MS4 Update

Indiana Association for Floodplain and Stormwater Management

INAFSM Annual Meeting
September 13, 2023
Florence, IN

Skipp Kropp
Steptoe & Johnson PLLC

OVERVIEW

- WOTUS
- IDEM MS4 General Permit
- MS4 Litigation

- WOTUS

Sackett v. United States, (May 25, 2023, 598 U.S. ___ ,2023)

Background

- Sacketts purchased 0.63-acre vacant lot near Priest Lake, Idaho, in 2004 and began constructing home there in 2007, after attaining building permits from local authorities.
- Shortly after, EPA informed Sacketts that their lot might be subject to CWA regulation because it contained "wetlands" that were "navigable waters“
- EPA directed Sacketts to halt construction until they received a permit from the USACE.
- Sacketts received an EPA administrative compliance order in fall 2007
- Sacketts sued in 2008 under the Administrative Procedure Act, lower courts held EPA compliance orders were not subject to the APA, but the Supreme Court reversed in a 2012 decision, now known as Sackett I

Sackett v. United States, (598 U.S. ___ ,2023)

Background

- Sacketts argued to US District Court for District of Idaho on remand that their land was not subject to CWA and, in 2019, district court applied Kennedy's test from Rapanos, holding the lot was regulated by the CWA.
- Ninth Circuit affirmed in August 2021, and rejected an attempt by EPA to moot the litigation by withdrawing the compliance order.
- Sacketts filed a petition for a writ of certiorari seeking to determine whether Rapanos decision should be revisited to instead adopt plurality opinion's test to determine whether a wetland fell under the CWA jurisdiction

Decision

- In earlier agreeing that Sacketts' lot is a wetland, the 9th Circuit applied the Kennedy test in Rapanos v. United States: whether there is a "significant nexus" between the wetlands and waters that are covered by the CWA, and whether the wetlands "significantly affect" the quality of those waters.

Sackett v. United States, (598 U.S. ___ ,2023)

Decision

- Justice Samuel Alito in 2023 decision explained courts should apply more stringent test, outlined by four justices (including Alito, Chief Justice John Roberts, and Justice Clarence Thomas) in Rapanos, in which CWA applies to a particular wetland only if it blends or flows into a neighboring water that is a channel for interstate commerce.
- Alito continued, it is clear that some "adjacent" wetlands will also qualify as "waters of the United States," meaning that wetlands that are entirely separate from traditional bodies of water will not qualify, but CWA will apply, to wetlands that are "as a practical matter indistinguishable from waters of the United States" because they have a "continuous surface connection" with a larger body of water, "making it difficult to determine where the 'water' ends and the 'wetland' begins."

LATEST WOTUS RULE

- August 29, 2023- EPA and Army issued final rule to amend final “Revised Definition of ‘Waters of the United States’” rule, published in the Federal Register on January 18, 2023.
- Final rule conforms definition of “waters of the United States” to the Supreme Court’s May 25, 2023, decision in *Sackett v. EPA*.
- Rule removes significant nexus test from consideration when identifying tributaries and other waters as federally protected
- Revises adjacency test when identifying federally jurisdictional wetlands
- Clarifies that interstate wetlands do not fall within the interstate waters category
- Clarifies the types of features that can be considered under the “additional waters” category.

LATEST WOTUS RULE

Changes that the agencies have made to the January 2023 Rule categories:

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Traditional Navigable Waters	No changes	(a)(1)
Territorial Seas	No changes	(a)(1)
Interstate Waters	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
Impoundments	No changes	(a)(2)
Tributaries	Removing the significant nexus standard	(a)(3)
Adjacent Wetlands	Removing the significant nexus standard	(a)(4)
Additional Waters	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

[1] The "Revised Definition of 'Waters of the United States'" rule published in the Federal Register on January 18, 2023.
[2] These tables are provided for informational purposes; the rule establishes the requirements defining "waters of the United States."

LATEST WOTUS RULE

Changes that the agencies have made to the January 2023 Rule definitions:

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean "having a continuous surface connection."	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

LATEST WOTUS RULE

No Changes to the Exclusions from “Waters of the United States”

Amendments to January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. The exclusions are:

- Prior converted cropland, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- Waste treatment systems, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- Artificially irrigated areas, that would revert to dry land if the irrigation ceased.

