BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re	Buckley Air Force Base Municipal Separate Storm Sewer System	NPDES Appeal No. 13-07
NPDES Permit Number:	CO-R042003	

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Buckley Air Force Base ("Buckley AFB" or the "Base") is a Department of Defense ("DoD") installation located in the State of Colorado. Because the State of Colorado does not have an approved National Pollutant Discharge Elimination System ("NPDES") permit program for federal facilities, the U.S. Environmental Protection Agency Region 8 ("Region 8" or "EPA") is the permitting authority for all federal facilities in the State. On August 6, 2013, Region 8 issued a Clean Water Act ("CWA" or the "Act") NPDES permit ("Permit") under CWA § 402(p), 33 U.S.C. § 1342(p), to Buckley AFB for discharges of stormwater from Buckley AFB's municipal separate storm sewer system ("MS4"). On August 27, 2013, the U.S. Department of the Air Force, 460th Space Wing ("Petitioner") filed a petition for review of the Permit.

Petitioner challenges, on numerous grounds, a permit condition that requires Buckley AFB to implement post-construction stormwater controls based on maintaining pre-development hydrology. Some of the bases for the permit challenge reach well beyond this permit and, if successful, would have sweeping implications for the entire NPDES stormwater program. This includes a challenge to the scope of EPA's authority to regulate post-construction discharges of stormwater, and Petitioner's claim that EPA cannot require post-construction stormwater controls designed to maintain pre-development hydrology on an adjudicatory basis in a permit proceeding without first promulgating a specific pre-hydrology standard in a federal regulation. Contrary to Petitioner's assertions, CWA § 402(p)(3)(B)(iii) confers upon EPA broad authority to establish post-construction stormwater controls in NPDES municipal stormwater permits, and allows for the exercise of that authority without reference to specific standards promulgated through notice and comment rulemaking.

This case also raises an important issue under Section 313 of the Act, 33 U.S.C. § 1323. Petitioner claims that the permit imposes stormwater controls in a discriminatory manner, contrary to CWA § 313. On the contrary, Region 8 applied the same "maximum extent practicable" standard in CWA § 402(p)(3)(B)(iii) to the Buckley AFB MS4 as it would for any MS4, not just federal facility MS4s. The Buckley AFB MS4 Permit, like other MS4 permits, includes requirements for post-construction stormwater controls that would reflect and build upon current practices that are being implemented at Buckley AFB and by MS4s around the nation. Where, as here, Region 8 has relied on existing practices at the particular facility, on best practices employed in the regulated community, and upon the most recent science and engineering relating to the control of pollutants in stormwater, it has applied the requirements of CWA § 402(p)(3)(B)(iii) in the same manner and to the same extent as they would to any non-governmental entity in conformance with the Act.

Region 8 properly exercised its authority under CWA § 402(p)(3)(B)(iii) when it issued the Buckley AFB MS4 Permit, and did so in a manner that conforms with all the requirements of the Act, including CWA § 313. As a result, the Environmental Appeals Board ("Board") should deny the petition for review.

II. SCOPE AND STANDARD OF REVIEW

A petitioner seeking review of a NPDES permit under 40 C.F.R. § 124.19 must meet certain procedural and substantive thresholds before the Board will analyze the petition to determine whether to grant review of the permit. The procedural thresholds as described by the Board include "timeliness, standing, issue preservation, and compliance with the permit conditions of specificity for review." *In re MHA Nation Clean Fuels Refinery*, NPDES Appeal

Nos. 11-02, 11-03, 11-04 & 12-03, slip op. at 7 (EAB June 28, 2012); *In re Beeland Group, LLC, Beeland Disposal Well #l*, UIC Permit No. MI-009-II-0001, slip op. at 8-9 (EAB Oct. 3, 2008).

If the petitioner meets the procedural requirements, the Board will review the contested permit conditions to determine whether any such conditions are based on "a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion or an important policy consideration that the Board should, in its discretion, review." 40 C.F.R. § 124.19(a)(4); *In re Stonehaven Energy Management, LLC*, UIC Appeal No. 12-02, slip op. at 8 (EAB March 28, 2013). "The Board has consistently denied review of petitions which merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit." *In re Peabody Western Coal Co.*, NPDES Appeal No. 10-15 & 10-16, slip op. at 7-8 (EAB Aug. 31, 2011) (citing *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), aff'd, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) ("[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations."); *In re City of Irving, Municipal Separate Storm Sewer System*, 10 E.A.D. 111, 129-30 (EAB 2001); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments)).

For each issue for which it seeks review, the petitioner bears the burden of demonstrating clear error. *Id.* To do so, the petitioner "must specifically state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review." *MHA Nation,* slip op. at 7; see also *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 10 (EAB Nov. 16,

2011). When a petitioner seeks review of issues that are primarily technical in nature, the Board gives substantial deference to the permit issuer. *MHA Nation*, slip op. at 8. However, this may occur only after the Board reviews the administrative record to determine whether "the permit issuer made a reasoned decision and exercised his or her 'considered judgment.'" *Id.* (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997)). In its review of the record, "the Board looks to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record." *In re City of Attleboro, MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 17-18 (EAB Sept. 15, 2009). "If the Board is satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the Board typically will defer to the permit issuer." *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos.08-11 to 08-18 & 09-06, slip op. at 44 (EAB May 28, 2010).

III. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's water." CWA § 101(a), 33 U.S.C. § 1251(a). To help achieve this goal, Congress prohibited the discharge of pollutants from a point source into navigable waters by any person, unless authorized to discharge under Sections 402 or 404. CWA § 301(a), 33 U.S.C. § 1311(a). Congress authorized EPA to issue discharge permits containing conditions that point sources must meet prior to discharge. CWA § 402(a), 33 U.S.C. § 1342(a). Those permit conditions include effluent limitations based on narrative standards of control technology, CWA § 301(b)(1)(A)-(B), 33 U.S.C. § 1311(b)(1)(A)-(B), and any more stringent effluent

limitations necessary to meet water quality standards, CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

After several attempts by EPA to address municipal and other stormwater discharges under the Act, Congress amended the CWA in 1987 to add Section 402(p) to expressly address "discharges composed entirely of stormwater." 33 U.S.C. § 1342(p)(1). Section 402(p) provided for phased-in regulation of certain stormwater discharges. The first phase required NPDES permit coverage for four types of stormwater discharges: (1) discharges with respect to which a permit had been issued prior to February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from MS4s serving populations over 100,000; and (4) any discharge for which the permitting authority determines to be contributing to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2). The EPA promulgated regulations for these stormwater discharges in the "Phase I" stormwater rule in 1990. 55 Fed. Reg. 47990 (Nov. 16, 1990).

