BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Buckley Air Force Base Municipal Separate Storm Sewer System United States Department of the Air Force, 460th Space Wing, *Permit Applicant* NPDES Permit No. CO-R042003	NPDES Appeal No. 13-07

PETITION FOR REVIEW OF NPDES PERMIT FOR BUCKLEY AIR FORCE BASE MUNICIPAL SEPARATE STORM SEWER SYSTEM AND REQUEST FOR ORAL ARGUMENT

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I. INTRODUCTION

The United States Department of the Air Force, 460th Space Wing (the "Air Force" or "Petitioner") respectfully submits this petition for review of the Final National Pollutant Discharge Elimination System ("NPDES") Permit No. CO-R042003 (the "Permit") issued on August 6, 2013 by the United States Environmental Protection Agency ("EPA"), Region 8. Copies of the NPDES Permit and Statement of Basis ("SOB") are attached hereto as Attachments A and B, respectfully.

As discussed more fully herein, conditions and requirements in Section 2.6 the Permit relating to Post-Construction Hydrology for New Development and Re-Development are based on one or more findings of fact and/or conclusions of law that are clearly erroneous and implicate important policy considerations that the Environmental Appeals Board ("EAB") should review. The Air Force filed comments to the draft Permit during the public comment period, and the issues raised in this petition were raised during the public comment period. Consequently, the Air Force has standing to file this petition, and the issues have been preserved for review by the EAB. This petition is timely filed within the time period specified by the EAB in its order dated August 28, 2013.

II. ISSUES PRESENTED FOR REVIEW

1. May the EPA make the management of stormwater, based on pre-development hydrology, an absolute requirement in a NPDES permit without consideration of whether such requirement reduces the discharge of pollutants to the maximum extent practicable?
2. May the EPA enforce requirements under Section 438 of the Energy Independence and Security Act through a NPDES permit issued under the Clean Water Act?
3. May the EPA mandate stormwater retention standards in a NPDES permit for a small Municipal Separate Storm Sewer System ("MS4") that conflict with EPA's Phase II Rule?
4. May the EPA impose new regulatory requirements in a NPDES permit that were not promulgated during rulemaking under the Administrative Procedures Act?
5. Can federal facilities be required to attain different or more stringent standards than non-federal facilities under a NPDES permit?

III. STATEMENT OF FACTS

Buckley Air Force Base ("AFB") is a Department of Defense ("DoD") installation adjacent to the city of Aurora, Arapahoe County, Colorado, within the Denver metropolitan area. Buckley Field was first used by the military as a training facility for B-24 bombardiers during World War II. After the war, the installation was transferred to the Colorado Air National Guard ("COANG") in 1946, and then to the Department of the Navy from 1947 to 1959, when the COANG resumed use of the installation. In October 2000, Buckley Air National Guard Base was realigned and became an AFB under Air Force Space Command ("AFSPC").

The host unit at Buckley AFB is the 460th Space Wing ("460 SW"), whose mission is to provide combatant commanders with expeditionary warrior Airmen and deliver global infrared surveillance, tracking and missile warning for theater and homeland defense. The 460 SW also provides infrastructure and organizational support for approximately 77 tenant organizations with facilities and operations located on Buckley AFB, including the 140th Wing ("140 WG") of the COANG, Colorado Army National Guard, Navy Operational Support Center, Marines Corps, Coast Guard, and reserve components of these forces. The 140 WG operates and manages the only active military airfield in the Denver metropolitan area as a tenant at Buckley AFB.

Prior to the issuance of the subject NPDES Permit, stormwater discharges from MS4s for eight federal facilities in Colorado, including Buckley AFB, were regulated under EPA's General Permit for Storm Water Discharges from Federal Facility Small Municipal Separate Storm Sewer Systems in Colorado (COR042000).[1] This general permit was issued on June 23, 2003 and expired on June 22, 2008. In or around June 2008, EPA Region 8 expressed its plan to issue individual

[1] A copy of the general permit is located at: http://www.epa.gov/region8/water/stormwater/pdf/MS4%20permit.pdf. Notably, this general permit provided flexibility to the permittee to develop a storm water management program "appropriate for the community" without containing any of the rigid pre-development hydrology requirements contained in the subject Permit. *See* General Permit, p. 16.

MS4 permits to the eight federal facilities covered under the general permit rather than reissue the general permit, which was administratively extended by Region 8.[2]

As part of the process of issuing an individual permit for point source stormwater discharges from the Buckley AFB MS4, Region 8 conducted a facility audit of the MS4 program at Buckley AFB in August 2009. Following this audit, Region 8 issued its audit report in November 2009 and a preliminary or "working draft" permit in December 2009. In the Audit Report (attached hereto as Attachment C), Region 8 noted that "Buckley AFB has a strong program to address stormwater discharges from 'municipal' and industrial facilities," and "[p]ollutants leaving the base are likely minimal due to the strong 'municipal' and industrial sites program and a commitment to tracking and properly disposing all potentially hazardous chemicals." Audit Report dated Nov. 2009, p. iii. The preliminary draft permit was forwarded to the 460 SW and AFSPC for review and comment. Personnel from the 460th Civil Engineering Squadron ("460 CES"), a unit of the 460 SW that is responsible for infrastructure and environmental matters at Buckley AFB, provided comments to the working draft permit in January 2010 and met with Region 8 in March 2010. Region 8 verbally accepted many of these comments and revised the Permit accordingly.

On September 22, 2010, Region 8 issued a public notice announcing its intent to issue the NPDES Permit for Buckley AFB and providing a 30-day public comment period. Within the 30-day period, comments were submitted to Region 8 from the following:[3]

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[2] The eight federal facilities are the Denver Federal Center ("DFC"), Denver Veterans Administration Medical Center, Federal Correctional Institution Englewood, Peterson AFB, Buckley AFB, U.S. Air Force Academy, Fort Carson, and the National Institute for Standards and Technology ("NIST"). Individual permits have been, or in the process of being, issued for the DFC, Fort Carson, and NIST.

[3] An Administrative Record has not been formally designated for this matter. However, the Administrative Record would include, at a minimum, the comments submitted during the public comment period as well as the SOB, which contains Region 8's response to these comments. These documents are being submitted as Attachments to this petition and are cited herein by document name and page number. Petitioner can update the petition with specific citation to the Administrative Record, if one is designated, in accordance with 40 CFR § 124.19(a)(4)(ii).

i. Department of the Air Force, by Lt Col George Petty, Commander, 460 CES, dated September 24, 2010 (attached hereto as Attachment D);

ii. Department of Defense, by Mark Mahoney, DoD Regional Environmental Coordinator, Region 8, dated October 13, 2010 (attached hereto as Attachment E); and

iii. Department of the Air Force, by Thomas Manning, Air Force Regional Environmental Coordinator, Region 8, dated October 18, 2010 (attached hereto as Attachment F).

