

impact, County Amici's brief is desirable for the Court in that it provides (1) disclosure of the separate but related question of MDE's discretionary authority (not at issue in this case about whether MDE is under a mandate to impose water quality standards compliance in the permit); (2) a broader perspective on the real-world implications of Petitioners' arguments, including for multi-billion dollar MS4 compliance costs to be borne by the public; (3) more legislative and regulatory background on the Clean Water Act ("CWA") provisions at issue; and (4) a more detailed assessment of the relevant case law on the statutory mandate aspect of the issue. For all of these reasons, the amicus curiae brief is desirable and will aid the Court in adjudicating the legal questions at issue.

II. County Amici Did Not Intentionally Misrepresent Petitioners' Position

Petitioners allege that County Amici "falsely claim that Appellees seek to force compliance with Maryland's water quality standards 'within a single five-year permit term.'" Opp. at 2 (quoting Mot. Leave 2). It is only in response to County Amici's brief that Petitioners now admit for the first time in this litigation that "their argument in no way addresses the timing of compliance." *Id.* Their admission is also surprising given that the thrust of their prior briefs has been to seek a judicial order requiring the permit – *which by law can have a term of no more than five years* – to compel the permittee to meet water quality standards. Given the maximum five-year term and Petitioners' complete silence on the issue throughout the litigation, it is only reasonable to infer that they sought compliance within the life of the permit they are challenging. Rather than intentionally misrepresent Petitioners' arguments, County Amici merely took them at face value. In any event, despite Petitioners' recent concession on timing, their attack on the CWA § 402(p)(3)(B)(iii) practicability standard remains pending as the heart of this case and thus the full substance of County Amici's brief remains valid, useful and desirable.

III. County Amici Have Not Interjected Any New Arguments

Petitioners assert that County Amici are seeking to interject a new issue into the case by addressing the extent of the Maryland Department of the Environment's ("MDE") *discretionary* authority, if any, to require strict compliance with the water

quality standards notwithstanding the CWA § 402(p)(3)(B)(iii) practicability standard. County Amici have the exact opposite intention. Although there have been references to MDE's discretionary authority in the briefing in this appeal and in the case below, no party has asserted that the Court must address that issue to adjudicate any of the questions presented. Accordingly, County Amici's intent is merely to make the Court aware that an ancillary issue mentioned in some of the parties' briefs is contested elsewhere but not by any party here, and that this issue may arise in a future action where it would be better decided as a true controversy following full briefing that has not occurred at any time in the course of this litigation. It is precisely *because* the parties to this appeal are in apparent agreement on this otherwise contested issue of generally applicable law that this appeal presents a poor vehicle to address it.

IV. Cost and Practicability Sources Were Properly Cited

Petitioners request that the certain sources cited by County Amici be stricken because they are not part of the record. The challenged sources highlight the extraordinary cost and other practicability issues MS4 localities must overcome as they continue improving water quality. These sources are cited for two proper reasons. First, they demonstrate County Amici's interest in this case as required by Rule 8-511(b)(1)(A). Second, they are relevant to the purely legal question of what standard applies under the CWA and related state law.

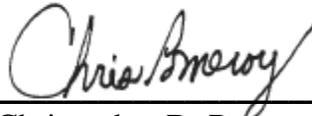
Judicial review of agency action takes two forms: (1) "determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions" and (2) "to determine if the administrative decision is premised upon an erroneous conclusion of law." *Motor Vehicle Admin. v. Lipella*, 48 A.3d 803, 810, 427 Md. 455, 467 (2010). The administrative record is expressly relevant *only* to the Court's review of the evidentiary basis for MDE's findings and conclusions; not to whether its actions were premised upon an erroneous conclusion of law. Before this Court can evaluate MDE's findings and conclusions in light of the record, it must first decide the purely legal question of what CWA standard applies to MS4s—that is, whether the maximum extent practicable standard mandated by CWA § 402(p)(3)(B)(iii) replaces the

requirement in § 301(b) to comply with water quality standards. County Amici's brief addresses this threshold question of law. The state and local governmental sources cited by County Amici properly provide context to this broader legal issue which must be decided independently of any evidentiary issues associated with the administrative record. This is a traditional role of an amicus brief.

Petitioners also expressly take issue with the accuracy of the cost figures cited by County Amici. While the County Amici believe that citing state and local governmental documents for context is perfectly appropriate, we also note that the precise sums are not material here. The point is that Petitioners' position on the practicability standard of CWA § 402(p)(3)B)(iii) is a multi-billion dollar issue impacting localities throughout the state and this disclosure as context for the legal issue at stake is completely appropriate.

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Respectfully submitted,



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