IN THE
COURT OF APPEALS OF MARYLAND

No. 25
September Term, 2021

MARYLAND SMALL MS4 COALITION, ET AL,
Petitioners,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,
Respondent.

From Appeal to the Court of Special Appeals

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF THE BRIEF OF PETITIONER QUEEN ANNE'S COUNTY, MARYLAND

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INTEREST OF AMICUS CURIAE

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 340 municipal clean water agencies, including four utility members in the State of Maryland, 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.

NACWA submits this brief based on its members' compelling interest in ensuring that Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permitting requirements, 33 U.S.C. §§ 1251 et seq. (1972), and attendant CWA liability, remain predictable and within the scope of the statute. NACWA's members are public agencies funded by local residents and businesses, whose limited dollars are dedicated to protecting water quality in the communities they serve. NACWA's members are stewards of public health, the environment, and public funds. Their work requires making substantial investments in major infrastructure projects and maintenance

designed to have the greatest environmental impact without financially overburdening local communities. Requiring NACWA's members to address pollution that is outside the scope of their jurisdiction and over which they have no control, as the April 29, 2021, Court of Special Appeals ("COSA") decision would, threatens their ability to complete necessary projects, meet existing regulatory obligations, and serve their function as public environmental stewards.

STATEMENT OF THE CASE

NACWA adopts the Statement of the Petitioner Queen Anne's County, Maryland (the "County").

QUESTION PRESENTED

1. Has the Maryland Department of the Environment ("MDE") unlawfully made small MS4 owners responsible for discharges from independent third parties and nonpoint source runoff that does not flow into or discharge from the permittees' MS4s?

2. Has MDE unlawfully imposed requirements beyond the maximum extent practicable ("MEP") standard in the General Permit?

STATEMENT OF FACTS

NACWA adopts the Statement of Facts of the County.

STANDARD OF REVIEW

NACWA adopts the Standard of Review of the County.

SUMMARY OF ARGUMENT

This appeal concerns the MDE's implementation of a provision of the federal CWA, 33 U.S.C. § 1342(p), and the associated regulations at 40 C.F.R. §§ 122.34(a) and 123.35, which govern permits for stormwater discharges from Small Municipal Separate Storm Sewer Systems ("MS4s"). MDE implements these federal authorities by issuing NPDES permit coverage to owners of Small MS4s under a delegation of authority from the U.S. Environmental Protection Agency ("EPA") in accordance with Md. Code Ann., Envir. § 9-253 and COMAR 26.08.04.01(A).[1]

The stormwater general permit issued by MDE requires the small MS4 owners like the County to reduce impervious surfaces by 20% in the Census-designated urbanized area of their jurisdictions and implement other parts of the permit across the entire locality. Like many of NACWA members' MS4s,

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[1] 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 CWA, 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 (NPS) Pollution*, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution.

however, the County's MS4 serves only certain portions of the county rather than the entire jurisdiction; much of the County is rural. The County appealed the permit, arguing, among other things, that MDE: (i) unlawfully made the County responsible for third-party discharges and nonpoint source runoff; and (ii) has no authority to impose conditions that exceed the CWA's MEP standard. COSA issued an opinion on April 29, 2021, which held:

(1) MDE did not exceed its authority when it required the County to include impervious surface areas that do not drain to the County's MS4 in the calculation of areas that must be restored under the MS4 permit.

(2) Certain permit requirements did not exceed the CWA's maximum extent practicable standard. [2]

If upheld, the COSA decision is likely to significantly expand the obligations of local communities that own and operate MS4s far beyond what the CWA allows.

Like all CWA point sources, MS4s are required to obtain NPDES permits that set limits on the pollutants discharged from their pipes into navigable waters. MS4s differ from non-stormwater municipal point sources, however, 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

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[2] *Md. Small MS4 Coal. v. MDE*, 250 A.3d 346 (Md. Ct. Spec. App. 2021).

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. This stormwater, which picks up pollutants from a variety of sources, is then discharged directly into surface water.

