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 A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIAN E. FROSH
Attorney General of Maryland
ADAM D. SNYDER*
KUNLE ADEYEMO
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
asnyder@oag.state.md.us
(410) 576-6398

Attorneys for Respondent

JANUARY 23, 2020

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Under the "cooperative federalism" enshrined in the Clean Water Act, the states have the "primary" right and responsibility "to prevent, reduce, and eliminate pollution" within their boundaries and, accordingly, are delegated authority to issue permits under the Act. Those permits may include state-law conditions that are more stringent than federal law. The State of Maryland issued a permit to its political subdivision, Carroll County, authorizing stormwater discharges from the County's municipal separate storm sewer system. In the permit, the State required the County to reduce the pollution from its regulated stormwater discharges by restoring an amount of impervious surfaces equal to 20% of the total such surfaces within the County.

The questions presented are:

1. Where the permit allows the County to carry out the restoration entirely within the bounds of its municipal separate storm sewer system, does expressing the amount of restoration as a fraction of the county-wide total of impervious surface, instead of as an absolute number, mean that the County is responsible for pollution that occurs outside its permitted system?

2. Did the County receive the judicial review to which it was entitled when the state court upheld its designation as a "medium" jurisdiction on the merits,

QUESTIONS PRESENTED – Continued

by concluding that there was a reasonable basis for its designation, and on the separate ground that the County had acquiesced in its status by not previously objecting, when state law limits judicial review to objections raised before the agency?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

At its heart, this case is a dispute between two subdivisions of the State of Maryland over how best to allocate the burden of cleaning up the Chesapeake Bay. Petitioner, the governing body of Carroll County, Maryland, objects to two aspects of the municipal separate storm sewer system ("MS4") permit issued to the County by respondent, the Maryland Department of the Environment. The County contends that these two features of the permit demand too much of the County, both legally and financially.

The County's first objection, to the permit's 20% restoration requirement, is based on a mistaken view of how that requirement operates. Pet. 14. Requiring the County to restore an amount of impervious surfaces equal to 20% of the impervious surfaces within the County does not make the County "legally responsible" for pollution that is discharged outside its MS4 system. The 20% figure simply establishes the *amount* of pollution reduction that the County must achieve in order to address the pollution from its system and contribute to the State's efforts to achieve the ambitious goals of the "Bay TMDL"—the federally required pollution "diet" for the Chesapeake Bay. The County is free to achieve that pollution reduction wherever it likes, whether entirely within the limits of its MS4 system or, as the County chose to do here, by restoring lands elsewhere within its jurisdiction. The restoration requirement does not require the County to do anything outside its MS4 system or otherwise make the County

"legally responsible" for discharges that might occur there.

The County's second objection is to its classification as a "medium" jurisdiction and the way in which the Maryland court resolved that objection, which the petition portrays as a wholesale failure to provide an "opportunity for judicial review." Pet. 20. The County assures the Court that it is "not necessary to reconstruct history" to resolve this second objection, and understandably so, as that history shows that the County accepted its status as a medium jurisdiction when it received its first permit in 1995, accepted it again in renewals of its medium MS4 permit in 2000 and 2005, affirmatively conceded its medium status in a 2014 federal consent decree resolving violations of its MS4 permit, and failed to raise the issue in the permit proceeding before the agency below, despite a State law requirement that it do so to preserve the issue for appeal. The Court of Appeals decided the classification issue in light of that factual history and concluded that the County had acquiesced in its classification as a medium jurisdiction *and*, on the merits, that there is a "reasonable basis" for the classification, based on the County's population and on the State's residual authority to designate jurisdictions as "medium" based on their contribution to water quality impairment.

Neither of the County's objections raises a nationwide issue worthy of the Court's review. The Clean Water Act is an example of cooperative federalism, under which states are free to enact pollution-control measures that are more stringent than federal requirements and

tailored to suit their particular needs. How a Maryland court resolves the questions presented here will have no bearing on how other state courts resolve them based on their own state laws and will have no precedential effect even on issues of federal law. That jurisprudential fact, combined with the unique historical facts that underlie much of the Maryland court's decision, limit the guidance that this Court's review could provide.

STATEMENT

The Clean Water Act

NPDES Permits

The federal Clean Water Act prohibits the discharge of pollutants without a National Pollutant Discharge Elimination System or "NPDES" permit. 33 U.S.C. §§ 1311(a), 1342. Either the EPA, or a state approved by the EPA, issues the NPDES permit. 33 U.S.C. § 1342(b). The Department is authorized to issue NPDES permits in Maryland.

