

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 9 MAP 2023

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BOROUGH OF WEST CHESTER,  
*Appellant,*

v.

PA. STATE SYSTEM OF HIGHER EDUCATION and WEST CHESTER  
UNIVERSITY OF PA. of the STATE SYSTEM OF HIGHER EDUCATION,  
*Appellees.*

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**BRIEF OF *AMICUS CURIAE***  
**CITIZENS FOR PENNSYLVANIA'S FUTURE**  
**IN SUPPORT OF THE APPELLANT**

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Appeal from the final Order of the Commonwealth Court of Pennsylvania entered  
January 4, 2023 under No. 260 M.D. 2018, Granting Motion for Summary  
Judgment filed by the Pennsylvania State System of Higher Education and West  
Chester University of Pennsylvania, and Denying Cross-application for Summary  
Relief filed by the Borough of West Chester

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## **STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE**

Citizens for Pennsylvania’s Future (“PennFuture”) is a Pennsylvania non-profit organization whose mission includes protecting our air, water, and land, and empowering citizens to build sustainable communities for future generations. Members of PennFuture regularly use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania’s environment.

Amicus focuses this brief on the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution (“ERA”), and urges this Court to reverse the Commonwealth Court decision and find that stormwater charges are lawful fees, consistent with Pennsylvania jurisprudence and the state constitution. Amicus has a long-standing interest in the health and wellbeing of Pennsylvania residents and is committed to preserving and protecting Pennsylvania’s natural resources. Amicus has a specific interest in ensuring that the ERA be interpreted in a manner that vindicates the constitutional environmental rights of Pennsylvania residents and preserves the constitutional trust protecting Pennsylvania’s natural resources. In compliance with Pa. R.A.P. 531(b)(2), no other person or entity other than amicus or its counsel paid for or authored this brief.

## **STATEMENT OF THE ISSUES ADDRESSED BY AMICUS CURIAE**

- I. Did the Commonwealth Court commit an error of law or abuse of discretion in holding that the Stream Protection Fee is a tax and not a fee? (Issue A in Jurisdictional Statement of Appellant)

Answered in the affirmative.

- II. Did the Commonwealth Court commit an error of law or abuse of discretion in holding that the Borough's method for calculating the amount of the Stream Protection Fee renders that fee a tax? (Issue G in Jurisdictional Statement of Appellant)

Answered in the affirmative.

- III. Did the Commonwealth Court commit an error of law or abuse of discretion in holding, implicitly or expressly, that the amount of the Stream Protection Fee is not reasonably proportional to the value of the benefits which accrue to Respondents from their properties' connection to the Storm water System? (Issue H in Jurisdictional Statement of Appellant)

Answered in the affirmative.

- IV. Did the Commonwealth Court commit an error of law or abuse of discretion in holding, implicitly or expressly, that the existence of general environmental benefits accruing from the Stormwater System precludes the existence of specific benefits which accrue to Respondents from their properties' connection to and use of the Stormwater System? (Issue I in Jurisdictional Statement of Appellant)

Answered in the affirmative.

- V. Did the Commonwealth Court commit an error of law or abuse of discretion in holding that Respondents do not voluntarily receive specific benefits from their properties' connection to and use of the Stormwater System and concomitant payment of the Stream Protection Fee? (Issue K in Jurisdictional Statement of Appellant)



Answered in the affirmative.

## **SUMMARY OF ARGUMENT**

Clean water is universally recognized as a critical resource for human health, environmental health, and economic development. While myriad threats to water quality and functional streams exist, stormwater runoff—the water from rain or snow that runs across the built environment, picking up pollution, before reaching a stream, river, lake, or other surface water—has been recognized for decades as one of the largest contributors to water quality impairment both nationwide and in the Commonwealth. As the National Research Council recognized in a report to Congress, “Stormwater runoff from the built environment remains one of the great challenges of modern water pollution control, as this source of contamination is a principal contributor to water quality impairment of waterbodies nationwide.” NAT’L RSCH. COUNCIL, WATER SCIENCE AND TECHNOLOGY BD., COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, URBAN STORMWATER MGMT. IN THE U.S. vii (2008) (hereinafter, “NRC Stormwater Report”).

Stormwater runoff can result in the contamination of drinking water supplies; prohibitions on swimming, fishing or boating uses; injury or death to aquatic plants and animals; and dangers to public health. In addition to the threats to water quality, stormwater’s potential for increased flooding presents an imminent threat to public and private property. The hazards of stormwater runoff are particularly prominent in

the new reality of increasingly intense storms deluging the Commonwealth as a result of climate change. It is not an overstatement to say that regulations that serve to control stormwater runoff are vitally important to a healthy and vibrant society at nearly every level.