In the second phase, Congress required the EPA to study stormwater discharges that were not required to be regulated in the first phase and, on the basis of those studies, to designate additional stormwater discharges for regulation "to protect water quality." 33 U.S.C. § 402(p)(5), (6). In addition, Section 402(p)(6) calls for EPA to establish "a comprehensive program to regulate such designated sources" and provides that such a program "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *Id.* In 1999, EPA issued the "Phase II" regulations, which designated for regulation discharges from certain small MS4s and from construction sites disturbing one to five acres of land, under CWA § 402(p)(6). 64 Fed. Reg. 68722-68852. The Phase II regulations defined small MS4s to include "systems similar to separate storm sewer

systems in municipalities, such as systems at military bases…" 40 C.F.R. § 122.26(b)(16). Though not required to regulate discharges designated under Section 402(p)(6) through use of NPDES permits, EPA determined that NPDES permits were the best means for regulating these discharges. *See* 64 Fed. Reg. at 68734, 68739.

Unlike other NPDES permits (including industrial stormwater permits), MS4 permits are subject to the unique requirements of CWA section 402(p)(3)(B) rather than the requirements of CWA § 301(b). *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). While NPDES permits generally must include technology-based effluent limitations and any more stringent effluent limitations necessary for the attainment of water quality standards, MS4 NDPES permits issued pursuant to CWA § 402(p) must "require controls to reduce the discharge of pollutants to the maximum extent practicable," ("MEP") and may, in the discretion of the permitting authority, include "other provisions" determined appropriate for the control of such pollutants. 33 U.S.C. § 1342(p)(3)(B)(iii); *see also City of Abilene v. EPA*, 325 F.3d 657, 661 (5th Cir. 2003).

The Phase II regulations provide a framework for the exercise of the CWA § 402(p) permitting authority by establishing minimum requirements for MS4 permits. *See* 40 C.F.R. § 122.34. Thus, Phase II MS4 permits "require *at a minimum* that [the permittee] develop, implement, and enforce a storm water management program 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 of the Clean Water Act." 40 C.F.R. § 122.34(a) (emphasis added). The storm water management program ("SWMP") "must include the minimum control measures described in paragraph (b) of this section." *Id.* Among the minimum measures is "[p]ost-construction storm water management in new development and

redevelopment." 40 C.F.R. § 122.34(b)(5). This minimum measure includes a requirement to develop and implement a program "to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre . . ." and requires "strategies which include a combination of structural and/or non-structural best management practices ("BMPs") as appropriate for your community." *Id*. The minimum measures for MS4 permits in the Phase II rule were upheld. *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003).

The majority of NPDES permits issued in the United States are issued by states that are authorized to administer the NPDES permitting program by EPA under CWA § 402(b). For the most part, NPDES permits in Colorado are issued by the Colorado Department of Public Health and Environment. EPA approved the Colorado NPDES program on March 27, 1975. 40 Fed. Reg. 16713 (April 14, 1975). At the time EPA approved the Colorado NPDES program, EPA interpreted CWA § 313 – which specifies that federal facilities are subject to and must comply with all federal, state, and local requirements respecting the abatement and control of water pollution – to subject federal facilities only to the substantive pollution control restrictions applicable under state law, and not to procedural requirements like state permitting requirements. EPA's interpretation was upheld by the Supreme Court in *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 212 (1976). For that reason, Region 8 retained the authority to issue NPDES permits to federal facilities in the State of Colorado. In the 1977 amendments to the CWA, enacted after EPA had approved the Colorado NPDES program, Congress revised CWA § 313 to clarify that federal facilities were subject to state procedural requirements, including the requirement to obtain state-issued NPDES permits. Pub.L. No. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598 (1977). Since that time, however, Colorado has not sought

authorization from EPA to issue NPDES permits to federal facilities located within Colorado. Region 8, therefore, remains the NPDES permitting authority for discharges from federal facilities discharging to waters of the United States in Colorado, including for federal facilities requiring MS4 permits issued pursuant to CWA § 402(p)(3)(b)(iii) and its implementing regulations.

IV. FACTUAL AND PROCEDURAL BACKGROUND

Buckley AFB was first permitted to discharge from its MS4 in 2003, when it submitted a Notice of Intent ("NOI") to Region 8 to obtain coverage under the Region 8 Small MS4 General Permit for Colorado Federal Facilities ("Region 8 GP"). As the five-year permit term for the Region 8 GP came to an end, Region 8 decided not to renew the Region 8 GP and decided instead to issue individual permits to the federal facilities that had been covered under the GP. A number of federal facilities voiced their concern about the new permitting direction and requested meetings with Region 8. Among the concerns they raised in their request was the issue of post-construction stormwater control requirements. In preparing for the workgroup meetings, Region 8 developed a Small MS4 Permit Application Form, which it transmitted to the federal facilities. All federal facilities covered by the Region 8 GP promptly completed and submitted the application form. As a result, when the Region 8 GP expired in late 2008, they maintained continuous coverage under the administratively continued general permit.

Region 8 continued to meet with the federal facilities throughout the first half of 2009 to discuss permit language for the individual permits. During this period, Region 8 proposed and then finalized individual MS4 permits for the Fort Carson military reservation MS4 and the National Institute of Standards & Technology ("NIST") MS4. Both permits contain requirements

to implement post-construction stormwater controls designed to "maintain pre-development hydrology." Neither facility appealed any aspect of its MS4 permit.

Region 8 conducted an audit of the Buckley AFB MS4 program in June 2009. EPA identified no major deficiencies in Buckley AFB's compliance with the terms of the general permit, but did identify changing development patterns affecting the hydrology of the receiving waters for the MS4 discharges. At the end of 2009, Region 8 shared a draft version of the individual MS4 permit with the Buckley AFB MS4 environmental staff prior to public notice. In January 2010, Buckley outlined in a letter to Region 8 its significant concerns with the draft permit, particularly the provisions requiring Buckley AFB to implement post-construction stormwater controls designed to maintain pre-development hydrology that are the subject of this appeal. Region 8 and Buckley AFB staff met again to discuss these concerns, but no progress was made towards resolution.

In September 2010, Region 8 issued draft permits for the Buckley AFB and Denver Federal Center MS4s. Buckley AFB, DoD, and the Air Force all submitted comments on the proposed Buckley AFB MS4 permit. Buckley AFB submitted a two-page comment letter, which included three attachments concerning DoD implementation of Section 438 of the Energy Independence & Security Act of 2007 ("EISA"), 42 U.S.C. § 17094. EPA-BAFB-0000572 to 578. DoD submitted a three-page comment letter, which included three attachments concerning DoD implementation of EISA § 438. EPA-BAFB-0000583 to 589. The Air Force submitted the final comment letter EPA received, including a two-page document detailing specific permit provisions and Air Force's recommendations regarding those provisions. EPA-BAFB-0000579 to 582. No other comments were received.

