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November 6, 2000

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Re: Fairfax County Water Authority v. Maryland Department of the Environment
OAH 98-MDE-WMA-116-044

Dear Counsel:

Enclosed is the Department's Final Decision in the referenced matter.

Very truly yours,

Bernard A. Penner
Final Decision Maker

cc: Jane T. Nishida
J.L. Hearn

**FAIRFAX COUNTY
WATER AUTHORITY**

v.

**THE WATER MANAGEMENT
ADMINISTRATION OF THE
MARYLAND DEPARTMENT
OF THE ENVIRONMENT**

* **BEFORE THE FINAL DECISION**
* **MAKER FOR THE MARYLAND**
* **DEPARTMENT OF THE**
* **ENVIRONMENT**
* **CASE NO. 98-MDE-WMA-116-044**

* * * * *

FINAL DECISION

This contested case proceeding between the Department and the Fairfax County Water Authority (“Authority”) arises out of an application by the Authority under § 5-504 of the Environment Article of the Maryland Code¹ for a waterway construction permit to construct an offshore water intake structure in the Potomac River between Montgomery County, Maryland and Loudoun County, Virginia. The intake is proposed to replace an existing shoreline intake as the primary intake for the Corbalis water treatment plant, part of a system that supplies public drinking water to some 1.2 million citizens of Virginia. The Department, through the Water Management Administration (“Administration”), which exercises jurisdiction over the Potomac River to the Virginia shoreline, denied the application pursuant to § 5-507. The Authority appealed the denial and requested a contested case hearing before the Office of Administrative Hearings (“OAH”).

Following a two-day hearing on December 3rd and 7th, 1998, Administrative Law Judge (“ALJ”) Neile Friedman issued a Proposed Decision on January 21, 1999 in which she concluded that the permit should be granted. Both parties filed exceptions to the ALJ’s Proposed Decision. On June 7, 1999, I issued a Final Decision remanding the case back to the OAH for further evidentiary hearings. Following additional hearings, the ALJ issued a second Proposed Decision

1 All statutory references are to the Environment Article unless otherwise specified.

on May 10, 2000 in which she again concluded, based on the new evidence, that the Administration had failed to adequately support its denial of the permit and that the permit should be granted. The Administration filed exceptions to the Proposed Decision; the Authority filed a conditional cross-exception. Both parties filed responsive pleadings in opposition to the other's exceptions. Oral argument was held before me on September 21, 2000.

The Administration filed eight (8) separate exceptions to the ALJ's second Proposed Decision. While there is merit to many of the Administration's contentions, and I have granted one exception, based on my review of the record in this proceeding, I concur with the ALJ that issuance of a permit to construct the mid-river intake would not have a significant adverse environmental impact on the Potomac River, would promote the public welfare, and is in the best public interest. I further concur with the ALJ that the Administration has failed to meet its burden of persuasion to support denial of the permit. In light of my decision to affirm the Proposed Decision and direct issuance of the permit, the Authority's conditional cross-exception is rendered moot and I decline to address it.²

In the intervening period between the remand hearing and issuance of the ALJ's second Proposed Decision, the Maryland General Assembly enacted the Potomac River Protection Act (the "Act"), Chapter 557 of the Laws of Maryland of 2000, which took effect on June 1, 2000. The Act imposes conditions on the issuance of waterway construction permits in the Potomac River. While the ALJ did not address the Act in her Proposed Decision, the record is sufficiently developed to enable me to apply the terms of the Act to this permit without further hearing, and to conclude that

² The Authority's conditional exception seeks reversal of the ALJ's determination to deny discovery of intra-agency documents which the Authority asserts will establish political influence in the permit decision-making process. Since this Final Decision directs issuance of the permit, even if the Authority's exception were granted, it would not change the outcome of this proceeding.

the Act does not prevent issuance of the permit. The effect of the Act is discussed in more detail below.

LEGAL STANDARDS

Section 5-504 of the Environment Article and COMAR 26.17.04.09 require a waterway construction permit for the construction of any structure in the Potomac River. Section 5-507(a) contains standards governing review of construction permit applications. In determining whether to grant an application, the Department must “weigh all respective public advantages and disadvantages” of the permit application. The Department shall grant the permit if it determines that the applicant’s plans “provide greatest feasible utilization of the waters of the State, adequately preserve public safety and promote the general public welfare.” The Department may reject a construction permit application if it believes from the evidence that “the proposed construction is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest.” These criteria are replicated in COMAR 26.17.04.11A. COMAR 26.17.04.04B further requires construction permit applications to “include evidence of the benefits to be derived from the project.” This evidence may be stated in monetary terms or, when more appropriate, other quantitative or qualitative terms.

