (2) As determined by the Department, cause an individual or cumulative effect that:
> (a) Violates any applicable State water quality standard, the Environment Article of the Annotated Code of Maryland, or the Clean Water Act;
> (b) Degrades surface and ground water quality.[194]

Maryland water quality regulations specify: "Certain waters of this State possess an existing quality that is better than the water quality standards established for them. The quality of these waters shall be maintained . . . ."[195]

Respondents argue the Permit complies with Maryland water quality standards, by requiring Columbia adhere to various industry manuals. In *Anacostia*, the Court of Special Appeals found that a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit failed because it placed undue reliance on industry manuals that the Permit incorporated

[194] MD. CODE REGS. 26.23.02.06.A.
[195] MD. CODE REGS. 26.08.02.04.

by reference, and thereby eluded meaningful judicial review.[196] The Court held that the permit failed because it incorporated outside documents by general references rather than setting specific guidelines and requirements.[197] References to sources outside of the permit, "makes it impossible to figure out what the Permit requires without hunting for the underlying information in a way that requires far more expertise than one could reasonably expect."[198] The permit's generalized conditions and references to outside documents rendered the Court unable to conduct a "meaningful review of the Permit's compliance with the law."[199]

The case at bar is analogous to the situation in *Anacostia*. The Permit before this Court contains a number of special conditions, all of which reference outside documents. Special Condition G requires the "(Frac-out Plan) shall be in effect during HDD activities;" Special Condition J requires the implement[ation] [of] enhanced erosion and sediment control measures . . . as provided in the Department's May 10, 2013 letter to Permittee;" Special Condition K requires "[t]he Permittee shall implement Advanced Best Management Practices" for certain stream crossings; and the live stakes "shall be done in accordance with the 'Stream-Side Planting Plan . . . .' "[200]

Instead of clearly stating what standards apply and how the Project will adhere to those standards, MDE relies on four different outside documents as evidence to support their contention that substantial evidence exists. Even if a person were to know how to access all of these documents and actually does access them, determining whether the Project was in compliance would be an onerous task and one that requires "more expertise than one could

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[196] Md. Dep't Envir. v. Anacostia Riverkeeper, September Term 2013, No. 2199 (Filed April 2, 2015) Slip Op. at 30.
[197] *Id.* at 23.
[198] *Id.* at 24.
[199] *Id.* at 24.
[200] R. at 28.

reasonably expect."[201] As the enhanced erosion and sediment control measures were provided only in a letter to Columbia, MDE offers no explanation as to how members of the public could become aware of those measures.

Respondents next contend the Permit meets State water quality standards, because Special Condition P requires post-construction monitoring of Little Gunpowder Falls. In *Anacostia*, the NPDES permit "require[d] monitoring only in the Lower Paint Branch Watershed, one of many [watersheds] affected . . . ."[202] To support its position that the permit was actually subject to monitoring at every watershed, MDE argued "*prior* iterations of the Permit required broader monitoring [obligations] . . . ."[203] However, the Court found this argument unpersuasive and held "if that is what the Department intended, the terms of the Permit need to reflect that so that the Permit's overall compliance with the Act's monitoring obligations can be understood and tested."[204]

Similarly, the Permit before this Court requires monitoring of one stream when many are impacted by Columbia's Project. Special Condition P requires monitoring "consisting of one benthic and one fish sample . . . after pipe installation at Little Gunpowder Falls, known as Crossing #9."[205] Respondents failed to explain how monitoring of one stream is representative of the entire project, ensuring Columbia's project will not cause or contribute to the degradation of State water qualities.

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[201] *Anacostia Riverkeeper*, Slip Op. at 24.
[202] *Id.* at 28.
[203] *Id.* at 29.
[204] *Id.*
[205] R. at 28.

There is insufficient information within the Permit for this Court to determine if the Permit complies with the State's water quality standards, and as such, this Court must remand for further proceedings to ensure the Permit complies with Maryland state water quality regulations.