No action was taken by Region 8 on the proposed NPDES Permit for the next two years. In early January 2013, representatives from Region 8 contacted 460 CES personnel to re-engage on finalizing the NPDES Permit. Meetings were held by personnel from both Region 8 and 460 CES on January 23 and February 27, 2013. During these meetings, the issues raised in the comments submitted during the public comment period were discussed, and Region 8 agreed to accept and/or modify the language in the Permit based on several of the concerns raised. *See* SOB, Response to Comment 2 (deleting "during emergency situations" from Section 1.3.2); Response to Comment 3 (modifying language to 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); Response to Comment 9 (replacing "70% vegetative cover" with "final stabilization" in Section 2.5.6); and Response to Comment 10 (replacing "contracts" with "scopes of work" in Section 2.6.9.3). During the meeting on February 27, 2013, 460 CES personnel proposed alternate language to Sections 2.6 through 2.6.3; however, the parties were unable to come to an agreement on mutually acceptable language in the Permit regarding "Post-construction Stormwater Management for New Development and Redevelopment."

On August 6, 2013, EPA Region 8 issued the final Permit to the Air Force. The Permit imposes a rigid stormwater retention standard for new and re-development construction projects, requiring Buckley AFB to maintain pre-development hydrology. The contested stormwater retention requirements for new and re-development projects at Buckley AFB are contained in Section 2.6 through 2.6.3 of the Permit as follows:

2.6. **<u>Post-construction Stormwater Management for New Development and Redevelopment</u>**. The permittee must:

2.6.1. Develop or revise Form 1391 Military Construction Project Data Sheets to require the design of permanent post-construction stormwater control measures for all new and redevelopment construction projects disturbing equal to or greater than one acre. The resulting forms, at a minimum, must require that the permanent post-construction stormwater control measures be designed to 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;

2.6.2. Develop or revise Form 1391 to include a line item for costs associated with the design and installation of permanent stormwater control measures;

2.6.3. As part of the pre-construction design review process for new and redevelopment construction projects disturbing equal to or greater than one acre, review all projects to ensure (1) that they include the permanent post-construction storm water control measures required by Form 1391, and (2) that such measures are designed to retain, detain, infiltrate, or treat runoff from newly and redeveloped impervious surfaces in a manner which maintains pre-development hydrology such as runoff volumes, patterns and quality; ...

IV. ARGUMENT

The Clean Water Act ("CWA"), as amended, 33 U.S.C. §§ 1251 *et seq*., is "designed to prevent harmful discharges into the Nation's waters." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). The CWA prohibits the "discharge of any pollutant" from a "point source" into the "navigable waters of the United States" unless the point source has a NPDES permit. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1135 (10th Cir. 2005) (quoting 33 U.S.C. §§ 1311(a), 1362(12)). As a general matter, "the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 102 (2004).

The CWA distinguishes between point and non-point sources depending on whether a pollutant is channeled and controlled through a discernible, confined, and discrete conveyance.

Defenders of Wildlife v. EPA, 415 F.3d 1121, 1123-24 (10th Cir. 2005). "Storm sewers are established point sources subject to NPDES permits…. Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation." *Environmental Defense Ctr. v. EPA,* 344 F.3d 832, 841& n.8 (9th Cir. 2003) (citing *Oregon Natural Desert Ass'n v. Dombeck,* 172 F.3d 1092, 1095 (9th Cir.1998)). MS4s are generally a collection of "point sources," comprising numerous, geographically scattered, and sometimes uncharted sources of pollution, including streets, catch basins, gutters, man-made channels, and storm drains. *Natural Resources Defense Council v. County of Los Angeles,* 725 F.3d 1194, 1198 (9th Cir. 2013). In 1987, Congress amended the CWA to grant EPA the express authority to create a separate permitting program for point source stormwater discharges of pollutants from large and medium-sized MS4s, industrial activity, and certain other large discharge sources. 33 U.S.C. § 1342(p)(3) and (4). In 1990, EPA issued regulations for large and medium-sized MS4s and other large sources, commonly referred to the Phase I Rule. *See* 55 Fed. Reg. 47990 (Nov. 16, 1990). In the 1987 amendments, Congress further directed the EPA, in consultation with the States, to conduct studies and issue regulations regarding stormwater discharges from sources not covered by the Phase I Rule, including small MS4s. In December 1999, EPA promulgated final regulations to address point source stormwater discharges from, *inter alia*, small MS4s. These regulation are commonly referred to as the Phase II Rule. 64 Fed. Reg. 68722 (Dec. 8, 1999).

In the Phase II Rule, "EPA reasonably adopted a 'flexible version' of the NPDES permit program to suit the unique needs of [small MS4s]." *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 854 (9th Cir. 2003); *see also City of Abilene v. EPA,* 325 F.3d 657, 660 (5th Cir. 2003) ("This more flexible type of permit is referred to as a 'management permit.'").

The Phase II Rule requires an operator of a small MS4 to develop, implement, and enforce a storm water management program ("SWMP") designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable ("MEP"), to protect water quality, and to satisfy the appropriate water quality requirements under the CWA. *See* 40 CFR § 122.34(a). The SWMP must address the following six minimum control measures in the Phase II Rule:

(1) Public education and outreach on storm water impacts;
(2) Public involvement/participation;
(3) Illicit discharge detection and elimination;
(4) Construction site storm water runoff control;
(5) Post-construction storm water management in new development and redevelopment; and
(6) Pollution prevention/good housekeeping for municipal operations.

40 CFR § 122.34(b). In the absence of evidence to the contrary, EPA presumes that a permit for a regulated small MS4 operator who implements a SWMP implementing the six control measures does not require more stringent limitations to meet water quality standards. *See* 64 Fed. Reg. at 68753 (Dec. 8, 1999).

For small MS4s, the SWMP must implement best management practices ("BMPs") that satisfy the six control measures described in 40 CFR § 122.34(b). EPA has defined BMPs in its regulations as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 CFR § 122.2.

Unlike other individual NPDES permits, MS4 permits impose requirements not only on the permittee (the MS4) but also on all facilities that contribute to discharges from the MS4. The terms of NPDES permits are enforceable (*e.g.*, citizen suits). 33 U.S.C. § 1365. Under the CWA citizen-suit provision, federal courts are authorized to enter injunctions and assess civil penalties against any person (including the United States) found to be in violation of "an effluent standard or limitation" under the CWA. *Environmental Conserv. Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*

Inc., 528 U.S. 167, 175 (2000)). In addition, a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." *Laidlaw*, 528 U.S. at 175.

Separate and apart from the CWA, in December 2007, Congress enacted Section 438 of EISA, 42 U.S.C. § 17094, which establishes stormwater runoff requirements for federal development and re-development projects. Under these stormwater retention requirements, federal facility projects over 5,000 square feet must "maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow." 42 U.S.C. § 17094.

