UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2107

September Term, 2011

ANACOSTIA RIVERKEEPER, ET AL.

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT, ET AL.

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

JJ.

Opinion by Graeff, J.

Filed: January 7, 2013

This appeal arises from a challenge to a municipal separate storm sewer system permit (the "Permit") issued by the Maryland Department of the Environment ("MDE"), appellee, to Montgomery County and several municipalities[1] ("Montgomery County"), also appellees. The purpose of the Permit is to regulate the discharge of stormwater runoff from the storm drain system owned and operated by Montgomery County by implementing a set of practices to reduce the volume of pollutants released from the system.

Appellants, a coalition of environmental groups, including Anacostia Riverkeeper, and individuals[2] (collectively the "Riverkeepers"), appeal from an order of the Circuit Court for Montgomery County affirming the finding of the Administrative Law Judge ("ALJ") that they did not have standing to challenge the Permit. The Riverkeepers present two questions for our review, which we have rephrased slightly, as follows:

1. Did the circuit court err by affirming the ALJ's finding that the Riverkeepers lack standing and by dismissing their petition for judicial review of the Permit?

2. Is the Permit inadequate on its face because it does not satisfy legal requirements for water pollution permits under Maryland law and the federal Clean Water Act?

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[1] Along with Montgomery County, the permit also authorized storm water runoff discharges for the Towns of Chevy Chase, Chevy Chase Village, Kensington, Somerset, and Poolesville, as well as the Village of Friendship Heights.

[2] Appellants include Anacostia Riverkeeper, Inc., Potomac Riverkeeper, Inc., Mac Thornton, a resident of Montgomery County and a board member of Potomac Riverkeeper, Pat Munoz, a resident of Washington, D.C., and also a board member of Potomac Riverkeeper, Waterkeeper Alliance, and Friends of the Earth.

For the reasons set forth below, we shall reverse the judgment of the circuit court and remand this case for proceedings consistent with our holding.[3]

STATUTORY BACKGROUND

Congress enacted the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). In order to accomplish these goals, the CWA prohibits the "discharge of any pollutants" to waters of the United States, except as explicitly authorized by the statute. *Id*. § 1311(a). The primary means by which a person can discharge a pollutant without violating the CWA is through a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *Id*. §§ 1251(a)(1), 1311(a), 1342(a)(1).

The original CWA did not explicitly regulate stormwater discharges. *See* § 1342(p)(1). In 1987, however, Congress amended the statute to require NPDES permits for stormwater discharges from municipal storm sewer systems. *Id*. at § 1342(p)(3)(B). The

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[3] Montgomery County raises an additional issue, whether the circuit court was required to dismiss the Riverkeepers' amended petition for judicial review because it was filed on September 30, 2009, more than 30 days after the Administrative Law Judge's ("ALJ") decision was issued, and therefore, it was untimely. The Riverkeepers dispute this assertion, arguing that their petition was timely filed on July 24, 2009, the "date on which it was received by the clerk's office." Although Montgomery County raised the timeliness of the petition below, the circuit court declined to reach the issue, deciding instead to affirm the decision of the ALJ that the Riverkeepers did not have standing to challenge the permit. While we do have discretion to address an issue raised in but not decided by the trial court, *see* Md. Rule 8-131(a), we decline to do so. *See Mattingly v. Hughes Electronics Corp*., 147 Md. App. 624, 645 (2002) (declining to address issue raised in, but not decided by trial court), *aff'd on other grounds*, 376 Md. 302 (2003).

1987 amendments provided, in pertinent part, that permits for discharges from municipal storm systems "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." *Id*. at § 1342(p)(4)(B)(iii).

The Clean Water Act embraces the concept of cooperative federalism, and one of the goals of the statute was the "recognition, preservation, and protection of primary responsibilities and rights of States." *Id*. at § 1251(b). Accordingly, the CWA provides that the United States Environmental Protection Agency ("EPA") may delegate authority to implement the NPDES permit program to any state "desiring to administer its own permit program for discharges into navigable waters within its jurisdiction." *Id*. at § 1342(b). As this Court has explained: "Maryland is one state that has received delegation to issue NPDES permits." *Assateague Coastkeeper v. Md. Dep't. of the Envt.*, 200 Md. App. 665, 677 n.10 (2011), *cert. denied*, 424 Md. 291 (2012). Maryland law provides MDE with the authority to issue discharge permits if it determines that the terms of the permit comply with "[a]ll applicable State and federal water quality standards and effluent limitations." Md. Code (2007 Repl. Vol.) § 9-324(a)(1) of the Environment Article ("Envir.").

