

# Kentucky Stormwater Association

## MS4 Update

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# OVERVIEW

- NEI Transition
- Litigation

# NEI Transition

- EPA adopted National Enforcement Initiatives (NEI) periodically
- NEIs for Air, Energy Extraction, Hazardous Chemicals, and Water
- Water NEIs were:
  - Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters
  - Preventing Animal Waste from Contaminating Surface and Ground Water
  - Keeping Industrial Pollutants Out of the Nation's Waters

# NEI Transition

- Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters
  - EPA stated goal:

“EPA and authorized states will continue to address combined sewer overflows, sanitary sewer overflows and municipal separate storm sewer system violations and monitor the progress of these long-term agreements, where appropriate adapting them to include green infrastructure practices and new pollution control technology. Green infrastructure helps reduce the water quality impacts of heavy rains and snow melts and is cost-effective and sustainable. Examples include: green roofs, rain gardens, permeable pavements, and revitalization of vacant lots.

# NEI Transition

- August 21, 2018: EPA issued memo on transition from NEIs to National Compliance Initiatives (NCIs)
- “The EPA intends to evolve the NEI program into a NCI program by providing states and tribes with additional opportunities for meaningful engagement, by developing and applying a broader set of compliance assurance tools, and by aligning the NCIs with the Agency Strategic Plan measures and priorities.

# NEI Transition

- August 21, 2018: EPA memo on transition from NEIs to National Compliance Initiatives (NCIs)
- Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters
  - The EPA has almost completed this NCI, obtaining significant improvement in compliance and major reductions in water pollution. Work in FY 2019 will be focused on completing ongoing enforcement cases and monitoring compliance with existing enforcement settlements. In collaboration with authorized state programs, work in these areas will continue as part of core program in FY 2020, especially with a focus on addressing impaired waters

# LITIGATION

UPPER MISSOURI WATERKEEPER v.

MONTANA DEQ and City of Billings (DA 18-0462,

Submitted on Briefs: February 13, 2019

Decided: April 9, 2019)

- Public-benefit non-profit corporation dedicated to protecting water quality sued Montana DEQ's for issuing Montana Pollutant Discharge Elimination System permit for Billings' MS4s
- City intervened as defendant
- District Court, Eighteenth Judicial District, County of Gallatin granted summary judgment to defendants
- Corporation appealed.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Small MS4s in Montana include cities of Billings, Missoula, Great Falls, Bozeman, Butte, Helena, and Kalispell
- DEQ issued first five-year MS4 general permit in 2005, second in 2010 and, in 2014, began working on third MS4 general permit, convening meetings involving stakeholders, including Billings
- MS4 cities proposed extending 2010 general permit for two years while the MS4 cities, DEQ, and other stakeholders formed a storm water working group to develop a new MS4 general permit.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- DEQ agreed and issued a general permit effective from January 1, 2015, to December 31, 2016
- September 19, 2016: DEQ issued public notice of public hearing on issuance of 2017 draft permit
- At October 21, 2016, testimony was presented by Waterkeeper, city of Helena, and city of Bozeman
- Waterkeeper testified regarding changes from 2015 general permit to draft permit, stating that the draft permit is “a really good permit,” while also noting some areas of the permit needed “tweaks.”

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- November 30, 2016: DEQ issued General Permit
- EPA did not object under its review authority and General Permit went into effect January 1, 2017
- December 30, 2016: Waterkeeper sued DEQ alleging General Permit was deficient in several respects.
- City of Billings intervened
- Waterkeeper filed motion for summary judgment
- DEQ and City of Billings each filed cross-motions for summary judgment

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- District Court held hearing on the motions on March 13, 2018
- All parties agreed that no material facts were in dispute and the matter could be determined based upon the arguments of the parties and the administrative record
- June 14, 2018: District Court denied Waterkeeper's motion, granted DEQ's and the City of Billings' cross-motions, and affirmed DEQ's issuance of the General Permit
- Waterkeeper appeals.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether the General Permit complies with public participation requirements?
  - BMPs listed in the General Permit were developed with two years of input from numerous stakeholders, including the general public
  - MS4s regulated by the General Permit are essentially choosing from an already-approved menu

