No. _____

In the Supreme Court of the United States

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

Petitioner,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Maryland is authorized by the United States Environmental Protection Agency to issue National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act. The Maryland Department of the Environment issued an NPDES permit to Carroll County, Maryland to authorize stormwater discharges from the County's municipal separate storm sewer system. Notwithstanding that NPDES permits regulate only point source discharges from the permitted facility, this NPDES permit makes the County responsible for nonpoint source runoff and other third-party stormwater discharges that neither flow into nor discharge from the County's municipal separate storm sewer system. The questions presented are:

1. Can responsibility for nonpoint source runoff and third parties' stormwater discharges be imposed upon a local government under the Clean Water Act through an NPDES permit for discharges from its municipal separate storm sewer system?

2. Is a Clean Water Act permitting decision to classify a "Small" municipal separate storm sewer system as "Medium" and subject it to the Clean Water Act's heightened requirements for such systems without complying with the applicable designation process prescribed by 40 C.F.R. § 122.26(a) subject to judicial review?

PARTIES TO THE PROCEEDING

Petitioner County Commissioners of Carroll County, Maryland was the appellee in the Court of Appeals of Maryland. Respondent Maryland Department of the Environment was the appellant in the case below.

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PETITION FOR A WRIT OF CERTIORARI

The County Commissioners of Carroll County, Maryland respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App. 1a) reversing the trial court's judgment in Petitioner's favor is reported at *Maryland Department of the Environment v. County Commissioners of Carroll County, Maryland*, 214 A.3d 61 (2019). The opinion of the Circuit Court for Carroll County (App. 146a) and the decision of the Maryland Department of the Environment (App. 198a) are unreported.

JURISDICTION

The Court of Appeals of Maryland entered judgment on August 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. App. 263a.

INTRODUCTION

This case raises important questions about the jurisdictional scope of the Clean Water Act and permittees' ability to challenge National Pollutant Discharge Elimination System (NPDES) permit conditions that exceed that scope. The United States Environmental Protection Agency (EPA) and state authorities that issue discharge permits under the Clean Water Act to local governments that typically own and operate regulated municipal separate storm

sewer systems (MS4s) have found it increasingly difficult to strike a proper balance between reducing stormwater pollutants and creating logistically and financially practicable permit conditions. As the MS4 permit program matures, EPA and authorized States are more frequently issuing permits, over the objection of permittees, that push the boundaries of the carefully crafted stormwater program created by Congress. Because these permits are most often issued by one of the 47 States authorized by EPA to do so, there are limited opportunities to present these jurisdictional issues to federal courts. *See Pa. Mun. Auths. Ass'n v. Horinko*, 292 F. Supp. 2d 95, 109 (D.D.C. 2003) ("[A]bsent an EPA objection, federal courts had no jurisdiction to review state [Clean Water Act discharge] permitting decisions."). Accordingly, this federal regulatory program has matured in an ad hoc manner nationwide, with widely disparate interpretations being applied in different States, including the State of Maryland's extremely expansive Clean Water Act interpretation at issue here.

This petition raises two situations in which state permitting authorities can, and in this case the State of Maryland did, misconstrue the Clean Water Act to regulate local governments' MS4s far beyond the scope intended by Congress. The first question presented raises a fundamental question of Clean Water Act jurisdiction: whether a discharge permit issued under the authority of the Clean Water Act can be used to regulate nonpoint sources of stormwater pollutants. Petitioner asks this Court to clarify that the jurisdictional limits of the Clean Water Act's NPDES program apply no differently to NPDES permits for MS4s than they do to NPDES permits for

more traditional regulated discharges such as municipal wastewater treatment plants.

The second question presented concerns whether permittees have a right to judicial review of decisions that overregulate their MS4s contrary to the plain language of the applicable NPDES permit regulations in 40 C.F.R. § 122.26. Many local governments' MS4s were classified as "Large" or "Medium" in the early 1990s, thereby subjecting them to more stringent regulation under the applicable federal regulations than "Small" MS4s.[1] As a practical matter, the distinction between Large, Medium, and Small MS4s was not of great importance to many local governments in the early years of the stormwater permit program, but those classifications are growing more significant as the program evolves and permits become more burdensome. Petitioner asks this Court to clarify whether MS4 owners and operators have a right to seek modification or correction of their classification in subsequent permit actions to conform to the applicable regulation and to seek judicial review when the permitting agency's decision violates the regulation.