NPDES permits generally must include "(1) effluent limitations that reflect the pollution reduction achievable by using 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 Carroll County*, 268 F.3d 255, 265 (4th Cir. 2001) (citation omitted).

Point sources like factories and wastewater treatment plants typically discharge wastewater through a discrete number of pipes or outfalls that are subject to end-of-the-pipe, numeric permit limitations on the pollutants discharged during the facility's operation. Municipal stormwater systems, by contrast, encompass hundreds or thousands of storm drains, gutters, roadside ditches, and other conveyances, each of which discharges intermittently, typically during rain events. Pet. App. 10a-11a. Those systems—referred to as Municipal Separate Storm Sewer Systems or "MS4s"—were not required to obtain permits until after 1987 and, even then, only on a phased-in schedule. Pet. App. 82a-83a.

Under Phase I of the program, a municipal-stormwater system was required to obtain an MS4 permit by October 1, 1994, if it "serv[ed] a population of 100,000 or more," "contribute[d] to a violation of a water quality standard," or was a "significant contributor of pollutants" to waters of the United States. 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26(a)(1). Although jurisdictions that fall into this category are further differentiated as "large" (i.e., population over 250,000) and "medium" (i.e., population between 100,000 and 250,000), they are all considered "Phase I" jurisdictions and subject to nearly identical permit requirements. "Phase II" of the program required MS4 permits for smaller jurisdictions that were not required to obtain permits under Phase I of the program.

The Chesapeake Bay TMDL

In addition to its permitting requirements, the Clean Water Act requires states to identify all waters within their jurisdiction for which technology-based effluent limitations have proved insufficient to meet water quality standards. For each "impaired" waterbody, a state must establish—with EPA approval—a total maximum daily load, or "TMDL," for each pollutant that fails to meet its corresponding water quality standard. 33 U.S.C. § 1313(d)(1)(C). A TMDL is the maximum amount, or "load," of a pollutant that the water body can receive and still meet applicable water quality standards. *Id.*; Pet. App. 15a.

The portion of a receiving water's pollutant load attributable to point sources of pollution is known as a "wasteload allocation." 40 C.F.R. § 130.2(h). Wasteload allocations "are the most critical part of the TMDL equation," because the effluent limitations included in stormwater permits must be " 'consistent with the assumptions and requirements' " of approved wasteload allocations. *Maryland Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 103-04 (2016) (quoting 40 C.F.R. § 122.44(d)(1)(vii)(B)). In this way, TMDLs underlie all NPDES permits, including the MS4 permit at issue in this case.

Although Maryland has issued, and EPA approved, many waterway-specific TMDLs, the TMDL most relevant here is the one that governs the entire Chesapeake Bay watershed. Because the Bay's watershed

spans several jurisdictions,[1] EPA took the lead in developing and issuing the "Bay TMDL" in December 2010. Pet. App. 18a; *Anacostia Riverkeeper*, 447 Md. at 104-07. The Bay TMDL calls for Maryland and the other Bay jurisdictions to reduce, by 2025, their discharges of nitrogen, phosphorus, and sediment—the three pollutants for which the Bay violates water quality standards.

To ensure achievement of these goals, EPA required each Bay jurisdiction to submit watershed-implementation plans, or "WIPs," which serve as "'roadmaps' setting forth a plan for how and when a jurisdiction will reach the pollution reduction goals in the Bay TMDL." *Anacostia Riverkeeper*, 447 Md. at 109 (quoting Bay TMDL); *see also* Pet. App. 19a. In its watershed-implementation plan, Maryland stated that it would achieve pollution-reduction goals by including within Phase I MS4 permits conditions that would "require nutrient and sediment reductions equivalent to urban stormwater treatment on 30 percent of the impervious surface that does not have adequate urban stormwater controls." Md. Ct. App., No. 5, Sept. Term, 2018, Appendix to Appellant's Br. ("Appellant's App'x") 18. Phase II MS4 permits would also require restoration of impervious surfaces, but only at 20% of a smaller jurisdiction's total, instead of the 30% required of the larger jurisdictions. Pet. App. 82a n.74. EPA

[1] The Chesapeake Bay watershed covers parts of Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia.

evaluated Maryland's plan and incorporated it into the Bay TMDL. *Anacostia Riverkeeper*, 447 Md. at 109-10.

