

Response to Comments

Comments from Buckley Air Force Base (AFB)

1. Comment:

The Air Force is concerned with, among other things, the proposed inclusion in the Draft MS4 Permit of storm water management controls apparently based on the Energy Independence and Security Act of 2007, Section 438 (EISA 438). The Department of Defense (DoD) is committed to managing storm water from its facilities' development and redevelopment projects through Low Impact Development (LID) design principles and practices. Attached is the DoD policy which implements EISA 438 storm water requirements using LID techniques and EPA's Technical Guidance Implementing EISA 438. This DoD policy, which was not in place at the time of our previous comments, indicates how the EISA 438 federal storm water requirements for development and redevelopment projects will be met by DoD agencies. To include requirements in an MS4 permit for a federal facility would be redundant, inconsistent with EPA's authority under the Clean Water Act, and would seem to inappropriately hold a federal agency to a standard that would not be applicable to non-governmental entities. Therefore, we request that sections 2.6.1, 2.6.2, and 2.6.3 be deleted from the draft MS4 permit.

Response:

Small MS4s are required to design their programs to reduce the discharge of pollutants to the "maximum extent practicable" (MEP), protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act. As a small MS4, Buckley AFB is required to implement the six minimum control measures outlined in 40 CFR § 122.34(b)(1-6). One of the six minimum control measures is a post-construction runoff control program. The regulation requires that the Permittee develop, implement, and enforce a program to address discharges of post-construction stormwater runoff from new development and redevelopment areas.

Section 2.6 of the permit contains the requirements that the Buckley AFB MS4 must implement to comply with the post-construction runoff control requirement in 40 CFR § 122.34(b)(5). While the language of this section is similar to that used in EISA 438, EPA has not incorporated EISA 438 into this permit. Rather, EPA has used that statute to inform the Agency's determination, pursuant to Section 402(p)(3)(B)(iii) of the Clean Water Act, as to what controls are required to reduce the discharge of pollutants to the maximum extent practicable. Based upon information obtained from other federal facilities in Colorado (including other military installations), a review of MS4 permits issued by other EPA Regions, and a review of literature pertaining to current best practices in stormwater control, EPA has determined that Buckley AFB can meet the MEP standard required by the CWA by implementing control measures that would also meet the performance standard established in EISA 438. Thus, EPA has

concluded that post-construction stormwater control measures that retain, detain, infiltrate, or treat runoff from newly and re-developed impervious surfaces in a manner which maintains pre-development hydrology such as runoff volumes, patterns and quality are a necessary element of Buckley AFB's MS4 program.

2. Comment:

In Section 1.3.2 (the last bullet in the list of allowable non-stormwater discharges), we request that the phrase "during emergency situations" be deleted.

Response:

EPA has deleted "occurring during emergency situations" from the last bullet in the list of allowable non-stormwater discharges.

3. Comment:

We also request that section 4.10 be changed to delete the language allowing the State of Colorado to inspect the installation.

Response:

EPA has modified the language in section 4.10 to allow only for State inspectors working on EPA's behalf pursuant to a resource sharing agreement with EPA to inspect the installation.

**Comments from Department of Defense –
Department of Air Force on behalf of Buckley AFB:**

4. Comment:

In Section 1.3.2, delete the phrase "occurring during emergency situations."

Response:

Repetitive comment. See Response to Comment #2.

5. Comment:

Delete Section 2.6.1 in its entirety.

Response:

Repetitive comment. See Response to Comment #1.

6. Comment:

Delete Section 2.6.2 in its entirety.

Response:

Repetitive comment. See Response to Comment #1.

7. Comment:

Delete Section 2.6.3 in its entirety.

Response:

Repetitive comment. See Response to Comment #1.

8. Comment:

In Section 4.10, exclude the phrase “the State or.

Response:

Repetitive comment. See Response to Comment #3.

9. Comment:

In Section 2.5.6, replace “70% vegetative cover” with “final stabilization.” The rationale is the construction general permit requires that the site achieves final stabilization as a condition of termination; it defines final stabilization in several ways, only one of which is achieving 70% vegetative cover. Given the semi-arid setting, we typically do not achieve that density prior to termination; it typically takes two to three growing seasons to achieve; we utilize other criteria in the definition.

Response:

The EPA Construction General Permit requires final stabilization which is defined in the permit, along with several other criteria, as obtaining 70% vegetative cover. Therefore, EPA has replaced “70% vegetative cover” with “final stabilization” in the permit.

10. Comment:

In Section 2.6.9.3, replace “contracts” with “scopes of work.” The rationale is contracts for work at Buckley AFB are written by many entities and often have multi-year performance periods; making changes to existing contract terms is impractical in many situations. However, a scope of work, which is developed for each project, can be customized to require certain components such as installation of permanent stormwater control measures.

