

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0903

September Term, 2014

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BARBARA HEROLD, TRUSTEE OF THE  
CAISSE HELLMERS FAMILY TRUST

v.

MARYLAND DEPARTMENT OF THE  
ENVIRONMENT

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Wright,  
Graeff,  
Rodowsky, Lawrence F.  
(Retired, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: August 2, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this appeal, the Caisse Hellmers Family Trust (the “Trust”), appellant, through its trustee, Barbara Herold, an unrepresented litigant, challenges an Administrative Law Judge’s (“ALJ”) decision in favor of the Maryland Department of the Environment (“MDE”), appellee. MDE filed an enforcement action against the Trust, arising out of a construction project directed by Ms. Herold, which included a 50-foot-long by 25-foot-wide steel girder bridge over a tributary that traversed the Trust’s property. The ALJ agreed with MDE that the Trust violated Maryland Code (2007 Repl. Vol.) §§ 4-105(a)(3) and 4-413(a) of the Environment Article (“EN”), addressing the discharge of sediment into State waters, and she ordered the Trust to pay the \$12,500 penalty assessed by MDE.<sup>1</sup> On petition for judicial review, the Circuit Court for Anne Arundel County affirmed the ALJ’s decision.

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<sup>1</sup> The ALJ indicated that all references to the Environment Article were to the 2007 version of the Maryland Code. Section 4-105 was repealed and reenacted by 2013 Md. Laws, Ch. 81, §1, with minor amendments not relevant to this appeal.

On appeal, Ms. Herold presents 10 questions for our review.<sup>2</sup>

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<sup>2</sup> Ms. Herold presents the following questions:

1. Did [the ALJ] and [the circuit court] render their decisions without reasonable grounds or adequate consideration of the circumstances faced by [a]ppellant in their decisions?
2. Is [the ALJ and the circuit court] in rendering their decisions guilty of an abuse of discretion or otherwise, not in accordance with the law, and taken without observance of procedure required by law?
3. Did the [ALJ] abuse its discretion by admitting into evidence photographs without proof that they were authentic in what [MDE] intended to present?
4. Was the evidence provided, specifically the photographs provided by [MDE] adequate in proving that silt pollution to the stream or flood plain actually took place?
5. Did [the ALJ and the circuit court] neglect to draw[] inferences from evidence and testimony in favor of [a]ppellant resulting in rendering arbitrary decisions based on their lack of understanding of the circumstances?
6. Did [the ALJ and the circuit court] act arbitrarily and or capriciously in their actions at the hearing and in their decisions?
7. Whether, on October 28, 2009, [a]ppellant violated Section 4-105(a)(3) of the Environment Article by failing to maintain the required erosion and sediment controls at the site or by failure to implement sediment control measures necessary to control sediment runoff?
8. Whether, on October 28, 2009, [a]ppellant violated Section 4-413(a) of the Environment Article by placing sediment in a position likely to pollute the waters of the State?
9. Whether, during the period from January 6, 2010 through February 2, 2010, the [a]ppellant was in violation of Section 4-105(a)(3) of the Environment Article by failing to maintain the required erosion and sediment controls at the site or by failing to implement sediment control measures to control sediment runoff?
10. Whether, during the period from January 6, 2010 through February 2, 2010, the [a]ppellant was in violation of Section 4-413(a) of the Environment Article by placing sediment in a position likely to pollute the waters of the State?

These questions can be consolidated for our purposes. Accordingly, we rephrase the questions presented, as follows:

1. Was there substantial evidence to support the ALJ’s finding that the Trust violated EN §§ 4-105(a)(3) and 4-413(a) on October 28, 2009, by failing to properly maintain certain sediment control devices and placing sediment in a position likely to enter waters of the State?
2. Was there substantial evidence to support the ALJ’s finding that the Trust violated EN §§ 4-105(a)(3) and 4-413(a) between January 6, 2010, and February 2, 2010, by failing to follow the sequence of construction in an approved plan and placing sediment in a position likely to enter waters of the State?
3. Did the ALJ properly rule on evidentiary issues?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

**STATUTORY AND REGULATORY AUTHORITY GOVERNING  
SEDIMENT CONTROL**

Before turning to the facts involved, we shall set forth the relevant statutory and regulatory background regarding sediment control.

MDE is vested with authority to regulate soil and sediment discharges into waters of the State. *See* EN Title 4, subtitles 1 and 4. The State has implemented a regulatory scheme to control the serious harm that discharges can cause to the aquatic environment. EN § 4-402.

Section 4-105(a)(2)(i) provides that, “[b]efore any person begins any construction, the appropriate approval authority shall first receive, review, and approve the proposed earth change and the sediment control plan.”<sup>3</sup> Section 4-105(a) provides, in pertinent part:

- (3) A person may not begin or perform any construction unless the person:
  - (i) Obtains an approved sediment control plan;
  - (ii) Implements the measures contained in the approved sediment control plan;
  - (iii) **Conducts the construction as specified in the sequence of construction contained in the approved sediment control plan;**
  - (iv) Maintains the provisions of the approved sediment control plan;and
  - (v) Implements any sediment control measures reasonably necessary to control sediment runoff.

(emphasis added).

