

IN THE SUPREME COURT OF PENNSYLVANIA

9 MAP 2023

THE BOROUGH OF WEST CHESTER,

Appellant,

V

**PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION and WEST
CHESTER UNIVERSITY OF PENNSYLVANIA of the STATE SYSTEM of
HIGHER EDUCATION,**

Appellees.

**BRIEF OF *AMICUS CURIAE* CHESAPEAKE BAY FOUNDATION, INC.
IN SUPPORT OF THE APPELLANT**

**Appeal from the Order of the Commonwealth Court of Pennsylvania, dated
January 4, 2023 at Docket No.: 260 M.D. 2018**

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The Chesapeake Bay Foundation, Inc. (CBF) submits this brief as *amicus curiae* in support of the Borough of West Chester (“the Borough”).

I. STATEMENT OF INTEREST

The Chesapeake Bay Foundation is a non-profit, nonpartisan, public interest advocacy organization with members throughout the Chesapeake Bay region. As of April 2023, CBF has more than 168,000 total members and e-subscribers, including 17,677 in Pennsylvania. CBF maintains offices in Annapolis and Easton, Maryland; Richmond and Virginia Beach, Virginia; and Harrisburg, PA. CBF members enjoy swimming, boating, kayaking, sailing, fishing, crabbing, bird watching, and other aesthetic and recreational pursuits in the waters of the Chesapeake Bay and its rivers and streams. Many of CBF’s Pennsylvania members enjoy these pursuits in the waters of the Commonwealth and Chesapeake Bay.

CBF has continually advocated for healthy rivers, clean streams, and a restored Bay. In pursuit of its mission, CBF engages in education, restoration, advocacy, and litigation. CBF Pennsylvania staff undertake, among other things, legislative and regulatory advocacy and participate in urban stormwater restoration projects. Restoration work includes tree plantings, installation of vegetative buffers along rivers and streams to reduce stormwater runoff and erosion. Since 2020, CBF has spent over \$9 million on restoration projects in Pennsylvania

designed to improve the quality of Pennsylvania waters, including stormwater restoration projects. Funds for administering these projects are primarily provided by member donations and grants.

CBF also operates a robust education program. CBF's education program educates students and teachers about the value of the Bay and its tributaries. Last year alone, CBF spent over \$4 million on its education program which operates through the Bay region, including the Commonwealth of Pennsylvania where CBF spent over \$325,000 on just its education program in 2022.

CBF and its members are particularly concerned with this Court's ruling in this matter. While the Commonwealth Court's decision addresses only the Borough of West Chester's Stormwater Charge, the court's holding has significant adverse ramifications for all Stormwater Utility Fee programs throughout the Commonwealth of Pennsylvania where state owned properties are located. Those include municipalities discharging stormwater into tributaries of the Susquehanna River; most importantly, Harrisburg, the seat of state government where large areas of impervious surfaces are owned by the Commonwealth and subject to utility fees.

II. BACKGROUND

The Commonwealth Court held that the Borough's Stormwater Charge is a tax, rather than a fee. The court reached this conclusion based on three findings. First, the charge "provides 'benefits that are enjoyed by the general public,' such as

decreased flooding, erosion and pollution, as opposed to ‘individualized services provided to particular customers.’” *Borough of W. Chester v. Pennsylvania State Sys. of Higher Educ.*, 291 A.3d 455, 465 (Pa. Commw. Ct. 2023) (Quoting *DeKalb Cnty., Georgia v. United States*, 108 Fed. Cl. 681 (2013)). Second, the charge is based on a property’s anticipated burden on the system rather than benefits to the payor. *Id.* Finally, the Borough failed to “establish that it enters into ‘voluntary contractual relationships’ with property owners subject to Stormwater Charge assessments.” *Id.* at 466 (Quoting *City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1298 (Pa. Commw. Ct. 1996)). Because the Court held that the Stormwater Charge is a tax and Commonwealth properties have tax immunity, the Pennsylvania State System of Higher Education (PASSHE) does not have to pay the charge related to the impervious surfaces located on its West Chester University (WCU) campus. *Id.*

The Commonwealth Court’s decision is flawed in two respects. First, disregarding recent precedent from other jurisdictions, it used an inappropriate legal standard in determining whether a municipal charge is a fee or a tax. *See Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019). The Commonwealth Court emphasized that to determine whether a stormwater assessment is a fee, the charge must be proportional to the benefit bestowed on the party assessed. To ensure this, the Court required the Borough to prove that its

Municipal Separate Storm Sewer System (MS4) provided a benefit to PASSHE. *Borough of W. Chester*, 291 A.3d at 465. This approach turns on its head the analysis of whether a charge is a fee or a tax. Instead, the Court ought to have considered the burden WCU's stormwater discharges contribute to local water quality impairment in the Brandywine Creek watershed which the Borough is obligated to address. *See* NPDES Permit No. PAI130026

