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In The  
Court of Special Appeals of Maryland

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No. 02199  
September Term, 2013

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MARYLAND DEPARTMENT OF THE ENVIRONMENT, *et al.*,  
*Appellants,*

v.

ANACOSTIA RIVERKEEPER, *et al.*,  
*Appellees.*

Appeal from the Ruling of the Circuit Court for Montgomery County  
(The Honorable Ronald B. Rubin, Judge)

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BRIEF OF AMICI CURIAE  
MARYLAND ASSOCIATION OF COUNTIES,  
MARYLAND MUNICIPAL STORMWATER ASSOCIATION,  
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,  
WET WEATHER PARTNERSHIP AND BALTIMORE COUNTY

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Amici curiae Maryland Association of Counties, Maryland Municipal Stormwater Association, National Association of Clean Water Agencies, Wet Weather Partnership, and Baltimore County (collectively, “County Amici”) respectfully submit this brief in support of Appellants Montgomery County (the “County”) and the Maryland Department of the Environment (“MDE”). County Amici represent counties, cities, towns and other local clean water agencies that own and operate municipal separate storm sewer systems (“MS4”) throughout Maryland and the United States. These MS4s are subject to Clean Water Act (“CWA”) discharge permits similar to the Montgomery County MS4 permit at issue.

### **STATEMENT OF THE CASE**

County Amici adopt the Statement of the Case of Appellant Montgomery County.

### **QUESTION PRESENTED**

Is the permit valid even though it does not mandate strict compliance with all water quality standards for all receiving waters for discharges from the County’s MS4 drainage system?

### **STATEMENT OF FACTS**

County Amici adopt the Statement of Facts of Appellant Montgomery County.

### **STANDARD OF REVIEW**

County Amici adopt the Standard of Review of Appellant Montgomery County.

### **ARGUMENT**

In the case below, the Petitioners cobbled together select phrases from the CWA and the U.S. Environmental Protection Agency’s (“EPA”) implementing regulations and comparable provisions of Maryland law applicable to industrial and municipal wastewater discharges to argue for a financially and physically impossible mandate on locality-owned stormwater drainage systems known as MS4s. Their interpretation, which is plainly contrary to the CWA, has never been accepted or applied by MDE or EPA. To County Amici’s knowledge, the Circuit Court’s Opinion and Order accepting Petitioners’ argument is the first time that any federal or state court in the United States has ruled that the CWA requires MS4 permits to mandate strict compliance with water quality

standards. Instead, the statute provides a different legal standard for MS4s – that pollutant discharges be reduced to the “maximum extent practicable,” or “MEP” for short. CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). Unless reversed, the Circuit Court’s Opinion and Order will have harsh financial impacts on Maryland’s families and businesses. It will effectively require MDE to force local governing bodies to raise stormwater utility rates and taxes – to whatever amount is needed – to attempt in a mere five years the monumental task of reversing the effects of centuries of real estate development on water quality in urban and suburban areas so as “to meet water quality standards.” (See E.21, ¶¶ 4, 8). This is not only impracticable; it is impossible. Notwithstanding the demonstrated commitment of County Amici and their members to clean water, County Amici must oppose the Petitioners’ and Circuit Court’s positions and urge reversal of this first-of-its-kind judicial ruling that completely disregards the statutory practicability standard and a mountain of legal precedent.

**I. The Question of Whether MDE Must Require Strict Compliance with Water Quality Standards Is Before the Court, But Not the Issue of Whether MDE Has Discretionary Authority to Do So in the Absence of Any Such Mandate**

This case squarely addresses one and only one aspect of a broader dispute over the extent of CWA requirements applicable to MS4s. The issue that has been properly joined here is whether MDE is under a statutory *mandate* to include a requirement to strictly comply with all water quality standards, *see* 33 U.S.C §§ 1311(b)(1)(C), 1313(a)–(c), when issuing discharge permits for MS4s in accordance with CWA § 301(a) (prohibition on discharge except pursuant to a discharge permit), *id.* § 1311(a), and CWA § 402 (permitting program), *id.* § 1342. If the Court should rule that that there is no such requirement (as MDE, Montgomery County, County Amici, and EPA agree), County Amici respectfully urge this Court not to opine on the separate, critically-important issue of whether MDE nevertheless has the *discretion* to impose a water quality standards compliance requirement regardless of CWA § 402(p)(3)(B)(iii) and the practicability of such a requirement.