LATEST WOTUS RULE

No Changes to the Exclusions from “Waters of the United States”

Amendments to January 2023 Rule do not change the eight exclusions from the definition of “waters of the United States” that provide clarity, consistency, and certainty. The exclusions are:

- Artificial lakes or ponds, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting pools or swimming pools, and other small ornamental bodies of water created by excavating or diking dry land.
- Waterfilled depressions, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”
- Swales and erosional features (e.g., gullies, small washes), that are characterized by low volume, infrequent, or short duration flow

MS4 facilities should be excluded as WOTUS based on the new rule

- IDEM MS4 General Permit

IDEM MS4 General Permit

- Municipal Separate Storm Sewer System General Permit (INR040000) section 4.6, “SWQMP Post-Construction Stormwater Runoff MCM,” mandates MS4s to have legally binding agreements on private development to assign permanent responsibility for the on-going operation and maintenance of structural BMPs.
- Specifically, section 4.6(d) requires:

A MS4 operator must develop and administer a comprehensive program to address discharges of post-construction stormwater run-off from new development and redevelopment. The program must include a strategy to manage the program, monitor compliance, and, as necessary, enforce violations of the local ordinance. MS4 entities renewing permit coverage, must assess program requirements and goals from the previous permit, modify as necessary, and implement the requirements of this permit. A MS4 entity, at a minimum, must develop and implement a strategy to achieve the requirements within specific deadlines as outlined in this permit.

IDEM MS4 General Permit

- MS4 GP section 4.6(d) requires the MS4 to:
- Develop and implement a written operational and maintenance plan or requirement for all stormwater structural measures that are owned and/or operated by the MS4 entity and those within private development to ensure the long-term operation and maintenance of the measures. The requirements must be enforceable and include one or more of the following:

  (1) The owner/operator signed statement accepting responsibility for maintenance when the property is legally transferred to another party.

  (2) Written conditions in a sales or lease agreement that require the recipient to assume responsibility for maintenance.

  (3) Written conditions for residential properties operated by a homeowner's association or other entity.

  (4) Any other legal agreement that assigns permanent responsibility for maintenance of structural stormwater management measures.

IDEM MS4 General Permit

- **Considerations:**
  - MS4 resources necessary for periodic inspections required to monitor compliance
  - Deed recordation required to ensure continuity of compliance
    - Who monitors?
    - MS4 duplicate files to community deed filing system for deed records?
  - Criteria for approval of party responsible for operation and maintenance of stormwater management practice(s) identified in the BMP Operations and Maintenance Manual
    - Who establishes?
    - Standards?
    - Who confirms credentials?

IDEM MS4 General Permit

- **Considerations:**
  - Owner/operator must provide community records of inspections, maintenance and repair stormwater management practices identified in BMP Operations and Maintenance Manual
    - MS4 resources to review records?
    - Physical inspection of repairs reported by owner/operator
    - Resources necessary for MS4 to monitor property transfers (option 2)
  - Resources necessary for MS4 to monitor status of HOAs
    - HOAs are typically unstable
    - Monitoring status of HOA and even contact information will not be easy

IDEM MS4 General Permit

- **Considerations:**
  - Agreements assigning permanent responsibility for maintenance of structural stormwater management measures
  - Definition of “permanent”
  - Perpetual compliance?
  - Agreement assignable?

- MS4 Litigation

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

CWA citizen suit

- Action against HOA seeking an injunction to remedy HOA's allegedly illegal discharge of pollutants into lake and its abutting wetlands.
- Both parties moved for summary judgment

Background

- Lacamas Shores- residential community on Lacamas Lake, Washington.
- Defendant is HOA of that community, owns and is responsible for maintaining a wetland biofilter stormwater treatment system constructed in the late 1980s to obtain necessary permits to develop Lacamas Shores.
- Biofilter is man-made wetland using vegetation (e.g., grasses and aquatic plants) to sequester and remove pollutants introduced by stormwater runoff from development.
- Stormwater collected in drainage basins is directed through various mechanisms, including underground pipes and a "bubbler" system into the Biofilter, and then is discharged via two separate "outlets" into Lacamas Lake.

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

- Plaintiff claims that Biofilter has fallen into disrepair because of HOA's failure to plant new vegetation and harvest decomposing vegetation
- Plaintiff alleges growth and decomposition of inappropriate vegetation in Biofilter has caused it to generate new pollutants that are then released into Lacamas Lake and the naturally occurring wetlands abutting it.
- Plaintiff asserts "the HOA's lack of maintenance of the Biofilter has transformed the Biofilter from a system that removes pollutants into a system that adds pollutants."

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Procedure

- Plaintiff sued on November 12, 2021, under CWA citizen suit provisions.
- Complaint claims Defendant has been violating CWA Section 301(a) by discharging pollutants from Biofilter into Lacamas Lake and abutting wetlands without NPDES permit
- Plaintiff's seeks civil penalties and an injunction requiring HOA to cease alleged discharges, remediate environmental damage, and develop quality assurance procedures to ensure future compliance with CWA.
- August 31, 2022, parties filed cross-motions for partial summary judgment, seeking several discrete legal rulings on case.
- Plaintiff and Defendant each filed oppositions to the other's motion and each replied

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- Plaintiff, first, asks Court to rule that "the HOA can be liable under the CWA for its pollutant discharges even if the Biofilter is a water of the United States, and second, to rule that pollutant discharges from Biofilter are not covered by NPDES permit and, therefore, not authorized.
- Plaintiff's CWA claim premised on allegations that HOA has been "discharging pollutants from the Biofilter" to Lacamas Lake and the wetlands abutting it, alleging that "Biofilter as a whole is a point source, and each discrete outfall" (i.e., each of the Biofilter's two outlets) "is a separate point source."
- Parties dispute whether Biofilter is a water of the United States as a factual matter, but assume it is for purposes of present cross-motions.
- Given these allegations and the assumption at hand, Plaintiff's motion seeks a legal ruling that he can prevail on his claim even if the Biofilter is classified as a water of the United States as well as a point source.
- Defendant argues that theory of liability is incompatible with the CWA