Second, the Court overlooked relevant facts when it held that the Borough could not establish how much stormwater PASSHE contributes to the Borough's Municipal Separate Storm Sewer System (MS4). *Borough of W. Chester*, 291 A.3d at 466-67. In fact, the Borough's Stormwater Charge was directly proportional to the amount of stormwater PASSHE discharges to the Borough's MS4 system. The Borough can and has determined the amount of water it handles by every owner of impervious surfaces in its jurisdiction through its straightforward assessment structure. Impervious areas include rooftops, parking areas, sidewalks and walkways, porches, decks, and patios.¹ In general, the Stream Protection Fee ("SPF") rate is \$6.70 per 1000 square feet per month; for properties with less than 3000 square feet there is a five tier yearly flat-rate system.² Moreover, the United States Environmental Protection Agency (EPA), which developed the MS4

¹ Borough of West Chester, *West Chester Stream Protection Fee* (Mar. 2021), <https://west-chester.com/683/Stream-Protection-Fee>.

² *Id.*

regulatory system, has established a tool designed to estimate the amount of rainwater and frequency of runoff from a specific site. This tool can be used by “anyone interested in reducing runoff from a property, including site developers, landscape architects, urban planners, and homeowners.”³ Thus, it can readily be determined how much stormwater PASSHE discharges into the Borough’s MS4; however, the Court simply did not consider these facts.

Undoubtably, the Borough renders PASSHE a significant benefit by handling the bulk of the stormwater running off the north sector of its WCU campus. Explained below, PASSHE owns property within the quadrant from Sharpless Street south to West Rosedale Avenue and from South Church Street west to South New Street. This land contains buildings with rooftop downspouts, roads including North Campus Drive and University Avenue with storm drains, and storm sewer inlets (Exhibit A, inlets 2348, 2350-60, 2364-70, 3102-07) discharging water into underground pipes that comprise part of the Borough’s MS4 system. The stormwater in those pipes flows under South New Street near the New Street garage, also a PASSHE building, and directly into Plum Run, an impaired waterbody. *See* Exhibit B.

³ US EPA, *National Stormwater Calculator* (Nov. 2022), <https://www.epa.gov/water-research/national-stormwater-calculator>.

The stormwater discharge from the University's campus into Plum Run has been so large that it has eroded the banks and bottom of Plum Run, causing the discharge of sediment into the creek. The creek is impaired for water flow and variability.⁴ Plum Run flows into Brandywine Creek which flows into the Christiana River and into the Delaware River; all of which are impaired for sediment.⁵ As a consequence, WCU's stormwater discharges are contributing to the downstream impairment of *several* major waterways.

While we dispute that the Commonwealth Court's "benefit" test is the correct one, the Borough can easily meet it by noting that if WCU was prohibited from discharging its stormwater into the Borough's MS4 system, WCU would have to build an immense stormwater holding pond just to store and treat the stormwater from the North Campus area. Obviously, the Borough's MS4 system bestows a significant benefit on PASSHE.

⁴ PADEP, *Plum Run Watershed TMDL* (Sept. 2011), https://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqstandards/tmdl/PlumRun_TMDL.pdf.

⁵ Brandywine Red Clay Alliance; *Plum Run* (2023), <http://brandywineredclay.org/watershed-conservation/red-streams-blue/plum-run/>; USEPA, *Impaired Waters and TMDLs in Region 3* (2023), <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-3#Specific%20Impaired%20Waters%20and%20TMDLs>.

III. ARGUMENT

A. Stormwater Runoff from Impervious Surfaces is a Growing Problem Throughout the Commonwealth.

Stormwater is rainwater or other precipitation that does not infiltrate into the ground and flows over the land or hard surfaces ending up in the nearest waterway. Here, stormwater generated within West Chester Borough is ultimately discharged into the Delaware River. Stormwater flows are increased in direct relationship to the amount of impervious cover: as less water is able to enter the ground, more is left to flow into surface waters. As stormwater passes over impervious surfaces it will often pick up loads of oil, grease, dirt, and nutrients (nitrogen and phosphorus).⁶ Uncontrolled stormwater flows cause increased flooding, pollutant loading, erosion, and property damage.⁷ Sediment – gravel and soil particles that have been eroded from the land, frequently by stormwater – is Pennsylvania's largest surface water pollutant by volume.⁸ As previously noted, stormwater from

⁶ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

⁷ PennState Extension; *What is Stormwater?* (Aug. 2022), <https://extension.psu.edu/what-is-stormwater#:~:text=All%20of%20the%20water%20that,garage%2C%20and%20d%20own%20your%20driveway> ; Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

⁸ PennState Extension; *What is Sediment and Why is it a Stormwater Pollutant?* (Aug. 2022); <https://extension.psu.edu/what-is-sediment-and-why-is-it-a-stormwater-pollutant> .