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether the General Permit complies with public participation requirements?
- Much like the experience of attending a wedding reception does not become a fundamentally different activity for a guest once he or she chooses between the given dinner options of chicken or fish, an MS4 choosing which preapproved BMPs to implement in their SWMP does not alter the essential terms of the General Permit. The guest is still attending a wedding reception regardless of his or her dinner choice; and Montana's MS4s are still having their storm water discharges regulated pursuant to the existing terms of the General Permit regardless of which combination of already-specified BMPs are ultimately used. EPA's small MS4 regulations were developed to allow for flexibility in permitting.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether the General Permit complies with public participation requirements?
  - The act of an MS4 choosing between specified BMPs in an MPDES general permit does not constitute a new effluent limit requiring further public participation before the permit can take effect.
- Whether DEQ's decision to incorporate construction and post-construction storm water pollution controls into the General Permit was unlawful, arbitrary, or capricious?
  - Waterkeeper argues that General Permit's construction and post-construction storm water pollution controls are arbitrary and capricious because the standards set by DEQ for runoff control are both legally inadequate and unsupported by substantial evidence.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether DEQ's decision to incorporate construction and post-construction storm water pollution controls into the General Permit was unlawful, arbitrary, or capricious?
- Court applies "a deferential standard of review to an agency's interpretation in matters of its expertise"
- Record reflects that DEQ did explain its decision in setting the numerical standard
- Record supports that DEQ's decision to incorporate the standards of the Construction Storm Water Permit into this portion of the General Permit was not arbitrary and capricious

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether DEQ incorporating TMDLs into the General Permit was unlawful, arbitrary, or capricious?
- Waterkeeper argues that the General Permit violates the CWA by not including water quality based effluent limitations (WQBELs) necessary to meet water quality standards for impaired water bodies, but instead incorporates TMDL waste load allocations
- Court says DEQ's interpretation of rule regarding TMDLs is not unlawful, arbitrary, capricious, or unsupported by substantial evidence because EPA first approved the TMDLs in a separate process and then reviewed and concurred in the issuance of the General Permit which contained those TMDLs

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

- Whether DEQ's decision to incorporate pollution monitoring requirements into the General Permit was unlawful, arbitrary, or capricious?
  - Waterkeeper argues that General Permit both fails to provide for monitoring that is representative of the MS4 system and provide for monitoring that is sufficient to ensure compliance with the General Permit's terms
  - Court will defer to an agency acting within its area of expertise.
  - Pollution monitoring requirements at issue are squarely within DEQ's area of expertise, are not required by either federal or state regulations, and are supported by substantial evidence of their improvements from the last general permit.

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

Holding:

- We remain mindful of the fact that Montanans have a constitutional right to a clean and healthful environment.
- General Permit at issue in this case is a clear improvement from prior iteration, a fact Waterkeeper itself acknowledged when testifying regarding the General Permit

# LITIGATION

## UPPER MISSOURI WATERKEEPER v. MONTANA DEQ and City of Billings

### Holding:

- Court does not have the authority to review the General Permit line by line to subjectively determine whether each decision made by DEQ in this matter is the “correct” one, but under the applicable standard of review DEQ’s decisions have not been unlawful, arbitrary, or capricious. North Fork Pres.
- General Permit is not the end of the responsibility for DEQ and the MS4s to improve Montana’s water quality, but simply another step along the way
- This General Permit is a step in the right direction.
- District Court correctly denied Waterkeeper’s Motion for Summary Judgment, granted DEQ and the City of Billings’ Cross-Motions for Summary Judgment, and affirmed DEQ’s issuance of the General Permit

Affirmed

# Whales?



# LITIGATION

KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC  
Filed 01/05/2018

- Kinney owns a real property on Virginia Way in Laguna Beach, California (the “City”)
- Chaldus and Viviani own properties across the street from Kinney
- TAB is a community services district for the Three Arch Bay subdivision in the City and operates a MS4
- TAB's MS4 discharges mud, silt, sand, debris, sediment, and other pollutants along with storm-water runoff from its land. More severe during rain storms, part of the runoff passes downhill through Kinney's property, across Virginia Way, and eventually into the Pacific Ocean.

