

IN THE CIRCUIT COURT FOR TALBOT COUNTY

PETITION OF:
SHORERIVERS INC.

**FOR JUDICIAL REVIEW OF
THE DECISION OF:**
THE MARYLAND DEPARTMENT
OF THE ENVIRONMENT

IN THE MATTER OF:
ISSUANCE OF DISCHARGE PERMIT
19DP3460 FOR TRAPPE EAST WWTP

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CASE NO: C-20-CV-21-000004

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

ShoreRivers Inc. (“Petitioner”), by and through undersigned counsel, submits this Memorandum of Law in support of Petitioner’s Motion to Remand and request for an order requiring the Maryland Department of the Environment (“the Department”) to consider and enter into the administrative record in the proceedings to issue Discharge Permit 19DP3460 for Trappe East Wastewater Treatment Facility (“the Permit” or “final Permit”) Petitioner’s objections and comments and allow opportunity for public comment on the specific documents and permit changes detailed below. This Court will only have a full and complete administrative record to review pursuant to Md. Code. Ann., Envir. § 1-606(c) by remanding the administrative proceedings for consideration of the objections raised after the close of the comment period that pertain to core components and critical and indispensable features of the Permit.

The Department has denied Petitioner, interested parties, and the public an opportunity to review a key component and mandatory part of the Permit, despite repeated requests made during

and after the comment period to make such documents available for public comment. Instead, critical aspects of the Permit were made available to the public for review only after the close of the comment period. The Department then made a final determination to issue the Draft Permit with substantial changes that were not ascertainable during the comment period. This Court should remedy this unlawful foreclosure of public comment by granting this motion, thus further enabling this Court to review a full and complete administrative record.

JURISDICTION AND STANDING

This Court has jurisdiction over the petition for judicial review of these proceedings pursuant to Title 1, Subtitle 6 of the Environment Article of the Annotated Code of Maryland. A final determination issued by the Department for the issuance or renewal of a permit to discharge to waters of the State 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 public participation process through the submission of written or oral comments. Md. Code Ann. Envir. § 1-601(a)(3),(c). A petition for judicial review may be filed with the Circuit Court for the county where the application for the permit states that the proposed activity will occur. Md. Code Ann. Envir. § 1-601(e). As discussed below, Petitioner has standing under federal law and participated in the comment period through the submission of written and oral comments. (Ex. B at 1.) This Court has jurisdiction because the Permit would authorize discharges in Talbot County.

I. ShoreRivers Meets Federal Standing Requirements.

To satisfy federal standing requirements, one must show that “(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, 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) (quoting

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (IOC), Inc., 528 U.S. 167, 180-81 (2000)). An organization has standing if “its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Patuxent Riverkeeper*, 422 Md. at 300 (quoting *Friends of the Earth*, 528 U.S. at 181).

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. *Patuxent Riverkeeper*, 422 Md. at 300 (citing *Friends of the Earth*, 528 U.S. at 181-82). 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.” *Patuxent Riverkeeper*, 422 Md. at 300 (citing *Friends of the Earth*, 528 U.S. at 183-84). 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. *Id.* at 308 (quoting in part the Circuit Court’s findings).

To establish traceability, one need only show that the permit allows the facility to discharge pollution that “causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (internal quotations omitted). The traceability requirement “does not mean that

plaintiffs must show to a scientific certainty that defendant's effluent . . . caused the precise harm suffered by the plaintiffs.” *Piney Run Pres. Ass’n v. Cty. Comm’rs*, 268 F.3d 255, 263-64 (4th Cir. 2001) (quoting *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992)) (internal quotation marks omitted). Finally, to demonstrate redressability "it must be likely, and not merely speculative, that a favorable decision will remedy the injury." *Gaston Copper*, 204 F.3d at 154.

Ms. Rebecca Eismann is a resident of the Town of Trappe in Talbot County. (Ex. A at 1.) Ms. Eismann’s home is adjacent to the property in which the Trappe East Wastewater Treatment facility would operate and directly south of the spray field designated in the Permit. *Id.* Ms. Eismann is a member of ShoreRivers because she appreciates the water quality reports produced by the organization and finds them useful for staying safe when she fishes and boats on the Choptank and its tributary creeks and streams. *Id.* Ms. Eismann is concerned that, unless the Permit is strengthened, the Wastewater Treatment facility proposed to be authorized by the Permit would jeopardize the relatively pristine condition of the Miles Creek. *Id.* Ms. Eismann is also concerned about the procedural issues that have arisen during the Permit issuance process, which includes the lack of notice provided to her as a registered “interested party.” *Id.*

Mr. Shelby Blythe is a resident of the Town of Trappe in Talbot County. (Ex. A at 4.) Mr. Blythe is a longstanding member of ShoreRivers because he supports the organization’s mission to protect the environment and promote sustainable farming practices. *Id.* Mr. Blythe is a ShoreRivers “Creek Watcher” who volunteers to take water quality samples in local waterways and helps promote oyster restoration activities. *Id.* Mr. Blythe enjoys boating and fishing on the Choptank River and spending time with his grandchildren who swim at local beaches. *Id.* Mr. Blythe is concerned about the potential that the facility proposed to be operated under the Permit

would make the local waters unsafe. *Id.* Mr. Blythe is also concerned about the potential impacts of nutrient pollution on drinking water derived from residential wells. *Id.* at 5.

