

RESOLUTION NO. 36-15

A RESOLUTION OF THE CITY OF COLORADO SPRINGS CITY COUNCIL IN SUPPORT OF LEGISLATION CONCERNING REGIONAL STORMWATER MANAGEMENT AND POST-FIRE MITIGATION ACTIVITIES

WHEREAS, the management of stormwater and the mitigation of the impacts of wildland fire events is essential to preserve lives, protect public health and safety, avoid damage to private property and public infrastructure, and comply with state and federal law; and

WHEREAS, the City of Colorado Springs ("City") has in the past, and will in the future, plan, construct, operate and maintain regional stormwater control facilities in order to protect water quality and maintain the health, safety and welfare of its citizens and downstream neighbors; and

WHEREAS, the City undertakes such actions as necessary to ensure compliance with its MS4 stormwater permit; and

WHEREAS, the office of the State Engineer issued a 2011 Memorandum entitled "Administrative Approach for Stormwater Management" which provides an exemption from water rights administration for the retention of storm flows for up to 72 hours by local, site-specific developments, but does not afford the same treatment to regional detention facilities or post-wildfire mitigation facilities; and

WHEREAS, the Division of Water Resources of the Colorado Department of Natural Resources has issued correspondence to the City of Colorado Springs and others indicating a need for such entities to take action by April 1, 2015 in association with alleged out-of-priority water depletions as a consequence of post-fire mitigation facilities constructed in response to the Waldo Canyon fire; and

WHEREAS, regional stormwater management facilities and post-fire mitigation facilities have not historically obtained water court decrees for plans for augmentation or administratively approved substitute water supply plans; and

WHEREAS, the process for obtaining administrative or judicial approval for such plans can be adversarial, time consuming and expensive, with no guarantee of success; and

WHEREAS, it is essential to manage stormwater flows and to mitigate the impacts of wildland fire events in order to meet the health, safety and welfare objectives referenced above; and

WHEREAS, the City, through Colorado Springs Utilities (“Utilities”), has assisted the Fountain Creek Watershed, Flood Control and Greenway District (“District”) in its ongoing efforts to advance a cooperative study amongst interested Arkansas River basin stakeholders in analyzing flood control alternatives on Fountain Creek and a related effort to identify water rights that may be adversely impacted by new flood control activities on Fountain Creek and evaluate options for the construction and operation of such facilities in a manner that appropriately mitigates such impacts; and

WHEREAS, it is also necessary to ensure that the owners of decreed water rights that may be affected by new flood control facilities on Fountain Creek are treated in a just and equitable manner relative to any potential impairment of such rights as a consequence of the construction and operation of such facilities.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. The City supports the passage of state legislation which establishes that stormwater management facilities and post-wildland fire mitigation facilities that are owned and operated by a governmental entity or are subject to governmental oversight, and meet such additional criteria established in the legislation, do not cause injury to vested water rights.


Section 2. Support for SB 15-212 notwithstanding, the City, including Utilities, will continue to work cooperatively with Arkansas River basin stakeholders in completing the technical analysis currently being performed under the auspices of the District in an effort to identify storm water and flood control implementation options which ensure the fair and equitable treatment of those within the basin who hold downstream direct flow and storage water rights.


Section 3. The City Council authorizes City and Utilities staff to undertake such actions as may be necessary to carry out the intent of the Council as described herein.

DATED at Colorado Springs, Colorado this 14th day of April, 2015.


Keith King, Council President

ATTEST:


Sarah B. Johnson, City Clerk



SENATE BILL 15-212

A BILL FOR AN ACT

CONCERNING A DETERMINATION THAT WATER DETENTION FACILITIES
DESIGNED TO MITIGATE THE ADVERSE EFFECTS OF STORM WATER RUNOFF
DO NOT MATERIALLY INJURE WATER RIGHTS.

B R 3/28/15 12:33 PM
Comment: Redlined against Word March 26 v2

Bill Summary

Under current administrative practice, facilities that are designed to detain storm water for environmental and public safety purposes may be required to release water to avoid injury to water rights.

The bill specifies that storm water detention and infiltration facilities in existence as of the date of this Act and post-wildland fire facilities do not injure water rights if they meet specific criteria. The bill specifies that there is a rebuttable presumption that storm water detention and infiltration facilities constructed after the effective date of this Act do not injure water rights if they meet specific criteria. Water from these facilities cannot be put to beneficial use or form the basis for any claim to or for the use of water.