In addition to the general criteria governing the review of applications for waterway construction permits cited above, COMAR 26.17.04.11B lists four specific criteria to be considered in the review of a construction permit application of this nature. They are: (1) the impacts upon the scenic, fish wildlife and other recreational values of a State scenic river³; (2) the degree to which the structure will impede the flow of a State scenic river; (3) the extent to which the structure will block

³ The stretch of the Potomac in which the intake structure will be located is designated as a scenic river under the State Scenic and Wild Rivers Program.

the passage of fish; and (4) the extent to which the structure will eliminate or have significant adverse impact upon aquatic and terrestrial habitat and their related flora and fauna. COMAR 26.17.04.11B(1)-(3), (5).

As provided for in COMAR 08.01.04.16, and by stipulation of the parties, the Administration bears the burden of going forward to establish a *prima facie* case, as well as the burden of persuasion to support denial of the permit.

STATEMENT OF THE CASE

This matter has a long history. The details of this proceeding up to the point of remand were set forth fully in my prior decision. On January 4, 1996, the Authority applied for a permit to construct an offshore drinking water intake in the Potomac River in an application designated number 96-NT-0024/199661481. On December 10, 1997, after additional information was requested and submitted, a public information meeting was held. The Administration subsequently issued a Notice of Decision to the Authority denying the Authority's permit application. In the Notice of Decision, the Administration stated that based on the evidence submitted, "it believe[d] the general public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake." The Administration indicated that the proposed construction project did not provide for the greatest feasible utilization of waters of the State nor adequately preserve public safety or promote the general public welfare. The Administration determined that the project was not necessary and therefore, was wasteful and detrimental to the public interest.

The Authority appealed the Administration's permit denial on December 23, 1997. The ALJ filed a Memorandum and Order on Prehearing Motion ("Prehearing Order") on November 24, 1998. The ALJ concluded that the Administration could not require the Authority to demonstrate that there were no practical alternatives to its proposed construction of a mid-river water intake as a

prerequisite to issuance of the permit. The ALJ further ruled that, “need is not an appropriate criteria for determination of construction eligibility, [and that] evidence related to [this] issue will not be relevant to this proceeding.” Prehearing Order at 9.

As noted above, a hearing on the merits was held on December 3rd and 7th, 1998. The ALJ limited the admissibility of evidence to the criteria listed in COMAR 26.17.04.11B. At the conclusion of the Administration’s case, the Authority moved for summary disposition. On January 21, 1999, the ALJ granted the Authority’s Motion for Summary Disposition and overruled the Administration’s denial of the water intake construction permit, holding that the Administration had failed to present sufficient evidence to establish a prima facie case that the permit was properly denied.

The Administration filed a set of exceptions which consisted primarily of objections to the scope of the hearing issues as framed by the ALJ’s Prehearing Order. The Authority filed conditional cross-exceptions and each party responded to the other’s exceptions. Oral argument on the exceptions was held on April 30, 1999.

I issued an initial Final Decision on June 7, 2000, in which I declined to affirm the Proposed Decision, finding that the ALJ had improperly limited the scope of the issues and evidence in the case. Specifically, I found the ALJ erred when she ruled that “need” was not an appropriate consideration in determining whether to grant a construction permit. Need is an element of determining whether the proposed construction constitutes the “greatest feasible utilization of the waters of the State”, and whether the proposed project is “inadequate” or “wasteful.” Evidence regarding the need for a project tends to establish the project’s benefits, the public interests served by the project, as well as advantages and disadvantages. The construction of an unnecessary intake structure would be wasteful, since the environmental disruption caused by the act of construction

and the resources consumed to build it would have no counter-balancing benefit. I also found that water quality issues are relevant and important in determining the extent of the need for the new intake structure. I agreed with the ALJ that there was no legal basis upon which the Administration could require the applicant to demonstrate that no practical alternative to construction of the proposed intake existed as a prerequisite to granting the permit. I remanded the matter to the ALJ for further consideration in accordance with the guidance provided therein.