Mr. William Thompson is a resident of Easton in Talbot County. (Ex. A at 6.) Mr. Thompson is a longstanding member of ShoreRivers who enjoys photographing local waters such as Miles Creek and wildlife from his kayak. *Id.* Mr. Thompson is very aware of the impact that nutrient pollution has on aquatic ecosystems and is concerned that the Permit would result in pollution to the Miles Creek that would cause him to not return, despite the fact that the Miles Creek has one of the few points of access to waterways in the area. *Id.* Mr. Thompson is also concerned about the safety of seafood from this area resulting from pollution. *Id.*

Remanding the administrative proceedings to provide adequate review of the Final Permit and the nutrient management plan could assist the Department in ensuring that the Permit reduces pollution consistent with state and federal law and would help to alleviate the concerns of Ms. Eismann, Mr. Blythe, and Mr. Thompson, and address their injuries. Therefore, Ms. Eismann, Mr. Blythe, and Mr. Thompson would have standing to sue in their own right.

Moreover, the interests at stake are germane to the Petitioner's mission. The mission of ShoreRivers is to protect and restore Eastern Shore waterways through science-based advocacy, restoration, and education. Petitioner's members do not need to be individually involved in the lawsuit because Petitioner requests prospective relief, not specific damages or remedies for each person. When an association seeks prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members ... actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). Here, Petitioner seeks a remand of the administrative proceedings associated with the Permit with instructions that the Department hear its objections and comments with respect to a key aspect of the Permit that was not available during the comment period and

with respect to changes made to the Permit after the close of the comment period that were not reasonably ascertainable. Therefore, Petitioner meets the threshold standing requirements under federal law.

II. ShoreRivers Participated in the Public Participation Process.

Petitioner actively participated in the public participation process. ShoreRivers provided oral comments at a public hearing following the tentative determination to renew the draft Permit and Petitioner also timely filed extensive written comments to the Department during the comment period. (Ex. B.)

STATEMENT OF FACTS

I. Factual Background.

A. Proposed Discharge Permit.

On February 5, 2003, the Trappe Town Council adopted Resolution 7-2002 to annex the Trappe East Annexation Area, which consists of approximately 924.22 acres of land to the east side of the Town of Trappe. (Ex. D at 2.) On January 21, 2019 the Town of Trappe and the Trappe East Holding Business Trust submitted an application to the Department for a groundwater discharge permit for the proposed Trappe East Wastewater Facility to be located at the east end of Backtown Road. (Ex. C.) The permit co-applicants engaged John D. Hynes & Associates, Inc. to conduct a hydrogeologic evaluation to determine whether spray irrigation of treated wastewater is a feasible sewage disposal option for the particular site. (Ex. E at 1.) On November 5, 2019, the final hydrogeologic evaluation was presented to the co-applicants describing suitability of up to 540,000 gallons per day, or 2 inches per week, over 85 acres of fields for 10 months per year. *Id.*

The Department published a Notice of Tentative Determination to issue the Draft Permit on August 30 and September 6, 2019, and a public hearing was held on November 19, 2019. (Ex. F at 2.) Petitioner submitted testimony at the November 19, 2019 hearing and filed written

comments during the public comment period that ended January 20, 2020. (Ex. B at 1.) Petitioner's comments discussed, among other things, the failure of the Department to follow its own regulatory guidelines, inconsistencies between the proposed Permit and the Chesapeake Bay Total Maximum Daily Load (Bay TMDL), failure to recognize phosphorus limits under the regulatory Phosphorus Management Tool, inadequate restrictions on spray irrigation during times when vegetation is not growing and during the prohibited winter blackout period, and the lack of a nutrient management plan. *Id.* at 1-5.

The nutrient management plan written by Environmental Management Solutions, LLC was presented to Trappe East Holdings Business Trust on June 2, 2020, more than four months following the close of the comment period for the Trappe East Wastewater Plant. (Ex. M at 1.) Petitioner, along with interested party Chesapeake Bay Foundation, submitted a letter to the Department on July 17, 2020 requesting that the Department reopen the comment period application to allow the public to review the nutrient management plan and because the Department had failed to adhere to its own regulatory guidelines that required the relevant project to be incorporated into the county water and sewer plan before a discharge permit application would be processed. (Ex. G at 1-2.) Following the Department's denial of this request, Petitioner submitted a letter to the Department on August 14, 2020 requesting the Department hold a public hearing or informational meeting regarding the changes to the draft Permit. *Id.* at 3. Upon denial of this request, Petitioner sent a letter to the Department on September 10, 2020 to respond to questions from the Department regarding its authority and duties with respect to reopening a comment period. *Id.* at 5-6.

