DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION, MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:
5090
N00/ENV/SJA
May 27, 2010

Mr. Garrison D. Miller
U.S. Environmental Protection Agency
NPDES Permits and Enforcement (3WP41)
1650 Arch Street
Philadelphia, PA 19103-2029

SUBJECT: DRAFT PERMIT FOR THE DISTRICT OF COLUMBIA'S MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4)

Dear Mr. Miller:

As the Department of Defense (DoD) Regional Environmental Coordinator (REC) for the U.S. Environmental Protection Agency (EPA) Region III, and on behalf of all of the services, I am responsible for coordinating responses to various environmental policies or regulatory matters of interest. I appreciate the opportunity to provide comments for your consideration on the U.S. EPA Draft MS4 Permit for the District of Columbia (District). The attached submission incorporates comments from the Departments of Navy, Army, and Air Force. In addition to the overarching concerns described below, several comments concerning specific provisions proposed in the draft MS4 Permit for the District are included in the attachment.

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. We share the EPA's goal of restoring the Chesapeake Bay. The President designated the DoD as the lead for development of strengthened stormwater management practices at Federal facilities and on Federal lands under EO 13508 (Chesapeake Bay Protection and Restoration). In this role, the DoD is leading the effort, with our Federal facility partners, to implement the recommendations outlined in the recently published Guidance for Federal Land Management in the Chesapeake Bay Watershed, as mandated by the EO.

With regard to this draft permit, the DoD is concerned over the inclusion in section 4.1.1.b of the Draft MS4 Permit (Performance Standard for Federal Facilities) of stormwater management controls 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. We note 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.

We do not believe the CWA authorizes the inclusion of EISA § 438 standards in the District'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, we believe 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 EPA has already, in a sense, started the rulemaking process when it requested input on a rulemaking for newly-developed or redeveloped sites through issuance of its Stakeholder Input on Stormwater Management Including Discharges from New Development and Redevelopment, 74 Fed. Reg, 68617 (December 28, 2009). On February 24, 2010, the DoD submitted comments addressing similar concerns, including specifically requesting clarification of EPA authorities concerning stormwater management and NPDES Permits under section 402(p) of the CWA. See enclosure (1).

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 two different stormwater performance standards; one for Federal entities and one for non-Federal entities. The draft permit will place the District in the position of being unable to comply with the Permit, as the District would be unable to enforce a requirement that discriminates against its Federal Government dischargers.

The DoD is also concerned with 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 Federal 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 elements of the Technical Guidance as mandatory elements in an 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 January 19, 2010. See enclosure (2).

The draft MS4 Permit requires development sites to retain the predevelopment volume of stormwater runoff. For Federal facilities, the options are either retention of the runoff from a 95th percentile storm (1.7 inches); or maintenance of predevelopment hydrology of a meadow, land-cover condition. Neither the CWA, EISA § 438, nor the EPA Technical Guidance, ultimately require "predevelopment hydrology" to be modeled as a "meadow." The EPA Technical Guidance describes predevelopment hydrology on a greenfields site (i.e., before "development") as a condition prior to any construction of infrastructure on undeveloped land, such as a "meadow or forest." In redevelopment sites, the EPA recognized that existing conditions and uses of the site could restrict the volume of runoff that could be infiltrated, evapotranspirated, or harvested/used. We believe the practical effect of the inclusion

of a requirement to model conditions as a "meadow" will result in a mandatory retrofit of existing stormwater discharges following relatively minor construction projects (as small as 5,000 square feet). Again, this is inconsistent with the CWA, EISA § 438, and the EPA's Technical Guidance.

In incorporating portions of EISA § 438 into the District'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. When on-site or off-site, management of stormwater is not feasible, the discharger is apparently required to pay into an in-lieu-fee program to be established by the District. The DoD objects to the EPA's elimination of the statutory requirement concerning technical feasibility, and is unaware of any authority for Federal Agencies to pay into an in-lieu-fee program for stormwater management. Performing "off-site" mitigation may also be problematic for Federal facilities, given Federal constraints on land use.

At your convenience, we request a meeting with you to further discuss our concerns, and our technical comments. The DoD points of contact for this matter are Ms. Christine Porter, Director for Regional Environmental Coordination, at (757) 445-6399 or christine.porter@navy.mil; Mr. William Bullard, Senior Water Program Manager, at (757) 444-4154 or william.bullard1@navy.mil; and Commander Gatha Manns, Regional Environmental Counsel, at (757) 322-2938 or gatha.manns@navy.mil.