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- Court makes no determination whether Biofilter and its two outlets are point sources, but finds that Plaintiff cannot prevail on CWA claim if it is premised on the Biofilter simultaneously being a point source and a water of the United States.
- CWA, in defining discharge of a pollutant, sets out a to-from relationship between point sources and navigable waters. Statute separately defines those terms using disparate and non-overlapping language. Statutory text indicate that point sources and navigable waters are two different things: the former sends polluted water, and the latter receives it
- CWA's definition of the "discharge of a pollutant" expressly contemplates the "addition" of a pollutant to a navigable water

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- Plaintiff's theory of liability – in which one navigable water adds pollutants into another – would render inoperative the term, "addition."
- Court finds that EPA's interpretation of CWA forecloses Plaintiff's theory of liability in this motion.
- If Biofilter is a water of the United States, then any pollutants created by Biofilter would not be "added" to subsequent bodies of water. Those pollutants would initially exist within a navigable water (i.e., Biofilter), and although they may later move into separate waters (i.e., through the Biofilter's two outlets), they would at all times simply remain present in the unitary waters of the United States.
- It may very well be that Biofilter is not a water of the United States and only a point source. Under that scenario, a theory of liability based on addition of pollutants from Biofilter (as a point source) to Lacamas Lake (as a navigable water) would comport with CWA

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- It may also be the case that, if Biofilter is a water of the United States, there exists some point source within or in relation to it that is not itself a navigable water. Under that scenario, a viable theory of liability could be based on addition of pollutants from that point source to Biofilter.
- Court, however, does not consider those scenarios in resolving the parties' cross-motions given that their stipulated assumption.
- Plaintiff also seeks ruling that Biofilter's pollutant discharges are not covered by Western Washington Phase II Municipal Stormwater Permit (the "Municipal Permit"), which is an MS4 permit authorizing certain stormwater discharges by municipal sewer systems.
- Defendant responds that Biofilter is covered by MS4 permit because it is operated by City of Camas.

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- Plaintiff argues that the Biofilter is not an MS4 because it is a private stormwater treatment facility owned and operated by a private entity: the HOA. In support, Plaintiff submits City of Camas stormwater facility map and a list of city-owned facilities, together indicating that Biofilter is a privately owned facility not owned or operated by City of Camas.
- Defendant offers no response to Plaintiff's argument, and thereby fails to rebut the evidence so Court grants this part of Plaintiff's motion and finds that Municipal Permit does not apply to any pollutant discharges from Biofilter.

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

Analysis

- Defendant's motion seeks two separate rulings. First, Defendant asks Court to rule that Plaintiff cannot state a claim under CWA where Biofilter is classified both as a point source and a water of the United States and, second, that Biofilter cannot "discharge" any pollutants because it is not a meaningfully distinct body of water from Lacamas Lake and natural wetlands abutting it.
- Court grants summary judgment to Defendant on first part of its motion
- Defendant, in its reply, offers no response to Plaintiff's argument so abandons its argument. Therefore, absent any factual showing from Defendant on this issue, Defendant is not entitled to ruling that Biofilter is not a meaningfully distinct body of water from Lacamas Lake and the wetlands abutting it, so Court denies this part of Defendant's motion.

Steven D. BANG v. LACAMAS SHORES HOMEOWNERS ASSOCIATION, 638 F.Supp.3d 1223, US District Court, W.D. Washington, at Tacoma (October 31, 2022

- Holding:
  - Plaintiff cannot prevail on his CWA claim to the extent it is premised on the theory that the Biofilter is simultaneously a point source and a water of the United States.
  - The pollutant discharges from the Biofilter are not covered by the Western Washington Phase II MS4 Permit.
  - The Court does not find that Biofilter is not a meaningfully distinct body of water from Lacamas Lake and the natural wetlands abutting it.

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

- Puget Soundkeeper Alliance (Soundkeeper), a Washington nonprofit corporation, challenges permits issued by Department of Ecology to MS4 operators in Washington State.
- Permit Section S5 imposes requirements on permittees that, if breached, are addressed through a compliance pathway located in S4
- S5 section of the Phase I permit requires that each permittee establish a "Stormwater Management Program." Phase I programs must include a number of aspects, such as mapping water sources, communicating with other MS4s and the public, creation of pollutant source control methods, creation of structural controls, etc. The Phase II programs are similar in most respects, but some of the more specific requirements are less robust.