From County Amici's close familiarity with other MS4 permits in the process of being reissued by MDE, as well as national experience, there are three basic positions regarding the legal authority and proper scope of MS4 permits. Generally, activist groups, including the out-of-state Petitioners here, contend that permittees must be required to construct all desirable pollutant controls and take all other measures necessary to meet water quality standards within the five-year life of the permit. They typically assert this position with ***no regard for how impracticable that may be*** in terms of cost to local ratepayers or consideration of lack of scientific knowledge or available technology, of geophysical limitations, or of realistic time horizons necessary to plan, design, finance, permit, and construct stormwater treatment retrofits for existing development (typically private property). Their position generally ignores the fact that most urban stormwater water quality issues are the result of many decades of prior land development without advanced stormwater management, which will take many years to fix through redevelopment or corrective action projects, not to mention the challenges of managing the effects of stormwater runoff, which varies tremendously in storm frequency, magnitude and duration, and in the types and quantities of pollutants contained therein.

In sharp contrast, federal, state, and local governments widely agree that the CWA does not require that MS4s achieve and maintain strict compliance with all water quality standards during the permit term. While the ultimate goal is to achieve compliance with water quality standards, EPA acknowledges that this task will entail an "iterative process" of implementing, evaluating, and improving controls over "successive [five-year] permit terms." 64 Fed. Reg. 68722, 68754 (Dec. 8, 1999). As a matter of federal law, this position has routinely prevailed over the activists' position, making the contrary Circuit Court ruling here a notable outlier in CWA jurisprudence. Notwithstanding this consensus on the critical issue in this case, governmental views tend to diverge on the separate issue of what ***discretionary*** power the federal and state regulatory agencies have in light of CWA § 402(p)(3)(B)(iii). Those regulatory agencies typically claim broad authority based on the phrase "such other provisions as the Administrator or the State determines appropriate" in § 402(p)(3)(B)(iii), while localities (MS4 owners) typically disagree, particularly to the extent that a regulatory agency claims the power to assert such requirements in an impracticable manner.



Importantly, Montgomery County has not challenged whether any of the permit conditions violate CWA § 402(p)(3)(B)(iii) by exceeding the practicability standard. MDE has imposed onerous water quality standards-based provisions in the permit – albeit not to the extreme degree desired by Petitioners – most notably the requirement to restore or retrofit 20 percent of untreated impervious area in Montgomery County to make progress toward achieving water quality standards. The “maximum extent practicable” standard is a *community-specific* performance standard,<sup>1</sup> and it is of no concern to County Amici if any locality in its own discretion agrees to accept stretch goals proposed by MDE in a tentative or final determination to issue an MS4 permit, even if those goals are beyond practicable. However, Montgomery County’s brief and MDE’s brief in the Circuit Court cite dicta from the Ninth Circuit’s decision in *Defenders of Wildlife v. Browner*, suggesting that regulatory agencies may have discretionary authority to impose such requirements. 191 F.3d 1159, 1166 (9th Cir. 1999). The issue of whether MDE has such discretion, especially in a situation where the burden exceeds the community’s practicability threshold – as some Maryland localities currently negotiating their “next generation” five-year MS4 permits with MDE contend – is a critically important future issue that has not been joined or briefed below or in this appeal. Accordingly, it is not necessary to reach that issue to decide this appeal. *See Hatt v. Anderson*, 297 Md. 42, 46, 464 A.2d 1076, 1078 (Md. 1983) (cautioning against rendering purely advisory opinions on issues that are not yet justiciable). If necessary, future proceedings will provide a live controversy and better opportunity for full development of the relevant legal and factual arguments by affected parties and an administrative record on this community-specific issue. Accordingly, the County Amici respectfully urge the Court to avoid opining on what legal limitations apply to MDE in this regard.