Code of Maryland Regulations (“COMAR”) 26.17.01.01.B(7) defines “erosion” as “the process by which the land surface is worn away by the action of wind, water, ice, or gravity.” “Sediment” is defined as “soils or other surficial materials transported or deposited by the action of wind, water, ice, gravity, or artificial means.” COMAR 26.17.01.01B(25). Pursuant to COMAR 26.17.01.09H(4), modifications to a sediment control plan needed to be approved.<sup>4</sup>

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<sup>3</sup> The authority for reviewing and approving sediment control plans is delegated to local soil conservation districts. Md. Code (2007 Repl. Vol.) § 4-105(a)(2)(ii) of the Environment Article (“EN”).

<sup>4</sup> The Trust filed several motions regarding these Code of Maryland Regulations (“COMAR”) provisions, regarding the relevant year involved. We note, however, that the changes involved were minor, all of the COMAR provisions require approval of any modifications to a sediment control plan, and the COMAR provisions are not relevant to a determination on the merits, given that the violations alleged were of EN §§ 4-105(a)(3) and 4-413(a). Accordingly, we shall deny, in a separate order, the (continued . . .)

Under EN § 4-413(a), “it is unlawful for any person to add, introduce, leak, spill, or otherwise emit soil or sediment into waters of the State or to place soil or sediment in a condition or location where it is likely to be washed into waters of the State by runoff of precipitation or by any other flowing waters.” EN § 4-101.1(d) defines “Waters of this State” to include:

(1) Both surface and underground waters within the boundaries of this State subject to its jurisdiction, including that part of the Atlantic Ocean within the boundaries of this State, the Chesapeake Bay and its tributaries, and all ponds, lakes, rivers, streams, storm drain systems, public ditches, tax ditches, and public drainage systems within this State, other than those designed and used to collect, convey, or dispose of sanitary sewage; and

(2) The flood plain of free-flowing waters determined by the Department of Natural Resources on the basis of the 100-year flood frequency.

EN § 4-116(e) authorizes MDE to impose a penalty of up to \$1,000 for each violation, not exceeding \$20,000 total for any action, on any person who violates any provision of Title 4, Subtitle 1, or any regulation or plan adopted, approved, or issued under that subtitle. Each day a violation continues is a separate violation. In assessing a penalty for violations of the provisions of the subtitle, consideration is given to the following factors:

1. The willfulness of the violation, the extent to which the existence of the violation was known to but uncorrected by the violator, and the extent to which the violator exercised reasonable care;

2. Any actual harm to the environment or to human health, including injury to or impairment of the use of the waters of this State or the natural resources of this State;

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(. . . continued) Trust’s “Motion to Strike Appellee’s Brief,” in which it sought to strike “all references” in MDE’s brief to COMAR 26.17.01.09H(4), 26.17.01.11, and 28.02.01.11B and its “Motion to Reconsider Inclusion in Brief as Opposed [to] Court’s Order to Exclude,” in which it sought to include various COMAR regulations.

3. The cost of cleanup and the cost of restoration of natural resources;
4. The nature and degree of injury to or interference with general welfare, health, and property;
5. The extent to which the location of the violation, including location near waters of this State or areas of human population, creates the potential for harm to the environment or to human health or safety;
6. The available technology and economic reasonableness of controlling, reducing, or eliminating the violation;
7. The degree of hazard posed by the particular pollutant or pollutants involved;
8. The extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator; and
9. Whether or not penalties were assessed or will be assessed under other provisions of this subtitle.

EN § 4-116(e)(2)(ii).

In addition to any other penalty assessed, EN § 4-417(d) authorizes MDE to assess civil penalties of up to \$10,000 for each day of violation, not to exceed \$100,000, on any person who violates Title 4, Subtitle 4, or rules, regulations, orders or permits issued pertinent thereto. Similar to § 4-116(e)(2)(ii), consideration in assessing a penalty pursuant to § 4-117(a) is given to, among other things, the willfulness of the violation, the damage or injury to the waters of the State or the impairment of its uses, and the cost of clean-up. EN § 4-417(d).

### **FACTUAL AND PROCEDURAL BACKGROUND**

MDE's enforcement action arose out of a road construction project performed under Ms. Herold's direction on a property owned by the Trust and located in Anne Arundel County within a 100-year flood plain. As indicated, the project included the construction of a bridge over Stocketts Run, a tributary of the Patuxent River. There was testimony that, throughout the multi-year project, employees of the Anne Arundel County Department of

Inspections and Permits had an “extreme amount of difficulty” trying to convince Ms. Herold to comply with the grading permit, install the proper sediment and erosion controls in the sequence they were supposed to be installed, maintain them properly, and stabilize the site in accordance with the approved plans.

On July 25, 2011, MDE issued a Complaint and Penalty. Count I alleged that, from October 25-28, 2009, the construction site lacked required erosion and sediment controls, in violation of EN § 4-105(a). Count II alleged that, from October 25-28, 2009, sediment was discharged into a tributary, polluting the waters of the State, in violation of EN § 4-413. MDE assessed a penalty of \$12,500 against the Trust for the violations.

On August 4, 2011, Ms. Herold requested a contested case hearing. On October 28, 2011, MDE filed an Amended Complaint, Order and Penalty. The amended complaint alleged additional violations resulting from follow-up site inspections on December 17, 2009, January 6, 2010, January 20, 2010, and February 2, 2010.

On February 6, 2012, after hearing argument, the ALJ granted MDE’s Motion for Partial Summary Decision on Liability. On April 27, 2012, after holding a penalty hearing, the ALJ issued a penalty order in the amount of \$12,500 against the Trust. Ms. Herold then petitioned for judicial review in the circuit court, and the circuit court reversed the ALJ’s orders and remanded the matter for a hearing on the merits.