In January and February 2013, EPA met twice with the Buckley AFB environmental staff to discuss their comments and try to reach resolution of the issues they raised. Little progress was made. In March 2013, Region 8 staff conducted a site visit of the Buckley AFB MS4. Region 8 staff was given a tour of the MS4's receiving waters and Buckley AFB environmental staff demonstrated how the MS4 was implementing the requirements of EISA § 438. No further staff level meetings occurred after this visit. Between March and August 2013, legal counsel for Region 8 and Buckley AFB continued to discuss potential solutions to the impasse over the post-construction stormwater controls, but reached no agreement. On August 6, 2013, Region 8 issued the final permit with an effective date of October 1, 2013. The final permit includes the following provisions relating to the implementation of post-construction stormwater controls:

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 projects disturbing equal to or greater than one acre, review all projects to ensure (1) that they include the permanent post-construction stormwater control measures required by Form 1391, and (2) that such measures are 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

EPA-BAFB-00001633.

On August 27, 2013, Petitioner filed an unopposed Motion for Extension of Time to File Petition for Review with the Board. The next day, the Board issued a motion granting a 30-day extension. On September 31, 2013, Petitioner filed its Petition for Review. Region 8 filed an unopposed Motion for Extension of Time to Respond to the Petitioner's Brief on October 24, 2013. By order of October 29, 2013, the Board granted an extension until November 27, 2013. Region 8 subsequently sought extension of the deadline for filing a response to December 13, 2013, which the Board granted by Order dated November 25, 2013. Region 8 now files its response. As explained below, the Board should deny the petition for review.

V. ARGUMENT

The Board should deny the petition for review of the Buckley AFB MS4 Permit for the reasons outlined below.

A. The permit condition requiring design of post-construction stormwater runoff controls to maintain pre-development hydrology is authorized and a reasonable exercise of Region 8's discretion under 33 U.S.C. § 1342(p)(3)(B)(iii) and its implementing regulations, and 33 U.S.C. § 1323(a).

Petitioner asserts that EPA's inclusion of permit provisions in the Buckley AFB MS4 Permit that require it to control pollutants in post-construction stormwater runoff with measures designed to maintain pre-development hydrology constitutes clear error or an abuse of discretion. Petitioner argues that Region 8 exceeded its statutory authority under CWA § 402(p)(3)(B)(iii) because the contested provisions "extend[s] beyond the 'discharge of pollutants' and fails to account for the 'maximum extent practicable' limitation" under the statute and implementing regulations. Pet. at 8, 16. Petitioner also argues that the contested permit provisions "impose different standards than are required for similar non-federal facilities in Colorado" in contravention to Section 313(a). Pet. at 26. As explained below, Region 8 did not commit clear error or abuse its discretion in determining the appropriate post-construction stormwater controls

to include in the Buckley AFB MS4 Permit, nor did Region 8 apply any standard or requirement that does not apply to non-federal facilities.

1. Region 8 has authority under 33 U.S.C. § 1342(p)(3)(B)(iii) to require post-construction stormwater controls designed to maintain pre-development hydrology.

Petitioner argues that Region 8 exceeded its authority under the CWA when it required Buckley AFB MS4 to require design of stormwater control measures that retain, detain, infiltrate, or treat runoff from newly developed and redeveloped sites in a manner which maintains pre-development hydrology as a means of reducing pollutants in discharges from the MS4. Petitioner asserts that this approach to regulating pollutants is impermissible because it claims that this would be a regulation of non-pollutants, which is prohibited by the CWA. Pet. at 9. Petitioner cites a recent decision in the Eastern District of Virginia concerning the establishment of "total maximum daily loads" or "TMDLs" under Section 303(d) of the Act for this proposition. *Virginia Dep't of Transp. v. EPA*, 2013 U.S. Dist. LEXIS 981 (E.D. Va. Jan. 3, 2013). This TMDL case, however, has nothing to do with EPA's authority to control stormwater discharges through NPDES permits.

In the TMDL case, Virginia DOT challenged EPA's establishment under CWA § 303(d) of a TMDL that expressed load and wasteload allocations of sediment in terms of the stormwater flow rate of the impaired stream. EPA asserted that, for the purposes of the TMDL, the in-stream flow from storm events served as a surrogate for the pollutant sediment because of the correlation between stormwater flow and sediment loads. Section 303(d)(1)(C) provides: "Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation." The district court held that the

plain language of section 303(d) of the statute precludes establishing TMDLs for anything other than "pollutants," stating that "EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants." *Id.* at *7. Since the court's decision turns on the specific language of CWA § 303(d)(1)(C), it has no bearing on EPA's authority to regulate "stormwater discharges," as expressly required under CWA § 402(p)(6), or to require specific types of controls under CWA § 402(p)(3)(B)(iii).

Unlike Section 303(d), Section 402(p) specifically authorizes – indeed requires – NPDES permits for certain "discharges composed entirely of stormwater," recognizing that all stormwater contains pollutants. 33 U.S.C. § 402(p)(1), (2), (6). With respect to MS4 discharges, Section 402(p)(3)(B)(iii) authorizes EPA to issue permits that control and regulate the discharge of stormwater, listing a variety of ways – "management practices, control techniques and system, design and engineering methods" – in which MS4 permits can require reduction of pollutants in MS4 discharges, and further authorizes "such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). By stating that "[p]ermits for discharges from municipal storm sewers . . . shall require controls . . ." the statute requires the permit writer to determine the appropriate controls to include in the permit. *Id.*; *Natural Resources Defense Council*, 966 F.2d at 1308 ("Congress gave the administrator discretion to determine what controls are necessary . . ."); *City of Abilene*, 325 F.3d at 661 ("The plain language of § 1342(p) clearly confers broad discretion on the EPA to impose pollution control requirements when issuing NPDES permits."); *Defenders of Wildlife*, 191 F.3d at 1166 (9th Cir. 1999) ("That provision gives the EPA discretion to determine what pollution controls are appropriate."). As explained below, Region 8 reasonably determined that the particular post-construction stormwater controls in the Buckley AFB MS4 Permit will reduce

pollutants in stormwater from newly developed and redeveloped sites discharged through the MS4 to the maximum extent practicable and are appropriate controls for such pollutants.

In sum, Region 8 properly exercised its authority under CWA § 402(p)(3)(B)(iii) when it included a provision requiring design of post-construction stormwater controls to maintain pre-development hydrology in the Buckley AFB MS4 Permit.

2. Region 8 did not run afoul of 33 U.S.C. § 1323(a) when it required Buckley AFB to implement post-construction stormwater control measures pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii).

Petitioner also argues that Region 8 is impermissibly seeking to enforce EISA § 438 requirements by incorporating them into the MS4 Permit. Pet. at 12-16. Region 8 recognizes that under CWA § 313(a), federal facilities are required to meet requirements respecting the control and abatement of water pollution in the same manner and the same extent as any nongovernmental entity. 33 U.S.C. § 1323(a). As Region 8 stated clearly in its response to comments, the post-construction stormwater controls in the permit implement only the requirements of CWA § 402(p) to require stormwater controls to the maximum extent practicable, and such other controls the Administrator deems appropriate for the control of such pollutants. EPA-BAFB-00001659 to 1664.