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<sup>1</sup> EPA has purposefully refrained from setting practicability standards for MS4 permits because “MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis.” 64 Fed. Reg. at 68754. In determining what controls are practicable for a community, EPA suggests consideration of any relevant factors, including “specific local concerns,” “MS4 size,” “implementation schedules,” “current ability to finance the program,” and “capacity to perform operation and maintenance.” *Id.*

## **II. The Financial Stakes for Maryland’s Counties, Cities and Towns in the Petitioners’ and Circuit Court’s “Meet Water Quality Standards” Demand Are Massive and Incalculable**

To illustrate the severe financial implications of the Circuit Court’s Order, one need only consider the high-profile Total Maximum Daily Load (“TMDL”) for Chesapeake Bay water quality standards addressing just three pollutants (nitrogen, phosphorus, and sediment) (the “Bay TMDL”). Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 29, 2010). The State estimates it will cost local ratepayers and taxpayers<sup>2</sup> \$5.89 billion in MS4-related controls over the next decade. Maryland Phase II Watershed Implementation Plan 56 (Oct. 26, 2012).<sup>3</sup> For perspective, that equates to an average cost of \$2,754 per household – or \$275 per household per year for 10 years – using the simplifying assumption that all Maryland households are within the Chesapeake Bay watershed.<sup>4</sup> A requirement for the five-year permit to meet Chesapeake Bay water quality standards (in lieu of the State’s assumed 10-year pace) would double the annual average cost to \$550 per household per year. While this is a simplified example (e.g., it focuses on households without factoring in commercial property owners who would also pay), the larger point is that the Bay TMDL is but one of hundreds of TMDLs for water bodies statewide that are each subject to approximately 130 different water quality standards. *See* COMAR § 26.08.02.03-

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<sup>2</sup> “Ratepayer” is the industry standard term for a person who pays a utility bill charging fees such as Maryland’s stormwater utility enterprise funds for Phase I MS4s mandated by Md. Code Ann. Envir. § 4-202.1. “Taxpayer” is the more generic term relevant where stormwater capital, operations and maintenance expenses are funded with general funds. *See generally* *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013) (discussing distinction between rates and fees on one hand, and taxes on the other). Some localities may use both mechanisms to fund MS4-related expenses. For convenience, this brief will simply refer to “ratepayers.”

<sup>3</sup> Available at [http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/FINAL\\_PhaseII\\_Report\\_Docs/Final\\_Documents\\_PhaseII/Final\\_Phase\\_II\\_WIP\\_MAIN\\_REPORT\\_102612.pdf](http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/FINAL_PhaseII_Report_Docs/Final_Documents_PhaseII/Final_Phase_II_WIP_MAIN_REPORT_102612.pdf).

<sup>4</sup> The U.S. Census Bureau estimates that there are 2,138,806 Maryland households (2008-2012). *See* U.S. Census Bureau, Maryland QuickFacts, <http://quickfacts.census.gov/qfd/states/24000.html> (last visited July 28, 2014).

2 (Numerical Criteria for Toxic Substances in Surface Waters); COMAR § 26.08.02.03-3 (Water Quality Criteria Specific to Designated Uses).

The Bay TMDL's price tag of \$5.89 billion for municipal stormwater statewide and thousands of dollars per household is just the "tip of the iceberg" for localities and local ratepayers. For example, under the Montgomery County Coordinated Implementation Strategy for TMDLs, prepared by the County as required by the MS4 permit at issue, the County estimates a five-year cost (mostly to meet the 20 percent impervious area restoration requirement) of \$305 million.<sup>5</sup> As a rough indicator of the magnitude of the expense, that equates to an average of \$853 per household (again ignoring commercial property owners who would pay a share of the \$305 million).<sup>6</sup> Regarding the broader impact of water quality standards-related requirements (i.e., including other TMDLs), as of January 2012 in Montgomery County the strategy identifies 10 affected local watersheds, with 13 approved TMDLs, five more draft TMDLs, and an additional nine impairments that did not meet water quality standards but for which a draft or approved TMDL had not yet been prepared. Including the County's 20 percent impervious area restoration requirement (\$305 million), the County estimated its cost at \$1.884 billion through and including the FY2030 permit. Using the same approach as above, that equates to \$5,269 per household. Clearly, annual costs for these massive undertakings, if they had to be completed within a single five-year permit term, will be extraordinarily high, if not unaffordable, for many ratepayers.

County Amici also submit that such an extraordinary scope of work is technically and physically impossible to accomplish in five years. Confirming this view is the fact that even the permit as issued is proving to be impossible to meet. Montgomery County

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<sup>5</sup> Montgomery County Coordinated Implementation Strategy for TMDLs 28, tbl. 4.2 (Jan. 2012), *available at* <http://www.montgomerycountymd.gov/DEP/Resources/Files/ReportsandPublications/Water/Countywide%20Implementation%20Strategy/Countywide-coordinated-implemented-strategy-12.pdf>.