Issue 1: May the EPA make the management of stormwater, based on pre-development hydrology, an absolute requirement in a NPDES permit without consideration of whether such requirement reduces the discharge of pollutants to the maximum extent practicable?

As issued by Region 8, the Permit mandates that Buckley AFB implement post-construction stormwater control measures for new and re-developed impervious surfaces in a manner which "maintains pre-development hydrology such as runoff volumes, patterns and quality." Buckley AFB MS4 Permit § 2.6.1. This condition establishes an *absolute* requirement for maintaining pre-development hydrology that is in conflict with the statutory standard requiring MS4s reduce "the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). By establishing an absolute pre-development hydrology runoff requirement that extends beyond the "discharge of pollutants" and fails to account for the "maximum extent practicable" limitation, Region 8 has exceeded CWA statutory authority and engaged in clear error.

"The [CWA] authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants…. In other words, unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 504 (2d Cir. 2005).

MS4 permits must be based on CWA Section 402(p)(3)(B) and its implementing regulations. *See City of Abilene v. EPA,* 325 F.3d at 659; *Decker v. Northwest Envtl. Defense Center*, 133 S.Ct. 1326, 1334 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.' ") (citing *United States v. Larionoff,* 431 U.S. 864, 873 (1977)). Section 402(p)(3)(B)(iii) of the CWA clearly specifies that an MS4 permit:

> *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 provisions as the Administrator or the State determines appropriate *for the control of such pollutants*.

33 U.S.C. § 1342(p)(3)(B) (emphasis added). Courts construing the requirements of Section 402(p)(3)(B) have explained that it replaces the CWA numeric effluent limitations under Section 301 with a "maximum extent practicable" standard. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1165 (9th Cir. 1999); *Conservation Law Found. v. Boston Water & Sewer Comm'n,* 73 ERC 1282, 2010 WL 5349854, *7 (D. Mass. Dec. 21, 2010) (the "maximum extent practicable" is "the standard imposed by the CWA and EPA" for MS4s). While Section 402(p)(3)(B) requires measures to reduce pollutant discharges, it does so only to the extent that such measures are practicable.

The post-construction stormwater retention measures contained in the Permit are, at best, an impermissible means for achieving Region 8's claimed end. While the retention of stormwater runoff may result generally in a reduction in pollution, "[s]tormwater runoff is not a pollutant." *Virginia Dep't of Transp. v. EPA*, 2013 WL 53741, *5 (E.D. Va. Jan. 3, 2013) (holding that EPA may not regulate stormwater, over which it has no statutorily granted power, as a proxy for regulating a pollutant over which EPA is granted power). Similar to the CWA provisions at issue in *Virginia Dep't of Transp*., Section 402(p)(3)(B) does not confer authority on EPA to regulate stormwater, but rather, the discharge of pollutants contained in the stormwater.

Without statutory authority, the means (the absolute retention of stormwater runoff) cannot be employed by Region 8 as an enforceable requirement in the Permit for achieving the asserted end (reducing the discharge of pollutants).

In its comments submitted to Region 8, DoD raised the issue that "EPA has eliminated the statutory provision that federal facilities are to maintain predevelopment hydrology '*to the maximum extent technically feasible*.' Rather, the draft permit makes the management of stormwater based on predevelopment hydrology an *absolute* requirement." DoD Comments dated Oct. 13, 2010, pp. 2-3 (emphasis added). By failing to include this statutory limitation, Region 8 is imposing a standard that goes beyond what is required by EISA § 438 and, *a fortiori*, what is required under the CWA's MEP standard. Simply stated, if the means are not technically feasible under EISA, then the ends are not practicable under the CWA.[4] Region 8 does not have the discretion to read the "maximum extent technically feasible" language out of EISA any more than it has the discretion to read the MEP language out of the CWA. "EPA could not without arbitrariness and caprice strike the [feasibility] proviso and pretend that it has a rule with an absolute limit." *Riverside Cement Co. v. Thomas*, 843 F.2d 1246, 1248 (9th Cir. 1988).

In the SOB, Region 8 responded that the permit writers used their technical judgment in determining what permit conditions are necessary for Buckley AFB MS4 to meet the MEP standard in Section 402(p)(3)(B)(iii). *See* SOB, p.23. Although the SOB lists a number of factors generally considered by permit writers, Region 8 did not provide a reasoned analysis showing how any of the listed factors: (1) specifically apply to conditions at Buckley AFB; (2) are "necessary" to reduce the discharge of pollutants; or (3) demonstrate that the post-construction stormwater retention requirements are either technically feasible or practicable, as required under statutory mandates.

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[4] As discussed in greater detail in Issue 2 *infra*, EISA § 438 does not provide EPA statutory authority to regulate stormwater as a means controlling the discharge of pollutants under a NPDES permit.

The term "maximum extent practicable" is not defined in the statute or in any formal agency regulations. The preamble to the Phase II Rule states, "EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis." 64 Fed. Reg. 68722, 68754 (December 8, 1999). In describing this standard, EPA stated that it "envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards." *Id.*; *see* SOB, pp. 7-8 (describing MEP as "an iterative process"). The absolute pre-development hydrology standard in the Permit, however, is incompatible with the flexible, iterative process described by EPA.

In construing similar provisions under other environmental statutes, the courts have noted that the MEP standard "joins together two somewhat opposing concepts, 'maximum' and 'practicable,' without providing the key to their reconciliation." *National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 927 (E.D. Cal. 2004) (finding that a development plan mitigates takes to the "maximum extent practicable" under the Endangered Species Act). In *Norton*, the court rejected plaintiffs' proffered construction that the MEP standard requires mitigation "up to the financial breaking point." *Id.* at 929. Rather, the court concluded that the words "maximum extent practicable" signify that the applicant "may do something less" than the environmentally superior alternative, "where to do more would not be practicable." *Id.* The court reasoned:

> While the meaning of the term "practicable" in the statute is not entirely clear, the term does not simply equate to "possible." "Practicable" is often used in the law to mean something along the lines of "reasonably capable of being accomplished." *Black's Law Dictionary* (7th ed.1999).

Id. With this reasoning in mind, it is difficult to see how the absolute stormwater retention standard mandated in the Permit is practicable in reducing the discharge of pollutants, without any articulation of the specific circumstances of Buckley AFB.[5]

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[5] Specific circumstances relevant to any practicality analysis include, among other considerations, Buckley AFB's existing infrastructure, space limitations, legal requirements, and other specific site and off-site constraints that narrow the range of appropriate BMPs for new development and redevelopment.

In issuing the Permit, Region 8 has failed to articulate with reasonable clarity the crucial facts it relied upon and its reasons for concluding that the rigid pre-development hydrology requirement is "necessary" for Buckley AFB to meet the flexible MEP standard. Rather than addressing stormwater runoff on a project-by-project basis, Region 8 has adopted a one-size-fits-all approach for new development and re-development at Buckley AFB that does not account for the specific circumstances of a particular construction project. "Without an articulation by the permit writer of his analysis, [the EAB] cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirements of rationality." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342-43 (EAB 2002) (quoted in *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007)). *See also In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997).

