



Section 438 EPA-DoD Interaction
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10/19/2009 08:51 AM

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Greg,

Here's an interesting article about Section 438. Looks like there are a lot of questions still to be answered. See especially the last paragraph.

Regards, Sue

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EPA, DoD Near Deal On Granting Flexibility In Pending Stormwater Guide, Defense Environment Alert, 13 October 2009

EPA is apparently close to providing the Defense Department (DOD) and other agencies flexibility in an upcoming guidance for how they meet strict stormwater requirements for controlling post-construction runoff that the military feared it would have trouble meeting in some cases, according to a DOD source. The agreement is significant because it could provide direction on how the Obama administration addresses post-construction stormwater requirements in the Chesapeake Bay watershed and other areas as they seek to clamp down on polluted runoff that impairs waters across the country. But it is not clear how EPA will enforce the guidance as its use was not mandated in President Obama's recently issued executive order on federal agencies' sustainability as environmentalists and Sen. Ben Cardin (D-MD) had suggested. The order sets a 60-day deadline for EPA to complete the guidance.

EPA has been under growing pressure from environmentalists and others to issue the guidance aimed at helping federal facilities better control their stormwater runoff and implement "green" infrastructure techniques. But the debate between EPA and DOD had been holding up the guidance, though the DOD source says the two sides have generally resolved their dispute.

The guidance is aimed at helping federal agencies adopt a consistent approach to meeting stormwater control requirements detailed in the 2007 Energy Independence & Security Act (EISA). Section 438 of EISA encourages federal agencies to use green infrastructure technologies, such as wetlands, green roofs and permeable

EPA-BAFB-0000370

pavements, to limit stormwater runoff. The section mandates that new or modified federal facilities that exceed 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 pre-development hydrology of the property with regard to the temperature, rate, volume, and duration of flow." The idea behind section 438 is to mimic pre-development site conditions so runoff is not increased when designing the project, according to the DOD source. Whereas traditional approaches to meeting stormwater management requirements have focused on managing discharge rates, such as through the use of retention ponds, EPA says that alone can "exacerbate the problem."

After EPA developed a draft of its guidance earlier this year, DOD raised concerns over the regulator's interpretation of the law's requirement to preserve sites' "pre-development hydrology," sources say. DOD wanted greater flexibility when it came to meeting the standard in cases where it was redeveloping land. One environmentalist familiar with the issue believes that DOD wanted to keep the status quo in certain cases, rather than improve the hydrology when a site was redeveloped.

The DOD-EPA negotiations appear to have led EPA to ease the requirement for some cases. The DOD source says EPA now plans to provide the "flexibility that we needed for some areas where it might be difficult to go to the maximum extent practicable" to restore the pre-development hydrology of a property. The source would not offer further specifics on the compromise.

A second DOD source says that it could be difficult for agencies to meet the law's requirements if EPA were to strictly require return to predevelopment conditions if agencies did not know those conditions. How could an agency redevelop land that has been used as a landfill, and has been under the agencies' control for 200 years, this source asks. This source questions who would know the condition of the land when originally obtained by the agency.

But it is not clear how the guidance will be enforced as EISA does not prescribe that authority to any entity.

Environmentalists and Cardin, chair of the Senate water subcommittee, had suggested earlier this year that the administration mandate the guidance's use in the executive order on federal agencies' sustainability. They argued that including the requirement in an executive order would give EPA the authority to implement and enforce the section 438 guidance. Another option they have suggested is having EPA mandate the requirements in Clean Water Act permits (*Defense Environment Alert*, June 9). But the administration appeared to dismiss the suggestion as the sustainability order Obama issued Oct. 5 is silent on the issue. The order does set a timeline for EPA to issue the order, requiring its issuance within 60 days

EPA-BAFB-0000371