WCU's North Campus travels exclusively through waterbodies that are already historically impaired for sediment.⁹ Sediment and other pollutants in stormwater are known to harm water quality and smother aquatic life – killing benthic organisms necessary for healthy, functioning aquatic ecosystem.¹⁰ Pennsylvania's own Department of Environmental Protection (DEP) recognizes this in its own stormwater programs, reminding citizens that “urban stormwater runoff pollution is a problem that has no boundaries, and neither does the solution!”¹¹

Stormwater is of notable concern in urban areas as they are becoming more concentrated with impervious landcover. This is causing an escalation in the volume, concentration, and intensity of flows entering streams. Streams across the Commonwealth are now deeper and traveling faster than they have been historically.¹²

⁹ Brandywine Red Clay Alliance; *Plum Run* (2023), <http://brandywineredclay.org/watershed-conservation/red-streams-blue/plum-run/>; USEPA, *Impaired Waters and TMDLs in Region 3* (2023), <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-3#Specific%20Impaired%20Waters%20and%20TMDLs> .

¹⁰ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

¹¹ PA DEP, *How to Be Stormwater Smart* (2023), <https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Pages/Be-Stormwater-Smart.aspx>

¹² PennState Extension; *What is Sediment and Why is it a Stormwater Pollutant?* (Aug. 2022); <https://extension.psu.edu/what-is-sediment-and-why-is-it-a-stormwater-pollutant>.

Under the authority of the Clean Water Act (CWA), the EPA requires MS4s to be installed in “urbanized areas.” 33 USC § 1342(p). Urbanized areas receive this classification based on population density. “Large institutions, like college campuses [,] are also part of the MS4 program because they also contain the type of dense development that produces concentrated stormwater flows.”¹³

The CWA establishes stormwater requirements; these are implemented by states under federal supervision.¹⁴ To implement these requirements, EPA established an MS4 program pursuant to the National Pollution Discharge Elimination System (NPDES). The MS4 program applies to municipalities and institutions that have separate systems for sanitary sewer and stormwater management.¹⁵ DEP handles MS4 permitting throughout the Commonwealth.¹⁶

To legally discharge stormwater, a municipality must obtain authorization under DEP’s MS4 permit program.¹⁷ This can be granted through either an individual permit or coverage under a general permit. These state-managed

¹³ Penn State Extension; *What is an MS4?* (Jun. 2023); <https://extension.psu.edu/what-is-an-ms4>

¹⁴ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

¹⁵ *Id.*

¹⁶ US EPA, *Stormwater Discharges from Municipal Sources* (Jun. 2023), <https://www.epa.gov/npdes/stormwater-discharges-municipal-sources>.

¹⁷ PA DEP, *Municipal Stormwater Program Updates* (2023), <https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/pages/default.aspx>

NPDES permits are designed to “reduce the discharge of pollutants from the regulated small MS4, to the maximum extent practical, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA and the Pennsylvania Clean Streams Law.”¹⁸ In Pennsylvania, there are two Large MS4s, no Medium MS4s, and 1059 Small MS4s.¹⁹ MS4 jurisdictions must develop a Stormwater Management Program (SWMP) and those that discharge into watersheds classified by DEP as “impaired” must also develop Pollutant Reduction Plans (PRP).²⁰

The Borough maintains a small MS4 and is subject to an individual MS4 permit and a PRP for the Brandywine Creek, Blackhorse Run, Plum Run, and Taylor Run watershed. NPDES Permit No. PAI130026; Exhibit D, NPDES Stormwater Discharges from MS4, West Chester Borough – Brandywine Creek, Blackhorse Run, Plum Run, Taylor Run Pollutant Reduction Plan, Revised July 2018. WCU / PASSHE is a small MS4 covered under a general MS4 permit.²¹

¹⁸ PennDOT, *Municipal Separate Storm Sewer System (MS4)* (2023), <https://www.penndot.pa.gov/Doing-Business/LocalGovernment/StormWaterManagement/Pages/MS4-Information.aspx>

¹⁹ PA DEP, *Municipal Stormwater Program Updates* (2023), <https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/pages/default.aspx>. See Exhibit C, Map of PA MS4s 2010.

²⁰ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

²¹ Chester County Conservation District, *Chapter 102 PAG-02 NPDES General Permit Coverage Approval NPDES Permit No.: PAC150228*, (Jul. 2020).

EPA's MS4 mandate is unfunded, leaving the cost of compliance to local authorities. Stormwater Management is a growing financial burden across Pennsylvania and the greater United States.²²

Stormwater Management Requirements in the Commonwealth of Pennsylvania are codified in 32 P.S. § 680.1 *et seq.* The General Assembly found that the inadequate management of stormwater is a threat to public health and safety as well as a public financial burden. In response, the legislature determined that authorizing a comprehensive program of stormwater management “is fundamental to the public health, safety and welfare and the protection of the people of the Commonwealth, their resources and the environment.” 32 P.S. § 680.2(2). This legislation required that, within two years, counties were responsible for developing and adopting watershed stormwater management plans. 32 P.S. § 680.5(a). The statute enumerated required elements of this plan including “proposed methods of financing the development.” 32 P.S. § 680.5(b)(9). Hence, the Borough was legislatively tasked with developing a stormwater management plan and a funding strategy.