The Department provided notice to Petitioner on December 22, 2020 that it had made a final determination to issue Discharge Permit 19-DP-3460. (Ex. H at 1.) The contents of several

provisions in the final Permit changed significantly from the draft Permit issued for public comment in August 2019, including changes to the limits on nitrogen and phosphorus concentrations, wastewater storage capacity and the freeboard requirement, spray field size, and the rate of irrigation allowed on the spray field. (Ex. I at 2, 3, and 6.)

B. Water Quality Standards and Pollution Reduction Plans.

The Permit authorizes spray irrigation of wastewater to several fields adjacent to the non-tidal portion of Miles Creek, as well as an unnamed stream connected to Miles Creek, nearly two miles upstream from the confluence with the Choptank River. *Id.* at 15. The Choptank River, like the Chesapeake Bay, has been designated by the Department as impaired due to excessive nitrogen, phosphorus, and total suspended solids (sediment), and the Lower Choptank is also impaired by fecal coliform bacteria. (Ex. F at 9.) Unlike the Chesapeake Bay watershed as a whole, however, the Choptank River is continuing to experience an increase in nitrogen and phosphorus pollution according to the United States Geological Survey’s monitoring data, measured over both the short-term (2010-2019) and long-term (1985-2019), the only major Bay tributary experiencing such trends. (Ex. J at 1.)

II. Statutory and Regulatory Framework.

A. Water Pollution Discharge Permits.

The objective of the Clean Water Act (“CWA”) “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 USCS § 1251(a). The CWA requires states to periodically review water quality standards and to identify those waters that are “impaired” as demonstrated by their current pollutant concentrations. 33 U.S.C. § 1313.

To give effect to water quality standards and restore impaired waterways, the CWA established the National Pollutant Discharge Elimination System (“NPDES”) program,

administered by the EPA. 33 U.S.C. § 1342. Water quality standards “by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.” *American Paper Inst. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993). Thus, it is generally illegal to discharge pollutants from certain facilities except in compliance with a permit.

Each state is authorized to implement its own NPDES program upon approval of the EPA and certification from its attorney general that the state program provides adequate authority to carry out the program consistent with the federal statute. 33 USCS § 1342(b). EPA authorized Maryland to issue NPDES permits pursuant to a state permit program through a Memorandum of Agreement dated May 18, 1989, and the Department is required to administer this permit program “as part of its own discharge permit system.” COMAR 26.08.04.07.A.

Maryland’s Water Pollution Control (“WPC”) laws thus incorporate the federal CWA statutory and regulatory requirements, requiring effluent standards to be “at least as stringent” as those specified by the federal NPDES program. Md. Code. Ann., Envir. § 9-314(c). However, the state WPC laws also go well beyond the floor set by federal law and “provide additional and cumulative remedies to prevent, abate, and control pollution of the waters of this state.” Md. Code. Ann., Envir. § 9-302(a). In establishing state discharge permits, Maryland WPC regulations bind the Department to not only “satisfy the regulatory requirements of the National Pollutant Discharge Elimination System under the Federal Act” but also “in accordance with provisions and conditions” of numerous Chapters of the Department’s water pollution regulations. COMAR 26.08.04.01.A. Moreover, discharging water pollutants is unlawful unless it is in full compliance with the CWA and Maryland WPC laws and regulations. Md. Code. Ann., Envir. § 9-322; COMAR 26.08.04.07.

The Department may only issue a discharge permit if it “finds that the discharge meets: (1) All applicable State and federal water quality standards and effluent limitations; and (2) All other requirements of this subtitle.” Md. Code. Ann., Envir. § 9-324(a). The Department is required to “impose additional restrictions in a State Discharge Permit” whenever “the Department determines that compliance with the established water quality standards or nutrient control requirements cannot be achieved through the application of best practicable control technology.” COMAR 26.08.01.02.

Under federal law, a NPDES permit is required “when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1466, 206 L.Ed.2d 640, 643 (2020). If it is determined that a pollutant may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, a water quality-based effluent limitation must be imposed. 40 C.F.R. § 122.44(d)(1)(i). And under state law, if best available technology is determined to be insufficient to achieve “compliance with the established water quality standards,” the Department’s regulations mandate that “the Department shall impose additional restrictions in a State Discharge Permit...” and that “additional treatment shall be (i) [r]equired; and (ii) [b]ased on waste load allocation.” COMAR 26.08.03.01.C(2)(b).

Federal regulations prohibit the issuance of a permit for a new source or discharger “if the discharge from its construction or operation will cause or contribute to the violation of water quality standards” unless the applicant can demonstrate the availability of adequate pollution load allocations and that existing dischargers are under a compliance schedule to bring the water segment into compliance with water quality standards. 40 C.F.R. § 122.4(i).