Sincerely,

G. G. WOMACK
Acting

Enclosure: 1. DA SECNAV ltr of 24 Feb 2010, Stakeholder Input on Stormwater Management Including Discharges From New Development and Redevelopment

2. Under SECDEF ltr of 19 Jan 2010, DoD Implementation of Storm Water Requirements under Section 438 of the Energy Independence and Security Act (EISA)

5090
N00/ENV/SJA
May 27, 2010

Copy to:
District Department of Environment, Water Quality Division

U.S. Air Force Center for Engineering and the Environment
(Mr. Ron Joyner)

U.S. Army Regional Environmental Coordinator Region 3, Assistant Secretary of the Army for Installations & Environment
(Ms. Amy Alton)

Attachment: DoD Comments on EPA'S Draft Permit for the District of Columbia's MS4 System

1.1 PERMIT AREA:
This permit covers all areas within the corporate boundary of the District of Columbia served by, or otherwise contributing to, discharges from the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia.

COMMENT: Not all DoD facilities actually drain to the District's MS4 system. DoD will identify the facilities (or portions thereof) which do and do not drain into the District's MS4 system.

2.1 LEGAL AUTHORITY:

1. The Permittee must have adequate legal authority to control discharges to and from the MS4 in order to prevent or reduce the discharge of pollutants to achieve water quality objectives. Any deficiencies in the legal authority to carry out these requirements shall be remedied as soon as possible in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2. No later than one year following the effective date of this Permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area.

COMMENT:
As discussed in the cover letter to these comments, the District may be unable to obtain the requisite legal authority to impose discriminatory requirements against federal entities .

4.1.1 STANDARDS FOR NEW AND REDEVELOPMENT

a. Performance Standard for Non-federal Facilities
No later than one year following issuance of this Permit, the Permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement either of the following performance standards:

i. … stormwater controls to achieve on-site retention of 1.2 inches volume of stormwater from a 24- hour storm … through evapotranspiration, infiltration, and/or stormwater harvesting and use for all new development and redevelopment greater than 5,000 square feet in the District

ii. … stormwater controls to achieve the retention of the predevelopment runoff volume of stormwater ….. based on a full hydrologic and hydraulic analysis of the site that ensures maintenance of predevelopment hydrographs (volume, rate and duration) for the 1-, 2-, 10- and 100-year 24-hour storm events. The modeled predevelopment condition must be meadow.

b. Performance Standard for Federal Facilities

i. … stormwater controls to achieve on-site retention of 1.7 inches volume of stormwater from a 24- hour storm … through evapotranspiration, infiltration and/or stormwater harvesting and use for all new development and redevelopment greater than 5,000 square feet in the District

ii. … stormwater controls to achieve the retention of the predevelopment runoff volume of stormwater ….. based on a full hydrologic and hydraulic analysis of the site that ensures maintenance of predevelopment hydrographs (volume, rate and duration) for the 1-, 2-, 10- and 100-year 24-hour storm events. The modeled predevelopment condition must be meadow.
In addition, pollutants in the discharge must be controlled to meet the standards contained in section 1.4 herein, unless such discharges are fully compensated for by a program for implementing in-lieu or off-site mitigation credits.

d. Off-Site Mitigation
Within one-year of the effective date of this Permit, the District shall implement an off-site mitigation and Fee-in-Lieu program to be utilized when projects cannot meet stormwater management standards … The program shall include at a minimum: establishment of baseline requirements to be applied for mitigation projects, specific criteria for determining when full compliance with the performance standard cannot technically be met based on physical site constraints, and specific procedures for evaluating when an off-site mitigation is not feasible and in-lieu credits must be substituted to satisfy this requirement.
….

Attachment: DoD Comments on EPA'S Draft Permit for the District of Columbia's MS4 System

The Permittee mitigation program may allow adjustments to retention standards for redevelopment, high density development, transit-oriented development and other development patterns in non-federal facility areas for which the District can quantify water quality, water quantity, climate change adaptation or other environmental benefit(s)…..

COMMENT:

1) Federal facilities have more stringent performance standards than non-Federal facilities. As discussed in the cover letter, the District would be unable to enforce these standards against federal facilities since there has been no waiver of sovereign immunity for requirements that discriminate against the Federal Government.

2) This Draft MS4 Permit defines the predevelopment condition as "meadow." As discussed in the cover letter, neither the CWA, EISA § 438 nor the EPA Technical Guidance ultimately require "predevelopment hydrology" to be modeled as a "meadow." DoD requests substitution of the language "meadow" or meaning of predevelopment hydrology to include "meadow, forest or pre-project hydrology as appropriate" to accommodate the needs of redevelopment sites.