A "storm water detention and infiltration facility" is defined as a facility that is owned or operated by a governmental entity or is subject to oversight by a governmental entity, designed and operated to continuously release or infiltrate at least 97% of all of the water from rainfall events that are equal to or less than a 5-year storm within 72 hours after the end of the rainfall event, and continuously release or infiltrate the water from rainfall events greater than a 5-year storm as quickly as practicable, but in all cases at least 99% within 120 hours after the end of the rainfall event. The facility must operate passively and cannot actively treat the storm water.

B 3/28/15 12:33 PM
Comment: There is apparently some misunderstanding regarding the term "detention". That term is used here to reflect a temporary state – in the storm water world "detention" is temporary and "retention" means that the water will be stored. We think that this interpretation is embodied in this legislation because a qualified facility must "continuously release or infiltrate"

B 3/28/15 12:37 PM
Deleted: at least 99% of

A "post-wildland fire facility" means a facility that is not permanent; is located on, in, or adjacent to a nonperennial stream; is designed and operated solely for the mitigation of the impacts of wildland fire events; and is designed and operated to minimize the quantity of water detained and the duration of the detention of water to the levels necessitated by public safety and welfare. The person who installed or operated a post-wildland fire facility has to ensure that the facility is removed or rendered inoperable after the emergency conditions created by the wildfire no longer exist.

B 3/28/15 12:38 PM
Comment: Change made pursuant to comment that pointed out that the 99% applies to the entire amount, not just the amount that can be released as quickly as practicable

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

Be it enacted by the General Assembly of the State of Colorado:

1. SECTION In Colorado Revised Statutes, 37-92-602, **add** (8) as follows:

37-92-602. Exemptions - presumptions - legislative

declaration - definitions. (8) (a) THE GENERAL ASSEMBLY HEREBY DECLARES THAT STORM WATER DETENTION AND INFILTRATION FACILITIES AND POST-WILDLAND FIRE FACILITIES ARE ESSENTIAL FOR THE PROTECTION OF PUBLIC SAFETY AND WELFARE, PROPERTY, AND THE ENVIRONMENT.

(b) FOR THE PURPOSES OF THIS SUBSECTION (8):

(I) A "STORM WATER DETENTION AND INFILTRATION FACILITY" MEANS A FACILITY THAT IS OPERATED SOLELY FOR STORM WATER MANAGEMENT, AND:

(A) IS OWNED OR OPERATED BY A GOVERNMENTAL ENTITY OR IS SUBJECT TO OVERSIGHT BY A GOVERNMENTAL ENTITY;

(B) CONTINUOUSLY RELEASES OR INFILTRATES AT LEAST NINETY-SEVEN PERCENT OF ALL OF THE WATER FROM A RAINFALL EVENT THAT IS EQUAL TO OR LESS THAN A FIVE-YEAR STORM WITHIN SEVENTY-TWO HOURS AFTER THE END OF THE RAINFALL EVENT;

(C) CONTINUOUSLY RELEASES OR INFILTRATES ALL OF THE

B R 3/28/15 12:33 PM

Comment: Questions have been raised re the 97%. Modern storm water facilities have a micro pool that functions as a sump to collect pollutants. These micro pools are very small and are for water quality purposes only. Second, storm water managers want storm water facilities emptied as much as possible so that they are available for the next storm. The last 3% reflects the fact that head drops as the level drops, which means that the last few percentages may be released or infiltrated in a slightly longer period. There is no intent to permanently retain the water, and the legislation makes clear that no use of the water is permissible.

WATER FROM A RAINFALL EVENT GREATER THAN A FIVE-YEAR STORM AS QUICKLY AS PRACTICABLE, BUT IN ALL CASES SHALL RELEASE OR INFILTRATE AT LEAST NINETY-NINE PERCENT OF ALL OF THE WATER FROM THE RAINFALL EVENT, WITHIN ONE HUNDRED TWENTY HOURS AFTER THE END OF THE RAINFALL EVENT; AND

B R 3/28/15 12:33 PM

Comment: 99% works here rather than 97% because the minimal amounts that will take longer to release or infiltrate are a smaller percentage of the larger storms.

B 3/28/15 12:33 PM

Comment: Change to be consistent with rest of text

B 3/28/15 12:28 PM

Deleted: SUCH STORM EVENTS

(D) OPERATES PASSIVELY AND DOES NOT SUBJECT THE STORM WATER RUNOFF TO ANY ACTIVE TREATMENT PROCESS.

