No. 19-592

In the Supreme Court of the United States

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,
Petitioner,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

AMICI CURIAE THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL MUNICIPAL STORMWATER ALLIANCE, ASSOCIATION OF MISSOURI CLEANWATER AGENCIES, MARYLAND MUNICIPAL STORMWATER ASSOCIATION, NORTH CAROLINA WATER QUALITY ASSOCIATION, SOUTH CAROLINA WATER QUALITY ASSOCIATION, VIRGINIA MUNICIPAL STORMWATER AGENCY, AND WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION'S BRIEF SUPPORTING PETITIONER'S WRIT OF CERTIORARI FOR THE FIRST QUESTION PRESENTED

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INTERESTS OF *AMICI CURIAE*

Amici are organizations from across the United States whose members are public entities that provide water conservation, flood and stormwater management, and wastewater treatment services to the public.[1]

The National Association of Clean Water Agencies ("NACWA") is a nonprofit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include over 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, water reclamation districts, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge. Clean water utilities provide services that are essential to protecting public health and the environment; regulatory certainty is essential to allow utilities to make and plan prudently for investments of public funds.

The National Municipal Stormwater Alliance ("NMSA") was formed in 2017 and is a nonprofit organization representing approximately 3,000

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amici* state that no counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. All counsel of record have consented to the filing of this brief.

municipal separate storm sewer system ("MS4") permittees located within 15 states across eight EPA regions. NMSA's vision is to support MS4 permittees across the country, enabling them to develop efficient and effective stormwater programs. NMSA serves as a voice for MS4 communities, advocating for science-based policies and better understanding of local stormwater management programs.

The Maryland Municipal Stormwater Association ("MAMSA") is a statewide association of 20 counties, cities, and towns that own and operate municipal separate storm sewer systems regulated under the Clean Water Act.

The Association of Missouri Cleanwater Agencies ("AMCA") is a statewide association of 21 local governmental entities that own and operate facilities regulated under the Clean Water Act, including municipal separate storm sewer systems.

The North Carolina Water Quality Association ("NCWQA") is a statewide association of 41 local governmental entities that own and operate facilities regulated under the Clean Water Act, including municipal separate storm sewer systems.

The South Carolina Water Quality Association ("SCWQA") is a statewide association of 39 local governmental entities that own and operate facilities regulated under the Clean Water Act, including municipal separate storm sewer systems.

The Virginia Association of Municipal Stormwater Agencies ("VAMSA") is a statewide association of 43 counties, cities, and other public entities that own and

operate municipal separate storm sewer systems regulated under the Clean Water Act.

The West Virginia Municipal Water Quality Association ("WVMWQA") is a statewide association of 31 local governmental entities that own and operate facilities regulated under the Clean Water Act, including municipal separate storm sewer systems.

Amici submit this brief based on their members' compelling interest in ensuring that the Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permitting scheme, 33 U.S.C. §§ 1251 *et seq*. (1972), and attendant Clean Water Act liability, remains predictable and lawfully within the scope of the Clean Water Act. *Amici*'s members are public agencies funded by local rate and taxpayers, and whose limited dollars are dedicated to protecting water quality in the communities they serve. *Amici*'s members are stewards of public health, the environment, and public funds, whose work requires substantial investment in major infrastructure projects designed to have the greatest environmental impact within limited ratepayer dollars. Requiring *amici*'s members to address discharges that are not within their boundaries, do not discharge to their systems, and over which they have no control, threatens their ability to complete necessary projects and meet existing regulatory obligations.

SUMMARY OF ARGUMENT

A narrow majority of the Maryland Court of Appeals decided that NPDES permits for municipal separate storm sewer systems ("MS4s") can require MS4s to remediate nonpoint source pollution that does not originate from—or even enter—their systems, is outside the service area of their systems, and over which they have no authority or control.[2] The four-to-three majority reached its decision over two dissenting opinions by misinterpreting the Clean Water Act and its enabling regulations. The decision is likely to significantly expand the obligations of local communities that own and operate MS4s—and all point source owners and operators—far beyond what the Clean Water Act and NPDES permit program allow.

