IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2018

No. 7

FREDERICK COUNTY, MARYLAND,

Appellant,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Appellee.

On Appeal from the Circuit Court for Frederick County
(William R. Nicklas, Jr., Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF AMICUS CURIAE THE CHESAPEAKE BAY FOUNDATION, INC. IN SUPPORT OF APPELLEE

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INTRODUCTION

Amicus curiae, the Chesapeake Bay Foundation, Inc. ("CBF"), hereby submits the following brief pursuant to Maryland Rule 8-511(a). CBF has received written consent from all parties to file this *amicus curiae* brief.

CBF has long been involved in the development of municipal separate storm sewer system discharge permits in Maryland, and has worked for years to strengthen MS4 permits across the state. In 2013, MDE issued draft permits for Phase I medium and large counties in Maryland. CBF commented extensively on these permits, and expressed concern that the MS4 permits did not comply with water quality standards or include numeric benchmarks for pollutant reduction. Instead the final MS4 permits required twenty percent restoration of the counties' impervious surface with no benchmarks for completion.

After issuing the final MS4 permits for a number of jurisdictions, CBF and many other environmental organizations challenged the permits in Circuit Courts across the state. CBF filed suit in Anne Arundel Circuit Court to challenge the Anne Arundel County MS4 permit. Other organizations challenged the Baltimore City, Baltimore County, and Prince George's County MS4 permits in Circuit Court as well. CBF also filed an *Amicus Curiae* Brief in the litigation over Montgomery County's MS4 permits. The various cases were all consolidated and argued before the Court of Appeals in November 2015, and the Court upheld the permits as valid under the Clean Water Act in *Maryland Department of the Environment v. Anacostia Riverkeeper*, 447 Md. 88 (2016).

CBF still takes issue with the current MS4 permits and their approach towards meeting pollution reduction goals. However, and most importantly, CBF does not want to see these permits further weakened, especially over issues as fundamental as the jurisdictional reach of the MS4 permit. While CBF may disagree on the approach adopted by MDE to regulate stormwater in the MS4 permit, we are in staunch agreement that the permit should apply jurisdiction wide. This *amicus curiae* brief will offer a broader policy perspective on why it is critical to regulate stormwater on a jurisdiction scale, and why this key element of the MS4 permits should not be undermined.

STATEMENT OF THE CASE

Frederick County ("the County") has appealed the decision of the Frederick County Circuit Court upholding the substantive provisions of the County's municipal separate storm sewer discharge permit ("MS4 Permit") and remanding for clarification. MDE issued the MS4 permit pursuant to the federal Clean Water Act and section 9-323 of the Environment Article to regulate discharges to and from the County's municipal separate storm sewer system. The Circuit Court determined that MDE may issue a jurisdiction-wide NPDES permit, but remanded the permit back to MDE to clarify inconsistent language with respective to the scope of the permit. (E. 26.)

This case originated when Frederick County filed a petition for review of the final MS4 permit on January 28, 2015. (E. 3.) The case was stayed at the request of the parties pending the outcome of litigation related to substantially similar MS4 permits issued to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County. *See Maryland Dept. of Env't v. Anacostia Riverkeeper*, 447 Md.

88 (2016) [hereinafter *Anacostia Riverkeeper*]. Following the Court of Appeals of Maryland's decision to uphold the MS4 permits as valid, this matter was brought back before the court for a judicial review hearing on May 22, 2017. (E. 8.) The Circuit Court entered an order on July 18, 2017, upholding the substance of the permit but remanding the permit to MDE to revise the geographic scope of the permit. (E. 26–27.) Frederick County timely noted an appeal to the Court of Special Appeals on August 16, 2017 (E. 33). The Court of Appeals granted a Petition for Writ of Certiorari on March 6, 2018.

QUESTIONS PRESENTED

1. Does MDE have the authority to use the impervious surface area of the entire County as the baseline for the permit's requirements, when the Clean Water Act authorizes MDE to issue permits on a jurisdiction wide basis, and when the requirements are consistent with the strategies approved in the Chesapeake Bay total maximum daily load for reducing stormwater runoff?
2. Did MDE properly deny the County's request to use water quality trading to comply with the permit when there is no trading policy or regulations in place?