# LITIGATION

## KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC

Filed 01/05/2018

- Kinney accuses Chaldus and Viviani of using manmade structures to impede runoff on their properties, increasing the amount of pollutant deposits on Kinney's property
- December 13, 2011: Kinney sued Chaldus and Viviani in state court asserting nuisance and trespass claims
- 2015: Kinney sent letters to California Regional Water Quality Control Board and EPA regarding the pollutant discharge into the Pacific Ocean
- Early 2017: Kinney filed complaint alleging that Chaldus and Viviani violated the CWA by discharging pollutants into the Pacific Ocean
- Court dismissed that complaint for failure to comply with the CWA's notice requirement. Kinney now brings a nearly identical complaint again.

# LITIGATION

KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC  
Filed 01/05/2018

- Court said CWA proscribes water pollution and prescribes a citizen-enforcement scheme
- CWA allows private citizens to bring a civil suit “against any person ... who is alleged to [violate] (A) an effluent standard or limitation under [the Act] or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation”
- A Clean Water Act citizen plaintiff must plead that the defendant 1) discharged; 2) a pollutant; 3) from a point source; 4) into navigable waters of the United States; 5) without an NPDES permit.

# LITIGATION

KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC  
Filed 01/05/2018

- Kinney argues that Chaldus and Viviani are discharging storm-water runoff from structures on their properties into the Pacific Ocean without possessing an NPDES permit
- Kinney also alleges that Viviani and the Clialdus are in violation of NPDES permit requirements.
- Chaldus and Viviani cite EPA and California guidance explaining that individual homeowners who discharge storm-water runoff into septic tanks or municipal sewer systems are not required individually to obtain NPDES permits and, instead, California regional water boards regulate such discharges by issuing NPDES permits to municipal and community entities like TAB.

# LITIGATION

KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC  
Filed 01/05/2018

- Court says in Association to Protect Hammersley, Ninth Circuit concluded a private party may still bring citizen suit under CWA against defendant for discharging pollutants without a permit even when the applicable state agency has determined that a permit is not required
- *Hammersley* rule allows courts to decide whether a defendant's action requires a permit even where the state agency does not require one
- BUT CWA Section 402(p) provides exact storm-water discharge permit requirements and neither the statute nor the regulations require that individual homeowners connected to a municipal system obtain NPDES permits for storm-water runoff

# LITIGATION

KINNEY v. THREE ARCH BAY COMMUNITY SERVICES DISTRICT, Case No. 8:17-cv-01693-RGK-JC  
Filed 01/05/2018

- Holding:
  - The mere fact that Viviani and the Chaldus are not required to obtain a permit does not itself bar Kinney's claims
  - Court could decide that they need a permit but *Hammersley* rule does not permit courts to ignore traditional tenets of statutory interpretation or principles of regulatory deference
  - It would run contrary to both section 402(p) of the CWA and its implementing regulations to hold that individual homeowners like Viviani and the Chaldus violate the CWA by discharging storm-water runoff without a permit
  - Kinney fails to state a plausible claim to relief in this case

# LITIGATION

CITY OF LONG BEACH v MONSANTO COMPANY, et al. CD California,  
Case No. CV 16-3493, Signed 08/21/2018

- October 20, 2016: City of Long Beach filed second amended complaint against Monsanto, Solutia Inc., and Pharmacia LLC asserting claims for: (1) public nuisance; (2) equitable indemnity; (3) strict liability; (4) negligence; and (5) trespass
- Monsanto and co-defendant successors manufactured PCBs and allegedly “knew for decades the PCBs were toxic and knew they were widely contaminating all natural resources and living organisms...”
- City alleges that Monsanto’s PCBs pollute Port of Long Beach, the Colorado Lagoon, and the Dominguez Watershed through stormwater and other runoff
- City “owns, manages, and operates a municipal stormwater and dry weather runoff system, which captures, collects, and/or transports stormwater and dry weather runoff.”
- City “is required to comply with a MS4 Permit which includes reduction of PCBs.”