<sup>6</sup> The U.S. Census Bureau estimates that there are 357,579 households in Montgomery County (2008-2012). U.S. Census Bureau, Montgomery County, Maryland QuickFacts, <http://quickfacts.census.gov/qfd/states/24/24031.html> (last visited July 28, 2014).

has what is likely the most well-funded stormwater pollution reduction effort of any county in the state, and certainly the County deserves nothing but credit for its outstanding good faith effort. Yet the County projects that its performance will fall short of completing the permit's ambitious 20 percent impervious area restoration requirement by the February 2015 permit deadline. See FY15 Operating Budget: Department of Environmental Protection 12 & Att. 33 (May 9, 2014).<sup>7</sup> Given this reality, Petitioners' efforts to make compliance still more impossible should be rejected, because the law never requires the impossible. *Sri Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985).

At bottom, the impracticably high standard sought by Petitioners is contrary to the public interest. By imposing a "meet water quality standards" requirement no matter how costly or otherwise impracticable it is to do so, they would compromise the capability of localities to meet other, potentially more pressing public needs ranging from other stormwater issues (e.g., drainage system maintenance and flood control) to water quality (e.g., sewer and wastewater treatment maintenance and upgrades) and other public works (e.g., solid waste management and recycling) to broader societal needs that compete for the same limited resources (e.g., public safety, public education, social services, transportation, and others). Because MS4 permits are legally binding on localities and independently enforceable by the State, the EPA, and individual citizens or associations of citizens such as Petitioners, see 33 U.S.C. § 1365(a), if Petitioners prevail in this appeal the requirement to meet water quality standards would be a regulatory "super-priority" that trumps the other legitimate needs of the community that are not legally required. Accordingly, it is imperative that the practicability standard established by Congress for MS4 communities be protected and preserved.

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<sup>7</sup> Available at [http://montgomerycountymd.granicus.com/MetaViewer.php?view\\_id=100&clip\\_id=7232&meta\\_id=64905](http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=100&clip_id=7232&meta_id=64905) (projecting that only "3,634 acres of impervious out of the 3,976 impervious acres restoration goal" will be completed, "*under construction*," or "*in design*" through the FY2015, which ends June 30, 2015) (emphasis added).

### **III. MDE's Permitting Decision Cannot Be Invalidated for Not Requiring Water Quality Standards Compliance Because There is No Such Legal Requirement**

The Circuit Court's unprecedented conclusion that an MS4 permit must contain specific requirements to meet water quality standards is contrary to the plain meaning of the CWA and its legislative history as well as to all prior cases on this CWA point.

#### **A. The CWA and Legislative History Demonstrate that MS4 Permits Need Not Strictly Comply with Water Quality Standards**

In 1987, Congress amended the CWA to establish the MS4-specific compliance standard in § 402(p)(3)(B)(iii) that MS4 permits “shall include 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 State determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii). For MS4s, this requirement ***completely replaces*** the § 301(b)(1)(C) requirement to meet water quality standards, which remain applicable to industrial stormwater as well as “traditional” point sources such as industrial and municipal wastewater discharges.

To understand the role of the maximum extent practicable standard, it is necessary to review the basic types of effluent limitations established prior to 1987. CWA § 301, 33 U.S.C. § 1311, as originally enacted in 1972, established two distinct types – “technology-based” and “water quality-based.” The first category consists of a “series of progressively more demanding technology-based standards,” applicable to different categories of dischargers taking into account consideration of economic and technical feasibility. *NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). The second adds any more stringent limitations “necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C); *see also Ackels v. EPA*, 7 F.3d 862, 865 (9th Cir. 1993). At that time, § 301(b)(1)(C) required whatever level of effluent control was needed to implement water quality standards “without regard to the limits of practicability.” S. Rep. No. 92-414, at 43 (1971).