STATEMENT OF THE CASE

To protect densely populated areas from flooding and erosion, many local governments operate drainage systems of pipes, swales, ditches, and other features to convey stormwater flowing off impervious surfaces such as roofs, roads, and parking lots to nearby waterways. 64 Fed. Reg. 68722, 68794–95 (Dec. 8, 1999). These drainage systems are called

[1] Large and Medium MS4s are often referred to collectively as "Phase I MS4s." Regulated Small MS4s are often referred to as "Phase II MS4s." App. 13a.

"municipal separate storm sewer systems" or "MS4s." 40 C.F.R. § 122.26(b). With certain exceptions not relevant here, the Clean Water Act prescribes that a local government must obtain an NPDES permit to lawfully discharge stormwater from its MS4. 33 U.S.C. §§ 1311(a), 1342(p).

The Clean Water Act does not regulate every drop of rain that falls to the Earth; it regulates only "pollutants" in stormwater that are "discharged" from a "point source" to waters of the United States—which includes stormwater pollutants that are collected by and discharged from an MS4. *See* 55 Fed. Reg. 47990, 47996 (Nov. 16, 1990) (stating that the MS4 permit requirement "only covers storm water discharges from point sources"); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013) (stating that the Clean Water Act only regulates discharges from point sources).[2] In contrast, areas that produce sheet flow off a parking lot or a field and into a water of the United States are examples of *nonpoint* sources that are not within the jurisdiction of the Clean Water Act's NPDES permit program. *Upstate Forever v. Kinder Morgan Energy Partners, Ltd. P'ship*, 887 F.3d 637, 655 (4th Cir. 2018).

Petitioner owns and operates an MS4 that serves certain parts of Carroll County, Maryland, primarily in the more densely populated areas. App. 66a.

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[2] "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Discharge" also is a defined term meaning the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) & (16).

Stormwater in other areas of the County does not flow into or discharge from Petitioner's MS4. Instead, stormwater in areas not served by Petitioner's MS4 reaches surface waters either as diffuse nonpoint source surface flow or as point source discharges from conveyances owned by third parties (e.g., commercial developments with their own drainage systems discharging to nearby waters). App. 377a–78a.

Respondent Maryland Department of the Environment issues NPDES permits in Maryland under authority delegated from EPA pursuant to 33 U.S.C. § 1342(b). App. 199a. Respondent issued an NPDES permit to Petitioner on December 29, 2014 authorizing stormwater discharges from its MS4. App. 262a. However, Respondent included several conditions in the permit that hold Petitioner responsible for the pollutants in nonpoint source stormwater runoff and third-party stormwater discharges in areas of Carroll County not served by Petitioner's MS4. Most significantly, the impervious area 20% restoration condition requires Petitioner to install stormwater controls and retrofits to "restore" (i.e., treat) 20% of the total impervious surface area acreage identified in a county-wide assessment that does not already have updated stormwater controls. App. 389a–90a. Other permit conditions that apply outside of Petitioner's MS4 service area include a requirement to develop and implement watershed assessment and restoration plans for impaired waters that do not receive discharges from the County's MS4. App. 388a–90a. Respondent imposed these permit conditions "jurisdiction-wide," meaning they apply to nonpoint source runoff from impervious surfaces (e.g., parking lots, roofs) and stormwater discharges from conveyances owned by private third parties in areas

of Carroll County not served by Petitioner's MS4. App. 258a–59a.

Petitioner appealed Respondent's final permit decision to the Circuit Court for Carroll County. App. 146a. Petitioner argued that several of the NPDES permit's "jurisdiction-wide" conditions, including the impervious area 20% restoration and watershed assessment and restoration plan requirements, far exceed the jurisdictional scope of the Clean Water Act's NPDES permit program by (1) regulating nonpoint source stormwater runoff and (2) transferring responsibility to Petitioner for third parties' stormwater discharges that are not regulated "discharges from" Petitioner's MS4. App. 147a. Petitioner also argued that Respondent over-designated its system as a Medium rather than a Small MS4, thereby subjecting it to more stringent Clean Water Act regulation contrary to the plain language of 40 C.F.R. § 122.26(b)(7). App. 147a.

The trial court, reviewing Respondent's NPDES permit decision in an appellate capacity under state procedure, entered judgment in Petitioner's favor on the two questions raised in this petition. App. 178a, 186a. Petitioner and Respondent filed cross-appeals to the Court of Special Appeals of Maryland. App. 24a. Before a decision could issue from that court, the Court of Appeals of Maryland granted Petitioner's petition for writ of certiorari to review the trial court's decision (App. 25a), as well as a related decision by the Circuit Court for Frederick County, Maryland.[3]

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[3] Frederick County presented the same questions as Petitioner in the case below, as well as one additional question about the construction of the "maximum extent practicable" standard in 33 U.S.C. § 1342(p)(3)(B)(iii). *See infra* note 7.