In response to the threats presented by stormwater, federal and state lawmakers have enacted a system of environmental protections. These environmental regulations, in essence, formalize recognition that access to clean water and a healthy environment is a critical resource for society and humanity, and so while certain pollution and impacts might be inevitable as a by-product of the industry, development, and technology of modern society, these impacts can and must be controlled. Indeed, Article I, Section 27 of Pennsylvania's Constitution (the "Environmental Rights Amendment" or "ERA") enshrines this recognition at the highest possible institutional level of our Commonwealth. Pa. Const. art. I, § 27.

In Pennsylvania, therefore, an entity does not possess an unfettered right to pollute the water or the environment. Rather, they are generally prohibited from pollution, *except as permitted* to do so. Environmental regulations carve out these limited permissions. Charges associated with these limited permissions are thus easily understood as the grant of a license to allow individuals, businesses, or other entities the benefit of a limited amount of pollution *which they would not otherwise be legally entitled to produce*.

Appellant West Chester Borough (the “Borough”) properly enacted its Stream Protection Fee (the “Stormwater Charge”) as a part of its duties under the federal Clean Water Act, the PA Clean Streams Law, and the PA Stormwater Management Act, and consistent with its duties as a trustee of the ERA public trust. This Stormwater Charge, assessed solely for the purpose of advancing the Borough’s stormwater management system, is properly understood as a fee, not a tax.

The Commonwealth Court’s analysis in the opinion below unfortunately failed to properly conceptualize the nature of these stormwater fees. The Commonwealth Court improperly relied on foreign precedent which conflicts with Pennsylvania law, disregarded the purpose of the Stormwater Charge, and improperly found the Borough’s Stormwater Charge as not reasonably proportionate to the benefit received by Appellees Pennsylvania State System of Higher Education (PASSHE) and its West Chester University (WCU). The Commonwealth Court’s reasoning further erred by failing to consider the implications of the ERA on this case, which implicates assets of the public trust.

The issue of stormwater fees has not yet been directly considered by this Court, and the Commonwealth Court has issued conflicting decisions. *Compare Borough of W. Chester v. Pennsylvania State Sys. of Higher Educ.*, 291 A.3d 455 (Pa. Cmwlth. 2023), *with Appeal of Best Homes DDJ, LLC*, 239-40 C.D. 2020 (Pa. Cmwlth. Dec. 23, 2021). This case thus presents an opportunity for this Court

reverse the Commonwealth Court’s decision and to clarify that stormwater fees such as this one, which meet the classic purpose and indicia of a fee rather than a tax, and are consistent with the ERA and laws and regulations protecting clean water in the Commonwealth, are lawful fees.

## ARGUMENT

### **I. Stormwater Management is a Critical Component of Protecting Pennsylvania’s Waters**

In a natural, undeveloped environment, when it rains or snows, water falls upon the ground and either evaporates or is absorbed into the soil, where it filters into groundwater or to various surface waters. In the built environment, by contrast, this stormwater cannot penetrate the ground. Broadly speaking, stormwater runoff results when the amount of precipitation that falls on an area exceeds the capacity of the ground to absorb it. Stormwater runoff is therefore a function of both the capacity of the ground itself and the amount of precipitation.

Urbanization of the landscape affects the ability of the ground to absorb precipitation in two ways: First and foremost, through the introduction of impervious ground cover, which eliminates the possibility of water penetrating the ground surface. U.S. ENV’T PROT. AGENCY, CAUSAL ANALYSIS/DIAGNOSIS DECISION INFO. SYS. (CADDIS) VOLUME 2: SOURCES, STRESSORS, AND RESPONSES, URBANIZATION – STORMWATER RUNOFF (hereinafter, “CADDIS VOLUME 2”), <https://www.epa.gov/caddis-vol2/urbanization-stormwater-runoff> (last visited July

6, 2023) (“The effects of urbanization on stream ecosystems are largely driven by impervious cover.”). Secondly, a byproduct of construction and development is that the nominally pervious surfaces—such as the grass strips alongside roads or within parking lots—that remain become so compacted that they reach a point where the rate of permeability is indistinguishable from pavement.<sup>1</sup> Thus, as the National Research Council has observed: “Urbanization profoundly affects how water moves both above and below ground during and following storm events; the quality of that stormwater; and the ultimate condition of nearby rivers, lakes, and estuaries.” NRC Stormwater Report, *supra*, at 11.

Stormwater runoff creates several layers of problems in urbanized areas. The first threat is to water quality. As the stormwater flows across the ground surface, it collects pollutants such as oil, pesticides, sediments, bacteria, pet waste, and trash, and carries them into the receiving waterways—the streams, rivers, and lakes that serve residents of the Commonwealth for drinking water sources, business and

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<sup>1</sup> The effects of compaction can also be observed even where there may be several inches of pervious surface. A growing body of research is considering the implications of subsurface compaction in developed urban and suburban environments. For example, recent research from Penn State shows that even where surface topsoil is uncompacted, stormwater ceases infiltration and runs laterally through the ground when it reaches highly compacted soil horizons from previous, older development, in turn resulting in structure basement flooding in areas not historically designated as flood plain. Shirley Clark et al., 2022 Villanova Univ. Pa. Stormwater Symposium, *Impact of Soil Compaction and Restrictive Layer Depth on Total Infiltration Volume and Flooding* (2022) (presentation of preliminary results in ongoing research project).

industrial uses, recreational opportunities, or simply as part of the larger natural environment that protects mental and physical well-being. Additionally, the sheer increased volume of the runoff itself leads to more flooding, harming both private and public property.

