

IN THE CIRCUIT COURT FOR HARFORD COUNTY, MARYLAND

Civil Action No.: C-12-CV-20-000492

GUNPOWDER RIVERKEEPER

Petitioners et al

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Respondents et al.

For Judicial Review of the Decision of the
Maryland Department of the Environment in the
Case of Nontidal Wetlands and Waterways Permit
No. 19-NT-0228 201961268

**MEMORANDUM IN SUPPORT OF GUNPOWDER RIVERKEEPER'S
PETITION FOR REVIEW**

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	)	
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	)	
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**MEMORANDUM IN SUPPORT OF GUNPOWDER RIVERKEEPER’S
PETITION FOR JUDICIAL REVIEW**

Gunpowder Riverkeeper (“Riverkeeper”), by and through undersigned counsel, submits this memorandum of law in support of its Petition for Judicial Review of the Maryland Department of the Environment’s (“the Department” or “MDE”) final decision to issue a Nontidal Wetlands and Waterways Permit No. 19-NT-0228 201961268 (“Permit”) to BTC III I-95 Logistics Center LLC (Formerly CREG /Westport I LLC) (“Applicant”) for the Abingdon Business Park.

In support of its Petition for Judicial Review of the Maryland Department of the Environment’s (“MDE”) final decision to issue a Nontidal Wetlands and Waterways Permit (“Permit”) to allow BTC III I-95 Logistics Center LLC (Formerly CREG /Westport I LLC) to construct a mixed-use business park on 330 acres consisting of warehouse facilities, retail space, restaurants, and a hotel. The project will include parking lots, utilities, retail

buildings and stormwater management facilities, temporary construction access and dewatering. The project permanently impacts 17,112 square feet of forested (isolated) nontidal wetlands, 32,782 square feet of a nontidal 25-foot wetland buffer, 570 linear feet (6,457 square feet) within an intermittent stream, and 4,618 square feet of a 100-year nontidal floodplain. The temporary impacts are to 120 linear feet (1,573 square feet) of a perennial stream and 230 linear feet (3,235 square feet) of an intermittent stream, and 17,764 square feet within the 100-year nontidal floodplain to the Haha Branch of Bush River.

Gunpowder Riverkeeper, hereinafter (“Riverkeeper” or “Petitioner”) states as follows:

STATEMENT OF THE CASE

This matter before the Court is about failure: failure by the Department to make a rational, supported, and legally defensible permitting decision, failure to protect important and beneficial natural resources, failure by the Applicant to comply with state law and regulations, and a failure to properly consider and weigh the Petitioner and the public’s comments and concerns.

The Department’s decision to issue the Wetlands and Waterways permit at issue here flies in the face of common sense and the law. In making this decision, the Department ignores their own relevant studies, data, and analyses; established scientific and ecological principles; and t significant and legitimate concerns from Petitioner, the public, experts in relevant fields, Harford County Council members, and respected conservation and environmental advocacy organizations. The Department also ignores statutory and regulatory requirements and makes a decision that is not supported by the evidence in the Record and contrary to the legislative intent and findings of Maryland’s Nontidal Wetlands Protection Act.

The Nontidal Wetlands Protection Act states clearly that nontidal wetlands are intricately connected and important to preserving and protecting waters of the state of Maryland. The legislature’s findings align with established scientific facts, directly linking the degradation and losses of nontidal wetlands to the decline of the Chesapeake Bay and other waters of the state. The State has also found that land use decisions and excessive development results in direct loss and degradation of nontidal wetlands in the state, which in turn leads to diminished water quality. The importance and necessity of nontidal wetlands to the health of Maryland’s

environment cannot be understated. Nontidal wetlands reduce pollutant loadings, including excessive nutrients, sediments, and toxics; attenuate flood and stormwater; stabilize shorelines; provide erosion control, are habitat for many species of fish, birds, and mammals, including rare and endangered species and support animal and human food chains and timber production. The Department's decision to issue this permit ignores the importance and necessity of nontidal wetlands and runs counter to scientific understanding, the legislative mandate and findings.

Petitioner and the public raised significant, legitimate, and repeated concerns, to the Department about the lack of public need for this project and how allowing this Permit and Project will have a ripple effect of negative impacts on three local schools, neighboring churches and adjacent neighborhoods. Abingdon Woods is the last large stand of forest in Abingdon and contains numerous wetlands, streams and Haha Branch, a tributary of the Bush River that flows to Otter Point Creek. When this forest and its associated wetlands and waterways are significantly destroyed and altered, it will remove the natural barrier and pollution filter the forested wetlands provide the community from Interstate 95 and the surrounding industrial areas. This will inundate the surrounding communities, schools and churches with noise, air, and water pollution, and have a detrimental impact on the quality of life of all who live near this project.

In summary, the Department has approved a Permit that will lead to the substantial destruction of 330 acres of forested wetlands to construct a mixed-use industrial business park. This project will further degrade water quality in an already impaired watershed and further inundate the surrounding community with more pollution. As will be demonstrated below, the Department's rationale and decision making in granting this Permit is flawed, irrational, arbitrary; ignores crucial analyses and is contrary to law. In reviewing projects that propose to impact nontidal wetlands, MDE may not issue a permit for a non-water-dependent activity unless it has no practicable alternative, minimizes impacts to the nontidal wetlands, and will not cause or contribute to the degradation of ground or surface waters. The Applicant has failed to demonstrate that any, let alone all, of these criteria are met. Therefore, the Permit must be remanded.

QUESTIONS PRESENTED

1. Did the Department err in concluding the project qualified for a Letter of Authorization?
2. Did the Department err in concluding that the regulated activities will not cause or contribute to a degradation of groundwater or surface waters?
3. Did the Department err in concluding that the project's economic value outweighs the ecological and economic value of the impacted nontidal wetlands?
4. Did the Department err in determining the Tier II Review was adequately completed and that impacts to Tier II water Otter Point Creek were justified?
5. Did the Department Arbitrarily Approve the Permit?

JURISDICTION AND VENUE

I. This Court has Jurisdiction to Review the Permit.

This Court has jurisdiction over the petition for judicial review of the Permit pursuant to Title 5, Subtitle 2 of the Environment Article of the Maryland Code. A final determination on the issuance of a Nontidal Wetlands and Waterways Permit is subject to judicial review at the request of any person that meets the threshold standing requirements under federal law and who participated in the agency's public comment process. Md. Code Env. §5-204(f). As discussed below, Riverkeeper and its supporters have standing under federal law and participated in the comment process through the submission of written and oral comments. A petition for review shall be filed in the circuit court for the county where the application for the permit states that the proposed activity will occur. Md. Code Env. §5-204(i). The Permit authorizes the project in Harford County, therefore this Court has jurisdiction over the matter. Accordingly, it is subject to judicial review under Md. Code Env. §5-204 and 1-601.

II. Gunpowder Riverkeeper Meets Federal Standing Requirements.

To satisfy federal standing requirements, one must show three elements: (1) harm: that it has suffered an "injury in fact" that is both concrete and particularized and actual or imminent, (2) causation: that the injury is "fairly traceable" to the challenged action, and (3) redressability: a likelihood that the injury will be redressed by a favorable decision. *Patuxent Riverkeeper v. Md Dep't of the Env't*, 422 Md. 294, 299-300 (2011) (citing *Friends*

of the Earth, Inc. v. Laidlaw Env't Servs, Inc., 528 U.S. 167, 180-81 (2000)). An organization has standing if “its members would otherwise have standing to sue 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.” 422 Md. at 300 (quoting *Friends of the Earth*, 528 U.S. at 181).

Sufficient “injury in fact” may consist of “a negative impact on the organizational representatives’ recreational or aesthetic appreciation of the affected area” or a negative impact on a person’s economic interests. *Id.* Referring to *Friends of the Earth*, the Court of Appeals observed, “[t]he Court noted that an injury to aesthetic, recreational or economic interests need not be consummated, so long as an individual can demonstrate reasonable concerns about the effects of the challenged activity.” *Id.* In *Patuxent Riverkeeper*, the Court of Appeals held that the organization had standing to challenge a wetlands and waterways permit for a road extension and a stream crossing for a commercial development. The injury that the court found sufficient was harm to the recreational, aesthetic and economic interests of one of its members who was “‘a frequent recreational paddler’ on the Western Branch of the Patuxent River” and also had an “‘aesthetic interest in the beauty of the river and the cleanliness of its water,’” as well as an economic interest due to maps and guides he made and sold. 422 Md. at 308 (quoting in part the Circuit Court’s findings).

Despite making these findings, the Circuit Court had dismissed the judicial review action for lack of standing because of its view that any injury to the member was conjectural or speculative. *Id.* at 308-09. The Court of Appeals disagreed. It said that the Circuit Court had “failed to credit the reasonable concern that [the member] manifested about future harm to the ecology of the Western Branch” downriver of the permitted project. 422 Md. at 309. The Court found the necessary causal nexus was present because of allegations that “stream crossings at headwaters and wetlands can cause” adverse impacts on the watershed downstream. *Id.* at 310. Finally, the element of redressability was satisfied by the possibility of rescission of the permit or imposition of more intensive mitigation requirements. *Id.*

The injuries to the recreational, aesthetic and economic interests of Gunpowder Riverkeeper and its supporters here are strikingly similar to those in *Patuxent Riverkeeper*. Gunpowder Riverkeeper is a 501(c)(3)

nonprofit organization with approximately 445 members who live, work and recreate in the Gunpowder River and Bush River watersheds. See Exhibit A, Affidavit of Theaux M. Le Gardeur (hereinafter “Le Gardeur Aff’”), ¶ 10. Mr. Theaux Le Gardeur is Gunpowder Riverkeeper’s executive director, the Gunpowder Riverkeeper and a supporter of the organization. *Id.* A resident of Reisterstown, Maryland, he frequently fishes, canoes, and wades in and on the Bush River and its tributaries. *Id.* ¶ 1. Mr. Le Gardeur also hikes their banks, takes photographs, and enjoys the aesthetic quality of the river and its environs. *Id.*

In addition, Mr. Le Gardeur’s livelihood depends on the continued existence of a thriving fishery in the Bush River watershed. *Id.* ¶ 4. For 21 years, he has owned and operated a fly-fishing shop and a fishing guide service in Monkton, Maryland. *Id.* ¶ 3. Mr. Le Gardeur holds a Maryland freshwater fishing guide license and teaches people how to fish on the Gunpowder and Bush Rivers and their tributaries. *Id.* Furthermore, Mr. Le Gardeur is a Hunting and Fishing License Agent for the Maryland Department of Natural Resources who administers and sells recreational sporting licenses to those who visit the Gunpowder and Bush River watersheds in Baltimore and Harford Counties. *Id.* ¶ 5.

Development of the Abingdon Business Park threatens Mr. Le Gardeur’s livelihood and enjoyment of the Bush River. The current permit allows for construction that will permanently impact forested nontidal wetlands, nontidal 25-foot wetland buffer, an intermittent stream, and 100-year nontidal floodplain; it will also have numerous temporary impacts and stream crossings. The project will also significantly deforest parts of the HaHa branch watershed and the Tier II watershed of Otter Point Creek I. This construction is likely to result in negative water quality impacts to the HaHa Branch and to Otter Point Creek, immediately downstream of the project area. Degraded water quality in turn diminishes fisheries and Mr. Le Gardeur’s economic, recreational and aesthetic enjoyment of the Bush River watershed and imperils his livelihood. *Id.* ¶ 1, 11, 14, 15. A favorable decision by this Court rescinding this permit would redress the harm to Mr. Le Gardeur’s economic, recreational, and aesthetic interests in the Bush River and its tributaries Haha Branch and Otter Point Creek. *Id.* ¶ 18.

Mrs. Tracey Waite is a supporter of Gunpowder Riverkeeper and supports Riverkeeper’s mission and its opposition to the approval of the Permit. Exhibit B, Affidavit of Tracey Waite (hereinafter “Waite Aff’”), ¶ 3 and

4. Mrs. Waite lives in Bel Air Harford County, Maryland and has lived there for 25 years. *Id.* ¶ 2 Mrs. Waite walks, hikes, kayaks and recreates in the Bush River watershed and Otter Point Creek. *Id.* She also participates in youth education and exploration activities in Otter Point Creek and in the Anita Leight Estuary Area, Mrs. Waite enjoys the aesthetic qualities of the Bush River and enjoys knowing that the Otter Point Creek area is a relatively healthy ecosystem protected by upstream forested wetlands known as Abingdon Woods. *Id.* ¶ 2, 5, 18. Mrs. Waite is aware that the Bush River watershed is polluted because of excessive development and high percentages of impervious surface within the watershed. *Id.* ¶ 13. Mrs. Waite is aware of the numerous benefits that wetlands and healthy stream systems provide the environment and downstream users, Mrs. Waite is concerned that this Permit, that allows the destruction and alteration of wetlands and waterways in Abingdon woods, will diminish their beneficial impacts and lead to the associated negative impacts to water quality in Haha Branch and immediately downstream in Otter Point Creek. *Id.* ¶ 11, 12, 16. Mrs. Waite is concerned that the Permit will result in increases in pollution in stormwater and more stormwater runoff. *Id.* If the permit is not rescinded and the project allowed to move forward, Mrs. Waite will no longer feel safe or comfortable recreating or facilitating student and youth education and exploration activities in Otter Point Creek or participating in programs at Anita Leight Estuary for fear and knowledge of the increases in polluted stormwater runoff from the project entering Haha Branch and Otter Point Creek. *Id.* ¶ 16, 17. A favorable decision by this Court rescinding this permit would redress the harm to Mrs. Waite’s recreational and aesthetic interests in the Bush River and its tributaries Haha Branch and Otter Point Creek and Mrs. Waite would continue to use the watershed as she has been for years. *Id.* ¶ 18.

Mrs. Janet Hardy is a supporter of Gunpowder Riverkeeper and supports Riverkeeper’s mission and its opposition to the approval of the Permit. Exhibit C, Affidavit of Janet Hardy (hereinafter “Hardy Aff”), ¶ 3 and 4. Mrs. Hardy has lived in Abingdon, Harford County, Maryland for 63 years, Mrs. Hardy’s family has lived in the Gunpowder and Bush River watersheds for over 100 years, the watersheds are intricately linked and important to Mrs. Hardy and her family as they have recreated, enjoyed, fished and crabbed in the watersheds for generations. *Id.* ¶ 2, 3. Mrs. Hardy has used the watershed for years, her family boats in Otter Point Creek and

swims in the Bush River, Mrs. Hardy wishes to preserve and protect the watershed for her and her family for generations to come. *Id.* ¶ 2, 3, 21. Mrs. Hardy lives approximately 100 feet from Abingdon Woods. Mrs. Hardy routinely experiences flooding on her property and in her community during rain and storm events; this flooding and associated water issues began when residential and commercial development around her house increased. *Id.* ¶ 16. Mrs. Hardy is concerned that increased development allowed by the Permit will lead to more flooding on her property and in her community and negative impacts to water quality in Abingdon Woods and immediately downstream in Otter Point Creek. *Id.* ¶ 17, 18, 20, 21. Mrs. Hardy is concerned about harms to her property, aesthetic, and recreational interests from this Permit and will no longer feel comfortable recreating or allowing her grandchildren to recreate in Otter Point Creek or participate in programs at Anita Leight Estuary for fear and knowledge of the polluted runoff from the Project entering the waterways. *Id.* ¶ 21. A favorable decision by this Court rescinding this permit would redress the harm to Mrs. Hardy's recreational and aesthetic interests in the Bush River and its tributaries Haha Branch and Otter Point Creek and Mrs. Hardy would continue to use the watershed as she and her family have done for over a hundred of years. *Id.* ¶ 23.