Prior to January 1, 2010, the Maryland Code provided that, once MDE made a final permit determination, a person could request a contested case hearing to appeal that determination. *See* Envir. § 1-605(a). To obtain such a hearing, the requester was required

to make "factual allegations with sufficient particularity to demonstrate" that the requester was "*aggrieved by the final determination*." *Id*. at § 1-605(a)(1) (emphasis added). If such a showing was not made, then dismissal was warranted. *Id*. at § 1-606(a). At that time, "standing to challenge permitting decisions by MDE was limited to a person . . . 'whose personal or property rights [were] adversely affected by the decisions.'" *Patuxent Riverkeeper v. Md. Dep't. of the Envt*., 422 Md. 294, 298 (2011) (quoting *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144 (1967)). Moreover, a group did not have standing "unless the organization had a 'property interest of its own-separate and distinct from that of its individual members.'" *Id*. (quoting *Med. Waste Assoc., Inc. v. Maryland Waste Coal., Inc.*, 327 Md. 596, 612 (1992)).

In 2009, the General Assembly changed the process for challenging MDE permitting decisions. *See* 2009 Md. Laws Ch. 650, 651. It eliminated the contested case hearing procedures before an ALJ, permitting direct judicial review of MDE's decision to grant or deny permits. Md. Code (2007 Repl. Vol., 2011 Supp.) Envir. Article §1-601(b), (c). Moreover, as the Court of Appeals recently explained, "the General Assembly embraced the 'broader' notion of standing applied in federal courts, to enable both individuals and organizations to challenge environmental permits in judicial review actions," where certain conditions are present. *Patuxent Riverkeeper*, 422 Md. at 298. Specifically, § 1-601 now provides that a final determination by MDE on the issuance, denial, or revision of discharge permits is subject to judicial review at the request of any person who "[m]eets the threshold

standing requirements under federal law," and "[p]articipated in a public participation process through the submission of written or oral comments." Envir. §§ 1-601(a), (c). The Fiscal and Policy Note that accompanied House Bill 1569 explained that "[t]he bill's alteration of the standing requirements would also allow more persons or groups to challenge the permits" issued by MDE. Dep't. of Leg. Serv., Fiscal and Policy Note of H.B. 1569 (2009). The General Assembly made the new judicial review provisions effective as of July 1, 2010. 2009 Md. Laws Ch. 651 § 7.

In 2012, the General Assembly amended section 1-601 to clarify "the right of parties to appeal to the Court of Special Appeals a decision by a circuit court regarding certain final permit determinations by the Department of the Environment." 2012 Md. Laws Ch. 358. In the Fiscal and Policy Note, the General Assembly explained that the 2009 amendments replacing the contested case hearing process with judicial review of permit determinations "resulted in the inadvertent deletion of a reference to the right to appeal to the Court of Special Appeals for a party who is aggrieved by a final judgment of a circuit court after a contested case hearing under the Administrative Procedure Act." Dep't. of Leg. Services, Fiscal and Policy Note for H.B. 186 (2012). The legislation provided that it "shall be construed to apply retroactively to all appeals of final permit decisions subject to Title 1, Subtitle 6 of the Environment Article." 2012 Md. Laws Ch. 358.

FACTUAL AND PROCEDURAL BACKGROUND

On March 15, 1996, MDE granted Montgomery County its initial NPDES municipal storm sewer system permit to regulate the discharge of stormwater runoff from the storm drain system owned and operated by the County. MDE reissued the permit in 2001, and in 2004, it modified the permit to include several municipalities as co-permittees. On August 12, 2005, Montgomery County submitted an application to MDE to renew its permit. On November 29, 2005, MDE held a public informational meeting to discuss whether it should renew Montgomery County's permit. In consideration of Montgomery County's application, MDE also had numerous discussions with the Maryland Stormwater Consortium and the United States Environmental Protection Agency ("EPA").

