



DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 10
50 Fremont Street, Suite 2450
San Francisco, California 94105-2196

28 March 2012

Mike Bussell, Director
Office of Water and Watersheds
United States Environmental Protection Agency (EPA) Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
(206) 553-7151

Subject: EPA Region 10 Municipal Separate Storm Sewer Systems (MS4) Permit

Dear Mr. Bussell

As the Department of Defense (DoD) Regional Environmental Coordinator (REC) for the U.S. Environmental Protection Agency (EPA) Region 10, and on behalf of all the military services, I am responsible for coordinating responses to various environmental policies and regulatory matters of interest. I appreciate the opportunity to provide comments for your consideration on the U.S. EPA Draft MS4 Permit for Joint Base Lewis McChord (JBLM).

The DoD is committed to managing stormwater through green technology and low impact development (LID) design principles and practices and has implemented policy to do so. The DoD is fully implementing the provisions of the Energy Independence and Security Act of 2007, Section 438 (EISA §438), consistent with the EPA Technical Guidance, using LID techniques in accordance with DoD policy. Please see attached policy letter, dated 19 January 2010.

With regard to this draft permit, the DoD is concerned over the inclusion in Section II.B.5. of the draft MS4 Permit of post-construction stormwater management controls which are based on EISA §438. The DoD notes that EISA and the CWA are two separate statutes having related but distinct underlying purposes and enforcement mechanisms. The CWA is designed to eliminate the discharge of pollutants into waters of the United States; EISA §438 is designed to maintain or restore to the maximum extent technically feasible the pre-development hydrology of the property with regard to the temperature, rate, volume, and duration of flow. That is, EISA §438 is designed to retain stormwater on-site, consistent with predevelopment hydrology, to allow infiltration into groundwater rather than entry into surface water. We also note Congress did not amend the CWA when it passed EISA §438. Rather, EISA §438 was written to be self-executing by federal agencies in the management of stormwater from federal development and redevelopment projects.

The DoD does not believe the CWA authorizes the inclusion of EISA §438 standards in the base's MS4 Permit. The CWA contains broad enforcement authorities to ensure compliance by the entire regulated community, including federal facilities, in applicable circumstances, but Congress did not extend that authority to the substantive EISA § 438 requirements.

Regardless of whether Section II.B.5. is based on EISA §438, the post-construction stormwater requirements are inconsistent with and go well beyond the EPA's regulatory

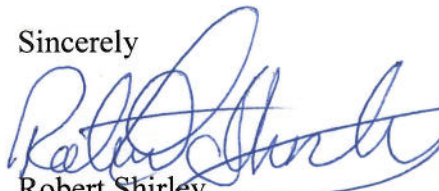
requirements contained in 40 CFR 122.34. These regulations provide that small MS4 permits will contain best management practices (BMPs) and six minimum control measures, all designed to reduce the discharge of pollutants to the maximum extent practicable. The prescriptive post-construction performance standards go well beyond these regulatory requirements.

DOD is also concerned over the inclusion of a retrofit program, including retrofits to "reduce flows." We are unaware of any statutory or regulatory basis to mandate that a federal agency, as part of a Clean Water Act permit, retrofit structures on its federal property. To the contrary, the CWA statutory requirement for small MS4s such as JBLM is to reduce pollutants to the maximum extent practicable. Additionally, the EPA regulations at 40 CFR 122.34 prescribe the requirements for a small MS4 permit, including implementation of the six minimum control measures. None of the minimum control measures or any other regulation requires retrofit or other construction requirements.

In addition, the draft permit proposes to hold federal facilities to a more stringent performance standard than non-federal facilities. The federal government is only subject to requirements under the CWA to the extent it is treated in a non-discriminatory manner. Under CWA §313(a), federal agencies are subject to "all Federal, State, interstate, and local requirements ... respecting the control and abatement of water pollution in the same manner, and to the same extent as any non-governmental entity." In this case, the EPA has proposed a standard that will result in activities on JBLM being held to a higher standard than non-governmental entities; as such, EPA's inclusion of these standards in a permit for JBLM may violate CWA provisions prohibiting discriminatory treatment of federal facilities.

As stated above, DoD is committed to managing stormwater from its facilities' development and redevelopment projects through green technology and low impact development design principles and practices and has implemented policy to do so. The DoD is fully implementing the provisions of the Energy Independence and Security Act of 2007, Section 438, consistent with the EPA Technical Guidance, using Low Impact Development Techniques in accordance with DoD policy. DoD service representatives are available to further discuss these concerns. My point of contact for this matter is Ms. Lauren Parker, who can be reached at (415) 977-8847.

Sincerely



Robert Shirley

DoD Regional Environmental Coordinator
Region 10

Attch: DOD EISA §438 policy

Cc: Office of Water and Watersheds, OWW-130
ATTN: NPDES Stormwater-JBLM