The primary purposes of Gunpowder Riverkeeper are to protect, conserve, and restore the Gunpowder River, Bush River and Bird Rivers and their watersheds for the benefit of the public.¹ Riverkeeper also educates the public about environmental threats to these rivers, conducts outreach, stewardship and monitoring programs, and partners with other organizations that share similar goals. *Id.* Riverkeeper's goal and purpose are germane to the subject of this case, which pertains to a permit that allows the destruction and alteration of wetlands and waterways in the Bush River watershed, destruction and alteration that will lead to negative water quality impacts and harm Riverkeeper and its supporters recreational, economic, and aesthetic interests. Exhibits A, B, and C. There is no aspect of the case that requires the participation of any individual support in the litigation. Therefore, on these facts, Gunpowder Riverkeeper has associational standing. *See Patuxent Riverkeeper*, 422 Md. 300.

¹ *About Gunpowder Riverkeeper* <https://gunpowderriverkeeper.org/about-gunpowder-riverkeeper/> (accessed 6/28/2022).

III. Gunpowder Riverkeeper Participated in the Agency Proceedings.

Riverkeeper and supporters actively participated in the Department's public notice and comment proceedings for the Permit. R. at 0547-0553, 0554-0559, 0597, 0624-0627 0658-0667, 0700-0703, 0956-0966, 0984-0985, and 1064-1069. Riverkeeper and supporters submitted multiple written public comments and participated in the Department's public hearing on the draft permit. R. at 0509-0521. This satisfies the requirements of Md. Code Envir. §5-204(f).

STATEMENT OF THE FACTS

I. Factual Background.

A. Impacted Watershed

The Bush River watershed is highly impaired and degraded. The State of Maryland is required to assess and monitor the quality of waters of the state. COMAR 26.07.02.01. This is done through the preparation of integrated reports.² Maryland's integrated report details a bleak picture of the water quality in the Bush River, the entire watershed, from the small streams and creeks to the rivers and on down to the tidal portion where it empties into the Chesapeake Bay is impaired and degraded by numerous pollutants.³ R. at 0661. These pollutants include Total Suspended Solids ("TSS") Chlorides, Sulfates, Habitat Alterations/Channelization, and lack of riparian buffers. *Id.* All of these pollutants have one thing in common; they are all caused by and associated with urban, commercial, and residential development. The Department has established this fact in their 2013 report titled *Watershed Report for Biological Impairment of the Bush River in Harford County, Maryland Biological Stressor Identification Analysis Results and Interpretation* ("Watershed Report").⁴ R. at 0661. The Watershed Report states that "degradation of biological communities in the Bush River watersheds is due to urban land use and the associated concomitant effects of altered hydrology" and that "scientific literature established a link between highly agricultural and urbanized landscapes and degradation in the health of non-tidal ecosystems." Watershed

²Maryland's Searchable Integrated Report Database [Combined 303(d)/305(b) List]
<https://mde.maryland.gov/programs/water/TMDL/Integrated303dReports/Pages/index.aspx> (accessed 6/28/2022)

³ *Id.* Search "Bush River" for results.

⁴ https://mde.maryland.gov/programs/Water/TMDL/DocLib_Bush_02130701/Bush_River_BSID_19Dec13_Final.pdf

Report pg. v. The Watershed Report indicates that the Bush River watershed is a classic example of what has been termed “urban stream syndrome” where increased urbanization produces flooding, “altered habitat conditions, degradation of water quality, and reduced biotic richness.” *Id.* at 13. The Watershed Report makes clear that as development in the watershed increases the water quality will continue to degrade.

In short, the Department's assessments of the watershed indicates that poor water quality is directly related to increases in impervious surface within the watershed.

The Record also details how anecdotal evidence and information from the communities and people around Abingdon Woods paints the same picture as the Department’s assessments. R. at 549. These communities are already inundated with flooding and stormwater issues and there is significant concern from the public that the destruction of wetlands and waterways in Abingdon woods and conversion of hundreds of acres of forested wetlands and waterways into millions of square feet of impervious surfaces will certainly exacerbate already existing flooding, stormwater runoff, and water quality issues facing the community and the watershed.

There are over one hundred comments in the record from concerned citizens, experts, and organizations and there is not a single one of these comments is in supports of the Permit or the Project. Many of these comments related to water quality, flooding, and stormwater concerns, brief list of some of these comments with a summary of the concerns is included below:

R. at 0659-0667 Petitioner Gunpowder Riverkeeper’s comment. Petitioner's first public comment details a number of water quality issues including, Tier II Antidegradation, the highly impaired nature of the Bush River, the Department’s determined causes of these impairments, water quality impact mitigation, and climate change driven water quality impacts.

R. at 0530 Concerned individual comment

R. at 0583-0591 Technical Comments from a Nonpoint Source Policy Analyst, Chesapeake Bay Program. These comments indicate a clear path from destruction of forested wetlands to reductions in the water quality of the Bush River and also make clear that this permitting decision runs counter to Harford County’s and the State’s

nutrient reduction goals. It also includes all sources and data that could have been used by the Department to conduct an analysis of the potential water quality impacts stemming from the Permit.

R. at 0554-559 Comments from a coalition of individuals and organizations opposed to the Permit. This letter makes clear comments about how this project will lead to negative water quality impacts to the Bush River watershed.

R. 601 Concern individual comment. This comment details specific concerns about excessive runoff and excessive salinity in the water that would be caused by of the permitted impacts to wetlands and waterways from increases in impervious surface in the Bush River watershed.

R. at 0618 Concerned individual comment. This comment expresses concern for reduction in beneficial wetland functions because of the impacts authorized by the Permit.

R. at 0633-0634 Technical Comment from retired hydrologist. This comment provides relevant studies demonstrating the negative water quality impacts associated with converting wetlands and waterways to impervious surfaces even if appropriate stormwater controls are in place.

R. at 0652-0656 Comments from the Chesapeake Bay Foundation. These comments touched on a number of Permit deficiencies but also detailed how the Permit did not protect Tier II high quality waters.

R. at 0683-0686 Concern individual comment. This comment details the water quality and environmental benefits that wetlands provide.

R. at 0698 Local Business Comment. This comment details how the impacts to water quality will negatively affect a downstream local business that relies on clean water to foster an attractive environment for the success of their business.

R. at 0705-0707 Comments from the Otter Point Creek Alliance. These comments written by an expert detail how impacts to wetlands and waterways in Abingdon Woods will likely result in degradation of water quality of HaHa branch and the Bush River to a lower quality that no longer supports the Tidal Arrowhead plant, a species on Maryland's list of rare, threaten, and endangered species. The comment also details the sensitive and unique freshwater tidal habitats that exist in HaHa Branch and the Bush River immediately downstream from

Abingdon Woods that support high species diversity environments and are popular wildlife watching locations that all depend on clean water. The comment also details that according to NOAA more than 60% of the Chesapeake Bay's historic wetlands have been lost mostly due to development pressure and population growth. The comment also details how replacing wetlands and diverting and crossing streams with impervious surface will lead to lower water quality that will negatively impact the sensitive waterways and habitats immediately downstream.

R. at 0713-0714. Comments from Clean Water Action. This comment details how the Permit will allow impacts to Otter Point Creek I, a high quality Tier II catchment, resulting in degradation of water quality.

R. at 0813-0814. CBF Addendum comments. This comment details how the sensitive ecosystems and wildlife within the Otter Point Creek National Estuarine Research Reserve, immediately downstream from Abingdon Woods are particularly sensitive to changes to upland wetlands and waterways and the impacts authorized by the Permit will lead to negative impacts to this waterbody.

R. at 0547-0549. Comments from the Stop Abingdon Business Park Coalition. This comment details a community "water issues survey" of the surrounding communities to Abingdon Woods. This survey detailed significant flooding, runoff, pollution, and other water related problems in the communities surrounding Abingdon Woods. The community is dealing with these issues even with the beneficial existence of 330 acres of forested wetlands. This means that any reduction in the function and acreage of wetlands on site and impacts to waterway hydrology will result in further water problems for the surrounding community.

B. Impacted Community

This Permit and project will also affect the day-to-day lives and livelihood of those who live, work, and go to school around Abingdon Woods.

At the Permit's public comment hearing, a seventh grader from Edgewood Middle School, one three schools next to Abingdon Woods, spoke at a public comment meeting about the impacts of building a business park where they live. R. at 0545. The student warned about the local animals losing their habitats due to construction, an increase in dead zones in the HaHa branch, and the community losing the ability to enjoy the

environment where they grew up. *Id.* at 0545-0546. Local animal species, such as deer, silver fox and red fox will be displaced due to habitat loss. R. at 0365. Habitat loss also affects residents. The current residents will lose recreational use of nature and face aesthetic injuries to their property. R. at 0367.

The increased amount of construction and operation traffic from the business park poses further environmental concerns, along with public safety risks, for the local community. Places in Abingdon Woods already struggle with traffic flow. The St. Francis de Sales Church, which the proposed Abingdon Business Park will directly run along, had to hire a police officer to control traffic from Abingdon Road to the church property. R. at 0365.

Residents are concerned about noise pollution. While the proposed construction plans include sound walls to separate residential properties from construction and the roads, residents point out that one tractor-trailer alone is loud enough to mimic a gun going off. A resident, whose property is likely to share a wall with the proposed cross-dock warehouse operation, worries about having to hear “a private fleet of 200 tractors that will all get started at the same time, sit, and idle.” R. at 0347. Residents additionally criticize the wall, as it will not protect residents from trailer truck emissions. Immunocompromised residents worry about diesel fuel emissions as emissions can detrimentally affect those with end stage liver disease and noise pollution will make it harder for these residents to get the rest they need. R. at 0552.

Residents also worry about light pollution that is likely to occur due to industrial lighting for the proposed roads and businesses. R. at 0347. The effects of light pollution are “linked to poor slumber habits” and “cut into the quality and quantity of sleep people get,” which causes “metabolic disturbances and poor overall health.” R. at 0354.

The proposed business park also triggers water quality concerns for nearby residents as there are existing water drainage issues in nearby properties. A resident worries about the potential of environmental disasters due to increased traffic. R. at 0351. An oil spill from a trailer tractor would be devastating to the Anita Leight Estuary and other local waters. *Id.* Construction practices also trigger residents as they worry that destroying nature for the business park will cause a second Old Ellicott City disaster due to lacking stormwater management and

control. R. at 0352. Homeowners already suffer from flooding issues due to a drainage ditch across their property and Philadelphia Road closes with every major rainstorm. R. at 0355-0356. The 25 ft. wall is at risk to cause water runoff to seep into residential properties located at the bottom of the hill the wall is proposed to be built. *Id.* Other residents have already had to install sumps in their basements due to flooding even prior to the business park being built. R. at 0360.

The construction design also inhibits emergency services, a career firefighter notes that there is no room on the roads for emergency service transportation to quickly reach victims. R. at 0360. There is already heavy traffic on I-95 preventing emergency services to get to victims. *Id.* He worries that increased traffic on the eastern part of I-95 will increase response time to Abingdon residents. *Id.*

As demonstrated by the numerous comments above, this Permit and Project will have a drastic impact on the quality of life of those who live in the communities surrounding Abingdon Woods.

II. Statutory and Regulatory Framework.

A. The Clean Water Act Section 404

The Clean Water Act (CWA), through Section 404 establishes the basic structure for regulating impacts to wetlands by requiring a permit from the United State Army Corps of Engineers (“Corps”) before filling or altering wetlands areas. These permits are commonly called “dredge and fill” permits. These permits are issued pursuant to regulation promulgated by both the Corp and the Environmental Protection Agency (“EPA”). 33 U.S.C. §1344(b). The EPA also retains veto authority of a Corps 404 permit if the EPA finds that the permitting regulations are not being complied with. 33 U.S.C. §1344(c). The CWA also allows delegation of section 404 authority to states with a competent and substantially similar state program to the Section 404 permit program. 33 U.S.C. §1344(e). The state of Maryland does not have such authority. Additionally, States, under Section 401 of the CWA can condition or veto any section 404 permit issued by the Corps if the State believes that the permitted activity will cause violations of state water quality standards. 33 U.S.C. §1341. Section 404 also authorizes the Corps to issue general permits on a State, regional, or nationwide basis “for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such

category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C.S. § 1344(e). These permits must be updated/renewed every five years. Over the years, the Corps has issued a series of general permits for Maryland with the current permit being the MDSPGP-6 (“GP-6”) which became effective in October 2021.⁵ Projects issued coverage under Maryland’s prior general permit, the MDSPGP-5 (“GP-5”), must follow specific transfer reauthorization requirements to obtain coverage under the GP-6.⁶ This is to ensure that the prior authorized impacts under GP-5 still qualify and meet the terms and conditions of the updated GP-6.⁷ *Id.*

As detailed further below, in Maryland, the wetlands permitting process starts with the submission of a Federal/State Joint Permit Application.⁸

B. Nontidal Wetlands and Waterways Permits.

In 1991, the Maryland legislature, recognizing the important role that nontidal wetlands play in protecting and preserving water quality in waters of the state and the Chesapeake Bay, mitigating pollution and flooding, controlling erosion and stormwater, and supporting wildlife habitat and food chain support, providing recreational, commercial and aesthetic values, created a program to provide comprehensive, statewide protection of nontidal wetlands. Md. Code. Env § 5-902. The intent of the General Assembly was to stop further degradation and losses of nontidal wetlands due to human activity wherever possible. *Id.* The stated goal of the program was not only no net losses of nontidal wetland acreage and function, but included target of a net resource gain in nontidal wetlands compared to the year when the program was created. *Id.*

⁵ U.S. Army Corps of Engineers MDSPGP-6 Reissuance

<https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/MDSPGP-6-Reissuance.aspx> (accessed 6/28/2022)

⁶ Notice to Applicable Permittees of the U.S. Army Corps of Engineers (Corps) Maryland State Programmatic Permit-5 (MDSPGP-5) for Transfer of Authorization to Maryland State Programmatic Permit-6 (MDSPGP-6), Category A and B Activities.

https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/Web_Notify-to-Applicable-Permittees-of-the-GP.pdf (accessed 6/28/2022)

⁷ *Id.*

⁸ Nontidal Wetlands Regulations and the Property Owner

<https://mde.maryland.gov/programs/water/WetlandsandWaterways/DocumentsandInformation/Documents/www.mde.state.md.us/assets/document/WetlandsWaterways/property.pdf> (accessed 6/28/2022)

To effectuate these goals, the General Assembly created a program within the Department to ensure the “conservation, regulation, enhancement, creation, monitoring, and wise use of nontidal wetlands.” Md. Code. Env § 5-903 (a). Under this program, the Department has responsibility for evaluating activities that are proposed on nontidal wetlands and granting or denying permits for such activities. *Id.* at (h). The Department then promulgated regulations to carry out the permitting program. Within nontidal wetlands, buffers, and expanded buffers, regulated activities include those that remove, excavate, or dredge materials of any kind; change the existing drainage characteristics, sedimentation patterns, flow patterns, or flood retention characteristics of the area; grade or remove material that would alter the existing topography; or destroy plant life that would alter the character of a nontidal wetland. COMAR 26.23.01.01.74(a). With limited exemptions for forestry and agricultural activities, regulated activities may not be conducted in a nontidal wetland without a permit from the Department. COMAR 26.23.02.01.74(a).