The permit record establishes that Buckley AFB is already taking steps to implement stormwater control measures designed to mimic pre-development hydrology by infiltration, evapotranspiration, or other means. It is irrelevant as to why the Base is undertaking these practices. As explained below, that Buckley AFB is actually doing so is merely one factor that the permit writer considered in exercising her engineering judgment to determine what controls will reduce pollutants in the Buckley AFB MS4's discharges to the "maximum extent practicable." This in no way constitutes unequal treatment of a federal facility, as Petitioner

argues. In the context of issuing individual MS4 permits, a permit writer's consideration of existing practices at an MS4 facility in determining MEP for that facility is a permitting approach that applies equally to nongovernmental entities. For example, if a town were implementing post-construction stormwater controls due to a state or local law, those controls could be considered when determining MEP for an individual MS4 permit for that town.

Petitioner argues that "[b]ecause the Buckley AFB Permit imposes different permit conditions 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" in violation of CWA § 313. Pet. at 26-29. Petitioner points to the lack of a provision in the Colorado NPDES General Permit for small, non-standard MS4s ("Colorado General Permit") requiring permittees to implement post-construction stormwater controls designed to maintain pre-development hydrology to demonstrate this point. While Region 8 agrees that the Colorado General Permit requires post-construction stormwater controls that differ from the controls in the Buckley AFB MS4 Permit, the Region disagrees that the EPA-issued NPDES permit for Buckley's MS4 applies a substantive pollutant control standard that differs from any other NPDES permit that authorizes discharges from an MS4. The Buckley AFB Permit requires controls to reduce the discharge of pollutants to the maximum extent practicable pursuant to CWA § 402(p)(3)(B)(iii) like any other NPDES permit for MS4 discharges.

Petitioner's argument that Region 8 cannot issue NPDES permits to federal facilities in Colorado that diverge from requirements in NPDES permits issued under the EPA-approved Colorado NPDES permitting program is irrelevant to determining whether the applicable NPDES permitting standard for MS4 discharges is generally applicable. Petitioner does not argue that Region 8 should not have applied the "maximum extent practicable" pollutant

reduction standard, but rather that, as a result of applying that standard, the resulting NPDES permit should impose requirements that are no more stringent or prescriptive than the standard applied in the Colorado General Permit issued by the EPA-approved Colorado NPDES permitting agency. Petitioner's argument, however, is belied by the holdings of the Board and court cases regarding individual NPDES permitting for MS4 discharges. As the Board has held previously, "the MS4 permit requirements set forth under CWA § 402(p)(3)(B)(iii) were designed to allow permit writers to use a combination of pollution controls that, as Congress noted, 'may be different in different permits.'" *In re City of Irving*, 10 E.A.D. at 119 (upheld against statutory and constitutional "as applied" challenges in *City of Abilene*, 325 F.3d 657 (5th Cir. 2003)). The Board's finding is consistent with that of the Ninth Circuit when it upheld the first phase of NPDES storm water permitting rules against a challenge that EPA should have specified MS4 permit conditions, and not merely application requirements. *Natural Resources Defense Council*, 966 F.2d at 1308 & n.17 (upholding permit application regulations against a statutory challenge arguing that EPA regulations, rather than individual permit writers, must establish permit conditions and requirements).

In issuing the NPDES permit for Buckley AFB's MS4 discharges, Region 8 evaluated the information in the permit application. The differences between the individual NPDES permit for Buckley AFB's MS4 and the Colorado General Permit (and any other MS4 permit) result from different permit writers applying their best professional judgment to determine controls to reduce pollutants to the maximum extent practicable, and therefore do not render any differences in the Buckley AFB's Permit discriminatory under CWA § 313.

At the heart of this appeal is Petitioner's disagreement with Region 8's determination made pursuant to its authority under CWA § 402(p)(3)(B)(iii). As explained below, the contested post-

construction stormwater control requirements in the Buckley AFB Permit were established using the same standard under CWA § 402(p)(3)(B)(iii) that applies to all MS4 permits and, therefore, do not subject the Buckley AFB MS4 discharges to requirements to a different extent or in a different manner than any NPDES permit that would apply to discharges from an MS4 operated by a non-governmental entity. That the challenged permit condition may be different from or more prescriptive or stringent than conditions in the Colorado General Permit does not run afoul of CWA § 313. As a result, Petitioner has failed to meet its burden of demonstrating that EPA's determination was clearly erroneous or an abuse of discretion.

3. Region 8 properly concluded that the post-construction stormwater control measures in the Buckley AFB Permit do not create a conflict with state water law.

Petitioner also asserts, as it did in public comment, that requiring Buckley AFB to implement post-construction stormwater controls designed to maintain the pre-development hydrology of a site after new development or redevelopment "may run afoul of Colorado water law." Pet at 17. Region 8 disagrees that Colorado water law precludes inclusion of the contested permit conditions. As explained in its response to comments, Region 8 ascertained that Colorado has an administrative policy which provides that stormwater management features which are designed to release or infiltrate precipitation within 72 hours of a precipitation event are deemed to meet legitimate stormwater management needs. The comment response also noted that "the permit does not specify which practices must be used" to meet the permit requirement, and that there are options available to implement the permit requirement without running afoul of Colorado law. EPA-BAFB-00001662.

As a threshold matter, Petitioner fails to meet its burden of explaining why Region 8's original response to Petitioner's comments concerning the relationship between the post-

construction stormwater control requirement and Colorado water law was "clearly erroneous, an abuse of discretion, or otherwise warrant[ed] review," *MHA Nation*, slip op. at 7. Petitioner merely reiterates that the contested permit condition may implicate Colorado water law and provides no new or specific supporting information to show clear error, as required by the Board. *Peabody Western Coal*, slip op. at 7-8. Because Petitioner has failed to meet its burden, the Board should decline to review this issue.

Additionally, Petitioner provides no basis for its assertion that the permit condition may cause Buckley AFB to violate Colorado water law. After receiving the initial comment, EPA consulted with the Colorado State Engineer's Office ("CSEO") to assess this risk. EPA-BAFB-0000677 to 686, 689 to 698. As noted above and in the Statement of Basis, the CSEO has an administrative policy which provides that stormwater management features which are designed to release or infiltrate precipitation within 72 hours of a precipitation event are deemed to meet legitimate stormwater management needs, and thus minimize impacts on water rights. EPA-BAFB-00000707. Petitioner argues that EPA did not assess the practicability of meeting the post-construction stormwater control measure without violating state water law. However, as explained below, in determining what is practicable Region 8 considered, among other factors, Buckley AFB MS4's current efforts to manage stormwater on the base, as well as its ongoing efforts to comply with EISA § 438. EPA-BAFB-00001177 to 1197. Because Buckley AFB is already implementing measures on the Base that seek to maintain pre-development hydrology and is encountering no conflicts with Colorado's water law, and because the CSEO administrative policy gives Buckley AFB leeway to design post-construction stormwater control measures that comport with the requirements of Colorado water law, EPA concluded that the post-construction stormwater control requirement was practicable. Petitioner has failed to meet is

burden of demonstrating that EPA's conclusion was clearly erroneous or an abuse of its discretion.