(b) Remaining Assimilative Capacity Challenge:

As a preliminary issue, Columbia argues Riverkeeper's challenge is moot "because these waterbodies have already been crossed by the Project [therefore] petitioner has no available remedy."[206] Riverkeeper argues the "claims as to Phase I are not moot because the Court could still vacate the Permit and Certification, order restoration, direct MDE to consider additional post-construction monitoring requirements or expand the mitigation requirement."[207]

A claim " 'is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy.' "[208] Contrary to Columbia's assertion, there is clearly an existing controversy between the parties. The crux of Riverkeeper's challenges to the Permit are the conditions, or lack thereof, for the Project. As the Project is ongoing and as this Court is remanding the decision, MDE could impose the additional measures that Riverkeeper proposes. Therefore, this Court finds Riverkeeper's claim is not moot and will address the merits.

Riverkeeper Challenge #1

As to the merits, Riverkeeper first argues MDE "lacked evidence to determine that Little Gunpowder Falls and Otter Point Creek have remaining assimilative capacity."[209] Riverkeeper's argument challenges MDE's use of the baseline standards instead of more recent data, which Riverkeeper argues renders MDE's decision arbitrary and capricious.

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[206] Resp't Columbia Mem. Riverkeeper at 21.
[207] Pet'r Riverkeeper Reply Mem. at 3 n.1.
[208] Clark v. O'Malley, 434 Md. 171, 197 (2013) (citing *In re* Joseph N., 407 Md. 298, 301 (2009)).
[209] Pet'r Riverkeeper Mem. at 25.

Respondents assert "MDE properly determined that both Little Gunpowder Falls and Otter Point Creek had assimilative capacity."[210] Respondents argue this default calculation is what COMAR contemplates and there is no statutory requirement that more recent data be collected or used.

Discussion:

MDE lists bodies of water as Tier II when their "water quality is better than the minimum requirements specified by the water quality standards . . . ."[211] The quality of Tier II waterways must "be maintained."[212] When a body of water is designated as a Tier II, a permit is needed to ensure compliance with anti-degradation standards.[213] There are two steps in the anti-degradation analysis.

MDE must first determine whether there is assimilative capacity in a Tier II stream and if there is assimilative capacity, it must then determine whether there is "remaining assimilative capacity," also referred to as "assimilative capacity threshold." [214] Assimilative capacity is defined as "the difference between the water quality at the time the water body was designated as Tier II (baseline) and the water quality criterion."[215] Essentially, a stream's assimilative capacity threshold refers "to the maximum allowable load of the specific substance the waterbody can receive without violating water quality standards."[216] Under the anti-degradation analysis, "water quality shall be considered diminished only if the assimilative capacity . . . is cumulatively

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[210] Resp't Columbia Mem. Riverkeeper at 21.
[211] MD. CODE REGS. 26.08.02.04-1.A.
[212] *Id.*
[213] "Maryland's wetlands and waterways regulatory process governed by the . . . Nontidal Wetlands (COMAR 26.23.01–06) . . . satisfies the requirements of this regulation." MD. CODE REGS. 26.08.02.04-1.I.
[214] Resp't MDE Mem. at 27.
[215] MD. CODE REGS. 26.08.02.04-1.G(3)(a).
[216] Assateague Coastkeeper v. Md. Dep't of the Envir., 200 Md. App. 665, 715 (2011).

reduced by more than 25 percent from the baseline water quality determined when the body was listed as Tier II."[217]

Both streams were determined to have assimilative capacity when they were designated as Tier II waterways in 2008;[218] therefore, the next step is to calculate the assimilative capacity threshold. In order to make this determination, "current data collected within the last 3 years that meets MBSS [Maryland Biological Stream Survey] protocols, regarding collection, quality assurance, and analysis is utilized by the Department to determine current remaining AC [assimilative capacity]."[219] As there was no current data regarding Little Gunpowder Falls or Otter Point Creek, "the Department [made] a default determination that there is some capacity remaining."[220] When MDE used the baseline water quality criterion, both streams were found to have remaining assimilative capacity.[221]