Petitioner presented the following question to the Court of Appeals of Maryland: "Does [Respondent] MDE's permit action unlawfully hold the County responsible for unregulated nonpoint source runoff and for stormwater discharges by independent third parties that never enter into or discharge from the [Petitioner] County's MS4?" App. 312a. In response, Respondent argued:

> The permit at issue here reflects the programmatic nature of MS4 permits. Although the permit authorizes only "stormwater discharges from the municipal separate storm sewer system owned or operated by Carroll County" . . . many of its conditions require pollution control measures that, almost by definition, are implemented county-wide. . . . None of these "programs" is implemented with respect to a single outfall or even a single catchment area for a specific MS4 system; these programs are instead implemented throughout the County's jurisdiction. Incorporating these jurisdiction-wide programs into the MS4 permit reflects congressional intent that the municipal-stormwater-permitting program sweep broadly to cover more than just the specific outfalls through which the system discharges. Because of the many ways in which the permit operates throughout the County's political jurisdiction, the [Maryland Department of the Environment] "will continue to define the regulated permit area as jurisdiction-wide" and it "*considers all provisions of th[e] permit to apply to the geographic area of Carroll County*."

App. 361a–62a (emphasis added).

Petitioner also raised the second question presented in this petition before the Court of Appeals: "Has MDE unlawfully subjected the County to overly stringent requirements in the Permit by classifying the County's system as 'Medium' rather than as 'Small' and by subjecting it to the same requirements as 'Large' systems?" App. 312a.

The Court of Appeals of Maryland entered an opinion and judgment in favor of Respondent with respect to the two questions presented in this petition. Regarding the first question, the court upheld the challenged permit conditions on Clean Water Act grounds not raised by the parties. The court stated that assigning responsibility to Petitioner for nonpoint source runoff and third-party dischargers was necessary to ensure compliance with the Chesapeake Bay Total Maximum Daily Load (TMDL) and other local TMDLs established or approved by EPA under 33 U.S.C. § 1313(d). App.75a–76a. On the second question, the court afforded what the dissent characterized as "absolute deference" to Respondent's classification of Petitioner's MS4 as a "Medium" on the basis that Petitioner "acquiesced" in that classification (App. 141a–42a (Getty, J., dissenting)), notwithstanding the acknowledgment that Respondent did not follow the process prescribed by 40 C.F.R. § 122.26(a)(1) and that the system does not meet 40 C.F.R. § 122.26(b)(7)'s definition of a "Medium municipal separate storm sewer system." App. 94a, 99a–100a. Accordingly, the court declined to address the latter question on the merits.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for two reasons. First, the Court should clarify that NPDES

permits issued for MS4 discharges restrict pollutant *discharges from the regulated MS4*, not unregulated nonpoint source runoff and stormwater discharges from conveyances owned by private third parties that do not flow into and discharge from the regulated MS4. Second, the Court should clarify that local governments saddled with overly burdensome Medium or Large MS4 misclassifications contrary to 40 C.F.R. § 122.26(b) should be able to modify or correct those classifications as the five-year NPDES permit is reissued and, if necessary, seek judicial review of the same consistent with 40 C.F.R. § 123.30.

I. REVIEW IS WARRANTED TO PROVIDE CLEAR GUIDELINES TO EPA AND DELEGATED STATE PERMITTING AUTHORITIES ON THE JURISDICTIONAL SCOPE OF NPDES PERMITS ISSUED FOR MS4 DISCHARGES.

No provision of the Clean Water Act has more outstanding, unsettled questions than 33 U.S.C. § 1342(p) and its regulations governing permits for MS4 discharges. At present, there is a patchwork of inconsistent regulation for MS4s, with 47 States exercising delegated authority to issue NPDES permits to MS4s under the Clean Water Act.[4] Because the vast majority of NPDES permits are issued by delegated state permitting authorities, opportunities for these decisions to be reviewed by federal courts of appeals are rare.

The Court of Appeals of Maryland's decision has interjected substantial uncertainty and dramatically

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[4] EPA, NPDES State Program Information, https://www.epa.gov/npdes/npdes-state-program-information (last visited Oct. 27, 2019).

expanded the regulatory liability of MS4 owners by amending the jurisdictional scope of the NPDES program to include nonpoint source runoff that is not otherwise regulated by the Clean Water Act, as well as by transferring responsibility to the MS4 owner for third parties' discharges that are not owned or operated by the MS4 permittee. Guidance from this Court is needed to stop States from misconstruing the Clean Water Act to expand the jurisdictional scope of the NPDES permit program for MS4s beyond the clear intent of Congress.