3) The draft permit allows adjustments to the retention standards for non-Federal facilities for redevelopment and certain types of development if the District can quantify an environmental benefit. This is ambiguous and establishes an additional disparity between standards for non-Federal and Federal facilities.

4) The Draft MS4 Permit is more stringent than the EPA EISA § 438 Technical Guidance since the guidance encouraged, but did not require, off-site mitigation after on-site stormwater retention was completed to the maximum extent technically feasible. DoD's EISA § 438 policy guidance states off-site mitigation may be applied within available resources. Requiring off-site mitigation, and Fee-in-lieu for Federal facilities may be beyond the scope of the authority of the Federal facility to implement.

Attachment: DoD Comments on EPA'S Draft Permit for the District of Columbia's MS4 System

4.1.2 RETROFIT PROGRAM FOR EXISTING DISCHARGES

4. The District, with facilitation assistance from EPA Region III, will also target major Federal landholders, such as the General Services Administration and the Department of Defense, for outreach and education, with the objective of identifying retrofit opportunities and establishing agreements to comply with the performance standard in 4.1.1.b..

COMMENT:
1) DoD is available to discuss a retrofit program with EPA, the District and other Federal facilities. We currently plan to implement urban retrofits outlined in the Guidance for Federal Land Management in the Chesapeake Bay Watershed as mandated by Executive Order 13508.
2) Section 4.1.2.1 of the draft permit stipulates the performance standard for a retrofit program for non-Federal properties. However, for non-Federal properties, site specific conditions may constitute a justification for setting a retrofit performance standard at less than their new and redevelopment performance standard. The opportunity to set a lower performance standard is not provided for Federal retrofit projects creating an additional disparity between standards for non-Federal and Federal facilities.

4.1.3 TREE CANOPY:
1. Performance Standard. Achieve a minimum annual tree planting rate of at least 4,150 plantings annually within the DC MS4 Permit Area.

COMMENT:
The draft permit should clarify whether Federal lands are included in the area subject to the performance standard. DoD may be limited in its ability to satisfy this requirement, depending upon the DoD facility involved.

4.2 OPERATION AND MAINTENANCE OF STORMWATER CAPTURE PRACTICES

2. Non-District Owned and Operated Practices. In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances,

maintenance agreements, or other policies deemed appropriate by the District. The District must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the District, and/or other mechanisms. The District must maintain an electronic inventory of practices on private property to include this information.

COMMENT:
District development of accountability mechanisms to insure maintenance of stormwater control measures on DoD properties will need to accommodate the unique aspects of Federal land, e.g., there may be limitations on entering deed restrictions, and DoD security requirements. DoD requests flexibility, but will insure internal accountability mechanisms meet the District's requirements.

4.4 MANAGEMENT PLAN FOR COMMERCIAL AND INSTITUTIONAL AREAS
The District shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas. … The Permittee shall: 1. Track; 2. Inspect; and 3. Ensure compliance with the MS4 permit …..

COMMENT:
The District should not establish a duplicative reporting requirement or inspections for DoD facilities with separate NPDES stormwater permits issued by EPA.

4.5 MANAGEMENT PLAN FOR INDUSTRIAL FACILITIES AND SPILL PREVENTION
The District shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all industrial (including relevant federal) facilities.

1. Continue to implement a program to monitor and control pollutants in stormwater discharged from industrial facilities within the MS4 permit area …..

d. Industrial facilities with NPDES permits

Attachment: DoD Comments on EPA'S Draft Permit for the District of Columbia's MS4 System

COMMENT:

DoD requests clarification of this provision. Some industrial stormwater permits issued to Federal facilities such as the Washington Navy Yard, cover the entire facility. In this circumstance, it is our understanding the industrial stormwater NPDES permit requirements take precedence over the District's MS4 permit. DoD requests the District MS4 permit program avoid implementation of requirements that would duplicate NPDES permit requirements to the maximum extent practicable.

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(INSTALLATIONS AND ENVIRONMENT)
1000 NAVY PENTAGON WAY
WASHINGTON DC 20350-1000

IN REPLY REFER TO
24 FEB 2010

Jonathan Angier
Environmental Protection Agency,
Office of Water, Office of Wastewater Management
Mail code: 4203M,
1200 Pennsylvania Ave.,
NW Washington, DC 20460.

Attention: Docket ID No. EPA-HQ-OW-2009-0817

Subject: Stakeholder Input; Stormwater Management Including Discharges from New Development and Redevelopment.