To obtain and permit for activities that will impact nontidal wetlands in Maryland, Applicant’s must submit a Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland (“JPA”).⁹ The purpose of the JPA is to ensure that applications and project comply with both federal and state requirements and are reviewed by both state and federal regulators. The JPA has specific instructions for information and documentation that must be provided to the Department by the Applicant. The JPA includes sections to be filled in by Department staff regarding types of state and/or federal permits or authorizations needed. *Id.* The JPA also requires that the Application be submitted to the Department and to the Corps. *Id.*

The Department may only issue a permit to water-dependent projects that require access to a nontidal wetland as a central element of the project’s basic function, or to non-water-dependent projects that have no practicable alternative, as defined by the Department’s regulations. COMAR 26.23.02.04(A). Furthermore, the permitted activity must “first avoid then minimize adverse impacts to the nontidal wetland,” must be consistent

⁹MDE Nontidal Wetlands Permit Guide

<https://mde.maryland.gov/programs/Permits/Documents/2008permitguide/WMA/3.19.pdf> and the JPA

<https://mde.maryland.gov/programs/water/WetlandsandWaterways/PermitsandApplications/Documents/www.mde.state.md.us/assets/document/permit/alter.pdf>

with any comprehensive watershed management plan in place, and must not cause or contribute to degradation of ground or surface waters. *Id.*

The Department may also issue a Letter of Authorization, as was done in this case, when an Applicant claims that impacts will be limited to isolated non tidal wetlands of less than 1 acres and having no significant plant or wildlife value or if the cumulative loss of nontidal wetlands and buffer which contains no significant plant or wildlife value is less than 5,000 square feet or greater than 5,000 square feet provided the actual loss of nontidal wetlands is less than 5,000 square feet and the activities in the buffer result in minimal adverse impacts to nontidal wetlands as determined by the Department. COMAR 26.23.03.01 and Md. Code Env't 5-906(a). Activities granted under a letter of authorization may also be required to comply with various best management practices required by the Department. COMAR 26.23.03.02.

1. Practicable Alternatives Analysis

The Practicable Alternative Analysis for a nontidal wetland permit requires that the permit applicant demonstrate that both alternative sites and on-site minimization are analyzed and no practicable alternative exists. COMAR 26.23.02.04(D). The Department shall consider four aspects of a project in determining if a practicable alternative exists.

First, the Department must consider if other sites present a practicable alternative. If the “basic project purpose cannot be reasonably accomplished using one or more other sites in the same general area as the proposed project that would avoid or result in less adverse impact to nontidal wetlands,” then alternative sites for the regulated activity do not constitute practicable alternatives. COMAR 26.23.02.04(D)(2)(a). The Department retains the discretion to make an independent definition of the definition of the “general area” from the applicant’s definition. COMAR 26.23.02.04(D)(2)(a).

Second, the Department must evaluate the feasibility of alternative designs for the proposed project and if any alternative design would result in less adverse impact to the wetlands while still accomplishing the basic purpose of the project. COMAR 26.23.02.04(D)(2)(b). The Regulations contain pertinent factors for the Department to consider when evaluating direct and indirect adverse impacts. COMAR 26.23.02.05(B)(3).

Third, the Department shall evaluate the applicant's good faith in evaluating alternatives, for this analysis, the Department must consider any pertinent information, including the applicant's communications with local authorities and written documentation of efforts to reconfigure the project and acquire another site. COMAR 26.23.02.04(D)(2)(c).

Fourth, the Department must consider whether the regulated activity is necessary for the project to meet a demonstrated public need, this analysis requires the Department to weigh the economic value of the proposed project against the ecological and economic value of the impacted nontidal wetlands. COMAR 26.23.02.04(D)(2)(d).

2. Mitigation of impacts

Losses of nontidal wetlands are only permitted when "necessary and unavoidable." COMAR 26.23.01.05(B)(1). The Department shall not issue a nontidal wetlands permit unless the regulated activity will "first avoid and then minimize adverse impacts to the nontidal wetland based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions." COMAR 26.23.02.04(A)(2). The burden is on the applicant to demonstrate that all necessary steps have been taken to accomplish this. COMAR 26.23.02.05(B)(1). In reviewing the sufficiency of the applicant's efforts, the Department shall consider a number of factors described in the regulations. COMAR 26.23.02.05(B)(2).

3. Degradation of ground and surface waters is not permitted

The Department may not issue a permit for a regulated activity unless the activity does not cause or contribute to a degradation of ground waters or surface waters. COMAR 26.23.02.04(A)(3). This includes causing any individual or cumulative effect that degrades aquatic ecosystem diversity, productivity, and stability; plankton, fish, shellfish, and wildlife; recreational and economic values; and the public welfare; in addition to any individual or cumulative effect that violates any applicable State water quality standard, the Environment Article of the Annotated Code of Maryland, or the Clean Water Act or that degrades surface and ground water quality. COMAR 26.23.02.06(A). The Regulations provide no exception for projects of economic or social necessity.

C. Total Maximum Daily Loads

Total Maximum Daily Loads (TMDLs) are a requirement, found in §303(d), CWA. This requires that the state of Maryland establish water quality standards (“WQS”), monitor conditions of Maryland’s waters, list waterbodies that do not meet the established WQS, set priority ranks for the listed water bodies, and then establish TMDLs to meet WQS.¹⁰ TMDLs can be thought of as pollution diets for watersheds impaired by pollutants; if the diet is met, water quality will improve, if not, then water quality continues to degrade. As discussed above the entire Bush River watershed is impaired for various pollutants. *Supra*, Statement of the Facts I.A.

D. Antidegradation.

Federal regulations promulgated under the Clean Water Act require states to develop statewide Antidegradation policies that protect existing uses of waters and, furthermore, protect the quality of waters where the existing quality exceeds the levels necessary for its designated uses. 40 CFR 131.12. Maryland’s Antidegradation program recognizes three categories of waters: Tier I, Tier II, and Tier III. Tier III waters are Outstanding National Resource Waters, the highest quality classification. COMAR 26.08.02.04-2.¹¹ Maryland has no Tier III waters, which means the State’s Tier II waters are the highest quality in Maryland. Tier II waters are high quality waters, defined as waters where the “water quality is better than the minimum requirements specified by the water quality standards.” COMAR 26.08.02.04-1. The lowest classification of waters in the Antidegradation program is Tier I; all waters that cannot meet Tier II or II criteria are classified as Tier I. *Id.* Degradation of Tier II waters is only permitted for “necessary economic or social development.” COMAR 26.08.02.04.B. Maryland has implemented a “Tier II Review Antidegradation Policy” as required by federal regulations. 40 CFR 131.12. Tier II review applies to “Water and Sewer Plan amendment approvals, *Nontidal Wetlands and Waterways permits and authorizations* [emphasis added], and New or modified National Pollutant Discharge Elimination System (NPDES) discharge permits”.¹²

¹⁰ <https://mde.maryland.gov/programs/water/TMDL/Pages/index.aspx> (last accessed 6/28/2022).

¹¹ *Maryland's High Quality Waters (Tier II)*

https://mde.maryland.gov/programs/water/tmdl/waterqualitystandards/pages/antidegradation_policy.aspx (accessed 6/28/22).

¹² *Maryland's High Quality Water (Tier II)*,

https://mde.maryland.gov/programs/water/tmdl/waterqualitystandards/pages/antidegradation_policy.aspx

For nontidal wetlands and waterways permits, the review is conducted at the watershed scale, meaning that permitted activities anywhere upstream of a Tier II stream may be subject to Tier II review. *Id.* During Tier II review, the applicant must provide an analysis of reasonable alternatives to the proposed project that do not require direct discharge to a Tier II water. COMAR 26.08.02.04-1(G). “For land disturbing projects that result in permanent land use change, this ‘no discharge’ analysis specifically evaluates the reasonability of other sites or alternate routes which could be developed to meet the project purpose, but are located *outside* of the Tier II watershed.”¹³ If a reasonable, cost-effective alternative exists, it is required as a condition of the permit or as an amendment to the applicable county plan. COMAR 26.08.02.04-1(G)(2). If the no-discharge alternatives are not cost effective, the Applicant must “provide the Department with plans to configure or structure the discharge to minimize the use of the assimilative capacity of the water body” and, if impacts cannot be avoided or no assimilative capacity remains, the Applicant must provide the Department with a social and economic justification (“Justification”) for permitting degradation of the Tier II water. COMAR 26.08.02.04-1(G)(3).

To justify degradation of the Tier II water, the Justification must demonstrate the enumerated requirements and include the required components stated in state regulations COMAR 26.08.02.04-1(K) and COMAR 26.08.02.04-1(L)(1)-(4). The Department shall determine if the Justification demonstrates that the costs of pollution are reasonable and, if not, shall determine if lowering the quality of the Tier II water is necessary for growth to take place in the watershed. COMAR 26.08.02.04-1(M)(1).

E. Permit

Here, MDE and the Corps issued the following: a state Letter of Authorization and Category B coverage under the GP-5. However, the Department also required and the applicant included information and documentation during the application process that is not statutorily required for a Letter for Authorization. The JPA is clear about what information is required and what is not required in applying for a letter of authorization,

(last accessed Oct. 24, 2021).

¹³ *Antidegradation Review Report Form Alternatives Analysis - No Discharge Alternative*
https://mde.maryland.gov/programs/water/TMDL/WaterQualityStandards/Documents/Tier-II-Forms/TierII_NoDischargeAnalysis_Form_1.2.pdf

here the Applicant indicated that an authorization was applied for. R at 0044 and 0047. After Part 5 of the JPA, it states in bold “IF YOU ARE APPLYING FOR A LETTER OF EXEMPTION, PROCEED TO BLOCK 10”. R. at 0047. Applicant however filled out and provided information for blocks 6, 7, and 8 despite not being required to do so. These blocks, along with block 10 are only required for Wetlands and Waterways Permits and not for Letters of Authorization. This created uncertainty and a lack of clarity in the permitting process and it was never explained properly to Petitioners or the public. However, because these sections were filled out and documentation submitted to the Department, the Department and this Court must treat the corresponding statutory and regulatory requirements to be at issue in the case, in essence this Letter of Authorization was essentially a full wetlands and waterways permit.

STANDARD OF REVIEW

Maryland law provides for judicial review of nontidal wetlands permits. Md. Code Envir. §5-204(f). This review is limited to issues presented in the administrative record before the Department. Md. Code Envir. §5-204(h). The standard of review and corresponding levels of deference to the agency depend on whether a court is reviewing an agency's discretionary decisions, findings of fact, or legal conclusions. *Md. Dep't of the Env't v. Cty. Comm'rs*, 465 Md. 169, 201 (2019). The substantial evidence and arbitrary and capricious standards apply where a statute provides for judicial review without a contested case hearing or a specified standard of review. *Riverkeeper*, 447 Md. at 118. The substantial evidence standard applies to agency findings of fact, while the arbitrary and capricious standard applies to matters committed to agency discretion and to a review of the agency's application of the law to the facts. *Id.*; *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 354 (2013). In contrast, an agency's conclusions of law are reviewed de novo. *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005).

An administrative agency's findings of fact must meet the “substantial evidence” standard. *Gore Enter. Holdings, Inc. v. Comptroller of the Treasury*, 437 Md. 492, 504 (2014). In applying the substantial evidence standard, a reviewing court will defer to the facts found and inferences drawn by the agency when the record supports those findings and inferences. *Cty. Comm'rs.*, 465 Md. at 201 (citing *Riverkeeper*, 447 Md. at 120). In particular, where factual issues involve scientific matters within an agency's area of technical expertise, the agency

is entitled to “great deference.” *Riverkeeper*, 447 Md. at 120. Ultimately, a court seeks to understand “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Id.* (quoting *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173 (2011)). The substantial evidence standard has also been applied by Maryland courts to “mixed questions” of law and fact. *See Gore*, 437 Md. at 504; *Schwartz*, 385 Md. at 553.

A reviewing court applies the “arbitrary and capricious” standard of review with respect to matters committed to agency discretion and to a review of the agency’s application of the law to the facts. *Cty. Comm’rs.*, 465 Md. at 202; *Para*, 211 Md. App. at 354. The arbitrary and capricious standard of review is “extremely deferential” to the agency. *Harvey v. Marshall*, 389 Md. 243, 296-99 (2005).

For guidance in applying the arbitrary and capricious standard, a reviewing court may look to case law applying the similar standard in federal administrative law. *Cty. Comm’rs.*, 465 Md. at 202. The U.S. Supreme Court has held that a reviewing court is not to substitute its own judgment for that of the agency and should affirm decisions of “less than ideal clarity” so long as the court can reasonably discern the agency’s reasoning. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Maryland’s treatment of the standard is in accord with the Supreme Court’s leading case on the arbitrary and capricious standard, which looks at whether the agency: (1) relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; or (3) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Riverkeeper*, 447 Md. at 120-21 (quoting *NRDC v. United States EPA*, 808 F.3d 556, 569 (2d Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (applying the arbitrary and capricious standard to the issuance of a Clean Water Act discharge permit). Although this standard is highly deferential to the agency, it is not meant to reduce judicial review to a “rubber stamp” of agency action. *Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009) (quoting *Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 (1976)). While the standard of review is narrow, the court must nonetheless engage in a searching and careful scrutiny of the record. *Id.* It follows that less deference is due where there are no data, but the agency assumes a result or where there is an inadequate or only partial basis for a finding.

Unlike for agency findings of fact or an exercise of discretion, courts owe less deference to an agency's legal conclusions. A court reviews an agency's conclusions of law de novo for correctness. *Schwartz*, 385 Md. at 554. A court is under no constraints in reversing an administrative decision based solely upon an erroneous conclusion of law. *People's Counsel for Balt. Cty. v. Md. Marine Mfg. Co.*, 316 Md. 491, 497 (1989). However, a court is to give careful consideration to the agency's interpretation of a statute it has been charged with administering. More deference is appropriate when the interpretation of a statute that the agency administers results from a process of "reasoned elaboration," when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rulemaking. *Cty. Comm'rs*, 465 Md. at 203-04 (citing *Baltimore Gas & Electric Co. v. Public Service Commission*, 305 Md. 145, 161-62 (1986)). When an agency interprets its own regulation, that interpretation is "akin to the interpretation of a statute" and "is an issue of law which, ultimately, the court must decide." *Md. Bd. of Pub. Works v. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 520 (2012).

ARGUMENT

I. MDE Erred In Concluding the Project Qualified for a Letter of Authorization.

The Department erred when it concluded that this project qualified for a Letter of Authorization. State Regulations only allow these authorizations in specific situations that require specific demonstrations by the applicant. COMAR 26.23.03.01. Specifically, in this case, the Applicant claimed that there was "non significant plant or wildlife value and wetland impact in an isolated nontidal wetlands less than 1 acre in size." R. at 0047. The Record does not support these claims.

First, the proposed project will impact 1.14¹⁴ acres of nontidal wetlands and buffers and therefore does not qualify for this exemption under the letter of authorization because the impacts are more than one acre. COMAR 26.23.03.01.

¹⁴ Permanent Isolated PFO Wetland Impacts 11,112 sq ft + Permanent Wetland Buffer Impacts 32,782 sqft = 49,894 sqft or 1.14 acres of impact.

Second, COMAR requires that a determination that an area is an isolated nontidal wetland must be based on published hydrologic and hydraulic data or data obtained in the field which shows whether the nontidal wetland is hydrologically connected. Here, the determination is not based on published data and the data collected is merely limited visual observation by Applicant's consultants and does not show conclusively whether the wetland is hydrologically connected. This is not sufficient information to satisfy COMAR and this regulatory requirement was not met.

Third, Letters of Authorization are only permitted where the impacted wetlands have no significant plant or wildlife value. COMAR 26.23.03.01. Here the Applicant provided no information or analysis of the plant and wildlife significance or value of the impacted wetlands. The State Legislature established that wetlands and their buffers have inherent value and provide numerous benefits to the environment and society. Md. Code. Env. 5-902. Because of this inherent value it is not sufficient for the Applicant to conduct such a limited and cursory review of the plant and wildlife value of the impacted wetlands and the Department cannot accept such a limited analysis. A careful review of the plant and wildlife value is especially warranted here when the public comments in the Record highlight the existence of such value within the impacted wetlands and waterways and immediately downstream. R. 0704-0708 and 0808-0814. The Record lacks any assessment or information from the Applicant or the Department about the wildlife and plant value of the impacted wetlands.