<https://www.west-chester.com/DocumentCenter/View/13911/Permit-Cover-Letter-WCU-Presidents-Walk-PAC150228docx>

²² Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

To pay for the burdensome costs associated with installing stormwater management projects, municipalities are increasingly implementing stormwater utility (SWU) fee programs.²³ As of last year, more than 2,000 SWUs are in place nationwide.²⁴ Stormwater management fees are regarded as “the most fair way” for municipalities to fund mandated stormwater programs.²⁵ A fee is more appropriate than a tax because tax increases impose costs on the population as a whole rather than targeting those who generate stormwater. Logistically, stormwater fees are also fairer than a tax because tax-exempt entities that often generate significant stormwater runoff – like universities – must contribute proportionally to stormwater management. Fees are deemed reasonable if they are levied based on the property’s potential to generate runoff.²⁶ Possible fee assessment methods include the Equivalent Residential Unit (ERU) – using average impervious area of a residential parcel in the community or a tiered system with several subcategories based on impervious area. The Intensity of Development Factors (IDF) or Equivalent Hydraulic Areas (EHA) are another form of fee calculation that account

²³ Warren Campbell, *Western Kentucky University Stormwater Utility Survey 2022* (Jun. 2022), https://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=1005&context=seas_faculty_pubs.

²⁴ *Id.*

²⁵ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

²⁶ Stephen Zaffuto, *Stormwater Fees in PA - What You Need to Know* (Jun. 2020), <https://highswartz.com/legal-insights/municipal-law/stormwater-fees/>

for and weigh both pervious and impervious area. Finally, some municipalities will implement a Residential Equivalent Factor (REF), a scientific and highly tailored method. While there is no uniform stormwater fee assessment system, each of these methods follow the same theme: contributions are proportional to the burden placed on the system— and thus proportional to the benefit received.²⁷ Stormwater utility fee frameworks have been challenged and upheld in other circuits. *See Norfolk S. Ry. Co.*, 916 F.3d 315 (4th Cir. 2019).

In 2017, the Borough implemented the Stream Protection Fee Program to comply with Pennsylvania’s stormwater law. This SWU fee program raises revenue to comprehensively address stormwater management in the Borough.²⁸ The Borough’s tiered fee system imposes a stream protection fee upon “every developed property within the Borough that is connected with, uses, is serviced by or is benefitted by the Borough's stormwater management system.” W. CHESTER CODE § 94A-6,8. The Borough’s SWU ordinance includes an appeals process. Properties may also be provided credits if a “stormwater facility construction or maintenance substantially mitigates the peak discharge or runoff pollution flowing from such properties or substantially decreases the Borough's cost of maintaining the stormwater management system.” *Id.* at 10. For example, WCU would have an

²⁷ PEC PA, *The Overview of Municipal Stormwater Fee Programs* (Jul. 2019).

²⁸ Borough of West Chester, *Stormwater Management*, <https://west-chester.com/187/Stormwater-Management>.

even more burdensome impact on the Borough's system if it did not also have its own MS4 stormwater controls. Instead, the University is only assessed fees proportional to its contribution – namely from the underground stormwater pipes that discharge directly into Plum Run.

B. The Importance of the West Chester Stormwater Utility.

1. The Pollutant Footprint of West Chester Stormwater

Plum Run is a 3.5 square mile watershed, the headwaters of which originate on or around WCU.²⁹ Plum Run has been listed as an impaired stream by DEP for upwards of two decades and continues to pose a notable pollution concern for downstream waters. The primary source of pollution in West Chester

is the increase in stormwater runoff from impervious surfaces such as roofs, parking lots, roads and driveways. The increase in stormwater volumes and velocities results in accelerated erosion and sedimentation, while thermal and chemical pollution from roads and large parking lots further degrade water quality. The increased sediment can lead to other problems including alterations in the natural configuration of the channel, loss of stream meanders, decreased diversity of pool, riffle, and run patterns and a destruction of the variety and abundance of aquatic habitat.³⁰

²⁹ Brandywine Red Clay Alliance; *Plum Run* (2023), <http://brandywineredclay.org/watershed-conservation/red-streams-blue/plum-run/>

³⁰ Brandywine Valley Association, *Restoration Plan for Plum Run Watershed* (Feb. 2008), <http://www.bandywineredclay.org/documents/Plum%20Run%20Restoration%20Plan.pdf>

Studies have repeatedly identified areas of Plum Run that need stormwater management projects.³¹ In 2014, WCU even published an ecology and stream health study discussing current shortcomings and failures in water quality.³² The study highlights the extent of WCU's stormwater contribution to Plum Run, especially the west branch, and even asks how WCU could further mitigate the negative impacts its discharge is having on the stream.³³ By developing its PRP and enacting its SWU fee ordinance the Borough is attempting to take action on these needs. By refusing to pay the stormwater fee, WCU ignores its acknowledged contribution to the problem and directly contradicts the goals of its own study as well as federal and state legislation.