Recognizing the seriousness of threats to water quality, Congress and Pennsylvania's General Assembly enacted laws to protect water resources and to establish the legal framework for programs to protect and restore the waterways of the nation and the Commonwealth. Declaring that its purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters", 33 U.S.C. §§1251–1387, in 1972 Congress enacted major revisions to the Clean Water Act ("CWA") in a powerful rejoinder to the threats to America's waters. Congress made fine-tuning amendments in 1977, revised portions of the law in 1981, and enacted further amendments in 1987 and 2014. The CWA is premised on the concept that all discharges into the nation's waters are unlawful, unless specifically authorized by a permit. *See id.*; CLAUDIA COPELAND, CONG. RSHC. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 5 (2016). The CWA establishes the National Pollution Discharge Elimination System ("NPDES") program, authorizes the Environmental Protection Agency ("EPA") to issue permits allowing discharge, and provides authority to delegate the NPDES permitting program to states with counterpart permitting programs that meet specific minimum criteria. Pennsylvania

is one such state, and EPA has delegated authority to the Pennsylvania Department of Environmental Protection (“DEP”). *See* 33 U.S.C. § 1342(b).

The 1987 amendments authorized measures to address the “nonpoint source” pollution of stormwater runoff, directing states to develop and implement nonpoint pollution management programs. 33 U.S.C. § 1329. Under these programs, municipal storm sewer systems (“MS4s”)<sup>2</sup> must obtain a NPDES permit for their stormwater discharges, develop a Stormwater Pollution Prevention Plan or Stormwater Management Plan, and implement measures that prevent discharges of the pollutants in stormwater runoff. 33 U.S.C. § 1342(b). Thus, municipalities such as West Chester Borough, which is an MS4 municipality, typically serve on the front lines of stormwater management, developing stormwater infrastructure, programs,

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<sup>2</sup> MS4s are conveyances or systems of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains that are owned or operated by a public entity, are designed or used for collecting or conveying stormwater, and are not a combined sewer or part of a publicly-owned treatment works. A municipality is bound by EPA regulations for an MS4 when all or a portion of a municipality lies within an urbanized area, as determined by the US Census Bureau. PA. DEPT. ENV’T PROT., MS4 FAQ v. 1.6 3 (Rev. Sept. 23, 2022). The MS4 program requires the MS4 owner/operator to implement a series of programs to reduce the discharge of pollutants from the storm sewer system to the maximum extent practicable in a manner that protects water quality. *Id.* In Pennsylvania, each MS4 permittee must create a Stormwater Management Program (SWMP) to minimize the impacts from runoff. The SWMP requires municipalities to focus on six Minimum Control Measures: Public Education & Outreach; Public Involvement and Participation; Illicit Discharge Controls; Construction Site Runoff Control; Post-Construction Stormwater Management; and Pollution Prevention and Good Housekeeping. *Id.* at 4.



and policies to protect public health and the quality of the environment. Municipalities are thus charged by federal and state law with the responsibility to see these implementation programs, which are critical to protecting water resources, through. In so doing, they create a paradigm where the user-landowners located within the MS4 geography are able to enjoy the distinct benefit of having their stormwater runoff managed on their behalf.

Municipalities use various funding mechanisms to pay for their stormwater management programs. One common mechanism is the implementation of a charge on the user-landowners within the MS4 who contribute to—and benefit from—the system. While a variety of methodologies may be used to calculate the dollar amount of their stormwater service fees, because the amount of impervious surface area on a developed area of land is the most important factor influencing stormwater runoff, it is a commonly used factor. NRC Stormwater Report, *supra*, at 23 (noting with “urban development in general, and impervious surfaces in particular, the movement of water across the landscape is radically altered. . . . Nearly all of the associated problems result from one underlying cause: loss of the water-retaining function of the soil and vegetation in the urban landscape.”). By linking impervious area to the fee calculation, a municipality simultaneously ensures that the fees are directly related to stormwater management benefits received and creates a reliable source of funding that is dedicated to meeting stormwater needs and impacts. PENNFUTURE,

FUNDING STORMWATER MGMT. IN PA. MUN.: CREATING AUTHS. AND IMPLEMENTING ORDINANCES 6 (2017) (hereinafter, “Stormwater Ordinance Manual”).