Maryland Water Pollution-Control Law

In addition to the requirements of federal law, Maryland has enacted its own state-law water pollution-control requirements. Since 1982, Maryland has required its counties and municipalities to implement stormwater-management programs to "'reduce as nearly as possible the adverse effects of stormwater runoff.'" *Anacostia Riverkeeper*, 447 Md. at 111 (quoting Md. Code Ann., Envir. § 4-201 (LexisNexis 2007)). To assist the counties in developing their programs, state regulations established design criteria intended to "'maintain after development, as nearly as possible, the predevelopment runoff characteristics' of the land." *Anacostia Riverkeeper*, 447 Md. at 111 (quoting Md. Code Ann., Envir. § 4-203(b)(1) (brackets omitted)). In 2000, the Department amended the regulations to provide, among other things, "'water quality treatment of up to 90 percent of the average annual rainfall throughout the State.'" *Id.* (quoting 27 Md. Reg. 1167, 1168 (June 16, 2000)). Then, in 2007, the General Assembly enacted legislation requiring the use of "environmental site design" on new development projects. *Id.* at 112; *see also id.* at 131-32. Environmental site design includes the use of management practices and techniques such as green roofs and other measures that "'mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources.'" *Id*. at 112 (quoting Md. Code Ann., Envir. § 4-201.1(b)).

In addition to stormwater-specific measures, Maryland law prohibits the discharge of *any* pollutant to waters of the State unless authorized by a permit issued under § 9-323 of the Environment Article. Md. Code Ann., Envir. § 9-322. The Department is authorized to issue a permit if it finds the discharge will comply with applicable state and federal water quality standards and effluent limitations. Md. Code Ann., Envir. § 9-324(a)(1).

The Carroll County MS4 Permit

The Department notified Carroll County in 1990 that, because its population exceeded 100,000, it would be required to obtain a Phase I MS4 permit. The County objected that some of its population resided within incorporated municipalities and thus should not be counted toward the 100,000-person threshold for designation as a Phase I MS4 jurisdiction under EPA regulations. Pet. App. 91a-92a. The County asked the Department to omit them from Phase I or "at least delay the application of the Phase I requirements" to the County. Pet. App. 92a. In response, the Department agreed to delay Carroll County's designation as a Phase I jurisdiction until 1994, by which time all agreed that the population of the County outside incorporated areas would surpass 100,000 people. Pet. App. 92a; Appellant's App'x 20-27 (1990s correspondence).

The Department issued Carroll County its first MS4 permit, effective in 1995, and issued permit renewals in 2000 and 2005. Pet. App. 81a. The reissued

permits required the County to evaluate water quality, prioritize watersheds for restoring impervious surfaces to more natural conditions, and begin those restoration efforts. In September 2009, Carroll County applied for its fourth MS4 permit, which is the one at issue here. Md. Ct. App., No. 5, Sept. Term, 2018, Record Extract ("R.E.") 102.

After extensive discussions with interested parties, the Department, in 2012, sent a revised draft of the Carroll County permit to EPA for its review. EPA objected to the draft permit and requested that the Department add more specific language requiring the County to restore, within the permit term, 20% of the previously developed impervious land that had little or no stormwater controls. Pet. App. 75a. After incorporation of the new language, EPA lifted its objection to the draft permit. *Id.*

With EPA approval in place, the Department completed its processing of the application and, in June 2014, published its tentative determination to issue the permit. Pet. App. 198a. The County participated in the subsequent public hearing and submitted written comments but did not object to its Phase I status. Pet. App. 81a. The Department issued notice of its final determination on Carroll County's permit in December 2014. Pet. App. 22a.

The County's MS4 permit requires it to continue its various stormwater management programs, including erosion and sediment control, identification and elimination of illicit discharges, and management and

maintenance of county-owned property. R.E. 50-54. Additionally, the permit requires the County to submit an impervious area assessment and "commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area . . . that has not already been restored to [the maximum extent practicable]." Pet. App. 390a.

The State Court Proceedings

Carroll County filed a petition for judicial review of the final permit in the Circuit Court for Carroll County, which stayed the case at the request of the parties, in part to await the outcome of the *Anacostia Riverkeeper* litigation. In *Anacostia Riverkeeper*, environmental organizations challenged the substantively identical MS4 permits issued to Maryland's "large" MS4 jurisdictions and contended that they were insufficiently protective of the environment. The Court of Appeals upheld the permit, upon concluding that the 20% requirement was consistent with the Bay TMDL, was not arbitrary and capricious, and was supported by substantial evidence in the record. *Anacostia Riverkeeper*, 447 Md. at 129-30.

Thereafter, proceedings in Carroll County's case resumed before the circuit court, which upheld certain aspects of the permit but ruled that the Department had erred by (a) requiring the County to restore 20% of all of the impervious areas within the County, as opposed to only those areas that were within the regulated MS4 systems themselves and (b) by regulating

the County as a "medium" jurisdiction instead of a "small" jurisdiction required to obtain only a Phase II permit. Each party appealed the portions of the circuit court's decision adverse to it, and the County petitioned the Court of Appeals of Maryland for a writ of certiorari to review the circuit court's decision, together with another circuit court's decision in a similar case involving Frederick County's MS4 permit.