Like all point sources, MS4s are required to obtain NPDES permits that set limits on the pollutants

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[2] The NPDES program expressly regulates discharges from "point sources," which are "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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Nonpoint source pollution is not defined in the Clean Water Act, but generally includes sheet flow runoff from impervious surfaces in urban areas, runoff from agricultural lands, and seepage through groundwater. *See* EPA, *Basic Information about Nonpoint Source Pollution*, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution.

discharged from their pipes. MS4s differ from non-stormwater point sources in that their flows are not conveyed to a treatment plant and discharged from a single pipe at the end of the process. Instead, MS4s convey stormwater generated from precipitation events through diffuse networks of pipes and other conveyances that may or may not be interconnected and may serve only a portion of a community or jurisdiction. Stormwater picks up pollutants from a variety of sources, which are then discharged through MS4s directly into surface water. Because MS4s cannot control the amount or frequency of pollutants that enter their systems, MS4s are required to implement best management practices ("BMPs") or other controls designed to prevent pollutants from flowing into their systems, with the goal of reducing the amount of pollutants discharged from their systems to the maximum extent practicable ("MEP"). 33 U.S.C. § 1342(p)(3)(B)(iii).[3]

In this case, Petitioner County Commissioners of Carroll County, Maryland ("Carroll County") filed for a renewal of the NDPES permit for its MS4, and Maryland Department of the Environment ("MDE") issued a permit that not only includes these BMPs, but also requires Carroll County to reduce impervious surfaces by 20% *county-wide*. Like many MS4s, Carroll

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[3] *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 FR 47990-01 (1990) ("Storm water discharges are intermittent by their nature, and pollutant concentrations in storm water discharges will be highly variable. Not only will variability arise between given events, but the flow and pollutant concentrations of such discharges will vary with time during an event.").

County's MS4 serves only certain portions of the county rather than the entire jurisdiction, and Carroll County therefore appealed the permit, arguing, among other things, that requiring county-wide impervious surface reductions exceeded MDE's authority and was arbitrary and capricious.

The Court of Appeals approved MDE's new permitting requirements by misinterpreting a core element of the Clean Water Act "total maximum daily load" ("TMDL") process: the assignment of additional load reduction requirements to point sources where nonpoint source reductions cannot be guaranteed. *See* 33 U.S.C. § 1313(d). States develop TMDLs where controls on point sources alone are insufficient to allow a water body to attain water quality standards. For each waterbody in "nonattainment," a state develops TMDLs, commonly thought of as pollution budgets, identifying the existing point source and nonpoint source discharges and allotting pollution loads that can be discharged from each source that will allow the waterbody to achieve "attainment" status. *Id.*

Point sources are assigned "wasteload allocations," while nonpoint sources receive "load allocations," but in either case, the relevant "load" means the amount of a pollutant that is either attributable to or can be discharged from that source.[4] *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011)

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[4] Load or loading is "[a]n amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading)." 40 C.F.R. § 130.2(e).

("In addition to setting a maximum daily level of pollution, EPA regulations require TMDLs to allocate contaminant loads among point and non-point sources of pollution."). When all sources are limiting their discharges to their wasteload and load allocations only, the waterbody should attain water quality standards.

Once the relevant allocations are made, the loads are translated into permit limits for point sources and nonpoint source BMPs to ensure compliance. EPA, *Guidance for Water Quality Based Decisions: The TMDL Process*, 23-25 (1991) ("TMDL Guidance"). If pollutant reductions cannot be achieved, however, more stringent pollutant limits may be imposed on point sources. *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216-17 ("This process also ensures that the flows of contaminants from point sources are adjusted to account for non-point source pollution, which is inherently more difficult to monitor, control, or reduce.") (citing *Am. Littoral Soc'y v. EPA*, 199 F. Supp. 2d 217, 229 (D.N.J. 2002)).