STATEMENT OF FACTS

Applicable Legal Framework: Clean Water Act

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act prohibits the discharge of pollutants into navigable waters without a permit. The National Pollutant Discharge Elimination System (NPDES)

permitting program authorizes the discharge of pollutants from point sources under certain circumstances.

Under the Clean Water Act, states must assign a use to a water body, such as recreation, fishing, or drinking water supply. Once the state has designated a use, the state then develops criteria to protect those uses, which are referred to as water quality standards. The water quality standards represent how clean the water needs to be in order to support the designated uses. After developing the water quality standards, the states establish effluent limitations to be applied in NPDES permits, because "effluent limitations restrict the discharge of pollutants." *Anacostia Riverkeeper,* 447 Md. at 102 (citing 33 U.S.C. § 1362(11)). Therefore, NPDES permits must contain "(1) effluent limitations that reflect the pollution reduction achievable by using [the best] technologically practicable controls and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet 'water quality standards." *Piney Run Pres. Ass'n v. County Comm'rs of Frederick County*¸268 F.3d 255, 265 (4th Cir. 2001) (quoting *American Paper Inst. Inc. v. United States E.P.A.*, 996 F.2d 346, 349 (D.C. Cir. 1993); *see also* 33 U.S.C. § 1311(b)(1).

Applicable Legal Framework: Maryland Law

The EPA has the authority to delegate NPDES permitting authority to the states. 33 U.S.C. § 1342(b). Maryland received permitting authority in 1989, and the state codified its own pollution control laws that mimic the federal Clean Water Act scheme. Maryland law prohibits the discharge of any pollutant to the waters of the state unless authorized by a permit. MD. CODE. ANN., ENVIR. §§ 9-322; 9-323. MDE may issue a

discharge permit "if the Department finds that the discharge meets… all applicable State and federal water quality standards and effluent limitations." MD. CODE. ANN. ENVIR. § 9-324(a)(1). Maryland case law dictates that a discharge permit must meet the water quality standards of the receiving waterbody. *See Northwest Land Corp. v. Maryland Dept. of Env't,* 104 Md. App. 471, 479 (1995).

The Chesapeake Bay TMDL

Section 303(d) of the Clean Water Act requires states to identify waters within their boundaries where the technology-based effluent limitations in NPDES permits are not strong enough to ensure that the water quality standards for the state's waters are being met. 33 U.S.C. § 1313(d). Often called the Impaired Waters list, once a water body is deemed impaired, the state must establish a total maximum daily load ("TMDL") for every pollutant preventing the water body from achieving the water quality standards. 33 U.S.C. § 1313(d)(1)(C). A TMDL is the maximum amount of any pollutant that a water body can receive and still meet water quality standards. A TMDL is the sum of individual waste load allocations for point sources (which includes municipal storm sewer outfalls), load allocations for nonpoint sources (like farmland), and natural background pollution. 40 C.F.R § 130.2(i).

The Chesapeake Bay was listed as impaired in 1998 by Maryland, Virginia, and the District of Columbia. Chesapeake Bay Program, Backgrounder: Chesapeake Bay TMDL (Total Maximum Daily Load) 1, https://www.chesapeakebay.net/documents/5372/tmdl_2008.pdf (last visited May 8, 2018). The EPA issued the Chesapeake Bay TMDL for nitrogen, phosphorus, and

sediment on December 29, 2010. The Bay TMDL limits loadings in Maryland to 39.09 million pounds of nitrogen per year, 2.72 million pounds of phosphorus per year, and 1,218.10 million pounds of sediment per year. United States Environmental Protection Agency, Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 29, 2010), Executive Summary at 7, available at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html. Reducing pollutants from stormwater runoff will be critical towards meeting the reduction goals of the TMDL in Maryland. Stormwater pollution contributes 28% of Maryland's total nitrogen load, 28% of the total phosphorous load, and 32% of the total sediment load to the Chesapeake Bay. *Id*. at 4-5–4-6.

