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Montgomery County, Md., Must Meet MS4 Permit Obligations Despite Rulings: Holland & Knight.

HIGHLIGHTS:

- Maryland courts have issued two important decisions regarding assessing and collecting stormwater management fees in Montgomery County.
- Court rulings have held that Montgomery County must do a better job explaining how it will achieve its water restoration goals and how it charges its Water Quality Protection Charge (WQPC) to ultimately fund such work.
- Given the rising costs of compliance, Montgomery County and other counties across Maryland may best be served by greater private sector participation in the delivery and financing of stormwater projects.

Maryland courts have issued two important decisions pertaining to the ability of Montgomery County, Md., to assess and collect stormwater management fees from a private landowner and the validity of the Municipal Separate Storm Sewer System (MS4) Permit issued by the Maryland Department of the Environment (MDE) to Montgomery County.

MS4 permits are required under federal and state law to address stormwater runoff impairing water quality and to ensure that the municipalities manage, implement and enforce stormwater management programs to comply with Maryland's receiving water quality standards. In *Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al.*, the Maryland Court of Special Appeals held that the MS4 permit requires the county to "implement or install best management practices on 20 percent of the impervious surfaces within the county in an effort to restore the pollution reductions functions performed by undeveloped land" and to submit "a long term schedule for completion of detailed assessments of each watershed in the County." In order to fund these projects, Montgomery County assesses a Water Quality Protection Charge (WQPC) against all property (including businesses, HOAs and non-profit organizations) based on the potential for a property to contribute to stormwater runoff.1

In one case, the court held that the MS4 permit was faulty because it was not specific enough concerning the manner in which the county measures compliance with water quality goals. In the other, the court held that the county's collection of a fee from a developer was inconsistent with state law. While these cases may be seen as a setback to Montgomery County, they do not alleviate the need of the county (and like counties in Maryland) to continue retrofitting impervious acres and finding a way to pay for it. Assuming the decisions stand, both the county and state can address the courts' concerns with greater explanation of the rationale behind their decisions. Meanwhile, jurisdictions and counties across the region have begun looking at unique, alternative delivery mechanisms, such as public-private partnerships as a means to adhere to MS4 requirements while being more cost-effective. Given that overall requirements to clean up the Chesapeake Bay remain, creative solutions such as public-private partnerships may look increasingly attractive. These court rulings should not affect such creative solutions. In fact, they may make them more attractive.

Stormwater Fees

In *Paul N. Chod v. Board of Appeals for Montgomery County,* the Montgomery County Circuit Court heard a challenge to Montgomery County's stormwater remediation fee (Section 19-35 of the County Code), also known as the WQPC. The challenge was brought by developer Paul Chod in response to an $11,000 WQPC bill assessed against his Shady Grove Development Park in Gaithersburg. Chod's property had several stormwater management ponds that collect and treat all of the stormwater that drains from the park and surrounding private and public properties. In 1991, Chod entered into a Declaration of Stormwater Management Facility with the county that obligated Chod to provide landscaping and trash removal maintenance and the county to provide structural maintenance of the ponds, at the county's discretion. In 2013, the county assessed a WQPC on the petitioner's property for $14,932.17, and the petitioner applied for a credit of the charge. The county eventually proffered a partial credit, which prompted Chod to file suit.

At issue is §4-202.1 of the State Environment Article, the recently amended law2 requiring all 10 local jurisdictions subject to a MS4 permit to adopt a stormwater remediation fee. The underlying Maryland law provides the following:

(e)(3)i) If a county or municipality establishes a stormwater remediation fee under this section, a county or municipality shall set a stormwater remediation fee for property in an amount that is based on the share of stormwater management services related to the property and provided by the county or municipality.

(ii) A county or municipality may set a stormwater remediation fee under this paragraph based on:

1. A flat rate
2. An amount that is graduated, based on the amount of impervious surface on each property
3. Another method of calculation selected by the county or municipality

Typically, a larger, more developed property produces more runoff, and therefore, is assessed a higher WQPC. During trial, the county indicated that it uses the amount of impervious surface on a property to calculate the WQPC. The county further testified, however, that Chod's retention ponds control the quality and quantity of stormwater for the entire 150-acre drainage area and that the county's services are "essentially nonexistent."

The court considered the following two questions concerning the WQPC: (1) whether the WQPC is invalid for failing to adhere to §4-202.1; and (2) whether the petitioner, Chod, was entitled to a full credit for the fee.

Consistency with §4-202.1

The county took the position that §4-202 was inherently flexible, allowing a charge to be imposed as a fee unrelated to the services provided. The court rejected this argument, holding that "the WQPC is not valid simply because it uses one of the methodologies permitted in subsection (e)(3)(ii), which in this case was the amount of impervious surface on the property. The statute still requires that the WQPC be based on the county's stormwater management services that are related to the property." Thus, the court "finds that the WQPC is invalid per se because this Charge need not reasonably relate to the stormwater management services provided by the County."