Upon remand, the ALJ conducted additional hearings over six days in November of 1999. Experts in sediment and erosion transport, sedimentation, water chemistry and water treatment processes testified in support of the Authority's permit application. The Authority introduced 168 separate exhibits (some of which were admitted jointly), which filled six large binders. The evidence included data and comparative analysis of turbidity, total suspended solids, alkalinity and pH levels in thousands of water samples collected from different points in the river since 1986. The Authority offered expert testimony, published articles and other documentary evidence on the association between high turbidity levels from watershed runoff and the presence of a waterborne parasite, cryptosporidium, in the raw water, and on the presence of sources of cryptosporidium in the watersheds upriver from the existing intake. Much of the evidence presented at the hearing was not before the Administration when the Authority's permit application was under consideration.

After both parties filed Proposed Findings of Fact and Conclusions of Law, the record closed on March 1, 2000. The ALJ issued a second Proposed Decision on May 10, 2000. In her Proposed Decision, the ALJ found, *inter alia*, that mid-river water is on the whole cleaner and more easily treated than water withdrawn at the existing intake, and that drawing water from mid-river will reduce the risk of cryptosporidium and other waterborne disease. She concluded that enhanced enforcement of sediment and erosion control requirements is an inferior alternative to the mid-river

intake and that in denying the permit, the Administration had failed to meet its burden to establish that construction of the intake would be wasteful, dangerous, impracticable or detrimental to the best public interest. She found that construction of the mid-river intake would be in the best public interest and she recommended that the permit be issued.

On June 8, 2000, the Administration filed exceptions to the Proposed Decision. The Authority filed a single conditional cross exception. Oral argument on the exceptions was held on September 21, 2000. This Final Decision is issued based upon my review of the entire record.

THE ADMINISTRATION'S EXCEPTIONS

A party may take exception to any portion of an ALJ's proposed decision. In doing so, the party must recite the asserted basis for each exception. COMAR 26.01.02.35; 28.02.01. Because the Department's determination to issue the permit renders the conditional cross-exception raised by the Authority moot, this Final Decision is limited to consideration of the exceptions raised by the Administration. The Administration's exceptions and my determinations regarding the ALJ's findings follow below.

Exception No. 1: The Comparative Quality of Mid-River Water

The Administration argues that the ALJ erred in concluding that mid-river water from the Potomac River is, on the whole, cleaner and more easily treated than water withdrawn at the existing shoreline intake. In support of this exception, the Administration makes the following arguments:

- (1) that, on average, water quality at the existing intake is good and comparable to mid-river water;
- (2) that the ALJ's findings are based on data intended to ignore high sediment flows at mid-river;
- (3) that turbidity spikes equivalent to those occurring at the shoreline will occur at mid-river; and
- (4) that the ability to switch intakes to avoid high sediment flows does not support the issuance of a permit.

The record, when considered as a whole, does not support the Administration's assertions that mid-river water is comparable in quality to that drawn from the shoreline. The only sampling data in the record was offered by the Authority. More extensive sampling data, particularly from mid-river during basinwide flood events, would have provided a more comprehensive data set to better evaluate the relative benefits of moving the intake to mid-river, and might well provide support for the Administration's contention, but such data was not presented.

The sampling data presented by the Authority supports the ALJ's finding that mid-river water is higher in turbidity than shoreline water only 20% of the time. Proposed Finding of Fact No. 25. The water quality data and analysis contained in the Billman Report (FCWA Exhibit 22), and in FCWA Exhibits 23, 24, and 25 establish that with respect to turbidity levels, fluctuations in turbidity levels and total suspended solids concentrations, mid-river water quality will frequently exceed that of the water at the existing intake, and on a small, but meaningful number of occasions, to a significant extent. In addition, the Authority's data set also indicates that mid-river water has a higher pH and a higher, more stable alkalinity that makes the water easier to treat. FCWA Exhibit 24 at 8-9, graphs 6B-C; Tr. at 361-62, 365-66. To the extent that the Administration contends that additional data might lead to a different conclusion, the burden falls on the Administration to present it.

The Administration offered expert testimony that the Authority's mid-river sampling was flawed because the sampling protocols were not designed to collect water from the bottom of the river where the intake will be located, and where sediment flows are expected to be higher. Testifying in response on behalf of the Authority, Professor Wilcock explained why, in his view, that mid-river water at the site of the proposed intake was well-mixed and why the mid-river sampling protocols captured samples that were representative of the water quality near the bottom of the river.

Tr. at 863-67. As between the two witnesses, the ALJ found the Authority's witness more persuasive and she accepted his testimony as credible. I am unable to find any strong reason to reject her findings on this point. *See Anderson v. Department of Public Safety*, 330 Md. 187, 217 (1993).