In the 1987 amendments, Congress specifically addressed stormwater discharge permit standards and created fundamentally different standards based on the nature of the discharge. For *industrial* stormwater, Congress determined in CWA § 402(p)(3)(A) that these discharges would continue to be subject to water quality standards pursuant to CWA § 301. 33 U.S.C. § 1342(p)(3)(A) (“industrial activity shall meet all applicable provisions of this section [CWA § 402] and section 1311 [CWA § 301]”); *see also id.* § 1311(b)(1)(C). In contrast, for municipal stormwater, Congress provided in § 402(p)(3)(B) that the level of pollutant reduction is limited to the “maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B)(iii).

When Congress created this practicability standard for MS4s in 1987, it was aware that the appropriate means of regulating stormwater discharges had been a challenging issue ever since the CWA was enacted in 1972. Because of the unique nature of stormwater runoff, which varies tremendously in terms of the frequency, magnitude and duration of flows, and the amount and types of pollutants it contains, EPA recognized that such discharges were ill-suited to the traditional end-of-pipe controls that are applied to industrial and municipal wastewater facilities and attempted to regulate stormwater discharges differently. In fact, EPA’s first stormwater regulations, promulgated in 1973, exempted any stormwater that was not contaminated by industrial or commercial activity. 38 Fed. Reg. 13530 (May 22, 1973). After the D.C. Circuit held that EPA could not exempt point sources, *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977), EPA published new regulations in 1976. 41 Fed. Reg. 11307 (Mar. 18, 1976). After those rules had been revised in 1979, and again in 1980, they were challenged by a number of major trade associations and environmental groups. *NRDC v. EPA*, 673 F.2d 392 (D.C. Cir. 1980). This resulted in a settlement that required EPA to promulgate an entirely new regulation intended to strike a balance between environmental concerns and the practical limitations of issuing individual permits for millions of stormwater point sources. *See* 47 Fed. Reg. 52073 (Nov. 18, 1982). The main focus of the proposal was to limit the definition of stormwater “point source” and to reduce permit application requirements. The final rule published in 1984 distinguished between sources located at an industrial

plant that would be subject to normal permitting requirements and other sources that would be subject to simplified application requirements. 49 Fed. Reg. 37998 (Sept. 26, 1984). These rules generated a large number of post-promulgation comments, and once again lawsuits were filed. EPA proposed revisions in 1985. 50 Fed. Reg. 9362 (Mar. 7, 1985). After 132 comments were received, EPA reopened the comment period and suggested the use of group applications as an alternative to individual permit applications. 50 Fed. Reg. 32548 (Aug. 12, 1985).

It was against this backdrop of regulatory confusion and continuous litigation over the legal requirements for stormwater discharge permits that Congress began to consider changes to the law. Ultimately, these deliberations culminated in the 1987 CWA amendments, which provided relief from applicable permit deadlines and created an entirely new standard for MS4s.

The legislative history relating to CWA § 402(p) is not extensive, but it is clear. The provision reflects a legislative compromise, forged in the conference committee, which created a partial exemption for MS4s from normal permitting requirements. This exemption provided relief from the general requirements of the CWA relating both to the deadlines for issuing permits and to the nature of the controls to be imposed. In a debate on October 16, 1986, Sen. Stafford explained the conference committee's rationale for the unique approach to municipal stormwater:

Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:

***These are not permits in the normal sense we expect them to be. These are actual programs.*** These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. 32381 (1986) (remarks of Sen. Stafford) (emphasis added). Other passages in the legislative history demonstrate Congress' intent to create the new distinct

standard for MS4s. For example, during a Senate debate on January 14, 1987, Sen. Durenberger explained the special treatment afforded to municipal sources:

The Federal Water Pollution Control Act of 1972 required all point sources, including storm water dischargers, to apply for NPDES [National Pollutant Discharge Elimination System] permits within 180 days of enactment. Despite this clear directive, EPA has failed to require most storm water point sources to apply for permits which would control the pollutants in their discharge.

The conference bill therefore includes provisions which address industrial, municipal, and other storm water point sources. I participated in the development of this provision because I believe that it is critical for the Environmental Protection Agency to begin addressing this serious environmental problem.

The bill establishes priorities, deadlines, and permit requirements for storm water point sources. It affords municipal and nonindustrial dischargers some relief from the 1972 permit application requirements. ***A permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable.*** Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the storm water discharge.

