Circuit Court for Anne Arundel County
Case Nos. C-02-CV-000786

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2602

September Term, 2016

FOOD & WATER WATCH, ET AL.

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Wright,
Berger,
Leahy,

JJ.

Opinion by Wright, J.

Filed: May 14, 2018

Food and Water Watch and the Assateague Coastal Trust (referred to collectively as "FWW") filed suit against the Maryland Department of the Environment ("MDE"), alleging that the MDE's General Discharge Permit (the "2014 Permit") for Concentrated Animal Feeding Operations ("CAFOs") neither provided for chemical, biological, and physical monitoring at any outfall or in-stream locations, nor required effluent monitoring, pursuant to 40 C.F.R. § 122.44 and the Clean Water Act (the "CWA").

Before issuing a final determination on the 2014 Permit, MDE held a public comment period and FWW filed written comments. MDE made a final determination to issue the 2014 Permit on or about November 25, 2014, and the permit became effective on December 1, 2014. FWW timely filed a petition for judicial review on December 24, 2014, to the Circuit Court for Anne Arundel County, to which MDE filed a Response to the Petition on February 4, 2015. The parties were granted a Joint Motion for Limited Remand and Request to Stay Proceedings, and the circuit court only considered the issue of effluent monitoring. The court held a hearing on the Petition for Judicial Review on December 5, 2016. On January 19, 2017, the court entered an Order rejecting FWW's challenge.

FWW timely appealed and asks us to answer the following question which has been rephrased for clarity:[1]

> Whether the circuit court erred in finding that the MDE's final determination to issue the 2014 General Discharge Permit was consistent with all applicable state and federal laws and regulations?

[1] Did MDE Violate Federal and State Law by Failing to Require Monitoring of the Discharge from the Animal Feeding Operations (AFOs) Regulated by the General Discharge Permit?

BACKGROUND

A. Federal Regulatory Scheme

In this appeal, we are asked to review whether MDE's 2014 Permit complies with the requirements and effluent limitation guidelines promulgated by the Environmental Protection Agency ("EPA") in its attempt to regulate the emission of water pollutants from CAFOs. Before reviewing this appeal, however, a few introductory words about CAFOs are in order.

CAFO's are the largest of the nation's 238,000 or so "animal feeding operations" and are "agriculture enterprises where animals are kept and raised in confinement." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (codified at 40 C.F.R. Parts 9, 122, 123 and 412) [hereinafter "Preamble to the Final Rule"].[2] These animal feeding operations are not what our Founding Fathers would have recognized as farms. *See generally,* Stanley Elkins & Eric McKitrick, *Jefferson and the Yeoman Republic,* The

[2] Under 40 C.F.R. 122.23(b)(1), an AFO is defined to mean: a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(continued)

Age of Federalism 195-208 (1972). Quite the opposite, CAFOs are large-scale industrial operations that raise extraordinary numbers of livestock.[3] For instance, a "Medium CAFO"[4] raises as many as 9,999 sheep, 54,999 turkeys, or 124,999 chickens. "Large

[3] The CAFO Rule defines a concentrated AFO as "an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section." 40 C.F.R. § 122.23(b)(2). Paragraph (c) provides that an appropriate authority (either a state director, the EPA administrator or both) may designate an AFO as a CAFO upon a determination that the AFO is "a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.23(c).

[4] According to 40 C.F.R. § 122.23(b)(6), the term Medium CAFO includes:

> . . . any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:
>
> (i) The type and number of animals that it stables or confines falls within any of the following ranges:
>
> (A) 200 to 699 mature dairy cows, whether milked or dry;
>
> (B) 300 to 999 veal calves;
>
> (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
>
> (D) 750 to 2,499 swine each weighing 55 pounds or more;
>
> (E) 3,000 to 9,999 swine each weighing less than 55 pounds;
>
> (F) 150 to 499 horses;
>
> (G) 3,000 to 9,999 sheep or lambs;
>
> (H) 16,500 to 54,999 turkeys;
>
> (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(continued)

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(continued)

CAFOs"[5] raise exponentially more livestock – sometimes, as many as millions of animals in one location.[6]

[5] 40 C.F.R. § 122.23(b)(4) classifies an AFO as a Large CAFO if it:

> . . . stables or confines as many as or more than the number of animals specified in any of the following categories:
>
> (i) 700 mature dairy cows, whether milked or dry;
>
> (ii) 1,000 veal calves;
>
> (iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.
>
> (iv) 2,500 swine each weighing 55 pounds or more;
>
> (v) 10,000 swine each weighing less than 55 pounds;
>
> (vi) 500 horses;
>
> (vii) 10,000 sheep or lambs;
>
> (viii) 55,000 turkeys;
>
> (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
>
> (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
>
> (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
>
> (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
>
> (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

[6] For additional information on the consequences of CAFOs see Sierra Club, Why Are CAFOs Bad?, https://www.sierraclub.org/michigan/why-are-cafos-bad (last visited May 9, 2018).