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

- Section S4 requires permittees' compliance with certain water quality standards and contains the permits' enforcement mechanism. It addresses circumstances in which site-specific water quality violations occur despite compliance with Section S5's programmatic requirements.
- Soundkeeper's claims before the Board and on appeal revolve around undisputed fact that many of Washington's waters contain levels of pollutants that exceed applicable water quality standards.
- Soundkeeper says no permittee has notified Ecology of more recent 303(d) list impairments and possible effect on salmon per S4.F, that in response to only one out of 243 S4.F reports sent to Ecology, it required no action other than already required under S5 of the permits, and that S4 has never been used to require any additional action by a permittee to address pre-spawn salmon mortality.

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

- The sticky wicket for MS4s is that, unlike most permittees—e.g., a chemical plant or agricultural facility—they do not generate the pollutants they discharge, and the goal of eliminating the pollutants from hundreds and thousands of point sources is a task that can only be remedied over time.
- NPDES permits for MS4s "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate." CWA 402(p)(3)

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

- Soundkeeper identifies five corresponding legal issues. Two are clearly stated: "Whether 40 C.F.R. § 122.4413 applies to the Permits" and whether Ecology "violated its obligations to review and assess Section S4 ... when it reissued the Permits to ensure [S4 meets the applicable legal standards]."
- The remaining three issues, however, are less straightforward. They question
  (1) whether Section S4 "fails to ensure that the discharges authorized by the Permits will not cause, have the reasonable potential to cause, or contribute to a violation of a water quality standard,"
  (2) whether Section S4 fails to comply with requirements to apply all known, available, and reasonable [technologies and] methods to control toxicants (AKART) and MEP standards, and
  (3) whether Section S4 fails to ensure compliance with limits more stringent than AKART "or water quality based effluent limits as necessary to meet Washington water quality standards or total maximum daily load cleanup plans."

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

Analysis

- Court notes "we understand Soundkeeper to raise two issues, which encompass all of Soundkeeper's five issue statements:
  (1) Does state or federal law or regulation require Washington's stormwater permits to hold out of compliance any MS4 that discharges a pollutant into a water impaired by that pollutant?
  (2) If not, has Ecology arbitrarily and capriciously drafted the permits by excluding such a provision?"
- Soundkeeper position is there is a bright-line rule in state and federal statues forbidding allowance of any discharge into impaired water.
- Court analysis says statutes and regulations each grant Ecology crucial discretion either not to require strict effluent limits, or to enforce limits in manner it finds most reasonable. Because Ecology enjoys this discretion, its actions must be analyzed not de novo, as Soundkeeper argues, but through an arbitrary and capricious lens.

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

Analysis

- The plain language of 40 C.F.R. § 122.44(d) indicates that it does not apply to MS4s. On this issue, the Board concluded in prior proceedings in this case that 40 C.F.R. § 122.44(d) does not apply to municipal stormwater systems. Agreeing with Ecology and the intervenor-respondents, it ruled that 40 C.F.R. § 122.26 is instead the section of the C.F.R. that sets MS4 permit conditions.
- We therefore conclude that as to 40 C.F.R. § 122.44's paragraph (d), the Board did not err…"The overarching federal law for MS4s— 33 U.S.C. § 1342(p)(3)(B)(iii)—is broad and flexible. It does not require [the permitting agency] to implement numeric effluent limitations; BMPs are appropriate."

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

Analysis

- Next, whether the Permits Are Arbitrary and Capricious
- Arbitrary and capricious actions are " 'willful and unreasoning and taken without regard to the attending facts or circumstances.'
- But "[w]here there is room for two opinions, and the agency acted honestly and upon due consideration, [the] court should not find that an action was arbitrary and capricious, even though [it] may have reached the opposite conclusion." Port of Seattle, 151 Wn.2d at 589
- A party challenging an agency action under this standard therefore bears a heavy burden of proof and persuasion. Soundkeeper has not met its burden

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

Analysis

- Soundkeeper contends Ecology failed to review or assess the permits' Sections S4 for compliance with AKART, MEP, C.F.R. § 122.44, or various portions of the WAC. It also contends that Ecology has admitted to not conducting this review. We disagree on both counts.
- Ecology "made the AKART and MEP findings as to the Permits as a whole," according to Jeff Killelea, who lead the reissuance.
- Record includes redlined versions of the 2019 permits that track every change made from the last iteration; though the permits' general structure survives, few paragraphs remain untouched, and some portions are entirely new.

PUGET SOUNDKEEPER ALLIANCE, Appellant, v WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, 2023 WL 5713819, 9/5/2023

Analysis

- The permits are the result of a multi-decade iterative process. They are hundreds of pages long, the result of detailed back and forth with the community through the comment process, and have been the subject of years of litigation, much of it involving Soundkeeper itself. Ecology has devoted a great deal of attention to the question of how to permit MS4s, and is sensitive to the many practical limitations on their operators' abilities to address the pollutants they discharge.
- Holding for Respondents

SIERRA CLUB, et al v. FL DEP, Ginnie Springs Outdoors, LLC, Paul Still, and Friends of Wekiva River, Inc., Appellees (District Court of Appeal of Florida, First District, 357 So. 3D, 737; Feb 15, 2023)

- Following entry of four orders of Department of Environmental Protection establishing Basin Management Action Plans ("BMAPs") covering fifteen springs, adoption of recommended order of Administrative Law Judge, and denial of exceptions to recommended order made by appellants, comprised of individuals and environmental organizations, appellants appealed.