Moreover, beyond local water quality impacts, WCU's polluted high volume discharge continues downstream from Plum Run into Brandywine Creek through Delaware and into the Christiana River. Ultimately, the water, sediment, and other pollutants entering Plum Run are discharged into the Delaware River.³⁴ This entire river system – from the headwaters in West Chester to the Delaware River – is

³¹ *Id.*

³² W. Fairchild et. al., Plum Run and its Watershed: A Short Course in Stream Ecology (2014), https://digitalcommons.wcupa.edu/cgi/viewcontent.cgi?article=1002&context=gna_prso_series

³³ *Id.*

³⁴ DNREC, 2022 Brandywine Watershed Report (2022), <https://documents.dnrec.delaware.gov/Watershed/Wetlands/Assessments/Brandywine-Watershed-Condition-Report.pdf>

impaired due to sediment.³⁵ Due to its downstream impact, Plum Run's contribution alone was included as a focus area for the Delaware River Watershed Initiative.³⁶

2. The West Chester / PASSHE stormwater system.

PASSHE's West Chester University North Campus is located between Sharpless St, S. Church St., West Rosedale Ave., and S. New St. within the Borough. Exhibit D, Map of West Chester Borough and WCU campus. Stormwater sewer pipes located under North Campus collect water from drains on WCU roads and downspouts on campus buildings and discharge into Plum Run where it is contained within a pipe beneath North Campus.³⁷ Each of the blue dots in Exhibit A along Sharpless and North Campus Drive is a stormwater inlet.

Plum Run is comprised of two branches, one to the west (West Branch) and another to southwest of the WCU campus (East Branch).³⁸ The west branch of the stream begins either under North Campus or just north of it, around the intersection

³⁵ East Bradford, *Plum Run Watershed: The Big Picture . . .* (Accessed 2023), <https://www.eastbradford.org/DocumentCenter/View/598/11-Plum-Run-Watershed-Board-Draft-PDF?bidId=>

³⁶ Brandywine Red Clay Alliance; *Plum Run* (2023), <http://brandywineredclay.org/watershed-conservation/red-streams-blue/plum-run/>

³⁷ West Chester Borough, *Chester Creek / Goose Creek Pollution Reduction Plan* (Sept. 2017; Rev. Jul. 2018), Appendix C. <https://www.westchester.com/DocumentCenter/View/17254/WC-ChesterCr-GooseCr-PRP-Revised-Complete-R?bidId=> . See also, Exhibits A and B; Perrone Dep. 122:8-124:3; Bixby Dep. 98:20-99:13.

³⁸ Fairchild, *supra*, fn 46, Figure 1.

of Sharpless Street and S. Church Street, and passes through North Campus, in an underground pipe owned by the Borough. Respondent's Brief in Support of Mot. for Summary Judgment; *see also* Perrone Dep. 31:15-33:17; Bixby Dep. 107:18-108:6; Exhibit E.

There are buildings, roads, paved walkways and other impervious areas constructed on North Campus from which stormwater runoff flows directly into the Borough Stormwater Collection and Conveyance System without being managed or controlled by PASSHE's on-site University-owned stormwater facilities. Borough's Application & Mot. Summary Judgment Relief ¶ 27; *see also*, Vennettilli Affidavit at ¶ 25.26, Exhibit E to Mot. for Summary Judgment Relief; Exhibit B. *None* of the stormwater running through those pipes discharging to the west branch of Plum Run is treated by the University. *Id.*; *see also*, Fairchild, *supra*, fn 46, figure 16 (No WCU maintained stormwater retention ponds (red diamonds) exist on the West Branch of Plum Run).

The University's MS4 permit identifies five outfalls where stormwater leaves the University's system and enters the Borough's system. *See* Exhibit A. One outfall is located in the concrete headwall on the west side of South New Street where the piped portion of Plum Run begins to flow above ground. Respondents' Mot. for Summary Judgment, quoting Boxy Dep 212:23-214:3; *See also*, Perrone Dep. 32:23-34:7; Exhibits D, E, and F.

Plum Run is part of the Borough's MS4 system. NPDES PERMIT NO. PAI130026. Pursuant to the Commonwealth's criteria, the Borough has developed a PRP for the Brandywine Creek, Blackhorse Run, Plum Run, and Taylor Run. The Borough plans to undertake stream bank restoration where WCU's stormwater enters Plum Run down several hundred yards towards Brandywine Creek. Exhibit G, West Chester MS4 map, streambank restoration plan. Stream bank restoration is necessary due to high water volume exacerbated by large amounts of impervious surface upstream including WCU's University Ave., Ehinger Gym, Holinger Fieldhouse, the Sciences and Engineering Centers, and Lawrence Hall. Exhibit H, Satellite image of WCU. These high-water flows scour dirt from the bottom and sides of the stream bank adding silt to the water. As a result, Brandywine Creek is impaired for siltation.³⁹ Moreover, since 1998 Plum Run has been listed by the state as impaired due to "water/flow variability" caused by "urban runoff/storm sewers" proving the longstanding and intractable nature of the problem.⁴⁰ "The sources associated with water/flow variability [include] hydromodification, road

³⁹ *Chester Creek / Goose Creek Pollution Reduction Plan, supra*, fn 52, at p. 8.