(continued)

CAFOs generate billions of dollars of revenue every year.[7] The EPA has elected to focus on the industry because CAFOs also generate millions of tons of manure every year, and "when improperly managed, [this manure] can pose substantial risks to the environment and public health." Preamble to the Final Rule at 7179.

Animal waste includes a number of potentially harmful pollutants. According to the EPA, the pollutants associated with CAFO waste principally include: (1) nutrients such as nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; (4) pathogens (disease-causing organisms such as bacteria and viruses); (5) salts; (6) trace elements such as arsenic; (7) odorous/volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2976-79 (proposed Jan. 12, 2001); *see also* Preamble to the Final Rule at 7181.

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

[7] *See, e.g.*, EPA, DEVELOPMENT DOCUMENT FOR THE FINAL REVISIONS TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM REGULATION AND THE EFFLUENT GUIDELINES FOR THE CONCENTRATED ANIMAL FEEDING OPERATIONS, 4-35 (Dec. 2002) (noting that "[b]y 1997, the value of poultry production exceeded $21.6 billion, and much of the poultry output was generated by corporate producers on large facilities producing more than 100,000 birds." (citations omitted)).

Congress' attempts at water pollution control began in the mid-twentieth century, when Congress enacted the Federal Water Pollution Control Act ("FWPCA") in 1948. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155. After water pollution became the main focus of the environmental movement, Congress adopted extensive amendments in the 1972 FWPCA, which for the first time established a comprehensive water pollution regulatory program. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. In 1977, Congress further amended the FWPCA, creating the CWA. Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566. The CWA has a stated goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and is now the primary federal regulatory authority for addressing water pollution. 33 U.S.C. § 1251(a) (2008). The CWA largely addresses water pollution through the National Pollutant Discharge Elimination System ("NPDES") permit program.

The CWA requires the EPA to issue NPDES permits. *See* 33 U.S.C. § 1342. Among its core provisions, the CWA prohibits the "discharge of any pollutant" to waters of the United States, except as authorized by a permit issued under the NPDES.[8] Pursuant to that statute, the EPA may delegate its permit-issuing authority to a state government if the EPA accepts that state's proposed permit program. 33 U.S.C. § 1342(b). The EPA Administrator approved Maryland's NPDES permit program on

[8] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362 (12).

September 5, 1974. *See* 57 Fed. Reg. 43,734. Consistent with this grant of authority, the Maryland Department of Environment ("MDE") may issue the various NPDES permits in Maryland. Code of Maryland Regulations ("COMAR") 26.08.04.07.

The EPA designates certain AFOs as CAFOs, which allows for potential NPDES regulation, because they are expressly listed within the definition of "point source" in the CWA.[9] 33 U.S.C. §1362(14); 40 C.F.R. §401.11(d). As regulated by EPA, an AFO becomes a CAFO based upon the actual number and type of animals at the operation.[10] 40 C.F.R. §122.23. The EPA, or an authorized state authority, reserves the right to "designate any AFO as a CAFO upon determining that [the AFO] is a *significant* contributor of pollutants to the waters of the United States."[11] 40 C.F.R. §122.23(c) (emphasis added). AFOs that fall outside of the NPDES permit program, like non-CAFOs, may still be regulated by state programs.[12]

[9] A "point source" is defined as "any discernible, confined and discrete conveyance," including any container or "CAFO" "from which pollutants are or may be discharged." *Id.* § 1362 (14).

[10] For a brief summary of how EPA regulates CAFOs by size, see Regulatory Definitions of Large CAFOs, Medium CAFOs, and Small CAFOs, http://www.epa.gov/npdes/pubs/sector_table.pdf.