Importantly, because MS4 operators cannot control the amount or frequency of pollutants that enter their systems, rather than the stringent water quality-based limitations mandated for all other types of NPDES permits, MS4s are instead required under the CWA 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." 33 U.S.C. § 1342(p)(3)(B)(iii).[3]

Another key aspect of the CWA relevant to MS4 permitting under certain circumstances is the "total maximum daily load" ("TMDL") process. 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

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[3] *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990–01 (Nov. 16, 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.").

"nonattainment," a state develops TMDLs, commonly thought of as "pollution budgets," which identify all existing both point and nonpoint source discharges and allot pollution loads that can be discharged from each that will cumulatively reduce pollution enough to allow the waterbody to achieve "attainment" status. *Id*.

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

Once the relevant allocations are made, the loads are translated into point source permit limits and nonpoint source BMPs to ensure compliance. EPA, *Guidance for Water Quality Based Decisions: The TMDL Process*, 23-25 (1991) ("TMDL Guidance").[5]

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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).

[5] *Available at* https://www.epa.gov/sites/default/files/2018-10/documents/guidance-water-tmdl-process.pdf.

MDE's permit inappropriately inserted into this process a mandatory obligation for point sources to reduce the discharge of pollutants from nonpoint sources. Specifically, the permit requires an MS4 to reduce nonpoint source pollution that is generated outside its service area, does not flow into its pipes, and over which it has no authority or control.[6]

It is true that if pollutant reductions cannot be achieved by nonpoint sources, 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)). However, under this longstanding approach, point sources are required

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[6] NACWA objects 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 permit obligations. *See* TMDL Guidance at 24-25. NACWA does 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 CWA'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, *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015). But MS4s should not be made responsible for the attainment of such nonpoint source allocations.

to further reduce their *own* loading if the original allocations are insufficient, or if nonpoint source reductions cannot be guaranteed to achieve attainment of water quality standards. They are not – nor should they be – responsible for pollution which they have no authority or ability to control.

MDE and the lower court's expanded reading of MS4 permittees' obligations would set a precedent that could undermine the ability of NACWA's members to comply with their NPDES permits, subject them to unwarranted enforcement actions and litigation from regulators and citizen groups, and, most critically, divert limited public resources to attempt to address private pollution. Moreover, it would put public utilities and local governments in the perilous position of having to exert control over activities on private property to be in compliance with the CWA when they have no legal mechanism to do so.

As agencies tasked with and devoted to protection of the environment and water quality, NACWA's members often advocate for more stringent regulation of nonpoint sources. But MDE's regulation of MS4s in this case upends the statutory structure for addressing nonpoint source pollution and would unlawfully shift the burden of controlling nonpoint sources to public utilities that lack the legal authority and funding to do so.

NACWA therefore requests that the Court: (1) modify the General Permit to ensure that it does not assign responsibility to small MS4s for

nonpoint source discharges or point source discharges made by third parties; and (2) remand the permit to MDE with instructions to ensure that its requirements individually and collectively comport with the MEP Standard.

ARGUMENT

I. MDE'S INCORRECT APPLICATION OF THE CWA AND NPDES REGULATIONS THREATENS TO UNLAWFULLY EXPAND THE OBLIGATIONS OF CLEAN WATER UTILITIES

A. The Lower Court Ruling Upends the Well-Settled Principle that Permit Obligations Apply Only to Discharges from Systems Owned or Operated by the Permittee

A well-established principle of NPDES permitting is 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 the owner and operator are different persons, the operator must obtain the permit); 40 C.F.R. § 122.26(a)(3)(iii) (requiring an "operator of a discharge" from an MS4 to obtain a permit). Indeed, 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. Va. 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."). Looked at another way, courts have regarded NPDES permits to be akin to a contract. *See, e.g., Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001) ("In analyzing a provision of an NPDES permit, we review the district court's interpretation in the same manner as we would contracts or other legal documents"). Just as only signatories to contracts are bound by their terms, so, too, can NPDES permits only require a permittee to address discharges that it owns or controls.

Before this decision, EPA and MS4 operators had a common understanding that NPDES permits were designed to address only those discharges that emanate from their systems. *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990-01 (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, 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*.