A. MS4s Are Subject to a Carefully Tailored Regulatory Program under the Clean Water Act's NPDES Program.

Congress, EPA, and States have wrestled for over 40 years with the challenge of how to appropriately regulate municipal stormwater discharges under the Clean Water Act's NPDES framework. MS4s differ in three major ways from other NPDES-permitted facilities, such as factories and wastewater treatment plants, that discharge into waters of the United States. First, unlike wastewater discharges, stormwater discharges are caused by highly intermittent, variable, and unpredictable precipitation events. Second, the MS4 owner—which is typically the local city or county government[5]—is not the primary generator of the pollutants being discharged; rather, the sources of pollutants typically are citizens and businesses engaged in legal undertakings and the activities of daily life, as well as

[5] Other federal or state governmental entities that own or operate "systems similar to separate storm sewer systems in municipalities," such highway departments, public universities, and military bases, also can be regulated under the NPDES program as MS4s. 40 C.F.R. § 122.26(b)(16)(iii).

natural soil erosion and deposition of airborne pollutants on the ground. Past decisions about the location, design, and construction of roads, parking lots, and residential and commercial buildings often play a major role in determining how and where stormwater flows. Third, an MS4 typically discharges through hundreds or thousands of individual outfalls into surface waters, so an MS4's contribution to instream water quality is difficult to ascertain and to regulate precisely. *See Natural Res. Def. Council v. N.Y. Dep't of Envtl. Conservation*, 34 N.E.3d 782, 801–02 (N.Y. 2015); *Md. Dep't of the Env't v. Anacostia Riverkeeper*, 447 Md. 88, 97–98, 134 A.3d 892, 987–98 (2016).

In recognition of the challenges of regulating municipal stormwater, Congress amended the Clean Water Act in 1987 to establish special provisions to address stormwater discharges from MS4s. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69–71 (Feb. 4, 1987) (codified at 33 U.S.C. § 1342(p)). Three of those provisions are relevant to this petition. First, given the expansive universe of natural and manmade stormwater discharges, such discharges require an NPDES permit only if they meet certain statutory criteria. 33 U.S.C. § 1342(p)(1), (2), & (5).[6] Second, because municipal storm sewer system boundaries rarely line up neatly with political jurisdictional boundaries, EPA and

[6] Under these cited sections, stormwater discharges from certain industries and Large and Medium MS4s required NPDES permits by a specified date, other discharges would be subject to regulation on a case-by-case basis based on their impacts on water quality, and the remaining classes of stormwater discharges would be potentially subject to regulation pending a study by EPA.

state permitting authorities were granted flexible authority to issue consolidated permits for multiple MS4 discharges on a "system- or jurisdiction-wide basis." *Id.* § 1342(p)(3)(B)(i). Lastly, because the Clean Water Act's traditional technology-based and water quality-based permitting standards had proven unworkable for MS4s, Congress created a unique standard to govern their NPDES permits:

> Permits for discharges from municipal storm sewers . . . 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.

33 U.S.C. § 1342(p)(3)(B)(iii). The "maximum extent practicable" standard is the exclusive standard governing MS4 permits, replacing the strict water quality-based permitting standard in 33 § U.S.C. 1311 that applies to all other types of NPDES-permitted discharges. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164–65 (9th Cir. 1999).

Congress tailored the NPDES permit program to make it practical to apply to MS4s, but it did not rewrite—and certainly not expand—the jurisdictional scope of the Clean Water Act. Similar to all other NPDES permits, the statute directs EPA and state permitting authorities to issue permits to MS4s with controls to reduce the "discharge of pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). The "discharge of pollutants" means the "addition of any pollutant to navigable waters from any *point source*." *Id.*

§ 1362(12) (emphasis added). This language is mirrored in EPA's implementing regulation, which authorizes the issuance of NPDES permits for MS4s for "discharges composed entirely of storm water" from "municipal separate storm sewers" that are "owned or operated by" a county or other governmental entity. 40 C.F.R. § 122.26(a), (b)(8). Nothing in the statute or EPA's implementing regulations expands the jurisdictional scope of NPDES permits issued to MS4s to nonpoint source runoff. Likewise, nothing in the statue or regulation empowers EPA and States to use NPDES permits to compel MS4 owners to assume responsibility for stormwater discharges owned and operated by third parties outside of the area served by the MS4. *See* 64 Fed. Reg. 68722, 68750 (Dec. 8, 1999) ("Today's rule does not regulate the county, city, or town. Today's rule regulates the MS4.").

