

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**

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



DEPARTMENT OF DEFENSE
OFFICE OF REGIONAL ENVIRONMENTAL AND GOVERNMENT AFFAIRS-WESTERN
US CUSTOM HOUSE
721 19TH STREET, ROOM 427
DENVER, CO 80202

13 October 2010

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Wastewater Unit

VIA-Hand Delivery

Donna Roberts (8P-W-WW)
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

RE: DRAFT PERMIT FOR BUCKLEY AFB'S MUNICIPAL SEPARATE STORM
SEWER SYSTEM (MS4)

Dear Ms. Roberts:

As the Department of Defense (DoD) Regional Environmental Coordinator (REC) for the U.S. Environmental Protection Agency (EPA) Region 8, and on behalf of all of 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 Buckley AFB.

The 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 (EISA § 438), consistent with the EPA Technical Guidance, using Low Impact Development Techniques in accordance with DoD policy. (Enclosed.)

With regard to this draft permit, the 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 § 438. The draft permit includes requirements from EISA § 438 in a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Permit. 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 navigable 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 is designed to retain stormwater on-site to allow infiltration into groundwater rather than entry into navigable waters of the United States. 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.

Furthermore, we do 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. Prior to the inclusion of requirements based on EISA § 438 in an MS4 Permit, DoD believes the 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.

The DoD is concerned the MS4 draft permit requirement that post-development hydrological conditions be identical to pre-development hydrological conditions may run afoul of Colorado water law. As the permit is now written, post-development stormwater runoff would have to be captured to artificially match the pre-development hydrological conditions; and arguably, that captured water may belong to a senior water right holder. Specifically, Title 37, Article 92 of the Colorado Revised Statutes may require adjudication in a water court to establish that a senior holder is not being deprived of his beneficial use. EPA's inclusion of these requirements in the permit, without a legal basis, may impermissibly subject federal facilities to potential legal actions.

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 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.

The DoD is also concerned with what appears to be the incorporation of portions of the EPA's EISA § 438 Technical Guidance as legally binding requirements in a NPDES Permit. As required by EO 13514, the EPA issued Technical Guidance on Implementing the Stormwater Runoff Requirements for Projects under EISA § 438, in December 2009. In issuing the Technical Guidance, the EPA explained that the document was intended solely as guidance and did not impose any legally binding requirements on federal agencies, or impose legal obligations upon any member of the public. The DoD was surprised to see what appears to be elements of the Technical Guidance as mandatory elements in a NPDES Permit. It is not clear why these performance standards were included in the draft permit. The DoD has already instructed its installations to implement EISA § 438, consistent with the EPA's Technical Guidance, through its policy memorandum issued 19 January 2010. (Enclosed.)

In incorporating portions of EISA § 438 into the base's draft permit, the 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. The DoD objects to the EPA’s elimination of the statutory requirement concerning technical feasibility.

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 (EISA § 438), consistent with the EPA Technical Guidance, using Low Impact Development Techniques in accordance with DoD policy.

Representatives of this office and the Air Force are available to meet with you, at your convenience, to further discuss these concerns. My point of contact for this matter is Kevin Ward, Regional Counsel, who can be reached at (303)844-0955.

Sincerely,



Mark A. Mahoney
Department of Defense
Regional Environmental Coordinator, Region 8

Attachment



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

JAN 19 2010

MEMORANDUM FOR ACTING ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS AND ENVIRONMENT)
ACTING ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
ACTING ASSISTANT SECRETARY OF THE AIR
FORCE (INSTALLATIONS, LOGISTICS, AND
ENVIRONMENT)

SUBJECT: DoD Implementation of Storm Water Requirements under Section 438 of
the Energy Independence and Security Act (EISA)

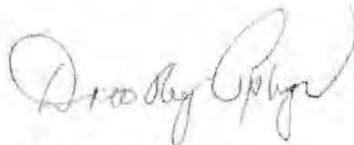
Reducing the impacts of storm water runoff associated with new construction helps to sustain our water resources. In October 2004, DoD issued Unified Facilities Criteria on Low Impact Development (LID) (UFC 3-210-10), a storm water management strategy designed to maintain the hydrologic functions of a site and mitigate the adverse impacts of storm water runoff from DoD construction projects. Using LID techniques on DoD facility projects can also assist in fulfilling environmental regulatory requirements under the Clean Water Act. Since 2004, DoD has implemented LID techniques for controlling storm water runoff on a number of projects.