MDE does not suggest that small MS4 owners like the County somehow own or operate the nonpoint sources at issue, or that the discharges flow through their small MS4s. Instead, the agency wrongfully reasons that, because point sources bear the burden of achieving pollutant reductions where nonpoint source reductions have fallen short, point sources must effectively be responsible for the nonpoint source discharges themselves. This interpretation not only contradicts the NPDES regulations stating that "persons" are required to obtain permits for only those discharges they own or operate, but also common sense and the transitive property. *E.g.*, 40 C.F.R. § 122.21(a)(1), (b).

Notably, in determining that MS4s should be responsible for pollution that does not enter their systems, MDE seemingly overlooked existing, lawful 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 point source 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 Balt., Inc. v. Wheeler*, No. GLR-17-1253, 2019 WL 1317087, at *4–5 (D. Md. Mar. 22, 2019). These mechanisms provide appropriate avenues through which MDE could achieve the reductions it is unlawfully seeking in the General Permit.

B. MDE's Permit Is Inconsistent with How MS4s Are Designed and Operate

MDE also misinterprets federal regulations by assuming the authority to apply permit requirements across an MS4 owner's entire jurisdiction without regard to the MS4's service area.

The boundaries of a small MS4 are established by reference to the limits of urbanized areas; and then, further, by the limits of the actual MS4 system (*i.e.*, the network of pipes and other conveyances). EPA's regulations draw small MS4 boundaries based on Census-defined urbanized areas, rather than entire jurisdictions. 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 discharges from the MS4 outside of the urbanized area are a cause of an identifiable 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.").

Even within urbanized areas, however, 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). 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 by it.

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 means that the permit 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 to allow for permitting of smaller pieces of the larger whole.

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. Cnty. 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."

Accordingly, Congress provided permitting authorities with discretion to issue permits "on a system-wide or jurisdiction-wide basis," rather than requiring "separate permits for millions of individual stormwater discharge points." *Id.* In light 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 were not required for each MS4 outfall due to the unique nature of MS4s).

MDE's requirement that MS4s address pollution occurring outside of their boundaries is inconsistent with the design and operation of MS4s and results in unlawful and impracticable burdens on MS4 communities.

C. MDE Unlawfully Extends "Beyond MEP" Standard to MS4 Permits

While most types of NPDES permits are required to include stringent water quality-based effluent limitations, municipal stormwater discharges regulated under the CWA instead are required to "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, engineering and design methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B).

This requirement for municipal stormwater dischargers in unique under the CWA and was specifically crafted by Congress in recognition of the fact that

municipal stormwater systems cannot control the amount or frequency of pollutants that enter their systems. MDE, however, has argued that conditions in an MS4 permit may exceed the statutory MEP standard. MDE COSA Br. 23-24. And MDE has extended this "beyond MEP" standard approach to requirements that do not even relate to water quality. This completely goes against the intent of Congress for regulating these types of discharges.

For example, the Permit requires the County to develop and maintain comprehensive maps of its MS4, which will be impracticable for most small MS4s to complete within the timeframe mandated by the Permit. (E 35, R 1213). Other requirements related to good housekeeping, pollution prevention, and outfall screening schedule (20% of total outfalls per year) likewise exceed the MEP standard. (E 33–35, R 1211–13).

MDE's approach to MS4 permitting effectively eliminates the MEP standard in 33 U.S.C. § 1342(p)(3)(B)(iii), which could have devasting impacts on MS4s and their ratepayers in Maryland and across the country contrary to the public interest. By imposing beyond MEP requirements, no matter how costly or otherwise impracticable they will be to comply with, MDE is clearly frustrating the intent of Congress with regard to regulating municipal stormwater. MDE is also limiting 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 public works (e.g.,

solid waste management and recycling) to broader societal concerns (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, EPA, and citizens, if MDE prevails in this appeal these unlawful beyond MEP requirements will necessarily trump 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.