4. Rulemaking is not required prior to establishing post-construction stormwater control conditions in the Buckley AFB MS4 permit based on maintaining pre-development hydrology.

Petitioner argues that EPA should have engaged in APA rulemaking prior to establishing a post-construction stormwater control requirement to implement the maximum extent practicable standard from CWA § 402(p)(3)(B)(iii) in the Buckley AFB Permit. Pet. at 19. Petitioner's argument that EPA can act only once it has issued a rule specifying uniform standards implementing the maximum extent practicable standard contravenes well established principles of administrative law. The Supreme Court has firmly established that agencies can act by rulemaking *or* adjudication, and that the choice "between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1974). The fact that an administrative agency has not promulgated a general rule does not limit the authority of that agency to perform its statutory duty. *Id.* at 201. This permitting process is an adjudication, and to suggest that EPA cannot apply the narrative standard from CWA § 402(p)(3)(B)(iii) without first implementing the standard in a rule would contravene that principle.

As a threshold matter, however, Petitioner fails to meet its burden of explaining why Region 8's original response to Petitioner's comments regarding the need for APA rulemaking were "clearly erroneous, an abuse of discretion, or otherwise warrant[ed] review," *MHA Nation*, slip op. at 7. Petitioner argues in its Petition that in its response to comments, 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," and in doing so, "failed to provide a reasoned

analysis" as to why APA rulemaking is not required. In comments submitted on October 13, 2010, DoD[1] simply stated, without further explanation, that "[p]rior 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 Procedure[] Act to amend its stormwater regulations . . ." EPA-BAFB-0000584. Because DoD provided no reasoning or analysis as to why such a rulemaking would be warranted, Region 8 was not required to guess at why DoD believed this, and its response explaining how MS4 NPDES permitting works pursuant to CWA § 402(p)(3)(B)(iii) was both correct and sufficient. Thus, Petitioner has not met its burden of demonstrating clear error and the Board should decline to review this claim.

Even if the Board disagrees, EPA's application of the narrative standard in the Act in an adjudication is an acceptable method of implementing its statutory authority under *SEC v. Chenery Corp,* 332 U.S. at 203, and cannot constitute clear error under 40 C.F.R. § 124.19(a)(4)(A). Because Region 8 issued the Buckley AFB Permit pursuant to the procedures at 40 C.F.R. Part 124, it has fully complied with the procedural requirements established for informal adjudications under the APA, 5 U.S.C. § 554(c). For this reason also, the Board should decline to review this claim.

In sum, Petitioner's arguments as to why EPA lacks authority to require Buckley AFB to implement post-construction stormwater controls designed to maintain pre-development hydrology as a means of reducing pollutant discharges from the Base "to the maximum extent practicable" must fail.

B. The contested post-construction control requirements in the permit are reasonable requirements "to reduce the discharge of pollutants to the maximum extent

[1] While Region 8 received separate comments from the Air Force and Department of the Defense, the Region assumes they are the same party for purposes of this appeal.

practicable" under 33 U.S.C. § 1342(p)(3)(B)(iii), and Region 8 did not commit clear error by imposing such requirements.

Petitioner argues that EPA has committed clear error by imposing an "absolute pre-development hydrology runoff requirement that . . . fails to account for the maximum extent practicable limitation" in CWA § 402(p)(3)(B)(iii). Pet. at 8. This argument fails to reflect the actual permit language and ignores Region 8's response to Petitioner's comments on the draft permit explaining that it is practicable to use current practices, both on the Base and at MS4s across the country, as one of the bases for the permit's requirements. EPA-BAFB-00001659, 1663. Further, Region 8 carefully considered a number of factors in determining MEP for this permit requirement.

The CWA requires permit writers to "tak[e] into account the full range of considerations before it" to determine "that the BMPs required by the permit collectively represent the maximum practicable effort to reduce pollution." *In re Gov't of the D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 349 (EAB 2002). In promulgating regulations for MS4 permits in the Phase II rule, EPA declined to provide uniform "maximum extent practicable" permit requirements, but rather provided extensive discussion of how the MEP standard would be applied and what factors a permitting authority should look for in determining what MEP represents for the permitted MS4. In the preamble to the final Phase II rule, EPA stated:

> 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. EPA envisions that this evaluative process will consider such factors as conditions of receiving water, specific local concerns, . . . climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance." 64 Fed. Reg. at 68754. [2]

[2] The U.S. Court of Appeals for the Ninth Circuit rejected the Phase II Rule's general permit process on the grounds that it allowed the MS4, rather than the permitting authority, to determine what stormwater controls constitute MEP and that it failed to provide opportunity for public comment on the MS4's choice of stormwater controls.

Thus, in establishing what constitutes maximum extent practicable, EPA must look at a variety of factors, including available stormwater control technology, the scientific and engineering literature regarding the control of stormwater, current best practices employed by other MS4s, and site specific conditions that are found at the facility. As a general matter, EPA, scientists and the regulated community all recognize that stormwater runoff collects and transports pollutants into MS4s and subsequently into their receiving waters, and that by decreasing the volume of runoff, pollutants discharged from MS4s are reduced. EPA-BAFB-00001249 to 1250. Further, EPA has long recognized that increased flow rate, velocity and energy of stormwater discharges results from the creation of new impervious surfaces, *i.e.*, development. *See e.g.*, 64 Fed. Reg. 68722, 68725 (Dec. 6, 1999). This increase in stormwater velocity and volume results in increased pollutant loadings, which can cause or contribute to water quality impairments. Moreover, increased velocity and volume can alter the physical parameters of waterbodies by widening and incising channels, which fundamentally transforms the natural hydrologic regime with long-term negative impacts on aquatic habitats and biotic interactions. EPA-BAFB-0000555 to 556, 1239 to 1243. As explained in the Phase II rule preamble with respect to the post-construction minimum measure, "EPA intends to prevent water quality impacts resulting from increased discharges of pollutants, which may result from increased volume of runoff. In many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into

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Environmental Defense Center v. U.S. Env. Prot. Agency, 344 F.3d 832, 854-858 (9th Cir 2003) ("*EDC* decision"). The deficiencies identified in the *EDC* decision with respect to general MS4 permits are also relevant to individual MS4 permits; *i.e.,* it is up to the permitting authority, and not the permittee, to determine in the permit what controls are necessary to reduce pollutants in the MS4's discharges to the MEP, and the public must have the opportunity to comment on those controls.

consideration in order to reduce the discharge of pollutants, to meet water quality permit conditions and to prevent degradation of receiving streams." 64 Fed. Reg. at 68761.

