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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.