Issue 2: May the EPA enforce requirements under Section 438 of the Energy Independence and Security Act through a NPDES permit issued under the Clean Water Act?

As discussed above, the rigid stormwater retention standards in the Permit are not based on any CWA statutory provisions. Rather, they appear to be based on another statute under which EPA lacks any enforcement authority. While the Permit does not overtly refer to EISA Section 438, in its response to comments, Region 8 stated that:

> 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.

SOB, p. 19. Region 8 is thus seeking to do through EISA § 438 that which it lacks authority to do under the CWA. Whether incorporated by express reference or through backdoor bootlegging, it is not permissible to include EISA § 438 stormwater runoff requirements in a MS4 permit where no independent authority exists under the CWA for non-point source stormwater runoff. Simply stated, EISA § 438 does not provide a permissible means for achieving the CWA's end.

The contested Permit language to "retain, detain, infiltrate, or treat" stormwater runoff so that "pre-development hydrology such as runoff volumes" are maintained, is much more similar to EISA § 438 than the CWA requirement that addresses the "discharge of any pollutant" from a "point source" into the "navigable waters of the United States" through a NPDES permit. Under EISA § 438 stormwater requirements, federal facility projects must "maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow." 42 U.S.C. § 17094. In full, this provision states:

> **Sec. 17094. Storm water runoff requirements for Federal development projects**
> The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow.

Id. Unlike the CWA, EISA contains neither a waiver of sovereign immunity nor provisions concerning enforcement. At most, EISA contains a section on "relationship to other law."[6] Although Congress could have included such a provision as part of the CWA, EISA did not amend the CWA. EISA is thus a self-implementing provision.[7] By Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance* (Oct. 5, 2009), President Obama directed EPA to coordinate with other federal agencies and issue guidance regarding EISA § 438. In December 2009, EPA issued its non-binding guidance, which "does not impose any legally binding requirements on federal agencies" or proclaim any authority by EPA to enforce this provision, but states that "[e]ach agency or department is responsible for ensuring compliance with EISA Section 438."[8]

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[6] 42 U.S.C. § 17002 provides: "Relationship to other law. Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation."

[7] The limited waiver of sovereign immunity under the Administrative Procedure Act could apply, and thus judicial review could be available for EISA § 438 claims that a federal agency action is unlawful, such that it is, for example, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706.

[8] *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act,* EPA (Dec. 2009), p. 2.

The Air Force commented that a CWA permit must be based on CWA requirements, not EISA § 438. "EISA Section 438 requirements are independent of storm water requirements under the [CWA] and should not be included in permits for storm water unless a State (or EPA) has promulgated regulations for certain EISA Section 438 requirements (*i.e.*, temperature/heat criteria) that are applicable to all regulated entities under its [CWA] authority." Air Force Comments dated Sept. 24, 2010, pp. 1-2. The CWA and EISA § 438 are two separate statutes having related but distinct purposes and enforcement mechanisms.[9] The CWA is designed to eliminate or regulate the discharge of pollutants into navigable water of the United States, and CWA permit terms are enforceable through citizen suits. 33 U.S.C. § 1365. On the other hand, EISA § 438 is designed to maintain or restore, to the maximum extent technically feasible, the pre-development hydrology (volume, temperature, rate) of the property prior to a construction project. In other words, EISA § 438 is designed to retain stormwater on-site to allow infiltration into groundwater rather than entry into navigable waters of the United States. As noted above, EISA § 438 does not contain any specific enforcement mechanism, such as a citizen suit provision.

Because a NPDES permit must be based on CWA provisions and conform to applicable regulations, EPA must articulate how the stormwater retention standard in the Permit is connected to the statutory mandate in Section 402(p)(3)(B) to reduce point source discharges of pollutants to waters of the United States. EPA cannot rely on another statute for which it lacks enforcement authority, such as EISA § 438, to broaden its authority under the CWA.

In its response to Air Force comments, Region 8 acknowledged that it used EISA § 438 "to inform the Agency's determination" as to whether Buckley AFB can meet the MEP standard under Section 402(p)(3)(B)(iii). Contrary to this stated rationale, by requiring Buckley AFB to achieve on-site retention of stormwater, EPA is not measuring success by the reduction of point source discharges of pollutants to waters, but rather by the quantity of water being retained.

[9] While 40 CFR § 122.49 identifies other federal laws that apply to the issuance of NPDES permit, EISA § 438 is not included in this list.

A similar rationale was recently rejected by the court in *Virginia Dep't of Transp. v. EPA*, 2013 WL 53741 (E.D. Va. Jan. 3, 2013), which held that, since "[s]tormwater runoff is not a pollutant," EPA has no statutorily granted power to regulate stormwater "as a proxy for [a pollutant] over which it *is* granted power…." *Id.* at *3 (emphasis in original).

This point is best illustrated by the fact that, under the Permit, Buckley AFB would not be permitted to discharge even uncontaminated stormwater if the pre-development hydrology standard was not being met. This is not the purpose of a NPDES permit. Under the CWA, a NPDES permit is intended to reduce point source discharges of pollutants. As such, the level of pollutants discharged (*i.e.*, water quality) – not water volume – must be the standard by which a stormwater management program is measured under CWA Section 402(p)(3)(B)(iii). *See Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 504 (2d Cir. 2005) ("[U]nless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.").

Region 8 clearly erred in relying on EISA § 438 in determining the controls necessary to meet the MEP standard under the CWA; however, this error was compounded by Region 8's misapplication of EISA § 438. As raised by DoD during the public comment period, "EPA has eliminated the statutory provision that federal facilities are to maintain predevelopment hydrology '*to the maximum extent technically feasible.*'" DoD Comments dated Oct. 13, 2010, pp. 2-3 (emphasis added). By failing to include this statutory limitation, Region 8 is imposing a standard that goes beyond both what is required by EISA § 438 and, by extension, what is required under the CWA's MEP standard. Region 8 does not have the discretion to read the "maximum extent technically feasible" language out of EISA any more than it has the discretion to read the MEP language out of the CWA. "EPA could not without arbitrariness and caprice strike the [feasibility] proviso and pretend that it has a rule with an absolute limit." *Riverside Cement Co. v. Thomas*, 843 F.2d 1246, 1248 (9th Cir. 1988).

By enacting EISA § 438, Congress has spoken directly on the issue of stormwater runoff requirements for federal development projects. Not only did Congress set the standards and limitations that are applicable to federal projects, it also determined how they are to be enforced. Neither EISA nor the CWA gives Region 8 the authority to alter or amend EISA's statutory mandates, and its attempt to do so in the Permit is clear error.