B. Total Maximum Daily Loads.

As part of the required continuing planning process under the CWA, each state is required to establish Total Maximum Daily Loads (“TMDLs”) for water quality limited (“impaired”) waters. 40 C.F.R. § 130.7. The CWA establishes additional protections for impaired waters and additional expectations associated with the TMDL for the Chesapeake Bay, which has been declared a national treasure. 33 U.S.C.S. § 1311(b)(1)(c); Executive Order 13508 of May 12, 2009. To restore the Chesapeake Bay, Maryland, along with Pennsylvania, Virginia, the District of Columbia, the U.S. Environmental Protection Agency (“EPA”), and the Chesapeake Bay Commission signed the Chesapeake Bay Agreement in 1983, beginning a partnership to reduce pollution to the Bay. Bay restoration activities undertaken pursuant to both the 1983 agreement and a subsequent agreement signed in 2000 failed to result in meaningful progress. *Md. Dep't of the Env't v. Cty. Comm'rs*, 465 Md. 169, 193 (2019). Due to this lack of progress, the EPA developed the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) cleanup plan, on December 29, 2010. 76 Fed. Reg. 549 (Jan. 5, 2011). Maryland also signed the 2014 Chesapeake Bay Watershed Agreement with its six other Bay jurisdictions, the Chesapeake Bay Commission, and the federal government.

EPA established the Bay TMDL in reliance on Maryland’s implementation of its Watershed Implementation Plan, which was consistent with the assumptions of the Bay TMDL. *Cty. Comm'rs*, 465 Md. at 227. The Department, in turn, subsequently removed a number of water segments from its impaired water list, also in reliance on the Watershed Implementation Plan. *Blue Water Balt. v. Pruitt*, 266 F. Supp. 3d 174, 177 (D.D.C. 2017).

State law requires the Department to ensure that discharges meet “[a]ll applicable State and federal water quality standards and effluent limitations.” Md. Code. Ann., Envir. § 9-324. This is

accomplished, in part, through incorporating into a discharge permit the waste load allocations associated with relevant TMDLs, which “constitute a type of water quality-based effluent limitation” and which compel MDE to include “limits on the quantities of wastes which may be discharged”, including “[c]onsiderations of seasonal variations.” 40 C.F.R. § 130.2(h); COMAR 26.08.01.01.B(97). The Maryland Court of Appeals recently affirmed the role of the WIP as an independent legal basis for which the Department may establish water quality-based effluent limitations. *Cty. Comm’rs*, 465 Md. at 264.

C. Groundwater Protection.

Maryland water pollution regulations require a permit for the discharge of “wastewater effluents disposed of by means of spray or other land treatments.” COMAR 26.08.02.09.A(2). This groundwater quality regulation requires adherence with the Department’s “Guidelines for Land Application/Reuse of Treated Municipal Wastewaters’ MDE-WMA-001-04/10, which is incorporated by reference.” COMAR 26.08.02.09.D. The regulatory requirements established in the guidelines generally govern the land application of waste, the state and county coordinated process for issuing a discharge permit, groundwater monitoring requirements, and appendices that discuss site-specific considerations, including notably, more stringent limitations, such as a zero nitrogen concentration standard, for sites with close proximity to impaired waters. (Ex. K.) The Department’s regulatory guidelines state that “processing of a groundwater discharge permit application for a new development project will not be started until the development project is incorporated into the approved County Water and Sewerage Plan.” (Ex. K at 13.)

D. Regulation of Community Sewerage Systems.

Title 9, Subtitle 5 of the Environment Article sets forth the law applicable to county water and sewer plans. Any “sewerage system” must be in conformance with the county comprehensive

plan. Md. Code. Ann., Envir. § 9-511. A “community sewerage system” is defined as any publicly or privately owned sewerage system applying to two or more lots. *Id.* The Department is required to adopt regulations to “control, limit, or prohibit the installation and use of . . . sewerage systems.” Md. Code. Ann., Envir. § 9-510(b). The Department established these regulations in Subtitle 26.04 of COMAR, including requirements to be consistent with all state and federal laws and controls on subsurface discharges.

In 2012, Maryland enacted legislation to provide additional protections for the Chesapeake Bay applicable to community sewerage systems. 2012 Md. Laws 149. The new law established requirements to govern the approval and operation of a community sewerage system. Specifically, a community sewerage system that discharges wastewater by land application may only be approved if “100% of the nitrogen and phosphorus in the applied effluent will be taken up by vegetation” and in accordance with “a nutrient management plan required under § 8–803.1 of the agriculture article.” Md. Code. Ann., Envir. § 9-1110.

E. Nutrient Management Plans.

A nutrient management plan is required to “manage the amount, placement, timing, and application of animal manure, fertilizer, biosolids, or other plant nutrients in order to protect water quality and maintain the productivity of soil in accordance with COMAR 15.20.08.” COMAR 15.20.06.02. Performance and technical standards associated with nutrient management planning are contained in the Maryland Department of Agriculture's Nutrient Management Manual (Supplement No. 8 (August 2016)), which is incorporated by reference into the Department of Agriculture’s regulations. COMAR 15.20.07.02. Section I-D of the Nutrient Management Manual governs the application of nutrients to fields, including a winter blackout period during which application of nutrients to a field is prohibited. The Nutrient Management Manual and Department

of Agriculture regulations have additional and specific restrictions applicable to the field application of phosphorus. COMAR 15.20.08.09.