In October 2008, MDE reached a tentative determination to reissue Montgomery County's municipal stormwater permit, and it made a draft version of the permit available for public comment. MDE's summary of the permit was as follows:

> This permit represents another step forward for Montgomery County's NPDES municipal stormwater program. In 1996, the County's initial permit laid the foundation for a comprehensive approach to controlling runoff. This was done by inventorying and mapping storm drain system infrastructure; identifying sources of pollution; monitoring storm events to judge chemical, biological, and physical stream responses; and enhancing existing, and establishing new management programs. The second permit in 2001 used the previous five year term to build one of the most formidable municipal stormwater programs in the Mid-Atlantic Region. The County evaluated jurisdiction-wide water quality through a comprehensive biological stream assessment program, prioritized watersheds in order to perform more detailed analyses to guide management implementation, and began to restore ten percent of existing impervious area.

> This proposed permit requires an additional twenty percent of the County's impervious area to be restored, a strategy for a trash free Potomac River by 2013 to be developed and implemented, and TMDL implementation plans to be developed and carried out according to the [C]ounty's schedule in order to meet stormwater waste load allocations established for impaired waters. All of these requirements are in addition to existing countywide management programs and ongoing monitoring efforts and will go a long way toward making Montgomery County's NPDES municipal stormwater program arguably one of the best in the country.

By letter dated December 1, 2008, the Riverkeepers submitted comments detailing their concerns with the draft permit. They stated that, although "the Draft Permit represents a significant step forward, without substantial changes, it will fail to protect Maryland waters and fail to meet the requirements of State and federal law." The Riverkeepers took issue with a number of the requirements contained in the permit, including the stormwater management program requirements, the erosion and sediment control program requirements, the trash and litter program requirements, the watershed assessment restoration requirements, and the requirements intended to prevent discharges from exceeding the total maximum daily loads (TMDLs) for certain pollutants.

On February 25, 2009, and again on March 4, 2009, MDE published its Notice of Final Determination to Issue Permit. In the notice, MDE stated that it reviewed and responded to the comments it received on the draft permit, and that it had "reached a final determination to issue an NPDES permit to Montgomery County to control storm drain system pollution." MDE indicated that the final permit would include "one minor change" from the draft permit based on the comments received, which was "to include deadlines to

meet benchmarks and waste load allocation in implementation plans applicable to TMDLs." The notice also provided that any person who believed that he or she would be adversely affected by the permit, and wished to contest MDE's determination, could request that a contested case hearing be held. March 19, 2009, was the deadline for requesting such a hearing.

By letter dated March 18, 2009, the Riverkeepers submitted their request for a contested case hearing.[4] The "requesters" included two Potomac Riverkeeper, Inc. board members, Mac Thornton and Pat Munoz. The request explained that Mr. Thornton owned property in Cabin John, Maryland, and regularly kayaks and canoes on rivers and streams in Montgomery County that are adversely affected by discharges from the stormwater sewer system. Ms. Munoz, "an avid paddler," also made regular use of the rivers and streams in Montgomery County, and her "use and enjoyment of these water bodies" also is adversely affected by the discharges. The Riverkeepers argued that a hearing was required because the deficiencies that they identified in their comments on the draft permit were not addressed by MDE in the final permit.

In addition to their hearing request, the Riverkeepers also requested that MDE issue and implement the final permit "without delay," as opposed to staying the permit pending the resolution of the Riverkeepers' hearing request and the issues it raised therein. Specifically,

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[4] As discussed, *infra*, the Riverkeepers filed their request pursuant to the procedures in effect at that time, which have now changed. *See* Md. Code (2007 Repl. Vol.) § 1-605(a) of the Environment Article.

they argued that there was "no reason that Montgomery County cannot and should not implement the planning and other measures required by the Final Permit during the time that the requested contested case hearing is resolved, particularly given the Requesters are asking that the permit be made stronger, not weaker."

On March 25, 2009, MDE delegated the Riverkeepers' request to the Maryland Office of Administrative Hearings ("OAH") to decide whether the Riverkeepers had standing to request a contested case hearing under the now-superseded sections of the Maryland Environment Article. *See* Md. Code. (2007 Repl. Vol.) Envir. §§ 1-605 and 1-606. On May 20, 2009, Montgomery County filed a Motion to Dismiss the request for a contested case hearing on the ground that the Riverkeepers had failed to demonstrate that they were aggrieved by MDE's decision on the permit, as required by Envir. § 1-605(a). Montgomery County and MDE subsequently filed separate motions for summary decision, arguing that there was no dispute of material fact and requesting that a proposed final decision upholding MDE's final determination to issue the Permit be rendered.

