

**Kentucky Stormwater Association**  
**MS4 Update**  
**June 27, 2018**  
**Owensboro, KY**

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# OVERVIEW

- Waters of the US
- NEI
- Litigation

# Waters of the US

- August 27, 2015: U.S District Court for the District of North Dakota enjoined applicability of 2015 WOTUS Rule in 13 States challenging the 2015 Rule in that court.
- October 9, 2015: U.S. Court of Appeals for Sixth Circuit stayed 2015 WOTUS Rule nationwide pending further action of the court.
- February 28, 2017: President Trump issued Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

# Waters of the US

- January 22, 2018: US Supreme Court held that courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule.
- February 6, 2018: EPA Final Rule adding applicability date to the 2015 Rule. 2015 rule effective date was August 28, 2015 but applicability date was not codified in CFR. (83 Fed Reg 5200)
  - Applicability date is now February 6, 2020.

# National Enforcement Initiative

- EPA adopts National Enforcement Initiatives (NEI) periodically
- Current NEIs adopted for Air, Energy Extraction, Hazardous Chemicals, and Water
- Water NEIs:
  - 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

# National Enforcement Initiative

- 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.

”

# LITIGATION

Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME, P.A.; Donaldson Properties No 3 LLC; Dewitt Jay Donaldson; Howard County, Maryland (United States Court of Appeals, Fourth Circuit, 2018 WL 2095192, May 9, 2018)

Facts:

- Donaldson owns 3.2–acres in Howard County, Maryland
- Schneider lives 200 feet south of Donaldson Property on the same road.
- Both properties bordered to the west by unnamed creek

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Facts:

- Donaldson wants to build a 17,000 square-foot funeral home and mortuary on his property
- In July 2013, “over the passionate opposition of Schneider and others,” County approved Donaldson’s petition.
- March 26, 2016, Donaldson began construction of funeral home by “moving heavy equipment onto, clearing vegetation from, and grading the property.”



# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Facts:

- The Donaldson Property construction site was not covered by permit and MDE cited it soon thereafter.
- On April 4, 2016, Donaldson filed a notice of intent to be covered by the Maryland General Permit for Stormwater Associated with Construction Activity.
- April 19, 2016, MDE granted Donaldson coverage under the GCP and several weeks later deemed the site in compliance.

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Facts:

- April 6, 2016, Schneider sent Donaldson and Howard County a CWA citizen suit notice of intent to sue
- August 12, 2016, Schneider brought a four-count CWA citizen suit against Donaldson and Howard County in federal district court.

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Allegations:

- Donaldson was constructing funeral home without requisite CWA permits for stormwater runoff and construction in wetlands.
- Donaldson and Howard County violated Maryland and CWA regulations by not conducting an antidegradation review, which he claimed was required to ensure that project would not impair water quality of the Tributary and Carrolls Branch

# LITIGATION

Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

Procedure:

- Donaldson and County separately filed motions to dismiss (Donaldson included his permit from MDE and MDE inspection reports)

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Disposition:

- January 6, 2017: District court denied Schneider's motion for preliminary injunction/TRO, granted Donaldson's and the County's motions to dismiss
- Holding– Schneider had standing to sue Donaldson, but failed prove an “ongoing allegation” as required for CWA citizen suit because Donaldson is now covered by the GCP.

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

### Disposition:

- Holding: Even if Schneider had alleged ongoing violation, case was improper collateral attack on issuance of a permit, and court should abstain from asserting jurisdiction
- Holding: Schneider lacked standing to sue Howard County because it did not have an obligation to perform an antidegradation review and had not caused Schneider's injury-in-fact.
- Schneider appealed to 4<sup>th</sup> Circuit.

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

4<sup>th</sup> Circuit holding on appeal:

- Construction without a permit claim is mooted by permit coverage so Schneider failed to prove an ongoing violation
- Schneider forfeited any challenge to the district court's dismissal of his claim of failure to obtain a CWA 404 permit because he did not make any argument about dredge or fill discharges in his opening brief.

# LITIGATION

## Alan J. SCHNEIDER v. DONALDSON FUNERAL HOME et al

4<sup>th</sup> Circuit holding on appeal:

- Challenge for failure to conduct antidegradation review fails because Donaldson is covered by CGP, which was already in effect.
- Howard County MS4 permit does not obligate Howard County to “ensure that all rain water touching private property in the County is rendered pure before it enters a river or stream.”
- Lower court affirmed



# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Facts:

- Plaintiff sued City of Austin for violations of the Clean Water Act stemming from ongoing discharges of sand, soil, rock, and other sediment being washed Colorado River from the bed and banks of a channel running through a city park.
- Plaintiff also alleges that construction materials from City's work on channel are discharged into river, but evidence suggests those discharges have ceased.

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Facts:

- Channel originally existed as natural gully that brought water to river from different manmade channel not extended to river
- Had City done nothing, natural erosion would have continued until gully reached stable slope of 0.25 percent which would extend 8,000 feet inland

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Facts:

- Naturally occurring erosion had deposited enough sediment into Colorado River to form visible sandbar at gully's delta as early as 1997, long before City began work on Channel
- Left unchecked, natural erosion would have continued to deposit considerable amounts of sediment into the river

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Facts:

- In 2010, City began construction of Channel along footprint of gully to reduce erosion and define the contours of gully
- City used temporary erosion controls during the construction period and built a pedestrian footbridge that spanned the Channel about 1,000 feet upstream of river, completing work on Channel and pedestrian bridge in 2012.