In summary, the proper objects of regulation for an NPDES permit issued to an MS4 owner are the stormwater discharges from that MS4. The statute authorizes all such point source discharges under common ownership or operation to be consolidated into a single "system-wide" or "jurisdiction-wide" permit for administrative convenience. 33 U.S.C. § 1342(p)(3)(B)(i). The duty imposed by Congress on the EPA or state permitting authority is to issue a permit that reduces the discharge of pollutants from those collected point sources to the "maximum extent practicable."[7] *Id*. § 1342(p)(3)(B)(iii).

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[7] Another issue of nationwide importance presented in the consolidated appeal below concerns the effect of the "maximum extent practicable" standard in 33 U.S.C. § 1342(p)(3)(B)(iii). App. 38a–39a. That is, does the Clean Water Act empower EPA and States to issue NPDES permits ordering MS4 owners

Respondent Maryland Department of the Environment lost sight of the jurisdictional scope and purpose of the NPDES permit program when it asserted the authority under the Clean Water Act to issue an NPDES permit with conditions (e.g., the above-described impervious area 20% restoration and watershed assessment and restoration planning conditions) that impose legal responsibility on Petitioner Carroll County for stormwater throughout the entire "geographic area" of the County—most of which is not served by its MS4 (App. 327a, 368a). The consequence of that action is that the County has been made legally responsible for stormwater that sheet flows off of impervious surfaces—i.e., nonpoint source runoff—and third parties' stormwater discharges, notwithstanding that neither drains into or discharges from the County's MS4. The Court of Appeals of Maryland's decision affirming Respondent's permit action was wrong and creates a deep conflict in Clean Water Act precedent.

B. The Court of Appeals of Maryland's Decision Conflicts with Longstanding Clean Water Act Precedent that NPDES Permits Cannot Regulate Nonpoint Sources of Pollutants.

Federal courts of appeals have uniformly held that nonpoint source runoff is not subject to regulation

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(typically local governments) to undertake *impracticable* efforts and expense to reduce stormwater pollutant discharges? The Maryland Court of Appeals held that it does despite the statute's "maximum extent practicable" standard. App. 245a. That critical question has never been addressed by a federal court. Though it also is of nationwide importance, this question is not presented in this petition because it was presented solely by co-appellant Frederick County in the case below.

under the Clean Water Act through NPDES permits. *E.g.*, *Ky. Waterways Alliance v. Ky. Utils. Co.*, 905 F.3d 925, 929 (6th Cir. 2018) ("Point-source pollution is subject to the NPDES requirements, and thus, to federal regulation under the CWA. But all other forms of pollution are considered nonpoint source pollution . . . ."); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009) ("[S]urface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the [Clean Water Act] permit requirement."); *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 841 n.8 (9th Cir. 2003) ("Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation."); *Shanty Town Assoc. Ltd. P'ship v. U.S. Envtl. Prot. Agency*, 843 F.2d 782, 791 (4th Cir. 1988) ("[T]he [Clean Water Act] contains no mechanism for direct federal regulation of nonpoint source pollution."). The decision of the Court of Appeals of Maryland stands in stark contrast to this clearly established precedent.

In its briefing in the case below and in the permit decision documents, Respondent claimed broad authority under 33 U.S.C. § 1342(p)(3)(B)(i) to issue a "jurisdiction-wide" permit that holds Petitioner responsible for stormwater *everywhere* within its political boundaries (App. 258a, 359a–60a)—notwithstanding that much of the stormwater regulated by the permit is nonpoint source runoff that does not flow into or discharge from Petitioner's MS4.[8]

[8] The Clean Water Act authorizes States to regulate water quality more stringently than is required by the Clean Water Act. 33 U.S.C. § 1370. However, state law is not at issue in this

That rationale cannot be reconciled with the courts of appeals decisions consistently holding that nonpoint source runoff is not subject to regulation by NPDES permits.

The Court of Appeals of Maryland based its decision on a rationale not argued by Respondent in defense of its permit action—but the result is the same. The court reasoned that the State of Maryland had "assigned" a "nonpoint source pollution reduction" to MS4s in a Watershed Implementation Plan presented to EPA, which EPA subsequently incorporated into the Chesapeake Bay Total Maximum Daily Load (TMDL).[9] App. 74a. The court proceeded to reason that because 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that NPDES permits should contain effluent limitations that are "consistent with the assumptions and requirements" of an applicable TMDL, Respondent was obligated to issue an NPDES permit to Petitioner that holds Petitioner responsible for nonpoint source stormwater runoff throughout its jurisdiction. App. 74a–75a. The court's novel rationale overlooks the simple fact that Petitioner's NPDES permit, not the

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petition. Maryland has not adopted regulations governing NPDES permits for MS4s, *see* COMAR tit. 26, subtit. 08, and its grant of statutory authority from the state legislature consists of those "powers that are necessary to comply with and represent this State under the [Clean Water Act]," Md. Code Envir. 9-253(b). The Court of Appeals of Maryland based its decision on the questions presented in this petition solely on a construction of federal law. App. 75a–76a, 99a–100a.