On June 8, 2009, the Riverkeepers filed a response opposing Montgomery County's Motion to Dismiss. They argued that their request adequately demonstrated that they were aggrieved by MDE's decision on the Permit, and accordingly, they had standing to request a contested case hearing.

On June 24, 2009, an ALJ issued an order responding to Montgomery County's Motion to Dismiss and the two Motions for Summary Decision. The ALJ found that the

Riverkeepers did not have standing to request a contested hearing. Relying on *Sugarloaf Citizens Ass'n v. Dep't of the Environment*, 344 Md. 271, 288 (1996), the ALJ stated that, to be aggrieved, a person "must have some specific interest or property right that is adversely affected. Additionally, that interest must be such that the person requesting the hearing is personally and specifically affected in a way different from the public generally." Finding that the Riverkeepers were not aggrieved, the ALJ stated:

> The environmental organizations, without doubt, have no interests that differ from those of the public generally. Ms. Munoz and Mr. Thornton engage in recreational activities on the Potomac River and its tributaries, but neither owns land directly adjacent to any State waterway. While their recreational activities are specific, any member of the public can engage in those same activities. There is no *prima facie* showing that the granting of the Permit personally and specifically affects their interests in ways different from the public generally. Consequently, I am granting Permittee Montgomery County's Motion to Dismiss based on the lack of standing.

In light of the ruling on the motion to dismiss, the court found that the motions for summary decisions were moot.

In July 2009, the Riverkeepers filed, in the Circuit Court for Baltimore County, a Petition for Judicial Review of the ALJ's Order. By letter dated August 31, 2009, the Riverkeepers advised the Clerk of Court for the Circuit Court for Baltimore County, stating: "It has come to our attention that the copy of the Petition was mailed to the Maryland Office of Administrative Hearings," as opposed to MDE. Along with the letter, they enclosed an additional copy of the petition for delivery to MDE.

On September 30, 2009, the Riverkeepers filed an Amended Petition for Judicial Review. The petition stated that the Riverkeepers sought judicial review of the decision of MDE, as opposed to the decision of OAH.

On May 4, 2010, MDE filed a Motion to Dismiss Petition for Judicial Review. In its motion, MDE argued that the Riverkeeper's original petition for judicial review was untimely, as the ALJ's decision was issued on June 24, 2009, and the petition, it alleged, was filed on July 29, 2009, more than 30 days later, in violation of Maryland Rule 7-203. MDE also asserted that the petition should be dismissed because it was filed in the wrong circuit court. Specifically, it argued that the petition should have been filed in the Circuit Court for Montgomery County, in accordance with Md. Code. (2009 Repl. Vol.) § 10-222(c) of the State Government Article ("S.G."), which provides that "a petition for judicial review shall be filed with the circuit court for the county where any party resides or has a principal place of business."

On May 24, 2010, the Riverkeepers filed a motion to transfer their case to the Circuit Court for Montgomery County. They acknowledged that "this case could have been brought in Montgomery County because Petitioner Mac Thornton resides there." They asserted that their motion to transfer should be granted in the interests of justice, and that the change in venue would not prejudice MDE or Montgomery County.

On June 21, 2010, MDE and Montgomery County filed their responses to the Riverkeeper's motion to transfer venue. They argued that the Riverkeeper's petition should

be dismissed because it was not timely filed, and accordingly, transferring the case was not in the interests of justice. On September 27, 2010, the Circuit Court for Baltimore County ordered that the case be transferred to the Circuit Court for Montgomery County.

On November 29, 2010, the Riverkeepers filed a Motion for Summary Judgment, arguing that they had standing to challenge the Permit, and the Permit was legally inadequate on its face. They requested a hearing on their motion.

On May 19, 2011, the court held a hearing on the various motions before the court. The court indicated that there were two issues before it: (1) whether the petition was timely filed; and (2) if the petition was timely filed, whether petitioners had standing. The court heard arguments on these issues, and it requested that the parties file supplemental briefs addressing both timeliness and standing.