For the above reasons it is clear that the Applicant did not satisfy all the requirements of COMAR 26.23.03.01 and therefore it was an error of law for the Department to determine that the proposed impacts qualified for a Letter of Authorization.

II. MDE erred in concluding that the regulated activities will not cause or contribute to a degradation of groundwater or surface waters.

MDE notice of decision states that MDE determined that “[t]he project is consistent with State water quality requirements”. R. 0003. Additionally, the Summary of the Basis for Decision (“Summary”) states that the Department may not issue a nontidal wetlands permit unless it finds that the applicant has demonstrated that the

regulated activity “will not cause or contribute to a degradation of ground or surface waters.” R. at 0004 and Md. Code. Envir. § 5-907(a)(3) and COMAR 26.23.02.04.

By approving this Permit, the Department has made an affirmative finding that the regulated activities will not cause or contribute to a degradation of waters of the state. This finding/determination by the Department, lacks substantial evidence to support the determination, is arbitrary, and is contrary to law.

A. The Record lacks substantial evidence to support a determination that the regulated activities will not cause or contribute to a degradation of ground or surface waters.

The Record is devoid of actual and substantial evidence that the regulated activities authorized by this Permit will not cause or contribute to a degradation of ground or surface waters. This Court will only defer to the Department's judgment when the record supports those findings and inferences. *Riverkeeper*, at 120. Here, the Record does not support the Department's finding that the Permit will not cause or contribute to a degradation of waters of the state.

Here, the Record supports the exact opposite conclusion. The Record demonstrates that it is indeed very likely that this Permit will cause or contribute to a degradation of waters of the state. *See Supra* Statement of Facts I.A. pgs. 13-15. The Record contains an extremely limited response from the Department to these concerns and contains no analysis or assessment or even an estimate of the negative water quality impacts likely from this Project. The Department's only response even related this concerns is to say that the County's approval of future erosion and sediment control plans and stormwater management plans, all plans that were not reviewed by the Department prior to approving the Permit, will be enough to ensure no negative water quality impacts onsite or immediately downstream. R at 0009-0010.

A reasoning mind could not, in reviewing the Record, reasonably reach the factual conclusion that the Department did and therefore the determination that the Permit will not cause or contribute to a degradation of water quality lacks substantial evidence and cannot be upheld by this Court. *Riverkeeper*, at 120, quoting *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173 (2011).

B. The Department arbitrarily determined that the regulated activities will not cause or contribute to a degradation of ground or surface waters.

The Record demonstrates that the Department entirely failed to consider the wealth of water quality data, studies, analysis, and concerns raised by Petitioner and the public and that the Department failed to even consider its own studies and analyses about the state of the water quality in the Bush River.

Based on the Record, the Court cannot reasonably discern the agency's reasoning for concluding that the Permit will not cause or contribute to a degradation of waters of the state as this conclusion runs counter to the evidence before the Department. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). The Department responds to almost none of the substantive comments raising water quality concerns and there is no evidence in the Record that the comments and the studies and data that back them up were given fair weight and consideration by the Department. Furthermore, the Department makes no comment or addresses in any way their own TMDL assessments and their own Watershed Report for the Bush River, both documents seemingly ignored. It is implausible to think that this information would be ignored when the Permit at issue allows destruction and alteration of wetlands and waterways and the State's own analyses show that the impaired and degraded nature of the Bush River is caused by the very same thing the Department allows with this Permit, that being the destruction and alteration of wetlands and waterways via the conversion to impervious surface. *Riverkeeper*, at 120-21, quoting *NRDC v. United States EPA*, 808 F.3d 556, 569 (2d Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Department's determination is more than a decision of less than ideal clarity; it is a decision that is not clear at all. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). There is nothing in the record supporting the Department's conclusion that the Permit will not cause or contribute to degradation of waters of the state. The Department's blanket statements and assumptions that the County's erosion and sediment control plans and stormwater plans, plans that the Department did not review before approving the Permit, will protect water quality are not sufficient. The Record demonstrates these plans as they have been implemented throughout the State and in the Bush River watershed do not and have not protected the water quality of the Bush River.

As such, the Department's determination that the Permit will not cause or contribute to a degradation of water quality is arbitrary and cannot be upheld.

C. The Department made an error of law in finding that the regulated activities would comport with MD. Code. Env. 5-907.

The Department's determination that the Permit would not cause or contribute to a degradation to waters of the state was not supported by substantial evidence and was demonstrably arbitrary, as detailed above. Therefore, the decision violates MD. Code. Env. 5-907, is an error of law and must be reversed.

III. The Department Erred in Determining that the Regulated Activity Has No Practicable Alternative.

The Practicable Alternative Analysis for this Permit nontidal wetland permit requires that the permit applicant demonstrate that both alternative sites and on-site minimization have been analyzed and no practicable alternative exists. COMAR 26.23.02.04(D). Md. Code. Env § 5-907(b). State statute and regulations include a number of factors and information that the Department must consider when evaluating whether the proposed regulated activity has a practicable alternative. *Id.* As demonstrated below MDE has either failed to consider all of the factors or made arbitrary decisions pertaining to them and thus has not performed its regulatory duty resulting in a Permit that was arbitrarily approved and approved in error of the law.

A. MDE has arbitrarily concluded that the basic project purpose cannot be reasonably accomplished using one or more other sites that would avoid impacting nontidal wetlands.

First, the Department must consider whether the basic project purpose cannot be reasonably accomplished utilizing one or more other sites in the same general area that would result in less adverse impacts on nontidal wetlands. Md. Code. Ann., Envir. § 5-907(b)(1). "The Department shall consider the applicant's definition of the general area, but may make an independent determination." COMAR 26.23.02.04(D)(2)(a).

MDE arbitrarily concluded that the basic project purpose cannot be reasonably accomplished using another site that would avoid impacts to nontidal wetlands. The Applicant and MDE failed to consider using space at Tradepoint Atlantic in Baltimore City, this location clearly meets the Applicant's criteria, it has the appropriate zoning, proximity to distribution avenues, and enough space for the Applicant flagship warehouse. R. at 0005,

0042, 0734.¹⁵ According to the Tradepoint Atlantic’s website there are millions of square feet of space available for development, the site has direct access to 695 and 95, along with rail and seaports in Baltimore and is located in a state “Enterprise Zone”. R. at 0961. Not only would use of this site avoid adversely impacting *any* nontidal wetlands and waterways, avoid destroying a forest, and would have much less environmental impact, it is already developed and ready for construction. *Id.* This site was brought to the attention of MDE through public comment, but was ignored. MDE arbitrarily excluded a site in the analysis that clearly met the applicant’s criteria. MDE was aware of the Tradepoint Atlantic site, and still relied on the applicant’s erroneous assertion that no other site met their needs without even asking the applicant to offer a reason why Tradepoint was inadequate.

B. MDE has arbitrarily concluded that the applicant made reasonable attempts to remove or accommodate constraints regarding project alternatives.

The Department must consider whether the applicant made reasonable attempts to remove or accommodate constraints such as inadequate zoning, infrastructure, or parcel size in rejecting alternatives to the project. Md. Code. Ann., Envir. § 5-907(b)(3). “To determine if an applicant has made a reasonable effort to accommodate constraints, the Department shall consider any pertinent information, including: (1) Correspondence or other written documentation between an applicant and a local authority, including a request for a special exception or other zoning variance; (2) Evidence of efforts to modify the local infrastructure, including future planned expansions or redesign of the project because of a potential nontidal wetland impact; and (3) Written documentation of efforts undertaken to acquire another site or reconfigure the proposed project to accommodate the constraint. COMAR 26.23.02.04(D)(2)(c)(i)-(iii).

In the analysis, the applicant limited their search to 18 available leases in Harford County and three sites for land development in the surrounding area. R. at 740-41. Each potential lease was found lacking due to limited square footage available. *Id.* The sites analyzed for land development were found lacking for various reasons including: incompatible zoning, environmental impacts, distance from a major highway, or size constraints. R. at 744. Site 12 was plainly too small, as was Site 14 to a certain extent. R. at 741, 744. Site 13

¹⁵ <https://www.tradepointatlantic.com/> Last Accessed 6/28/2022

could be accessed from two roads: a two-lane country road or MD Route 543. R. at 742. The country road was 2.4 miles from Interstate 95, but would require improvements for truck traffic. R. at 742. However, the applicant did not state MD Route 543 was inadequate other than stating it was 3.8 miles from Interstate 95. R. at 742. Furthermore, the proposed site also requires road improvements, totaling millions of dollars. R. at 331. Site 13 encompassed 906 acres, three times the acreage of the proposed site, and yet the applicant stated the site was encumbered with multiple stream and wetland systems and was therefore not adequate. R. at 742-43. A similar statement could be made of the proposed site, as it too is scattered with streams, tributaries, and nontidal wetlands and buffers. Lastly, Site 13 is zoned for “General Business,” but the applicant did not submit documentation that they sought a zoning variance. R. at 743.

C. MDE has arbitrarily concluded that the project’s economic value outweighs the ecological and economic value of the impacted nontidal wetlands.

The Department must consider whether the regulated activity is necessary for the project to meet a demonstrated public need. Md. Code. Ann., Envir. § 5-907(b)(4). The public need analysis requires the Department to consider the economic value of the proposed project in meeting a demonstrated public need in the area and the ecological and economic value of the nontidal wetlands impacted. *Id.* The Department shall consider any pertinent information about the necessity of the project to meet a demonstrated public need, as well as the ability of the wetlands to continue to function and provide benefits to the public. COMAR 26.23.02.04(D)(2)(d). Additionally, the Department shall consider if the proposed project promotes the public health, safety, or welfare. COMAR 26.23.02.04(D)(2)(d)(i).

Here, the Department was not presented with an assessment of the ecological and economic value of the nontidal wetlands impacted. There is nothing in the Record to suggest that the Department conducted an estimation of the water quality benefits that would be lost to this project nor is there any evidence in the Record to suggest that the Department reviewed and considered any of the numerous water quality comments, data, and studies that were provided to the Department. The Department did not and could not weigh the ecological and economic value of the wetlands against the economic value of the proposed project, as is required by law. *Id.*

Furthermore, the Record shows that the economic value and demonstrated public need for the project were speculative at best. The Applicant did not provide reliable estimates of tax revenue, how many jobs this project would produce, names of secured tenants, or other data that would support economic value and public need for this project. R. at 350. The Applicant could not give a projected estimate of the tax revenue for Harford County and according to the Record, an estimate was never provided to the Department. R. at 350. The Applicant's estimation of jobs created by this project was produced using U.S. Energy Information Administration ("EIA") data, and thus not tailored to the State, much less Harford County, nor was there any justification in the Record for how and why the EIA data should be used as a surrogate for more localized data or an explanation as to why more localized data was not gathered and reviewed. R. at 820. The Applicant stated "many companies" distribute throughout the Mid-Atlantic region from the Port of Baltimore and "require large-scale warehouse facilities to organize, store, and distribute their products." R. at 484. However, the Record does not contain any evidence that any of these "many companies" that need these warehouses have been secured as tenants or even showed interest in the project. The Applicant's justification for the project, that e-commerce sales have increased 9 times faster than in-store sales from 1998-2017, is nationwide data that is too general and conclusory and not directly applicable to projects in Harford County and there is no explanation as to why more specific and localized data was not gathered. R. at 817. Given the sparse, speculative, and generalized data provided by the applicant in regards to the tax revenue, job creation, tenancy prospects, and public need, it was arbitrary for the Department to determine the project was economically justified and fulfilled a public need.

The Department's reliance on the Applicant's assertion that the proposed project fits "within the State's and Harford County's designated use for Enterprise Zones and will serve as an economic engine" is flawed and arbitrary. R. at 0005 and 0734. The Record demonstrates clearly that this project does not meet the criteria of the Enterprise Zones. R.0962-0963. These "EZ" sites are designated by the state "to encourage new development and new jobs by *revitalizing older industrial areas.*" R. at 734. (emphasis added). "These Enterprise Zones are also created to retain/expand existing resident businesses to encourage job creation and retention." R. at 734. In Harford County Enterprise Zones are designated to encourage the creation of well-paying jobs, ensure retention

and spur expansion of resident business, promote development and occupancy of vacant, underutilized land and buildings, and support the county's commitment to revitalized older industrial areas of Harford County. R. at 0962. There is nothing in the Record to suggest the proposed project meets any of these criteria, yet somehow the Department concludes and relies on this in supporting their decision that there was no practicable alternative. The proposed project is not located in an older industrial area, it is not an expansion of an existing business, it is fundamentally not a revitalization project, and it is not promoting development and occupancy of vacant, underutilized land and buildings. Furthermore, the Applicant stated that building in the EZ and the county's "Development Envelope" would "support the State's policy of limiting sprawl to preserve rural and natural resources." R. at 862. It is difficult to fathom a project more contrary to this stated policy than destroying wetlands and hundreds of acres of forest to build a business park with more than 2,000,000 square feet of warehouse storage.

Furthermore, MDE did not address public comments that spoke to the economic value of the wetlands, the implications the proposed project may have on the public health, safety, or welfare or the impacts on local businesses and property values. All of this information is highly relevant to an assessment of economic need. Water's Edge Events Center, LLC submitted public comment stating that further impairment of the Bush River, which runs by the business and provides ambiance and beauty, would have "detrimental consequences" for the business. R. at 698. Residents surrounding the Abingdon Woods site shared various concerns about the proposed project, but were largely ignored in MDE's decision-making. One resident consulted a real estate agent familiar with the area who stated home values would likely decrease by more than \$40,000 should the wetlands be replaced with warehouses. R. at 540. Furthermore, residents were concerned about the increased traffic on an already-overburdened thoroughway and the strain on emergency services. R. at 343, 344, 353. MDE did not consider any of the public health, safety, or welfare concerns presented by residents surrounding the area, nor the economic value of the wetlands to local businesses downstream of the proposed project.

MDE arbitrarily and in error of law concluded that the proposed project's economic value outweighed the economic and ecological value of the nontidal wetlands. MDE could not perform its statutory duty to weigh the

benefits of the nontidal wetlands against the economic value of the project because the applicant did not submit an estimate of the wetland's value. Furthermore, MDE relied on false assertions by the developer that the project meets the State's "EZ" or the Harford County's "Development Zone" stated purposes. Additionally, the limited and generalized information provided by the developer made it impossible for MDE to rationally conclude that the project was justified as a public need. The Department did not perform its statutory duties and the Applicant did not submit sufficient supporting information, it was therefore an error of law for the Department to conclude that project had no practicable alternative.

IV. The Department Erred in Determining the Tier II Review was Adequately Completed and that Impacts to Tier II water Otter Point Creek Were Justified.

The Department required an Antidegradation Review and accompanying Social and Economic Justification for this project. R. at 0012 and COMAR 26.08.02.04. This was required because of the project's impacts to the High Quality Tier II water of Otter Point Creek I. *Id.* Antidegradation Review and the Social and Economic Justification ("Justification") have a number of steps and demonstrations that must be made to the Department by the Applicant. Here, many of these requirements were left unfulfilled, resulting in an incomplete review and erroneous decision by the Department that "the Applicant adequately completed the requirements of the Tier II review for the [project]." R. at 0012.

Here, an analysis of reasonable alternatives that must include "cost data and estimates to determine the cost effectiveness of the alternatives" was required. COMAR 26.08.02.04-1(G)(1). However, the Record does not show that any of this cost data and estimates for the alternatives was provided nor is there a discussion of the reasonableness of the alternatives in the Record. This does not meet the requirements of COMAR.