133 Cong. Rec. 1279–80 (1987) (remarks of Sen. Durenberger) (emphasis added).

During the House debate on January 8, 1987, Rep. Roe further explained:

Another important provision concerns management and control of municipal and industrial storm water discharges. The bill establishes a mechanism to address the major problems associated with discharges from storm sewers through a permitting procedure and the development and implementation of management practices, control technologies, and design and engineering methods.

133 Cong. Rec. 1006 (1987) (remarks of Rep. Roe) (discussing § 402(p)(3)(B)(iii)’s MEP provision rather than § 301(b)(1)(C)). Each of these statements by sponsors of the 1987 amendments illustrate that all of the permitting mechanisms and controls required for MS4 discharges are governed by the maximum extent practicable standard, including both the “management practices” explicitly described in CWA § 402(p)(3)(B)(iii) and any “other provisions” that EPA determines to be practicable and appropriate for the reduction of pollutants in MS4 discharges.



## **B. Extensive Case Law Supports Reversal of the Ruling Below**

Consistent with the plain language of CWA § 402(p)(3)(B)(iii) and the legislative history, courts have repeatedly held that “maximum extent practicable” is the only standard that applies to MS4 discharges. In *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), the court was presented with a challenge to EPA’s implementing regulations for “Phase I” of the stormwater permit program, including EPA’s decision not to require minimum criteria or performance standards for municipal stormwater discharges. In ruling against the petitioners, the court summarized the law as follows:

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, ***Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge.***

*Id.* at 1308 (emphasis added). In response to the petitioners’ objection that the regulation contained no minimum criteria or performance standards for MS4 discharges, the Court concluded that Congress gave EPA the discretion to determine what controls are necessary:

Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements . . . . NRDC’s argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. ***Congress could have written a statute requiring stricter standards, and it did not.***

*Id.* (emphasis added). Seven years later, in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), several environmental groups objected to MS4 permits issued to five Arizona municipalities, arguing that they must contain limitations ensuring strict compliance with water quality standards pursuant to CWA § 301(b)(1)(C). The Court disagreed, holding that CWA § 402(p)(3)(B), the structure of the CWA as a whole, and precedent “all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly” with water quality standards. *Defenders*, 191 F.3d at 1166. In rejecting the petitioners’ argument that the statute was ambiguous, the Court reasoned that “Congress’ choice to require industrial storm-water discharges to comply with

[CWA § 301], but not to include the same requirement for municipal discharges, must be given effect.” *Id.* The Court concluded that § 402(p)(3)(B) “replaces” the requirements of § 301(b) with the maximum extent practicable standard for MS4 discharges, and that it creates a “lesser standard” than § 301(b) imposes on other types of discharges. *Id.* at 1165. If § 301(b) continued to apply to MS4 discharges, the Court reasoned, the “more stringent” requirements of that section would always control. *Id.* at 1166. The § 402(p)(3)(B)(iii) “maximum extent practicable” standard is a “lesser standard” than that of § 301(b)(1)(C), because § 301(b)(1)(C) requires water quality standards, when applicable, to be met “without regard to the limits of practicability.” *Id.* at 1163.

In the 15 years since the *Defenders* decision, many cases have been decided that support reversal here.<sup>8</sup> For example, in Minnesota, the federal district court held that “[w]hile CWA requires permits to contain conditions that ensure that water quality standards are met, the CWA specifically *exempts municipal storm water permittees* from that requirement.” *Miss. River Revival, Inc. v. City of St. Paul*, No. CIV. 01-1887 DSD/SRN, 2002 WL 31767798, at \*6 (D. Minn. Dec. 2, 2002) (emphasis added). Later, in *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Ctrl. Agency*, 66 N.W.2d 427 (Minn. Ct. App. 2003), a Minnesota state court reached the same result.

The Fifth Circuit has recognized the unique status of MS4 permits under the CWA, characterizing MS4 permits subject to the maximum extent practicable standard as “management permits” – as distinct from “numeric end-of-pipe permits” like those for industrial stormwater. *City of Abilene v. EPA*, 325 F.3d 657, 659–60 (5th Cir. 2003).