The "Anti-degradation Policy Implementation Procedures" regulation is enacted by MDE to guide the issuance of permits, allowing dredging or fill material into waters of the State. As this is a regulation that MDE administers, "the expertise of the agency in its own field should be respected"[222] and on review, the agency's interpretation of its own statute "should ordinarily be given considerable weight . . . ."[223] Where an agency is acting within its discretion, the decision

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[217] MD. CODE REGS. 26.08.02.04-1.J(2).
[218] MD. CODE REGS. 26.08.02.04-1.O.
[219] R. at 5044.
[220] R. at 5050.
[221] "Little Gunpowder Falls-3 was designated as a Tier II stream in 2008 with a baseline water quality designation of 4.00 (fish) and 4.00 (benthic). Otter Point Creek-1 was designated as a Tier II stream in 2008 with a water quality designation of 4.33 (fish) and 4.14 (benthic)." The baseline water quality applicable to all waters is 3.00 (fish) and 3.00 (benthic). The assimilative capacity equation for Otter Point Creek is 4.33 – 3.00 = 1.33 (fish) and 4.14 – 3.00 = 1.14 (benthic). The assimilative capacity equation for Little Gunpowder Falls is 4.00 – 3.00 = 1.00 (fish) and 4.00 – 3.00 = 1.00 (benthic). Therefore, both streams have assimilative capacity. Otter Point's assimilative capacity is 1.33 (fish) and 1.14 (benthic) and Little Gunpowder Fall's is 1.00 (fish) and 1.00 (benthic). Resp't Columbia Mem. Riverkeeper at 27.
[222] Md. Aviation Admin. v. Noland, 386 Md. 556, 572 (2005).
[223] Md. Bd. of Physicians v. Elliot, 170 Md. App. 369, 437 (2006) (emphasis omitted).

will be overturned only if this Court finds it "is 'so extreme and egregious' that it may be deemed 'arbitrary and capricious.' "[224] MDE interprets its anti-degradation regulation to allow, but not require, the use of more recent data to calculate a stream's assimilative capacity threshold.[225]

Giving deference and respect to MDE's interpretation of its own regulation and MDE's expertise in the field, this Court finds MDE's decision was not arbitrary and capricious.

Riverkeeper Challenge #2:

Riverkeeper next argues Special Condition P's mandates are insufficient monitoring to ensure the streams' assimilative capacity threshold will not drop below the baseline water quality standard. Respondents argue the Permit's Special Condition P's monitoring requirements along with the Permit's special conditions, requiring Columbia adhere to various industry standards, are sufficient to ensure the streams' assimilative capacity threshold will not drop below baseline water quality standard.

Discussion:

As discussed more fully above, the Permit lacks sufficient information, rendering this Court unable to determine if the Permit's special conditions comply with State water quality regulations.

(c) CWA:

Riverkeeper's third argument is that the Permit fails to set forth monitoring requirements as required by the CWA. Respondents counter that the CWA's monitoring requirement is discretionary; and therefore, MDE had no obligation to set forth monitoring requirements in the Permit.

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[224] *Id.* at 406.
[225] *Id.*

Discussion:

The CWA provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with effluent limitations under section 1311 or 1312 of this title . . . and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.[226]

The effluent limitations and monitoring requirements are not discretionary. While the Certification does not set forth any effluent limitations or monitoring requirements, it does incorporate the Permit and its conditions. Special Condition L of the Permit specifies:

> [T]he Permittee shall comply with Part IV. Effluent Limitation, Preventions of the Discharge of Significant Amounts of Sediment, Monitoring, Recording Requirements found in the Maryland Department of the Environment General Permit for Stormwater Associated with Construction Activity, General NPDES [National Pollutant Discharge Elimination System] Permit Number MDR10, State Discharge Permit 09GP.[227]