(II) A "POST-WILDLAND FIRE FACILITY" MEANS A FACILITY THAT IS:

(A) NOT PERMANENT;

(B) LOCATED ON, IN, OR ADJACENT TO A NONPERENNIAL

STREAM;

(C) DESIGNED AND OPERATED SOLELY FOR THE MITIGATION OF THE IMPACTS OF WILDLAND FIRE EVENTS; AND

(D) DESIGNED AND OPERATED TO MINIMIZE THE QUANTITY OF WATER DETAINED AND THE DURATION OF THE DETENTION OF WATER TO THE LEVELS NECESSITATED BY PUBLIC SAFETY AND WELFARE.

(c) (I) STORM WATER DETENTION AND INFILTRATION FACILITIES IN EXISTENCE AS OF [THE EFFECTIVE DATE OF THIS ACT]

THAT ARE OPERATED IN COMPLIANCE WITH PARAGRAPHS (b) AND (d) OF THIS SUBSECTION (8), AND POST-WILDLAND FIRE FACILITIES THAT

B 3/28/15 12:33 PM

Comment: Change is to correct the inadvertent effect of the prior language that applied the existing/future distinction to both wildland fire facilities. Please let us know immediately if this is an issue for someone.

ARE OPERATED IN COMPLIANCE WITH PARAGRAPHS (b) AND (d) OF THIS
SUBSECTION (8) DO NOT CAUSE MATERIAL INJURY TO VESTED WATER
RIGHTS.

B 3/28/15 12:10 PM

Deleted: THAT ARE IN EXISTENCE AS OF [THE
EFFECTIVE DATE OF THIS ACT] AND

(II) (a) The holder of a vested water right may bring an action in a court of competent jurisdiction to determine whether the operation of a storm water detention and infiltration facility constructed after [the effective date of this Act] has caused material injury to that water right. Operation of the facility at issue in compliance with paragraphs (b) and (d) of this subsection (8) shall create a rebuttable presumption that the facility does not cause material injury to vested water rights.

(b) The holder of a vested water right who brings an action under 8(c)(II)(a) may rebut the presumption established by that paragraph by evidence sufficient to show that the operation of the storm water detention and infiltration facility has caused material injury to the water right by modifying the amount or timing of water that would have been available for diversion by the water right absent the operation of the facility at issue, under hydrologic conditions that existed as of the water right's priority date, excluding flows resulting from development of impervious surfaces within the drainage that created the need for the storm water detention and infiltration facility at issue.

(c) An entity that owns, operates, or has oversight for a storm water detention and infiltration facility constructed after the effective date of this legislation shall, prior to operation of the facility, provide notice of the location and approximate size of such facility to all parties on the substitute water supply plan notification list maintained by the state engineer pursuant to section 37-92-308(6), C.R.S., for the water division in which the facility is located.

(d) (I) WATER DETAINED OR RELEASED BY A STORM WATER
DETENTION AND INFILTRATION FACILITY OR POST-WILDLAND FIRE

FACILITY SHALL NOT BE USED FOR ANY PURPOSE BY THE PERSON THAT OWNS, OPERATES OR HAS OVERSIGHT OVER THE FACILITY, OR THAT PERSON'S ASSIGNS, AND SHALL BE AVAILABLE FOR DIVERSION IN PRIORITY AFTER RELEASE OR INFILTRATION.

B 3/28/15 12:33 PM
Comment: Added at the request of an interested party
B 3/28/15 12:31 PM
Deleted: REMAIN

(II) A PERSON SHALL NOT RELEASE WATER DETAINED BY A STORM WATER DETENTION AND INFILTRATION FACILITY OR POST-WILDLAND FIRE FACILITY FOR THE SUBSEQUENT DIVERSION OR STORAGE BY THE PERSON THAT OWNS, OPERATES, OR HAS OVERSIGHT OVER THE FACILITY OR THAT PERSON'S ASSIGNS.

(III) THE OPERATION OF A STORM WATER DETENTION AND INFILTRATION FACILITY OR POST-WILDLAND FIRE FACILITY IS NOT AND SHALL NOT BE THE BASIS FOR THE CLAIM OF A RIGHT TO WATER OR CREDIT OR OTHER CLAIM TO OR FOR THE USE OF WATER.

B R 3/28/15 12:33 PM
Comment: Yes, I know – questionable drafting – but we have some that want “shall not” and others that want “is not”. The proponents are fine with either

(e) A PERSON WHO INSTALLED OR OPERATED A POST-WILDLAND FIRE FACILITY SHALL ENSURE THAT THE FACILITY IS REMOVED OR RENDERED INOPERABLE AFTER THE EMERGENCY CONDITIONS CREATED BY THE WILDFIRE NO LONGER EXIST.

2. SECTION Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2015, if adjournment

sine die is on May 6, 2015); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2016 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to the administration of facilities occurring on or after the applicable effective date of this act.