The Maryland Court of Appeals' decision here inserted into this process a mandatory obligation for point sources to reduce the discharge of pollutants *from* nonpoint sources—i.e., pollution that is generated outside an MS4's service area, does not flow into the MS4's pipes, and over which the MS4 has no authority or control. Petitioner's Appendix ("Pet. App.") 71a-74a.[5]

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[5] *Amici* object to Maryland's imposition of the new burden for nonpoint source reductions on a nearby MS4. Nonpoint source reductions have no place in an NPDES permit, absent the permittees' consent to achieve these reductions and corresponding credit from the permitting agency in the form of less stringent

This holding directly contradicts the longstanding approach whereby a point source would be required to further reduce its *own* loading if the original allocations were insufficient, or nonpoint source reductions could not be guaranteed to achieve attainment of water quality standards. This expanded reading of MS4 permittees' obligations would undermine the ability of *amici*'s members to comply with their NPDES permits, divert critical public resources to address private pollution, and subject them to needless litigation and enforcement actions from regulators and citizen groups. Additionally, this expansion puts *amici*'s members in a perilous position because they lack legal control over activities on these nonpoint source properties, and thus have no legal mechanism to require and enforce the loading reductions, which will result in permit violations through no fault of their own.

Amici request that the Court grant the Petition for Writ of Certiorari of Carroll County. *Amici* are particularly interested in Question Presented No. 1 for the following reasons:

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permit obligations. *See* TMDL Guidance at 24-25. *Amici* do not dispute the importance of plans to implement TMDLs in a manner that reduces pollutants discharged from nonpoint sources. Control of nonpoint sources is crucial to the Clean Water Act's purpose, and NACWA advocated for the inclusion of nonpoint source allocations in the Chesapeake Bay TMDL. *See* Brief of Intervenors-Appellees Virginia Association of Municipal Wastewater Agencies, Maryland Association of Municipal Wastewater Agencies, and National Association of Clean Water Agencies at 11-22, *American Farm Bureau Federation v. EPA*, 792 F.3d 281 (3d Cir. 2015) (No. 13-4079), 2014 WL 1652117.

1. The Court of Appeals' decision is a novel and incorrect interpretation of the Clean Water Act that upends allocation of pollutants among relevant sources through the TMDL process.

2. The decision could require *amici*'s members to dramatically increase rates/taxes on the people they serve in order to clean up messes for people and businesses that they do not serve and who do not pay the corresponding rates/taxes. The decision would also impose obligations on *amici*'s members that they cannot meet. Their inability to comply with these obligations will subject them to additional regulatory scrutiny, enforcement actions and citizen suits, and potentially substantial civil penalties.

3. While *amici*'s members care a great deal about Clean Water Act compliance, the law does not force them to take on burdens that are outside of their control. And doing so would divert already limited ratepayer dollars from critical infrastructure projects and existing permit obligations.

As agencies tasked with and devoted to protection of the environment and water quality, *amici*'s members often advocate for more stringent regulation of nonpoint sources. But the Maryland Court of Appeals' decision undoes the existing regulatory structure and would burden *amici*'s members with addressing discharges for which they lack authority or funding. *Amici* therefore request that the Court grant Carroll County's Petition for Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS' NOVEL AND INCORRECT APPLICATION OF THE CLEAN WATER ACT AND NPDES REGULATIONS THREATENS TO EXPAND THE OBLIGATIONS OF *AMICI*'S MEMBERS SIGNIFICANTLY

A. The Maryland Court of Appeals' Decision Upends the Well-Settled Principle that Permit Obligations Apply Only to Discharges from Systems Owned or Operated by the Permittee.