# LITIGATION

CITY OF LONG BEACH v MONSANTO COMPANY, et al. CD California,  
Case No. CV 16-3493, Signed 08/21/2018

- City is named as a responsible party in the TMDL for Toxic Pollutants in the Dominguez Channel and Greater Los Angeles and Long Beach Waters and is required to significantly reduce concentrations of PCBs in stormwater, sediment, and fish tissue by 2032
- City alleges that Pollution caused by Monsanto's PCBs forces spending funds to abate PCB discharge to comply with state and federal regulations
- City “cannot operate its stormwater and dry weather runoff systems as designed[, and] will continue to incur costs to reduce PCBs from stormwater and dry weather runoff, which includes efforts to capture and beneficially use stormwater and dry weather runoff to augment existing water supplies”
- Defendants file motion to dismiss for failure of the complaint to state a claim on which relief can be granted (in other words, the plaintiff has failed to substantiate its claims)
- Defendants motion denied so case will proceed

# LITIGATION

NATURAL RESOURCES DEFENSE COUNCIL v. STATE WATER RESOURCES CONTROL BOARD; County of Los Angeles et al., Intervenors and Respondents, Court of Appeal, Second District, Division 5, California, filed 12/24/2018

- NRDC and Los Angeles Waterkeeper sued State Water Resources Control Board and California Regional Water Quality Control Board seeking an order setting aside the 2012 Los Angeles County MS4 permit
- Plaintiffs argued that watershed management programs (WMPs) and enhanced watershed management programs (EWMPs) in the 2012 Permit were “safe harbors” that violated the anti-backslide and anti-degradation provisions in the CWA and the state Porter-Cologne Water Quality Control Act
- County of Los Angeles and the Los Angeles County Flood Control District filed a complaint in intervention
- 20 cities, 4 permittees under the 2012 Permit, also filed a complaint in intervention
- Trial court denied the petition for writ of administrative mandamus and plaintiffs appeal.

# LITIGATION

NATURAL RESOURCES DEFENSE COUNCIL v. STATE WATER RESOURCES CONTROL BOARD; County of Los Angeles et al., Intervenors and Respondents, Court of Appeal, Second District, Division 5, California, filed 12/24/2018

- Anti-backsliding:
  - Although the “interpretation of a statute or regulation is ultimately a question of law, we must ... defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.”
  - We extend such deference, however, “only where the administrative agency has an interpretive advantage over the court because of the scientific and technical nature of the issues.”
  - Plaintiffs contend 2012 Permit violates statutory and regulatory anti-backsliding provisions in the Clean Water Act because WMP and EWMP provisions allow permittees to delay compliance with water quality standards
  - Court disagrees “because the Clean Water Act's anti-backsliding provisions do not apply to municipal storm water discharge,” citing California case law.

# LITIGATION

NATURAL RESOURCES DEFENSE COUNCIL v. STATE WATER RESOURCES CONTROL BOARD; County of Los Angeles et al., Intervenors and Respondents, Court of Appeal, Second District, Division 5, California, filed 12/24/2018

- Anti-degradation:
  - Plaintiffs argue the 2012 Permit fails to comply with federal and state anti-degradation policies because defendants failed to conduct a complete anti-degradation analysis, the trial court applied an incorrect standard of review to the State Board's factual findings on the degradation of high quality waters, the State Board's factual findings were inadequate to justify the degradation of high quality waters, and the WMP and EWMP provisions in the permit allow impermissible degradation of impaired waters.
  - Lower trial court applied "the standard of review as independent judgment review `to determine whether the finding of the Administrative Law Judge is supported by the weight of the evidence'" under California law.
  - Trial court decision gave no indication that the court did any independent analysis of the facts presented

# LITIGATION

NATURAL RESOURCES DEFENSE COUNCIL v. STATE WATER  
RESOURCES CONTROL BOARD; County of Los Angeles et al.,  
Intervenors and Respondents, Court of Appeal, Second District,  
Division 5, California, filed 12/24/2018

- Holding
  - “Trial court's anti-backsliding ruling is affirmed, its anti-degradation ruling is reversed, and the matter is remanded to the trial court with directions to reconsider, under the independent judgment standard of review, plaintiffs' assertion in their petition for writ of administrative mandamus that the 2012 Permit violates the federal and state anti-degradation policies.”