The Court of Appeals granted certiorari, consolidated the two counties' appeals, and upheld the permits. As to Carroll County's first argument here, the court concluded that the 20% restoration requirement plainly "does not require the County to undertake impervious surface restoration outside the geographic area that drains into the MS4," Pet. App. 65a; it is instead "a numeric water quality based effluent limitation" designed to reduce the effect of the County's MS4 discharges to levels "necessary to achieve applicable water quality standards for the Bay." Pet. App. 75a. As for the County's objection to its classification as a "medium" jurisdiction, the court concluded that it was "clear" from the record that "the Department has authority to classify the Count[y] as [a] phase I jurisdiction[ ]," that "the agencies charged with administering the Clean Water Act have consistently regarded the Count[y] as [a] Phase I MS4[ ]," and that "there was a reasonable basis for doing so." Pet. App. 99a-100a. Because the County had never challenged its status, "the Department did not exercise its designation authority more formally" than it might have, Pet. App. 100a, but

there was evidence in the record that it had done so. Pet. App. 93a, 99a.

The County's MS4 permit expired in December 2019. Although the County continues to operate its MS4 system under the terms of the expired permit, the County has submitted a final compliance report indicating that it has already fulfilled the permit's 20% restoration requirement. The Department is currently processing the County's application for a new permit.

REASONS FOR DENYING REVIEW

I. THE 20% RESTORATION REQUIREMENT IS VALID UNDER FEDERAL AND STATE LAW.

A. The 20% Restoration Requirement Does Not Make the County Legally Responsible for Non-Point-Source Pollution Outside its MS4 System.

The requirement that the County restore 20% of its total impervious surface area is the "most significant[]" issue that the County raises, Pet. 5, and the only issue that the amici address, and yet both misconstrue how the restoration requirement operates in Maryland. The restoration requirement does not, as the County claims, make it "legally responsible" for nonpoint source pollution that flows from impervious surfaces outside its MS4 system. Pet. 14. As the Court of Appeals found, the 20% restoration provision "does not require the County to undertake impervious surface

restoration outside the geographic area that drains to the MS4, as it does not dictate where such restoration must take place." Pet. App. 65a. The County remains free to carry out its restoration obligations entirely within the limits of its MS4 system, or elsewhere in the County, if restoring lands in the more rural areas of the County proves to be less expensive.[2]

As the Court of Appeals observed, the County does not "contend that the inclusion of an impervious surface restoration requirement itself is beyond the scope of an MS4 permit." Pet. App. 66a. Instead, the County objects to the use of "a county-wide measure of impervious surface as the baseline" for calculating the restoration requirement. *Id*. But using 20% of a county-wide baseline just sets the *amount* of the restoration that is required. That amount—which came to approximately 1,600 acres—could have been set just as easily at a specific number of acres or as a larger percentage of the impervious surfaces within a smaller geographical area. In fact, the County presumably would not object

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[2] To support its argument to the contrary, the County quotes at length from the Department's brief below to suggest that the Department's position has been that all the permit's conditions, including the 20% restoration requirement, apply "throughout the County's jurisdiction." Pet. 7. The County, however, omits from its quotation the list of programs that the Department was addressing in its brief—the County's "stormwater management program," its "erosion and sediment control program," and its "public education and outreach program," Pet. App. 362a—which clearly apply jurisdiction-wide. The 20% restoration requirement also applies jurisdiction-wide in the sense that the County has the flexibility to carry out restoration anywhere it chooses within its jurisdiction, but nothing more than that.

to a requirement that it restore 100% of the impervious surfaces within the limits of its "MS4 service area," *see* Pet. App. 69a, even though that amount would far exceed the amount imposed in its current permit.[3]

In other parts of the petition, the County seems to acknowledge that the permit does not require it to restore lands outside its service area, Pet. 19, but objects that the restoration requirement violates the Clean Water Act by regulating nonpoint source pollution, *id*. at 14-17, and by assigning to the County "the legal responsibility and expense" for other operators' discharges, *id.* at 18-19. Neither assertion withstands scrutiny.

First, the permit plainly does not regulate nonpoint source pollution. By its terms, it "covers all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Carroll County, Maryland." Pet. App. 384a (§ I.B). Nothing in the permit supports the notion that uncontrolled nonpoint source discharges from areas outside the County's MS4 can give rise to liability under its permit. Instead, the purpose of the 20% restoration requirement is to set an effluent limit on the discharge of point-source pollution *from the County's MS4*.