The Maryland Court of Appeals' four-to-three decision upends a well-established principle of NPDES permitting: that permittees are responsible only for discharges from conveyances that they own or operate. *See* 40 C.F.R. § 122.21(a)(1), (b) ("Any person who discharges or proposes to discharge pollutants" must obtain a permit, and where owner and operator are different persons, operator must obtain the permit); 40 C.F.R. § 122.26(a)(3)(iii) (requiring "operator of a discharge" from an MS4 to obtain a permit). The definition of a "municipal separate storm sewer" rests on the idea that the stormwater conveyances are "owned or operated" by a public agency. 40 C.F.R. § 122.26(b)(8). *See also W. Virginia Highlands Conservancy, Inc. v. Huffman,* 588 F. Supp. 2d 678, 691–92 (N.D.W. Va. 2009), aff'd, 625 F.3d 159 (4th Cir. 2010) (state agency, as "operator" of discharges, required to obtain NPDES permit).

The NPDES program does not contemplate that dischargers will be responsible for discharges they do not own or operate. Instead, "[t]he NPDES is a permit program through which individual entities responsible for covered point sources receive permits setting the maximum discharges of particular contaminants via these sources." *Anacostia Riverkeeper*, 798 F. Supp. 2d at 214. *See also Sierra Club v. Meiburg*, 296 F.3d 1021, 1024 (11th Cir. 2002) ("The statute gives EPA the authority to issue permits for point sources.").

Before this decision, EPA and MS4 operators had a common understanding that NPDES permits are designed to address only those discharges that emanate from their systems. *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 FR 47990-01 (1990) ("Under today's rule, appropriate municipal owners or operators of these systems must obtain NPDES permits for discharges *from these systems*." (emphasis added)). And EPA specifically explained that the MS4 "rulemaking only covers storm water discharges from point sources," that MS4s fall within the statutory definition of point sources (i.e., any discernable, confined, and discrete conveyance), and that "a storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a 'point source.'" *Id*.

The Court of Appeals did not suggest that Carroll County somehow owned or operated the nonpoint sources at issue or that the discharges flowed through Carroll County's MS4. Instead, it determined that

because point sources bear the burden of pollutant reductions where nonpoint source reductions cannot be achieved, point sources must effectively be responsible for nonpoint source discharges. Pet. App. 41a-45a. This interpretation directly contradicts the NPDES regulations stating that "persons" are required to obtain permits for only those discharges they own or operate. *E.g.*, 40 C.F.R. § 122.21(a)(1), (b).

The Maryland Court of Appeals' view of the TMDL process is also not supported by relevant authority. The definition of TMDL establishes that the nonpoint source tradeoffs contemplated by the regulation involve controls on the point source itself:

> 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.

40 C.F.R. § 130.2(i). *See also Anacostia Riverkeeper*, 798 F. Supp. 2d at 216-17 ("This process also ensures that the flows of contaminants *from* point sources are adjusted to account for non-point [sic] source pollution, which is inherently more difficult to monitor, control, or reduce." (emphasis added)).

And the Court of Appeals overlooked existing regulatory tools to address both nonpoint discharges and private storm sewers that do not discharge into an MS4. The TMDL Guidance outlines specific suggested BMPs for nonpoint sources that can be adopted by states. TMDL Guidance at 23-24. EPA also retains

"residual designation authority" to require an NPDES permit for any discharges from private storm sewers owned by commercial, industrial, and institutional entities ("CII sources") that threaten water quality. *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 874 (9th Cir. 2003) (upholding EPA's residual authority to require CII sources to obtain NPDES permits where "the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States") (quoting 40 C.F.R. §§ 122.26(a)(9)(i)(C)-(D)). *See also Blue Water Baltimore, Inc. v. Wheeler*, No. GLR-17-1253, 2019 WL 1317087, *4-5 (D. Md. Mar. 22, 2019).

If the Court of Appeals is correct, point sources could now be required not only to reduce the amount of pollutants in their own discharges, but also to reduce the amount of pollutants discharged from nonpoint sources that do not flow into their systems and over which they have no authority or control. This view has no basis in the Clean Water Act, as described above.