[11] Any size AFO that discharges manure or wastewater into a natural or man-made ditch, stream or other waterway is defined as a CAFO, regardless of size. To be considered a CAFO, a facility must first be considered an AFO, and then must meet additional criteria.

[12] Envtl. Prot. Agency, Agricultural Counselor Office of the Administrator, Summary of Major Existing EPA Laws and Programs That Could Affect Agricultural Producers 5 (June 2007), http://www.epa.gov/agriculture/agmatrix.pdf.

Federal regulations concerning AFOs and CAFOs have evolved significantly since 1972. In 2003, the EPA expanded the definition of CAFO to include poultry operations utilizing a dry manure handling system. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7179-80, 7192 (Feb. 12, 2003). In 2005, in *Waterkeeper Alliance v. U.S. E.P.A.*, 399 F.3d 486, 504-06 (2d Cir. 2005), the United States Court of Appeals for the Second Circuit held that the EPA had no authority to require CAFOs to apply for a permit based on a "potential to discharge." It held that the CWA "[gave] the EPA jurisdiction to regulate and control only *actual* discharges - not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original). The Court also held that the EPA's requirement violated the CWA in failing to require that [nutrition management plans ("NMPs")] be included in NPDES permits. *Id.* at 502. In response to *Waterkeeper Alliance*, the EPA promulgated new regulations in 2008, requiring CAFOs to obtain a NPDES permit if they discharge or "propose to discharge" pollutants. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for CAFOs in Response to the *Waterkeeper Alliance* Decision; Final Rule. 73 Fed. Reg. 70418, 70421-22 (Nov. 20, 2008) (codified at 40 C.F.R. pts. 9, 122, 412). The 2008 regulation also required a CAFO seeking a permit to submit a NMP, and it required the permitting authority to review the NMP, provide the public the opportunity to comment, and incorporate the terms of the NMP as an element of the NPDES permit. *Id*. at 70422.

B. Maryland Regulatory Scheme

MDE is charged with "managing, improving, controlling and conserving the waters of Maryland." *Nw. Land Corp. v. Md. Dep't of the Env't.,* 104 Md. App. 471, 478 (1995). The General Assembly has provided that MDE shall cooperate with others to accomplish the following objectives:

> (1) To improve, conserve, and manage the quality of the waters of this State;
>
> (2) To protect, maintain, and improve the quality of water for public supplies, propagation of wildlife, fish, and aquatic life, and domestic, agricultural, industrial, recreational, and other legitimate beneficial uses;
>
> (3) To provide that no waste is discharged into any waters of this State without first receiving necessary treatment or other corrective action to protect the legitimate beneficial uses of the waters of this State;
>
> (4) Through innovative and alternative methods of waste and wastewater treatment, to provide and promote prevention, abatement, and control of new or existing water pollution; and
>
> (5) To promote and encourage the use of reclaimed water in order to conserve water supplies, facilitate the indirect recharge of groundwater, and develop an alternative to discharging wastewater effluent to surface waters, thus pursuing the goal of the Clean Water Act to end the discharge of pollutants and meet the nutrient reduction goals of the Chesapeake Bay Agreement.

Md. Code (1982, 2014 Repl.Vol.) §§ 9-302(b)-(c) of the Environment Article ("Envir.").

One way MDE works to achieve these objectives and comply with federal law is by adopting rules and regulations regarding: (1) water quality standards, which "specify the maximum permissible short- and long-term concentrations of pollutants in the water, the minimum permissible concentrations of dissolved oxygen and other desirable matter

in the water, and the temperature range for the water," and (2) water effluent standards which "specify the maximum loading or concentrations and the physical, thermal, chemical, biological, and radioactive properties of wastes that may be discharged into the waters of this State." *Id.* § 9-314(b)(2).

MDE is also tasked with issuing discharge permits. *Id.* § 9-323. Maryland law prohibits the discharge of pollutants to "waters of the State," *i.e.*, surface or ground water, except as authorized by a discharge permit issued by MDE. *Id.* §§ 9-101(*l*)-323. In many respects, Maryland law is more stringent than federal law because it regulates discharges to groundwater *and* surface water, whereas federal law regulates only discharge s to surface water. *Compare* 33 U.S.C. § 1362(14), *and* Envir. § 9-101(*l*)(1), § 9-322. MDE is authorized to issue a discharge permit upon its determination that the discharge meets all state and federal water quality standards and appropriate effluent limits. Envir. § 9-324; *accord Nw. Land Corp.*, 104 Md. App. at 479. Maryland, like the EPA, has regulations in place governing the issuance of general discharge permits. *See* COMAR 26.08.04.09. A general discharge permit is issued to categories or classes of discharge that are susceptible to regulation under common terms and conditions. *See* COMAR 26.08.04.08.