ARGUMENT

A court is not able to adequately review an administrative decision without a complete record. *Stevens v. Prettyman Manor Mobile Home Park*, 237 Md. App. 565, 587 (2018). The remedy for an incomplete record in the case of a judicial review of a discharge permit is to remand the proceedings, in order to ensure the reviewing court has a complete record. Md. Code. Ann., Envir. § 1-601(d). A core, indispensable, and statutorily required component of the Permit was not available during the public comment period and several major changes to the Permit and to the Wastewater facility subject to the Permit occurred only after the comment period ended. Therefore, the record is incomplete and a remand is required.

I. A Remand of the Incomplete Record is Required Under 1-601(d).

The scope of judicial review of the Department's permitting decisions is limited to a review of certain types of records enumerated in statute. Md. Code. Ann., Envir. § 1-606(c). This approach is consistent with general principles of administrative law, which hold that judicial review of agency decisions is limited to an evaluation of a closed and exclusive record in order to understand whether there is substantial evidence within that administrative record to support the agency's action. *Pub. Serv. Com. v. Patuxent Valley Conservation League*, 300 Md. 200, 216 (1984); *Mayor of Balt. v. Trump*, 429 F. Supp. 3d 128, 137 (D. Md. 2019). "Were new evidence to be allowed before the circuit court and the court permitted to take that evidence into consideration when rendering its decision, the circuit court would no longer be focusing its attention upon the proper considerations." *Erb v. Md. Dep't of the Env't*, 110 Md. App. 246, 266-67. Thus, procedures for generating extra-record material, such as through discovery or cross-examination of witnesses, are

not permissible in closed record appeals of administrative agency decisions. *Venter v. Bd. of Educ.*, 185 Md. App. 648, 684-85 (2009) (citing *Montgomery Cty. v. Stevens*, 337 Md. 471, 481-82 (1995)).

Nevertheless, courts have long acknowledged the need for exceptions to this general rule under an overarching principle that the reviewing court must have a complete and properly developed record. *Prettyman Manor*, 237 Md. App. At 586. There are generally two avenues to ensuring that an administrative record is complete for judicial review: the first is to supplement the record with additional evidence, and the second is to remand the proceeding to the agency with instructions to return the record when it is complete. *Montgomery Cty.* 337 Md. at 482-83.

Maryland Rule 7-208, which governs judicial hearings of administrative decisions, such as the one before this Court, only allows additional evidence when permitted by law. Section 1-601 of the Environment Article does not permit additional evidence to be taken in a review of the issuance of a discharge permit, which had previously been authorized in these cases when governed under Maryland's Administrative Procedure Act contested case hearing procedures, prior to the enactment of Chapter 650 of 2009. Md. Code. Ann., St. Gov't. § 10-222(f). Moreover, without express statutory authorization, Maryland courts have only allowed for the presentation of additional evidence in limited circumstances, such as evidence that demonstrates the existence of procedural irregularities; agency actions taken in bad faith; or where no factual record exists at all. *Erb*, 110 Md. App. 246, 266-67; *Patuxent Valley Conservation League*, 300 Md. at 210-16; *Montgomery Cty.*, 337 Md. at 482-83. More recently, the Court of Special Appeals also recognized a limited exception for the purpose of considering evidence "to analyze whether grounds for an objection arose after the comment period, or were not reasonably ascertainable during the comment period," which are the statutory elements to support a request to remand agency

proceedings under § 1-601(d), as requested in the motion before this Court. Such evidence is provided in Exhibit G and attached to this memorandum of law. *Potomac Riverkeeper, Inc. v. Md. Dep't of the Env't*, 238 Md. App. 174, 218 (2018).

Instead of specifically authorizing a reviewing court to hear additional evidence not in the record, § 1-601 of the Environment Article simply requires a court reviewing the issuance of a discharge permit to “remand the matter to the Department” when one of the exceptions in items (d)(1)(i)-(ii) is triggered, in order to ensure the reviewing court has a complete record. A preliminary remand to the agency is necessary because a court “cannot review an administrative decision without a fully-developed record.” *Prettyman Manor Mobile Home Park*, 237 Md. App. at 587. Maryland courts have recognized the utility of preliminary remands for a variety of reasons, including a “remand for the taking of additional evidence” or a “remand because of a procedural error at the administrative level...” *Holiday Spas v. Montgomery Cty. Human Relations Com.*, 315 Md. 390, 400 (1989).

Recently, the Court of Special Appeals evaluated a request to remand a similar proceeding to the Department, but found that the Petitioner in that case did not have a “right to a new comment period” in that particular case because the court determined the Petitioner had already been “provided the opportunity to comment on the ‘core components’ of the permit.” *Potomac Riverkeeper*, 238 Md. App. at 214; applying *Md. Dep't of the Env't v. Riverkeeper*, 447 Md. 88, 168 (2016). In determining whether changes between the draft and final versions of the discharge permit that occurred after the close of the comment period were reasonably ascertainable to the Petitioner, the court specified that the Petitioner’s objections had to be “genuinely new objections that are materially different from those that have already been considered” by the Department reflected in the administrative record. *Potomac Riverkeeper*, 238 Md. App. at 204.