Response:

EPA has replaced “contracts” with “scopes of work” in the permit.

Comments from Department of Defense

11. Comment:

DoD is concerned over the inclusion in section 2.6.1 of the draft MS4 Permit (Post-construction Stormwater Management for New Development and Redevelopment) of stormwater management controls which appear to be based on EISA, Section 438. Specifically, DoD is concerned that EPA is required to complete a separate federal rulemaking to amend the stormwater regulations to implement such a standard, requiring the standard may run afoul with Colorado

Water law, that federal facilities will be held to a more stringent standard than non-federal facilities, that the incorporation of portions of EPA's EISA Section 438 Technical Guidance would make it legally binding in the permit, and lastly, that EPA has eliminated "to the maximum extent technically feasible" from the statutory provision of EISA, Section 438.

Response:

Commenter raises multiple concerns related to EISA, Section 438 and its relationship to this permit. Commenter states that "EPA is required to complete a separate federal rulemaking to amend [its] stormwater regulations to implement [the EISA stormwater control] standard." As mentioned in Comment #1, EPA is not implementing EISA in this permit. Rather, EPA has determined that Buckley AFB can meet the MEP standard required by the CWA by implementing control measures that would also meet the performance standard established in EISA 438. Thus, EPA has concluded post-construction stormwater control measures that retain, detain, infiltrate, or treat runoff from newly and re-developed impervious surfaces in a manner which maintains pre-development hydrology such as runoff volumes, patterns and quality are a necessary element of Buckley AFB's MS4 program. EPA is not required to conduct a rulemaking in making a determination on what is considered MEP for an individual permit.

Commenter states its concern that "requiring the [EISA] standard may run afoul with Colorado Water law." In Colorado, features that slow down flow, reduce the amount of pollutants in the stormwater, and do not put the water to beneficial use may be considered stormwater management or water quality features. The Colorado State Engineer's Office has a policy that states that if water quality features which are designed to detain and/or cause infiltration of precipitation but release the precipitation within 72 hours of the end of the precipitation event meet legitimate stormwater management needs. Even though EPA strongly encourages the use of low impact development/green infrastructure (LID/GI) practices to manage stormwater wherever possible, the permit does not specify which practices must be used. In a situation where use of a particular LID/GI practice would create possible difficulties with previously appropriated water rights (such as rainwater harvesting), other LID/GI practices (vegetative swales, permeable pavers, etc.) may be available to meet permit requirement. In Colorado, for example, where rainwater harvesting and subsequent reuse of rainwater is generally not allowed in urban areas, a bioretention basin that is designed to infiltrate stormwater in a short period of time may accomplish the same endpoint for purposes of stormwater management. Likewise, choosing a traditional stormwater practice that reduces the pollutants via a treat and release system is also an option.

Commenter states its concern that "federal facilities will be held to a more stringent standard than non-federal facilities." Under Section 402(p)(3)(B)(iii) of

the Clean Water Act, all MS4 facility permits are developed using the same standard:

Permits for discharges from municipal storm sewers . . . shall 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 provision as the Administrator or the State determines appropriate for the control of such pollutants.

Thus, federal facilities in Colorado are being held to a no stricter standard than any other MS4 operator. However, given that each MS4 operates in its own unique local hydrologic and geologic environment, conditions in different MS4 permits may vary widely.

MS4 permit conditions are developed to optimize reductions in storm water pollutants on a location-by-location basis. Permit writers consider many factors, including conditions of receiving waters, specific local concerns, MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance. When writing the MS4 permit for Buckley, EPA considered these and other factors in determining what permit conditions are necessary for the MS4 to meet the standard contained in Section 402(p)(3)(B)(iii) of the CWA. EPA ultimately concluded that the compliance with the set of conditions included in the permit will ensure that the discharge of pollutants in stormwater from the Buckley AFB MS4 is reduced to the maximum extent practicable. As such, while the actual conditions in the Buckley AFB MS4 permit may be different from other MS4s, Buckley AFB is being held to the same performance standard.

Lastly, commenter has raised the concern that incorporating portions of EPA's EISA Section 438 Technical Guidance into the permit would make it legally binding and that EPA has eliminated "to the maximum extent technically feasible" from the statutory provision of EISA in language of the permit. As noted above, the Buckley AFB MS4 permit is a free-standing document resulting from EPA's determination as to what pollution controls are necessary to reduce the discharge of pollutants in stormwater from the MS4 to the maximum extent practicable. EPA drew upon both the Technical Guidance and the EISA statute, among other sources, to inform its MEP determination. Subsequent to this review, EPA exercised its technical judgment and included conditions in the Buckley AFB MS4 permit which use language similar or identical to the language in the Technical Guidance and EISA. This choice of language falls within the discretion granted to the Agency by Congress in the CWA, and is merely incidental to EPA's determination of the necessary conditions of the permit.