Issue 3: May the EPA mandate stormwater retention standards in a NPDES permit for a small MS4 that conflict with EPA's Phase II Rule?

In claimed support of the rigid pre-development hydrology standard in the Permit, Region 8 stated in its response to comments that "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)." SOB, p. 19. Contrary to this assertion, Section 2.6 is fundamentally at odds with both the purpose and plain language of 40 CFR § 122.34(b)(5).

Consistent with the MEP standard contained in Section 402(p)(3)(B), EPA's Phase II Rule for small MS4s establish a "cost-effective, flexible approach for reducing environmental harms" that requires small MS4 operators to establish measurable, achievable goals that are neither cost-prohibitive nor economically infeasible. 64 Fed. Reg. 68722 (Dec. 8, 1999). The regulatory framework established by EPA in the Phase II Rule relating to post-construction runoff provides "*recommendations* to *attempt* to maintain pre-development runoff conditions." *Id.* at 68761 (emphasis in original); *see also* 40 CFR § 122.34(b)(5)(iii) ("EPA recommends that the BMPs chosen … *attempt* to maintain pre-development runoff conditions.") (emphasis added).

In contrast to the flexible approach contained in the regulations, the Permit impermissibly transforms EPA's recommended goal into an absolute mandate by requiring Buckley AFB to maintain actual pre-development runoff conditions, without any qualifiers such as consideration of costs or feasibility. When it adopted the final rule for small MS4s, EPA noted that "[m]any comments expressed concern that maintaining pre-development runoff conditions is impossible and cost-prohibitive," especially "where BMPs are not technologically or economically feasible."

64 Fed. Reg. at 68761. EPA responded that "MS4 operators have significant flexibility both to develop this measure as appropriate to address local concerns, and to apply new control technologies as they become available." *Id*. EPA recognized that "these program goals may not be applied to every site, and expects that MS4s will develop an appropriate combination of BMPs to be applied on a site-by-site, regional or watershed basis." *Id.* EPA further reaffirmed that "today's rule relating to pre-development runoff conditions are intended as *recommendations* to *attempt* to maintain pre-development runoff conditions." *Id.* (emphasis in original).

EPA's regulatory framework does not establish an absolute requirement for maintaining pre-development runoff conditions for new development or re-development. Such a requirement, as included by Region 8 in the Buckley AFB MS4 Permit, is contrary to the flexible approach established by EPA's final regulation for small MS4s. In establishing this requirement, Region 8 failed to (1) provide a reasoned analysis justifying its deviation from the standard contained in the regulations; (2) specify the crucial facts it relied upon in arriving at its conclusion, including any local water quality concerns and the means by which the Permit's deviations would reduce the discharge of pollutants; and (3) consider relevant and necessary facts specific to Buckley AFB, including infrastructure capabilities, space limitations, and legal constraints. Such failures by Region 8 constitute clear error.

As raised in DoD's comments submitted during the public comment period, "the draft permit makes the management of stormwater based on predevelopment hydrology an absolute requirement" and the "requirement that post-development hydrological conditions be identical to pre-development hydrological conditions may run afoul of Colorado water law." DoD Comments dated Oct. 13, 2010, pp. 3 and 2. Region 8 acknowledges that Colorado law generally prohibits rainwater harvesting and reuse in urban areas, but makes the general assertion that other practices "*may* be available to meet permit requirements." SOB, p. 22. Despite Region 8's broad claim, the SOB provides no analysis as to whether such practices are either practicable or feasible.

Moreover, while the Phase II Rule provides small MS4 operators with the flexibility to "include allowances for alternate or off-site BMPs," *see* 64 Fed. Reg. at 68761, the Air Force lacks legal authority outside the jurisdictional boundaries of Buckley AFB that would enable it to make allowances for off-site BMPs.

Rather than provide the Buckley AFB MS4 flexibility to develop BMPs in its SWMP based on site-specific conditions, as required by the Phase II Rule, the Permit imposes rigid conditions that would require the Air Force to make department-wide changes to its procedures, including changes outside its authority. For example, Section 2.6.1 would require the Air Force to "[d]evelop or revise Form 1391 Military Construction Project Data Sheets." However, DD Form 1391 is *not* an Air Force form, but a DoD form used to submit requirements and justification to Congress to support funding requests for military construction. As mandated by DoD Directive 4270.5, *Military Construction* (Feb. 12, 2005), and DOD 7000.14-R, Vol. 2B, Ch. 6, *Military Construction/Family Housing Appropriations* (June 2013), this form is used for *all* proposed military construction projects, regardless of their size or location. The Air Force does not have authority to revise a DoD form and its underlying regulations, nor would it be reasonable to make such revisions based upon a few site specific projects that are equal to or greater than one acre and utilize the Buckley AFB MS4.

Consistent with the Phase II Rule, the Permit should be goal-oriented and focus on broad measures to control the point source discharge of pollutants in stormwater runoff rather than providing rigid, binding conditions that restrict available options. The base-specific SWMP, developed to support the Permit, is the appropriate vehicle for the Buckley AFB MS4 to provide the specifics on how it will run the stormwater program to reduce the discharge of pollutants under the MEP standard, including the BMPs that will be implemented to satisfy the six control measures described in 40 CFR § 122.34(b). Region 8's arbitrary and unsubstantiated deviation from the Phase II Rule's regulatory requirements constitutes clear error.

Issue 4: May the EPA impose new regulatory requirements in a NPDES permit that were not promulgated during rulemaking under the Administrative Procedures Act?

As discussed above, the post-construction stormwater retention standards in the Permit are not based on CWA statutory provisions and conflict with EPA's Phase II Rule. As such, before new substantive limitations may be included in the Permit that are binding on Petitioner, "EPA is required to complete federal rulemaking under the Administrative Procedures Act to amend its stormwater regulations, providing all stakeholders notice and the opportunity to comment on the standards, their effectiveness, and the economic impact of the imposition of such standards." DoD Comments dated Oct. 18, 2010, p. 2. Similarly, "EISA Section 438 requirements are independent of storm water requirements under the [CWA] and should not be included in permits for storm water unless a State (or EPA) has promulgated regulations for certain EISA Section 438 requirements (*i.e.*, temperature/heat criteria) that are applicable to all regulated entities under its [CWA] authority." Air Force Comments dated Sept. 24, 2010, attch. pp. 1-2; *see also* U.S.C. § 553(b) and (c).

EPA initially recognized the need for new rulemaking in this area when it promulgated the Phase II Rule in 1999, *see* 64 Fed. Reg. at 68741, and it actually initiated rulemaking in 2009. 74 Fed. Reg. 68617 (Dec. 28, 2009). Nevertheless, the new regulatory requirements contained in the Permit were never promulgated in a final rule in accordance with the APA, and therefore, are invalid.