B. The Maryland Court of Appeals' Decision Is Inconsistent with How MS4s Are Designed and Operate.

The Court of Appeals also misinterpreted the Clean Water Act's inclusion of a "jurisdiction-wide" permitting option for MS4s in holding that Carroll County's permit could require impervious surface reductions county-wide, without regard to the MS4 service area. Pet. App. 62a-64a. The Court of Appeals' interpretation is contradicted by the unique nature of

MS4s and the body of law that has developed regarding the MS4 permitting scheme as a result.

The boundaries of an MS4 are established in two ways: first, by the limits of the urbanized areas or incorporated places within the jurisdiction; and then, further, by the limits of the actual MS4 system (*i.e.*, the network of pipes and other conveyances). For example, Carroll County owns and operates an MS4 that serves only certain portions of the County, primarily in the more densely populated areas. Petition at 4.

The NPDES regulations draw MS4 boundaries based on areas of incorporation and Census-defined urbanized areas, rather than entire jurisdictions. Large and medium MS4s are defined to included only those MS4s located in incorporated places meeting specific population thresholds under 40 C.F.R. § 122.26(b)(4), while small MS4s require NPDES permits only for the portions of the system located within a Census-designated urbanized area, unless the permitting authority determines that the MS4 is a cause of water quality impairment. *See* 40 C.F.R. § 122.32 ("If your small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated."). The dissent correctly explained that MDE lacked authority to require restoration of impervious surfaces county-wide, but instead "each county should be responsible only for restoring 20% of impervious surfaces in urbanized areas; in other words, the areas that each county's MS4 serves should be the same as the area in which the county's MS4 permit makes the county responsible for restoring 20% of

impervious surfaces." Pet. App. 131a (Watts, Hotten, and Getty, JJ., dissenting).

And even within these incorporated and urbanized areas, an MS4 does not necessarily extend to the boundaries of the urbanized area. Instead, an MS4 is defined to include only the system of pipes and other infrastructure that convey stormwater to waters of the United States:

> Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body … that discharges to waters of the United States …

40 C.F.R. § 122.26(a)(8)(i). So, where a community owns and operates only a small number of stormwater conveyances that serve a very small area within a larger community, the permit applies only to that system of conveyances and to the portion of the urbanized area actually served.

The "jurisdiction-wide" nature of some MS4 permits therefore does not mean that the MS4 owner or operator is responsible for *all* stormwater within the jurisdiction, but instead applies to all portions of the MS4 that fall within the relevant jurisdiction. This is consistent with 40 C.F.R. § 122.26(a)(3)(ii), which contemplates issuance of permits to entire systems (system-wide) or portions of systems located within a

specific jurisdiction (jurisdiction-wide), which may make up only a portion of the larger whole:

> The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

This section makes clear that jurisdiction-wide permits are intended to address situations where portions of an interconnected MS4 fall within different jurisdictions and allows for permitting of smaller pieces of the larger whole. This means that, for example, Carroll County could have been issued multiple NPDES permits for portions of its system that fall within specific towns or cities (jurisdiction-wide) rather than the single permit it obtained covering its entire system (system-wide).

This approach to MS4 permitting is grounded in the very nature of MS4s, which are diffuse networks of pipes and other conveyances that may not be interconnected or even geographically adjacent, and which may have hundreds of outfalls at various points throughout the system. In *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1208-09 (9th Cir.

2013), the Ninth Circuit explained that 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," and that therefore "Congress recognized that for large urban areas… ms4 [sic] permitting cannot be accomplished on a source-by-source basis" and therefore provided permitting authorities discretion to issue permits "on a system-wide or jurisdiction-wide basis," rather than requiring "separate permits for millions of individual stormwater discharge points." Because of the unique nature of MS4s, "[t]his increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees." *Id*. *See also Anacostia Riverkeeper*, 798 F.Supp. 2d at 248-49 (holding that individual wasteload allocations not required for each MS4 outfall due to the unique nature of MS4s).