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Facts:

- Construction project failed to arrest erosion problem and Channel bed is now 10 to 12 feet lower than when construction began
- Kleinman lives directly across river from mouth of Channel and can see the sandbar across the river at mouth of Channel
- Kleinman dislikes the sandbar saying sight of the sandbar makes it “very frustrating” to go out to his backyard and seeing it makes using his decks or swimming in the river unpleasant

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- Kleinman has standing to maintain action
- He must demonstrate: (1) he has suffered a concrete and particularized injury in fact that is actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) it is likely the injury will be redressed by a decision rendered in the plaintiff's favor.

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- Aesthetic and recreational injuries constitute injuries in fact for CWA citizen-suit plaintiffs
- Kleinman's injury is fairly traceable to the City's conduct
- Kleinman's injuries are redressable by a favorable decision

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- City is authorized to discharge storm water and pollutants from MS4 under a permit issued by the Texas Commission on Environmental Quality.
- Channel is part of the MS4 and City asserts that its discharges from Channel are covered by its MS4 permit and that its discharges comply with that permit. The Court disagrees



# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- City's position is that Channel discharges comply with MS4 permit because permit only requires City to “adopt minimum control measures to reduce erosion to the maximum extent practicable.”
- City also interprets MS4 permit to excuse discharges caused by “acts of God” such as the 2015 floods
- Neither position is correct

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- City must comply not only with SWMP but also with its own rules and ordinances including City's Environmental Criteria Manual, which includes a policy to “[m]inimize the erosion and transport of soil ... [p]revent sedimentation in ... waterways ... [and] [m]inimize flooding hazards ... associated with excessive sediment accumulation in ... waterways.”

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Holding:

- ECM requires the City to retrieve sediment carried offsite from construction sites after rain events and prohibits “[t]he release of excessive amounts of sediment in storm water runoff.”
- The substantial ongoing erosion of sediment resulting from City's construction of Channel does not comply with these requirements and takes City out of compliance with its MS4 permit

# LITIGATION

Michael KLEINMAN v. CITY OF AUSTIN (March 6, 2018, 2018 WL 1168859)

Relief:

- Kleinman awarded “nominal” civil damages (usually \$1)
- Because his injury is personal, City is spending \$12.5 million to reduce erosion, and public interest is not served by injunctive relief, Court finds that injunctive relief is unwarranted
- Following discussion on factors for assessing civil penalties, Court ordered City to pay civil penalty of \$25,000

# LITIGATION

UNITED STATES OF AMERICA & HAWAII  
DEPARTMENT OF HEALTH vs. HAWAII  
DEPARTMENT OF TRANSPORTATION (32 Nat.  
J.V.R.A. 7:30, 1000 WL 285513 (D.Hawai'i))

Facts:

- HDOT operates Honolulu and Kalaeloa Barbers Point Harbors, including pipes, roadways, and other storm water conveyances, which are MS4s
- Hawaii Small MS4 General Permit requires development and implementation of a SWMP and prohibits non-storm water discharges.

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Facts:

- December 2008: U.S. EPA and Hawaii DOH inspected Honolulu Harbor and the Kalaeloa Barbers Point Harbor
- June 2009: EPA issued Administrative Order to the HDOT for permit violations, requiring compliance through implementation of specific BMPs and submittal of specified BMP programs.

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Facts:

- Plaintiffs filed suit in U.S. District Court for the District of Hawaii, accusing HDOT of violating the Clean Water Act and the State of Hawaii's Water Pollution Law and failing to comply with the EPA's 2009 order
- Plaintiffs sought injunction against further violation, as well as civil penalties

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Injunctive Relief:

- HDOT required to revise organization structure, including reorganizing Office of Special Compliance as Office of Environmental Compliance
- HDOT to ensure Office of Environmental Class compliance staff have authority and responsibility to oversee compliance with all environmental requirements related to MS4 compliance including Stormwater permit and Stormwater Management Plans for Highways, Airports, and Harbors Divisions.



# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Injunctive Relief:

- HDOT – Harbors to solicit public comment on SWMP and submit an annual compliance report
- HDOT– Harbors shall continue to hold tenant Stormwater Pollution Prevention Awareness Training at least once per calendar year
- HDOT– Harbors will conduct IDDE training

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Injunctive Relief:

- HDOT – Harbors to conduct site assessments of high-risk areas
- HDOT – Harbors shall require that all construction sites on Harbors property comply with the *City and County of Honolulu stormwater BMP manual – Construction*
  - Manual covers manhole covers, erosion controls, sediment controls, non-stormwater management, and waste management

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Injunctive Relief:

- Similar requirements included for roadway paving or repair operations
- HDOT – Harbors shall create and submit a comprehensive storm sewer system map that identifies all HDOT – Harbors assets including inlets, manholes, pipes, above-ground drainage features, post construction control measures, and outfalls

# LITIGATION

## UNITED STATES & HDOH vs. HDOT

### Civil Penalty:

- HDOT assessed civil penalty of \$1.2 million plus interest from date of signature on Consent Decree, \$600,000 paid to US and \$600,000 to HDOH.
- CD included stipulated penalties of as much as \$1500/day for noncompliance with requirements
- Note: HDOT paid \$1 million penalty in 2005 for essentially same violations at airports and highways

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