"[I]f an agency adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation,' notice and comment are required." *U.S. Telecom. Ass'n v. FCC,* 400 F.3d 29, 35 (D.C. Cir. 2005) (emphasis omitted) (quoting *Shalala v. Guernsey Mem'l Hosp.,* 514 U.S. 87, 100 (1995)). Whenever an agency creates a new substantive requirement that amends or adds to a preexisting rule, it must conduct "rulemaking" in accordance with the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500 *et seq*. *Iowa League of Cities v. EPA*,

711 F.3d 844, 855 (8th Cir. 2013). Additionally, the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, "requires an agency to evaluate the adverse economic effects of and less harmful alternatives to its actions before taking them." *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d at 1286. EPA may not "'escape the notice and comment requirements … by labeling a major substantive legal addition to a rule a mere interpretation.'" *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1127 (10th Cir. 2005) (quoting *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1024 (D.C. Cir. 2000) (invalidating EPA guidance document that improperly broadened rule absent compliance with formal rule making procedures)).

Recently, in *Iowa League of Cities v. EPA*, 711 F.3d 844, 878 (8th Cir. 2013), the Eighth Circuit Court of Appeals invalidated new EPA requirements for water treatment processes at municipally owned sewer systems that were contained in two letters sent by the EPA to a United States Senator who had sought clarification regarding pre-existing EPA policy. Because the letters established binding restrictions, *id.* at 866, and these restrictions were irreconcilable with existing EPA rules, *id.* at 875, the Eighth Circuit concluded that they were invalid because EPA had not engaged in rulemaking in accordance with the procedures set forth by the APA. *Id.* The Eighth Circuit noted the distinction between "legislative rules," which require an agency to conduct rulemaking, and "interpretative rules," which do not. *Id*. at 855. Finding that the letters announced new legislative rules, the court stated:

> When an agency creates a new "legal norm based on the agency's *own authority*" to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules.

Id. at 873 (emphasis in original) (citations omitted).

EPA recognized the need for rulemaking in this area as early as December 1999 when it promulgated the Phase II Rule, announcing that "EPA is planning to standardize minimum requirements for construction and post-construction BMPs in a new rulemaking under Title III of the CWA." 64 Fed. Reg. at 68741. Subsequently, in December 2009, EPA initiated an exploratory rulemaking effort to establish a program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program. Through issuance of its "Stakeholder Input on Stormwater Management Including Discharges from New Development and Redevelopment," 74 Fed. Reg. 68617 (December 28, 2009), EPA requested input regarding performance, effectiveness, and cost of stormwater control measures for newly developed or redeveloped sites. As described in this Federal Register Notice, EPA was seeking input on the following preliminary regulatory considerations:

- Expand the area subject to federal stormwater regulations;
- Establish specific requirements to control stormwater discharges from new development and redevelopment… *including standards, to control stormwater discharges from new development and redevelopment*;
- *Develop a single set of consistent stormwater requirements for all MS4s*;
- Require MS4s to address stormwater discharges in areas of existing development through retrofitting the sewer system or drainage area with improved stormwater control measures; and
- Explore specific stormwater provisions to protect sensitive areas.

Id. at 68621-22 (emphasis added). Significantly, in its rulemaking effort, EPA acknowledged that there currently is no absolute rule for maintaining pre-development hydrology, stating:

> The Phase II rule recommends (*but does not require*) that the program to address stormwater from new development and redevelopment *should attempt* to maintain pre-development runoff conditions by installing and implementing stormwater control measures.

Id. at 68620 (emphasis added). In requesting input on "the need for and type of standards to set," EPA questioned whether it is advisable to establish a different standard "for discharges from new

development versus redevelopment," and further asked "[a]re there specific circumstances in which (for example) a requirement for new development to maintain pre-development hydrology would not be advisable or would cause other environmental harms?" *Id.* at 68622.[10]

In response to comments to the Permit, Region 8 simply stated "EPA is not required to conduct a rulemaking in making a determination on what is considered MEP for an individual permit." SOB, p. 22. Although permit writers do have discretion in determining appropriate permit conditions for achieving existing performance standards, maintaining pre-construction hydrology is not a mere permit condition. Rather, it is a new performance standard, which is not based on statute and conflicts with existing regulations. Contrary to Region 8's assertion, the fact that a new performance standard that is contrary to existing regulations is inserted into a new permit demonstrates that the requirement is binding, and thus, supports the conclusion that it is a legislative rule requiring rulemaking. *See National Ski Areas Ass'n, Inc. v. U.S. Forest Service*, 910 F. Supp. 2d 1269, 1280 (D. Colo. 2012) (finding that water rights directive inserted into new ski permits had "binding effect, as would a legislative rule"). As the court found in *National Ski Areas Ass'n*, language inserted into permits is "'the clearest possible example of a legislative rule' because it is intended to impose new duties, rights, and obligations on permit holders." *Id.* at 1282 (quoting *Mission Group Kansas, Inc. v. Riley,* 146 F.3d 775, 777 (10th Cir. 1998)).

In further support of the rigid standards in the Permit, and in response to the Air Force's comments, Region 8 provided to 45 CES personnel a copy of EPA's *MS4 Permit Improvement Guide* (April 2010) ("MS4 Guide").[11] The MS4 Guide contains numerous examples of specific conditions, controls, and requirements to be used by permit writers in drafting MS4 permits, including an entire chapter on post-construction stormwater management, which Region 8 cited

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[10] Additionally, in September 2010, EPA developed and distributed Stormwater Information Collection Request questionnaires to support this proposed rulemaking effort. EPA further announced a Stakeholder Input on Stormwater Rulemaking Related to the Chesapeake Bay, 75 Fed. Reg. 62358 (Oct. 8, 2010).

[11] The MS4 Guide is available at http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.

as a reference for the challenged conditions in the Buckley AFB MS4 Permit. Because the MS4 Guide was not promulgated by the EPA in accordance with the notice and comment requirements of the APA, it cannot provide authority for new legal obligations imposed on MS4 operators.

As stated in a letter dated April 14, 2010 by the Director for Water Permits Division, the MS4 Guide is primarily directed to NPDES stormwater managers and permit writers for the express purpose of "strengthening [MS4] permits." *See* MS4 Guide, p. *i*. While the MS4 Guide contains language such as "recommends" and "suggests," which avow that the sample language is not binding, the courts have disregarded similar disclaimers as "boiler-plate." *Appalachian Power*, 208 F.3d at 1023; *National Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119, 130 (D.D.C. 2012). Rather than rely on an agency's characterization of a guidance document, the courts have looked to the treatment and effect of the document:

> If an agency ... treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1285 (D.C. Cir. 2005) (quoting *Appalachian Power*, 208 F.3d at 1021).