However, as in *Anacostia*, instead of setting forth effluent limitations, as required by the CWA, the Permit incorporates by reference the effluent standards from the NPDES/Stormwater Permit. There is confusion as to the outside document to which the Permit's Special Condition L is referencing. While the Permit cites to the General Permit for Stormwater, MDR10, and State Discharge Permit, Number 09GP,[228] Respondents and Riverkeeper cite to Permit Number 11-HT, which epitomizes the problem of outside documents being incorporated by reference.[229] Even if this Court knew which document set forth the required effluent limitations, it is

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[226] 33 U.S.C. § 1341(d).
[227] R. at 28.
[228] R. at 28.
[229] *See* Resp't MDE Mem. at 25 (referencing "General Discharge Permit No. 11-HT"); Resp't Columbia Mem. Riverkeeper at 17 (discussing pages 16–17 of MDE's Summary Opinion, wherein MDE discusses Permit Number 11-HT); Pet'r Riverkeeper Mem. at 8 (referencing General Discharge Permit No. 11-HT and General Discharge Permit 09-GP).

"impossible to figure out what the Permit requires without hunting for the underlying information in a way that requires far more expertise than one could reasonably expect."[230] Compounding the problem is the fact that none of these documents are in the Record, making it impossible for this Court to determine whether the Permit complies with CWA's mandates.[231] Accordingly, this Court will remand the decision to MDE for further proceedings.

D. The Project is Consistent with any Comprehensive Management Plan that may be Developed in Accordance with §5-908:[232]

The fourth and final prong for granting a Permit pursuant to the Nontidal Wetlands Protection Act ensures compliance with any comprehensive management plan. Pursuant to Section 5-908, MDE "may prepare comprehensive watershed management plans which address nontidal wetland protection, creation, and restoration, cumulative impacts, flood protection, and water supply concerns."[233] The Project must be consistent with any watershed management plans, including decisions regarding restoring nontidal wetlands.[234] To evaluate this fourth prong, MDE considered: (1) hydrologic and hydraulic analysis; (2) erosion and sediment control plans; and (3) time of year restrictions.

Challenge:

Riverkeeper's water quality and monitoring challenges discussed above relate to this prong as well, although Riverkeeper does not specifically cite to this provision.

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[230] Md. Dep't of Envir. v. Anacostia Riverkeeper, September Term 2013, No. 2199 (Filed April 2, 2015), Slip Op. at 24.
[231] On judicial review this Court is confined to the Record. ENVIR. § 1-606(c).
[232] ENVIR. § 5-907(a)(4).
[233] § 5-908.
[234] *Id.*

Discussion:

MDE set forth special conditions for the Project, requiring Columbia: "implement enhanced erosion and sediment control measures for all stream crossings as provided in the Department's May 10, 2013 letter to the Permittee;" "incorporate Advanced Best Management Practice's" for certain stream crossings; "comply with Part IV. Effluent Limitation Preventions of the Discharge of Significant Amount of Sediment, Monitoring, Recording and Reporting Requirements found in the . . . General NPDES Permit Number MDR10, State Discharge Permit Number 09GP;" and satisfy the Forest Conservation Act requirements.[235]

As discussed more fully above, MDE's reliance on the incorporation of outside documents renders the Permit not specific enough. Accordingly, this Court remands the decision to MDE for inclusion of more specific information in the Permit.