The Administration further contends that the water quality data offered by the Authority from sampling at the Leesburg water intake located upriver, upon which the ALJ relied, is not a reliable predictor of conditions at the site of the proposed mid-river intake. Although the Administration has pointed out a number of differences between the Leesburg intake and the site of the proposed intake, it has failed to identify any testimony that explains how these differences diminish, in any significant way, the reliability of the Leesburg data. Professor Wilcock testified that water quality at the site of the proposed intake was probably even better than at Leesburg, where, because the channel is narrower and water velocities are higher, sediment concentrations are probably also slightly higher. Tr. at 872.

The Administration further argues that the Authority will derive no benefit from a mid-river intake because basinwide flood events occur more frequently than tributary flooding, and that during those events, mid-river water quality is, on average, much worse. The Administration points to evidence in the record that during the six-year period from 1985 through 1990, the average annual number of basinwide flood events was slightly higher than the number of instances in which the tributaries flooded (12 as opposed to 11). State's Exhibit 78 at 3997-98. Furthermore, analysis of mid-river and on-shore intake samples collected on three days in May of 1989 during basinwide flood events shows that on two of those three days, mid-river turbidity was, in fact, significantly higher. Joint Exhibit 22 at 6719; Tr. at 661-62, 655. This evidence, however, does not conflict with other evidence that mid-river conditions are only worse approximately 20% of the time. The Administration is asking me to infer from only two out of 66 reported basinwide flood events, that

similar conditions would be present during a majority of the basinwide flood events. More extensive comparative sampling during basinwide flood events might indeed establish that mid-river conditions are, on average, equivalent to or worse than on-shore conditions, but such evidence is not in the record before me. In the absence of more comprehensive data, the record is sufficient to support the ALJ's finding that mid-river conditions are worse only 20% of the time. Whether or not the Authority is able to switch to the on-shore intake under those conditions does not diminish the benefits derived from improved water quality during periods in which tributaries are flooding.

Finally, I agree with the Administration that a proliferation of intake structures in the pursuit of only marginally improved water quality benefits is not in the public's best interest. However, in this case, the record supports the ALJ's findings that construction of the mid-river intake will maximize the efficiency and reduce the potential for human error in the treatment process, reduce the risk of waterborne disease, the frequency of blockages from leaves, grass and ice, and significantly reduce the costs of treatment⁴. Pursuit of these goals is in the public's interest. The fact that the Authority has been able to meet federal and state water quality standards using raw water from the existing intake does not diminish the significance of these benefits. Nor does it follow from the Department's determination to grant this permit that every future application must be granted, regardless of how slight the incremental benefits may be. Each permit application must be considered on its own merits. Consequently, for the reasons discussed above, this exception must be denied.

⁴ In her second Proposed Decision, the ALJ made 126 separate findings of fact. I do not find it necessary to recite each of the relevant findings or the basis in the record for each one.

Exception No. 2: The Cryptosporidium Risk

The Administration contends that the ALJ committed error by concluding that drawing water from an offshore intake will reduce the risk of waterborne disease, in particular the numbers of cryptosporidium parvum (“c. parvum”) oocysts drawn into plant. Cryptosporidium is a microscopic parasite which can cause the diarrheal illness, cryptosporidiosis. It is found in the feces of infected humans and animals. The Administration argues that the ALJ’s finding is based on a theoretical association between elevated turbidity and the presence of c. parvum, which it asserts, is not generally applicable to all watersheds and has not been established to exist in this particular watershed. The Administration further argues that c. parvum may actually be present at higher levels in mid-river water due to discharges from upstream sewage treatment plants.

The Authority presented expert testimony from John Gaston and other evidence that increased levels of waterborne pathogens, including c. parvum, are likely to correlate with increased turbidity. The Authority’s experts acknowledged, however, that the strength of the correlation between turbidity and c. parvum depends on the extent to which sources of c. parvum are present in the watershed of concern. Discharges from sewage treatment plants present a continuous risk of c. parvum. Droppings from deer and other wild and domestic animals also carry the parasite. While there are no sewage treatment plants discharging into either Sugarland or Broad Runs, the record contains evidence that deer and other wildlife inhabit the Sugarland Run watershed, and that area residents walk their pets along Sugarland Run, leaving animal droppings. The record establishes some degree of risk associated with the presence of sources of c. parvum in the Sugarland and Broad Run watersheds, although the magnitude of the risk is not at all clear.