On June 6 and 7, 2013, the ALJ held a contested case hearing on the merits of MDE’s amended complaint. Jim Thomas, a grading inspector with Anne Arundel County, testified that his job was to enforce grading plans that are issued to contractors. Grading plans provide for a sequence of construction events to ensure that sediment controls are in



place during each phase of construction. Sediment controls ensure that water leaving the construction site remains clear.

Mr. Thomas visited the Trust’s construction site “probably 50 times” for sediment control purposes. He identified the Trust’s grading plans and a nine-step sequence of construction plan. He explained that each step in the sequence had to be done in order, and construction could not progress until the previous step was completed.

On October 28, 2009, Mr. Thomas visited the site and observed that the flood plain was damaged in several areas because “large amounts of sediment had left the sight [sic] in numerous places and made its way into the stream.” In the days prior to his visit, it had rained. Mr. Thomas noted that the sediment controls had been taken down and “just enormous amounts of water was running into the stream.” The stream was “very discolored” by “sediment and continuous amounts of runoff.”

Mr. Thomas identified the “1994 Maryland Standards and Specifications for Soil Erosion and Sediment Control.” He explained that stabilization is the “best way to minimize the pollution into the streams and waterways.” In addition to the sequence of construction, the 7 to 14 day rule applies “at all times.” That rule provided that “areas that have been cleared and graded, but will not be constructed on for more than 14 days (7 days for steep slopes) must be stabilized with mulch or temporary vegetation.” When the construction area is stabilized, the soil is not exposed to the weather, and that enhances sediment controls.

Mr. Thomas identified the “Sequence of Construction” that applied to the Trust’s project. The sequence of construction provided, in Step 5H, that “with bridge complete

and with inspecting agency approval, remove and/or maintain sediment control devices as required and stabilize. [Super silt fence] at Stream's edge . . . to remain." Step 6 provided: "Clear, grub, and grade remainder of access drive on south side." Mr. Thomas stated that, when he visited the site on October 28, 2009, the bridge abutment was in place, but the "wing walls were not completed." The south side of the roadway, however, was "completely scarified and there [were] no sediment controls . . . completely in as per the plan, and sediment [was] leaving the site in several areas." He stated that the Trust should have had silt fence installed as per the plan and there should have been stabilization of the entire area.

John Peacock, Environmental Code Administrator for the Anne Arundel County Department of Inspections and Permits, testified that he was responsible for inspecting construction that took place under all grading plans, which included erosion and sediment control inspection and erosion and sediment control plans. Due to the Trust's ongoing lack of compliance, Mr. Peacock took the "extreme measure" of offering to bring in an independent third party, the Anne Arundel Soil Conservation District ("AASCD"), who had approved the erosion and sediment control plan in "an attempt to try to convince Ms. Herold that we were not misinterpreting the plans, that we knew what we were requiring." The AASCD visited the site and observed numerous violations, including lack of stabilization and sediment control, and work being performed out of the approved sequence of construction.

Mr. Peacock explained that the AASCD must approve any updates to the sediment and erosion control plans, which must be re-approved every two years. He testified that

the Trust did not exercise reasonable care in implementing sediment and erosion controls on the construction site, and compliance with the approved plan “would have been enough to prevent the violation.” He stated that the project should have taken “less than a year” to complete, but it took Ms. Herold “two months short of nine years to complete . . . and along the way, just to get her to install and properly maintain the sediment controls that were required on the approved plans, we had to take extraordinary measures.” In that regard, he stated:

The inspector couldn’t convince her. The supervisor couldn’t convince her. I couldn’t convince her. We had the [AASCD] come out as an independent third party to try to convince her. They created a list bigger than ours. . . .

We had to issue a civil citation. We had to go through a hearing, the first review hearing, a contempt of court hearing, a show cause hearing . . . and then the fine wasn’t paid on time and we wound up issuing another stop order on the site, even though the court judgment said that she needed to stay in compliance with the site.

And when the removal of the silt fence occurred, it resulted in the sediment laden runoff in Stocketts Run we referred it to the [MDE] and we are here today.

You know, so it’s taken an extreme amount of . . . time all for a simple matter of a very simple grading permit that shouldn’t have taken that long to complete. And all for a simple matter of just putting in and maintaining your sediment controls, something that a developer typically does the next day after he’s notified.

Tammy Roberson, an environmental compliance specialist with MDE, testified that she conducts sediment and erosion control inspections. She visited the construction site after receiving a complaint in November 2009. Ms. Roberson identified the waterway authorization for construction of the bridge, stating that such an authorization is necessary

from MDE any time construction is performed in non-tidal wetlands, waterways, or the 100-year flood plain. She identified the 100-year flood plain, adjacent to Stocketts Run, on the grading and sediment control plan issued for the site. She also identified the sediment and erosion control plan, which “identifies the sediment and erosion controls that should be installed in order to do the work,” as well as the sequence of construction.

Ms. Roberson issued an inspection report, dated November 19, 2009, which indicated, *inter alia*, that the Trust’s non-tidal wetland authorization was expired. She informed Ms. Herold that no work should be completed until she received the proper authorization from MDE. Ms. Roberson testified that, during her visit, the roadway was not stabilized and there was sediment deposition on the bridge. There were no sediment and erosion controls in place to prevent sediment from washing off the bridge. The area on the south side of the bridge was disturbed.