⁴⁰ DEP Greenport, *2016 Pennsylvania Integrated Water Quality Monitoring and Assessment Report - Streams, Category 4c Waterbodies, Pollution not Requiring a TMDL* (2016) at p. 121-22,

<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=6281&DocName=25%202016%20INTEGRATED%20REPORT%20CATEGORY%204C%20-%20STREAMS.PDF%20%20%3Cspan%20style%3D%22color%3Agreen%3B%22%3E%3C%2Fspan%3E%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E>

runoff, urban runoff/storm sewers, and several others. Any source that alters runoff or streamflow can affect water/flow variability. Water or flow variability is considered pollution not requiring a TMDL but the problem still requires remediation.”⁴¹ Due to this impairment the Borough has created a PRP for Brandywine Creek and Plum Run following the Commonwealth’s criteria.⁴² Without a source of funding – the Stream Protection Fee – integral streambank restoration projects to correct the siltation caused by high water flow could not go forward.⁴³

C. The Commonwealth Court’s Analysis is Flawed

1 . *The Commonwealth Court Improperly Considered the Facts.*

The Commonwealth Court held that “a charge is a tax rather than a fee for service if it is not reasonably proportional to the value or benefit received....”

Borough of W. Chester, 291 A.3d at 463. The Commonwealth Court ruled that because the Borough could not identify the benefit its MS4 and PRP for

⁴¹ *Id.* at p. 53.

⁴² West Chester Borough, *Brandywine Creek, Blackhorse Run, Plum Run, Taylor Run Pollution Reduction Plan* (Sept. 2017; Rev. Jul. 2018) at pg. 5. <https://west-chester.com/DocumentCenter/View/17253/WC-BrandywineBlackhorsePlumTaylor-PRP-Revised-Complete-2?bidId=>. See also, West Chester Borough, Annual MS4 Status Report (Sept. 2020) at p. 45, <https://west-chester.com/DocumentCenter/View/17257/MS4-Status-Report-2019-2020?bidId=>

⁴³ Stormwater Assessment Advisory Committee, *Stormwater Assessment Fee Policy Options and Recommendations* (Dec. 2013) at p. 1-2, 9

Brandywine Creek, Blackhorse Run, Plum Run and Taylor Run, the utility charge is a tax. *Id.*, 291 A.3d at 463-65. This analysis misapprehends the nature of the benefit. As explained above, stormwater flows off imperious surfaces owned by the Commonwealth directly into the Borough's MS4 system. Hence, the Borough is obligated to address impairments caused by PASSHE's stormwater.

The Commonwealth Court accepted PASSHE's argument that none of the pollution prevention projects identified in the Borough's plan benefit University property. *Id.* Those statements misconstrue the nature of harms caused by stormwater and disregard the facts. The damage caused by stormwater is downstream from the discharge site, here, the WCU campus. So, it is no wonder that the projects do not benefit state land. The Stormwater Fee funds projects to ameliorate the harm caused by the Commonwealth's discharges such as the streambank restoration project slated for Plum Run just west of WCU's campus. Further, PASSHE admits it discharges to Plum Run – without a receiving waterbody WCU would require a stormwater holding pond for this discharge; thus, a benefit has been and is being received.

2. The Commonwealth Court's Legal Analysis Relies on Outdated Cases to Make a Flawed Conclusion

The Commonwealth Court places heavy burden on the proportionality of cost and benefit when distinguishing between a tax and a fee. First, the Court relies on a series of 1940's cases considering the question of whether a state or

municipal monetary assessment is a fee or a tax. *Borough of West Chester*, 291 A.3d at 463-4; *Supervisors of Manheim Twp., Lancaster Cnty., V. Workman*, 38 A.2d 273, 276 (Pa. 1944); *In re City of Philadelphia*, 21 A.2d 876, 879 (PA. 1941) and *In re Petition of City of Philadelphia*, 16 A.2d 32, 35 (PA. 1940). These cases are either not relevant to the issue before this Court or do not contemplate the nature of the current stormwater problem facing the Commonwealth of Pennsylvania explained above.

The Borough's Stormwater Fee is unlike the sewer taxes discussed in the City of Philadelphia cases. *In re Petition of City of Philadelphia*, 16 A.2d 32; *In re City of Philadelphia*, 21 A.2d 876. The Commonwealth Court quotes a general rule from *In re Petition City of Philadelphia*: "The obligation to pay [the charge] could be created only by the [c]ity's exercise of its general taxing power," where the charge was "imposed without any regard whatever to the extent or value of the use made of the sewer facilities." *Borough of West Chester*, 291 A.3d at 463 (quoting *In re Petition of City of Philadelphia*, 16 A.2d at 35). Applying this rule, the *In Re Petition City of Philadelphia* court held that a municipal sewer system charge was a tax because the charges imposed would not be proportional to the use of the system. 16 A.2d at 36. Unlike the aforementioned tax, the Borough's Stormwater Fee is proportional to use of the system, meeting the Commonwealth Court's test. Moreover, the Borough's MS4 permit obligations differ in nature: whereas sewer

usage cannot be assessed by property size or land cover, stormwater runoff contribution can be. The Borough's fee assesses "the extent or value of the use made of the [stormwater] facilities" when assigning charges. Areas with more impermeable landcover such as WCU contribute more stormwater to the system and ought to be assessed a charge proportional to its contribution.