The Administration argues, persuasively, that the comparative risk between shoreline and mid-river water is unknown because there was no sampling of mid-river water for the presence of

c. parvum oocysts and that the cryptosporidium risk at mid-river is likely to be higher because of wastewater discharges from numerous sewage treatment plants located upstream in the Potomac River basin. There was unchallenged testimony from the Authority's expert, however, that any c. parvum oocysts present in the discharge from upriver sewage treatment plants probably would be well mixed and evenly distributed throughout the river water by the time they reached the Authority's mid-river water intake, and therefore, present the same risk at mid-river as along the shoreline. Tr. at 960-61. Although the reduced risk of cryptosporidium may not be as great as the Authority argues, and additional evidence may have supported the Administration's contention that there is no risk reduction at all, I find that the record supports the ALJ's findings that a mid-river intake would reduce, however slightly, the risk of cryptosporidium in the raw water. Even a small reduction of risk is in the public interest because cryptosporidiosis can be fatal to individuals with AIDS or other diseases which have compromised their immunity systems. This exception is denied.

Exception No. 3: The Sediment and Erosion Control Alternative

The Administration takes exception to the ALJ's conclusion that pursuit of improved sediment and erosion controls on construction sites to address the turbidity problem is not a viable alternative to a mid-river intake. The Administration acknowledges that the Authority lacks the legal power to enact and enforce sediment and erosion controls, but argues that there are no legal obstacles preventing the Authority from contributing financially to support enhanced enforcement of existing controls, as it has done on at least one prior occasion. The Administration further argues that even if enhanced enforcement of sediment and erosion controls would not result in equivalent reductions in sediment loading, the law does not require that an alternative be fully equivalent in order to be considered viable.

The Administration and the Authority disagree about the projected benefits of enhanced enforcement. The Administration finds evidence in the record that the Authority's consultant initially projected a 10%--20% reduction in sediment loading as a result of enhanced enforcement, but later downwardly revised the projection when the Administration expressed concerns about the application. The Authority argues that the reduction will be less than 10% and is within the range initially projected (less than 10%--20%). Both projections are based on assumptions about the underlying effectiveness of erosion controls and enhanced enforcement that may or may not prove to be valid. Regardless of whether the reduction in sediment from construction sites is 20% or less than 10%, the record supports the ALJ's finding that the mid-river intake would result in a significantly higher reduction in solids loading of nearly 50%. This is partly because of undisputed evidence that runoff from construction sites is not the only source of sediment in the raw water. Moreover, improved sediment and erosion controls do not address the documented intake blockage problems the Authority has experienced from leaves, grass and ice along the shoreline, or the occasional contamination from oil spills and other contaminants.

It is further undisputed that the Authority does not have the legal power to enforce sediment and erosion control requirements adopted under local or state authority. While exercising its influence and funding discretion toward the ultimate goal of enhanced sediment and erosion controls is clearly in the Authority's interest, it lacks the legal control necessary to ensure implementation of more aggressive enforcement measures. The ALJ's conclusion that enhanced enforcement of sediment and erosion controls is an inferior alternative to the mid-river intake is sufficiently supported by the record. Consequently, this exception must be denied.

Exception No. 4: Evidence the Intake will Impede the Flow of the River

The Administration argues that the ALJ erred in her finding that there was no evidence in the record that the mid-river intake will impede the flow of a wild and scenic river. Whether a structure impedes the natural flow of a wild or scenic river is one of the criteria listed for consideration in determining whether to grant a waterway construction permit. COMAR 26.17.04.11B(2). The authority for this regulation derives from § 8-406 of the Natural Resources Article, which prohibits, without the specific approval of the Secretary of Natural Resources, construction of any structure that will impede the flow of a wild and scenic river. The regulation appears to contain a delegation of DNR's approval authority to the Director of MDE's Water Management Administration, but it requires the Administration to consider DNR's comments.

In support of its exception, the Administration points to a single letter from John Wilson, the Coordinator for the Scenic and Wild River Program within the Department of Natural Resources. State's Exhibit 12. The letter does not affirmatively state that the mid-river intake would impede the flow of the river. Rather, it states that the Authority's application failed to provide sufficient information to evaluate the effects of the project on that stretch of the river. In addition, the letter states, without further elaboration, that the delegation of approval authority to the Director of the MDE's Water Management Administration was rescinded when the [waterway construction permitting program] was transferred from DNR to MDE in 1995.