Using stormwater fees, as opposed to relying on general tax revenue, ensures that all members of a community who contribute to the generation of the stormwater runoff problem—and critically, who benefit from the mandated stormwater management solutions implemented by a municipality—contribute to paying their fair share for the solution. *Id.* Ultimately, a stormwater management fee enables a municipality to provide substantial protection to property owners and to communities from flooding, water pollution, and the threats to health and public welfare that proliferate as water and natural resources are diminished, and allows a municipality to meet its statutory obligations to manage water pollution.

In addition to the CWA, Pennsylvania also independently protects its water through the state constitution and law. Water is a part of the corpus of the public trust consisting of the Commonwealth’s natural resources that is established by Article 1, Section 27 of the Pennsylvania Constitution (the “Environmental Rights Amendment” or “ERA”).<sup>3</sup> The General Assembly has also recognized the

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<sup>3</sup> The ERA provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Pa. Const. art. I, § 27.

importance of clean water through Pennsylvania’s Clean Streams Law (“CSL”), 35 Pa. Stat. Ann. §§ 691.1 *et seq.*, and Act 167, the Stormwater Management Act. 31 Pa. Stat. Ann. §§ 680.1 *et seq.*<sup>4</sup> Recognizing that “A comprehensive program of storm water management, including reasonable regulation of development and activities causing accelerated runoff, is fundamental to the public health, safety and welfare and the protection of the people of the Commonwealth, their resources and the environment”, 31 Pa. Stat. Ann. § 680.1, Act 167 authorized DEP to “[c]oordinate storm water management in the Commonwealth”, 31 Pa. Stat. Ann. § 680.14(a), and required counties to develop watershed-wide stormwater management plans, in consultation with municipalities. 31 Pa. Stat. Ann. § 680.5.

The Borough is required by federal and state law to manage its stormwater within the regulated MS4 area, which includes the area of Appellee’s campus. However, the mandates of the CWA are unfunded, leaving to the municipalities ultimately charged with its implementation the task of raising the funds necessary to build, maintain, and improve their MS4s in order to maintain compliance with their NPDES permits. The Stormwater Charge, duly created as part and parcel of its stormwater management program, is the charge associated with the *benefit* that the

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<sup>4</sup> The CSL finds that “[c]lean, unpolluted streams are absolutely essential” to the health of the Commonwealth, and declares: “It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.” 35 P.S. § 691.4.

payors receive by having their stormwater runoff—which would otherwise unlawfully pollute the receiving waters—managed for them.

As a matter of policy, it creates a manifestly unjust result to find the Stormwater Charge to be a tax and not a fee. Should this Court uphold the Commonwealth Court’s decision, Appellees and other entities not subject to taxation will thereafter freely enjoy the use of the Borough’s stormwater management system, for which they do not pay. However, the Borough’s obligations will persist: the Borough must remain in compliance with its obligations under the law, including its NPDES permit and its trustee obligations under the ERA. Finding that the Stormwater Charge is a tax—from which Appellees are exempt—necessarily creates an outcome where other users, including individual residents and non-governmental landowners, will be forced through higher rates to subsidize Appellees’ use of the system, or where West Chester Borough will be forced to spend monies from general fund revenues—to which Appellees and other state entities not subject to taxation also do not contribute—in order to maintain the system and stay in compliance with its legal obligations. The Commonwealth Court’s broad opinion creates a situation where a state-owned liquor store in a shopping mall with a impervious parking lot in a municipality with state-created stormwater management obligations will not contribute to the costs of managing the stormwater runoff associated with its operations, and where, as described above, other users will subsidize the liquor

store's use of the system or where the municipality will be required to spend monies from its general revenue to meet its obligations.

Upholding the Commonwealth Court's decision that the Stormwater Charge constitutes a tax and not a fee will have grave policy implications, unreasonably and unjustly shifting costs to citizen taxpayers and other system users, and sets municipalities up for failure in their ability to meet their legal and ERA trustee obligations. However, even setting aside these considerations, the Stormwater Charge is more logically and appropriately considered a fee as a matter of Pennsylvania law, because the purpose of the Stormwater Charge is not to raise general revenue, but to raise monies, held separate from the general funds of the Borough, in order to fund a specific regulatory scheme, with specific benefits to users of the stormwater system. *See infra* Section II.

## **II. Stormwater Fees Meet the Classic Indicia of a Fee, Not a Tax.**

Stormwater fees meet the classic indicia of fees rather than taxes, consistent with both simple logic and Pennsylvania law. The core test of whether a charge is a tax or a fee is whether its purpose is to raise general revenue, and whether it is proportionate to the costs of administering the regulatory scheme as a whole. *Rizzo v. City of Phila.*, 668 A.2d 236, 237 (Pa. Cmwlth. 1995) (quoting *City of Phila. v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973)). The purpose of the Stormwater Charge here is not to produce general revenue, but to enable the Borough

to administer its stormwater control program by charging user-landowners proportionate to their use of the stormwater management system. The Commonwealth Court misunderstood the nature of the Stormwater Charge, and its application of the *DeKalb County, Georgia v. United States* was in error, because *DeKalb* conflicts with clear Pennsylvania precedent, and because the Commonwealth Court’s analysis failed to adequately consider the specifics of West Chester’s Stormwater Ordinance in the context of the greater regulatory scheme.