Furthermore, because Otter Point Creek I does not have remaining assimilative capacity the Justification requires that the Applicant demonstrate "the cost of maintaining high water quality in Tier II waters and the economic benefit of maintaining Tier II waters" and (2) "determin[ing] whether the costs of the pollution controls needed to maintain the Tier II water would limit growth or development in the watershed including the Tier II water." COMAR 26.08.02.04-1(L)(3)-(4). The Record demonstrates that the Department did not require the

applicant to submit the costs or benefits of maintaining the high water quality or address the costs of pollution controls needed to maintain Otter Point Creek 1 or whether the cost would limit growth and development in the watershed. Nowhere in the record does the Department discuss the costs or benefits of maintaining Otter Point Creek 1. This results in an incomplete Justification and the Department's reliance upon it to conclude the Tier II Review was "adequate" was an error of law because the regulatory requirements were not satisfied.

VII. MDE Arbitrarily Approval the Permit.

In light of the above arguments detailing the errors of law, determinations made without substantial evidence, and unreasonable decision-making regarding this Permit, it was wholly arbitrary for MDE to approve the permit without further investigation and correction of the deficiencies noted above.

CONCLUSION

For these reasons, Petitioner Gunpowder Riverkeeper urges this Court to Remand the Permit for further consideration to correct the deficiencies in the Permit and take the necessary actions to bring the Permit in line with State statute and regulations.

Respectfully submitted,

/s/Patrick DeArmey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June 2022 2020, a copy of the foregoing Memorandum in Support of Petition for Judicial Review was filed through the MDEC system, which caused service to be made on the parties below:

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_____/s/_____
Patrick DeArmey

IN THE CIRCUIT COURT FOR HARFORD COUNTY

PETITION OF
GUNPOWDER RIVERKEEPER

*

*

FOR JUDICIAL REVIEW OF

CASE NO. C-12-CV-20-000492

THE DECISION OF THE
MARYLAND DEPARTMENT OF
THE ENVIRONMENT

*

*

IN THE MATTER OF:
Nontidal Wetlands and Waterways Permit
No. 19-NT-0228 201961268

*

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**PETITIONER’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
REMAND**

Petitioner, Gunpowder Riverkeeper, by and through undersigned counsel, submits this Memorandum of Law in support of Petitioner’s Motion to Remand and request for an order requiring Maryland Department of the Environment (“MDE”) to consider and enter into the record, Petitioner’s objections and comments and allow opportunity for public comment on the specific documents and MDE determinations detailed below.

MDE has denied Petitioner and the public an opportunity to review and provide public comments on a key component and mandatory part of the permit and application at issue in this case. MDE then approved the permit, without hearing Petitioner’s comments on the withheld information and relying heavily on information excluded from public review, during the applicable

public comment period. Petitioner did not obtain these records until after the Permit was approved and more than six months after the close of the comment period. This Court should remedy this unlawful foreclosure of public comment by granting this motion.

FACTUAL BACKGROUND

On October 15, 2019, MDE caused notice to be published that Harford Investors LLP and CREG Westport I, LLC (“Applicant”) had applied for a Wetlands and Waterways Permit with permit number 19-NT-0228 201961268 (“Permit”). R. at 0014-0018, 0436-0475. This Application sought a permit to impact 49,894 square feet of nontidal wetlands and buffers, 16,418 square feet of waterways, and 22,382 square feet of 100-year floodplain via the construction of over two million square feet of warehouse space. R. at 0003. The proposed project will also require the deforestation of 220 acres of forest in the Abingdon Woods. R. at 0008. The notice provided a public comment period with an initial deadline of November 14, 2019 and indicated that a public hearing would be held on November 6, 2019. R. at 0437-0438. The public comment deadline was extended twice to December 4, and then to December 11, 2019 at 5:00 PM. R. at 568.¹ The Application also sought authorization to impact the Tier II high quality watershed of Otter Point Creek I by clearing 5.58 acres of forest within the watershed to construct a primary access road, a gas station, two restaurants, and three stormwater management facilities. R. at 0827. Additionally, MDE failed to publicly notice these impacts to Otter Point Creek I and the project’s potential for degradation of Tier II water quality. COMAR 26.08.02.04 These potential impacts to high quality Tier II waters are the subject matter of this motion.

¹ See MDE Wetlands and Waterways CREG/Westport I LLC - Abingdon Business Park webpage: https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/CREG_Westport_I.aspx accessed 10/30/2020.

Tier II waters are currently Maryland's highest quality waters with water quality that is significantly better than minimum standards. State and federal law requires that these high-quality waters must be maintained. COMAR 26.08.02.04 and 26.08.02.04-1, 40 CFR 131.12.² Degradation of these waters is only permitted for "necessary economic or social development." COMAR 26.08.02.04.B. To aid the Court's understanding, Petitioner has attached the following as Exhibit A - *MDE Facts About: Antidegradation and Tier II Waters* and Exhibit B - *MDE Tier II Review: Nontidal Wetlands and Waterway Construction*.³ Maryland has implemented a "Tier II Review Antidegradation Policy" as required by federal regulations. 40 CFR 131.12 and *Infra* note 2. This Tier II review applies to "Water and Sewer Plan amendment approvals, *Nontidal Wetlands and Waterways permits and authorizations* [emphasis added], and New or modified National Pollutant Discharge Elimination System (NPDES) discharge permits" Exhibit A pg.2 and Exhibit B.

In this case, MDE required the Applicant to conduct a Tier II Review and "justify MDE to permit this project and its impacts" to Otter Point Creek II, a Tier II watershed. R. at 0637. This required justification is to be in the form of a Social and Economic Justification (or "Justification") for "permitting limited degradation of the water quality." R. at 0637. COMAR 26.08.02.04-1G. MDE states that a Justification must "demonstrate that an economic hardship and/or public benefit overrides the value of the ecological services or water quality benefit that the Tier II water segment provides" and that applicants "must also provide documentation to show that all reasonable

² State and Federal regulations contemplate three tiers of waters. Tier I are all waters, Tier II are waters with significantly higher quality than Tier I, and Tier III waters are waters with outstanding water quality higher than Tier I and II. Currently there are no Tier III waters in the state of Maryland.

³ Also found here:

https://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Documents/Tier_II_Updates/TierII_General_FactSheet.pdf and <https://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Pages/Tier-II-Wetlands-Waterways.aspx>

avoidance, minimization, and mitigation alternatives have been considered, and where economically feasible, implemented.” COMAR 26.08.02.04-1M.⁴ Tier II review and Justification is also required by state nontidal wetlands statutes and regulations that prohibit MDE from permitting a project that will cause or contribute to degradation of surface waters or permitting a regulated activity that will cause individual or cumulative effects that degrade surface water quality or violate applicable water quality standards. Md. Env. Code. § 5-907(a). COMAR 26.23.02.06A.

On multiple occasions from September through December 2019 Petitioner and the public expressed concerns to both the Applicant and MDE that the project's impacts to Otter Point Creek I must be considered and justified, and further reminded MDE and the Applicant of the legal requirements discussed above. This included: Petitioner's direct communications with Applicant and MDE (R. at 0418.), public comments at the public hearing (R. at 0564.), and explicit written comments to MDE requesting that MDE require the Applicant to conduct a Tier II review and produce a Justification. R. 0558, 0655-0656, 0660, 0713. In order to review the project and assess the impacts to Tier II Otter Point Creek I, Petitioner submitted a Public Information Act (“PIA”) request to MDE for all public records related to the Permit Application on September 24, 2019. R. at 418. Ex.C. MDE purported to provide these public records on November 4-5, 2019. Ex.C. There were no records pertaining to the Applicant's antidegradation review and Justification analysis among the files that MDE released to Petitioner in November 2019. *Id.* For that reason, they were not available to the Petitioner or the public during the public comment period that ended on December 11, 2019 at 5:00 PM. *Id.*

⁴ *Infra* note 2.

Despite the clear expression of public concerns regarding the Applicant's proposed impacts to Tier II waters and the legal requirement that the Applicant conduct a Tier II review and submit a Justification to MDE, the Applicant failed to timely submit the Justification within the public comment period, resulting in an incomplete permit application before Petitioner and the public. Instead, the Justification was not submitted to MDE until January 22, 2020, a full 42 days after the close of the twice-extended public comment period. Moreover, neither Petitioner nor the public was informed that the Tier II Review was completed, and documentation provided to MDE after the comment period closed. As a result, Petitioner and the public were denied all opportunity to comment regarding the Applicant's Tier II review, Justification, and related documents during the open comment period. MDE effectively denied Petitioner the statutorily mandated opportunity to provide public comments on these mandatory parts of the permitting process because Applicant was late in submitting its Tier II review and Justification documents. R. at 0826.

Despite these procedural missteps, MDE approved the Permit on June 11, 2020. R. at 0001. MDE's Notice of Decision included a Summary of the Basis For Decision ("Summary") that serves as a "brief explanation of the rationale" for MDE's decision to approve the Permit and is the only publicly available explanation of MDE's approval. The Summary of MDE's rationale relies heavily on the Tier II review and Justification document provided by the Applicant to allow potential degradation of Otter Point Creek I and the destruction of the Abingdon Woods forest - the same Justification that Petitioner was denied access to and comment on. The Summary cites the Justification documentation at least a dozen times and the permit itself contains special conditions related to antidegradation and mitigation of impacts to the Tier II watershed. R. at 0005, 0006, 0007, 0012, 0013, 0015. Upon reviewing the Summary, Petitioner submitted a second PIA request to MDE on June 16, 2020 for the Tier II review and Justification documentation cited in

the Summary that was withheld from public review. Ex.C. These records, including the Justification analysis and supporting documentation, were *only made available* to Petitioner on June 25, 2020, *197 days after the close of the comment period*. *Id.* Petitioner has reviewed these records and developed comments and objections to the Justification analysis. *Id.* Petitioner's comments necessarily were developed after the comment period and were not reasonably ascertainable during the comment period. However, because Petitioners' comments and objections found in Exhibit D were not before MDE during the open comment period for this permit application, they are not considered part of this record. Md. Code Env. 5-204(h).⁵

As described above, MDE's analyses, and certainly all analyses related to the Justification, were reliant on records and information that were submitted to MDE after the close of the comment period, and were not made available to the Petitioner or the public until after MDE made its decision to approve the Permit. R. at 0826. Furthermore, the failure by the Applicant to timely submit these vital requisite materials not only deprived the public of the opportunity to review the Justification materials, but it also deprived the agency of potentially critical feedback of those Justification materials.

Furthermore, not only did MDE wrongfully foreclose public comment on the Justification, it also prejudged and pre-approved the Permit application prior to the close of the comment period and before the Applicant had completed and submitted their Justification analysis to MDE. The MDE permit writer in charge of this project informed a representative of the United State Army

⁵ State law prohibits Petitioner from raising these arguments to this Court if they are not already in the Record. Md. Code Env. 5-204(h).

Corps of Engineers (“COE”) on December 11, 2019 at 2:13 PM that the permit would be approved/issued.

“Every single day- my email box is overloaded with emails from every resident of Abingdon and anyone living within 10 miles of that site. Some even choose to send me 2nd and 3rd edition emails of their opposition to the project. *When the permit is issued* [emphasis added], I may have to leave the country for good. I may also re-direct any of the newer Abingdon emails arriving in 2020 to your mailbox if you don’t mind. Thanks.”

R. at 0718.

This MDE permit writer email above indicates that MDE intended to issue the Permit without further analysis and absent public comment on the Tier II Review. The permit writer was neither concerned with the substance of the Tier II review nor any public comments pertaining to it and had already made the decision to approve the permit long before the Applicant submitted the required analysis to MDE and before considering public comments.

The facts above demonstrate that MDE precluded public comment on required and critical parts of the Permit application and based its decision on these records and information that were not publicly available during the comment period, undercutting MDE’s own determination that public notice and public informational hearing requirements were satisfied for this permit approval. R. at 0003, 0004-0017.

With these facts and the argument below we ask this Court to remand this matter to MDE to correct these deficiencies and allow Petitioner and the public an appropriate amount of time to provide MDE with comments and objections to the Tier II review, Justification, and related documents not available during the original comment period. COMAR 26.08.02.04, Md. Code Env. 5-204

ARGUMENT

As demonstrated above, the Justification and related Tier II review documents were not available to Petitioner or the public during the comment period. R. at 0826. Petitioner was only able to review these documents more than six months after the close of the comment period. Thus, Petitioner's objections, developed in this post-comment period review, arose after the close of the comment period, were not reasonably ascertainable during the comment period, and could not have been raised to MDE during the comment period. Md. Code Env. 5-204(h).

Remand is required by state law when the "petitioner demonstrates that: (i) [t]he objections were not reasonably ascertainable during the comment period; or (ii) [g]rounds for the objections arose after the comment period. The court shall remand the matter to the Department for consideration of objections". Md. Code Env. 5-204(h). The Maryland Court of Special Appeals, in *Potomac Riverkeeper, Inc. v. Md. Dep't of the Env't*, 238 Md. App. 174, analyzed this statute and stated clearly that "the statute also provides that the court 'shall remand the matter to [MDE]' if the party petitioning for judicial review can demonstrate either that '(i) [t]he objections were not reasonably ascertainable during the comment period; or (ii) Grounds for the objections arose after the comment period.'" *Potomac Riverkeeper*, 238 Md. App. at 203. In this instance, the facts satisfy both statutory elements.

The Court of Special Appeals in *Potomac Riverkeeper* required additional elements necessary for a Petitioner to demonstrate that a remand to the agency is required and warranted, stating that: "[i]f the petitioning party demonstrates that there are genuinely new objections that are materially different from those that have already been considered by MDE, the court is required to remand the matter to MDE for consideration of the newly raised objections." *Id.* at 204-05. In this case, Petitioner's objections in Exhibit D are "genuinely new" and "materially different" from

prior objections raised by Petitioner to MDE during the public comment period of October 15 - December 11, 2019. R. at 0436.⁶ The objections in Exhibit D are substantive critiques of the rationale and analysis found in the Justification and related documents and are materially different from the procedural objections found in Petitioner's prior comments. R. at 0658-0667. As stated above, Petitioner's prior objections do not pertain to the substance of the Justification because the Justification, dated January 22, 2020, subsequent to the close of the comment period, was neither before MDE nor the public during the Permit's public comment period. R. at 0826-0832. In essence, prior comments noted that the Applicant failed to conduct the required Tier II review and produce a Justification analysis, whereas the new comments in Exhibit D are substantive critiques that the required analysis, eventually completed by the Applicant and provided to MDE after the close of the comment period, is inadequate and incomplete, is based on faulty rationale, and fails to consider factors required by state regulations. These are new and materially different concerns and objections.

Another consideration by the Court in *Potomac Riverkeeper* was that the public must have an opportunity to review and comment on "the 'core components' of the permit." *Potomac Riverkeeper*, 238 Md. App. at 214. In *Potomac Riverkeeper*, the Court held that Petitioners were given this opportunity, and that minor revisions to draft permits and differences in a final permit from a tentative permit do not automatically trigger a remand for more notice and comment. *Id.* at 204 and 214. This case is distinguishable from *Potomac Riverkeeper* and remand is required here because the Justification analysis is a core component of the Permit, the application, and decision making process, and its addition to the record after the close of the comment period resulted in major additions to MDE's analysis and rationale that were not available for public

⁶ *Infra* note 2.

comment. COMAR 26.08.02.04-1, 40 CFR 131.12, Md. Env. Code. § 5-907(a), COMAR 26.23.02.06A.⁷ MDE foreclosed public participation on these core components. The notice and opportunity for comment in this case is distinguishable from *Potomac Riverkeeper*, where the petitioner’s objections were based on information already in the record and not “materially different” from what was reviewed by the agency. *Id.* at 209, 214. Here, not only did the applicant fail to timely include the Justification, a critical component and central to the Tier II review, but Petitioner and the public were deprived of any opportunity to review and provide meaningful feedback that would have benefitted both the Applicant and MDE. Pursuant to Maryland Code and relevant case law, this error must therefore be remedied before this matter can proceed any further in this Court.