II. WATERWAYS CONSTRUCTION ACT

The Waterways Construction Act regulates projects to ensure that the project is in the public interest and involves the least impact necessary to achieve its purpose.[236] MDE reviews permit applications when the project proposes changes "in any manner . . . in whole or part the course, current, or cross section of any stream or body of water within the State, except tidal waters."[237] MDE must "weigh all respective public advantages and disadvantages and make all appropriate investigations."[238]

MDE shall grant the permit if the evidence demonstrates, "the applicant's plans provide greatest feasible utilization of the waters of the State, adequately preserve public safety, and

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[235] R. at 28.
[236] ENVIR. §§ 5-501 to 5-516.
[237] § 5-503(a).
[238] § 5-507(a).

promote the general public welfare . . . ."[239] In granting the permit, MDE may impose "any condition, term, or reservation . . . to preserve proper control in the State and insure the safety and welfare of the people of the State."[240]

In contrast, MDE shall deny the permit if the evidence demonstrates the proposed project "is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest . . . ."[241] If MDE finds the proposed project meets the above criteria, MDE "may reject the application or suggest modifications to the proposed plans to protect the public welfare and safety."[242]

Although Bosley does not specifically mention the Waterways Construction Act, the following challenges raised by Bosley involve matters of public concern; and therefore, the Court will address them here.

A. Maryland Historic Trust:

MDE has the duty to consult with the Maryland Historical Trust ("MHT") to ensure the Project has no adverse impact on historic properties.[243] MDE provided MHT Eight Supplemental Phase I Reports,[244] which MHT reviewed and ultimately determined that the Project would have no adverse impact on historic properties.[245]

Challenge:

Columbia contends that MHT evaluated the Bosley property and determined the Project posed no adverse impact.[246] In support, Columbia attached a letter dated January 8, 2014 from

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[239] *Id.*
[240] § 5-507(b).
[241] § 5-507(a).
[242] *Id.*
[243] MD. CODE ANN., STATE FIN. & PROC. §§ 5A-101 to 5A-406.
[244] R. at 7635–848.
[245] R. at 8152.
[246] Resp't Riverkeeper Mem. at 25.

Michael B. Hornum to Elizabeth Cole, the Administrator of Project Review and Compliance for MHT, to its Memorandum.[247] The letter requested MHT conduct additional evaluations of certain properties that "lack landowner permission for access . . ."[248] The letter informs "aerial maps of the unsurveyed locations have been enclosed;" however, Columbia did not include these aerial maps in the Exhibit.[249] While the text of the letter itself does not mention the Bosley's property, there is a handwritten note that says "Bosley Farm-18th C."[250] Columbia argues that this letter and the handwritten notes support the proposition that Balama Farm was evaluated and that MHT determined the Project did not have an adverse effect on Balama Farms.[251]

Although Respondent MDE did not address this challenge in its Memorandum, at the Hearing MDE directed this Court to an email from MHT to MDE dated April 8, 2014, informing MDE that MHT had finished the 8th Supplemental Phase I evaluation.[252] The email states:

> This study was done for proposed access roads 0225 and 1000 in Baltimore County and proposed access road and turn-around area 1780 in Harford County. While one of these access roads is located within the National Register Listed Caves Historic district, t [sic] is our opinion these activities will have no adverse effect on historic properties.[253]

Discussion

The question before this Court is whether there is substantial evidence on the Record to support MDE's finding. The letter on which Columbia relies is not contained in the Record; and

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[247] Resp't Riverkeeper Mem. at Ex. C.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] Columbia reads this note to say: "In vicinity BA-266 (Bosley Farm)-18th C.–Engineering plans submitted to MHT 3/3/14—impact areas are removed enough from Bosley Farm—low potential for significant deposits associated w/ 18th C. farm." (Resp't Columbia Mem. Bosely at 25 n.27). However, the letter is dated January 8, 2014, before MDE's decision on HDD, the handwritten notes are blurry, and there is no indication as to when the notes were made, which causes this Court to question the validity and accurateness of the letter.
[252] R. at 8152.
[253] R. at 8152.

on judicial review this Court is confined to the Record.[254] The April 8, 2014 email states that MHT had finished the Phase I evaluation; however, Bosley's property is part of Phase II.[255] Further, the access roads mentioned in the email are not the access road at Bosley's property.[256] Accordingly, the email does not provide substantial evidence to support MDE's finding.