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[3] The baseline for the County's restoration requirement came to approximately 8,000 acres of untreated impervious surfaces. Md. Ct. App., No. 5, Sept. Term, 2018, Appellant's Br. 23. Of that amount, the County has indicated, 7,092 acres represent the County's "MS4 impervious acres," while 943 acres "do not discharge through the County/municipal MS4." *See* 2015 NPDES MS4 Permit Annual Report at 43 (Dec. 29, 2015), available at https://www.carrollcountymd.gov/media/10621/2015-annual-report.pdf.

Second, the County argues that the Court of Appeals erred in arriving at the "novel rationale" that the Department, in its TMDL watershed-implementation plan, properly "assigned" a "nonpoint source pollution reduction" to the County's MS4. Pet. 16. But the County's argument ignores an important feature of the regulatory scheme: the TMDL process allows states to address the pollutant load from nonpoint sources, which are more difficult to control, by imposing limits on point sources. *See* 40 C.F.R. § 130.2(i) ("[T]he TMDL process provides for nonpoint source control tradeoffs."); *see also* Pet. App. 72a (collecting EPA guidance and other authorities establishing that states may assign nonpoint source contributions to point source permits to achieve TMDL limits).

The County's amici, for their part, acknowledge the State's ability to make tradeoffs between point sources and nonpoint sources, but suggest that any such tradeoffs must be accomplished through reductions in the "'flows of contaminants *from* [the] point source[].'" Br. of Amici Curiae Nat'l Ass'n of Clean Water Agencies, et al., at 12 (citation omitted). Two problems confront the amici at this point. First, as the County acknowledges, it is difficult to regulate directly the flow of contaminants from the "hundreds or thousands" of storm drains, gutters, and other outfalls that make up an MS4 system. Pet. 11. The need to contend with that regulatory challenge is what distinguishes MS4 permits from those applicable to industrial facilities, *see* Pet. 11-12, and it is why the permit achieves pollution reductions by improving the quality of the

stormwater that flows *into* the MS4 system, instead of through end-of-the-pipe controls. That is, the permit seeks to reduce municipal stormwater pollution through measures designed to reduce the litter, oil, and other contaminants that are deposited on the ground, R.E. 51-54, and by requiring the County to restore the land's natural pollution-control capacity by diverting stormwater runoff from impervious surfaces into vegetative swales, stormwater retention ponds, and other best management practices. This use of a "surrogate or proxy" for direct end-of-pipe controls, Pet. App. 70a, is consistent with the Clean Water Act and the "unique" and "flexible" approach it allows for permitting MS4 systems. *See* Pet. 12.

If, on the other hand, the amici's concern is that the *amount* of pollution reduction achieved through the restoration requirement exceeds the MS4 system's total pollution discharge, the facts are otherwise. Although "an MS4's contribution to instream water quality is difficult to ascertain and to regulate precisely," Pet. 11, the County has indicated that the amount of impervious surface within its MS4 system (7,092 acres) far exceeds the approximately 1,600 acres that it was required to restore. *See supra* n.3. Using that impervious area as a surrogate for pollution load demonstrates that the County's MS4 will continue to be a net discharger of pollutants even after fulfilling the 20% restoration.

Moreover, EPA has determined that the amount of pollution control achieved by the 20% restoration requirement is necessary to meet the water quality

standards set forth in the Chesapeake Bay TMDL. The 20% restoration requirement was included as a "key element" of the Bay TMDL, *Anacostia Riverkeeper*, 447 Md. at 110, 128, and EPA approved the TMDL based on the restoration requirement and other commitments that the states had made, *id.* at 127; *see also American Farm Bureau Fed'n v. United States E.P.A.*, 792 F.3d 281, 291 (3d Cir. 2015) (stating that EPA approved the TMDL "only after" determining that each jurisdiction had provided "reasonable assurance" that it would meet the pollutant reductions). As the County acknowledges, Pet. 16, federal law requires that effluent limits, including the 20% restoration requirement, must be "consistent with the assumptions and requirements" of the Bay TMDL,[4] *see* 40 C.F.R. § 122.44(d)(1)), so it cannot be that Maryland's decision to implement those "assumptions and requirements" in the County's MS4 permit violates the Clean Water Act.[5]

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[4] For this reason, the County's MS4 permit must be consistent with other TMDLs as well, which explains why the permit includes a requirement that the County formulate watershed assessments for Double Pipe Creek and the other impaired watersheds in the County. That planning requirement does not, however, require the County to carry out restoration in addition to the 20% restoration requirement discussed in text. Pet. App. 388a-390a (¶E.2.a).