Facts

- In 2005, FL legislature authorized DEP to develop Basin Management Action Plans ("BMAPs") to "equitably allocate ... pollutant reductions to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, as appropriate."

SIERRA CLUB, et al v. FL DEP, Ginnie Springs Outdoors, LLC, Paul Still, and Friends of Wekiva River, Inc., Appellees (District Court of Appeal of Florida, First District, 357 So. 3D, 737)

Facts

- 2016- Legislature enacted Florida Springs Act requiring DEP to adopt BMAPs for impaired Outstanding Florida Springs
- Each TMDL rule for the Outstanding Florida Springs at issue in this appeal identified a target concentration of nitrate and allocated the load to four broad categories: wasteload allocations ("WLAs") to NPDES permitted point-source discharges, WLAs to NPDES permitted municipal separate storm sewer discharges, load allocations ("LAs") to nonpoint sources, and a margin of safety
- Appellants here challenged BMAPs for certain Outstanding Florida Springs concerning nitrogen, arguing TMDL was required to provide detailed allocations of pollutant load reductions to specific categories of nonpoint sources.

SIERRA CLUB, et al v. FL DEP, Ginnie Springs Outdoors, LLC, Paul Still, and Friends of Wekiva River, Inc., Appellees (District Court of Appeal of Florida, First District, 357 So. 3D, 737)

Facts

- DEP Argued TMDL complied because:
- (a) The WLA for wastewater point sources is not applicable;
- (b) The WLA for discharges subject to the Department's NPDES **MS4** Permitting Program is to meet a monthly average in-stream ambient water quality target of 0.35 mg/L nitrate-nitrite. The range of reduction necessary to achieve the LA is estimated between 13 and 35% depending on the month and location within the basin. Achievement of the TMDL constitutes meeting the water quality target; and
- (c) The LA for nonpoint sources is to meet a monthly average of 0.35 mg/L nitrate-nitrite. The range of percent reduction necessary to achieve the LA is estimated between 13 and 35% depending on the month and location within the basin. Achievement of the TMDL constitutes meeting the water quality target.

SIERRA CLUB, et al v. FL DEP, Ginnie Springs Outdoors, LLC, Paul Still, and Friends of Wekiva River, Inc., Appellees (District Court of Appeal of Florida, First District, 357 So. 3D, 737)

- Court notes that statute requires that BMAPs for Outstanding Florida Springs include an "[i]dentification of each point source or category of nonpoint sources ...." The BMAPs for Outstanding Florida Springs must also include "[a]n estimated allocation of the pollutant load ... for each point source or category of nonpoint sources."
- DEP's allocations of load reductions in the BMAPs at issue allocated the reductions to the entire basins, not to any point or nonpoint source.
- DEP argues that statute only requires allocations to the basin as a whole based section that for TMDLs, "[a]llocations may also be made to individual basins and sources *or as a whole to all basins and sources* or categories of sources *of inflow to the water body or water body segments*." (emphasis added).

SIERRA CLUB, et al v. FL DEP, Ginnie Springs Outdoors, LLC, Paul Still, and Friends of Wekiva River, Inc., Appellees (District Court of Appeal of Florida, First District, 357 So. 3D, 737)

- Court notes that Appellants "persuasively argue that, if this clause applies at all to this issue, it only establishes that allocations to basins as a whole may be appropriate only for basins that are 'sources of inflow to the waterbody' that is the subject of the TMDL. There are no such basins at issue here."
- **Holding:** The District Court of Appeals held that TMDL rules adopted by the Department failed to comply with statute requiring that BMAPs make a detailed allocation among specific point sources and specific categories of nonpoint sources

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

Background

• Borough filed petition for declaratory judgment against state university system and one of its universities, seeking to establish that borough's charge related to stormwater management was not tax from which system and university were immune as agencies of Commonwealth, but fee for service which state and university were obligated to pay. After the Commonwealth Court, 2019 WL 3069642, overruled system's and university's preliminary objections, parties cross-moved for summary relief.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

FACTS

- Borough owns and operates a small MS4
- In or about 2016, Borough Council enacted various provisions of the West Chester Code providing for the Stormwater Charge
- Borough adopted this charge as the mechanism by which it would raise revenue to further construct, operate and maintain its stormwater management facilities.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

FACTS

- Code further provides:
- A. All sums collected from the payment of stream protection fees shall be deposited into the West Chester Borough Stormwater Management Fund.
- B. The Stormwater Management Fund shall be used by the Borough for:
  - (1) Implementation and management of a program to manage stormwater within the Borough.
  - (2) Constructing, operating, and maintaining the Borough's Stormwater…System.
  - (3) Debt service for financing stormwater capital projects.
  - (4) Payment for other project costs and performance of other functions or duties authorized by law in conjunction with the maintenance, operation, repair, construction, design, planning and management of stormwater facilities, programs and operations.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