[9] The Chesapeake Bay TMDL is a planned "pollution diet" for discharges of the pollutants nitrogen, phosphorus, and sediment to the Chesapeake Bay adopted by EPA under 33 U.S.C. § 1313(d). *Blue Water Baltimore v. Pruitt*, 266 F. Supp. 3d 174, 177 (D.D.C. 2017).

Chesapeake Bay TMDL, was at issue. On its face, the permit compels Petitioner to assume responsibility for developing watershed restoration plans for all areas of the County and for reducing the stormwater pollutant loads draining from 20% of the impervious surfaces within areas of the County not even served by Petitioner's MS4. Notwithstanding the existence of a TMDL, an NPDES permit must still comport with and may not override the basic jurisdictional limitations of the Clean Water Act. Furthermore, this novel rationale ignores the fact that the State of Maryland expressly claimed authority under the Clean Water Act to issue a "jurisdiction-wide" NPDES permit that makes Petitioner responsible for stormwater anywhere in the County, including in areas not served by Petitioner's MS4. App. 258a–59a.

The Court of Appeals of Maryland decision authorizes Respondent Maryland Department of the Environment to regulate nonpoint source stormwater runoff through the NPDES permit program, and by extension allows EPA (33 U.S.C. § 1319) and citizens (33 U.S.C. § 1365) to enforce these nonpoint source NPDES permit conditions. That decision is contrary to longstanding precedents in various courts of appeals that NPDES permits can regulate only point source discharges. Guidance from this Court is needed to reconcile these precedents and prevent further unlawful expansion of the jurisdictional scope of the Clean Water Act in NPDES permits issued to MS4s.

C. The Court of Appeals of Maryland's Decision Conflicts with the Previously Unquestioned Principle that the Owner or Operator of a Discharge Is the Proper Permittee.

By affirming an NPDES permit that regulates stormwater outside of the service area of Petitioner's MS4, the Court of Appeals of Maryland's decision also creates the unfortunate precedent of compelling a permittee to assume responsibility for discharges by unrelated third parties.

Many commercial and residential properties that do not drain into Petitioner's MS4 instead drain through privately owned ditches, swales, or pipes leading directly to waters of the United States. Under EPA's regulations, the "person" who "owns or operates" the discharge is responsible and must obtain a discharge permit if one is necessary. 40 C.F.R. § 122.21(a)(1), (b); *see also id.* § 122.26(a)(3)(iii) (requiring the "operator of a discharge" from an MS4 to obtain a permit). Consistent with how the Clean Water Act assigns responsibility for discharges, a "municipal separate storm sewer" subject to the MS4 permit requirement is defined to include only stormwater conveyances that are "*owned or operated*" by the locality. *Id.* § 122.26(b)(8) (emphasis added). Nevertheless, the NPDES permit issued by Respondent holds Petitioner responsible for stormwater discharges that Petitioner neither owns nor operates.

Consider a hypothetical big box store with a five-acre parking lot that discharges stormwater directly to a stream in an area not served by the Petitioner's MS4. App. 22a–23a, 389a–90a (outlining impervious

area evaluation process). To address the property's contribution of pollutants, Respondent could have exercised its residual designation authority to require the retailer to obtain an NPDES permit for its stormwater discharges. 40 C.F.R. § 122.26(a)(9)(i); *see also Los Angeles Waterkeeper v. Pruitt*, 320 F. Supp. 3d 1115, 1122–23 (C.D. Cal. 2018) (holding that permitting authority must proscribe or issue an NPDES permit to private entities discharging stormwater if the authority determines that the discharge causes or contributes to violations of water quality standards). Instead, Respondent took the unlawful regulatory shortcut of transferring the retailer's stormwater pollutant point source responsibility to Petitioner by making the County include the retailer's parking lots in its jurisdiction-wide tally of impervious area—20% of which must be restored under the impervious area 20% restoration requirement. Irrespective of whether the County retrofits the retailer's parking lot or installs treatment somewhere else, the legal responsibility and expense of reducing the retailer's separate point source pollutant discharges by 20% has been imposed on the County.