In Oregon, the state Court of Appeals held: “Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. However, under 33 U.S.C. section 1342(p)(3)(B), dischargers of municipal

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<sup>8</sup> The only purportedly contrary decision cited by Petitioners in the case below was a 2002 decision of EPA’s Environmental Appeals Board, *In re Gov’t of the D.C. MS4 System*, 10 E.A.D. 323 (E.A.B. 2002). That decision is inapposite. The Board expressly declined to reach the question of whether a permitting authority (EPA in that case) must require that MS4 permittees strictly comply with state water quality standards. *Id.* at 49 n.19.

storm water are **not subject to** that requirement.” *Tualatin Riverkeepers v. Or. Dep’t of Env’tl. Quality*, 230 P.3d 559, 564 n.10 (Or. Ct. App. 2010) (emphasis added).

In Massachusetts, a U.S. district court held that “[t]he Clean Water Act **does not mandate** that permits issued by EPA for municipal stormwater discharges require compliance with numeric water quality standards.” *Conserv. Law Found., Inc. v. Boston Water & Sewer Comm’n*, No. 10-10250-RGS, 2010 WL 5349854, at \*5 (D. Mass. Dec. 21, 2010) (emphasis added).

Most recently, in New York, another court adopted the Ninth Circuit’s reasoning in *Defenders* to conclude that municipal stormwater dischargers are not subject to the same requirements as industrial permits and instead are subject to the maximum extent practicable standard. *NRDC v. N.Y. State Dep’t of Env’tl Conserv.*, 111 A.D.3d 737, 748 (N.Y. App. Div. Nov. 13, 2013).

This Court should reach the same conclusion here, where MDE and EPA agree that the maximum extent practicable standard controls. As EPA explained in a December 2013 legal brief in another permit proceeding: “Unlike other NPDES permits (including industrial stormwater permits), MS4 permits are subject to the unique requirements of CWA Section 402(p)(3)(B) **rather than the requirements of CWA § 301(b).**” EPA Resp. at 6, *In re Buckley Air Force Base*, NPDES Appeal No. 13-07 (Doc. 21) (E.A.B. 2013) (emphasis added).<sup>9</sup> Likewise, as EPA explained in stormwater permitting guidance:

The CWA requires, with **the exception of MS4s**, that NPDES permits contain technology-based effluent limits and water quality-based effluent limits . . . when the technology-based limits alone do not adequately protect water quality. The CWA **standard for MS4s is that the permit must require controls to reduce the discharge of pollutants to the MEP** [maximum extent practicable] to protect water quality.

EPA, *TMDLs to Stormwater Permits Handbook* 10 (Nov. 2008) (emphasis added).<sup>10</sup>

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<sup>9</sup> Available at [http://yosemite.epa.gov/oa/eab\\_web\\_docket.nsf/Filings%20By%20Appeal%20Number/4CEBE347DDC7341485257C4300509261?OpenDocument](http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/4CEBE347DDC7341485257C4300509261?OpenDocument).

<sup>10</sup> Available at [http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/tmdl-sw\\_permits11172008.pdf](http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/tmdl-sw_permits11172008.pdf).

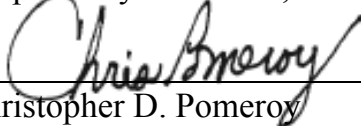
EPA has authorized MDE to administer the NPDES permitting program, and the state statute is perfectly consistent with the CWA in every relevant respect, including that it only imposes water quality standards in permits when “applicable.” *See* Md. Code Ann. Envir. § 9-324(a)(1) (stating that discharges must meet “[a]ll **applicable** State and federal water quality standards and effluent limitations” (emphasis added)). MDE has never adopted any regulations putting the regulatory community on notice of a different, more stringent standard than the federal program delegated to MDE, because MDE has consistently applied the federal maximum extent practicable standard as delegated by EPA. *See* COMAR § 26.08.04.02.A(1) (applying federal law to discharge permits).

### CONCLUSION

It is well-settled that MS4 permits authorizing the discharge of municipal stormwater runoff are governed by CWA § 402(p)(3)(B)(iii)’s practicability standard in lieu of the § 301(b)(1)(C) water quality standard requirement applicable to industrial stormwater and industrial and municipal wastewater. The Circuit Court’s conclusion that water quality standards apply to the Montgomery County MS4 permit and that the permit is unlawful because it does not adequately address water quality standards must be reversed as an error of law. Further, because Petitioners did not allege that the governing maximum extent practicable standard was violated, a reversal without remand is the appropriate disposition.

Dated: August 1, 2014

Respectfully submitted,

  
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