Respondents do not direct this Court to any document contained in the Record to support this proposition that MHT ever assessed the Bosley property or any document to show MHT inspected Bosley's property and determined the Project would have no adverse impact on the Bosley's historic property.

There is no question that Bosley's Balama Farms is a historic property. There is no evidence in the record to support MDE's determination that "MHT determined that no historic properties will be affected by the Project."[257] As this decision lacks substantial evidence, this matter will be remanded to MDE for further evidence.[258]

B. Beyond the Scope of Permit:

Bosley argues that the Permit exceeds the scope of MDE's authority because, "General Condition 6 does not authorize any injury to private property or invasion of rights."[259] Bosley argues Special Condition E, requiring the HDD method to cross Gunpowder Falls and implement geotechnical surveys, contradicts General Condition 6.[260] Bosley contends the Special Condition authorizes what the General Condition prohibits. Bosley explains the geotechnical surveys are

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[254] ENVIR. § 1-606(c).
[255] R. at 5 ("Phase II is approximately eight miles and will begin at MP 16.0 and end at MP 8.0."); R. at 12 ("#8—Gunpowder Falls and Tributaries to Gunpowder Falls (MP 11.6)").
[256] *See* R. at 709.
[257] R. at 20.
[258] Respondent Columbia argues this action for judicial review is not the proper forum for Bosley's challenge; however, at the Hearing when this Court inquired into what the proper forum would be, Columbia said they did not know.
[259] Pet'rs Bosley Mem. at 26; R. at 27.
[260] *Id.*. at 26.

already taking place on their property pursuant to Section 12-111 of the Real Property Article[261] and a federal condemnation action in federal court.[262]

Respondents argue the Permit does not give Columbia any property rights and any authority Columbia acquires to conduct activity on Bosley's property would be through an agreement between Columbia and Bosley or federal eminent domain authority. Columbia argues: "MDE did not, however, require the HDD be done using any particular properties as the drilling entry or exit points. In fact, the MDE has not required Columbia to use the Bosley property at all."[263] Columbia volunteers that "Columbia developed the HDD Route to accommodate the MDE's decision to require an HDD crossing at Gunpowder Falls."[264]

Discussion:

It is clear that Columbia used and is using MDE's decision to obtain access and occupy Bosley's properties. Columbia's ability to access and occupy Bosley's property comes from state and federal court orders,[265] not the Permit. As such, this Court finds MDE did not exceed the scope of the Permit.

CONCLUSION:

After consider the Petitioners' Memoranda, Respondents Opposition Memoranda and Petitioners' Reply thereto, the arguments of counsel, and the Record herein this Court makes the following findings.

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[261] MD. CODE ANN., REAL PROP. § 12-111.
[262] Natural Gas Act, 15 U.S.C. § 717f(h).
[263] Resp't Columbia Mem. Bosley at 29–30.
[264] *Id.* at 7–8.
[265] Columbia Gas Transmission, LLC v. Those Certain Parcels in Baltimore County and Harford County, Maryland, No. 1:14-CV-00220 (D. Md. 2014); Columbia Gas Transmission, LLC v. Balama Farms, Inc., No. 03-C-14-277 (Balt. Cnty. Cir. Ct. 2014).

This Court first finds the Public Notices did not accurately state the nature and location of Columbia's Project, therefore, this Court remands this matter to MDE in order to comply with the notice and hearing requirements of Section 5-204(b). Second, this Court finds the Permit lacks specific information and relies on incorporating outside sources, rendering it impossible for this Court to determine whether the Permit complies with State water quality regulations and the CWA. Therefore, the matter is remanded to MDE for further proceedings. Finally, there is not substantial evidence on the record to support MDE's decision that MHT evaluated the Project and determined no historic properties will be adversely impacted. Accordingly, this Court remands to MDE for further information.

JUSTIN J. KING, JUDGE
CIRCUIT COURT FOR BALTIMORE COUNTY

True Copy Test
JULIE L. ENSOR, Clerk
Per
Assistant Clerk