In establishing permit conditions for the post-construction minimum measure, Region 8 reviewed a variety of research indicating that post-construction controls designed to maintain pre-development hydrology are an extremely effective way of reducing pollutants in stormwater discharges. EPA-BAFB-0000433 to 440, 441 to 450, 504 to 521, 1211 to 1517, 1518 to 1623. This research indicated that such controls could include a variety of runoff volume reducers, including full-spectrum detention systems, EPA-BAFB-0000433 to 440, 1572, 1582 to 1585; bio-retention systems, EPA-BAFB-00001440 to 1450; other low impact development ("LID") approaches, EPA-BAFB-0000445 to 488, 1452 to 1457, 1551 to 1553; or treatment-oriented BMPs, EPA-BAFB-00001346 to 1357. Moreover, this research indicated that such stormwater controls could be implemented solely on a smaller, site-specific basis or on a broader, regional basis that integrated site-specific BMPs with the MS4's existing stormwater control infrastructure. EPA-BAFB-00001475 to 1488. In light of this information, Region 8 determined that post-construction stormwater controls designed to maintain pre-development hydrology are available and, when implemented at Buckley AFB, would ensure that pollutant loadings from newly developed and redeveloped sites would be controlled in a manner to limit impacts on the receiving waters.[3]

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[3] Petitioner argues that the post-construction stormwater control requirement in the Buckley Permit is not actually intended to address the discharge of pollutants because, "under the Permit, Buckley AFB would not be permitted to discharge even uncontaminated stormwater if the pre-development hydrology [permit condition] was not being met." Because Section 402(p) concerns "discharges composed entirely of stormwater," this argument is without merit. 33 U.S.C. § 1342(p)(1). In any case, neither Buckley AFB nor the other commenters have ever contested the fact that stormwater from the Buckley AFB MS4 contains pollutants such as sediment, oil and grease, and heavy metals. Because Buckley AFB MS4 *does* discharge stormwater containing pollutants, and because Region 8 has concluded that post-construction stormwater control measures designed to maintain pre-development hydrology are appropriate to reduce such discharges of pollutants, the contested permit condition is a valid exercise of EPA's authority under CWA § 402(p)(3)(B)(iii).

Having reached this conclusion, EPA then considered whether implementing post-construction stormwater controls designed to maintain pre-development hydrology conditions was practicable for Buckley AFB. As early as 2007, the Buckley AFB Excellence Plan indicated that the MS4 was undertaking efforts to ensure that "stormwater runoff volumes and velocities at new development sites shall be as close as practical to predevelopment values." EPA-BAFB-00001195 to 1197. The results of the 2009 MS4 Audit indicated that the Base was already addressing hydrological concerns by reducing flooding through ponds and other detention structures. EPA-BAFB-0000247, 263. During the Audit, Buckley AFB Civil Engineering department identified early planning for permanent post-construction BMPs as a way to improve how maintaining pre-development hydrology was addressed at individual construction sites on Base. EPA-BAFB-0000270 to 271. Civil Engineering staff also indicated that having post-construction performance specifications (i.e., "maintain pre-development hydrology") would allow the Army Corps of Engineers to review designs to ensure they meet that specification. *Id.* After the close of the public comment period, Region 8 engaged Buckley AFB environmental staff in additional discussions regarding the post-construction stormwater runoff requirements. In March 2013, EPA staff toured Buckley AFB and visited completed construction projects in which Buckley AFB MS4 was incorporating LID designs into its post-construction BMPs as part of its efforts to comply with the requirements of EISA § 438. EPA-BAFB-00001017 to 1018. Thus, after considering Buckley AFB's efforts and challenges to implement post-construction stormwater controls, including efforts to comply with EISA § 438, Region 8 concluded that implementing post-construction stormwater controls designed to maintain pre-development hydrology on Base was practicable. However, the fact that Buckley AFB undertook these activities in part because of EISA § 438 is irrelevant to the determination of what controls to

reduce pollutants in post-construction runoff to the MS4 are "practicable" under CWA § 402(p)(3)(B)(iii).[4]

In assessing what post-construction stormwater controls are "practicable," Region 8 also considered what practices are being implemented by similar MS4s under their permits. Three other federal facilities in Region 8 with MS4 permits were successfully implementing similar post-construction requirements in their permits.[5] It is reasonable for Region 8 to have considered the MS4 permits issued to these facilities and their success in meeting their permit requirements, given the geographic, operational, and financial similarities between these federal facilities. Denver Federal Center, NIST and Fort Carson submitted annual reports in 2010, 2011 and 2012 documenting their success in implementing stormwater controls designed to maintain pre-development hydrology as a means of reducing pollutants in their discharge. EPA-BAFB-

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[4] Petitioner further argues that Region 8 failed to ensure that the post-construction stormwater control requirement is practicable because the Region did not incorporate the EISA § 438 phrase "to the maximum extent feasible" into the permit. Pet. at 15. As explained above, Region 8 did not incorporate EISA § 438 into the Buckley Permit at all, and was not obligated to incorporate the "technically feasible" language cited by Petitioner.

[5] The permit for the Fort Carson military reservation ("Fort Carson") near Colorado Springs, CO, was issued May 1, 2009. Section 2.6.1 of the Fort Carson permit provides, "Starting the first day of the reissued permit, coordinate NEPA review procedures and review contracts to ensure that no projects shall be made available for bidding without procedures, best management practices, and costs provided to ensure that runoff from newly developed or re-developed impervious surfaces equal to or greater than one acre meets pre-development hydrology as defined by the watershed modeling process outlined in the SWMP. . ."

The permit for the National Institute of Standards & Technology ("NIST"), in Boulder, CO, was issued September 1, 2009. Section 2.6.1 of the NIST permit provides, "2.6.1 Starting the first day of the reissued permit, coordinate NEPA review procedures and review contracts to ensure that no projects shall be made available for bidding without procedures, best management practices, and costs provided to ensure that runoff from newly developed or re-developed impervious surfaces equal to or greater than one acre meets pre-development hydrology;"

The permit for the Denver Federal Center ("DFC") in Lakewood, CO was issued October 20, 2011. Section 2.6.1 of the DFC permit provides, "Include in contracts and requests for funding (e.g., a 'prospective package') a requirement to design for and provide funding for the installation of permanent stormwater control measures designed to retain, detain, infiltrate or treat runoff from newly developed impervious surfaces in a manner which mimics pre-development hydrology for all new projects and redevelopment which disturb greater than or equal to 5,000 square feet. Pre-development hydrology is defined in the SWMP. This should include a line item for costs associated with the installation and design of permanent stormwater control measures along with a specific performance specification (i.e., maintaining pre-development hydrology) or BMP specification."

00001133 to 1134, 1144, 1167 to 1169. In conversations between the federal facility operators and EPA staff, the operators described their stumbling blocks and their successes in implementing the post-construction stormwater control requirements in their permits. EPA-BAFB-0000699, 1198 to 1209.