Maureen Eckard, an environmental compliance specialist lead with MDE, testified that she inspected the site on December 17, 2009, and found it out of compliance with the sequence of construction. Due to the Trust’s failure to comply with its authorization to disturb the flood plain, among other problems, Ms. Eckard advised Ms. Herold to resubmit the Nontidal Wetlands plan to MDE for approval, and in the interim, stabilize the property with seed, tack, and mulch.

Ms. Eckard performed additional follow up inspections on January 6, January 20, and February 2, 2010. The approved plan required the Trust to complete construction of the bridge and stabilize the area surrounding the bridge before beginning construction of the roadway on the south side of the bridge. Each time Ms. Eckard returned to the site until

February 2, 2010, she found that significant areas of the property, including the roadway, were not stabilized as the plan required. Accordingly, disturbed soil and sediment on the roadway that sloped toward the bridge was in a position to wash onto the bridge and “end up [in] the waterway” during rain.

Ms. Herold testified, on behalf of the Trust, that she had never observed silt going into the stream in the flood plain, and she had never observed any pollution. She stated that, two days prior to October 28, 2009, workers had begun constructing the wing walls when a “little piece of super silt fence on the corner was pulled out.” She testified that the super silt fence had to be disturbed anyway because a “much larger hole” had to be dug to accommodate the bridge footers. When it started to rain, the worker put the fencing back in place. The rain continued, and at some point, a tree fell onto the super silt fence. The hole that the workers had dug had “filled in.” On October 28, 2009, Ms. Herold had super silt fence to repair the “little piece of super silt fence, the three foot piece” of the fence that had fallen down. Mr. Thomas visited the site and took photographs prior to her arrival with the fencing.

Charles Matheny, who was a sediment and erosion control supervisor for the Anne Arundel County Department of Inspections and Permits during the relevant period, testified that, when he visited the site on October 28, 2009, he did not observe sediment leaving the site. He recalled seeing a hole for the footers of the bridge’s wing walls filled with water. He did not agree “in any sense” with Ms. Herold’s suggestion that the open hole excavated in the flood plain by her contractor protected the flood plain. He also testified that the construction “never went completely along with the plan.”

On August 14, 2013, the ALJ issued a written decision upholding MDE's charge that the Trust violated EN §§ 4-105(a)(3) and 4-413(a) "as to the dates of October 28, 2009 and January 6, 2010 to February 2, 2010." The ALJ also affirmed the penalty in the amount of \$12,500.

The ALJ made multiple findings of fact, including: "Portions of the Property are within the one hundred-year floodplain and Stocketts Run, a tributary of the Patuxent River, runs through the Property;" an inspector visited the property and found that, in October 28, 2009, "sediment control measures required in the Plan were not satisfied," including "a section of the super silt fencing was missing near the southwest portion of the bridge and sediment was entering the 100-year floodplain where the fence was missing." The ALJ further found that, between January 6, 2010, and February 2, 2010, the site was not stabilized, was in a condition likely to pollute, and "the construction sequence in the Plan had not been followed."

The ALJ then turned to the October 25-28, 2009 incident, observing that MDE's argument was that the Trust failed to implement erosion and sediment controls because part of the super silt fencing near the bridge had been removed, which was a violation of §§ 4-105(a)(3) and 4-413(a). The ALJ noted that the Trust did not dispute that the super silt fencing was removed, but it did dispute the length of time that the fencing was down, arguing that the fencing was removed only on October 28, 2009. The ALJ determined that MDE had met its burden of proof only as to October 28, 2009, for the violation of § 4-105(a)(3).

With respect to the second violation, pursuant to § 4-413(a), the ALJ concluded that MDE had met its burden to show that the inadequate super silt fencing caused sediment to discharge into, or placed the sediment in a condition likely to discharge into, waters of the State, but only as to October 28, 2009. The ALJ noted that photographs attached to Mr. Thomas’ inspection showed that sediment was discharged into the 100-year flood plain and that a gap in the super silt fencing on a downward slope toward the stream made it “highly likely” that sediment would enter waters of the State. The ALJ rejected the Trust’s argument that the fence was only removed temporarily, and therefore, the Trust should be exempted, observing that §§ 4-105(a)(3) and 4-413(a) “flatly prohibits any discharge or potential for discharge of sediment into waters of the State,” and there are no exceptions “if the conditions leading to the discharge or potential discharge only last for a short while.”

The ALJ concluded:

Construction was performed on October 28, 2009 because workers were building a wing wall that day. Therefore, the [Trust] was performing construction without adequate erosion and sediment controls in place on October 28, 2009 in violation of Section 4-105(a)(3) . . . . Performing construction without adequate erosion and sediment controls places sediment in a position likely to pollute waters of the State. Additionally, sediment was observed entering the floodplain on October 28, 2009. Therefore, sediment was not just likely, but did in fact discharge into waters of the [S]tate on October 28, 2009 in violation of Section 4-413(a).

With respect to the allegations regarding the January 6, 2010, to February 2, 2010, period of time, the ALJ noted that MDE’s argument was that the Trust violated § 4-105(a)(3) because the Trust had not followed the “construction sequence,” and therefore, “those areas disturbed out of sequence were not stabilized.” In particular, MDE contended that the “road on the south side of the bridge should not have been disturbed

until after the bridge was complete and, therefore the [Trust] had to stabilize the area south of the bridge,” and the failure to do so “placed soil in a condition likely to discharge into waters of the State in violation of Section 4-413(a).” The ALJ concluded that MDE had met its burden to establish violations of §§ 4-105(a)(3) and 4-413(a) on January 6, 2010, through February 2, 2010.