FACTS

- In September 2016, the Borough Council adopted Resolution No. 11-2016 imposing the Stormwater Charge on owners of all developed properties within the jurisdictional limits of the Borough that are benefitted by the Borough's Stormwater System and the public health, safety and welfare enhancements that are afforded by the Borough's Stormwater System.
- The amount of the Stormwater Charge is dependent on the amount of impervious surface on the property.
- All revenue generated by the Stormwater Charge is deposited into the Borough's Stormwater Management Fund.
- Borough uses revenue generated by the Stormwater Charge only for purposes set forth in the Code, which include funding pollution remediation measures and complying with state and federal regulatory requirements.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

FACTS

- A portion of the University's campus, known as North Campus, lies in the south-central portion of the Borough
- PASSHE, in the name of the Commonwealth of Pennsylvania, is the title owner in fee simple of the properties which form a part of the North Campus, and the University is title owner in fee simple of another portion of that property
- Borough asserts that all of the Commonwealth titled and University titled properties, including North Campus, are "developed" for purposes of the Code and that these properties are connected with, use, and are served or benefitted by the Borough's Stormwater System

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ARGUMENTS

- Borough argues that impervious area North Campus that lies in the Borough covers 32 acres, constituting nearly 8% of the total impervious area within the Borough
- Borough further argues that stormwater flowing from impervious areas of North Campus situated in the Borough either enters and flows through its Stormwater System or flows directly into a nearby watercourse
- Borough contends "there is a direct relationship between the amount of impervious surface within a given watershed and the health and quality of the watercourse (and its tributaries) within that watershed, as well as public health, safety, and welfare concerns related to flooding and other stormwater-related issues."
- Borough sent Respondents Stormwater Charge invoices in 2017, 2018, and 2019, all of which Respondents refused to pay.
- Borough does not dispute that both PASSHE and the University are immune from local taxation; however, Borough argues the Stormwater Charge constitutes a fee for service rather than a tax, such that Respondents are obligated to pay it.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ARGUMENTS

- Respondents object on the basis that Stormwater Charge is not a fee for service, but rather a tax from which they are immune as Commonwealth entities.
- Respondents also argue that, even if Stormwater Charge is considered an assessment rather than a general tax because it is limited to stormwater infrastructure projects, it is still a form of tax subject to the Commonwealth's tax immunity.
- Respondents additionally contend that Stormwater Charge is not reasonably proportional to the value of any product or service provided to the Commonwealth in a quasi-private capacity, such as the provision of natural gas or garbage collection.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS

- July 15, 2019- Court issued a memorandum opinion overruling Respondents' preliminary objections
- Court reasoned that questions remained whether Borough's Stormwater System provided a discrete benefit to Respondents, as opposed to generally aiding the environment and public at large; whether value of Stormwater System to Respondents was reasonably proportional to the amount of Stormwater Charge; and, apart from general operation, maintenance and repair of the Borough's Stormwater System, how exactly Borough utilized funds generated by Stormwater Charge.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS- CURRENT PROCEEDINGS

- Respondents responded to court that Borough's Stormwater System confers a general environmental benefit on all property owners and citizens within and around Borough.
- Thus, Respondents maintained Stormwater Charge constitutes a tax which they are immune from paying.
- Respondents argue that University maintains its own separate MS4 permit and stormwater system to collect and manage stormwater runoff and, consequently, does not rely on Borough's MS4 for these purposes
- Respondents insisted that measures implemented on the University's campus pursuant to its own MS4 and at its own expense in fact decrease the amount of stormwater runoff managed by Borough's Stormwater System.
- Respondents also argued that University has borne cost of implementing numerous measures for prevention of stormwater runoff, such as adding trees, green roofs, rainwater gardens, and pervious paver surfaces to various portions of campus
- Respondents maintained that University's MS4 permit likewise generally benefits residents both on campus and in the Borough

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS- CURRENT PROCEEDINGS

- Respondents contend that Borough developed Pollution Reduction Plan, funded by Stormwater Charge, specifically to address sediment in Brandywine Creek, Blackhorse Run, Plum Run, and Taylor Run; to install infiltration facilities—including rain gardens, vegetated curb extensions, bioswales, infiltration trenches, and brick pavers—at Veterans Park, Marshall Square Park, and Brandywine Street; to conduct streambank restoration in the Blackhorse Run, Plum Run, and Taylor Run watersheds; to fund street sweeping and tree planting throughout the Borough; to address phosphorus buildup in Goose Creek; to install infiltration facilities-including rain gardens, vegetated curb extensions, bioswales, and infiltration trenches at John Green Memorial Park, Fugett Park, and Greenview Alley; to fund street sweeping and tree planting throughout the Borough; to install Jellyfish Filters at two discharge points on East Nields Street; and to manually clean inlet boxes throughout the Borough.
- Respondents contend that none of the aforementioned projects will benefit University campus property.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS- CURRENT PROCEEDINGS