Further, stormwater concerns have changed drastically since the *City of Philadelphia* cases. Over the last eight decades, our understanding of stormwater and its associated consequences has changed greatly. It is simply inapposite to compare a 2023 stormwater management program to a 1940 Court's understanding of a municipal sewer system.

Regardless, the Borough's Stormwater Charge meets the implied contract and fee definition considered by the *In Re Petition City of Philadelphia* Court. That court conceded that a municipality has the right to receive "payments for the use of its sewer facilities" and "these charges are not taxes, nor a substitute for taxes, but charges made, without discrimination, for an industrial service rendered in value equal to the respective sums charged." *In re Petition of City of Philadelphia*, 16 A.2d at 34. Thus, by "using the facilities with knowledge of the rates charged, the consumer, by implication, contracts and agrees to pay the rates, and his obligation to make payment rests upon contract rather than upon any exercise of the taxing power." *Id.* at 34.

The court there distinguishes the Sewer Rental Act by noting that “the City is requiring payment to be made not only by those who have availed themselves of the right to connect with the sewer but by all those to whom it is made available by its presence.” *Id.* Thus, rather than a fee assessed proportional to the use, a charge was imposed simply by the mere presence of the sewer facilities. In direct contrast, the Borough’s Stormwater Utility program charges a fee based upon the amount of stormwater a property discharges into the system. Further, unlike a sewage system, the amount of water a property contributes to a stormwater system can be mitigated by increasing the permeability of landcover and installation of stormwater Best Management Practices.⁴⁴ In the event a property owner elects to implement a runoff-mitigating practice, the Borough will account for this when assessing fees.⁴⁵ PASSHE elects to use the Borough’s stormwater management facilities by discharging stormwater directly into Plum Run. Thus, the facts indicate that PASSHE is properly subject to fees through this contract-by-implication model.

3. The Commonwealth Court Erred by Relying on *Dekalb* and Failing to Properly Apply the “Fee v. Tax” Factors Established in *San Juan Cellular*.

⁴⁴ PA DEP, *Municipal Stormwater Program Updates* (2023), <https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/pages/default.aspx>

⁴⁵ Borough of West Chester, *Stream Protection Fee*; <https://westchester.com/683/Stream-Protection-Fee>

The Commonwealth Court relies heavily on a Federal Court of Claims decision, *DeKalb County, Georgia v. United States*, 108 Fed. Cl. 681 (Fed. Cl. 2013) but disregards contrary precedent. *See Homewood Vill., LLC v. Unified Gov't of Athens-Clarke County*, 292 Ga. 514, 739 S.E. 2d 316 (Ga. 2013); *Norfolk Southern Ry. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019). The Commonwealth Court subscribed to the *DeKalb* court's view that in a proper fee system, the party receiving the benefit must have a direct contractual relationship with the charge assessor and utilities are, instead, "benefits enjoyed by the general public." *Borough of West Chester*, 291 A.3d at 465-6.

Following the Commonwealth Court's logic, for a stormwater utility charge to be a fee, the discharger – here PASSHE – would have to *contract* with the Borough to handle its runoff into Plum Run. That notion misconstrues the nature of stormwater and the problems it causes downstream of the point of discharge. Unlike traditional contract-for-service systems – like electricity – the nature of stormwater requires post-discharge management to mitigate destruction the increased flows will have. Despite the location of "service," stormwater management charges are still assessed based on usage directly proportional to the amount of impervious cover they have constructed or own and are not an exercise of taxing power.

Rather than relying solely on *DeKalb*, the Commonwealth Court ought to have followed the factors identified in *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992). See, *Norfolk Southern Ry.* This framework asks (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. *Norfolk Southern Ry.*, 916 F.3d at 319. If the charge falls "somewhere in the middle" between a classic tax and a classic fee, the most important of these considerations is the charge's purpose. *Id.*

In the *Norfolk Southern Ry* matter, the Fourth Circuit Court of Appeals found that the factors favored interpreting the City of Roanoke's stormwater charge as a fee as opposed to tax. *Id.* The first factor, like *Norfolk Southern Ry.*, suggests that the Borough's charge may be a tax because it is imposed by the legislature. However, the second factor indicates that the charge is a fee. Stormwater, by nature, is experienced on every property; thus, the management fee applies to a broad class of property owners. However, unlike a tax, "the amount assessed is proportional to the amount of impervious surface . . . [and] property owners may receive credits against the assessment if they engage in certain stormwater management practices. These features suggest that the charge is a measure of the stormwater management obligations that each parcel imposes upon the City, rather than a measure of ability to pay." *Id.* at 320.