The above-described unlawful assignment of responsibility for third parties' stormwater discharges arises from the same basic legal error that results in the regulation of nonpoint source runoff: the lower court's decision to affirm an NPDES permit that regulates stormwater that neither flows into nor discharges from the permittee's MS4. This second adverse consequence of that decision is further reason why the Court of Appeals of Maryland's decision should be reviewed by this Court.

II. REVIEW IS WARRANTED TO CLARIFY THAT MS4 PERMITTEES MAY MODIFY OR CORRECT OVERLY BURDENSOME MS4 MISCLASSIFICATIONS BY PERMITTING AGENCIES AND SEEK REVIEW IN COURTS.

There were few reasons to object to Medium and Large MS4 classifications in the early years of the program in the early 1990s because the burden was relatively modest. However, EPA has since dictated that "permitting authorities cannot simply reissue the same permit term after term without considering whether more progress can or should be made to meet water quality objectives." 81 Fed. Reg. 89320, 89338 (Dec. 9, 2016). Now, as the Petitioner's permit illustrates, MS4 permits are becoming increasingly burdensome with each successive five-year permit cycle. As NPDES permits for MS4s more routinely strain the limits of practicability, local governments that have historically—and in Petitioner's case erroneously—been regulated under the rules applicable to Medium and Large MS4s (40 C.F.R. § 122.26) may seek to be regulated under the Small MS4 rules (40 C.F.R. § 122.34) if they qualify for that classification under the controlling federal regulations.

The Clean Water Act prescribes a process that agencies must follow to (1) determine if a discharge will require an NPDES permit and (2) classify the discharge for the appropriate level of regulation. In this appeal, there is no serious dispute that Respondent failed to follow the requisite process to classify Petitioner's MS4 as a Medium system. The question presented largely concerns application of the rule of law and the opportunity for judicial review and remedy available to the hundreds of MS4 permittees

nationwide similarly situated to Petitioner.[10] Can a court afford "absolute deference" (App. 142a) to an agency's classification decision, thereby insulating its permitting action from scrutiny and judicial review on the merits?

A. EPA Regulations Dictate the Process States Must Follow to Designate and Classify a Stormwater Discharge under the NPDES Permit Program.

EPA's Clean Water Act regulations make a distinction between "Small," "Medium," and "Large" MS4s. 40 C.F.R. § 122.26(b)(4), (7), (16). For all practical purposes, Large and Medium MS4s are subject to the same heightened regulatory standard, *id*. § 122.26(d), whereas Small MS4s are subject to more streamlined and less onerous requirements that reflect their size and capacity to implement management measures, *id*. § 122.32.

A county-owned or -operated MS4 may be classified Medium only under one of three circumstances:[11] First, counties that are listed in Appendix I to 40 C.F.R. Part 122 are automatically classified as owners or operators of Medium MS4s. 40 C.F.R. § 122.26(b)(7)(ii). Second, the owner or operator of an MS4 that is "interrelate[ed]" with

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[10] As the Court of Appeals of Maryland noted, of the 1,017 Large and Medium MS4s nationwide as of 2000, 801 of them had been, like Petitioner, designated as such by EPA or a state permitting authority. App. 90a.

[11] MS4s in "[i]ncorporated place[s]" that exceeded certain population thresholds as of the 1990 Census were automatically classified as Medium MS4s under Appendix G to 40 C.F.R. Part 122. 40 C.F.R. § 122.26(b)(7)(i). That provision is inapplicable here because counties are not "incorporated places." 55 Fed. Reg. 47990, 48041 (Nov. 16, 1990).

another Large or Medium MS4 may be classified as a Medium MS4 if EPA or the state permitting authority makes an appropriate determination. *Id.* § 122.26(b)(7)(iii). Lastly, EPA or a state permitting authority may, "upon petition," designate a Medium MS4 within the boundaries of a "storm water management regional authority." *Id.* § 122.26(b)(7)(iv). The owner or operator of an MS4 classified as Medium is required to obtain an NPDES permit for stormwater discharges from the MS4. *Id.* § 122.26(a)(1)(iv).

MS4s that are not classified as Large or Medium may nevertheless be designated as requiring an NPDES permit if they meet EPA's criteria for regulated Small MS4s, 40 C.F.R. § 122.32, or, lastly, if EPA or the state permitting authority makes a determination that the discharge "contribute[s] to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," *id.* § 122.26(a)(1)(v). The latter provision concerning water quality violations is often referred to as "residual designation authority." *Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 26 (1st Cir. 2018).