On October 25, 2011, after the parties submitted supplemental briefing, the circuit court held a hearing. The court noted that it had delayed holding a hearing in the case pending the Court of Appeal's resolution of *Patuxent Riverkeeper*, 422 Md. at 294, a case which also addressed the issue of standing. The court found that, because the events in this case occurred before the enactment of the 2009 amendments, which "broaden[ed] the class of individuals and entities that can acquire standing to seek judicial review of an agency's determination to issue various environmental permits," the law prior to the amendments applied. The court stated that "the question then becomes whether there [was] substantial evidence in the record as a whole to support the ALJ's decision that the [Riverkeepers]

lacked standing." After discussing the ALJ's opinion, which concluded that the petitioners did not have interests that differ from those of the public generally, the court found that there was "substantial evidence in the record as whole to support the agency's decision."

Accordingly, the court affirmed the ALJ's decision.[5] This timely appeal followed.

DISCUSSION

I.

Standing

The Riverkeepers first contend that the circuit court erred in affirming the ALJ's finding that it did not have standing to challenge the Permit. They assert two grounds in support of this argument: (1) that legislative amendments in 2009 and 2012, which embraced the broader concept of standing applied in federal courts, was the law applicable to this case; and (2) even if the applicable law is that in effect prior to the amendments, the Riverkeepers still had standing to challenge the Permit.

MDE asserts that "the traditional aggrievement test in place prior to 2010" governs the issue of standing in this case, and the ALJ correctly applied that standard in finding that the Riverkeepers lacked standing to challenge the Permit. Montgomery County also argues that the law of standing prior to 2010 should be applied, contending that "[t]he statutory amendments that govern legal challenges to environmental permitting decisions beginning

[5] As indicated, the court stated that, based on its ruling addressing the merits of the standing issue, it did not need to address the issue whether the petition was filed timely.

in 2010 are inconsequential to the central question presented in this appeal, which is whether the [ALJ] acted in accordance with applicable law in 2009." It contends that the ALJ properly determined that the Riverkeepers lacked standing because they were not aggrieved by MDE's decision to grant the Permit, and the circuit court was correct in affirming that decision.

A.

Applicable Law

The parties agree that the 2009 Amendments broadened the law regarding standing. They disagree, however, whether these amendments, which became effective January 1, 2010, apply to this case.

In arguing that the new law applies, the Riverkeepers focus on the 2012 amendment, which it argues "[c]ommanded that the threshold standing requirements under federal law be applied retroactively to all appeals of final permit decisions by MDE, such as the instant case." As MDE and Montgomery County correctly note, however, the only change the 2012 legislation made to Envir. § 1-601 was to provide an express right of appeal to this Court, and "because the Legislature had never intended the 2009 Amendments to preclude a further review to this Court, it made its 2012 fix retroactive."

Although the Riverkeepers focus on the 2012 legislation, the focus should be on the 2009 Amendments, the legislation that broadened the concept of standing. MDE and Montgomery County argue that, because the ALJ decided the issue of standing on June 24,

2009, prior to the January 1, 2010, effective date of the 2009 amendments, the law in place prior to the 2009 amendments applies. We view the issue as whether this new law, which was in effect at the time the case was before the circuit court, should have been applied by the circuit court.

The Court of Appeals has explained that "[s]tatutes are presumed to operate prospectively; consequently, absent manifest legislative intent to the contrary, statutes may not be given retrospective or retroactive application." *Gregg v. State*, 409 Md. 698, 714 (2009). "The basic reason we presumptively apply new legislation prospectively is our concern that a retrospective application may interfere with substantive rights." *Grasslands Plantation, Inc. v. Frizz-King Enters., LLC*, 410 Md. 191, 226 (2009).

"There are, however, exceptions to the presumption that legislation is to be applied prospectively. 'One such category of exceptions concerns legislative enactments that apply to procedural changes.'" *Gregg*, 409 Md. at 714 (quoting *Langston v. Riffe*, 359 Md. 396, 406-07 (2000)). *Accord Grasslands*, 410 Md. at 226 ("Because procedural changes in most contexts do not affect substantive rights, such legislation is generally excluded from the presumption of prospectivity."); *Starfish Condo. Ass'n. v. Yorkridge Serv. Corp., Inc.*, 295 Md. 693, 705 (1983) ("'[O]rdinarily a change affecting procedure only, and not substantive rights, made by statute . . . applies to all actions [and matters] whether accrued, pending, or future, unless a contrary intention is expressed.'") (quoting *Janda v. General Motors*, 237 Md. 161, 168 (1964)); *Wharf at Handy's Point, Inc. v. Dep't. of Natural Resources*, 92 Md.