WQPC as Applied to Chod

Chod also challenged the WQPC under the theory that the county's stormwater management services to the property were essentially nonexistent. The court noted that the stormwater retention

ponds service an area three times the size of the Shady Grove Development Park and receive essentially no services from the county in return. It found that, "as applied, the Charge does not take into account the services provided by the property owner compared with the services provided by the county. Property owners like the Petitioner are thus being burdened with the same charge as other property owners despite bearing the cost of managing the property themselves. Such an application of the statute clearly violates the intentions behind the law, thus creating an arbitrary and onerous burden on the Petitioner."

Significance

While the court did set aside the WQPC as applied to Chod, it did not enjoin the county from continuing to assess stormwater fees. Therefore, this decision should be considered limited to the facts and circumstances of Chod. The county is free to continue assessing WQPCs consistent with the ruling (i.e., making sure that they address the services they provide related to the property – such as maintenance, repair and inspection of BMPs). While parties may see Chod as a roadmap to argue that no fee should be assessed if their system retains all stormwater on site, the county, equipped with information regarding the specific services provided related to the properties, is well positioned to argue that WQPCs are valid.

MS4 Permit

In *Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al.*, the Maryland Court of Special Appeals held that the MS4 permit issued by the MDE to Montgomery County violated the Federal Clean Water Act (CWA) and state law.

Montgomery County obtained its MS4 permit in 2010, requiring the county to restore 20 percent of impervious surfaces and complete a 10 percent restoration requirement from its previous permit term. In December 2013, Montgomery County Circuit Court Judge Ronald B. Rubin held that the MS4 permit did not meet federal or state requirements. The lower court judge found that MDE improperly failed to spell out how the agency would measure compliance. The court further held that "the permit's requirements to restore 20 percent of impervious surface is simply too general to show how permittees will meet water quality standards."

Level of Specificity in Permit

On appeal, the Court of Special Appeals held that the permit was not specific enough to allow for adequate public comment and did not provide meaningful deadlines to measure compliance with water quality goals. Specifically, the court held that permit "fails as a substantive matter because it does not contain ascertainable metrics that defines how the County must comply, or whether at some point it has complied with what all agree are two of the Permit's most important terms: regulation of TMDLs and the twenty percent requirement." The court reasoned that the permit does not "connect specific or measurable BMPs or various management programs [and] requires no justification for why a BMP strategy was selected and how that program or strategy will reduce discharges to the maximum extent practicable." The court concluded that the permit fails to explain how "anyone can define the universe of impervious surfaces or how specific BMPs will achieve the 20 percent impervious restoration requirement under the permit." The court appeared troubled by MDE's reliance on references to the stormwater manual and other BMP guidance documents, which it found "indecipherable," and expressed frustration that there is no way of knowing which BMPs the county will select until after the work is completed.

Significance

The court sent the permit back to MDE, but held the following:

Importantly, though, we hold that the Department and the County had the law right: the Permit falls short not for failing to hold the County to State water quality standards, as the challengers urge, but because it did not afford an appropriate opportunity for public notice and comment and because it lacks crucial details that would explain the County's stormwater management obligations.

Thus, the overall impact of this ruling implicates the process and the level of detail in the permit. Upon remand, MDE must do a better job of explaining its calculations and BMP assessments. It is unclear how specific MDE can actually be given that BMPs usually are applied on a case-by-case basis. In turn, while the court found MDE's guidance documents "indecipherable," stormwater professionals have relied on them for years and appear to have little difficulty applying such documents.

Conclusion

Montgomery County experienced a one-two punch in the courts over the past several months. If the decisions stand upon appeal, the county will have to do a better job demonstrating how it will achieve its restoration goals and how it charges its WQPC to ultimately fund such work. Regardless, the obligation to continue the restoration work remains while MDE makes changes to the permit. Given the rising costs of compliance, Montgomery County may best be served by allowing for greater private sector participation in the delivery and financing of stormwater projects in conjunction with, or exclusive of, its current efforts. Counties in Maryland and elsewhere across the country can look to the green stormwater retrofit public-private partnership in Prince George's County, Md., as an example of how to involve the private sector in developing innovative solutions to help meet their MS4 requirements.

Footnotes

1 Under recent revisions to State law sought by Governor Hogan, other Maryland counties may, but are not obligated to, assess stormwater fees. They do, however, have to ensure adequate funding for MS4 restoration work.

2 While Montgomery County was exempt from amendments to Section 402.1 pursuant to the Watershed Protection and Restoration Programs Revisions, under the law, the county is obligated to file a financial assurance plan that clearly identifies actions it will take to meet its MS4 permit; projected five-year costs; projected annual and five-year revenues; sources of funds to meet the requirements and actions and expenditures undertaken the previous fiscal year. In addition, the county has to demonstrate that it has "sufficient funding in the current fiscal year budget to meet its estimated annual costs." MDE must approve the plan.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.