The ALJ found that the proper construction sequence required the bridge to be completed prior to any clearing or grading of the road on the south side. The construction of the bridge was not complete until all of the wing walls were installed. The “wing walls on the south side of the bridge were installed sometime between October 28, 2009 and November 19, 2009” and the wing walls on the north side took “much longer to complete because a feeder stream had to be relocated to make room for the northeast wing wall.” In order to relocate the stream, the Trust needed approval from the Nontidal Wetlands & Waterways Division of the Water Management Administration of MDE, which approval was not granted until February 18, 2010. Every inspection report submitted after October 28, 2009, however, indicated that the road on the south side of the bridge had been disturbed. Thus, because the road on the south side of the bridge was cleared and graded prior to the installation of the last wing wall on the bridge, the Trust was not following the construction sequence. The ALJ noted that, despite the Trust’s argument that it was granted permission to begin construction on the road ahead of the schedule in the construction sequence, no evidence was presented of such a modification.

The ALJ then turned to the Trust’s argument that the area of the south side of the bridge did not have to be stabilized because it was in compliance with the “seven-fourteen



day rule,” which “allows areas within the approved limits of disturbance for the current step of construction to not be stabilized.”<sup>5</sup> The ALJ rejected this argument, noting that, even if there was compliance with the seven-fourteen day rule, that is not the equivalent of compliance with § 4-105(a)(3), and therefore, even if construction had been “performed south of the bridge within seven to fourteen days of the last day of construction in that area, the [Trust] has still violated Section 4-105(a)(3) because no construction should have occurred in that area at all.” Accordingly, the ALJ concluded that MDE met its burden to establish a violation of § 4-105(a)(3) from January 6, 2010 to February 2, 2010.

The ALJ further found a violation of § 4-413(a), concluding that MDE met its burden to prove that the inadequate stabilization of the site caused sediment to discharge into or placed sediment in a position likely to discharge into waters of the State. The ALJ noted that the bridge was located within the 100-year flood plain, and construction of the south side of the bridge was in the immediate vicinity of the waters of the State. Thus, without stabilization, there was “nothing to prevent sediment from eroding away and washing down to the stream.”

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<sup>5</sup> Anne Arundel County Code (2009), Art. 16, § 2-206(b)(1)(x)(5) provides, in pertinent part:

Following initial soil disturbance or redistribution, permanent or temporary stabilization shall be completed within:

A. seven calendar days as to the surface of all perimeter dikes, swales, ditches, perimeter slopes, and all slopes greater than 3 horizontal to 1 vertical (3:1); and

B. fourteen days as to all other disturbed or graded areas on the project site.

The ALJ concluded that the Trust failed to implement erosion and sediment controls on October 28, 2009, and it “failed to follow significant parts of [its] erosion and sediment control plan from January 6, 2010 through February 2, 2012,” thereby allowing sediment to be “discharged into the waters of the State on October 28, 2009 and placed sediment in a position likely to pollute the waters of the State from January 6, 2010 through February 2, 2010.” Finding that the Trust’s conduct “was willful and there was no exercise of reasonable care to correct the violations once the violations were known,” and given that the “location of the violations created the potential for harm to the environment,” there were “methods to eliminate or reduce the violations which were available and economical,” and that the “current violations were similar to violations committed by the [Trust] in the past,” the ALJ determined that MDE’s request for a \$12,500 penalty was “reasonable and fair.”

On September 13, 2013, the Trust again petitioned for judicial review in the circuit court, presenting two arguments in support of its petition. First, it asserted that the ALJ was “incorrect in her analysis of what actually happened on October 28, 2009,” which resulted in the ALJ finding the Trust in violation of §§ 4-105(a)(3) and 4-413(a) on October 28, 2009. With respect to § 4-105(a)(3), the Trust argued that, on October 28, 2009, no construction was being performed, but rather, only maintenance repairs were being performed to five feet of damaged silt fence surrounding the stream after a large rain event, and it is not a violation of § 4-105(a)(3) to make maintenance repairs so long as construction activities are not being conducted. With respect to § 4-413(a), the Trust argued that the ALJ’s finding that sediment was discharged into waters of the State was

error because the Trust had obtained a flood plain authorization allowing sediment to make its way onto the flood plain.

Second, the Trust asserted that it did not violate § 4-105(a)(3) from January 6, 2010, through February 2, 2010, because significant areas of the site required stabilization. It argued that the construction sequence was only a guideline of the requirements, and the Trust was given permission to begin construction of the road prior to completing the bridge. The Trust also asserted that it was not in violation of § 4-413(a) during that time period because sediment control measures were in place.

Following a hearing on April 7, 2014, the circuit court affirmed the decision of the ALJ, finding, in relevant part, as follows:

Specifically concerning the October 28, 2009 inspection, it is clear from the record that [the Trust] failed to implement erosion and sediment controls because part of the super silt fencing near the bridge had been removed. This is a clear violation of § 4-105(a)(3). Further, the [ALJ] was correct in determining that, as a result of the fencing gap, sediment was discharged and was likely in a position to discharge into waters of the State; a violation of § 4-413(a).

Regardless of [the Trust's] claims of fraud on the part of the inspectors, the [ALJ] found the inspector's report and testimony regarding these violations to be credible and therefore the [ALJ's] conclusion shall not be disturbed.<sup>[6]</sup>

Specifically concerning the January 6, 2010 to February 2, 2010 [period], it is clear from the record that [the Trust] violated § 4-105(a)(3) . . . because significant areas of the site required stabilization that were not stabilized, due to [the Trust's] failure to follow the [s]equence. The [c]ourt notes that [the Trust] disturbed the road on the south side of the bridge before the bridge was complete and stabilized, violating the requirements of [t]he [s]equence.