The Administration asserts, based on the Wilson letter, that the delegation of approval authority was rescinded by the Secretary of Natural resources, and that since DNR was not a party to this case, the issue was not even before the ALJ. If that were so, then this issue would have no bearing on the outcome of this proceeding.

This exception is denied. The Wilson letter is admittedly ambiguous, but the ALJ obviously concluded from her reading that DNR felt it lacked sufficient information to determine whether the intake would impede the flow of the river. Her apparent interpretation of the letter is not unreasonable. Moreover, there was no testimony that the project would impede the flow of the river. Assuming the delegation of authority was validly rescinded, as the Administration contends, I agree that it is the Authority's responsibility to secure any approvals required under DNR's independent jurisdiction.

Exception No. 5: Consideration of Operational Environmental Impacts

The Administration takes exception to the ALJ's conclusion in her January 1999 Proposed Decision, that the Administration could not consider the environmental impacts of operating the proposed intake in determining whether to grant the permit. The Authority responds that the ALJ was simply rejecting the Administration's contention that the reduced withdrawal of sediment from the river as a result of operating the mid-river intake is an environmental impact that weighs against issuance of the permit. That may have been her intention, but her stated conclusion was much broader in scope. In her Proposed Decision, the ALJ stated that ". . . MDE failed to cite to any authority supporting its view that the operation of a water intake . . . is an appropriate consideration under this regulation or under § 5-507, which pertains to *construction* of waterway obstructions, not *operation* of water treatment facilities." (emphasis in original). I find that the Administration may consider operational impacts when making permit determinations. Nothing in the statute limits the Department's consideration to disadvantages related only to construction.

Consequently, to the extent that the ALJ asserts the general proposition that the Administration may not consider the adverse impacts of the operation, as opposed to the construction, of an intake structure, the Administration's exception is granted. In this particular case,

however, to the extent that the Administration also contends that the quantity of sediment that the Authority would cease to withdraw from the river as a result of switching intakes constitutes an adverse impact which may be considered, the exception is denied. No valid legal authority has been cited which would place upon the Authority, by virtue of its withdrawing river water, an affirmative obligation to improve the quality of the river as it finds it.

Exception No. 6: Adverse Impacts from Construction of the Intake

The Administration contends that the ALJ committed error by finding that the Administration did not demonstrate that construction of the proposed intake would have adverse environmental impacts that would be detrimental to the public interest. Summarily stated, the Administration relies on evidence that excavation of the trench, construction of the intake, and operation of the new intake would cause an increase in sedimentation and destruction of benthic organisms. The Administration did, in fact, establish through its witness that construction of the intake will cause destruction of benthic organisms, and the Authority conceded that the construction will cause some increase in sedimentation. At the same time, however, the Administration's witness acknowledged that no permanent or significant temporary harm to the environment would result from construction of the new intake. *See, e.g.,* Tr. at 82-84; 162-64.

The destruction of benthic organisms in the vicinity of the construction and an increase in sedimentation are virtually inherent in any river bed construction project. The statutory and regulatory standards applicable to in-river construction recognize these eventualities, and impose standards to mitigate such impacts. Were that not the case, all such construction would be prohibited. The Administration failed to establish that any applicable standards would be violated, or that any significant permanent, as opposed to transitory, harm would result from the construction. In light of the transitory nature and insignificant magnitude of the adverse impacts, the ALJ's finding

that the Administration failed to prove the construction would be detrimental to the public interest is supported by the record. This exception is denied.

Exception No. 7: Whether a Mid-River Intake is in the Public Interest

The Administration contends that the ALJ committed error by finding that construction of a mid-river intake is in the public interest. This exception is, in essence, a collective restatement of the Administration's individual objections, and rests largely on its contention that enhanced enforcement of sediment and erosion controls, coupled with construction of an intake enclosure and trashrake, is a viable alternative which will result in significantly less environmental impact on the river.

The viability of the erosion and sediment control alternative has been fully discussed above. Such a program would without a doubt be beneficial, and has been acknowledged by the Authority to have the likelihood of at least partial success in reducing sediment levels in the Potomac. As previously noted, however, the Authority does not have the legal power to ensure implementation of an enhanced program. Moreover, there is other evidence in the record that reducing sediment runoff from construction sites will not address other sources of sediment in the river, nor eliminate the sediment spikes which have plagued the on-shore intake. Tr. at 1095. The ALJ found based on those facts, that the sediment and erosion control alternative was an inferior alternative.