As a final aspect of its MEP determination, Region 8 looked to other jurisdictions to see what their MS4 permits contained with regard to controlling the discharge of pollutants in post-construction stormwater. For example, after reviewing a number of MS4 permit programs within Region 8, including those run by the States of Montana and North Dakota, the Region found that both states have issued general permits with post-construction stormwater control requirements based on maintaining pre-development hydrology. EPA-BAFB-0000799. Montana requires its small MS4s, including Malmstrom Air Force Base in Great Falls, MT, to "attempt to maintain pre-development runoff conditions and hydrology." EPA-BAFB-0000818. North Dakota requires its small MS4s to "maintain or restore hydrologic conditions at sites to minimize the discharge of pollutants and prevent inchannel impacts associated with increased impervious surface." EPA-BAFB-0000851. MS4 permits outside Region 8 also include post-construction controls similar to that in the Buckley AFB Permit. The MS4 permit EPA Region 3 issued to the District of Columbia ("DC") includes post-construction controls requiring DC to update its SWMP Plan to integrate stormwater management practices that "mimic pre-development hydrology." EPA-BAFB-0000718. Additionally, Region 8 identified at least six other state permits – which it provided to Buckley AFB to consider – that have specific low-impact development goals that require the retention or infiltration of some defined quantity of stormwater runoff. EPA-BAFB-0000800. Region 8 concluded that while these various permit provisions are not identical to the contested provisions of the Buckley AFB MS4 permit, they all

incorporate some common elements of a pre-development hydrologic permit condition for their MS4s. That many MS4s were successfully implementing these post-construction stormwater controls bolstered EPA's conclusion that establishing such a control in the Buckley AFB Permit would be a practicable means of reducing pollutants in stormwater discharges.

Furthermore, as opposed to being an "absolute" requirement as claimed by Petitioner, Region 8 developed the contested provisions of the Permit specifically to provide Buckley AFB with a great deal of flexibility in designing its post-construction stormwater controls to maintain pre-development hydrology and control pollutants in stormwater runoff. The Permit gives Buckley AFB the discretion to conduct its own hydrologic modeling and ascertain "pre-development hydrology" that fits the circumstances present on the Base. *See e.g.,* EPA-BAFB-00001633, 1639 to 1640. Likewise, the Permit does not identify particular post-construction stormwater control measures Buckley AFB must employ, and Buckley AFB is free to choose whatever selection of BMPs it determines appropriate to "retain, detain, infiltrate or treat runoff" from its newly developed or re-developed projects. EPA-BAFB-00001633. Nothing prevents Buckley AFB from integrating the regional drainage facilities described in its 2007 Facilities Excellence Plan, EPA-BAFB-00001195 to 1197, into its ongoing stormwater planning.

Finally, Petitioner argues that the requirement that Buckley AFB MS4 "[d]evelop or revise Form 1391 Military Construction Project Data Sheets" is impracticable because Air Force lacks the authority to revise a DoD form. Pet. at 18. Form 1391 is the standard form DoD uses to define the requirements of military construction projects it wishes to include in its annual construction program, which is approved by Congress during the appropriations process. EPA-BAFB-0000451. The form itself is a blank document which project proponents complete to

provide the purpose; technical standards, criteria, and engineering requirements; and the estimated cost, among other information, of a proposed project.

As an initial matter, Petitioner's argument that it is impracticable to revise or otherwise modify Form 1391 was not raised during the public comment period, and thus was not preserved for review pursuant to 40 C.F.R. § 124.13. While the Air Force did submit a set of comments in which it suggested that Region 8 "[d]elete in its entirety" Section 2.6.1 of the Buckley AFB Permit, EPA-BAFB-0000581, no reasoning was provided regarding Buckley AFB's lack of authority to modify the form and EPA was correct and reasonable in concluding that the request to delete that provision was based on the EISA § 438 issues raised by the commenters. *See, e.g.,* EPA-BAFB-0000573. For these reasons, the Board should decline to review this issue.

Nonetheless, the record shows that EPA considered the nature and content of Form 1391 and concluded that it was practicable for Buckley AFB, as well as the other federal facilities in Region 8 operating under an individual MS4 permit, to "develop or revise" that form. It may be true that Air Force lacks the authority to actually develop an alternative to Form 1391. However, the form itself is a blank document that allows a federal facility to add line items at its discretion when proposing a new construction project. EPA concluded that the term "revise" was broad enough to encompass the addition of new line items in Form 1391 to provide funding for whatever planning and implementation costs Buckley AFB might incur in order to meet the post-construction stormwater control requirements.

In sum, there is ample support in the administrative record and Statement of Basis for Region 8's determination that requiring post-construction stormwater controls to be designed to maintain pre-development hydrology was a practicable means of reducing pollutants in discharges from the Buckley AFB MS4. Petitioner has therefore failed to meet its burden to

establish that the contested post-construction stormwater controls in the Buckley MS4Permit constitute clear error.

C. The requirement for post-construction stormwater controls to be designed to maintain pre-development hydrology comports with EPA regulations and does not constitute clear error.

1. The post-construction stormwater controls required by the permit are consistent with the post-construction minimum control measure provision of EPA's Phase II regulations at 40 C.F.R. § 122.34(b)(5).

Petitioner argues that Region 8's inclusion of a post-construction minimum control measure that requires the design of controls to maintain pre-development hydrology deviates from the Phase II regulatory requirements at 40 C.F.R. § 122.34(b) and thus constitute clear error. Pet. at 17. As an initial matter, Petitioner has not met its burden of demonstrating that this issue was preserved for Board review. 40 C.F.R. § 124.19(a); *In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004). Petitioner argues that Region 8 has "failed to provide a reasoned analysis justifying its deviation from the standard contained in the regulations." None of the commenters expressly raised EPA's Phase II regulations, or Region 8's application thereof, as an issue in their comments, as required by 40 C.F.R. § 124.13. Moreover, Region 8 could not have reasonably inferred from the commenters' two fleeting references to the limits of EPA's authority under the CWA to address EISA § 438, EPA-BAFB-0000573, 584, that Petitioner was challenging Region 8's application of the Phase II regulations. Because Petitioner has not met its burden, the Board should decline to review the issue.

If the Board finds the commenters' oblique reference to the limits of EPA's authority under the CWA have preserved the issue for review, Petitioner's claim that the predevelopment hydrology permit condition somehow deviates from the requirements of Phase II regulatory requirements at 40 C.F.R. § 122.34(b) is based on a serious misunderstanding of the

requirements of § 122.34. Section 122.34(a) states that a "NPDES MS4 permit will require at a minimum that [a permittee] will develop, implement and enforce a stormwater management program" and that such program "must include the minimum control measures described in [§ 122.34(b)]." 40 C.F.R. § 122.34(a). Thus, Section 122.34(b) establishes the *minimum* requirements of a NPDES permit for small MS4s, and describes the six *minimum* control measures that must be incorporated into a small MS4's storm water management program. Nothing in Section 122.34 indicates that the regulation is intended to be a mandatory template for all MS4 permits, and nothing in Section 122.34(b)(5) prevents EPA from imposing more specific post-construction minimum control measures than the general text of the regulation. Moreover, Petitioner proposes a role for Section 122.34 that would effectively vitiate EPA's ability to implement the "maximum extent practicable" standard on a case-by-case basis.