App. 659, 675 ("It is well-established that, when no contrary legislative intention is expressed, 'a statute governing procedure or remedy will be applied to cases pending when the statute becomes effective.'") (quoting *WSSC v. Riverdale Fire Co.*, 308 Md. 556, 564 (1987)), *cert. denied*, 328 Md. 239 (1992). In determining whether a change in a statute is substantive or procedural, the Court has stated that a "'law is substantive if it creates rights, duties and obligations, while a remedial or procedural law simply prescribes the methods of enforcement of those rights.'" *Langston*, 359 Md. at 419 (quoting 2 NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 41.09 at 56 (1999 Supp.)).

Here, the parties agree that the change in the standing requirements to challenge a discharge permit took effect before the circuit court ruled on Riverkeepers' petition for judicial review of the ALJ's decision. Under these circumstances, we hold that the circuit court erred in affirming the ALJ's determination that the Riverkeepers did not have standing to seek review of the Permit.

We find instructive the Court of Appeals per curium opinion in *Conti v. Board of Appeals of the Dep't. of Labor*, 356 Md. 459 (1999). In that case, the Secretary of the Department of Labor determined that sales agents of a company were employees, as opposed to independent contractors, for the purpose of unemployment insurance law. *Id*. at 460. On appeal, the Board of Appeals reversed the decision of the Secretary, finding that the agents were independent contractors. *Id*. In October 1997, the Secretary filed a petition for judicial review in the circuit court. *Id.* at 461. On June 30, 1998, the court dismissed the petition,

finding that the Secretary lacked standing to seek review of the Board's decision. *Id*. Effective June 1, 1998, however, prior to the circuit court's order, the General Assembly had amended the Labor and Employment Article to clarify the Secretary of Labor's right to seek judicial review of a Board decision. *Id.*

The Court of Appeals reversed the circuit court's finding of a lack of standing, rejecting the argument that the new law did not apply to the case. *Id*. The Court stated that, "[w]hen the [circuit] court dismissed the petition . . . the Secretary clearly and undisputedly had standing to seek judicial review." *Id*. It held: "As any lack of standing on the part of the Secretary would have been procedural only, and as such lack, if there was one, was cured by the amendment while the petition was still pending before the court, the judgment was in error." *Id*. *Accord Riverdale*, 308 Md. at 564 (A "statute governing procedure or remedy will be applied to cases pending when the statute becomes effective.").

Similarly here, at the time the circuit court ruled on the petition, the 2009 amendments addressing standing were in effect. Because the change in the law regarding Riverkeepers' standing to challenge the permit was procedural only, the new law applied, and the circuit court erred in finding that the 2009 amendments did not apply.

We turn now to the issue of whether the Riverkeepers have standing to challenge the Permit under the new law. For the reasons set forth below, we hold that they do.

B.

Riverkeepers' Standing Under the 2009 Amendments

Pursuant to § 1-601(c) of the amended Environment Article, a final determination by MDE on the issuance of a permit to discharge pollutants to waters of the State "is subject to judicial review at the request of any person that: (1) Meets the threshold standing requirements under federal law; and (2) . . . (ii) Participated in a public participation process through the submission of written or oral comments." Md. Code. (2007 Repl. Vol., 2011 Supp.) § 1-601(a), (c). This provision "embrace[s] the 'broader' notion of standing applied in federal courts, to enable both individuals and organizations to challenge environmental permits in judicial review actions." *Patuxent Riverkeeper*, 422 Md. at 298.

There is no dispute here that the Riverkeepers "[p]articipated in a public participation process through the submission of written or oral comments." *Id*. As noted, *supra*, the Riverkeepers submitted written comments to MDE on the draft version of the Permit, detailing their concerns and suggesting changes.