The third factor considers the purpose of the revenue collected. In close cases, the 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.*

Courts have reached different conclusions on this factor. The Commonwealth Court relies heavily on *DeKalb* reasoning that the resulting public benefits of stormwater make the charge a tax. The Commonwealth Court, however, fails to discuss any cases that reach the opposite conclusion. For example, the *Norfolk Southern Ry.* court cites *Homewood Village*. There, Georgia Supreme Court concluded that, although all residents will receive some benefit from stormwater management, those paying the charge receive a “special benefit” because the municipality is treating their polluted water, facilitating compliance with regulatory requirements. *Norfolk Southern Ry.*, 916 F.3d at 321 (Discussing *Homewood Vill., LLC v. Unified Gov't of Athens-Clarke Cnty.*, 739 S.E.2d 316 (2013)).

Accounting for both cases' perspectives, the *Norfolk Southern Ry.* court found it persuasive that the CWA requires municipalities to take action to reduce discharges rather than a public benefit provided at the discretion of the legislature. *Norfolk Southern Ry.*, 916 F.3d at 321. The Fourth Circuit highlights that the

stormwater management charge does not “defray[] the City's costs of regulating, [rather] the charge primarily defrays the City's costs of complying with regulations imposed upon it.” *Id.*, at 321. The Fourth Circuit ultimately held that “the charge's purpose is more consistent with that of a fee than a tax, because the charge forms part of a comprehensive regulatory scheme.”

Ultimately, “a classic regulatory fee is designed to address harmful impacts of otherwise permissible activities, and to ensure that the actors responsible for those impacts bear the costs of addressing them. that is exactly the function served by [the Borough’s] stormwater management charge, which ensures that owners of impervious surfaces bear the cost of managing stormwater runoff.” *Norfolk Southern Ry.*, 916 F.3d at 321-22. The Borough’s stormwater charge functions as part of a larger regulatory scheme with the purpose of remedying the environmental harms and holding stormwater dischargers financially responsible. While there is some benefit to the public at large, it is not the purpose of the charge; this indicates that the charge is a fee.

Ironically, the Commonwealth of Pennsylvania has passed on the costs of stormwater management to its residents. The Commonwealth also owns a significant portion of impermeable land and contributes significantly to stormwater discharges state-wide. Harrisburg is an example of this. There, the Commonwealth owns acres of impervious land that discharges stormwater directly into the

Susquehanna, either directly or indirectly through the city's MS4 system. Yet, the Commonwealth also refuses to pay stormwater assessments here. Beyond just West Chester, it would be unjust and hypocritical to allow the state immunity from financial responsibility for their stormwater runoff. Further, because municipalities are required to regulate, the cost would need to be passed on to Pennsylvania's citizens, unjustly requiring residents to pay for pollution they are not creating.

Regardless of PASSHE's arguments, the State's properties discharge large quantities of polluted stormwater, not just in West Chester Borough. The Commonwealth's opposition to paying any stormwater utility fees while simultaneously administering a stormwater compliance system admonishing the public to pay its fair share is an unjust double standard. It is proper for the Commonwealth of Pennsylvania to pay its fair share. *See Norfolk Southern Ry.*, supra, at 323-5, Wilkinson concurring. A ruling for ... [PASSHE] here would have deleterious implications for comparable municipal stormwater programs that are within the ... [Commonwealth]. *Id.* at 324.

To be sure, exempting PASSHE from the fee requirement will cause water quality consequences across Pennsylvania - including the Chesapeake Bay Watershed. If this decision is affirmed, the Commonwealth will be allowed to continue to contribute stormwater to surface waters across Pennsylvania. As a result, sediment and other pollutant loading will remain the same, if not increase.

The Commonwealth is already failing to meet its commitments under the Chesapeake Bay Clean Water Blueprint.⁴⁶ To meet these requirements, upgraded and expanded stormwater management is necessary. It would be infeasible for municipalities to adequately manage stormwater without fee contribution from one of the largest dischargers.

Because the Borough's Stormwater Charge is directly proportional to the volume of water discharged by the University and is used only to address harms caused by the University's stormwater, this Court should hold that the Borough's assessment is a fee and not a tax.

IV. CONCLUSION

For the reasons stated above, Amicus respectfully requests that this Court reverse the decision of the Commonwealth Court and hold that the Borough's stormwater charge constitutes a fee that PASSHE is required to pay.

Respectfully submitted,

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⁴⁶ PA DEP, *Chesapeake Bay – Wastewater* (Jul. 2023).
<https://www.dep.pa.gov/Business/Water/CleanWater/WastewaterMgmt/Pages/ChesapeakeBay.aspx>

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

In accordance with Pa. R.A.P. 2135(d), I, Paul W. Smail, 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/ Paul W. Smail
Paul W. Smail

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amici 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.

Dated: July 13, 2023

/s/ Paul W. Smail
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