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<sup>6</sup> In its response to MDE's answering memorandum, the Trust alleged that Mr. Peacock and Mr. Thomas provided false reports and testimony.

It is also clear from the record that [the Trust’s] failure to stabilize the area south of the bridge placed soil in a condition likely to discharge into the waters of the State, a clear violation of § 4-413(a).

Regardless of [the Trust’s] claims of fraud on the part of the inspectors, the [ALJ] found the inspector’s report and testimony regarding these violations to be credible and therefore the [ALJ’s] conclusion should not be disturbed.

The penalty imposed was also proper. The [ALJ] imposed a penalty of \$12,500.00 under § 4-116 and § 4-417; 1) \$2,500.00 for [the Trust’s] violations of 4-105; and 2) \$10,000.00 for [the Trust’s] violations of 4-413. Under the statutory scheme, the penalty amount was within the appropriate ranges, and the [ALJ] considered the necessary factors in imposing the penalty. The [ALJ] found, and the [c]ourt agrees, that the penalty imposed was quite lenient when considering that [the Trust] violated the same statutes more than once in a short period of time.

#### **STANDARD OF REVIEW**

Judicial review of an administrative decision “generally is a ‘narrow and highly deferential inquiry.’” *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass’n*, 192 Md. App. 719, 733 (2010) (quoting *Maryland-Nat’l Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 83 (2009)). This Court looks “through the circuit court’s decision and evaluates the decision of the agency,” *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. 172, 181 (2010), determining “‘if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.’” *Cosby v. Dep’t of Human Res.*, 425 Md. 629, 638 (2012) (quoting *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)).

With respect to the agency’s factual findings, we apply the substantial evidence test, which “‘requires us to affirm an agency decision, if, after reviewing the evidence in a light

most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Miller v. City of Annapolis Historic Pres. Comm’n*, 200 Md. App. 612, 633 (2011) (quoting *Montgomery County v. Longo*, 187 Md. App. 25, 49 (2009)). *Accord Comm’r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 24 (1996). In applying the substantial evidence test, this Court ““may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.”” *Alviani v. Dixon*, 365 Md. 95, 108 (2001) (citation omitted).

When reviewing an agency’s conclusions of law, we ““must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law.”” *Bd. of Dental Exam’rs v. Tabb*, 199 Md. App. 352, 373 (2011) (quoting *Solomon v. Bd. of Phys. Quality Assurance*, 155 Md. App. 687, 696-97 (2003)). Although a “certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers,” *Employees’ Retirement System of Baltimore v. Dorsey*, 430 Md. 100, 111 (2013), “[w]e are under no constraint . . . ‘to affirm an agency decision premised solely upon an erroneous conclusion of law,’” *Thomas v. State Ret. & Pension Sys. of Maryland*, 420 Md. 45, 54-55 (2011) (quoting *Ins. Comm’r v. Engelman*, 345 Md. 402, 411 (1997)). Thus, we review legal conclusions *de novo* for correctness. *Colburn v. Dep’t of Pub. Safety & Corr. Servs.*, 403 Md. 115, 127-28 (2008) (“[I]t is always within our prerogative to determine whether an agency’s conclusions of law are correct, and to remedy them if wrong.”) (citation and quotations omitted).

As long as an administrative decision does not exceed the agency’s authority, is not unlawful, and is supported by competent, material and substantial evidence, a reviewing court may not reverse or modify the decision unless the action was “so extreme and egregious” as to render it “arbitrary and capricious.” *Harvey v. Marshall*, 389 Md. 243, 300 (2005) (citation and quotations omitted). As long as the agency’s actions are “reasonably or rationally motivated,” this Court will not reverse the decision as “arbitrary or capricious.” *Id.* at 299.

An agency’s choice of sanction is entitled to greater deference than factual findings or legal conclusions. *Spencer v. Bd. of Pharmacy*, 380 Md. 515, 529-31 (2004). As the Court of Appeals has explained:

As long as an administrative sanction or decision does not exceed the agency’s authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless, under the facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be “arbitrary or capricious.”

*Maryland Transp. Auth. v. King*, 369 Md. 274, 291 (2002). The agency’s determination of a sanction must not be second-guessed upon judicial review, even if the court might have imposed a different sanction. *Id.* at 293.

## DISCUSSION

### I.

#### **October 2009 Violations of §§ 4-105(a)(3) and 4-413(a)**

The Trust first contends that the ALJ erred in finding that it violated EN §§ 4-105(a)(3) and 4-413(a) on October 28, 2009. It makes three arguments in this

regard. First, it contends that the ALJ “neglected to make proper inferences” from the evidence and chose to credit the testimony of the wrong witnesses. Second, it asserts that, even if there were deviations from the approved plan, the Trust was not in violation of the regulations because the conditions were caused by “an act of God” beyond the Trust’s control, i.e., “the storm responsible for the fallen trees which crushed the fence, causing the gap in the super-silt fence.” Third, the Trust asserts, it cannot be held liable for polluting the flood plain because “the material in the floodp[l]ain, dug from the floodplain and piled next to the hole from where it came, was not sediment.”

MDE responds that substantial evidence supports the ALJ’s conclusion that the Trust violated §§4-105(a)(3) and 4-413(a) on October 28, 2009, and the conclusion is legally correct. We agree.