B. The Court of Appeals of Maryland's Decision Is Wrong, Empowers States to Ignore the MS4 Designation Regulations, and Denies Permittees the Right to Challenge Improper Designations.

Petitioner was first issued a permit as a Medium MS4 in 1994. App. 81a. Petitioner challenged this classification, and requested reclassification as a Small MS4, in the permit action preceding this appeal. App. 259a. The grounds for Petitioner's

request are as follows: Petitioner does not satisfy any of the three criteria in the definition of a Medium MS4, 40 C.F.R. § 122.26(b)(7)(ii)–(iv), applicable to a county because (1) Carroll County is not listed in Appendix I to 40 C.F.R. Part 122; (2) Petitioner's MS4 is not "interrelated" with any other Large or Medium MS4s; and (3) Petitioner's MS4 was never the subject of a petition be designated as part of a regional system. App. 381a–82a. Furthermore, Respondent never made the requisite water quality standards violation determination to designate Petitioner's MS4 under 40 C.F.R. § 122.26(a)(1)(v). App. 182a. Petitioner does not contest that portions of its MS4 satisfy the requirements to be classified as a regulated *Small* MS4.

The Court of Appeals of Maryland did not find fault with Petitioner's factual assertions. In fact, the court agreed that it "might well have agreed" with Petitioner's argument had it been raised earlier. App.94a. The court explained its decision to nevertheless overrule Petitioner's objection to its misclassification as follows:

> What is clear . . . is that the Department had authority to classify the Counties as Phase I jurisdictions and, at least in the EPA's view, it did so. The Counties, in turn, have at the very least acquiesced in that classification since the 1990s. There is thus no question that the agencies charged with administering the Clean Water Act have consistently regarded the Counties as Phase I MS4s and that there is a reasonable basis for doing so. The Counties' delay in challenging their Phase I [Medium or Large] designation perhaps means that the Department did not exercise its designation

> authority more formally in the past, but that does not require that we direct that they now be treated as Phase II [Small] jurisdictions.

App. 99a–100a.

Although Petitioner believes that Respondent's classification decision in the 1990s disregarded the controlling regulation—the definition of arbitrary and capricious agency action—it is not necessary to reconstruct history. There is no prohibition in the NPDES regulations against correcting the misclassification of an MS4 (App. 142a (Getty, J., dissenting)) so that the regulations may be applied as written. Petitioner timely challenged Respondent's decision to perpetuate the misclassification of its MS4 as Medium in 2014 when Respondent reissued the permit now subject to this appeal. That *2014 decision* is the subject of this appeal, and yet the Court of Appeals of Maryland would not allow that question to be adjudicated on the merits. The court's refusal to afford Petitioner an opportunity to challenge this key provision of its NPDES permit is inconsistent with 40 C.F.R. § 123.30, which mandates that state courts provide an "opportunity for judicial review [of state-issued NPDES permits] that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit."

On this point, one of the Maryland Court of Appeals' two sharply critical dissenting opinions characterized the court's opinion as affording "absolute deference" to the NPDES permitting authority. App. 142a (Getty, J., dissenting). Judge Getty's dissenting opinion summarized the majority opinion as follows:

> In the simplest terms, the Majority acknowledges that the [Respondent] Department's construction of its unambiguous regulatory mandate was incorrect, finds little evidence on record to support this interpretation, identifies no legal authority that bars judicial review, and yet defers regardless. By nonetheless "affording 'controlling weight' to [the Department's] post-promulgation views" of its governing regulations [i.e., 40 C.F.R. § 122.26], our ruling today perpetuates a longstanding inequity, and risks foreclosing judicial review to litigants seeking to challenge administrative overreach.

App. 144a–45a (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring)).

Local governments must reapply for NPDES permits for their MS4 discharges every five years. 33 U.S.C. § 1342(b)(1)(B); 40 C.F.R. § 122.41(b). Cities and counties misclassified and over-regulated as Large or Medium MS4s must be afforded the opportunity to have the EPA or state permitting authority comply with their own NPDES regulations as written in determining whether the locality should be issued a Large, Medium, or Small permit. The Maryland Court of Appeals' decision denied Petitioner the right to seek correction of the State's misclassification error and to seek review when the permitting authority refused to comply with the controlling NPDES regulation. Allowing this unfortunate precedent to stand may result in potentially hundreds of other similarly situated cities and counties being denied the right to correct the misclassification and overregulation of their MS4s. Guidance from this Court is needed to clarify that

EPA and state permitting authority classification decisions for MS4s are subject to appropriate modification in accordance with the NPDES regulations and, if necessary, judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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