Nevertheless, in a matter of first impression, the Court of Special Appeals affirmed that § 1-601(d) does indeed establish a mandatory remand separate from a judicial proceeding to review the administrative record in support of an agency decision under § 1-601. *Potomac Riverkeeper*, 238 Md. App. at 204-05. (“At that point, the judicial review is limited to the administrative record and ‘limited to objections raised during the public comment period’ *unless* the petitioning party can demonstrate that there are new objections that ‘were not reasonably ascertainable during the comment period,’ or ‘arose after the comment period’ ended. Md. Code. Ann., Envir. § 1-601(d)(1). If 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.”) (Emphasis in original).

II. A Core Component and Required Element of the Permit Was Missing.

Petitioner was unable to point out critical deficiencies in the Permit because they relate to a statutorily required component of the Permit that was not available to the public until after the public comment period. The relevant legal standard for a permit to discharge municipal wastewater to groundwater via spray irrigation is 100 percent vegetative uptake of nitrogen and phosphorus under a nutrient management plan. Md. Code. Ann., Envir. § 9-1110(c)(2)(ii). Other courts have also recognized that a nutrient management plan is a fundamentally important part and “critical indispensable feature” of certain CWA discharge permits. *Waterkeeper All., Inc. v. United States EPA*, 399 F.3d 486, 504 (2d Cir. 2005). A nutrient management plan is not just a “core component” of the proposed Permit for the Trappe East Wastewater Facility, but rather a critical indispensable feature of the Permit, both because a nutrient management plan is statutorily required, and because it is simply not possible to ensure the relevant legal standard of 100 percent vegetative uptake is

satisfied without a nutrient management plan written by a qualified planner to ensure full uptake of nutrients.

The Department could have either submitted a nutrient management plan with the draft Permit or it could have incorporated the contents of the nutrient management plan within the draft Permit. Instead, the Department chose neither of these two options and issued for public comment a discharge permit with only a requirement for the applicant to submit a plan “[w]ithin 3 months of the starting date of the spray irrigation system operation.” (Ex. L at 7.) Under that Permit provision, the nutrient management plan would not be subject to public review and comment prior to the issuance of the Permit, as required under Title 1, Subtitle 6 of the Environment Article, nor meaningful review by the Department. Furthermore, the Draft Permit only required the nutrient management plan to include “procedures to *minimize* nitrogen discharge to the groundwater”. *Id.* at 7-8. (emphasis added). Thus, this provision does not contemplate achieving the relevant legal standard; it neither requires nor references 100 percent vegetative uptake of nitrogen, and it fails to reference uptake of phosphorus at all.

Moreover, by issuing the Permit without the required nutrient management plan, the Department was also not acting in accordance with the requirement of § 9-1110, which specifies that a community sewerage system “may be *approved only if* the system” is consistent with the 100 percent uptake requirement. Md. Code. Ann., Envir. § 9-1110(c)(2)(ii) (emphasis added). Here, the Permit does not contain limits to achieve 100 percent vegetative uptake, and the Permit does not require a nutrient management plan until after the Permit is approved by the Department, in violation of state law.

During the public comment period, Petitioner noted the absence of a nutrient management plan to “describe how to manage the source, rate, form, timing and placement and utilization of

nutrients in the soil.” (Ex. B at 5.) Petitioner further argued that “without this information MDE cannot confidently claim that any proposed discharge limits will not impact local groundwater or surface water quality.” *Id.* The administrative record demonstrates that the Department heard from other commenters as well about the need for a nutrient management plan to ensure nutrient pollution in the wastewater could meet the relevant legal standards.

Even after the public comment period ended, Petitioner and other interested parties repeatedly urged the Department to ensure that the agency could expeditiously issue a discharge permit with a statutorily required nutrient management plan that conforms to these relevant legal standards. Exhibit G contains several letters sent to the Department shortly after the nutrient management plan was finally released that detailed the problems with the plan and its inconsistencies with the draft Permit. Notably, the nutrient management plan released on June 2, 2020 referenced a different effluent limit for nutrient pollution than what was required by the draft Permit, a different requirement for the size of the wastewater storage lagoon, a different plan for the size of the spray fields, and a different crop uptake standard than what was contained in the draft Permit. (Ex. L at 2, 3, and 6; Ex. I at 2, 3, and 6.) In short, the nutrient management plan described an entirely different facility than what was described in the draft Permit.

A public comment period not only serves to protect the rights of the public, it is designed to benefit the agency as well. This foundational principle of administrative law was created in order to ensure that our agencies have access to all of the expertise from the private sector, academia, other government entities, and from interested members of the public with local or specialized expertise. “Participation by these groups [of people affected by regulations] in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.” Final Rep. of Attorney General’s Comm. on

Admin. Procedure 103 (Jan. 22, 1941). In this case, outside expertise clearly would have been beneficial to the Department and applicant, as the nutrient management plan contained numerous issues or inconsistencies with the draft Permit. Petitioner was unable to point out these deficiencies because the Department closed the comment period before the nutrient management plan was released over the objections of Petitioner and other commenters.