Frederick County MS4 Permit

Frederick County covers 426,880 acres and is the largest county by land in the state of Maryland. Stormwater from the county drains into five main watersheds: Upper Monocacy River, Lower Monocacy River, Double Pipe Creek, Catoctin Creek, and Potomac River (Frederick County and Montgomery County). Frederick County Office of Sustainability & Environmental Resources, Frederick County Stormwater Restoration Plan 14 (June 30, 2016).

The current permit at issue in this case is the third generation of the Frederick County MS4 permit. The last MS4 permit was issued to the County in 2002. The County applied for its new permit on June 1, 2006. (E. 63.) MDE, in cooperation with the EPA, developed the draft permit based on a template permit developed for Prince George's

County, which the EPA had significant involvement in developing. (E. 63.) On June 28, 2014, MDE issued its Tentative Determination to issue the MS4 permit, and provided the draft permit for public comment. (E. 62.) MDE issued the final MS4 permit on December 30, 2014. (E. 42).

STANDARD OF REVIEW

On appeal, this Court reviews the final decision of the administrative agency at issue in the case and not the decision of the circuit court. *Okoro v. Md. Dep't of the Env't*, 223 Md. App. 198, 205–06 (2015). The review is limited to "deciding if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and if the administrative decision is premised upon an erroneous conclusion of law." *Id.* at 206 (citing *John A. v. Bd. of Educ. of Howard Cnty.*,400 Md. 363 381 (2007)). A degree of deference is owed to the agency, and "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be give considerable weight by reviewing courts." *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 69 (1999).

ARGUMENT

Stormwater runoff remains a growing source of pollution in the Chesapeake Bay watershed, and the MS4 permits are the only avenue the state of Maryland and municipalities have to reduce pollution entering the Bay. *See* Chesapeake Progress, *2017 and 2025 Watershed Implementation Plans (WIPs)*, http://www.chesapeakeprogress.com/clean-water/watershed-implementation-plans (last visited May 2, 2018). Stormwater runoff becomes polluted when rain collects oil,

fertilizers, pet waste, pesticides, toxic metals, and other pollutants from impervious surfaces and washes these pollutants into local waterways, eroding streambanks along the way. Chesapeake Bay Foundation, Polluted Runoff: How Investing in Runoff Pollution Control Systems Improves the Chesapeake Bay Region's Ecology, Economy, and Health 1, 5 (2014). When polluted runoff enters our waterways, it can trigger high bacteria levels that cause beach closings and no-swimming advisories, and restrictions on oyster and shellfish harvesting. *Id.* at 2. The nitrogen and phosphorus from polluted stormwater runoff contributes to the excess nutrients in the Bay, causing algal blooms and depleting dissolved oxygen in the water. *Id.* at 6. As Maryland has continued to develop, increasing impervious area has led to an increase in polluted stormwater runoff, continuing to exacerbate the Bay's pollution problems. *Id.* at 5. These MS4 permits have become all the more important in the state's efforts to reduce pollution from the stormwater sector in Maryland. Maryland Department of the Environment properly applied the permit terms to the whole county in the MS4 permit, as a part of a comprehensive statewide approach to addressing stormwater pollution. This Court should therefore modify the ruling of the Circuit Court and affirm MDE's issuance of the permit without remand.

I. MDE WAS WELL WITHIN ITS AUTHORITY UNDER THE CLEAN WATER ACT TO ISSUE A JURISDICTION-WIDE PERMIT TO REGULATE STORMWATER IN FREDERICK COUNTY.