Maryland's initial permit scheme, became effective on December 18, 1996, and governed only CAFOs, which were defined as operations "with more than 1,000 animal units; more than 55,000 turkeys; or 30,000 or more chickens which produce a liquid waste stream." In 2008, MDE established a new permit scheme for AFOs, CAFOs, and Maryland Animal Feeding Operations ("MAFOs"). This new permit scheme governed

three categories. The first category, CAFOs, are AFOs that discharge to surface waters, which are covered by the CWA and must obtain a NPDES permit issued by MDE. COMAR 26.08.03.09B(3). The second category, an AFO that qualifies as a CAFO under federal regulations, but does not discharge or propose to discharge to surface water, is classified as a MAFO. *Id.* 26.08.03.09B(1)(d). MAFOs are not required to obtain a NPDES permit because they do not discharge to surface water. The State discharge permit required for MAFOs addresses groundwater; it does not permit discharges to surface water. *Id.* 26.08.03.09C(5)(c)-(6).

On or about December 1, 2014, MDE again issued a final determination to issue the 2014 Permit which is at issue here. The proposed 2014 Permit does not provide for effluent monitoring as it is a "zero discharge permit."

C. Factual Background

Before the proceedings in this case, MDE had issued a 2014 Permit that was effective between December 1, 2009, to November 30, 2014. This case arises out of MDE's issuance of a proposed 2014 Permit, to take effect after November 30, 2014. The record reflects that between June of 2014 and September of 2014, MDE was in communication with the EPA regarding the EPA's informal comments regarding the 2014 Permit. None of these communications concerned effluent monitoring, which is at issue in this case. On September 18, 2014, at the end of the informal review period, the EPA informed MDE that it had "no objection" to MDE's proposed 2014 Permit after MDE had implemented the EPA's previous comments.

Shortly thereafter, MDE entered a period of public comment, which ended at the close of business on October 20, 2014. That same day, FWW filed written comments providing feedback for several provisions of the 2014 Permit. Highlighting the water quality monitoring, FWW noted that the CWA requires that NPDES permits contain conditions, including conditions on data and information collection, and reporting to be in compliance with the CWA. Consequently, FWW posited that because MDE only required CAFOs and MAFOs to analyze the nitrogen and phosphorous content of manure annually and the phosphorous content and pH of soil samples from land application fields every three years, it was not in legal compliance with the CWA. FWW also argued that the proposed provisions did not provide information relevant to the CWA's requirement that NPDES permits must ensure compliance with the EPA's water quality standards. They determined that although MDE utilized a "case-by-case" approach, in determining which CAFOs and MAFOs needed to monitor pollutants, that approach had proven inadequate at ensuring compliance with the CWA. Thus, FWW proposed that MDE should require all CAFOs and MAFOs, regulated pursuant to the proposed 2014 Permit, to conduct regular water sampling for nitrogen, phosphorous, and fecal coliform where wastewater flowed off the CAFO via drainage ditches, or in other locations identified by the facility's certified nutrient management planner.

On November 20, 2014, MDE issued its response to the public comments. In response to a comment that "MDE should require all permittees to conduct annual water sampling for nitrogen and phosphorous at downstream sites and during time periods identified by the facility's nutrient management planner," MDE raised its main defense -

discretion. MDE asserted that pursuant to 33 U.S.C. § 13818(a)(1)(A)(iii)-(iv), it had the discretion to install, use, and maintain monitoring equipment when it reasonably determined that the monitoring equipment was "required to carry out the objective" of the CWA. MDE issued a Final Determination on its proposed 2014 Permit on December 1, 2014, and reissued the permit. In its briefs, MDE argues that its discretion extends to determining what conditions shall be in its NPDES permits including technology-based effluent limitations, the duration of the permit, best management practices, and monitoring requirements to assure compliance with the permit limitations. MDE relies on 40 C.F.R. § 122.44(i)(1) in arguing that "EPA specifically acknowledges that these requirements may not be appropriate for every NPDES permit." Further, MDE argues that exercises discretion in requiring additional best management practices if it deems it necessary, an authority it retains in the 2014 Permit.