The nutrient management plan is required to be a part of the Permit and, thus, must obviously be consistent with the Permit. Md. Code. Ann., Envir. § 9-1110(c)(2)(ii). Because the nutrient management plan was not provided to the public for its review, the Department was unable to receive the critical feedback that the plan was not consistent with the relevant legal standards, including 100 percent uptake of nutrient pollutants, the winter blackout period, and other nutrient management regulatory requirements designed to ensure that phosphorus will not leach from fields with excessive soil phosphorus levels. *Id.*

III. Major Changes to the Draft Permit Were Not Reasonably Ascertainable.

In addition to the omission of the nutrient management plan - a core component and indispensable feature of the Permit – the issuance of the final Permit revealed that virtually every major element of the wastewater system’s design, as submitted and provided to Petitioner and the public, had changed since the comment period closed. These changes were not reasonably ascertainable, and they occurred after the close of the public comment period, thereby foreclosing Petitioner’s right to public comment. Additionally, the administrative record will be incomplete as it lacks comments from Petitioner and the public regarding these substantial changes to major elements of the Draft Permit.

The confusing inconsistencies between the nutrient management plan that was released in June 2020 and the draft Permit released in August 2019 were clarified only upon the issuance of

the final Permit. It is clear the nutrient management plan was written to be consistent with the wastewater system design and corresponding conditions in the final Permit, not the draft Permit that the public was given the opportunity to review. The public had no ability to review the Permit in its present form, which described an entirely different discharge system with different permit terms, conditions, and effluent limitations.

Petitioner acknowledges that the final Permit contains a lower limit on the concentration of nitrogen that can be discharged from the sewage treatment facility to the sewage lagoon, reduced from 8 milligrams per liter to 3 milligrams per liter of nitrogen. (Ex. I at 2; Ex. L at 2.) However, perhaps as a result of this major change in the design of the wastewater treatment system, the Department changed other critical limits substantially, including the amount of wastewater able to be sprayed per week and the storage volume of the lagoon.

Perhaps the most important limitation to ensure that the Permit meets the legal standard of 100 percent vegetative uptake is the limitation on the rate of effluent disposal from the spray irrigation system onto the fields. The rate must be calibrated so that neither the amount of water nor the concentration of nutrient pollution in the effluent exceeds the ability of field crops to take up the water and the pollution in that water. The draft Permit contained a prohibition on spraying at more than a rate of “2 inches/week.” (Ex. L at 6.) The final Permit changed this rate limit significantly by eliminating the cap on how much effluent could be sprayed in a week, and instead allowed the limitation to be based on the amount sprayed in a year, as long as the average was maintained at two inches per week. (Ex. I at 6.) This represents a weakening of a critical condition in the Permit that directly relates to the ability of the Permit to meet the relevant legal standard. A similar limitation in the Permit regarding total flow of the system changed from 540,000 gallons per day averaged over a month in the draft Permit, to 540,000 gallons per day averaged over a

year. (Ex. I at 2-3; Ex. L at 2-3.) Obviously, the mathematical reality is that for many weeks on end, the rate of spraying can greatly exceed 2 inches per week, which fundamentally changes the nature of the draft Permit on which the public was allowed to comment.

These changes amount to a substantial relaxation of the limits and introduce serious risks to water quality because crops grow at different rates throughout the year and not at all for months at a time. Allowing for no more than 2 inches per week is substantially different than allowing for an unlimited amount per week as long as the average is for 2 inches per week on an annual basis, given that no irrigation is allowed for at least 75 days per year. Moreover, the legal standard applicable to this discharge Permit cannot possibly be met through annual averages. A 100 percent uptake standard requires a spray irrigation system – and a permit for that system – that apply the appropriate rate at an appropriate time, as would be the case under a well-devised nutrient management plan. It is important to note that, in accordance with the regulatory guidelines applicable to spray irrigation systems, the hydrogeological evaluation provided to the Department reflected a “maximum” flow of 540,000 gallons per day through the spray irrigation system, not a monthly or annual average. (Ex. E at 1.)

Another substantial change between the draft and final versions of the Permit was the reduction in storage volume for the lagoon. The draft Permit established a primary and secondary, or reserve, lagoon that could contain wastewater based on a total volume representative of 90 days of flow from the wastewater treatment system. (Ex. L at 6.) The final Permit contains a reduced total storage capacity by authorizing a single storage lagoon with the capacity to contain a volume representative of only 75 days of wastewater effluent. (Ex. I at 6.) The final Permit also eliminated the requirement that the storage lagoon maintain at least 3 feet of freeboard, which would ensure that wastewater does not overtop the lagoon during high winds or other conditions. *Id.*

These changes to the storage requirements could also present serious risks based on the potential to discharge pollutants to waters of this state and the risk for other hazards at the site. The Permit reduced the storage capacity required for the system down to the minimum amount required to be consistent with the 75-day winter blackout period established by Maryland Department of Agriculture regulatory requirements. Maryland Department of Agriculture's Nutrient Management Manual (Supplement No. 8 (August 2016)), I-D1-3. However, requiring a storage lagoon that can only contain the minimum amount of projected volume of wastewater effluent leaves no room for many foreseeable possibilities, including: higher than average wastewater generation; the fact that the lagoon may not be empty on the first day of the 75-day winter blackout period; or a late winter storm. If any one of these, or possibly many other, circumstances occurs, the facility will have no additional storage and no protective freeboard requirement and could require the system to spray irrigate or otherwise be emptied on an emergency basis to prevent an overflow.