The Court of Appeals' new requirement that MS4s address nonpoint sources could greatly expand the obligations of all NPDES permittees in a way that is inconsistent with the Clean Water Act, imposes new funding burdens on ratepayers, and is impossible for point sources to achieve.

II. THE DECISION COULD DIVERT CRITICAL PUBLIC DOLLARS TO PAY FOR PRIVATE POLLUTION AND SUBJECT *AMICI'*S MEMBERS TO NEEDLESS LITIGATION, ENFORCEMENT, AND CIVIL PENALTIES

The effect of this expansion likely will be to require *amici*'s members to divert their limited public ratepayer dollars to address private sources of pollution, stormwater that does not enter *amici*'s members' systems, but rather runs off of private commercial and residential property, and may even flow through privately owned storm sewers. The Court of Appeals' decision would require *amici*'s public agency members and the millions of ratepayers who fund them to bear the burden of addressing these private sources. And complying with these requirements will prove impossible, subjecting *amici*'s members to additional regulatory scrutiny and enforcement by regulators and citizen groups.

A. The Court of Appeals' Decision Will Cause MS4s to Divert Critical Resources from Existing Obligations.

The Court of Appeals' decision will divert already limited funding from critical infrastructure projects and the necessary functions of MS4 compliance to address these private sources. As it stands, *amici*'s members and their ratepayers face a funding shortfall for their existing obligations. Rates for municipal water, wastewater, and stormwater services have increased substantially since the mid-1980s at a rate that outpaces both inflation and the costs of other essential household services. R. Raucher *et al.*,

Developing a New Framework for Household Affordability and Financial Capability Assessment in the Water Sector, 1-3-1-4 (2019).[6] And yet, these rising rates fall far short of the funding required by many communities to meet regulatory requirements, update aging infrastructure, and respond to climate change. *Id*. at 1-4.[7]

MS4s in particular face an uphill battle to obtain the necessary funding and ratepayer buy-in necessary to implement their programs. A 2018 survey of stormwater utilities across the United States found that over a quarter of respondents had faced legal challenges to their stormwater fees. Black & Veatch Management Consulting, LLC, *2018 Stormwater Utility Survey*, 40 (2018).[8] Many of these challenges are based on the nexus between the service provided and the actual use of the system by individual properties. *E.g.*, *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013). Requiring MS4s to address discharges from private sources not connected to their systems will only subject *amici*'s members to further litigation from ratepayers challenging the proper scope of their services and the corresponding fees they charge.

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[6] https://www.nacwa.org/docs/default-source/resources---public/developing-new-framework-for-affordability-report-(final).pdf?sfvrsn=dc1f361_2.

[7] Estimates place the needed investment to replace aging water infrastructure and respond to climate change anywhere from more than $36 billion by 2050 to $1 trillion over the next 25 years. *Id*.

[8] https://www.bv.com/sites/default/files/2019-10/18%20Stormwater%20Utility%20Survey%20Report%20WEB_0.pdf.

And even where courts reject challenges to stormwater fees, these utilities face significant funding shortfalls to meet their existing obligations. The 2018 survey of stormwater utilities, referenced above, found that less than half of respondents reported that their funding was sufficient to meet their obligations, with nine percent indicating they lacked funding to address urgent needs. Black & Veatch at 24. The Maryland Court of Appeals' decision will further stretch these already limited dollars to pay for pollution not even passing through *amici*'s members' systems. To remedy this situation and consider the full range of impacts associated with requiring point sources to address discharges from nonpoint sources, *amici* request that the Court grant Carroll County's Petition for Certiorari.

B. The Court of Appeals' Decision Could Subject *Amici*'s Members to Additional Regulatory Scrutiny, Government Enforcement Actions, and Citizen Suits.

The Maryland Court of Appeals' decision expands the regulatory burden on an already overburdened water sector and the ratepayers they serve, and compliance with this expanded burden will often be impossible. *Amici's* members are in the business and dedicated to the mission of protecting the environment and water quality in the communities they serve. And *Amici* frequently advocate for more stringent regulation of nonpoint sources of water pollution because of the substantial contribution they make to impairment of the nation's waterbodies. But *amici*'s members have no resources, ability, or authority to

restrict discharges from sources that do not flow through their systems. And the Maryland Court of Appeals' decision will place them at risk of noncompliance and enforcement actions.