The issue here is whether the Riverkeepers meet "the threshold standing requirements under federal law." *Id*. In *Patuxent Riverkeeper*, 422 Md. at 299-300, the Court of Appeals explained the test for environmental standing under federal law, set forth by the decision of the United States Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*., 528 U.S. 167 (2000):

> [T]o satisfy standing in an environmental action, a plaintiff must show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and

> (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 180-81 [] quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 [] (1992). An environmental group can satisfy standing federally if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at [180-81].

Patuxent Riverkeeper, 422 Md. at 300.

With respect to the first element, that the plaintiff has suffered an injury in fact, the Court held that this includes "a negative impact on the organizational representatives' recreational or aesthetic appreciation of the affected area," including "the demonstrably diminished ability or desire to hike, camp, picnic, swim, canoe, boat or fish in a river contaminated by pollutants." *Id*. Addressing the other elements, the Court stated that "[s]uch aesthetic, recreational, or economic interests or values, however, must be based upon a demonstrable record of regularly utilizing the affected area, as well as a desire to do so in the future." *Id*. Further, "a genuine nexus must exist between the alleged injury and the challenged conduct," and "the remedy requested must 'effectively abate[] [illegal] conduct and prevent[] its recurrence.'" *Id*. at 301 (citations omitted).

In *Patuxent Riverkeeper*, 422 Md. at 296, the nonprofit environmental group sought judicial review of a permit to construct a road extension and stream crossing that MDE issued to a development company to enable the company to build a new town center. The circuit court found, based on the affidavit and testimony of Patuxent Riverkeeper's member, David

Linthicum, that Mr. Linthicum was a "frequent recreational paddler" on the Western Branch tributary of the Patuxent River, and he had an "aesthetic interest in the beauty of the river and the cleanliness of its water." *Id*. at 308. The court further found that Mr. Linthicum had "an economic interest in navigating the river, [because] he charts its tributaries to produce maps and guides that he sells to the Riverkeeper and others." *Id*. Despite these findings, the circuit court dismissed Patuxent Riverkeeper's petition for judicial review for lack of standing. *Id*.

The Court of Appeals held that the circuit court erred in dismissing the environmental group's petition, noting the finding of a "demonstrable aesthetic, recreational, and economic interests in the Western Branch as an avid paddler and mapmaker." *Id*. at 309. It held that

> The injury suffered by Mr. Linthicum, moreover, shares a sufficient nexus to the issuance of the non-tidal wetlands permit, because Mr. Linthicum alleged, referring to scientific articles as well as his own experiences, that stream crossings at headwaters and wetlands, such as that constructed at Ruby Lockhart Boulevard, can cause negative affects downstream on the Western Branch watershed.

Id. at 310. Moreover, there was testimony that rescission of the permit would abate the harm to the Western Branch. *Id*. Accordingly, the Court of Appeals held that the circuit court erred in granting the motion to dismiss for lack of standing.

Here, a similar analysis leads to the conclusion that the Riverkeepers meet the new law regarding standing. In support of their standing to challenge the Permit, the Riverkeepers submitted several affidavits, including that of Mr. Thornton, who asserted that he was an "avid paddler," and he has been "canoeing and (primarily) kayaking on the Potomac River and its tributaries since 1974." He stated that he was concerned that

"stormwater drainage is not being sufficiently regulated and is resulting in massive sediment loads to the waterways in the Potomac River watershed," noting that, on occasion, he "experienced the strong, unmistakable odor of sewage." He attested that he enjoys fishing on the Potomac River, but that fishing is poor after storms due to discoloration and increased pollution from stormwater.

In an affidavit submitted by Scott Edwards, Waterkeeper Alliance's Legal Director, the Riverkeepers connected Mr. Thornton's concerns to the Permit. Specifically, Mr. Edwards asserted that "the Permit is unable to adequately control urban stormwater discharges within Montgomery County," such that the water quality would continue to impact the Riverkeepers' members use and enjoyment of these waters. The Riverkeeper's argue that "injuries to these individuals' regular use and enjoyment of the impaired waterways will be redressed by an order remanding the Permit to MDE for inclusion of Permit conditions that adequately control pollution."