Municipal separate storm water systems are designed to collect and convey stormwater to protect property from flooding during rain or snow. MS4s "often cover many square miles and comprise numerous, geographically scattered and sometimes

uncharted sources of pollution, including streets, catch basins, gutters, man-made channels, and storm drains." *Nat. Res. Def. Council v. Cnty. of L.A.*, 725 F.3d 1194, 1208–09 (9th Cir. 2013). MS4s were initially excluded from the NPDES permitting program, but Congress amended the Clean Water Act in 1987 in recognition of "the environmental threat posed by stormwater runoff." *See Nat. Res. Def. Council v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). Following the 1987 amendments, municipal stormwater systems must obtain a NPDES permit if the MS4 serves a population over 250,000, a population between 100,000 and 250,000, or if the Administrator or the State "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2). The MS4 permit "may be issued on a system- or *jurisdiction-wide basis*" and "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 other such provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(iii) (emphasis added).

MDE has the authority to apply controls in MS4 permits to the entire County. The Clean Water Act expressly states that MS4 permits can be issued on a system- or jurisdiction-wide basis. 33 U.S.C. § 1342(p)(3)(B)(i). MS4 permits do not function the same way a traditional NPDES permit does because stormwater runoff enters multiple bodies of water from a series of different point sources such as outfalls, pipes, drainage ditches, and so forth. Congress expressly recognized this fact when it created the MS4

permit provisions of the Clean Water Act and built flexibility into the MS4 permitting scheme. Congress gave the permitting authority "broad discretion to issue permits 'on a system-wide or jurisdiction-wide basis,' rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. This increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees." *Nat. Res. Def. Council v. Cnty. of L.A.*, 725 F.3d 1194, 1209 (9th Cir. 2013) (citing 40 C.F.R. § 122.26(a)(1)(v)).

The Clean Water Act itself envisions MS4 permits applying to entire jurisdictions, like a county or municipality. This broad jurisdictional application is especially important for a state like Maryland with regional pollution reduction goals to achieve. The Chesapeake Bay TMDL is "a historic and comprehensive 'pollution diet' with rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region's streams, creeks, and rivers." Chesapeake Bay TMDL, at ES-1. Achieving the goals of this comprehensive pollution diet will require a comprehensive approach. By applying the requirements of these MS4 permits to the entirety of the county, Maryland has adopted a comprehensive approach—authorized expressly in the Clean Water Act—to abate stormwater pollution in Frederick County and throughout the state. It was therefore appropriate and lawful for MDE to issue the MS4 permit with terms that applied county-wide.

II. REGULATING STORMWATER ON A COUNTY-WIDE BASIS HELPS ACHIEVE THE POLLUTION REDUCTION GOALS OF THE CHESAPEAKE BAY TMDL FOR THE STORMWATER SECTOR.

A. Reducing the volume of stormwater entering the MS4 is the most effective way of reducing nutrient and sediment pollution entering waterbodies.

Stormwater runoff remains a persistent problem for the restoration of the Chesapeake Bay. Of the major sectors of pollution required to make reductions under the TMDL, urban and suburban stormwater runoff is the only major source of nitrogen that is steadily *increasing.* Chesapeake Progress, *2017 and 2025 Watershed Implementation Plans (WIPs),* http://www.chesapeakeprogress.com/clean-water/watershed-implementation-plans (last visited May 2, 2018). From 2009 to 2017, nitrogen pollution loads have increased in Maryland from stormwater runoff from 9,533,000 pounds per year to 9,797,000 pounds per year, and this trend is mirrored for the entire Chesapeake Bay watershed. *Id.* For perspective, the 2017 pollution target for stormwater in Maryland was 8,178,000 pounds of nitrogen per year. *Id.* The state is far from achieving that goal.

The MS4 permit program is the only avenue municipalities and the state of Maryland have to address this growing source of pollution. In fact, in its Phase I and Phase II watershed implementation plans (WIPs), Maryland has consistently called for the reduction of pollutants from the stormwater sector. And Maryland recognizes that the majority of the reductions from the stormwater sector will come through the MS4 permits "through the treatment of land that was developed in the past with little or no stormwater controls." Maryland Department of the Environment, Maryland's Phase II Watershed

Implementation Plan for the Chesapeake Bay Watershed, Executive Summary at iii (Oct. 26, 2012).