**A. Pennsylvania law examines whether the purpose of a charge is to raise general revenue, which the Stormwater Charge does not.**

In Pennsylvania, when determining whether a charge is a tax or a fee, a court must foremost consider the purpose of the charge: “[T]he primary purpose of taxes is *always* to raise money for the taxing authority.” *Adams Outdoor Advert. v. Borough of Stroudsburg*, 667 A.2d 21, 24 (Pa. Cmwlth. 1995) (citing *White v. Commonwealth Med. Pro. Liab. Catastrophe Loss Fund*, 571 A.2d 9 (Pa. Cmwlth. 1990)) (emphasis added); *Pittsburgh Milk Co. v. City of Pittsburgh*, 62 A.2d 49, 52 (Pa. 1948) (“A license fee never can duplicate a tax for the obvious reason that the former is imposed for regulatory purposes and the latter solely for the raising of revenue.”). Generally, “[t]he common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while [] fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.” *Rizzo*, 668 A.2d at 237 (quoting

*City of Phila.*, A.2d 247 ). Thus, a true fee is a charge imposed for “regulatory purposes,” supporting the cost of carrying out a regulatory scheme. *Pittsburgh Milk Co.*, 62 A.2d at 52.

Where a charge is clearly not to raise general revenues because the funds generated are held in a segregated specific account, and may only be spent for specific purposes related to the charge, a charge is more logically and properly classified as a fee even if it does not fit squarely into traditional conceptions of license fees. *See White*, 571 A.2d at 11.<sup>5</sup> Here, the Borough’s Stormwater Charge falls logically within the traditional bounds of a fee. First, the funds are not intended to go into the Borough’s general revenue, and do not in fact go to the general revenue. Rather, the primary purpose of the charge is to raise funds for “use of, benefit by and the services rendered by the stormwater management system,”

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<sup>5</sup> In *White* the court held that an “annual surcharge” (*i.e.*, the fee) imposed on physicians and deposited into a fund to cover the costs of medical malpractice claims was a permissible fee, not a tax. *Id.* at 11. The court found that (1) the purpose of the fee was not to raise revenues for public purposes or to defray the necessary expenses of government; (2) the fee would be “held in trust, deposited in a segregated account, invested and reinvested by the director, and shall not become a part of the General Fund of the Commonwealth”; and (3) “[i]n addition to the expense involved in administering the Fund, a part of the cost of supervision and regulation is the actual payment of claims to patients.” *Id.* The court concluded that constitutionally permissible fees are not limited only to narrow conceptions of traditional license fees, but that “the surcharge may not fit squarely within the four-part test of *National Biscuit*” under such traditional conceptions of license fees, but it nevertheless “falls more logically into the category of a license fee as opposed to any other category” “when viewed in the context of the total legislative scheme of the Act.” *Id.* at 11–12 (citing *National Biscuit Co. v. Philadelphia*, 98 A.2d 182 (Pa. 1953)).

W. CHESTER CODE § 94A-9(A) (2022). Upon collection, West Chester’s Code specifies that funds “shall be deposited into the West Chester Borough Stormwater Management Fund.” *Id.* The Stormwater Management Fund, in turn, may not be used for general purposes, but only for purposes of implementation and management of the Borough’s stormwater management program, not for other purposes. W. CHESTER CODE § 94A-9(B) (2022). Indeed, the Commonwealth Court’s opinion did not dispute these fundamental facts, nor note any dispute about the purpose of the charge, nor dispute that the funds raised were not for general revenue. *See Borough of W. Chester*, 291 A.3d at 458.

The Commonwealth Court’s analysis substituted the reasoning outlined in *DeKalb County, Georgia v. United States* for the purpose-oriented inquiry required by Pennsylvania law. 108 Fed. Cl. 681 (2013) (evaluating a stormwater charge and adapting three-part framework). In *DeKalb County*, the Court of Federal Claims examined whether a county stormwater fee was a tax, and thus whether certain federal facilities were exempt from obligation to pay this fee. *DeKalb County* adapted the three-part framework outlined in *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n*, 967 F.2d 683 (1st Cir. 1992), for differentiating taxes and fees. *DeKalb Cnty.*, 108 Fed. Cl. at 399. The *DeKalb* court’s adaptation inquired: “First, which governmental entity imposed the charge? Next, which parties must pay the charge?”



And finally, *for whose benefit are the revenues generated by the charge spent?*” *Id.* at 699 (emphasis added).