A remand would also afford MDE an opportunity to conform its decision making in this matter with prior MDE Wetlands and Waterways permitting decisions that prioritized and preserved public comment opportunities. Just as Petitioner urged MDE in public comments, we urge the Court to consider MDE’s decision making when faced with a similar situation in the case of 18-NT-0323/201861760 MD Solar 1 - Shugart Valley Place (“MD Solar”). R. at 0666, *see* MDE Wetlands and Waterways MD Solar 1 – Shugart Valley Place.⁸ MD Solar involved the clearing of forest, impacts to nontidal wetlands and buffers, and impacts to a Tier II watershed.⁹ It similarly involved an incomplete application and the requirement for the applicant to conduct a Tier II

⁷ *Infra* note 2.

⁸ *Supra* note 4.

⁹ *Id.* “MDE took testimony from over 80 people, many of whom expressed concern about the potential adverse impacts of the project on the high quality waters (Tier II waters) on the site, Wards Run 1 and Wards Run 2.”

review and submit a Justification analysis.¹⁰ To address this and preserve the public's right to public participation MDE stated as follows:

“Because MDE needs this additional information [the SEJ and Tier II review documents] in order to make its permitting decision, MDE is hereby extending the time period in which the public informational hearing record will remain open. The hearing record will remain open until **two calendar weeks** after MDE posts on this website the SEJ provided by the applicant which MDE will consider in its determination as to whether the loss of additional assimilative capacity in Wards Run 1 is justified. This will provide the public with an opportunity to review and comment on this additional information prior to MDE making its decision on the permit application.” *Id.*

In the matter of MD Solar, MDE rightly decided the Tier II review and Justification were necessary components of the decision making process, required public notice and comment, and decided that the public participation period should stay open while the Applicant conducted the required Tier II review of the project's impacts and produced a Justification analysis for both MDE and the public to review. After allowing time for public review and comment of the Justification, MDE then closed the comment period and finished the review of the permit application with a complete record before it. In public comments in the instant matter, Petitioner asked MDE for a similar opportunity, requesting that MDE “reopen the public comment period when the Applicant provides the missing information [to MDE] and that information is made available for public comment.” R. at 0666. Conversely to its actions in MD Solar, and without adequate justification, MDE denied this request, approved the Permit on an incomplete record, and foreclosed public comment on relevant and required documents not available to MDE or the Public during the public comment period.

¹⁰ *Id.* “MDE has recently communicated to the applicant that additional information and a social and economic justification (SEJ) are needed in order to determine whether the loss of additional assimilative capacity in Wards Run 1 is justified.”

Maryland Rule 7-208 allows additional evidence in a petition for judicial review proceedings when permitted by law. Md. Code Env. 5-204(h), described above, is such a law. Additionally, MD Rule 7-209 provides courts with several options when hearing petitions for judicial review, including the option to “remand the action to the agency for further proceedings.” Maryland caselaw also supports this Court’s authority to remand this permit back to MDE to hear additional objections and evidence from Petitioner and the public:

“Obviously a circuit court may remand a matter to an administrative agency. Indeed, Rule B13 [prior rule 7-209] expressly authorizes a remand. Thus, a court can remand for the taking of additional evidence, remand because of a procedural error at the administrative level, remand because an erroneous legal standard was applied, remand for further findings, remand where all parties consent, etc. Cases involving remands to administrative agencies for these and other reasons, however, are ones where there was either consent or some degree of judicial review.”

Holiday Spas v. Montgomery Cty. Human Relations Com., 315 Md. 390, 400 (1989).

Petitioner therefore requests that this Court provide judicial review of this motion and remand the action to MDE for the taking of additional evidence as required by state law and authorized by the Maryland Rules. *Id.* In order for the record to be supplemented as described above, this Court must also stay the current proceeding until MDE remedies the unlawful foreclosure of public comment and allows a reasonable time period of public notice and comment on Tier II Review and Justification and related documents.

CONCLUSION

For the reasons set forth above, remand is appropriate here. Petitioner asks this Court to stay this proceeding, Case No. C-12-CV-20-000492, remand the Permit back to MDE, require MDE to make publicly available the antidegradation review documents relied upon in the approval of the Permit, and hold a public participation and comment period for MDE to hear Petitioner and the public’s comments and objections to the above referenced documents.

Date: November 12, 2020

Respectfully submitted,

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EXHIBIT A

Maryland Department of the Environment **Facts About: Antidegradation and Tier II Waters**

This exhibit shows a summary of pertinent facts regarding Maryland Tier II Waters and Antidegradation Review referenced in the Memorandum of Law in Support of Motion to Remand page 5.

To access this information see:

https://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Documents/Tier-II-Forms/TierII_General_FactSheet.pdf



Antidegradation and Tier II Waters

What You Need to Know

Tier II waters are those that have an existing water quality that is significantly better than the minimum requirements, as specified in [water quality standards](#). Federal and State regulations require special protection of these high quality waters from degradation.

Why must Maryland identify Tier II waters?

Federal antidegradation regulations ([40CFR131.12](#)) require states to develop and adopt a statewide antidegradation policy that protect all Waters of the U.S. from degradation. These regulations also require states to maintain the condition of high quality (i.e. Tier II) waters that have water quality that is better than the minimum standard necessary to meet designated uses. The Maryland antidegradation implementation procedures are found in the Code of Maryland Regulations ([COMAR](#)) [26.08.02.04-1](#). Maryland has designated 253 Tier II streams.

How are Tier II Streams Identified?

- Maryland Biological Stream Survey (MBSS) data is used to designate Tier II streams.
- COMAR 26.08.02.04-1 states that MBSS data must show that stream “water quality is within 20 percent of the maximum attainable value of the index of biological integrity” (IBI).
- For Tier II designation, MBSS IBI scores must be greater than, or equal to 4.00, for both benthic macroinvertebrate (or ‘aquatic bugs’) and fish data.

What is Assimilative Capacity (AC)?

Assimilative capacity (AC) is defined in regulation as the difference between the Tier II water quality at the time the stream segment was designated as Tier II, and the water quality criterion. For Tier II waters, this is represented by the Tier II baseline IBI scores used to identify the stream as high quality, and the water quality criterion is represented by the Tier I IBI score of 3.00.

The *assimilative capacity analysis* allows MDE to evaluate recent MBSS data to determine whether Tier II water quality has either been maintained or diminished. Regulations specify that the water quality of a Tier II water is considered diminished if the AC is reduced by more than 25% from the original Tier II designation baseline. This analysis identifies the Tier II stream’s *assimilative capacity threshold*, which is the lowest acceptable benthic and fish IBI scores, after considering natural variability.

When data is above the assimilative capacity threshold, the MDE determines that there is some capacity remaining. Conversely, if there is a decline in scores to a level that is at or below the AC threshold, the stream is determined to have no remaining assimilative capacity.

Currently 62, or almost 25% of all Tier II streams, have no assimilative capacity.



Antidegradation and Tier II Waters

What You Need to Know

What is the Tier II Review?

The purpose of the Tier II review is to prevent degradation to high quality waters due to permitted activities. To protect downstream resources, the Tier II review is implemented on the watershed scale. This means that permitted activities occurring anywhere upstream of the designated stream segment may be subject to review. The review applies to:

- Water and Sewerage Plan amendment approvals,
- Nontidal Wetlands and Waterways permits and authorizations, and
- New or modified National Pollutant Discharge Elimination System (NPDES) discharge permits.

The review process identifies impacts associated with a given regulated activity, and then identifies if there are appropriate alternatives that may avoid these impacts to Tier II waters (the no-discharge alternative). If impacts cannot be avoided, then the review identifies reasonable alternatives that may minimize and mitigate impacts within the Tier II watershed. More broadly, the review identifies practices that could be considered along with existing conservation, restoration, and planning activities.

Please direct questions or comments concerning Maryland's Antidegradation Program, to Angel Valdez, Antidegradation Implementation Coordinator, at 410-537-3606, or angel.valdez@maryland.gov.

EXHIBIT B

Maryland Department of the Environment **Tier II Review: Nontidal Wetlands and Waterway Construction**

This exhibit provides an overview of the general Tier II review process for the Nontidal Wetlands and Waterway Construction Divisions and referenced in the Memorandum of Law in Support of Motion to Remand on page 5.

To access this information see:

<https://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Pages/Tier-II-Wetlands-Waterways.aspx>



MARYLAND Department of the Environment



Water Quality Standards

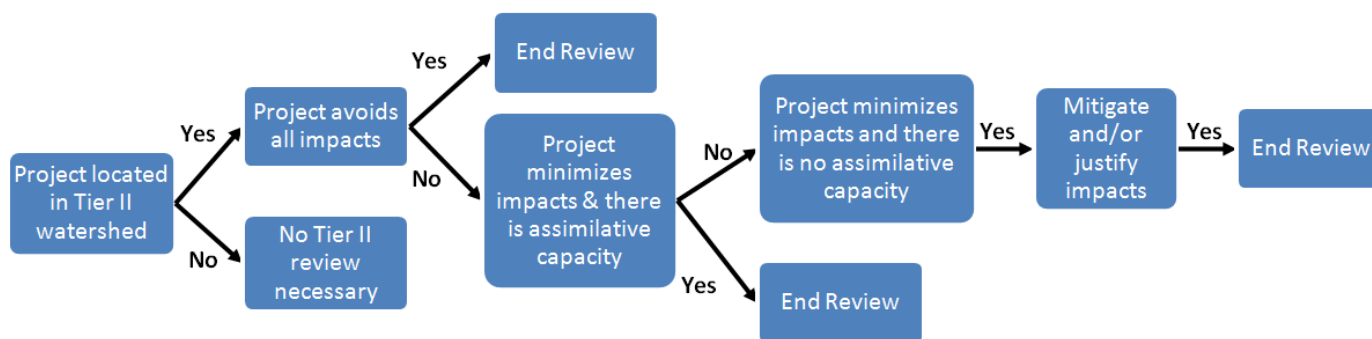
- › Water Quality Standards
- › Water Quality Data
- › Water Quality Report Home
- › TMDL Development
- › TMDL Implementation
- › Water Quality Maps
- › Water Quality

Tier II Review: Nontidal Wetlands and Waterway Construction

This online resource provides an overview of the general Tier II review process for the Nontidal Wetlands and Waterway Construction Divisions. Keep in mind that when using this webpage, the permitting authority will use application and site specific information to ultimately determine final permit conditions and requirements.

The purpose of the Tier II review is to prevent degradation to high quality waters due to permitted activities. To protect downstream resources, the Tier II review is implemented at the watershed scale. This means that permitted activities occurring anywhere upstream of the designated stream segment may be subject to review. Ample watershed forest cover, sufficient riparian buffers, and lower levels of impervious cover are essential to maintaining high quality waters. Therefore, avoiding, minimizing, and mitigating the environmental impacts associated with permitted activities is necessary to protect Tier II waters.

General Nontidal Wetlands and Waterway Construction Tier II Review Workflow:



In addition to the Nontidal Wetlands and the Waterway Construction Divisions application reviews, MDE coordinates with a variety of partners such as other State agencies, county and local government, non-profit and non-government organizations to develop and incorporate policies and other best management practices into broader watershed initiatives. This effort includes a strong focus on developing tools that prioritize practices leading to stronger Tier II waters protection, while maximizing the co-beneficial use of existing policies and programs, such as the Forest Conservation Act.

Click [here](#) for more information regarding assimilative capacity. Click [here](#) to view the interactive Tier II webmap where users can see the locations of Tier II stream segments and catchments, and receive more information about assimilative capacity status.

Overview of Tier II Review

➔ Common Situations that Generally Do Not Require Tier II Review

➔ Environmental Impact Avoidance Alternatives

➔ Common Environmental Impact Minimization Alternatives

➔ Construction Stormwater Antidegradation Checklist

➔ pH Management

➔ Environmental Impact Mitigation Alternatives

➔ Tier II Social and Economic Justification

➔ Other Potential Requirements

Other Nontidal Wetlands and Waterway Construction Divisions Tier II Review Resources:

- [pH form](#)

- [Tier II No- Discharge Analysis Form V1.2](#)
- [Tier II Minimization Alternative Analysis Form V1.1](#)
- [Construction Stormwater Antidegradation Checklist V1.1](#)

Click [here](#) to return to the Maryland Tier II Waters homepage.

Please direct any questions or comments concerning Maryland's Antidegradation program to Angel Valdez at Angel.Valdez@maryland.gov or 410-537-3606.

This page was last updated 07/2020.

[Contact Us](#)

[Privacy](#)

[Accessibility](#)

1800 Washington Boulevard, Baltimore, MD 21230

(410) 537-3000

EXHIBIT C

Affidavit of Mr. Theaux Le Gardeur

This exhibit includes the affidavit of Mr. Theaux Le Gardeur, the Executive Director and Riverkeeper of Petitioner, Gunpowder Riverkeeper. As referenced on pages 6 and 8 of the Memorandum of Law in Support of Motion to Remand.

AFFIDAVIT OF THEAUX M. LE GARDEUR

1. My name is Theaux M. Le Gardeur. I reside at 3456 Butler Road in Reisterstown, Baltimore County, Maryland.
2. In 2010 I founded Gunpowder Riverkeeper ("Riverkeeper") and serve as the Riverkeeper and Executive Director of Gunpowder Riverkeeper. The organization is a recognized 501(c) (3) organization, EIN # 27-1517453 that is characterized by the IRS under natural resources protection and conservation. The organization has 384 members that work, live and recreate along the Gunpowder and Bush Rivers and their tributaries and benefit from the protected State designated uses of these waterways including, water recreation, trout habitat and public drinking water supply.
3. In March 2019 I retained legal representation from Patrick F. DeArmey ("Attorney") to assist Riverkeeper in the investigation, review, and analysis of the proposed "Abingdon Business Park" project as related to Riverkeeper's interests in protecting water quality of the Bush River watershed.
4. In September 2019 I instructed Attorney to submit a Public Information Act ("PIA") request to MDE for records pertaining to Permit Application No. 19-NT-0228/201961268 and all supporting documents including information on Tier II impacts. This PIA request was submitted on September 24, 2019. R. at 0418.
5. On November 4, 2019 Attorney informed me that a file review at MDE was to be conducted that day where Attorney would scan and copy every record made available by MDE from the PIA request. Attorney provided me with digital copies of all the records made available by MDE and scanned by Attorney.
6. Attorney and I reviewed all the records made available by MDE.
7. The records made available on November 4, 2019 by MDE did not contain documents or files related to a Tier II review, nor an Antidegradation Analysis, nor a Social and Economic Justification.
8. Riverkeeper did not obtain records related to a Tier II review, Antidegradation Analysis, or a Social and Economic Justification for Permit Application No. 19-NT-0228/201961268 during the public comment period of October 15 – December 11, 2019.
9. Riverkeeper instructed Attorney to draft public comments requesting that MDE require the permit applicant to submit the Tier II review documentation. These comments were submitted to the Maryland Department of the Environment on December 4, 2019. R. at 0658-0667.

10. On June 14th, 2020 after reviewing MDE's Notice of Decision on Nontidal Wetlands and Waterways Permit No. 19-NT-0228 201961268 I instructed Attorney to file a second PIA request for records cited in MDE's Notice of Decision.
11. Records related to Tier II Review and Social and Economic Justification were not produced during the comment period.
12. Attorney informed me that the PIA request was filed on June 16th.
13. Attorney informed me that MDE provided records in electronic format from June 24-25, 2020.
14. From June -July 2020 Attorney and I reviewed theses records from the second PIA request and determined that the records pertaining to Tier II Review and the Social and Economic Justification were provided to MDE after the close of the comment period.
15. Notwithstanding Riverkeeper's continued interest in the permit proceeding, MDE failed to provide an opportunity for Riverkeeper to submit objections and comment to the administrative record related to the permit applicant's Tier II Review and Social and Economic Justification.
16. The stated timeline herein exemplifies that Riverkeeper was harmed by MDE's failure to require submission of the permit applicant's Tier II Review and Social and Economic Justification prior to or during the public comment period. In fact, MDE only made the information available after the close of the comment period and after approving the permit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 11/11/2020



Theaux M. Le Gardeur

STATE OF MARYLAND, COUNTY OF
Baltimore, to wit:

I hereby certify that on 11 day of November, 2020
Before me, the subscriber, a notary public of the State of Maryland, in and for Baltimore
County for which notary is appointed, personally appeared

THEAUX MAURICE LE GARDEUR and made oath in due form of law that the
matters and facts set forth in the affidavit are true.