EISA Section 438 (Title 42, US Code, Section 17094) establishes into law new storm water design requirements for Federal development and redevelopment projects. Under these 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." Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance* (October 5, 2009), directed the U.S. Environmental Protection Agency (EPA) to issue EISA Section 438 guidance. DoD shall implement EISA Section 438 and the EPA *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*, using LID techniques in accordance with the policy outlined in the attachment.

EISA Section 438 requirements are independent of storm water requirements under the Clean Water Act 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 Clean Water Act authority.

The attached policy will be incorporated into applicable DoD Unified Facilities Criteria within six months. My points of contact are Thadd Buzan at (703) 571-9079 and Ed Miller at (703) 604-1765.

A handwritten signature in black ink, appearing to read "Dorothy Robyn". The signature is fluid and cursive, with the first name "Dorothy" being more prominent than the last name "Robyn".

Dorothy Robyn
Deputy Under Secretary of Defense
(Installations and Environment)

Attachment:
As stated

DoD Policy on Implementing Section 438 of the Energy Independence and Security Act (EISA)

1. EISA Section 438 requirements apply to projects that construct facilities with a footprint greater than 5,000 gross square feet, or expand the footprint of existing facilities by more than 5,000 gross square feet. The project footprint consists of all horizontal hard surfaces and disturbed areas associated with the project development, including both building area and pavements (such as roads, parking, and sidewalks). These requirements do not apply to internal renovations, maintenance, or resurfacing of existing pavements.

2. The overall design objective for each project is to maintain predevelopment hydrology and prevent any net increase in storm water runoff. DoD defines “predevelopment hydrology” as the pre-project hydrologic conditions of temperature, rate, volume, and duration of storm water flow from the project site. The analysis of the predevelopment hydrology must include site-specific factors (such as soil type, ground cover, and ground slope) and use modeling or other recognized tools to establish the design objective for the water volume to be managed from the project site.

3. Project site design options shall be evaluated to achieve the design objective to the maximum extent technically feasible. The “maximum extent technically feasible” criterion requires full employment of accepted and reasonable storm water retention and reuse technologies (e.g., bio-retention areas, permeable pavements, cisterns/recycling, and green roofs), subject to site and applicable regulatory constraints (e.g., site size, soil types, vegetation, demand for recycled water, existing structural limitations, state or local prohibitions on water collection). All site-specific technical constraints that limit the full attainment of the design objective shall be documented. If the design objective cannot be met within the project footprint, LID measures may be applied at nearby locations on DoD property (e.g., downstream from the project) within available resources.

4. Prior to finalizing the design for a redevelopment project, DoD Components shall also consider whether natural hydrological conditions of the property can be restored, to the extent practical.

5. Estimated design and construction costs for implementing EISA Section 438 shall be documented in the project cost estimate as a separate line item. Final implementation costs will be documented as part of the project historical file. Post-construction analysis shall also be conducted to validate the effectiveness of as-built storm water features.

The following flowchart illustrates the DoD implementation process for EISA Section 438, consistent with the U.S. Environmental Protection Agency’s *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (December 2009) (<http://www.epa.gov/owow/nps/lid/section438/>).

Flowchart for EISA §438 Implementation

1. Determine applicability

Requirement: apply to all Federal projects with a footprint greater than 5,000 square feet

2. Establish design objective

Requirement: maintain or restore predevelopment hydrology

OPTIONS

1

Total volume of rainfall from 95th percentile storm is to be managed on-site.

2

Determine predevelopment hydrology based on site-specific conditions and local meteorology by using continuous simulation modeling techniques, published data, studies, or other established tools. Determine water volume to be managed onsite.

Design water volume
(to be retained)

3. Evaluate design options

Design water volume
(to be retained)

Requirement: meet design objective to maximum extent technically feasible (METF)

TYPICAL ON-SITE DESIGN OPTIONS

Bio-retention areas

Permeable pavements

Cisterns / recycling

Green roofs

Use any combination of on-site options to achieve the design objective to the METF. Document site-specific constraints.

Selected on-site design options

remaining water volume?

OFF-SITE OPTIONS
(optional)

Selected off-site design options

TECHNICAL CONSTRAINT EXAMPLES

- Retaining storm water on site would adversely impact receiving water flows
- Site has shallow bedrock, contaminated soils, high groundwater, underground facilities or utilities
- Soil infiltration capacity is limited
- Site is too small to infiltrate significant volume
- Non-potable water demand (for irrigation, toilets, wash-water, etc.) is too small to warrant water harvesting and reuse systems
- Structural, plumbing, or other modifications to existing buildings to manage storm water are infeasible
- State or local requirements restrict water harvesting
- State or local requirements restrict the use of green infrastructure/LID

4. Finalize design and estimate cost