[5] To the extent that the County objects to the inclusion of the 20% restoration requirement within the Bay TMDL and the associated implementation plans, its recourse was to challenge EPA's establishment of the TMDL, Pet. App. 35a (citing federal cases)—a conclusion of the Court of Appeals that the County does not dispute here. *See also American Farm Bureau Fed'n*, 792 F.3d at 292 (noting, in case involving challenge to Bay TMDL, that "TMDLs have long been the subject of litigation").

B. States May Impose Requirements That Are More Stringent than Federal Law.

Even if the County were correct that the 20% restoration requirement went beyond the limits of federal law, Maryland could still impose the restoration requirement under State law. As the County itself recognizes, Pet. 15 n.8, the Clean Water Act expressly allows states to set more stringent permit conditions under state law. *See* 33 U.S.C. § 1370(1) (stating that the Act does not "preclude or deny the right of any State" to adopt its own pollution-control standard, so long as it is not "less stringent than" the corresponding federal standard); *see also* 40 C.F.R. § 123.1(i) ("Nothing in this part precludes a State from . . . [a]dopting or enforcing requirements which are more stringent or more extensive than those required under this part.").

Federal courts have long held that states are free to regulate water pollution independently of the Clean Water Act. *See*, *e.g.*, *Bragg v. West Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001) (citations omitted); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999); *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) (noting that "the source State may require discharge limitations more stringent than those required by the Federal Government"); *cf. PUD No. 1 of Jefferson County*, 511 U.S. 700, 712 (1994) (holding that states may include within water quality certifications required under 33 U.S.C. § 1341 conditions necessary to ensure compliance "with any other appropriate requirement of State law"). This power to regulate pollution in a way that is "more stringent or

more extensive" than federal law requires, 40 C.F.R. § 123.1(i), has been exercised by Maryland's General Assembly, through legislation authorizing the Department to set pollution-control standards that are "*at least as* stringent as those specified by the National Pollutant Discharge Elimination System," Md. Code Ann., Envir. § 9-314(c) (emphasis added).[6]

Because the Court of Appeals concluded that the restoration requirement was authorized under federal law, it had no need to address the more stringent provisions of Maryland state law. *See* Pet. App. 57a n.53, 76a n.68. But any proceedings on remand would inevitably require consideration of those more stringent provisions, which counsels against this Court's certiorari review in at least three ways.

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[6] The County concedes that "[t]he Clean Water Act authorizes States to regulate water quality more stringently than is required by the Clean Water Act," Pet. 15 n.8, but suggests that Maryland does not actually do so, because under Maryland law the Department only has "'[all] powers necessary to comply with and represent this State under the [Clean Water Act],'" Pet. 16 n.8 (quoting Md. Code Ann., Envir. § 9-253 but omitting the word "all"). Aside from somehow reading (and revising) Environment § 9-253's broad grant of authority as if it were a limitation, the County ignores § 9-314(c) and its "at least" language, which establish the federal NPDES requirements as the floor, not the ceiling, for the Department's standards. Moreover, the County's pinched reading of the pertinent Maryland statutes cannot be squared with the construction of Maryland law given by the Court of Appeals, which is "the ultimate expositor[ ] of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see* Pet. App. 7a (describing state-law programs that "directly regulate" nonpoint sources where the Clean Water Act does not).

First, it underscores that the Court's guidance on the proper construction of the Clean Water Act's MS4 provisions necessarily will be of limited effect. A Maryland court's decision on the Clean Water Act has no precedential effect in other states, so the impact of the Court's review would be limited to begin with. But more importantly, states will always be able to impose more stringent provisions under their own state laws, the substance of which this Court's guidance could not anticipate or address.

Second, the Court's review will likely have limited effect, even *in this very case*, because Maryland pollution-control law is more stringent than the Clean Water Act. Maryland law prohibits the discharge of any pollutant to waters of the State unless authorized by a state-law permit, *see* Md. Code Ann., Envir. §§ 9-322, 9-323, and any discharge permit must contain provisions that comply with "State law or regulation." Code of Md. Reg. 26.08.04.02A(1)(d). As the Court of Appeals observed, Maryland law, in contrast to federal law, "directly regulate[s]" nonpoint source pollution "through [its] own regulatory programs." Pet. App. 7a. Maryland law also requires counties to have in place erosion and sediment control programs and stormwater management programs that directly regulate the stormwater discharges that are at issue here. *See* Md. Code Ann., Envir. §§ 4-103, 4-202. Thus, even if it were true that the Clean Water Act did not allow an MS4 permit to be used to address the effect of nonpoint sources of stormwater pollutants, Pet. 2, Maryland, like other states, is free to impose that same requirement under *state* law.