The MS4 Guide delineates new legal obligations on MS4 operators, described by EPA as "minimum permit provisions." MS4 Guide at 50. Similar to the Buckley AFB MS4 Permit, the permit language in the MS4 Guide "requires the use of specific stormwater controls, i.e., those that infiltrate, evapotranspire, or harvest and use stormwater, with the aim of maintaining or restoring the pre-development stormwater runoff conditions at the site" MS4 Guide, p. 50. Notably, while the MS4 Guide describes this standard as an "aim," Region 8 made it an absolute requirement in the Buckley AFB Permit. In so doing, Region 8 was likely influenced by EPA's instructions in the MS4 Guide to avoid "vague phrases such as 'as feasible' and 'as possible' . . .

because they result in inconsistent implementation by permittees and difficulties in permit authority oversight and enforcement." *Id.* at 6. While avoiding "vague phrases" may foster EPA's stated goal in the MS4 Guide of strengthening the language in the Permit, this does not provide legal justification for eliminating the statutory language "practicable" or "technically feasible" chosen by Congress, no matter how vague EPA may view such terms. *See* 33 U.S.C. § 1342(p)(3)(B); 42 U.S.C. § 17094.

In Chapter 5 of the MS4 Guide, which deals specifically with post-construction stormwater management, EPA cites with approval a report of the National Research Council, *Urban Stormwater Management in the United States* (National Academies Press 2008), which recommends "that the NPDES stormwater program examine the impacts of stormwater flow, *treat flow as a surrogate for other pollutants*, and include the necessary control requirements in stormwater permits." MS4 Guide, pp. 50-51 (emphasis added). By recommending that NPDES permits treat stormwater as a proxy or surrogate for pollutants, the MS4 Guide impermissibly seeks to expand permit writers' authority beyond that conferred by the CWA. *See Virginia Dep't of Transp.*, 2013 WL 53741, at *5.

When issuing the MS4 Guide, EPA noted "[it] has begun a rulemaking to strengthen the stormwater program. Using this Guide to improve permits represents the direction that EPA is taking to strengthen the program." MS4 Guide, p. *i*. EPA further noted that, "[a]s of April 2010, most MS4 permits only require permittees to adopt a post-construction program with enforceable requirements designed to reduce stormwater impacts from new development and redevelopment, *without specifying a performance standard*." *Id.* at 49 (emphasis added). Given the lack of any performance standard under current regulations, EPA cannot bypass rulemaking by establishing a new, enforceable performance standard through the MS4 Guide.

The need for further rulemaking in this area is evident by the specific terms and conditions imposed by Region 8 in the Buckley AFB MS4 Permit to maintain pre-development hydrology "such as runoff volumes, patterns and quality." Permit, §§ 2.6.1, 2.6.3. While EPA's Phase II

rulemaking focused primarily on increased discharges of pollutants from stormwater caused by new development and re-development, EPA has not evaluated the full impact that regulating stormwater volume would have. The effects on downstream users is a particular concern in states such as Colorado, Nevada and California where there is not enough water to meet the demands of growth and the demands of millions of downstream users. While the MS4 Guide envisions "a net improvement in regional water quality by decreasing total impervious area and its associated stormwater discharges," decreased volume would have a negative impact on downstream users, who are already using more water than rain and snow produce each year.

Similarly, the Permit requires Buckley AFB to maintain pre-development "patterns," but EPA has not provided any regulatory guidance on how to measure or evaluate compliance with this requirement, or how this even relates to the CWA. Neither the Phase II Rule nor the MS4 Guide addresses such "patterns," and the meaning of this term is unclear. To the extent that this Permit condition requires that Buckley AFB maintain runoff patterns, this would virtually preclude any addition to or alteration of impervious surfaces for projects greater than one acre since such surfaces would necessarily alter runoff patterns. By its terms, this Permit requirement would also prevent the reduction in impervious surfaces for re-development projects, since this too would alter runoff patterns.

These and other issues need to be considered by EPA through the rulemaking process and addressed as to all permittees. Although EPA initiated rulemaking to address such issues, a proposed rule has not been issued. In its rulemaking effort, EPA made clear that no performance standard was established in its Phase II Rule; however, Region 8 has imposed an absolute standard on the Buckley AFB MS4 that is contrary to the Phase II Rule. In so doing, it failed to provide a reasoned analysis regarding the various questions posed in EPA's rulemaking effort. Because the Permit sets new substantive requirements that are binding on the Air Force and enforceable through citizen suits, these requirements are invalid under the APA.

Issue 5: Can federal facilities be required to attain different or more stringent standards than non-federal facilities under a NPDES permit?

As stated in comments submitted during the public comment period, the NPDES 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 non-federal entities are otherwise not subject to; as such, EPA's inclusion of these standards in a permit for Buckley AFB may violate CWA provisions prohibiting discriminatory treatment of federal facilities." DoD Comments dated Oct. 13, 2010, p. 2; *see also* Air Force Comments dated September 24, 2010, p. 2 ("To include such requirements in an MS4 permit for a federal facility … would seem to inappropriately hold a federal agency to a standard that would not be applicable to non-government entities.").

Because the Buckley AFB Permit imposes different standards than are required for similar non-federal facilities in Colorado, it does not apply to federal facilities "in the same manner, and to the same extent" as non-federal facilities, the statutory mandate for waiving sovereign immunity under the CWA. Specifically, Section 313(a) of the CWA contains a limited, waiver of sovereign immunity that provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, …*shall be subject to, and comply with all Federal, State*, interstate, and local *requirements*, administrative authority, and process and sanctions respecting the control and abatement of water pollution *in the same manner, and to the same extent as any nongovernmental entity* . . . .

33 U.S.C. § 1323(a) (emphasis added).

In 1976 and 1992, the Supreme Court strictly interpreted the scope of Section 313's waiver of sovereign immunity. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976); *Department of Energy v. Ohio,* 503 U.S. 607 (1992). Because Congress has not amended the CWA in response to these Supreme Court cases, they remain the controlling interpretation. In both cases, when it was not clear from the express language of Section 313 that the waiver of sovereign immunity extended to the situation at hand, the Supreme Court restricted the scope of the waiver. Any waiver of federal sovereign immunity "must be unequivocal." *Department of Energy v. Ohio,* 503 U.S. 607, 615 (1992). Such waivers must be strictly construed in favor of the federal government. *Id.* They may not be "enlarged beyond what the statutory language allows." *Id.* Thus, when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, such as Section 313's nondiscrimination requirement, those conditions must be strictly observed and given full effect. *See Block v. North Dakota,* 461 U.S. 273, 287 (1983) (statute of limitation in Quiet Title Act's waiver of sovereign immunity must control).