On December 24, 2014, FWW filed a petition for judicial review of the Final Determination of the MDE, pursuant to Envir. § 1- 601(c)(2)(ii). On February 4, 2015, MDE filed a response to FWW's petition for judicial review. A hearing date was set for July 20, 2015.

On June 23, 2015, the parties submitted a Joint Motion to the circuit court for Limited Remand and Request to Stay Proceedings pursuant to Md. Rule 2-311. The parties requested that the court order a limited remand related to a section of the 2014 Permit requiring documentation of inspections of animal waste storage areas so that MDE could revise a provision to require "weekly" inspections for dry animal waste operations. The parties also wanted to provide the public with an opportunity to comment on the

revisions pursuant to Envir. §§ 9-316(c); 9-324; 40 C.F.R. §§ 122.4(a); 123.25; and 40 C.F.R., Part 412. That same day, the court granted the motion and postponed the July 20, 2015 hearing.

On December 5, 2016, the circuit court held a hearing solely addressing the monitoring issues. At the hearing, FWW argued that MDE's permit was "illegally deficient" because it failed to include any monitoring provisions to assure compliance with the CWA. Specifically, FWW argued that MDE's permit did not fit within the CWA's zero discharge exception. Due to that omission, FWW argued that MDE's failure to include monitoring provisions in the 2014 Permit was inexcusable. Conversely, MDE argued that because the 2014 Permit was substantively similar the 2009 Permit, which was upheld by this Court in 2009, as being compliant with state law, federal law, and the CWA, the 2014 Permit was in compliance.

On January 30, 2017, the circuit court affirmed the Final Determination of the MDE for the 2014 Permit and found that it was not premised upon an erroneous conclusion of law. FWW timely appealed.

STANDARD OF REVIEW

Our review of an agency decision is highly deferential. We look through the decision of the circuit court and use the same standard of review as required by the circuit court. *Kim v. Maryland State Bd. of Physicians,* 423 Md. 523, 533 n.4 (2011) (citing *People's Counsel for Baltimore County v. Surina,* 400 Md. 662, 681 (2007)). While the circuit court summarily affirmed, it stated that it "applied [the]

substantial evidence test" in reviewing MDE's final decisions.[13] The court also found that FWW did not demonstrate that MDE acted in an "arbitrary and capricious manner or erred as to a matter of law." Accordingly, we review the MDE's decision at two levels: *first*, to determine whether the record contains substantial evidence to support the agency decision, and *second*, to determine whether the decision is legally correct. *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173 (2011).

In determining whether a record contains substantial evidence, we use a generous level of deference:

> In applying the substantial evidence test, a reviewing court decides "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." A reviewing court should defer to the

[13] The Administrative Procedure Act, under Md. Code Ann., State Gov't § 10-222(b), permitted the circuit court to:

1. remand a case for further proceedings;

2. affirm the final decision; or

3. reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion or decision:

   (a) is unconstitutional;

   (b) exceeds the statutory authority or jurisdiction of the final decision maker;

   (c) results from an unlawful procedure;

   (d) is affected by any other error of law;

   (e) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

   (f) is arbitrary and capricious.

> agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court "must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.

Id. at 173 (quoting *Maryland Aviation Admin. v. Noland,* 386 Md. 556, 571-72 (2005)).

We will only overturn an agency decision if it is arbitrary and capricious. *Md. Board of Phys. v. Elliott*, 170 Md. App. 369, 406 (2006); *see also* Md. Code (1984, 2014 Repl. Vol.), § 10-222(h)(3)(vi) of the State Government Article ("S.G."). However, we will not defer to an agency whose conclusions are unsupported "by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence." *Stansbury v. Jones,* 372 Md. 172, 184 (2002); *see also Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co.,* 284 Md. 383, 395 (1979) ("When reviewing an administrative decision for arbitrariness or capriciousness, a court must first determine whether the question before the agency was fairly debatable," and if not, it is not arbitrary and capricious.).