The contrast of the Fourth Circuit’s reasoning in *Norfolk Southern Railway Company v. City of Roanoke* is illustrative. There, the Fourth Circuit also applied the *San Juan Cellular* three-part inquiry in evaluating a stormwater charge. *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019). The *Norfolk Southern* court described the *San Juan Cellular* framework: “(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) *what purposes are served by the use of the monies obtained by the charge.*” *Id.* (citing *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 133 (4th Cir. 2000)) (emphasis added). In *Norfolk Southern*, the Fourth Circuit held that third factor is given the controlling weight because the charge’s regulatory purpose provides a better indication of its overall nature. *Id.* at 322. “A charge is more likely to be a tax if its primary purpose is to raise revenue for general government activity that benefits the entire community.” *Id.*

Because it explicitly considers the purpose of the charge, the *Norfolk Southern* reasoning is consistent with Pennsylvania precedent in a way that *DeKalb County* is not. By relying on *DeKalb County*, and failing to consider cases such as *Norfolk Southern*, the Commonwealth Court disregarded the body of Pennsylvania precedent that looks to the purpose of a charge, in favor of considering the narrow and

altogether different question of whether the charge provides a specific benefit to the payor. This error should be reversed by this Court.

The Borough's Stormwater Charge is solely for the purpose of funding its greater stormwater management system, not for general purposes. This is the correct inquiry under Pennsylvania law. *E.g.*, *Adams Outdoor Advert.*, 667 at 24 (citing *White*, 571 A.2d 9); *Pittsburgh Milk Co.*, 62 A.2d at 52. The Commonwealth Court erred in disregarding the plain facts as to Stormwater Charge's purpose, which show that it is a fee.

**B. Evaluation of the benefit and proportionality of a charge requires viewing the charge in the context of the total legislative scheme.**

In addition to looking at the purpose of a fee, Pennsylvania courts must evaluate whether the fee is commensurate with the cost of administration and enforcement of the regulatory scheme as a whole. *Rizzo*, 668 A.2d at 238 (citing *Nat'l Props., Inc. v. Borough of Macungie*, 595 A.2d 742 (Pa. Cmwlth. 1991)) ("Fees charged by a municipality for services rendered are proper if they are reasonably proportional to the costs of the regulation or the services performed."). The Commonwealth Court's analysis of proportionality fails for several reasons. First, because it failed to evaluate the fee in the context of the stormwater management program of the Borough as a whole as required by Pennsylvania law, but instead substituted the reasoning of *DeKalb County*. Second, as a factual matter, impervious surface directly correlates to the amount of stormwater generated in an

area, and therefore accurately estimates how much benefit a user of the stormwater system receives. The Commonwealth Court’s analysis disregards this reality and mischaracterizes the nature of the Stormwater Charge.

Pennsylvania law requires evaluating a fee in the context of the regulatory scheme as a whole. *White*, 571 A.2d at 11; *see also Woodford v. Commonwealth Ins. Dep’t*, 243 A.3d 60, 85 (Pa. 2020) (finding legislative act to be a “comprehensive regulatory scheme” and evaluating the charge in question from within that framework). The costs of the regulatory scheme, moreover, are not limited to the ministerial tasks related to the scheme, but include costs of administration and enforcement. *See White*, 571 A.2d at 12 (holding that charges were reasonable “when viewed in the context of the total legislative scheme”). Here, the Stormwater Charge supports the Borough’s considerable role and responsibilities in carrying out the stormwater controls of the CWA.

Rather than evaluating the Stormwater Charge in context, the Commonwealth Court focused on the fact that the Stormwater Charge provides “benefits that are enjoyed by the general public . . . as opposed to ‘individualized services provided to particular customers,’” *Borough of W. Chester*, 291 A.3d at 465. This simply is not the test. Indeed, this Court has specifically noted that there may be general benefits enjoyed by the public from the regulation of an activity: “A . . . license fee [is] . . . a charge which is imposed by the sovereign, in the exercise of its police power, upon

a person within its jurisdiction for the privilege of performing certain acts and which has for its purpose the defraying of the expense of the regulation of such acts for the benefit of the general public.” *Pittsburgh Milk Co.* at 52 (citing *Pa. Liq. Con. Bd. v. Publicker*, 32 A.2d 914 (Pa. 1943)).<sup>6</sup> The benefit here is that Appellees are permitted to discharge a certain amount of stormwater runoff. The fact that the public enjoys a benefit of both having stormwater managed generally, in addition to not shouldering the expense of managing the University’s stormwater runoff, does not make the Stormwater Charge a tax.