One of the main ways to reduce the volume of stormwater entering a waterbody is to reduce the impervious surface cover of the surrounding land. Impervious cover can be used as a surrogate to measure stormwater loading, and "[e]fforts to reduce stormwater flow will automatically achieve reductions in pollutant loading. Moreover, flow itself is responsible for additional erosion and sedimentation that adversely impacts surface water quality." (E. 113.) Traditional runoff reduction practices designed to treat 1 inch of rainfall—including environmental site design practices, and structural practices such as infiltration practices, biorentention filters, and dry swales—remove 57% of nitrogen from stormwater runoff. (E. 466, 468.) Alternative best management practices, which includes restoring urban impervious surfaces to pervious surfaces and restoring impervious surfaces to forests, have a 13% efficiency per acre and 71% efficiency per acre for total nitrogen removal, respectively. (E. 457.) Upstream runoff reduction practices, like reducing impervious surface cover, consistently remove even more nitrogen, phosphorus, and sediment per inch of rainfall than stormwater treatment practices. (E. 468.)

B. The MS4 permits were relied on in the development of the Chesapeake Bay TMDL and identified in the Watershed Implementation Plans as a key strategy for reducing stormwater pollution.

Restoring impervious surfaces to abate stormwater runoff has long been a part of the Bay restoration equation, and is a "key strategy in restoring the Chesapeake Bay." *Anacostia Riverkeeper*, 447 Md. at 127. Counties have been on notice since the

development of the Bay TMDL that they would have to reduce impervious cover through the MS4 permits in order to meet the load allocations for urban stormwater runoff.

During the development and adoption of the Chesapeake Bay TMDL, the EPA relied on the watershed implementation plans prepared by the states, and required the states to provide reasonable assurances that the states could achieve the ambitious goals of the TMDL. In Maryland's WIP, the state identifies "renew[ing MS4] permits to require Nutrient and Sediment reductions equivalent to stormwater treatment on 30% of the impervious surface that does not have adequate stormwater controls for MD's largest counties" as one of the key strategies for reducing pollutant loads from the urban stormwater sector. Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Total Maximum Daily Load ES-15 (Dec. 3, 2010). The EPA relied on the requirements identified in the WIPs, which included impervious surface restoration at the county level that would be executed through the MS4 permits, as a key element of the reasonable assurances Maryland made to the EPA to illustrate how the state would meet the goals of the Bay TMDL. *Anacostia Riverkeeper*, 447 Md. at 127–28. This requirement extends to the county as a whole, and it was in MDE's authority to include jurisdiction-wide permit terms.

Additionally, the jurisdiction-wide restoration requirement is in *all* of Maryland's Phase I MS4 Permits for large and medium jurisdictions. As this Court stated in *Anacostia Riverkeeper*, "the State conceived of this strategy as an effective state-wide method of improving the Chesapeake Bay" and the court found the decision to include the restoration requirement—which applied to Montgomery County as a whole—

supported by substantial evidence and not arbitrary and capricious. 447 Md. at 129–30. While CBF advocated for *stronger* permit terms during the initial round of litigation over the 2014 MS4 Permits, this Court approved of the jurisdiction-wide application of the terms. The current efforts by Frederick County to undermine this previously-litigated permit condition are unfounded.

C. Treating only the MS4 system in Frederick County would restore just a fraction of the County's total acreage.

Frederick County is geographically the largest county in the state of Maryland, covering 667 square miles or 426,880 acres. Frederick County has consistently disagreed with the State of Maryland regarding how to calculate the baseline impervious cover under the MS4 permits. For example, the acreage Frederick County proposes would meet the 20% restoration requirement is 1,013 acres, only 0.2% of the geographic area of the entire county, since this represents restoration of only the County's MS4 system. Frederick County, National Pollutant Discharge Elimination System Municipal Separate Storm Sewer Systems Discharge Permit: 2017 Annual Report 66 (2017). This Court should defer to the state's jurisdiction-wide permit terms, and uphold the Circuit Court's decision allowing MDE to issue a jurisdiction-wide permit.