Given the demonstration of additional benefits likely to accrue from construction of the mid-river intake, the existence of an alternative with some effectiveness does not negate the value of the proposed project to the public. While the Potomac River is a significant environmental asset to both parties and both states, the law does not prohibit any impact to the river so long as any feasible alternative exists. Instead, the governing authority envisions a balancing of the relative benefits and impacts of each of the feasible alternatives. The record establishes that the proposed intake is likely

to provide better quality raw water, which will reduce the need for treatment to remove solids and thereby reduce the risk of human error in the treatment process. The record further indicates that with minimum adverse impacts to the river, the proposed intake will lower the risk from waterborne pathogens, disinfection byproducts, oil spills and other contaminants, reduce blockages of the intake from ice, leaves and grass and reduce the Authority's treatments costs. In this case, when the environmental impacts are weighed against the collective benefits of the mid-river intake, the balance tips in favor of the mid-river intake. This exception is, therefore, denied.

Exception No. 8: Extension of the Intake to 725 Feet

The Administration argues that the ALJ erred when she concluded that locating the intake 725 feet into the river from the Virginia shoreline was necessary to ensure a "margin of safety". The Administration contends that the evidence establishes that a 400 foot extension will achieve equivalent water quality improvements, with less environmental impacts to the river. In support of this exception, the Administration points to the Authority's own concessions in the record, including one analysis by the Authority's consultant, which concluded that locating the intake between 400 and 500 feet offshore will almost completely eliminate the effect of the tributaries on intake solids loading (J.E. 67 at 5819), and the Authority's contrary earlier positions in the litigation that an extension to 600 feet, and later, to 550 feet, would be acceptable.

The ALJ apparently gave little or no weight to this evidence. She accepted testimony from one of the Authority's experts that, based on the "professional judgement" of its engineering consultant, nearly doubling the length of the intake pipe to 725 feet was necessary to ensure an adequate "margin of safety".

It is unfortunate that the record on the need for a "margin of safety" is not more extensive. The Authority's consulting engineer was never called as a witness to explain the basis for his

judgement that an adequate margin of safety required nearly doubling the length of the intake pipe. Instead, the Authority offered the questionable testimony of its sedimentation expert who stated his opinion that the engineer's exercise of his professional judgement in this instance was reasonable.

There was, however, other more credible evidence supporting the ALJ's findings on the length of the intake pipe. The Authority's consultant predicted that individual floods may result in sediment plumes that extend farther out into the river than demonstrated by the computer modeling, which was based on average tributary flows and estimated sediment concentrations. J.E. 67 at FCWA 5819. In addition, the authority introduced into the record eight computer enhanced photographs, each of which showed evidence of a visible sediment plume extending 500 feet and beyond from the shoreline during tributary flooding events. FCWA 208.

In my initial decision, I specifically directed the ALJ to make findings on this issue. I agree that the Authority's previous willingness to accept a shorter extension undermines the credibility of its present insistence that nothing short of 725 feet is adequate or acceptable, but the Authority's desire to maximize the benefits from construction of a mid-river intake is understandable. The Administration has not presented me with a strong basis in the record to reject the ALJ's findings, particularly in light of the evidence that adverse environmental impacts from construction of the proposed intake will be minimal. For these reasons, this exception is denied.

THE POTOMAC RIVER PROTECTION ACT

Under the Potomac River Protection Act (the "Act"), any waterway construction permit issued prior to January 1, 2003, is subject to one of two alternate sets of conditions. Under either set of conditions, the intake pipe must be placed at least thirty inches below the water surface at the river's historic low flow, must replace a pipe already in use and may not be used concurrently with the existing pipe. In this case, each of these conditions is satisfied. The pipe will be buried below

the river bottom, and both the pipe and the intake structure will be no higher than thirty inches below the surface of the Potomac at historic low flow. With respect to the bar on concurrent use, I interpret the Act to allow alternating use of the existing and new intakes.

Alternate conditions govern the permissible size of the pipe, depending upon whether issuance of the permit is expressly found to be in the public interest. If issuance of the permit is found to be in the public's interest, the capacity of the new intake may be equivalent to the capacity of the existing intake, provided, however, that a physical device limiting the actual quantity withdrawn to the quantity authorized by the water appropriations permit is permanently attached to the intake.⁵

The Authority has requested approval of a new intake with a maximum capacity of 312 million gallons per day ("MGD"). The Authority's existing intake has a maximum daily capacity of 400 MGD. Its water appropriations permit limits its maximum daily intake to 200 MGD.