As set forth in detail above, the evidence presented was that, on October 28, 2009, during a visit to the site, Mr. Thomas observed that 30 feet of the super silt fence was missing, and sediment from the disturbed construction area and muddy water containing sediment was migrating into areas of the flood plain. Ms. Herold admitted that the fence, which was a sediment control required by the plan and was necessary to control runoff and migration into the flood plain, initially had been removed by the construction crew. There was substantial evidence to support the ALJ’s finding that the gap in the fencing on a downward slope toward a stream resulted in the discharge of sediment that was in a position likely to dislodge into water of the stream.

With respect to the Trust’s argument that the ALJ credited the wrong testimony and witnesses, this Court will not substitute its judgment for that of the ALJ. It is well-settled

that the ALJ was not “obliged to credit” the testimony of Ms. Herold or her witnesses. *See Att’y Grievance Comm’n of Md. v. Mahone*, 435 Md. 84, 108 (2013). “Indeed, we have said that ‘[t]he hearing judge is in the best position to evaluate the credibility of the witnesses and to decide which one to believe.’” *Id.* (quoting *Att’y Grievance Comm’n of Md. v. Monfried*, 368 Md. 373, 390 (2002)). The ALJ was free to make findings and draw inferences, and those findings and inferences were supported by substantial evidence.

With respect to the Trust’s argument that the violations were due to an “act of God” beyond the Trust’s control, based on a storm, we note, as did the ALJ, that the statutes and regulations provide no exemption or exception for circumstances where “the conditions leading to the discharge or potential discharge only last for a short while.” In any event, the ALJ was within her province to resolve conflicting evidence presented regarding the cause of the absence of fencing, and she did not err in concluding that the Trust had removed the fence and caused pollution of the flood plain.

With respect to the Trust’s argument regarding the flood plain, Matthew Stover, a natural resources planner for MDE, testified that pictures of the area showed a break in “the silt fence where you see sediment kind of pouring through into the flood plain.” He explained: “[O]nce sediment is in the flood plain, past any erosion or sediment control structures, you can just about guarantee it’s going to be in the stream.”

There was substantial evidence to support the ALJ’s finding that, on October 28, 2009: (1) the Trust violated EN § 4-105(a)(3), which makes it unlawful for a person to fail to implement and maintain the approved sediment control plan and any sediment control measures reasonably necessary to control sediment runoff; and (2) the Trust violated EN



§ 4-413(a), which makes it unlawful for a person to place sediment in a condition or location where it is likely to be washed into waters of the State by runoff of precipitation.

## II.

### **Violations Between January 6 and February 2, 2010**

The Trust next contends that the ALJ improperly determined that it violated §§ 4-105(a)(3) and 4-413(a) between January 6, 2010, and February 2, 2010, because it had not followed the proper construction sequence, and the areas disturbed out of sequence were not stabilized. It contends that the ALJ was incorrect in making this finding, and it “should be evident” that the Trust was “not guilty of any violations to the sequence of construction.”

MDE responds that substantial evidence supports the ALJ’s conclusion that the Trust violated §§4-105(a)(3) and 4-413(a) between January 6, 2010, and February 2, 2010, and the conclusion is legally correct. We agree.

The evidence before the circuit court supported a finding that the Trust did not follow the approved sequence of construction. For example, on January 20, 2010, a MDE inspector report stated that the sequence of construction, which required the bridge construction to be completed before work could be done on the south side of the bridge, had not been followed. The evidence showed that the Trust disturbed areas outside of the approved sequence of construction before the bridge was completed. This was sufficient to find a violation of EN § 4-105(a)(3), which prohibits construction other than “as specified in the sequence of construction contained in the approved sediment control plan.” To the extent that the Trust presented evidence or argument to the contrary, as we have

already explained, the resolution of any conflicting evidence was for the finder of fact to resolve.

Moreover, the evidence showed that, during the same time period, the Trust failed to prevent disturbed sediment on the roadway from washing into the waters of the State. Accordingly, substantial evidence supported the ALJ's findings of a violation of EN § 4-413(a), making it unlawful for "any person to add, introduce, leak, spill, or otherwise emit soil or sediment into waters of the State," unless done in compliance with a permit, during the time period between January 6, 2010, and February 2, 2010.

### **III.**

#### **Evidentiary Issues**

The Trust also raises two evidentiary issues. First, it asserts that the ALJ erred in admitting photographs without "proof of authenticity." Second, it contends that the ALJ erred in excluding evidence, including restrictions on the Trust's cross-examination of Mr. Peacock.

MDE responds that the ALJ did not make any evidentiary errors. We agree.

#### **A.**

#### **Photographs**

A party seeking to introduce photographs must establish the authenticity of the photographs, "either through the photographer or through someone with personal knowledge who can verify that the photograph accurately portrays its subject." *Morris v. State*, 192 Md. App. 1, 28 n.4 (2010). A decision regarding the admission of relevant evidence will be reversed only upon an abuse of discretion. *Id.* at 27.

Here, Mr. Thomas identified photographs that he had taken depicting muddy water leaving the site and pooling in an area adjacent to the stream, the absence of approximately 30 feet of super silt fencing, and lack of stabilization of the site. He explained that stabilization using lime seed, fertilizer, and mulch prevents the sediment from discharging outside the site and enhances sediment control.