III. MDE APPROPRIATELY EXCLUDED NUTRIENT TRADING FROM THE MS4 PERMITS BECAUSE THERE ARE NO ESTABLISHED REGULATIONS IN PLACE FOR STORMWATER NUTRIENT TRADING.

It was well within MDE's authority to exclude nutrient trading from the MS4 permits as a means to achieve nutrient reductions. There are currently no established

regulations for nutrient trading for stormwater. While nutrient trading may be an appropriate means of complying with traditional NPDES permits under codified regulations, it would be inappropriate to allow nutrient trading in the MS4 permits without established regulations and guidance given the complexity of MS4 permits. MS4 permits in Maryland cover thousands of outfalls that drain in multiple waterbodies across the state and into the Chesapeake Bay. According to CBF's own study on stormwater trading, one of the critical factors "to successfully introducing nutrient trading in the stormwater sector [is] the existence of a clear regulatory basis for trading." Cy Jones, et. al, Chesapeake Bay Foundation, *Nutrient Trading by Municipal Stormwater Programs in Maryland and Virginia: Three Case Studies*, Working Paper, WORLD RESOURCES INSTITUTE 1 (2017), http://www.cbf.org/document-library/cbf-reports/nutrient-trading-by-municipal.pdf. Given that there is no established regulatory basis for trading yet, MDE properly excluded nutrient trading from the MS4 permits.

CONCLUSION

Amicus curiae The Chesapeake Bay Foundation, Inc. have established that the decision to issue the Frederick County's MS4 permit was valid. Therefore, this court should modify the ruling of the Circuit Court and affirm MDE's issuance of the permit without remand.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,771 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s Brittany E. Wright
Brittany E. Wright

TEXT OF PERTINENT STATUTES AND REGULATIONS

33 U.S.C. §1311(b)

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the

introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are

promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USCS § 1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

33 U.S.C. § 1313(d)

(d) Identification of areas with insufficient controls; maximum daily load; certain effluvient limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total

maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

33 U.S.C. 1342 (b)

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

33 U.S.C. 1342(p)

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.
(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) 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.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall

establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

40 C.F.R. 130.2 Definitions

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

MD. CODE ANN. ENVIR. § 9-322

§ 9-322. Discharge of pollutants prohibited; exceptions

Except as provided in this subtitle and Title 4, Subtitle 4 of this article and the rules and regulations adopted under those subtitles, a person may not discharge any pollutant into the waters of this State.

MD. CODE ANN., ENVIR. § 9-323

§ 9-323. Discharge permit required

(a) In general. -- A person shall hold a discharge permit issued by the Department before the person may construct, install, modify, extend, alter, or operate any of the following if its operation could cause or increase the discharge of pollutants into the waters of this State:

(1) An industrial, commercial, or recreational facility or disposal system;

(2) A State-owned treatment facility; or

(3) Any other outlet or establishment.

(b) Additional requirements by rule or regulation. -- By rule or regulation, the Department may require a discharge permit for any other activity.

MD. CODE. ANN., ENVIR, § 9-324

§ 9-324. Issuance of discharge permit

(a) In general. -- Subject to the provisions of this section, the Department may issue a discharge permit if the Department finds that the discharge meets:

(1) All applicable State and federal water quality standards and effluent limitations; and

(2) All other requirements of this subtitle.

(b) Compliance with Title 1, Subtitle 6 of this article. -- Before issuing a discharge permit, the Department shall comply with the provisions of Title 1, Subtitle 6 of this article.

(c) Time and place of information meeting. -- The information meeting required by Title 1, Subtitle 6 of this article shall be held in the geographical area that will be most directly affected if the discharge permit is issued.

(d) Public notice of application. -- The Department shall give public notice of each application for a discharge permit as required by Title 1, Subtitle 6 of this article, and by making available to the public appropriate documents, permit applications, supporting material, plans, and other relevant information.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this 16th day of May, 2018, a copy of the foregoing *Amicus Curiae* brief was electronically filed with the Clerk of the Court and served through the Maryland Electronic Courts (MDEC) system on the following parties. Two (2) hardcopies of the brief were also served by first class mail, postage prepaid.

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