As witness, my hand and notarial seal.



Victoria M. Hu

Victoria M. Hu
NOTARY PUBLIC MARYLAND
Baltimore County
Commission Expires: 8/12/2023

Notary Public

My Commission expires 08/12/2023

EXHIBIT D

Petitioner Gunpowder Riverkeeper Comment Letter

This exhibit is a comment letter drafted on behalf of Petitioner, Gunpowder Riverkeeper that provides substantive objections and concerns regarding the Tier II Review and Social and Economic Justification conducted for Permit No. 19-NT-0228 201961268 and referenced in the Memorandum of Law in Support of Motion to Remand on pages 8, 10, and 11.

11/11/2020

Amanda Sigillito

Chief, Nontidal Wetlands Division
Water and Science Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
amanda.sigillito@maryland.gov

**Re: Abingdon Woods Tier II Review documents - Nontidal Wetlands and Waterways
Permit No. 19-NT-0228 201961268**

Dear Ms. Sigillito,

The Chesapeake Legal Alliance (CLA), on behalf of the Gunpowder Riverkeeper (“Riverkeeper”), hereby submits the following comments on the above referenced Permit approved by the Maryland Department of the Environment (“MDE”). These comments pertain to documents and information related to a Tier II review of proposed impacts to the Tier II watershed of Otter Point Creek conducted by Harford Investors LLP and CREG Westport I, LLC (“Applicant”) and obtained by Riverkeeper after the official public comment period closed for this Permit. Riverkeeper obtained these documents via a public information request submitted in June 2020. Substantive comments are below:

MDE required the Applicant to conduct a Tier II review and produce a social and economic justification (“Justification”) for the proposed impacts to the Tier II waterbody of Otter Point Creek I. In general, Applicant’s Tier II review and Justification is inadequate and incomplete, is based on faulty rationale, and fails to consider factors required by state regulations. The Justification does not comply with state regulations that detail the components of a Justification and does not include any discussion or analysis of the water quality impacts to Otter Point Creek I. The Justification only discusses the limited and speculative economic “benefits” of this proposed project and presumes that this project is necessary without any economic or market analysis to demonstrate the necessity.

The Justification Does Not Assess Water Quality Impacts

The proposed Abingdon Business Park project has impacts on the Tier II watershed of Otter Point Creek I stemming from deforestation in the watershed and grading within the

watershed.¹ Otter Point Creek I is also a Tier II watershed with no remaining assimilative capacity.² This means that Otter Point Creek I is on the brink of losing its Tier II status and degrading below the thresholds for its Tier II qualification. This project has potential to cause degradation to the Creek, and that potential was not thoroughly analyzed by the Applicant.

When a project cannot avoid impacts and the impacted watershed has no remaining AC then Applicant's are required to provide MDE "with a social and economic justification for permitting limited degradation of water quality."³ When reviewing the Applicant's Justification MDE must determine if it demonstrates that "the impact on water quality is necessary for development or growth to take place in the watershed."⁴ In this instance, the Applicant's Justification contains no information about the actual impacts of the proposed project on the Tier II watershed. The Justification does not discuss the lack of assimilative capacity in Otter Point Creek I and impacts of degradation below Tier II thresholds, it does not discuss current pollutant loads to the watershed compared to estimated pollutant loads during and after construction of this project, and the Justification does not discuss the duration and extent of any impacts to the Tier II watershed.⁵ In fact, the Applicant's Justification does not even contain the phrase "water quality" and for this and the above reasons it is wholly deficient in its analysis. Because the Justification is deficient, MDE cannot make any of their required determinations required under COMAR.⁶

Furthermore, Maryland's Nontidal Wetlands statutes and regulations require MDE to review and consider the cumulative and individual impacts of a project on water quality and prohibit MDE from permitting a regulated activity that will cause individual or cumulative effects that degrade surface water quality or violate applicable water quality standards.⁷ This necessarily entails ensuring that permitted projects under the Nontidal Wetlands Program do not degrade Tier II water quality. The Applicant's Justification does not demonstrate that the Tier II water quality of Otter Point Creek I will not be degraded by this project nor does it provide MDE with enough information to review and make a rational decision.

Designated Uses of Otter Point Creek I Are Not Protected

State regulations require that Tier II water quality must be maintained and that any permitted changes to Tier II water quality must "not diminish uses made of, or presently existing" in the impacted Tier II waters.⁸ Otter Point Creek I has the following designated uses: Use Class I

¹ March 3, 2020 Email from Angel Valdez to Geo Technical Associates

² *Id.* and Maryland's Tier II High Quality Waters (2016)
<https://mdewin64.mde.state.md.us/WSA/TierIIWQ/index.html>

³ COMAR 26.08.02.04-1.

⁴ *Id.*

⁵ COMAR 26.08.02.04-1L and M

⁶ COMAR 26.08.02.04-1M

⁷ Md. Env. Code. § 5-907(a). COMAR 26.23.02.06A.

⁸ COMAR 26.08.02.04B(2).

and II.⁹ This means that Otter Point Creek's water quality must be maintained to support the following uses: Water contact sports; Play and leisure time activities where individuals may come in direct contact with the surface water; Fishing; The growth and propagation of fish (other than trout), other aquatic life, and wildlife; Agricultural water supply; Industrial water supply; Shellfish propagation and storage, or harvest for marketing purposes; and Actual or potential areas for the harvesting of oysters, soft-shell clams, hard-shell clams, and brackish water clams.¹⁰

The Justification does not contain any of this information about the designated uses of Otter Point Creek I nor does it contain an analysis or discussion of potential impacts to the designated and the existing uses of Otter Point Creek I. Without this information in the Justification, the Applicant cannot determine the extent and duration of the project's impact on the designated uses. Furthermore, the lack of any analysis on this point means that MDE, when reviewing the Justification, could not perform one of their responsibilities in determining that the Justification is protective of water quality and existing uses.¹¹

No Discharge Alternative Analysis Fails to Consider Tradepoint Atlantic

Applicant's alternative site analysis fails to consider and evaluate the prospects of utilizing space at the massive industrial complex in Baltimore City called Tradepoint Atlantic.¹² This site has warehouses that meet the Applicant's size requirements, the site has direct access to 695 and 95 and has access to rail ports in Baltimore. Tradepoint Atlantic appears to check all the Applicant's criteria, yet it was not analyzed or included in the Alternative Site analysis of the Justification. Tradepoint Atlantic is a fully developed, full-service site and Applicant's development on this site would have much less environmental impact, it would not impact a Tier II watershed, and it would not destroy a forest. Applicant's Justification and Alternative Analysis requires an analysis of Tradepoint Atlantic. Siting the project at Tradepoint Atlantic would also comport this project with the State's goals of limiting sprawl and development in enterprise zones.

The Proposed Project Does Not Meet County Enterprise Zone Criteria

Applicant purports that this project falls within the Harford County Enterprise Zone and is therefore justified, stating "the proposed uses on the subject site fits within the State's and County's designated uses for Enterprise Zones and will serve as an economic engine for the region."¹³ This assertion is incorrect and lacks analysis of the actual criteria of the Harford County Enterprise Zone. Harford County states that Enterprise Zones are designated to:

- Encourage the creation of well-paying new jobs;
- Ensure retention and spur expansion of resident businesses;

⁹ MDE Map Designated Use Classes for Maryland's Surface Waters

<https://mdewin64.mde.state.md.us/WSA/DesigUse/index.html> last accessed (11/11/2020).

¹⁰ COMAR 26.08.02.02A.

¹¹ COMAR 26.08.02.04-1.

¹² <https://www.tradepointatlantic.com/>.

¹³ GTA Tier II Antidegradation Review, pg. 3-4.

- Promote development and occupancy of vacant, underutilized land and buildings; and
- Support the county's commitment to revitalizing older industrial areas of Harford County.”¹⁴

This project proposed in the Abingdon Woods does not meet these criteria, Abingdon Woods is not vacant, or underutilized, it is not an older industrial area that needs revitalization, and the Justification provides limited information regarding how this e-commerce center will spur expansion of resident business or will create well-paying jobs. The Justification only contains bald, unsubstantial assertions that this project “will serve as an economic engine for this region” and that the project will satisfy the needs of E-commerce and warehouse tenants.¹⁵ This is not sufficient justification to allow impacts to the already degraded watershed of Otter Point Creek I.

Applicant’s Economic Analysis is Flawed

As stated above, Applicant claims that this project “will serve as an economic engine for this region” simply because the site is located in an Enterprise zone.¹⁶ The Justification does not contain any actual economic or market analysis in the project’s area to determine if there is a demonstrated need for this warehouse space. Applicant cites one nationwide report from the Department of Commerce that states that e-commerce sales are growing nine times faster than in-store sales.¹⁷ Applicant then determines that because of this nationwide report that this warehouse project is then necessary for economic and social development in Harford County. This determination is speculative at best as it does not contain any discussion or analysis of the local or statewide social and economic needs potentially supported by the project. Applicant’s Justification does not comply with state requirements for components of the economic analysis portion of the Justification, and Applicant has not provided MDE with sufficient information and analysis for MDE to perform their duties when reviewing the Justification.¹⁸ Furthermore, MDE’s determination that this project is justified based on this limited economic analysis sets a dangerous precedent. A more robust analysis must be required.

Other Deficiencies

- The Justification does not contain information about what point and nonpoint source water pollution controls will be implemented to maintain Tier II water quality.¹⁹
- The Justification does not contain information or analysis that demonstrates that the cost of water pollution controls is reasonable and would not limit development and growth.²⁰

¹⁴ <https://www.harfordcountymd.gov/1280/Enterprise-Zones>.

¹⁵ GTA Tier II Antidegradation Review, pg. 1 and 4.

¹⁶ GTA Tier II Antidegradation Review, pg. 4.

¹⁷ GTA Tier II Antidegradation Review, pg. 1. And <https://www.commerce.gov/news/fact-sheets/2017/07/new-insights-retail-e-commerce>.

¹⁸ COMAR 26.08.02.04-1L and M.

¹⁹ COMAR 26.08.02.04-1M.

²⁰ *Id.*

- MDE did not properly notify the public that Tier II waters would be impacted by this project and did not include the Justification for review during the comment period.²¹
- The Justification does not contain detailed information regarding what types of environmental site design and best management practices would be used on site. Nor does the Justification provide locations or plans for any environmental protection practices, merely stating that practices will be implemented.²² This is not sufficient information upon which MDE can make a rational determination.
- The Administrative Record in case NO. C-12-CV-20-000492 also demonstrates that Applicant did not fully complete their Tier II Review requirements by failing to submit a completed Antidegradation Applicant Review Checklist Enhanced Best Management Practices for Tier II Waters.²³ The applicant's submission of this check list is missing almost all the information necessary for MDE to properly analyze the Tier II impacts of this project.

In closing, Applicant's Justification is insufficient to demonstrate that impacts to Tier II Otter Point Creek I are necessary for social and economic development, the Justification contains only a cursory analysis of economic necessity, the Justification contains no analysis of potential impacts to water quality, and the Justification does not provide MDE enough information and analysis to allow MDE to make a reasoned and rational decision about whether impacts to Tier II Otter Point Creek I are justified.

Riverkeeper thanks MDE for the opportunity to submit this comment.

Sincerely,



Patrick DeArmey
Staff Attorney
Chesapeake Legal Alliance
501 Sixth Street
Annapolis, MD 21403
(410) 216-9441
patrick@chesapeakelegal.org

On Behalf of Gunpowder Riverkeeper

²¹ COMAR 26.08.02.04E, COMAR 26.08.02.04-1M.

²² GTA Tier II Antidegradation Review, pg. 4-5.

²³ NO. C-12-CV-20-000492 Administrative Record Pgs. 874-876.

PETITION OF	*	IN THE
GUNPOWDER RIVERKEEPER	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF	*	FOR
THE DECISION OF THE	*	HARFORD COUNTY
MARYLAND DEPARTMENT OF	*	
THE ENVIRONMENT	*	
IN THE MATTER OF:	*	CASE NO. C-12-CV-20-000492
Nontidal Wetlands and Waterways Permit	*	
No. 19-NT-0228 201961268	*	

* * * * *

PETITION OF	*	IN THE
JEANNA TILLERY, ET AL.	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF	*	FOR
THE DECISION OF THE	*	HARFORD COUNTY
MARYLAND DEPARTMENT OF	*	
THE ENVIRONMENT	*	
IN THE MATTER OF:	*	CASE NO. C-12-CV-20-000567
Nontidal Wetlands and Waterways Permit	*	
No. 19-NT-0228/201961268	*	

* * * * *

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a Motion for Remand filed on behalf of the Petitioners, Gunpowder Riverkeeper, (“Petitioner”) et al. The Motion for Remand was joined by the additional petitioners when these matters were consolidated. The Motion for Remand was filed on November 12, 2020. Responses were filed on behalf of the Maryland Department of the Environment (“MDE”) and by Respondent CREG Westport I, LLC (“Applicant”). A hearing was held on January 29, 2021. The Court held the matter *sub curia* in order to review the pleadings and the complex exhibits and record. Upon review of the memoranda, the exhibits, the applicable law, and argument of the parties at the hearing, and for the reasons outlined in this memorandum opinion, this Court determines that the matter is to be remanded to the MDE for the limited purpose of reopening the comment section, to

allow the Petitioners to provide comments on the Tier II Antidegradation review and Socio-Economic justification analysis filed by the Applicant on January 22, 2020, and for the MDE to consider these objections as part of its decision on the permit application.

I. BACKGROUND

This matter concerns a proposed development and construction of a mixed-use business park along Interstate 95 between Edgewood Road and Abingdon Road in Harford County. The project, known as Abingdon Business Park, proposed to span nine lots, which total approximately 330 acres of mostly forested land, as well as several acres of non-tidal wetlands, buffers and waterways. The property is split between two watersheds. The majority of the property is within the watershed of a creek known as the Haha Branch. The Haha Branch is designated as a “Tier I” waterway. A smaller portion of the property falls within the Otter Point Creek I watershed. Otter Point Creek I is a “Tier II” waterway.¹ The site is known as Abingdon Woods. The area is currently zoned Commercial Industrial. It is sought to be developed by Harford Investors LLP and CREG Westport I, LLC. Because of the current status of the land, it is subject to the Wetlands and Waterways regulations of the Maryland Department of the Environment. CREG Westport applied for a Wetlands and Waterways permit (no. 19-NT-0228 201961268) (“permit”). The application sought a permit to impact 49,894 square feet of nontidal wetlands and buffers, 16,418 square feet of waterways, and 22,382 square feet of 100-year floodplain. (R. at 0003).

The MDE required the applicant to conduct a Tier II antidegradation review and justification in order to assist the MDE in its review of the permit application. This justification was to be in the form of a Socio-Economic Justification. (R. at 0637). The MDE requires a showing that “an economic

¹ Tier I waters are all waters. Tier II are waters with significantly higher quality than Tier I. COMAR 26.08.02.04; 26.08.02.04-1, 40 C.F.R. 131.12. States are required to adopt a statewide antidegradation policy to maintain the condition of high quality. Maryland’s antidegradation implementation procedure is found in COMAR 26.08.02.04-1.

hardship and/or public benefit overrides the value of the ecological series or water quality benefit that the Tier II water segment provides”. (Pet’r. Mem. at 3). The Applicants were further required to provide documentation to show that all reasonable avoidance, minimization, and mitigation alternatives had been considered, and where economically feasible, implemented.

