

**Summary of Conference Call with Kevin Rein
1/13/11, 3:00 pm**

Participants:

Kevin Rein, Colorado Division of Water Resources, Assistant State Engineer
Alexis Wade, EPA Headquarters, Office of General Counsel
Debora Clovis, EPA Headquarters, Water Permits Division
Chris Montague-Breakwell, EPA Headquarters, Water Permits Division
Amy Clark, EPA Region 8, Stormwater Coordinator

We went over the storm water management policy statement that Mr. Rein sent to EPA on 12/10/10. The statement:

"This statement applies to the Division of Water Resources' administrative approach for storm water management of precipitation that falls on an individual site. For the purposes of this statement, an individual site is defined as a discrete area that is undergoing one development effort. This statement clarifies the Division of Water Resources' administrative approach but the allowances in the administrative approach do not grant a water right or offer protection from a claim of material injury by a water user.

Storm water management is commonly achieved by means of detention and/or infiltration structures which may have the effect of adversely affecting vested water rights. Whether individual site storm water management is to be accomplished by means of a detention facility, an infiltration facility, or a facility that incorporates both detention and infiltration, the ideal is that precipitation that falls on an individual site should be dispersed from the surface of the individual site at the same rate as would have occurred prior to development on the site. Meeting this ideal does not entitle any party to divert or consume water added to the ground water or surface water supply due to a reduction in pre-development consumption by vegetation, unless such diversion or consumption is done in priority.

Precipitation that falls on a site and results in overland flow that becomes concentrated in the natural terrain or manmade drainages on the site may be directed to detention areas on the site. The detention areas must release all of the water detained from the site within 72 hours of the end of a precipitation event. Such detention should be designed to release the water from the site as quickly as downstream conditions allow and should minimize consumption from vegetation. The water may not be diverted from the detention area for any beneficial uses.

In addition, precipitation that falls on a site and results in overland flow that becomes concentrated in the natural terrain or manmade drainages on the site may be directed to infiltration areas on the site. The infiltration areas must be designed to infiltrate the water into the underlying aquifer for the purposes of managing the storm water quality and volume of discharge of precipitation that fell on the site. An infiltration area must be designed to infiltrate the water as quickly as possible and shall not result in an exposed water surface beyond 72

hours after the end of a precipitation event. An infiltration area must be designed to minimize consumption from vegetation. The water may not be diverted from the Infiltration area for any beneficial use. The water that infiltrates shall be treated as tributary ground water and is a public resource, subject to appropriation through the prior appropriation system.

These are administrative allowances that allow storm water to be managed while minimizing the impact to water rights. These allowances cannot be applied to precipitation that falls onto an area not on the individual site."

Points made during the follow-up conference call:

1. EPA questioned the part of the statement that says "For the purposes of this statement, an individual site is defined as a discrete area that is undergoing one development effort." We asked whether the policy only applies to construction sites and stops applying post-construction.
 - a. Mr. Rein said that "discrete area" refers to one type of development, not a lot of different developments or projects that run off to one place. It's best to think of this concept as areas that were developed together as a parcel.
 - b. "Undergoing one development effort" means that it results from one development effort. This is *not* meant to be a policy that only applies to developments under construction, it applies post-construction as well.
 - c. Mr. Rein will edit paragraph one and resend the document.
2. Mr. Rein told us that in paragraph three, the phrase "becomes *concentrated* in the natural terrain or manmade drainages" is important. The term "concentration" is key. The idea is that water is collected and this indicates a water rights issue.
 - a. Ex.) A green roof is only *intercepting* water that falls on it. There is no administrative authority to regulate that green roof, much like there is no administrative authority to regulate someone's front lawn.
3. The importance of *intent*:
 - a. The difference between having a lawn and having a rain garden is the *intent* of those activities. The intent of the lawn is to conform to common practice, and have an aesthetically pleasing landscape. The intent of a rain garden is to increase water consumption. Rain gardens are put in place to *collect* rainwater. If the intent is erosion control or aesthetics, water rights are not implicated. If the intent is to consume water, water rights are implicated.
4. If an area is developed and part of that development is left untouched to create a natural buffer, would this run afoul of water rights?
 - a. This may be covered by the infiltration/detention basin policy that allows the water to be stored if it is released within 72 hours.
5. The language at the end of paragraph four concerning infiltration basins ("The water that infiltrates shall be treated as tributary ground water...") is not in the paragraph on detention basins.
 - a. Mr. Rein says he may add the language to the upper paragraph. He explained that he added this sentence in paragraph four because some well permit holders argue that they should be able to draw more water if there is infiltration. He

wanted to make clear that infiltrated water is tributary to the stream, subject to appropriation, and cannot be taken out of priority.

6. Does water reclamation disturb water rights?
 - a. Mr. Rein gave the example of Denver Water which has a mixture of types of water. There is a water right for a percentage of the water, but other water is "fully consumable water" which can be put to use and reused until extinction. Denver Water may also have non-tributary water which can be used until extinction. (Non-tributary water – some groundwater formations have sandstone barriers that isolate the water from the stream system. When it is pumped it has little impact on the stream. Colo. Rev. Stat. Ann. § 37-90-103(10.5).)
7. Is there a size limit for rainwater harvesting under the new Colorado law?
 - a. Mr. Rein stated that there is no explicit limit. However, the permission to harvest is based on a well permit and is limited by the uses in the permit.
8. Have there been any more applications for pilot projects under §37-60-115(6) (when we met in October there was one application)?
 - a. Mr. Rein stated that there has been a lot of interest, but no new applications have been submitted. The application standards are difficult to meet, there are engineering considerations, and the applicant must have a plan of augmentation. These issues tend to deter applicants.