Mr. Angier,

Enclosed are Department of Defense (DoD) comments which include inputs from the Departments of the Navy, Air Force, and Army, as well as several other Defense Components. The Department has been closely following the regulatory developments pertaining to stormwater management and commends EPA's effort to take comments from all the stakeholders affected by changes within the regulatory program.

DoD supports EPA's efforts to streamline and strengthen the effectiveness of the stormwater program and to introduce green infrastructure practices, also known as Low Impact Development. Since November 2007, some DoD Components have employed innovative and effective stormwater management strategies with the goal of no net increase in stormwater volume, sediment or nutrient loading from military construction and major renovation projects. In this effort, DoD is at the forefront of Federal efforts to lead by example. However, DoD has some concerns over developing broad changes to the current stormwater regulatory program. Of particular note, DoD is concerned that EPA's current authority under Section 402(p) of the Clean Water Act may not provide the framework to regulate an expanded stormwater management program. In addition, DoD would like EPA to clarify the impact of state water laws, enforcement requirements, and the definition sensitive areas.

Thank you for the opportunity to provide input for the proposed effort to strengthen EPA's stormwater program. If you have any questions, our point of contact for this issue is Mr. Abe Nachabe at (202) 685-9215, or e-mail at abe.nachabe@navy.mil.

Donald R. Schregardus
Deputy Assistant Secretary of the Navy
(Environmental)

ENCLOSURE (1)
PAGE 1 OF 3 PAGES

CLEAN WATER ACT SERVICES STEERING COMMITTEE

Comments on the

Stakeholder Input; Stormwater Management Including Discharges from New Development and Redevelopment

74 FR 68617 (28 December 2009)

1. EPA Authority under the Clean Water Act

Proposed Requirement or Section Addressed: Clarification of EPA's statements concerning the scope of a new program and authority under section 402(p) of the Clean Water Act.

Comment: Under section 402(p), a National Pollutant Discharge Elimination System (NPDES) stormwater permit is required for stormwater point source discharges into navigable water, associated with a municipal system or industrial activity. Please explain how "a requirement for on-site stormwater controls such that post development hydrology mimics predevelopment hydrology" 74 Fed. Reg. at 68621 (Dec 28, 2009), would be implemented within this statutory authority.

Discussion: The Clean Water Act may not provide the necessary framework for implementing standards at development and redevelopment sites not involving a point source discharge of pollutants to navigable waters, and thus separate from existing NPDES requirements for municipal separate storm sewer systems (MS4) and construction activities.

Recommendation: Please clarify how the scope of a new program to reduce stormwater discharges from new development and redevelopment would match with the current authorities under section 402(p) of the Clean Water Act.

2. State Water Laws Impact

Proposed Requirement or Section Addressed: Section II. Background, Proposed Information Collection Request (ICR), page 68621

"Under the proposed ICR, EPA seeks any available information concerning current stormwater control practices, including those referred to as green infrastructure or low-impact development."

Comment: State water laws control to varying degrees any stormwater control practices. Prevailing state water law(s) should be considered during the rulemaking. Some of these laws may prevent the application of green technologies.

Discussion: It may be difficult to implement stormwater controls using "green technologies" on a uniform basis given the variability of state water laws. Some state water laws prohibit the diversion or retention of rainfall on an owner's real property.

Recommendation: Recommend that EPA considers the variations to state water laws as they may affect stormwater control practices.

-**References:** Energy Independence and Security Act of 2007, Sec. 438 and E.O. 13415, Sec 14. **http://www.epa.gov/owow/NPS/lid/section438/pdf/final_sec438_eisa.pdf**

3. Enforcement of Requirements Beyond Installation Boundaries

Proposed Requirement or Section Addressed: Section III, Input on Stormwater Practices and Considerations for Modifying Regulations, paragraph (B1) Page 68621

Comment: Military installations are federal MS4 operators. The area within the installation boundary is typically considered the urbanized area covered under the MS4 permit. If EPA is considering expanding the area subject to federal regulation beyond the urbanized area, it is important to note that DoD installations do not have the authority to enforce requirements outside the DoD installation boundaries.

Recommendation: Recommend EPA take into consideration DoD installations lack of enforcement authority outside installation boundaries.

4. Clearly Define Sensitive Areas

Proposed Requirement or Section Addressed: Section III, Input on Stormwater Practices and Considerations for Modifying Regulations, paragraph (B5) Page 68622

Comment: The term "sensitive area" is not defined.

Recommendation: If permits are going to start including buffer requirements for sensitive areas, the term 'sensitive area' needs to be defined.