- Respondents contend they are entitled to judgment as a matter of law because Stormwater Charge constitutes a tax from which they are immune, rather than a fee for service.
- Respondents maintain that Stormwater Charge constitutes a tax because the projects it funds are designed to return a "general benefit" and promote "the welfare of all."
- Respondents argue Borough's position that University derives a discrete benefit in return for payment of Stormwater Charge is undermined by stated finding of Borough's Council that maintaining a stormwater system is fundamental to the "public health, safety, and general welfare" of Borough residents.
- Respondents maintain that even if this Court were to deem the Stormwater Charge a special assessment on the basis that it funds certain infrastructure projects, such assessments nevertheless constitute a form of tax under Pennsylvania law.

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS- CURRENT PROCEEDINGS

- Respondents insist that, even if deemed a fee rather than a tax, Stormwater Charge is not reasonable, as it is not proportional to cost of maintaining Stormwater System.
- Respondents further maintain the purpose of municipal stormwater projects is to benefit not only adjacent properties, but the community as a whole.
- Respondents theorize that all property owners receive same general benefits from projects funded by Stormwater Charge, such as decreased flooding, minimized erosion to public waterways, and cleaner water.
- Respondents also note that prior to enactment of the Stream Protection Ordinance, Stormwater System was funded by Borough's general fund.
- Thus, Respondents request that this Court conclude the Stormwater Charge is a tax

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

ANALYSIS- CURRENT PROCEEDINGS

- Borough admits that University has its own **MS4** but contends that Stormwater System simultaneously accords both specific and general benefits, maintaining that such benefits are not mutually exclusive.
- Borough maintains that Stormwater Charge constitutes a fee, because amounts imposed may be reduced through the appeals process, revenue is deposited only in the Stormwater Management Fund, and it is imposed only on owners of developed land.
- Borough also asserts that if required to provide for disposal of their own stormwater, Respondents would incur initial capital costs in excess of $4,200,000, and that annualizing these costs along with annual maintenance costs yields a total annual cost of $178,500, whereas Respondents' actual annual Stormwater Charge bill is roughly $132,000.
- Thus, Borough contends that Stormwater Charge is reasonably proportional to level of benefit afforded Respondents from connection to Borough's Stormwater System

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

COURT DISCUSSION

- Testimony on behalf of Borough showed owners of both developed and undeveloped properties in Borough receive same general benefits from projects funded by Stormwater Charge.

- Further testimony showed that managing stormwater provides "a general benefit to the [c]ommunity" by, for instance, preventing damage to public infrastructure.

- Borough acknowledges that Respondents' own MS4 "equally benefit[s] property owners and citizens on campus and in the greater community."

- Borough reasons, however, that alleged specific and general benefits imparted by Stormwater System are not mutually exclusive. Assuming, *arguendo*, this is true, Borough nevertheless fails to point to any evidence that Respondents receive discrete benefits through payment of Stormwater Charge. As observed by Respondents, the NTM Report does not contain evidence of any distinct benefits accorded Respondents, but rather, merely projects expenses University would allegedly bear to manage stormwater runoff in the absence of the Stormwater System

The BOROUGH OF WEST CHESTER v. PA STATE SYSTEM OF HIGHER EDUCATION and West Chester University of Pennsylvania of the State System of Higher Education, No. 260 M.D. 2018 (2023 WL 2486168)

COURT DISCUSSION

- Notably, Borough admits "that neither [the] Borough nor Respondents maintains [sic] a precise calculation of the aggregate volume of stormwater runoff which flows from North Campus into the [Stormwater System]," despite "den[ying] that Respondents do not maintain any such calculation."
- Although Borough argues there is a "direct relationship" between the amount of impervious surface area and the extent of stormwater related issues for any given watershed, Borough nevertheless concedes there is no means of measuring the amount of stormwater runoff that flows from North Campus into Stormwater System. Thus, no direct measure of Respondents' purported use of the Stormwater System exists.
- We also agree with Respondents' assertion that the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property
- Holding: The Commonwealth Court (No. 260 M.D. 2018) held that charge was general tax.
- Motion for Summary Judgment filed by the Pennsylvania State System of Higher Education and West Chester University of Pennsylvania is GRANTED. The cross-application for summary relief filed by the Borough of West Chester is DENIED.

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- Nonprofit organization of public entities with municipal separate storm sewer systems brought action against Water Quality Control Division of Colorado Department of Public Health and Environment, alleging Division's general stormwater-discharge permit increased entities' costs without proportionally improving stormwater quality, violated organization's due-process rights, and disregarded requirements for issuance of stormwater permits.
- The District Court, City and County of Denver, dismissed organization's complaint for lack of subject matter jurisdiction and denied organization's petition for stay of permit.
- Organization appealed.