The Commonwealth Court also erred as matter of fact in its characterization of the Stormwater Charge as disproportionate. As a simple matter, this Court explained in *In re City of Philadelphia* that a charge based on the use of a system, rather than an arbitrary assessment unrelated to the use, is lawfully proportionate. 21 A.2d 876, 881 (Pa. 1941). The Borough’s Stormwater Charge is based on a landowners’ use of the stormwater system, because the charge is dependent upon the amount of impervious surface on the property. *Borough of W. Chester*, 291 A.3d at 458. There is widespread scientific consensus that urbanization, and specifically

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<sup>6</sup> Protecting the health, safety and general welfare of township inhabitants is in the public interest, and regulating water supply is a legitimate governmental activity. *See Greenfield Twp. Mun. Auth. v. D.R. Burket Tr.*, 959 A.2d 522, 525 (Pa. Cmwlth. 2008); *Stern v. Halligan*, 158 F.3d 729, 732 (3d. Cir. 1998) (finding mandatory connection to municipal water or sewer systems a legitimate exercise of police power).

introduction of impervious surfaces to land, has a direct and proportionate impact on runoff generation: The EPA notes that “The effects of urbanization on stream ecosystems are largely driven by impervious cover.” CADDIS VOLUME 2, *supra*; *see also* CHRISTOPHER KONRAD, U.S. GEOLOGICAL SURV., USGS FACT SHEET FS-076-03, EFFECT OF URBAN DEV. ON FLOODING (2004) (noting during development, “permeable soil is replaced by impermeable surfaces such as roads, roofs, parking lots, and sidewalks that store little water, reduce infiltration of water into the ground, and accelerate runoff to ditches and streams.”); NRC STORMWATER REPORT, *supra*, at 11.

The Borough is charged by law and hydrology to manage stormwater runoff at the watershed level—that is, the geographic area that drains to a particular river or creek. One annual scientific literature review, summarizing 280 stormwater management studies, noted “Watershed-scale runoff volume management is essential to maintain and/or restore flow regimes and pollutant concentrations that are supportive of aquatic habitat and biota.” Carolyn Rodak et al., *Urban stormwater characterization, control, and treatment*, 92 WATER ENV’T RSCH. 1552, 1576 (2020). Individuals and entities—or rather, the structures they build—automatically contribute to the runoff in a particular watershed by virtue of having developed the land within it.

Because of the undeniable hydrologic connection between impermeable surface area and stormwater runoff, policymakers across the globe use the impermeable surface area of a property to calculate the amount of stormwater runoff that is generated, and must therefore be managed, by a particular entity. Here, the Borough's Stormwater Charge is tailored to this very fact. The amount of stormwater runoff that a property generates is, of course, an accurate measure of that property's use of the Borough's stormwater management system. The Stormwater Charge, then, is not disproportionate to either the use of the system by the University, nor is it disproportionate to stormwater management regulatory scheme as a whole.

### **III. The ERA Provides Additional Context For Properly Interpreting the Stormwater Charge as Imposing a Fee and Not a Tax.**

This Court has explained that the mandate of the ERA “informs Pennsylvania’s elaborate body of environmental protection statutes and regulations.” *Clean Air Council et al. v. Dep’t of Env’t Prot.*, 289 A.3d 928, 932 (Pa. 2023); *Gerhart v. Dep’t of Env’t Prot.*, 74 MAP 2021 (Pa. Feb. 22, 2023). The ERA “mandates that the Commonwealth, as a trustee, conserve and maintain our public natural resources in furtherance of the people’s specifically enumerated rights.” *Pa. Env’t Def. Found. v. Commonwealth* (“*PEDF II*”), 161 A.3d 911, 934 (Pa. 2017) (internal quotation omitted). Here, because the stormwater regulation is part of the body of environmental laws and regulations protecting Pennsylvania’s natural resources, the ERA framework must be applied to interpretation of the fees

imposed. Application of the ERA demonstrates the absence of the revenue-raising characteristic of a tax in the issue at bar, and further shows why the Stormwater Charge must be a fee.<sup>7</sup>

**A. Proceeds from the natural resources of the public trust must be used to maintain and restore those natural resources.**

The ERA provides critical context to the interpretation of the Stormwater Charge in the instant case. When evaluating whether a charge is a fee or a tax, Pennsylvania courts have long held that the critical distinction is whether the charge is intended to be a general revenue-producing measure, or if it is a regulatory measure intended to cover the cost of administering a regulatory scheme authorized under the police power of the government. *Pittsburgh Milk Co.*, 62 A.2d at 52; *White*, 571 A.2d at 11. Such analysis must consider whether the funds raised are directed to the general funds of the government, or whether they should be held separately and reinvested in furtherance of the regulation. *E.g.*, *White*, 571 A.2d at 11. When charges are related to the public trust established by the ERA, this consideration

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<sup>7</sup> The Borough of West Chester is unquestionably a trustee under the ERA. *See Robinson Twp.*, 161 A.3d at 931 n.23 (explaining that “all agencies and entities of the Commonwealth government, both statewide and local” are trustees). The Borough has a duty as trustee to “refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources [including surface and groundwater], whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state’s failure to restrain the actions of private parties.” *Robinson Twp.*, 83 A.3d at 957; *PEDF II*, 161 A.3d at 933

takes on additional importance. This Court has explained that the ERA requires that where monies are derived from the diminution of trust assets, they must “remain in the trust and must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27.” *PEDF II*, 161 A.3d at 936.