Finally, that Maryland and the 46 other states authorized by EPA to issue NPDES permits might adopt "widely disparate interpretations" of MS4 responsibilities, Pet. 2, is neither surprising nor a reason for exercising certiorari review. Differences from state to state are not surprising because, as discussed above, the Clean Water Act allows each state to structure its MS4 program more broadly to reflect its more stringent state laws. The resulting "patchwork" of MS4 outcomes is not a problem to be rectified by this Court's review, as the County suggests, Pet. 9, but is instead an intended feature of a system of cooperative federalism that "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

II. THE COUNTY'S CLASSIFICATION AS A MEDIUM PHASE I JURISDICTION HINGES ON UNIQUE HISTORICAL FACTS AND PROVISIONS OF MARYLAND LAW.

The County's second objection—to its classification as a "medium" jurisdiction—similarly does not merit this Court's review, for two principal reasons.[7]

First, the County's classification hinges on a 25-year historical record, which establishes that the County has repeatedly conceded that it qualifies as a medium

[7] The County's amici do not support this aspect of the Petition.

jurisdiction. That history begins in the early 1990s, when the County accepted the demographic reality that, by the mid-1990s, its MS4 system would qualify as a medium jurisdiction under the statutory definition because it "serv[ed] a population of 100,000 or more." 33 U.S.C. § 1342(p)(2)(D).[8] Although it may well be true that, "[a]s a practical matter," the County's classification as a medium jurisdiction "was not of great importance" to it at the time, Pet. 3, that presumably would have changed "as the program evolve[d] and permits become more burdensome," *id.* Yet the County continued to accept its status as a medium MS4 jurisdiction in each successive renewal of its permit, including the 2005 permit, which first imposed a restoration requirement, Pet. App. 64a, and the 2014 permit that imposed the 20% restoration requirement and gave rise to the appeal below.[9] Not only did the County

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[8] The County does not discuss, cite to, or even acknowledge 33 U.S.C. § 1342(p)(2)(D), which is "the *statutory* definition of a medium Phase I MS4," Pet. App. 96a & 96a n.96 (emphasis added); *see also* Pet. App. 84a. Instead, the County chooses to rely solely on EPA regulations and their Appendix I. Pet. 21-22. Indeed, the principal textual basis of the County's classification argument in the court below—the use of the term "urbanized"—appears not in any statute or regulation but only in the *title* to Appendix I. Pet. App. 86a. That is, the County's claim of misclassification rests not on the pertinent statute, nor even a provision of a regulation, but on a title, of a chart, which appears in an appendix, to a regulation. Evidently, the County seeks to have this Court find significance in the label EPA gave that chart but give no deference to EPA's repeated determination that the County qualifies as a medium jurisdiction.

[9] The County is wrong to suggest in its petition that it challenged its classification "in the permit action preceding this appeal." Pet. 22. As the Court of Appeals recognized below, the

continue to accept its medium status as the terms of its permit became "more burdensome," it *conceded* its status when EPA sought to enforce those terms against it, at which point the County admitted the accuracy of EPA's findings that the County's "'MS4 serves a population of at least 100,000,' which is verbatim the language of the Clean Water Act defining medium Phase I jurisdictions." Pet. App. 96a n.96 (quoting portions of the Consent Agreement and Final Order appearing at R.E. 344 (¶15)).

The County assures the Court that it is "not necessary to reconstruct history" to resolve the County's objection to its classification, Pet. 24, but that history drove the state court's conclusion that the County had "agreed to, or at least acquiesced in, [its] treatment as [a] medium MS4[]." Pet. App. 97a; *see also id.* at 99a. The County's acceptance of its status as a medium jurisdiction was subsequently incorporated into the Bay TMDL and its implementation plans, which specifically required the restoration that the County now finds objectionable. Yet, even then the County did not challenge the requirement, as was its right. *See* Pet.

County "did not question its status as a Phase I jurisdiction during the administrative process for its most recent permit," and only did so for the first time "when it sought judicial review of that permit." Pet. App. 81a n.73. The page of the administrative record that the County now cites for the contrary proposition refers to a comment made by another county in *its* Phase I MS4 permit proceeding. Because the MS4 permits issued to the medium Phase I jurisdictions were nearly identical, the Department included the same response-to-comments document in the administrative records for each permit decision, but that does not mean that the County raised the issue in the "permit action" before the agency.