II. THE REQUIREMENTS AT ISSUE COULD DIVERT CRITICAL PUBLIC DOLLARS TO PAY FOR PRIVATE POLLUTION AND SUBJECT UTILITIES TO NEEDLESS LITIGATION, ENFORCEMENT, AND CIVIL PENALTIES AND UNACHIEVABLE PERMIT REQUIREMENTS

If upheld, MDE's expansive read of both the area and authority of MS4s would likely require NACWA's members to divert limited public dollars to address private sources of pollution. More to the point, complying with these requirements would put NACWA's members in an unenviable catch-22 of either trying to meet impossible and unlawful pollution control requirements, or operating within their legal bounds but then being subjected to enforcement by regulators and citizen groups for failing to comply with those impossible and unlawful requirements.

A. MDE's Requirements Will Cause MS4s to Divert Critical Resources from Existing Obligations

MDE's permit requirements will divert already limited public funding from critical infrastructure projects and MS4 operations and maintenance activities to address private sources of pollution that do not flow into the MS4. As it stands, NACWA's members and the communities they serve frequently face funding shortfalls 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).[7] And yet, these rising rates are still not enough to fund what is being asked of many communities to meet increasing regulatory requirements, update aging infrastructure, and respond to climate change. *Id*. at 1–4.[8]

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

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

[8] 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*.

respondents had faced legal challenges to their stormwater fees. Black & Veatch Management Consulting, LLC, *2018 Stormwater Utility Survey*, 40 (2018).[9] 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 at all will only exacerbate claims from ratepayers challenging the proper scope of their services and the corresponding fees they charge.

Even where courts reject challenges to stormwater fees, utilities face significant funding shortfalls to meet 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. Requirements like those found in MDE's General Permit would further stretch these already limited dollars to pay for pollution not even passing through MS4 systems.

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

B. The Permit Requirements at Issue Could Subject Utilities to Additional Regulatory Scrutiny, Government Enforcement Actions, and Citizen Suits

MDE's interpretation of the scope of MS4 permitting expands the regulatory burden on an already overburdened water sector and the communities they serve in a manner that will frequently be impossible to meet.

NACWA's members are dedicated to the mission of protecting the environment and water quality in the communities they serve. And NACWA frequently advocates for more stringent regulation of nonpoint sources of water pollution because of the substantial contribution they make to the impairment of the nation's waterbodies. But, unlike state regulatory agencies, NACWA's members have no resources, ability, or authority to restrict discharges from sources that do not flow through their systems, and unlawfully requiring them to do so puts them at risk of noncompliance and enforcement actions.

NACWA's members are public agencies whose authority is defined by state statutes, and whose authority to implement the type of impervious surface area reductions contemplated in the General Permit would be dependent on the passage of ordinances governing impervious surfaces in areas that do not discharge to their systems. Moreover, even if they could legally take the actions contemplated in MDE's MS4 permit, 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. Such

permit requirements would likewise place clean water at risk of enforcement actions brought by regulators and citizen groups, addition to the imposition of the significant civil penalties that can be imposed pursuant to the CWA for noncompliance. This court should reject MDE's unlawfully expansive view of the MS4 program

CONCLUSION

For the foregoing reasons, NACWA requests that the Court: (1) modify the General Permit to ensure that it does not assign responsibility to MS4s for nonpoint source discharges and point source discharges by other parties; and (2) remand the permit to MDE with instructions to ensure that its requirements individually and collectively comport with the MEP standard. MDE's interpretation of MS4 permitting requirements threatens to unlawfully expand the obligations of municipal stormwater agencies to include discharges over which they have no authority, ownership, or control. In addition to being unlawful under the CWA, upholding MDE's permitting decisions will necessitate the diversion of public funds away from projects designed to benefit local communities to address private pollution that MDE has the responsibility and means to regulate itself. NACWA asks this Court to intervene and place the burden of controlling sources outside of an MS4 back where it clearly belongs – with the regulatory authorities.

Dated: November 3, 2021

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,703 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font (Calisto MT), spacing (double), and type size (13-point) requirements stated in Rule 8-112.

/s/Nathan Gardner-Andrews
Nathan Gardner-Andrews

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 3rd day of November, 2021, a copy of the foregoing Brief was filed with the MDEC system, which caused service to be made on the parties below. Two copies of the same also were mailed first class, postage prepaid.

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