# Mushrooms on a creekbed



# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- Environmental organizations brought action under Administrative Procedures Act against EPA
- Allege that EPA's denial of their petitions to engage in NPDES permitting process with regard to storm sewer discharge
- Both parties move for summary judgment
- Court discussion
  - Urban stormwater pollution is a leading cause of water pollution in the Los Angeles area.
  - Dominguez and Los Cerritos Channel watersheds are both heavily polluted by stormwater runoff
  - Dominguez Channel watershed is impaired by a variety of pollutants, including zinc and copper
  - Freshwater portion of Los Cerritos Channel is impaired by zinc and copper pollution
  - Water quality of both watersheds is expected to remain impaired by pollution, especially zinc and copper pollution, for years to come
  - Metals like zinc and copper have acute and chronic impacts on aquatic life
  - Pollution also makes these waterways unsafe and unenjoyable for people who live, work, and play nearby
  - California controls impacts from stormwater discharges principally through MS4s permits throughout the Los Angeles area, where more than 85 municipalities are covered

# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- **TIMELINE**

- October 17, 2016: EPA deny Plaintiffs' petitions to require NPDES permits, concluding that stormwater discharges from privately-owned commercial, industrial, and institutional sources were "contributing to water quality impairments" at the watersheds
- EPA analyzed Plaintiffs' petitions in light of three factors:
  - (1) likelihood of exposure of pollutants to precipitation at sites identified in Plaintiffs' petitions;
  - (2) sufficiency of available data to make a determination that stormwater discharges from those sites contribute to a violation of water quality standards
  - (3) whether other federal, state, or local programs adequately address the known stormwater discharge contribution to a violation of water quality standards.
- May 8, 2017: Plaintiffs file complaint alleging (1) failure to perform a nondiscretionary duty under the CWA pursuant to citizen-suit provision and (2) in the alternative, arbitrary and capricious agency action in violation of the Administrative Procedure Act
- November 2, 2017: Court dismissed Plaintiffs' claim under CWA citizen-suit provision saying provision provides a limited waiver of sovereign immunity for citizen suits alleging EPA's failure "to perform any act or duty under this chapter which is not discretionary." Court concluded that EPA had discretion to decide whether or not to require NPDES permits for stormwater. Because the citizen-suit provision only provides for such suits where a plaintiff seeks to enforce a non-discretionary duty, the Court dismissed Plaintiffs' citizen-suit claim
- November 2, 2017: Court allowed Plaintiffs' claim under the APA to proceed

# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- Analysis (the Text of the Clean Water Act Requires EPA to Engage in the Permitting Process):
  - The Clean Water Act requires EPA to either (1) engage in the NPDES permitting process for the discharge at issue or (2) prohibit the discharge
  - EPA “does not have authority to exempt categories of point sources from the permit requirements”
  - Once EPA determined “there are sufficient data available to demonstrate that stormwater discharges are contributing to water quality impairments in the [Watersheds],” the statute required EPA to engage in the permitting process or prohibit the discharge
  - But EPA left the stormwater discharges at issue unregulated in violation of the text of the Clean Water Act. Declining to engage in the permitting process for the stormwater discharges at issue was therefore arbitrary and capricious because it was contrary to law.

# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- Analysis (EPA Considered an Improper Factor in Rejecting Plaintiffs' Petitions):
  - EPA's interpretation is not entitled to deference. Deference to administrative agencies under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council is appropriate only if the statute is ambiguous or silent on the question at issue. The statute at issue here unambiguously requires EPA to engage in the permitting process where it has determined that stormwater discharges contribute to a water quality violation
  - EPA does not point the Court to a provision of the CWA that indicates that EPA may consider whether other federal, state, or local programs adequately address the known stormwater discharge contribution to a violation of water quality standards. Therefore, EPA acted arbitrarily and capriciously in denying Plaintiffs' petition by considering a factor "divorced from the statutory text" in its denial.

# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- Analysis (Standing of Plaintiff American Rivers):
  - EPA contends that Plaintiff American Rivers lacks standing to assert the claims at issue because the only evidence submitted in support of its standing was declaration of a Washington-based Senior Director, who asserted that 37 members reside in the relevant watershed
  - To establish standing, a plaintiff must demonstrate “(1) a concrete and particularized injury that is ‘actual or imminent, not conjectural or hypothetical;’ (2) a causal connection between the injury and the defendant’s challenged conduct; and (3) a likelihood that a favorable decision will redress that injury
  - Plaintiffs do not dispute EPA’s argument with respect to American Rivers’ standing

# LITIGATION

LOS ANGELES WATERKEEPER, et al v. PRUITT (320 F.Supp.3d 1115

United States District Court, C.D. California.

- Holdings: The District Court, Stephen V. Wilson, J., held that:
  - unambiguous language of the CWA required EPA to either require NPDES permits for the discharges, or enforce the statute's total proscription of discharge of pollutants, upon determination that the discharges contribute to a violation of water quality standards;
  - EPA's denial of petition was arbitrary and capricious, where EPA relied on factor outside of clear terms of CWA; and
  - one plaintiff organization lacked standing to assert the claims at issue.
  - Plaintiffs' motion granted and defendants' motion denied.

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- United States and State of Colorado brought action against city alleging that city had violated its NPDES permit
- City of Colorado Springs has established and operates a MS4 designed and used for collecting and conveying stormwater to outlets that discharge to creeks within the Arkansas River watershed
- The creeks are “state waters” as defined in the CWAQCA and “navigable waters,” i.e., “waters of the United States” as defined in the CWA
- Arkansas River is also a “navigable water” within the definition of “waters of the United States” in the CWA
- Three claims:
  - (1) City's waiver of permanent stormwater quality controls at single-family residential developments
  - (2) City's failure to enforce requirements for temporary stormwater controls at construction sites
  - (3) City's approval of an improperly designed and constructed permanent stormwater quality control called an extended detention basin

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Core of case is that City has failed to reduce discharge of pollutants to the maximum extent practicable
- Permit requires City to develop, implement, and enforce a Stormwater Management Program designed to effectuate the goal of reducing discharge to the MEP and City has failed to follow its SMP that was approved by the State
- Plaintiffs are not challenging adequacy of SMP documents to meet the goals of the permit

# LITIGATION

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(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Analysis (waiver of permanent stormwater quality controls at single-family residential developments):
  - City's Permit requires City to implement and enforce program to address stormwater runoff from new development and redevelopment projects through the use of BMPs
  - BMPs address stormwater quality by capturing a specific volume of stormwater and allowing it to drain slowly over a period of time so that sediment particles settle out of the stormwater before it is discharged into creeks and streams
  - City development plan allowed waiver of drainage requirements until 2014, when waver provision was removed
  - City waived initial development requirements prior to 2014 but final drainage reports for development were submitted after 2014 DCM and BMP waiver provision was not available for those two filings. Issue was grandfathering.
  - Court said evidence shows that City waived permanent water quality BMPs at development without sufficient justification.

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Analysis (failure to enforce requirements for temporary stormwater controls at construction sites):
  - Plaintiffs argue City violated “Construction Sites” provisions of the Permit by
    - (1) approving grading and erosion control plan that did not comply with the City's SMP documents
    - (2) failing to require the developer to implement temporary BMPs that complied with the SMP
    - (3) failing to provide adequate oversight and inspection of temporary BMPs and to follow the enforcement procedures in SMP
  - City argues;
    - (1) development plan included all required information
    - (2) temporary BMPs installed were generally adequate
    - (3) City diligently inspected construction site and required developer to make corrections whenever noncompliant BMPs were found or BMPs at site were inadequate to control erosion and sedimentation.