App. 35a (citing federal cases); *see also American Farm Bureau Fed'n.*, 792 F.3d at 292 (deciding challenge to Bay TMDL). Any guidance that this Court would be able to provide on this issue would unavoidably consider that long history of concession and reliance and, thus, limit its effect and usefulness to the unique circumstance presented by this case.

In an effort to look past this decades-long factual record, the County suggests that its challenge to its classification raised *legal* issues that the Court of Appeals did not address on the merits, thus depriving the County of the "opportunity for judicial review" that states must provide as a condition of federal delegation under the Clean Water Act. Pet. 24. But the Court of Appeals *did* address the County's classification on the merits and found it "clear" that "the Department had authority to classify the Counties as Phase I jurisdictions" and that EPA had determined that the Department had done so. Pet. App. 99a-100a. In reaching those conclusions, the Court of Appeals rejected as "without merit" the County's argument that the list of medium jurisdictions set forth in "Appendix I" to the EPA regulations is "exclusive." Pet. App. 94a; *see also* 40 C.F.R. § 122.26(b)(7)(ii); 40 C.F.R. Pt. 122, App. I; Pet. 21.

The Court of Appeals also found, on the merits, that there was evidence in the record showing that the Department had "appropriately designated" the County as a medium jurisdiction under its separate, "residual" authority to make such designations based on the jurisdiction's impact to water quality. Pet. App. 97a; *see*

33 U.S.C. § 1342(p)(2)(E) (authorizing designation where an MS4 system "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States"). The court acknowledged that the evidence was "limited," Pet. App. 99a, but it appropriately recognized that the County's long acquiescence in its medium status "may have foreclosed any need" for the Department to invoke its residual designation authority "more formally," Pet. App. 97a, 100a.[10] Still, there remained "no question that the agencies charged with administering the Clean Water Act have consistently regarded the

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[10] For this very reason, Maryland law requires that judicial review of water pollution permits must "be on the administrative record before the Department and limited to objections raised during the public comment period." Md. Code Ann., Envir. § 1-601(d)(1). This statutory provision reflects the broader principle of administrative law that "a person may not obtain judicial review of a matter when he or she failed to properly raise the matter before the administrative agency," *Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991); *see also McKart v. United States*, 395 U.S. 185, 194-95 (1969) (exhaustion requirement serves to prevent judicial review from being " hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"). Because the County did not raise the classification issue in the permit proceeding before the agency, it is foreclosed from raising it here on appeal. *See Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 398 (1990) (declining to review issue that had not been raised in state administrative proceeding because "unambiguous application of state procedural law makes it unnecessary for [this Court] to review the asserted claim"). As the Court of Appeals made clear, it reached the merits of the classification argument only because *Frederick* County—which did not seek this Court's review—had preserved it. Pet. App. 81a-82a n.73.

Count[y] as [a] Phase I MS4[ ] and that there is a reasonable basis for doing so." Pet. App. 99a-100a.

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The County objects to what the State has determined is the best way to accomplish the ambitious and important goal of Bay restoration, but these types of uniquely governmental issues, involving uniquely governmental permits, are necessarily limited by each state's fiscal arrangements, environmental needs, and state laws. Maryland's highest court has long distinguished such intrastate governmental disputes from all others, because "a State agency or instrumentality, with respect to claims against or disputes with the State, is in a vastly different position from an individual or a private entity." *State v. Board of Educ. of Montgomery County*, 346 Md. 633, 644 (1997). Indeed, counties and municipalities "are but local divisions of the State," *Rockville v. Randolph*, 267 Md. 56, 62 (1972), and they possess only the powers that have been granted to them by the State, either through the Maryland Constitution or by statute. *See Kent Island Def. League, LLC v. Queen Anne's County Bd. of Elections*, 145 Md. App. 684, 689 (2002), *cert. denied*, 371 Md. 615 (2002).

This material difference of circumstances is also reflected in the experience of this Court, which has observed "that federal courts have not often encountered" litigation pitting a State government litigant against another agency of the same State. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260 (2011); *see also Marshall v. Dye*, 231 U.S. 250, 257 (1913)

(limiting the right to obtain certiorari review of the judgment of the highest court of a state to those who have "a personal, as distinguished from an official, interest in the relief sought and in the Federal right alleged" (citing *Smith v. Indiana*, 191 U.S. 138 (1903)).

These considerations confirm that intramural disagreements like this one—between a state and its political subdivision over uniquely governmental issues—are appropriately resolved by each state's highest court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland
ADAM D. SNYDER*
KUNLE ADEYEMO
Assistant Attorney General
200 Saint Paul Place,
20th Floor
Baltimore, Maryland 21202
asnyder@oag.state.md.us
(410) 576-6398

Attorneys for Respondent

**Counsel of Record*