Ms. Herold objected to the exhibit, stating that it was “a picture of the construction two years earlier.” The ALJ overruled the objection and admitted the photographs as MDE’s Exhibit 117, stating that Ms. Herold could “certainly question Mr. Thomas, since he’s indicated he was the one who took these pictures, and you can certainly question him about his memory. You can testify about the fact that you don’t believe these pictures were taken when Mr. Thomas says they were taken.” On cross-examination, Ms. Herold asked Mr. Thomas about the photographs admitted as MDE’s Exhibit 117, but she did not question their authenticity.

There was no abuse of discretion by the ALJ in admitting these photographs, particularly when: (1) another witness, Mr. Mathesius, testified that he visited the site on October 28, 2009, and was present when the photographs were taken; and (2) Ms. Herold subsequently offered into evidence a letter that included the same photographs taken by Mr. Thomas. Ms. Herold states no claim for relief in this regard.

## **B.**

### **Exclusion of Evidence**

On numerous occasions throughout the proceedings, the ALJ made it clear that she was considering only evidence regarding either the Trust’s liability on the relevant dates

or evidence that related to the penalty factor. In this regard, Mr. Thomas was permitted to testify that, on April 1, 2008, MDE issued a correction notice to the Trust. The correction notice stated that no sediment controls were installed, and the land on the south side of the project was “completely bare dirt,” which was “ahead of the sequence of construction.” The Trust was issued a citation on April 2, 2008. On April 14, 2009, the District Court of Maryland sitting in Anne Arundel County ordered that the Trust had violated and continued to violate the Anne Arundel County Code by failing to comply with the storm water management plan approved by the County, and it ordered a \$200 fine. Additionally, the court ordered the Trust to abate the violations. On May 4, 2009, after a visit to the construction site, Mr. Thomas issued another correction notice to the Trust after he found that the Trust still was not in compliance and that most of the work the District Court ordered the Trust to complete had not been done. After a review hearing, the District Court found that the Trust still had not abated the violations, nor had it paid the fine. The ALJ admitted the District Court documents into evidence, without objection.

On Ms. Herold’s cross-examination of Mr. Thomas, she attempted to ask him about the violations referenced in the April 2, 2008, citation, but the ALJ stated that the previous violation was not before her, and the only violations she was dealing with were “violations that were in this complaint.” Similarly, when Ms. Herold attempted to discuss the District Court’s April 14, 2009, order, the ALJ stated that she was “here to hear this case,” and the District Court case was not before her.

During Mr. Peacock’s direct examination, he testified that he had visited the Trust’s construction site on several occasions leading up to the issuance of the 2008 citation. When

asked about an August 5, 2004, letter from Stephen Rogers, the engineer who had worked on the original sediment and erosion control plan for the Trust’s project, the ALJ asked why MDE was offering the letter. MDE responded that the letter showed a pattern of violations by Ms. Herold. The ALJ admitted the letter as to MDE’s penalty request. Ms. Herold objected based on relevance, and the ALJ responded that it was “not relevant to the basis for the violation,” but it was relevant to determine “what, if any, penalty is imposed.”

Mr. Peacock also testified that, on April 15, 2009, Mr. Peacock wrote Ms. Herold a letter regarding the sequence of construction. The ALJ asked whether MDE was offering the letter for purposes of assessing a penalty, and counsel responded that “it could go directly to liability” also, “I think it’s material, but we can move on.” The ALJ admitted the document over Ms. Herold’s objection, noting that “it does discuss the south side of the project, which Mr. Thomas discussed, and it does discuss stabilization by the application of lime, fertilizer[,] seed, and straw, which Mr. Thomas also testified to.” The ALJ stated that she would give the document “further review [and] determine what, if any, weight to give to [it], especially as to liability.” Ms. Herold asked if she would be permitted to cross-examine Mr. Peacock about the letter, and the ALJ responded that she could, noting that, “except for identifying it, he didn’t testify.”

Also during Mr. Peacock’s testimony, MDE introduced several letters that were part of the “compliance file” regarding the Trust. Ms. Herold did not object to their admission. On cross-examination, Ms. Herold referred Mr. Peacock to a letter he had written to her on November 15, 2011. Upon questioning by the ALJ regarding the relevance of the letter,

Ms. Herold made no proffer regarding its relevance. Again, the ALJ stated that the letter did not “directly relate to whether you violated the sections alleged and may relate to the penalty.” The ALJ continued:

From my review of most, if not all of the documents Mr. Peacock . . . has offered, they are of a historical nature, even though some occurred after these alleged violations, as to issues involving how you handled these situations.

Again, going to an assessment of penalty, if any, not to . . . whether [the violations] actually occurred or not, but of a historical nature. Your . . . question . . . is really not relevant to any issue I have to decide.

Thus, to the extent we understand the arguments that the Trust is now making regarding the ALJ’s exclusion of evidence and/or restriction on its cross-examination of Mr. Peacock, the record reflects that the ALJ repeatedly advised Ms. Herold that it was only considering testimony and evidence related to the specific dates as to which violations occurred, and any other evidence regarding the penalty. As the testimony and evidence Ms. Herold sought to elicit was not relevant to whether there were violations on the specific dates at issue, we cannot conclude that the ALJ abused her discretion in limiting Ms. Herold’s cross-examination of the witnesses. *See* Md. Code (2014 Repl. Vol.) § 10-213(d) of the State Government Article (ALJ may exclude evidence that is irrelevant or immaterial).

**JUDGMENT OF THE CIRCUIT  
COURT FOR ANNE ARUNDEL  
COUNTY AFFIRMED. COSTS TO  
BE PAID BY APPELLANT.**