In *Center for Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007), the Tenth Circuit held that the Forest Service, by implementing Wyoming's best management practices, had "complied with State requirements respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity" and the "state agency has no authority to take enforcement action." *Id.* at 1331, 1333. The Center for Native Ecosystems argued that the Forest Service should be held to a higher standard to reduce its nonpoint-source pollution. The Tenth Circuit acknowledged that Congress's intent in Section 313 was to "ensure that Federal agencies were required 'to meet all [water pollution] control requirements as if they were private citizens.' S. Rep. No. 92-414 (1971), as reprinted in 1972 U.S.S.C.A.N. 3668, 3734." *Id.* at 1332. *See also Center for Biological Diversity v. Wagner*, 2009 WL 2208023, *18 (D. Or. June 29, 2009) ("Accordingly, the court finds that the Forest Service is not in violation of state law or the CWA since it has complied with state requirements 'in the same manner, and to the same extent as any nongovernmental agency.'") (citing 33 U.S.C.

§ 1323(a)). In other words, the federal government must comply with water pollution abatement requirements like any other non-federal entity. Regulators cannot impose stricter standards on federal facilities.

Other environmental laws, such as the Clean Air Act, also contain the phrase "in the same manner, and to the same extent, as any nongovernmental entity."[12] This phrase in the waiver clause expresses clear congressional intent to have the federal government comply with the CWA only to the same extent as any private entity. *See U.S. v. South Coast Air Quality Mgmt. District,* 748 F. Supp. 732, 741 (C.D. Cal 1990) (construing identical phrase in Clean Air Act, "the term 'nongovernmental' would appear to be very descriptive of congressional intent to have the federal government comply with the Act to the same extent as any private entity.").

Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the State of Colorado has established a federally-approved program, referred to as the Colorado Discharge Permit System, which is administered by the Colorado Department of Public Health and Environment ("CDPHE").[13] In implementing its permit program, CDPHE has promulgated its own Phase II Stormwater Permit Regulations, which became effective March 2, 2001. *See* 5 Colo. Code Regs. § 1002-61. "These regulations are consistent with EPA's [Phase II] regulations. With a few specific exceptions, the State regulations have the same content as the federal regulations." 5 Colo. Code Regs. § 1002-61:61.49. In accordance with Colorado's Phase II regulations, CDPHE has issued, among others permits, a general permit for stormwater discharges from small, non-standard MS4s (Permit No. COR-070000). This general permit is applicable to small MS4s for large education, hospital or prison complexes, similar to military bases.[14]

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[12] Clean Air Act, 42 U.S.C. § 7418 ("in the same manner, and to the same extent, as any nongovernmental entity"), Resource Conservation and Recovery Act, 42 U.S.C. § 6961 ("in the same manner, and to the same extent, as any person"), Safe Drinking Water Act, 42 U.S.C. § 1447 ("in the same manner, and to the same extent, as any person").

[13] In Colorado, NPDES permitting authority for federal facilities has not been delegated to CDPHE. Therefore, EPA is the NPDES permitting authority for federal facilities in Colorado.

[14] A copy of Colorado's Non-Standard MS4 General Permit COR-070000 is located on the CDPHE website at: http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596875370.

Contrary to Region 8's claims that "federal facilities in Colorado are being held to a no stricter standard than any other MS4 operator," SOB, p. 23, Colorado's Non-Standard MS4 General Permit applicable to non-federal entities does not contain the rigid post-construction stormwater runoff requirements contained in the Buckley AFB Permit. Indeed, the Colorado general permit does not impose an absolute requirement on non-federal entities to maintain pre-development hydrology. Rather, the Colorado general permit merely requires regulated entities to "develop, document, and implement a program to address stormwater runoff from the permittee's new development and redevelopment projects...." Permit COR-070000, p. 10. To comply with this requirement, the Colorado general permit allows small MS4 operators two options: to follow the requirements of local city and/or county programs; or to develop, document, and implement the permittee's own program.

In its response to comments, Region 8 makes the conclusory claim that "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." SOB, p 23. Although Region 8 provides a laundry list of "many factors" typically considered by permit writers in drafting conditions for different MS4 permits, *id.*, it has failed to cite a single factor specific to Buckley AFB's unique local hydrologic and geologic environment that would justify imposition of the absolute post-construction stormwater retention standard contained in the Permit.

Because Section 313 only waives federal facilities' sovereign immunity to the extent that federal facilities are treated like nongovernmental entities, Section 313 cannot be used to impose differing and more stringent permit requirements on federal facilities. The Buckley AFB Permit violates this waiver provision, thereby rendering such requirements unenforceable.

V. CONCLUSION

The stormwater retention standards in the Buckley AFB Permit are not based on CWA statutory provisions and conflict with existing regulatory requirements in EPA's Phase II Rule. Rather, these retention standards are based on Region 8's misapplication of EISA § 438, which is not enforceable in a NPDES Permit. Moreover, these standards were never promulgated in CWA rulemaking under the APA. Because the Permit holds federal facilities to a more stringent performance standard than non-federal facilities, they violate CWA provisions prohibiting non-discriminatory treatment of federal facilities and are not enforceable. Accordingly, these stormwater retention standards in the Permit must therefore be deleted or revised to conform with existing CWA statutory and regulatory requirements.

Date: September 30, 2013

U.S. DEPARTMENT OF THE AIR FORCE,
ENVIRONMENTAL LITIGATION CENTER

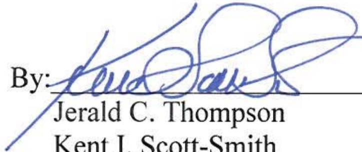
By: 

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TABLE OF ATTACHMENTS

Attachment A	NPDES Permit No. CO-R042003, issued August 6, 2013
Attachment B	Statement of Basis for Permit No. CO-R042003, issued August 6, 2013
Attachment C	Buckley Air Force Base Municipal Separate Storm Sewer System (MS4) Permitting Audit Report, dated November 2009
Attachment D	Comments by the U.S. Department of the Air Force, by Lt Col George Petty, Commander, 460th Civil Engineering Squadron, dated September 24, 2010
Attachment E	Comments by the U.S. Department of Defense, by Mark Mahoney, Department of Defense Regional Environmental Coordinator, Region 8, dated October 13, 2010
Attachment F	Comments by the U.S. Department of the Air Force, by Thomas Manning, Air Force Regional Environmental Coordinator, Region 8, dated October 18, 2010

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Kent I. Scott-Smith, hereby certify, in accordance with 40 CFR § 124.19(d)(1)(iv), that this Petition for Review, including all relevant portions, contains less than 14,000 words.

DATE: September 30, 2013

Kent I. Scott-Smith

CERTIFICATE OF SERVICE

I, Kent I. Scott-Smith, hereby certify that, on September 30, 2013, I caused to be served a true and correct copy of the foregoing Petition for Review, via Federal Express, to the following:

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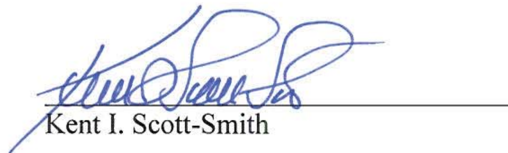
Dated on the 30th day of September, 2013.



Kent I. Scott-Smith