In determining whether MDE was legally correct in issuing the 2014 Permit, we are "under no constraints in reversing an administrative decision which is premised solely on an erroneous conclusion of law." *People's Counsel for Baltimore Cnty. v. Maryland Marine Mfg. Co.,* 316 Md. 491, 497 (1989). Thus, we will generally defer to MDE because of its level of expertise within its field. As Maryland's intermediate appellate court, our power to review administrative decisions "does not carry with it the right to substitute [our] fact-finding process for that of [the MDE]." *Nw. Land Corp. v. Maryland*

Dep't of Env., 104 Md. App. 471, 488 (1995) (quoting *Sec'y of Health & Mental Hygiene v. Crowder*, 43 Md. App. 276, 281 (1979)).

DISCUSSION

FWW's first argument relies on 40 C.F.R. § 122.48(b) that governs the requirements for recording and reporting of monitoring results of pollutants:

> *All permits shall specify*:
>
> (a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);
>
> (b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;
>
> (c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in 40 CFR part 3 (Cross-Media Electronic Reporting Regulation), § 122.44, and 40 CFR part 127 (NPDES Electronic Reporting). Reporting shall be no less frequent than specified in § 122.44. EPA will maintain the start dates for the electronic reporting of monitoring results for each state on its Web site.

Moreover, monitoring requirements must "assure compliance with permit limitations." 40 C.F.R. § 122.44(i)(1). FWW argues that MDE's CAFO General Discharge Permit fails the standard issued by the Court of Appeals in *Maryland Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88 (2016). In *Anacostia Riverkeeper*, the Court of Appeals, in assessing permits governing stormwater pollutant monitoring, held that the permits were largely governed under 40 C.F.R. § 122.26(d). In response to the Water Groups' assertion that the permits were not capable of producing representative data, the Court of Appeals held that the MDE's monitoring program "[would] produce representative data because [MDE] [had] (1) ensured that the Counties monitor[ed]

stormwater discharges at monitoring locations that represent[ed] an adequate range of land uses statewide, and (2) increased the frequency of monitoring to yield more representative information at the County level. *Id*. at 195. In assessing the effectiveness of the permits producing representative data, the Court of Appeals noted that "biological and physical monitoring are within the scope of the [EPA's] suggestions for alternative techniques, that is, 'monitoring techniques *other than* end-of-the pipe chemical-specific monitoring, including habitat assessments, bioassessments, and/or other biological methods.'" *Anacostia Riverkeeper*, 447 Md. at 147 (quoting 61 Fed. Reg. at 41,699) (emphasis in original).

FWW relies heavily upon *Anacostia Riverkeeper*, stating that the 2014 Permit does neither require the CAFOs permittee to "conduct chemical, biological, and physical monitoring" at any outfall or any in-stream location, nor does it "set forth the number of required monitoring events, sampling methods, pollutants, and locations.[14] The requirements FWW relies on apply specifically to stormwater discharges, which are not at issue in this case. Next, FWW argues that both the Ninth and Second Circuit Courts of Appeal have found that the EPA's regulations mandate that monitoring must be included in every permit. We examine these cases in turn.

The first case we examine is *Natural Res. Def. Council, Inc. v. Cnty. of Los Angele*s, 725 F.3d 1194 (9th Cir. 2013). FWW argues that this case stands for the proposition that "an NPDES permit is unlawful if a permittee is not required to

[14] We note that this language is taken directly from MDE's Permits governing stormwater discharges, not from the Court of Appeals' analysis of 40 C.F.R. § 122.48(b).

effectively monitor its permit compliance." 725 F.3d at 1207 (citing to 40 C.F.R. § 122.26(d)(2)(i)(F) (regarding municipal storm water discharges)). *Natural Res. Def. Council* concerned discharges of polluted stormwater in alleged violation of the NPDES program. The permit provision at issue in the case concerned the "Monitoring and Reporting Program." *Id*. at 1199. Pursuant to that program, permittees were "required to monitor the impacts of their LA MS4 discharges on water quality and to publish the results of all pollution monitoring at least annually." *Id*. at 1200. The stated objectives of the monitoring program included "'assessing compliance' with the Permit, 'measuring and improving the effectiveness' of the Los Angeles Countywide Stormwater Quality Management Program (SQMP) and assessing the environmental impact of urban runoff on the receiving waters in the County." *Id*. at 1199-1200. Permittees were required to monitor their LA MS4 discharges through mass-emissions monitoring.[15]

The Plaintiffs argued that the county defendants' monitoring data established their liability for permit violations under the CWA. Specifically, the county defendants argued that "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." *Id*. at 1205. The Court rejected this argument because the permit's objective was explicit – the intent was to characterize stormwater discharges *and* assess compliance with water-quality standards. *Id*.