I find that the necessary predicate -- that issuance of the permit is in the public interest -- has been satisfied, thus allowing the pipe to be constructed with a capacity of 312 MGD as requested by the Authority. That capacity requires a pipe diameter of ten (10) feet. Under this condition, the intake must have a physical limiting device attached which limits intake to the daily maximum volume to 200 MGD, the quantity authorized by its appropriations permit.

THE AUTHORITY'S CONDITIONAL CROSS-EXCEPTION

The Authority asserts a conditional cross-exception seeking discovery of internal Department documents, the withholding of which was upheld by the ALJ, after an *in camera* examination, on the ground of deliberative privilege. While the Authority claims that these internal documents would

⁵ Under the alternative condition, the withdrawal capacity of a new intake pipe may exceed the quantity the applicant is authorized to withdraw under its water appropriations permit by 5 MGD.

establish that undue political influence that was brought to bear on the Administration's decision to deny the construction permit, the ALJ found that evidence of undue influence is not relevant to determining whether the Department properly denied the Authority's permit application.

In affirming the Proposed Decision to issue the permit, I find no need to rule on the conditional cross-exception. The issue of whether the Department should be compelled to produce the internal documents requested by the Authority is moot.⁶

CONCLUSION

Under this Department's regulations governing permit denials, unless a statute or regulation expressly provides otherwise, both the burden of production and the burden of persuasion to prove that a permit should be issued are on the applicant. COMAR 26.01.02.28. The waterway construction permit program was one of a number of permit programs transferred from the Department of Natural Resources to this Department in 1995 as part of an effort to consolidate the State's environmental permitting programs in one agency. It appears to be one of a number of permits which are still governed by DNR's contested case hearing regulations, and which place the burden on the agency to prove that denial of the permit is in the public's interest. This is a strain on the agency's limited resources. Nothing in the statutory provisions governing waterway construction permits prevents the Department from shifting the burden in these permit adjudications to the applicant, should it desire to do so in the future with an appropriate amendment to its regulations.

Because in this case, however, the burden rested on the Administration, for the reasons discussed above, the Administration has failed to establish that issuance of the permit would be wasteful, dangerous, impractical or detrimental to the best public interest. Therefore, a waterway

⁶ I also find it unnecessary to address the Authority's argument that that the Compact of 1785 compels the Department to allow construction of the intake or that denial of the permit constitutes

construction permit authorizing construction of a water intake structure at the location proposed by the Authority shall be issued in accordance with the following terms and conditions.


- (1) The intake pipe may extend up to 725 feet into the river from the Virginia shore.
- (2) The diameter of the pipe shall not exceed 120 inches.
- (3) The intake shall be constructed in accordance with the plans submitted with the application.
- (4) The intake shall not be marked by a buoy.
- (5) The intake shall have permanently attached a physical device limiting daily intake to 200 MGD.
- (6) Pursuant to Stipulated Finding of Fact No. 6, the intake shall be constructed using either the “portadam” method or the method of construction in the wet using silt curtains, subject to review and final approval of the Administration. Regardless of the method selected, the contractor shall employ best management practices in the construction approved by the Administration, including a turbidity monitoring program approved by the Administration.
- (7) Pursuant to COMAR 26.17.04.09, construction under the permit shall be performed in accordance with the standards set forth in COMAR 26.17.04.08C.
- (8) The construction shall be subject to time limits for commencement and completion of the construction as provided in § 5-510.
- (9) As agreed to in Stipulated Finding of Fact No. 3, concurrent with the issuance of the waterway construction permit, the Administration shall issue a water quality certification pursuant to § 401 of the Clean Water Act.

an equal protection violation.

(10) As agreed to in Stipulated Finding of Fact No. 6, the Authority shall submit its a proposed plan of construction and proposed turbidity monitoring plan to the Administration for review and approval prior to commencement of construction, and shall not commence construction until it has received approval from the Administration. As agreed, the Administration shall exercise its review and approval authority within thirty (30) days following submission by the Authority.

This Final Decision affirms the Proposed Decision except to the extent that specific portions of the Proposed Decision are inconsistent with or expressly rejected in this Final Decision.

November 6, 2000
Date


Bernard A. Penner
Final Decision Maker

NOTICE

In accordance with § 10-222 of the State Government Article of the Maryland Code, the parties are hereby notified that they are entitled to seek judicial review of this Final Decision in the appropriate State circuit court. Any petition for judicial review must be filed within thirty (30) days following receipt of this document.