Petitioner commented on the lack of consistency between the size of the primary storage lagoon and the size needed to contain wastewater generated during the winter blackout period. But Petitioner could not have foreseen the much more significant and serious issue caused by the significant reduction in storage lagoon capacity between the draft and final versions of the Permit. Both of the changes to the allowable rate and flow of the spray irrigation system and to the storage capacity and freeboard associated with the lagoon raise significant issues that represent genuinely new objections that are materially different from what was before the public during the comment period. A reasonable person could not have expected the Department to substantially alter the rate and timing of spray irrigation flows or a potentially hazardous reduction in the volume of the storage lagoon, either of which changes would have necessitated a different set of comments,

concerns, and analysis be conveyed to the Department. Moreover, both changes implicate the ability of the Permit to meet the relevant legal standards for this Permit.

CONCLUSION

For the reasons set forth above, remand is appropriate here. Petitioner asks this Court to stay this proceeding, remand the Permit back to the Department, require the Department to make publicly available the nutrient management plan and the Permit with all final changes, and commence a new 30-day comment period for the Department to accept Petitioner and the public's comments regarding the Permit and nutrient management plan.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2021, I caused a copy of the foregoing Memorandum in Support of Petitioner ShoreRivers' Motion to Remand to be mailed via electronic mail to the following:

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IN THE CIRCUIT COURT FOR TALBOT COUNTY, MARYLAND

IN RE PETITION OF
SHORERIVERS, INC.

FOR JUDICIAL REVIEW OF THE
DECISION OF THE MARYLAND
DEPARTMENT OF ENVIRONMENT

IN THE CASE OF GROUNDWATER
DISCHARGE PERMIT ISSUANCE TO:
THE TOWN OF TRAPPE AND
TRAPPE EAST HOLDING BUSINESS TRUST
(Permit No.: 19-DP-3460)

Case No.: C-20-CV-21-000004

* * * * *

JOINT CONSENT TO PETITIONER'S REQUEST FOR AGENCY REMAND

The Council of Trappe (the "Town") and Trappe East Holdings Business Trust ("Trappe East") by and through their undersigned counsel, hereby file their response to Petitioner ShoreRivers, Inc.'s ("Petitioner") Motion to Remand to Administrative Agency dated March 24, 2021 ("Motion to Remand") by consenting to the relief requested in the Motion to Remand and further state:

1. This matter arises out of Petitioner's challenge to the Maryland Department of the Environment's (the "Department") issuance of the final Groundwater Discharge Permit 19-DP-3460 to the Town and Trappe East (the "Final Permit") in connection with the planned neighborhood development located east of Route 50 and annexed into the Town in 2005 ("Lakeside").

2. On or about January 28, 2021, Petitioner filed its Petition for Judicial Review requesting that the Court examine the Department's issuance of the Final Permit.

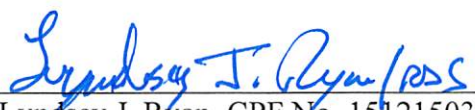
3. Thereafter, Petitioner filed its Motion to Remand requesting that the Court remand the Final Permit back to the Department for further administrative action prior to the Court's ruling

on Petitioner's Petition for Judicial Review. Specifically in the Motion to Remand, Petitioner requested that the Court require the Department to (a) establish an additional 30-day period for public comment and (b) hold a second public hearing on the final terms and conditions of the Final Permit.

4. The Town and Trappe East jointly file their consent to remand for the purposes of promoting the efficient use of local judicial resources, coupled with the hope of promptly resolving the instant dispute. A remand to the Department may streamline the instant litigation and conserve the resources of all the participants.

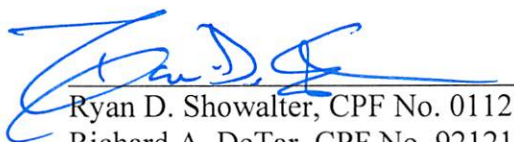
5. The Town and Trappe East have confidence in the Department's determination that the Final Permit complies with all applicable state and federal laws. As such, the Town and Trappe East have no reservations with the Department providing an additional 30-day period for public comment, holding an additional public hearing, or considering additional administrative action with respect to the Final Permit based on such public comment.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

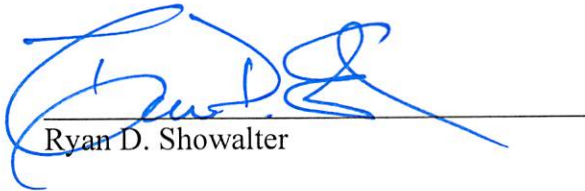
I HEREBY CERTIFY that on this 23rd day of April, 2021, a copy of the foregoing Joint Consent was served via the Maryland Electronic Courts (MDEC) case management system on the following:

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