As the Riverkeepers note, the circuit court determined that they "clearly . . . would win under federal standing." We agree. The injuries alleged by Mr. Thornton are similar to those which the Court of Appeals found met the "injury in fact" requirement in *Patuxent Riverkeeper*, 417 Md. at 308-10. Further, as in that case, the injury suffered by Mr. Thornton is "concrete and particularized," "actual and imminent," and it shares "a sufficient nexus" to the issuance of the Permit, as Mr. Thornton asserted that his kayaking and fishing activities are directly impeded by increased stormwater discharges into the Potomac River and its

tributaries which make the water discolored, increase the amount of floating trash, and cause foul smells.

Further, we agree with the Riverkeepers that the injuries described by their members and staff are traceable to their concerns about the Permit's ability to ensure water quality, and may be redressed through a decision on the merits of the Permit. Accordingly, the Riverkeepers meet the threshold standing requirements under federal law. In conjunction with our holding that the 2009 amendments applied retroactively, we hold that the circuit court erred in determining that the Riverkeepers did not have standing to seek judicial review of the Permit.

II.

Merits

The Riverkeepers argue that, rather than remand the case for further proceedings, "this Court can and should rule on Riverkeepers' legal challenge to the Permit." In support, the Riverkeepers cite to Rule 8-131(a), which provides: "Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). They urge review because "an order addressing the merits of the Permit would obviate the need for a potentially lengthy remand process and additional appeal to this Court."

MDE contends that the merits of the Riverkeepers' legal challenge to the Permit are not properly before this Court because MDE has not yet rendered a final decision on those issues. Specifically, it argues that, because the ALJ dismissed the case for lack of standing, there are no findings of fact with respect to the technical issues involved in the Permit, and no conclusions of law with respect to whether the Permit complies with applicable state and federal pollution control laws. Accordingly, MDE asserts that, in the event we find in favor of the Riverkeepers on the issue of standing, this matter should be remanded to the agency for findings of fact and conclusions of law.

Montgomery County also argues that the Permit is neither ripe for review nor properly within the scope of this Court's review. It argues that our review of the merits is inappropriate where there is no record of evidentiary proceedings on the Permit.

We agree with MDE and Montgomery County and decline to exercise our discretion to review the merits of the Permit. Although, as the Riverkeepers' note, Maryland Rule 8-131(a) provides that we may decide an issue that was not raised in or decided by the trial court "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal," *see* Md. Rule 8-131(a), in this case the exercise of our discretion is not warranted.

The scope of judicial review of decisions by administrative agencies is narrow, *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450 (2002), as the decisions made by such agencies are entitled to deference and to a presumption of validity. *Board of Educ.*

of Montgomery County v. Paynter, 303 Md. 22, 40 (1985). We review the decision of an agency in the light most favorable to the agency. *White v. North*, 121 Md. App. 196, 220 (1998), *vacated on other grounds*, 356 Md. 31 (1999). Even with regard to some legal issues, an administrative agency's interpretation and application of the statutes and regulations that the agency administers is normally accorded considerable weight by reviewing courts out of respect for the expertise of the agency in its own field. *HNS Dev., LLC v. People's Counsel*, 425 Md. 436, 449 (2012). "In order to apply the appropriate standard of review . . . the reviewing court first must know how and why the agency reached its decision." *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 65 (2002).

The new law governing judicial review of permits issued by MDE, § 1-606(c), specifically provides that "[a]ny judicial review . . . shall be limited to a record compiled by the Department." The record compiled by MDE shall consist of the following:

> (1) Any permit or license application and any data submitted to the Department or Board in support of the application;
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> (2) Any draft permit or license issued by the Department or Board;
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> (3) Any notice of intent from the Department or Board to deny the application or to terminate the permit or license;
>
> (4) A statement or fact sheet explaining the basis for the determination by the Department or Board;
>
> (5) All documents referenced in the statement or fact sheet explaining the basis for the determination by the Department or Board;
>
> (6) All documents, except documents for which disclosure is precluded by law or that are subject to privilege, contained in the supporting file for any draft permit or license;
>
> (7) All comments submitted to the Department or Board during the public comment period, including comments made on the draft application;

(8) Any tape or transcript of any public hearings held on the application; and

(9) Any response to any comments submitted to the Department or Board.

Id.

Here, no such record was compiled by MDE and submitted to the circuit court for its review, and it appears that portions of MDE's decision making process are missing from the record. The record was compiled by the parties, not MDE as required by the statute. Accordingly, the record before this court is insufficient to permit our review of the merits of the Permit.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID BY APPELLEES.