Contrary to Petitioner's view, Section 122.34(b) sets forth baseline criteria for each of the six minimum measures, including additional guidance. For example, the post-construction stormwater control provision includes guidance recommending best management practices to "attempt to maintain pre-development runoff conditions" and to "include: storage practices . . . filtration practices . . . and infiltration practices." 40 C.F.R. § 122.34(b)(5)(iii). However, subsequent language in the regulation makes clear that these are only minimum requirements. Section 122.34(e) requires permittees to "comply with any more stringent effluent limitations in [their] permit, including permit requirements that *modify*, or are in addition to, the minimum control measures . . . ." 40 C.F.R. § 122.34(e)(1) (emphasis added). Thus, on its face, 40 C.F.R. § 122.34 does not preclude EPA from exercising its authority under CWA § 402(p)(3)(B)(iii) to set specific permit conditions based on the permit writer's technical judgment of what controls are

needed to reduce pollutants in the MS4's discharges to the maximum extent practicable or are otherwise appropriate to control such pollutants.

It therefore follows that there is no need for EPA to engage in additional rulemaking before requiring post-construction stormwater controls based on maintaining pre-development hydrology in MS4 permits. Rulemaking is not a pre-requisite for establishing particular controls applicable under one permit.[6] As explained above, the existing regulations do not need amendment through APA rulemaking to authorize the sorts of permit conditions Region 8 has imposed in the Buckley AFB Permit. EPA is required by CWA Section 402(p)(3)(B)(iii) to include requirements in MS4 permits for controls to reduce pollutants discharged from the MS4 to the maximum extent practicable, and determination of such controls is an exercise of discretion within the framework of 40 C.F.R. § 122.34. The contested provisions in the Buckley Permit are not "inconsistent with any of the [agency's] existing regulations" and no additional rulemaking under the APA is needed for provisions such as these in MS4 permits. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). Petitioner has failed to demonstrate that the requirement that post-construction stormwater controls be designed to maintain pre-development hydrology constitutes clear error and the Board should decline to review this issue.

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[6] Petitioner points to a Federal Register notice EPA published in December 2009, 74 Fed. Reg. 68617, requesting stakeholder input on developing new post-construction stormwater control measures at new and re-developed sites as evidence that EPA must engage in APA rulemaking prior to requiring MS4 permittees to implement post-construction stormwater controls designed to maintain pre-development hydrology. While requesting public input on the possibility of such a rulemaking may demonstrate that EPA has considered adopting new regulations governing MS4 permitting, it has no legal effect on how EPA issues MS4 permits under the current regime. In fact, the December 2009 notice referenced by the petitioners only bolsters the EPA's position that the Buckley Permit is consistent with the existing MS4 regulations. The notice explains that wide discretion is afforded to EPA in individual permit decisions, recognizing that, much like in the Buckley AFB Permit, "some permitting authorities have required controls for stormwater discharges from developed property that neutralize the impacts from stormwater by promoting practices that retain stormwater on-site through infiltration, evapotranspiration, or stormwater reuse." *Id.* at 68620. The notice stated that EPA was considering a rulemaking "[t]o help make permitting more consistent and robust nationally," not to confer any new authority to permit writers. *Id.*

2. Region 8 considered but did not treat as a legislative rule, the MS4 Permit Improvement Guide, and many other resources, when it properly exercised its discretion under 33 U.S.C. § 1342(p)(3)(B)(iii) to require Buckley AFB to implement post-construction stormwater controls designed to maintain pre-development hydrology.

Petitioner argues that the guidance documents and other materials Region 8 considered in developing the Buckley AFB constitute legislative rules, and thus should be promulgated through rulemaking prior to their use. Pet. at 22. The Petitioner focuses much of its argument on similarities between EPA's *MS4 Permit Improvement Guide* (the "*MS4 Guide*") and the language of Section 2.6.1 of the Permit. To the extent this argument can be read as a challenge to the legal status of the *MS4 Guide* as administrative guidance, a permit appeal under 40 C.F.R. § 124.19 is not the proper avenue. Petitioners in permit appeals may only seek review of "the contested permit condition or other specific challenge *to the permit decision*." 40 CFR 124.19(a)(4). Moreover, Petitioner did not comment upon Region 8's use of the *MS4 Guide* during its development of the Buckley AFB Permit during the comment period, and the issue has thus not been preserved for the Board's review.

In any case, Petitioner's reliance on *Nat'l Ski Areas Ass'n v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269 (D. Colo. 2012), to support its contention that the *MS4 Guide* is a legislative rule is misplaced. In *Nat'l Ski Areas*, the Chief of the Forest Service issued a directive that mandated all officers nationwide to include specific clauses in all ski area special use permits. *Id.* at 1275. The court explained that the directive was a legislative rulemaking because "officers have no discretion over the terms of the [Chief's] Directive." *Id.* at 1280. The court noted that vacating the Chief's directive "will simply eliminate a national rule," but did not impact the underlying discretion which officers have exercised while they "operated for decades without a national directive." *Id.* at 1287. Thus, while more than half of all ski area permits already contained clauses similar to the Chief's directive, *id.* at 1276, the court declined to enjoin enforcement of

any of the existing permits issued pursuant to an officer's discretion, *see id.* at 1287. Unlike the Forest Service Directive in *Nat'l Ski Areas Ass'n*, the *MS4 Guide* does not create any binding legal obligations or constrain future agency discretion. Nothing in the *MS4 Guide* required Region 8 to include requirements for post-construction stormwater controls to be designed in a manner to maintain pre-development hydrology in the Buckley AFB MS4 Permit. Rather, as explained above, the *MS4 Guide* was one of a variety of resources Region 8 considered in establishing the post-construction stormwater control requirement in the Buckley AFB MS4 Permit. In doing so, Region 8 acted within its discretionary authority under CWA § 402(p)(3)(B)(ii) and in accordance with 40 C.F.R. § 122.34(b)(5). As a result, Petitioner has failed to demonstrate that the inclusion of the post-construction stormwater control requirement constitutes clear error.

VI. CONCLUSION

Because Region 8 properly based its application of the maximum extent practicable standard on the appropriate factors within the scope of its statutory and regulatory authority, and for the reasons explained above, the Board should deny the petition for review of the Buckley AFB MS4.

Respectfully submitted,

12/13/13
Date

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Everett Volk, certify that, in accordance with 40 C.F.R. § 124.19(d)(3), this Response to Petition for Review does not exceed 14,000 words in length.

12/13/13
Date

Everett Volk
Associate Regional Counsel
EPA Region 8

Certificate of Service

I, Everett Volk, hereby certify that true and correct copies of EPA Region 8's Response to Petition for Review were served:

Via the EPA E-Filing System to:

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