[15] "Mass emission monitoring measures all constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody." 725 F.3d at 1200.

FWW's reliance on this decision is misplaced. There, the County of Los Angeles was arguing that every permittee would only be responsible for a discharge for which it was the operator, which would allow individual permittees to discharge an unlimited amount of pollutants with abandon.[16] In the instant case, there can be no authorized discharges because the 2014 Permit is a zero discharge permit. The Ninth Circuit determined that "the [CWA] *requires* every NPDES permittee to monitor its discharges," it goes on to say that "an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance." *Id*. at 1207; s*ee* 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."); *see also* 40 C.F.R. § 122.26(d)(2)(i)(F).

"Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to 'shield' the permittee from liability under the CWA." 725 F.3d at 1204 (citing 33 U.S.C. § 1342(k)). This means that a permittee violates the CWA when it discharges pollutants in excess of the levels specified in the permit or it violates the permit's terms. *Id*. NPDES permits are to be given their plain and ordinary meaning. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999).

In *Nat. Res. Def. Council*, the court rejected the argument that the mass-emission monitoring program did not measure or was designed to measure any individual

[16] The MDE does not advance this argument.

permittee's compliance with the Permit, which it found was "clearly belied" by the text itself. 725 F.3d at 1205. As evidence of this fact, the court looked to the Permits "Monitoring and Reporting Program" which had stated objectives of "*both* characterizing stormwater discharges *and* assessing compliance with water-quality standards." *Id.* (emphasis in original). In addition, the Permit language stated that "'[a]ssessing compliance with this [Permit]' is one of the 'primary objectives of the Monitoring Program.'" *Id*. Similarly, MDE's permit plainly states in the section governing "authorized discharges" that "[t]he required plan(s) are essential parts of this permit, and failure to implement those plans in accordance with the approved specifications and schedules in those plans is a violation of this permit." Thus, if an AFO permittee discharged into waters of the State without complying with the required processes of the Permit, that permittee would be in violation of the CWA. FWW's reliance on *Nat. Res. Def. Council* is fatally flawed because the 2014 Permit has measures in place to ensure compliance.

FWW next urges us to examine *Nat. Res. Def. Council v. U.S. E.P.A.*, 808 F.3d 556 (2nd Cir. 2015). *Nat. Res. Def. Council* concerned a permit that regulated the discharge of ballast water from ships. *Id*. at 561. There were several issues raised in the case, but the most relevant was that "EPA's monitoring and reporting requirements for Technology Based Effluent Limitations ("TBELs") and Water Quality Based Effluent Limitations ("WQBELs") [were] not in accordance with the law because they were inadequate to guarantee compliance." *Id*. at 570. FWW raises essentially the same argument here.

Before turning to the monitoring and reporting compliance, we feel it necessary to highlight the Second Circuit's treatment of Best Management Practices ("BMPs"). FWW maintains that the MDE's BMPs cannot replace effluent limitations for compliance. However, the Second Circuit held the following:

> [E]PA's narrative WQBEL does not qualify as a BMP, as it is neither a practice nor a procedure. BMPs typically involve requirements like operating procedures, treatment requirements, practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage; they can also be structural requirements including tarpaulins, retention ponds, or devices such as berms to channel water away from pollutant sources, and treatment facilities. *See NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 991 n.1 (9th Cir. 2000). *Examples of BMPs that have been accepted as substitutes for effluent limits include: nutrient management plans for concentrated animal feeding operations, see [Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 497, 502], filtration of stormwater runoff from ditches before it enters rivers and streams (by timber companies), and constructing roads with surfacing that minimizes sediment in runoff (by timber companies), *see [Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013)].

Id. at 579 (emphasis added).

The Second Circuit's holding cuts against FWW's claim that MDE's BMPs and Nutrient Management Plans ("NMPs") cannot constitute compliance with the permit and regulations of the CWA. Unlike the EPA's narrative WQBEL, which does not constitute a BMP, MDE's BMPs include nutrient management plans, among others. Additionally, unlike the EPA's permit in the Second Circuit decision, MDE's 2014 Permit utilizes non-numeric Effluent Limitation Guidelines ("ELGs") in the form of BMPs. The CWA foresees situations where a state may promulgate BMPs in the place of numeric ELGs. *See* 40 C.F.R. § 122.44(k). BMPs may be used in place of numerical ELGs when "numeric effluent limitations are infeasible" or "the practices are reasonably necessary to

achieve effluent limitations and standards or to carry out the purposes and intent of the CWA." *Id*. at § 122.44(k)(3)-(4). In the instant case, MDE's 2014 Permit is reasonable and necessary to carry out the intent of the CWA as numeric limitations are infeasible because the 2014 Permit is zero discharge.