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- Water Quality Control Division (Division) within the Colorado Department of Public Health and Environment (Department) administers the Colorado Water Quality Control Act (Act)
- Act provides for judicial review of agency determinations. Depending on the type of agency action, a party may seek an adjudicatory hearing under the State APA
- For certain agency actions, seeking such a hearing under the Act is not a prerequisite before the party can seek judicial review
- Plaintiff, Colorado Stormwater Council (Council), did not request an adjudicatory hearing following the Division's issuance of the general stormwater discharge permit at issue here. Instead, Council filed a complaint for judicial review in the district court.

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- Council is a nonprofit organization of public entities with storm drainage systems that comprise what are known as non-standard MS4s, which are municipal separate storm sewer systems. Non-standard MS4s are regulated under the federal Clean Water Act, Colorado's Act, and regulations promulgated by the Colorado Water Quality Control Commission
- Department, through the Division, administers the permits for non-standard MS4s as part of a program known as the Colorado Discharge Permit System.
- Permit issued by Division governs discharge of pollutants in stormwater from non-standard MS4s.
- Non-standard MS4s are publicly owned stormwater systems located in urbanized areas but not owned by a city or county.
- Non-standard MS4s can include systems at public entities such as large educational institutions, hospitals, or prison complexes that have infrastructure that collect and convey stormwater runoff to surface waters and serve over 1,000 residents or individuals

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- In 2008, Division issued MS4s their own general permit
- In June 2019, Division published draft renewal and fact sheet proposing permit terms and changes to the 2008 General Permit
- Proposed changes were based on stakeholder input; the Division's experience with MS4 permitting; compliance; and enforcement since 2008; changes in stormwater treatment and technology; and changes made since 2008 in other Colorado and federal MS4 permits, regulations and guidance
- Division held extensive public comment period for proposed permit, revised the proposed permit, and then held second comment period
- Both comment periods went well beyond required thirty days.
- After close of second public comment period, Council submitted a cost-benefit analysis of the second draft permit for the Division's consideration.

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- In April 2021, Division issued final general renewal permit for non-standard MS4s, as well as final fact sheet, which included Division's rationale for permit and responses to comments on both permit drafts.
- Fact sheet included Division's assessment of Council's cost-benefit analysis, explaining why Division had only provided limited revisions to permit's terms.
- In May 2021, Council filed complaint for judicial review in district court challenging several terms of the permit.
- Council alleged that non-standard permit "(i) contain[ed] a series of new requirements and prescriptions for [the Council] members that will dramatically increase costs without proportionally improving stormwater quality, (ii) violat[ed] [the Council]'s due process rights in myriad ways, and (iii) disregard[ed] applicable requirements for issuance of stormwater permits."

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- Council also filed in the district court a petition for stay, alleging the "non-standard MS4s would suffer irreparable and serious injury without a corresponding public benefit if they were forced to implement the Non-Standard Permit."
- Division moved to dismiss the complaint
- District court dismissed Council's complaint for lack of subject matter jurisdiction, finding that General Assembly had created an administrative appeal process for general permits issued by Division and that Council was required to pursue that remedy before seeking judicial review
- Court then denied Council's petition for stay of the permit as moot. The permit went into effect November 1, 2021.
- Council appeals dismissal of its complaint and denial of its petition for stay

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Background

- Council contends that the district court erred by dismissing its complaint for lack of subject matter jurisdiction

Analysis

- The doctrine of administrative exhaustion requires a party to pursue available statutory administrative remedies before obtaining judicial review of a claim
- If a party fails to satisfy the exhaustion requirement, the district court lacks subject matter jurisdiction to hear the matter
- The exhaustion requirement, however, has limited exceptions, such as when it is "clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested," and "when the matters in controversy are matters of law that the agency lacks the authority or capacity to determine, such as constitutional issues

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Analysis

- Council contends that it was not required to seek a hearing under the APA because, under a specific section of the Act, a request for a hearing or reconsideration is not required before seeking judicial review
- Council contends that it was not required to pursue an administrative hearing because the language in the section is permissive rather than mandatory, stating "a party *may* appeal a general permit issued under section 25-8-502(1)(b)(I)(G) pursuant to the appeals process set forth in section 24-4-105"
- We conclude that the use of the word "may" in section 25-8-503.5(3) created an avenue by which Council could seek an administrative appeal by requesting a hearing under section 24-4-105, but the statute's permissive language did not eliminate Council's obligation to exhaust that administrative remedy before filing its complaint for judicial review in district court.

COLORADO STORMWATER COUNCIL v. WATER QUALITY CONTROL DIVISION OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Colorado Court of Appeals, Division V, Court of Appeals No. 21CA1781 (529 P.3d 134, February 2, 2023)

Analysis

- Therefore, we agree with the district court that by referring to section 24-4-105 in section 25-8-503.5(3), the General Assembly mandated an administrative hearing for parties challenging general permits issued by the Division before seeking judicial review

Holding

- Court of Appeals held that organization was required to seek adjudicatory hearing before filing complaint for judicial review of permit. We conclude that for agency actions concerning general permits, the party must first request and have an adjudicatory hearing governed by the APA as a prerequisite to seeking judicial review
- Affirmed.

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