The Petitioners filed a Public Information Act request with the MDE to obtain all public records relating to the Permit application. The record was provided on November 4-5, 2019. As is required by MDE regulations, a public notice was released that provided a public comment period with an initial deadline of November 14, 2019. A public hearing was held on November 6, 2019. (R. at 0437-0438). The public comment deadline was extended to December 4, 2019 and then extended again to December 11, 2019. (R. at 0568).

The permit application was approved by MDE on June 11, 2020. The Petitioners filed a request for Judicial Review of that decision. The matters have been consolidated for purposes of the review.

II. PETITIONERS’ CONTENTIONS

The Petitioners have preliminarily requested that this Court remand the matter to the MDE to re-open the public comments portion of the record. The Petitioners allege that in November of 2019, before the public comment period closed, the MDE required the Applicant to submit an antidegradation review and justification analysis in the form of a Socio-Economic Justification. This review and analysis is required by state nontidal wetlands statutes and regulations. Petitioners allege that from September to December 2019, prior to the closing of the public comments portion of the permit application review, they had expressed concern for the need for this review. None of the records obtained by the Petitioner from the MDE contained an antidegradation and justification review. The Petitioners claim that they were not able to provide a public comment on these documents because they were not publicly available or even filed prior to the end of the public comments period.

Petitioners allege that the justification and antidegradation review documents were not submitted to MDE until January 22, 2020. The documents were not provided to the Petitioners until after the permit was approved on June 11, 2020. The Petitioners allege that they discovered the existence of the documents upon review of the summary of the basis for the MDE's decision. The Petitioners claim that the summary relies heavily on the Tier II review and justification document provided by the Applicant. The Petitioners further claim that the permit contains special conditions related to the antidegradation and mitigation of impacts to the Tier II watershed. The Petitioners were able to obtain a copy of the document on June 25, 2020, over six months after the comment period had closed. The comments proposed to be made by the Petitioners upon remand are not currently part of the record of MDE pertaining to the issuance of this permit. The Petitioners are requesting that the Court remand the matter to the MDE to allow the Petitioners and the public an appropriate time to provide MDE with comments and objections to the Tier II review, socio-economic justification, and related documents that were not available during the original comment period.

The Petitioners rely on Maryland Annot. Code, Environment Section 5-204, which applies to the requirements of applicants to the MDE to give notice to certain individuals upon making application. This section of the code also provides the process for public hearings concerning the application, and the process for judicial review of the outcome of the permit application. In support of their request for a remand, the Petitioners direct the Court to Md. Annot. Code, Env. Sec 5-204 (h), which provides:

(h)(1) Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:

- (i) The objections were not reasonably ascertainable during the comment period; or
- (ii) Grounds for the objections arose after the comment period.

(2) The court shall remand the matter to the Department for consideration of objections under paragraph (1) of this subsection.

The Petitioners also direct the Court to the case of *Potomac Riverkeeper Inc. v. MDE*, 238 Md. App. 174, 189 A.3d 819 (2018), in which the Court of Special Appeals reviewed the Circuit Court’s denial of a similar motion to remand. The Court of Special Appeals agreed with the rationale of the Petitioners here, in that the Environmental Law Article permits a Circuit Court to review materials outside of the record in order to determine whether the matter should be remanded. In that case, however, the Court of Special Appeals found that the matter did not meet the requirements for a remand. The Court of Special Appeals explained:

We agree with Potomac Riverkeeper’s contention that the circuit court applied an erroneous standard for excluding consideration of the information gathered after the close of the comment period, and we disapprove of the circuit court’s stated rationale that, “[b]ecause [Potomac Riverkeeper’s] argument is based on extra-record material, *i.e.*, observations of additional North Branch discoloration not presented to MDE, the Court will not consider the ‘appearance’ of the River as a basis for remand.” Although, for the reasons explained herein, we agree with the circuit court’s conclusion that a remand is not required, we agree with Potomac Riverkeeper’s assertion that extra-record material *may* be considered for the limited purpose of determining whether the objection raised during judicial review falls within EN 1-601(d)(1)’s exceptions. Such a determination will necessarily, at times, require the consideration of extra-record material to analyze whether grounds for an objection “arose after the comment period,” or “were not reasonably ascertainable during the comment period.”

Potomac Riverkeeper Inc. v. MDE, supra.

The Petitioners have attached to their motion a copy of the comments that they propose to make in response to the antidegradation review and socio-economic justification analysis that they contend was filed after the close of the comments period. (See Exhibit D, attached to the motion).

III. APPLICANT’S CONTENTIONS

The Applicant has filed an opposition to the Motion for Remand. The Applicant’s first contention is that the Motion for Remand to reopen the record, is not permitted under the Maryland Rules of Procedure. The Applicant directs the Court to Rule 7-209, which states:

Disposition. Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above.

The Applicant maintains that this rule precludes the Court from granting the relief sought by the Petitioners.

Recognizing that the Petitioners are relying on Md. Code Ann., Env. Art, Section 2-504(h), the Applicant further maintains that the objections sought to be made by the Petitioners were reasonably ascertainable during the public notice and comment period. The Applicant maintains that the information contained in the Socio-Economic Justification that was submitted after the close of the public comments portion of the record was already contained elsewhere in the record. The Applicant submits that the Petitioner previously had the opportunity to file its comments to that information.

The Applicant further maintains that it was not legally required to submit the Socio-Economic Justification in order for the MDE to issue the permit. The Applicant points out that the Socio-Economic Justification is required for discharge permits, which is not what they are seeking. The Applicant argues that the only Tier II water at issue is approximately nine (9) acres of the project located within the Otter Point Creek I watershed, and that there are no nontidal wetlands impacts whatsoever in this area. The Applicants contend that the Socio-Economic Justification and the level of review suggested by the Petitioners is inapplicable to this project.

IV. MARYLAND DEPARTMENT OF THE ENVIRONMENT CONTENTIONS

The MDE filed a response in which it raised the same arguments as the Applicant. The Court will not repeat them here.

V. DISCUSSION

1. Whether the Requested Remand is Permitted Pursuant to the Rules of Procedure.

The parties have all properly stated the applicable rules and statutes. Maryland Rule 7-209 provides:

Disposition. *Unless otherwise provided by law*, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above. (emphasis added). Rule 7-209, Maryland Rules of Procedure.

Annot. Maryland Code, Envir., Sec 5-204 (h), provides:

(h)(1) Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:

- (i) The objections were not reasonably ascertainable during the comment period; or
- (ii) Grounds for the objections arose after the comment period.

(2) The court shall remand the matter to the Department for consideration of objections under paragraph (1) of this subsection.

Read together, the rule and the statute provide the Petitioners with the procedural relief that they are requesting. This conclusion is based on the reading of the statute and the rule as they relate to each other, and was confirmed by the Court of Special Appeals in the case of *Potomac Riverkeeper Inc. v. MDE*, 238 Md. App. 174, 189, A.3d 819 (2018), which is discussed *supra*.

Therefore, this Court rejects the procedural objections raised by the Applicant and the MDE. The Court finds that *if* the Petitioners can establish that their objections to the Socio-Economic Justification that was filed after the close of the public comments portion of the process were *not reasonably ascertainable during the comments period*, or that *the grounds for objections arose after the comment period*, this Court is required to remand the matter to the MDE for consideration of the objections by the Petitioners.

2. Whether the Socio-Economic Justification is Irrelevant Because it was Not Legally Required to be Filed.

The Court also rejects this argument, asserted by the Applicant. Whether the Socio-Economic Justification was legally required to be filed is irrelevant to the instant motion. The record shows that the MDE required that the Socio-Economic Justification be filed as part of the application process. (R. at 0637). The Socio-Economic Justification was filed after the close of the comments period and is part of the administrative record for this permit. Therefore, the contents of that document are relevant to the Petition for Judicial Review because the Socio-Economic Justification was reviewed by the MDE as part of the application process, and included in its permit summary, regardless of the legality of that request.

3. Whether the Information Contained in the Socio-Economic Justification was Reasonably Ascertainable During the Comment Period.

The Applicant argues that all of the information contained in its Socio-Economic Justification was previously provided to the MDE during the application process. The Applicant directs the Court to those portions of the record that previously addressed the information contained in the Socio-Economic Justification. The Court has reviewed the referenced pages of the record and has compared the information contained in these pages to the information produced in the Socio-Economic Justification. The Court will review these pages of the record by section of the Socio-Economic Justification:

a. General Purpose. The Applicant argued that the “General Purpose” section of the Socio-Economic Justification was previously contained in the MDE Record at 5, 46, and 484-487. The Court has reviewed these documents and has compared the information contained in these documents to the “General Purpose” section of the Socio-Economic Justification. The Court finds:

i. Page 5 of the Record is not relevant because it was produced by the MDE after the Socio-Economic Justification was submitted and was part of the MDE permit summary and basis for opinion.

ii. Page 46 of the Record was part of the Applicant's original application dated July 9, 2019. It contains a very brief summary of the general purpose that is also contained in the Socio-Economic Justification.

iii. Pages 484-487 of the Record is the Avoidance and Minimization Analysis that was submitted by the Applicant on October 14, 2019. It contains a detailed description of the site description and the Project Purpose that is not significantly different from the Project Purpose outlined in the Socio-Economic Justification.

b. Alternative Site Analysis. The Applicant argues that it had completed an Alternative Site Analysis and submitted it as part of its application. This document is contained in the Record at 733-744.

A review of the record reveals that the MDE had received numerous comments and submissions from the public not only during the comment period, but also at the public hearing, concerning the application's lack of a review of alternative sites. (R. at 0569-0573, email from Gloria Moon; R. at 0661, comment from Petitioner dated 12/4/2019). As a result, the MDE requested that the Applicant prepare an Alternative Site Analysis, update the project need, and expand upon the avoidance and minimization report for the project. (R. at 0724, email from MDE dated 11/8/2019). This email requested that the information be provided within the following two weeks. The requested reports were filed with the MDE by the Applicant on December 11, 2019 at 12:53 p.m., which was mere hours before the deadline for public comments expired at 5:00 p.m. (R. at 0724). In fact, the Petitioner filed a second comment on December 11, 2019 at 2:21 p.m. that did not refer to the

alternative site report that had been filed a few hours before the deadline for public comments. (R. at 0659). The Court has also reviewed Petitioner's Exhibit D, which contains the proposed comments that the Petitioner would like the MDE to consider as part of the record for this application. Exhibit D contains numerous comments concerning the validity of the Alternative Site Analysis submitted by the Applicant in both its Alternative Site Analysis and its Socio-Economic Justification.

The Court finds that the Alternative Site Analysis submitted by the Applicant, on December 11, 2019, was not reasonably ascertainable to the Petitioners during the comments period because it was filed immediately prior to the expiration of the public comments portion of the application process. The Court further finds that the grounds for the objections to the Alternative Site Analysis that was submitted on January 20, 2020 arose after the close of the comment period.

c. Socio-Economic Justification. The Applicant divided this portion of the Socio-Economic Justification into subtopics and directed the Court to pages in the Record to support its claim that the information was part of the record of the MDE and readily available to the Petitioners prior to the close of the public comment period on December 11, 2019.

The Applicant claims that the portions of the Socio-Economic Justification were contained in other parts of the Record. Specifically, the Applicant directs the Court to the December 5, 2019 final avoidance and minimization analysis. (R. at 0726-0732). The Court has reviewed this document and has not found any reference to the "planning and zoning" aspects of the property that are contained in the Socio-Economic Justification. The Court further notes that despite being dated December 5, 2019, this document was not submitted to MDE until it was attached to an email dated December 11, 2019 at 12:53 p.m., which was a few short hours before the close of the public comments at 5:00 p.m. (R. at 0724-0725). The Applicant further directs the Court pages 0819-0820 of the Record to support its contention that the "planning and zoning" background of the property existed in the MDE record prior

to the close of the public comment period. The Court's review of the Record shows that pages 0815-0821 contain a draft of what ultimately became the final version of the Socio-Economic Justification. The document was attached to an email that was sent to MDE and dated January 14, 2020. (R. at 0815). Although these pages were part of the MDE record, the records clearly reflect that the document relied upon by the Applicant in support of its claim that the information was previously available to the Petitioners was not part of the MDE record as of the date of the close of the public comment portion of the application.

The Petitioner's comment letter of December 4, 2019 specifically refers to what it maintains was the lack of a demonstrated public need and a lack of information regarding the economic value of the project. (R. at 0662). The Petitioner was prevented from commenting on the proposed socio-economic analysis for the project because this information was submitted after the close of the comment portion of the application process.

Exhibit D contains the Petitioner's proposed comments based on its review of the Socio-Economic Justification. The comments include reference to what it contends are deficiencies in the economic analysis contained in the Socio-Economic Justification.

The Applicant is correct that there is a mention of job growth in the record. (R. at 0331). However, this is of no import due to the discrepancies outlined above.

The Court finds that the socio-economic portion of the Socio-Economic Justification that was submitted by the Applicant on January 20, 2020, was not reasonably ascertainable to the Petitioners during the comments period. The Court further finds that the grounds for the objections to the socio-economic portion of the Socio-Economic Justification Site Analysis that was submitted on January 20, 2020 arose after the close of the comment period.

d. Proposed Mitigation. The Applicant contends that it is not required to submit to mitigation of the potential impact of its project to the Tier II waters, and so, no mitigation was required. The Court does not agree with this analysis. The Court has reviewed the permit that was ultimately issued by the MDE. This permit requires the Applicant to maintain mitigation of the potential impact to the Tier II waters by planting trees in an adjacent area. (R. at 0012). Therefore, the mitigation contained in the Socio-Economic Justification was relevant and important to the proposed plan. Petitioners were denied the opportunity to comment on the proposed mitigation. The proposed mitigation is not referenced in any other portion of the record that the Court could find.

VI. CONCLUSION

This Court finds that the Petitioners have established that their objections to the Socio-Economic Justification that was filed after the close of the public comments portion of the process were not reasonably ascertainable during the comments period, and that the grounds for objections arose after the comment period had closed. Therefore, this Court is required to remand the matter to the MDE for consideration of the objections proposed by the Petitioners. Further, this matter is stayed pending the reconsideration by the MDE of its approval of the permit application based on the objections raised by the Petitioners.

August 20, 2021
DATE

Diane Adkins-Tobin
DIANE ADKINS-TOBIN, JUDGE

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PETITION OF	*	IN THE
GUNPOWDER RIVERKEEPER	*	
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF	*	
THE DECISION OF THE	*	FOR
MARYLAND DEPARTMENT OF	*	
THE ENVIRONMENT	*	HARFORD COUNTY
IN THE MATTER OF:	*	
Nontidal Wetlands and Waterways Permit	*	CASE NO. C-12-CV-20-000492
No. 19-NT-0228 201961268	*	

* * * * *

PETITION OF	*	IN THE
JEANNA TILLERY, ET AL.	*	
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF	*	
THE DECISION OF THE	*	FOR
MARYLAND DEPARTMENT OF	*	
THE ENVIRONMENT	*	HARFORD COUNTY
IN THE MATTER OF:	*	
Nontidal Wetlands and Waterways Permit	*	CASE NO. C-12-CV-20-000567
No. 19-NT-0228/201961268	*	

* * * * *

ORDER

The above captioned matter having come before the Court upon the Motion for Remand filed on behalf of the Petitioners, arguments having been heard and considered, it is this 20th day of August, 2021, by the Circuit Court for Harford County, hereby

ORDERED that this case be **REMANDED** to the Maryland Department of the Environment for consideration of the Petitioner's objections; and it is further

ORDERED that this matter be stayed pending the decision of the reconsideration of the Maryland Department of the Environment.


 DIANE ADKINS-TOBIN, JUDGE

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