Next, FWW argues that MDE failed to require monitoring pursuant to 40 C.F.R. § 122.44(i)(1). Under 40 C.F.R. § 122.44, "each NPDES permit shall include conditions meeting the following requirements *when applicable*." *Id*. (emphasis added). 40 C.F.R. § 122.44(i)(1) governs the monitoring requirements. Pursuant to that, FWW contends that an NPDES permit must monitor for the mass of pollutants, the volume of effluents, other measurements as appropriate, according to sufficiently sensitive test procedures. *Id*. at (i)(1)(i)-(iii).

MDE counters that the monitoring requirements in § 122.44 are not legally required because the provision states that "each NPDES permit shall include conditions meeting the following requirements *when applicable*." *Id*. (emphasis added). MDE avers that because its permits is a "zero discharge" permit and impose no effluent limitations, monitoring is unnecessary to ensure compliance. MDE further argues that all Maryland CAFOs implement BMPs "to ensure that the operation of their waste storage and distribution systems [comply] with the zero discharge effluent limitation[.] FWW responds that the phrase "when applicable" does not render the monitoring at-will. FWW maintains that, unlike provisions that have place-specific requirements, the monitoring requirements apply to all permits, including those that regulate CAFOs.

The EPA provides guidance on the phrase "when applicable" in 40 C.F.R. § 122.41, noting that the conditions apply to *all* permits. *Id*. (emphasis added). All conditions applicable to NPDES permits must be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be included in the permit. *Id*. One of the conditions applicable to all NPDES permits is that of monitoring. Pursuant to that requirement, "samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." *Id*. at § 122.42(j)(1). The provision also mandates that records of monitoring include: (i) the date, time, and place of measuring; (ii) the individual(s) who performed the sampling or measurements; (iii) the date(s) analyses occurred; (iv) the individual(s) who performed the analyses; (v) the analytical techniques or methods used; and (vi) the results of such analyses. 40 C.F.R. § 122.41(j)(3)(i)-(vi). The provision also outlines that the monitoring must be conducted according to test procedures approved under 40 C.F.R. Part 136. *Id*.

MDE details in the record below the number of requirements that CAFOs owners and operators must adhere to in order to be in compliance with 40 C.F.R. 122.44 including: BMPs, NMPs, and effluent standards and guidelines. As mentioned previously, 40 C.F.R. § 122.44 mandates specific requirements "when applicable." MDE's, BMPs, NMPS, and effluent standards and guidelines it submitted are adequate to ensure zero effluent limitations. The 2014 Permit provides for a land application logbook that is maintained on-site for five years and is available for inspection by MDE personnel

upon request. This logbook is required to note where animal waste is distributed, record inspections, and testing to analyze manure, litter, process wastewater, and soil.

As MDE rightly contends, the 2014 Permit does not authorize pollutant discharges to waters of the State. Further, the 2014 Permit provides for processes that are capable of producing representative data, such as the BMPs, NMPs, effluent standards and guidelines. Therefore, we hold that there is substantial evidence in the record that MDE's 2014 Permit complied with EPA regulations.

It is well documented that CAFOs are a significant contributor of environmental and water pollution. However, as an appellate court of Maryland, we are guided by fidelity to the law. That law, 40 C.F.R. Part 136, contemplates that a State's effluent guidelines must produce representative data of zero pollutant discharge – that standard is met here. FWW argues that there must be strict adherence to the EPA's guidelines, but the EPA has afforded agencies such as MDE the flexibility in developing effluent limitations. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

We acknowledge that the CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Maryland is deeply committed to the preservation of the environment and our holding in this case no way diminishes our role in reviewing MDE's decisions with regard to the environment. We respect the historical and cultural significance of the CWA, which the MDE vested with the authority to adhere to its mandates. In accordance with the CWA, MDE created stringent laws to control for water pollutants, even going as far as creating a

zero discharge permit. Therefore, we conclude that MDE's decision was rational and lawful, and that the 2014 Permit is valid.

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