The Court of Appeals' decision would require MS4s to address discharges over which they have no control. *Amici*'s members are public agencies whose authority is defined by state statutes, and who may lack authority to implement the type of impervious surface area reductions contemplated in the County's permit, which would require the passage of ordinances governing impervious surfaces in areas that do not discharge to their systems. And even if they could, compliance would require authority, staffing, and resources to ensure that runoff from thousands of individual properties is addressed in perpetuity, a scenario in which failure is certain. As such, the Court of Appeals' decision places *amici*'s members at risk of enforcement actions brought by regulators and citizen groups, and imposition of civil penalties and attorneys' fees.

Amici's members have faced intense regulatory scrutiny over the last quarter century, since the adoption of EPA's Combined Sewer Overflow ("CSO") reduction policy in 1994. 59 FR 18688 (April 19, 1994). EPA began prioritizing "Keeping Raw Sewage and Contaminated Stormwater out of Our Nation's Waterways" as one of its top enforcement initiatives in the year 2000, and only recently announced the return of this initiative to its core programs in early 2019. EPA, *National Compliance Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our*

Nation's Waters (Update).[9] In that time, EPA took enforcement or compliance assurance action at 97 percent of large combined sewer systems, 92 percent of large sanitary sewer systems, and 79 percent of large and medium MS4s. *Id*. The return of this initiative to EPA's core programs does not represent the conclusion of enforcement against *amici*'s members, as many utilities nationwide have entered into multi-million, or even billion, dollar consent decrees that will take decades to implement. And because of the lengthy negotiations required to develop these decrees, many more remain in the process. *See* National Association of Clean Water Agencies, *Wet Weather Consent Decrees: Negotiation Strategies to Maximize Flexibility & Environmental Benefit, A Handbook for Utilities*, 8 (2016).[10]

Requiring MS4s to address pollution over which they have no control will bring additional enforcement focus on *amici*'s members. Where an MS4 lacks authority to require the type of impervious surface reductions required by Carroll County's permit, it will face continued regulatory scrutiny and enforcement for its inability to comply with permit obligations. And where regulators decline to bring enforcement actions,

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[9] https://www.epa.gov/enforcement/national-compliance-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our-0.

[10] https://www.nacwa.org/news-publications/white-papers-publications/wet-weather-consent-decrees. In at least one case, EPA required a Utah county to enter into this type of multi-year, federal consent decree focused solely on the county's MS4 permit obligations. *United States v. Lake County, Utah*, No. 2:16-cv-0087 (D. Utah Feb. 2. 2016).

the Clean Water Act allows citizens to bring suit and collect attorneys' fees for their efforts. 33 U.S.C. § 1365. In either scenario, the Clean Water Act imposes substantial civil penalties for NPDES permit violations for each day that the violation persists.[11]

The Court of Appeals' decision would impose an impossible task on *amici*'s members, who are dedicated to protecting water quality in the communities they serve, but have no ability to address discharges over which they have no control. And requiring them to do so will subject them to unnecessary enforcement. Therefore, *Amici* request that this Court grant Carroll County's Petition for Writ of Certiorari.

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[11] The current maximum civil penalty for NPDES permit violations is $54,833 for each day of each violation. 33 U.S.C. § 1319(d).

CONCLUSION

For the foregoing reasons, *amici* request that Carroll County's Petition for Writ of Certiorari be granted, particularly Question Presented No. 1. The Maryland Court of Appeals' decision threatens to expand *amici*'s members' obligations significantly to require them to address discharges over which they have no authority, ownership, or control. This will require diversion of necessary public ratepayer dollars to pay for private pollution, while subjecting *amici's* members to enforcement actions and citizen suits.

Respectfully submitted,

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