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Analysis (failure to enforce requirements for temporary stormwater controls at construction sites):
  - Court said City adopted and State approved 2002 plan that includes section on construction stormwater management that details requirements for planning, selecting, installing, and maintaining temporary BMPs at construction sites to control erosion, sedimentation, and stormwater quality during construction
  - Plan requires developer to submit an Erosion and Stormwater Quality Control Plan before construction begins. Developer did so.
  - Submitted plan narrative describes use of silt fencing, erosion logs, wattles, rock socks, a vehicle tracking control pad, straw bales, control blankets, and re-seeding to mitigate potential for erosion across the site and states that BMPs will be installed as required during the stages of construction as it proceeds
  - Court finds City's initial approval of the plan was not, in itself, a violation of the Permit

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
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- Analysis (failure to enforce requirements for temporary stormwater controls at construction sites):
  - City inspected site numerous times and has a stated policy of working with developers and contractors in adapting to changing conditions as construction goes forward
  - That is a reasonable recognition of residential construction as a dynamic process with economic consequences for both parties. But it does not absolve City from its duty to protect state waters from harmful effects to the extent practicable as required by both federal and state statutes and the Permit. That protection is of paramount importance.
  - Preponderance of evidence shows that City failed to meet its oversight responsibility almost from the beginning of construction in October 2014, and that there have been recurrent releases of sediment from construction site into the water flowing into the City's municipal storm system
  - City violated the Permit by failing to require implementation of adequate temporary BMPs and failing to take enforcement action when deficiencies were found. The deficiencies should have been corrected in time to prevent those sediment releases

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Analysis (approval of an improperly designed and constructed permanent stormwater quality control called an extended detention basin (EDB)):
  - Plaintiffs contend that:
    - (1) City improperly approved design and installation of EDB, which does not meet the minimum technical criteria set forth in SMP
    - (2) City failed to ensure adequate long-term operation and maintenance of the EDB as required by the Permit
  - City contends that:
    - (1) although EDB does not comply with certain recommended technical criteria in the SMP, it meets all required technical criteria
    - (2) EDB is being operated and maintained appropriately, and is functioning well with respect to water quality treatment
  - Court said EDB is one of the BMPs identified in the 2002 SMP and is a permanent structure with maintenance responsibility placed on the owner pursuant to a maintenance agreement with the City, recorded as a burden on the title
  - An EDB should have a “two-stage design,” where “top stage” is a shallower basin that contains the low-flow channel and only fills during less frequent storms; and “bottom stage” is a deeper basin in front of the outlet structure that fills often with frequently occurring runoff.

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
(352 F.Supp.3d 1086, US District Court, D. Colorado, Signed 11/09/2018)

- Analysis (approval of an improperly designed and constructed permanent stormwater quality control called an extended detention basin (EDB)):
  - As designed and built, development EDB has two inlets, one on the north side and another on the west side of the basin, each with a concrete forebay
  - Due to faulty design placing north inlet at an elevation lower than the EDB outlet, north forebay is always under water, including the inlet pipe
  - Sediment collects in inlet pipe, and some sediment remains in the forebay with algae growing in it
  - West forebay was properly designed and functions adequately
  - The EDB's design flaw was noted by City inspector who noted concern that placement of the north forebay would put it always under water, which would make maintenance difficult without draining the pool
  - City contends that 2002 SMP criteria requiring a small micro-pool, a two-stage design, a trash rack that extends to the bottom of the micro-pool, a forebay drain time of five minutes, and a concrete-bottomed low-flow channel are merely recommendations
  - Based on SMP language, Court finds that the City's approval of the design and installation of an EDB that does not meet these required technical criteria is a violation of the Permit

# LITIGATION

US and State of Colorado, Plaintiffs, Lower Arkansas Valley Water Conservancy District and The Board of County Commissioners of the County of Pueblo, Intervenor Plaintiffs, v. CITY OF COLORADO SPRINGS, COLORADO  
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- Holding: Defendant City of Colorado Springs, Colorado has violated MS\$ NPDES Permit

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