This framework helps illuminate the nature of the Stormwater Charge, and demonstrates the lack of the revenue-raising characteristic of a tax. The Borough here imposed the Stormwater Charge consistent with its obligations to conserve and maintain the waters within its bounds. Although the charge here comes not from a direct sale or lease of trust resources, as was the case in *PEDF II*, the charge is imposed because an entity has impervious surface that creates stormwater runoff, resulting in the diminution of the receiving waters, *i.e.* the public trust. Understood under the light of the ERA, it naturally follows that the funds raised by the Stormwater Charge must be used for purposes of the trust. And indeed, this is the case here: the Borough’s Code directs that “All sums collected from the payment of stream protection fees shall be deposited into the West Chester Borough Stormwater Management fund.” W. CHESTER CODE § 94A-9(A) (2022). The Borough’s Code further directs that the Stormwater Management Fund may only be used for purposes related to the Borough’s stormwater mitigation efforts. W. CHESTER CODE § 94A-9(B) (2022). The Stormwater Charge is not, by its own terms, a general revenue



measure. It is instead a charge associated with the diminution of trust assets, which is held separately, and may solely be used to order to fund programs specifically designed to restore that same asset. This is consistent with the framework of the ERA. The Commonwealth Court’s analysis fails to acknowledge this simple fact, focusing instead on whether the benefits of the stormwater charge are general or specific. Once again, the Commonwealth Court applied an incorrect legal standard, disregarding the fundamental element of Pennsylvania jurisprudence that examines the purpose of a charge, and failing to consider that the Stormwater Charge assists the Borough in discharging its obligations under the ERA to use funds derived from the diminution of trust assets to restore said assets.

**B. The ERA provides additional context showing the Stormwater Charge is proportionate to the cost of administering the regulatory scheme as a whole.**

The Commonwealth Court erroneously focused on an overly-narrow construction of the benefits of the Stormwater Charge in this case. This analysis failed to account for the ERA and disregarded the nature of the benefit bestowed by the Stormwater Charge.

In evaluating the scope of administering the regulatory scheme, courts should look to the totality of the regulation, not merely the clerical costs. *White*, 571 A.2d at 12 (the costs of implementing the totality of a regulatory scheme, including in that case payment of claims to patients, are the costs of “administering” the regulatory

program or scheme). A charge may be an impermissible tax when it is “characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision” of the regulatory scheme. *Greenacres Apartments, Inc. v. Bristol Twp.*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984). The ERA, which grants the right of the people to “pure water,” Pa. Const. art. I § 27, provides additional context for evaluating the scope of the regulatory scheme here. The NPDES permitting system, part of an Act that sets out to eliminate pollution from the nation’s waters, is a broad program. While this does not, by itself, prove that the Stormwater Charge is a fee and not a tax, it does suggest that the overall context of the costs of administration of the Borough’s stormwater management program should not be narrowly construed.

Rather than discussing the Stormwater Charge in the context of the stormwater regulation system, the Commonwealth Court simply concluded that the Stormwater Charge provides “benefits that are enjoyed by the general public,” and then went on to imply that the existence of these benefits means that the payor receives no particular benefit of their own. *Borough of W. Chester*, 291 A.3d at 458. This narrow interpretation of both the benefits and the scheme itself cannot stand.

With stormwater management, an entity such as the University is *already enjoying* the privilege and benefit that the charge is for: the discharging of stormwater into the stormwater management system. Such is one of the difficulties

of understanding the problem of environmental pollution: the *status quo* allows pollution to continue unabated, with the burdens and costs externalized away from the operator, who enjoys the privilege and benefit of the regulatory regime that manages their specific pollution, without incurring the fees that support the regime. The University is already generating and will continue to generate stormwater runoff, and the Borough is required to manage this stormwater. The privilege and benefit here is already enjoyed. The fee here seeks to reimburse the Borough for a service it must provide.

## CONCLUSION

For the reasons set forth herein, Amicus respectfully requests that this Court reverse the Commonwealth Court's decision finding that Appellant's Stormwater Charge is an impermissible tax. This Court should instead hold that the Stormwater Charge is a fee, consistent with the ERA and the laws and regulations protecting clean water in the Commonwealth.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS**

In accordance with Pa. R.A.P. 2135(d), I, Emma H. Bast, hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word.

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 13, 2023

/s/ Emma H. Bast  
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae*, Citizens for Pennsylvania's Future, was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121. The Proof of Service generated by the PACFile system will follow this Certificate of Service in the paper copy of this brief filed with the Court.

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