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

In the Matter of: Joint Base Lewis-McChord Municipal Separate Storm Sewer System United States Department of the Army, Joint Base Lewis-McChord, *Permit Applicant* NPDES Permit No. WAS-026638	NPDES Appeal No. 13-09

DEPARTMENT OF ECOLOGY'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT EPA REGION 10

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I. INTRODUCTION

The United States Department of the Army ("Petitioner" or "Army") attempts to use this proceeding to collaterally attack the Clean Water Act Section 401 Certification ("Section 401 Certification") the State of Washington, Department of Ecology ("Ecology") issued for the National Pollutant Discharge Elimination System ("NPDES") permit the Environmental Protection Agency ("EPA") issued to regulate stormwater discharges at Joint Base Lewis-McChord ("JBLM"). The Army incorrectly argues that EPA was not required to include conditions from the Section 401 Certification that regulate stormwater flow from new development and redevelopment because those conditions were based on the Western Washington Stormwater Management Manual ("Stormwater Manual"). Petition for Review of NPDES Permit for Joint Base Lewis-McChord Municipal Separate Storm Sewer System and Request for Oral Argument ("Petition") at 25–26. In addition, Petitioner suggests in a footnote that Ecology's Section 401 Certification was not binding on EPA because Ecology did not indicate how each condition could be made less stringent. *Id.* at 25 n.7. However, the certification clearly indicated what additional conditions *must* be included to insure that discharges from the JBLM facility will meet Washington State water quality standards, and made recommendations for how to make permit conditions less stringent where possible.

EPA correctly argues that Petitioner cannot challenge the validity of Ecology's Section 401 Certification in this appeal because Petitioner never raised this issue during the public comment period and because the Environmental Appeals Board ("EAB") is not the proper

forum to challenge Ecology's certification conditions. EPA Region 10's Response Brief ("EPA Response") at 26–27.

Ecology submits this amicus curiae brief to explain the EAB's lack of jurisdiction to review Ecology's Section 401 Certification, and how Ecology's Section 401 Certification properly implements appropriate requirements of state law. First, this brief presents the well-established rule that the EAB lacks jurisdiction to review the validity of permit conditions attributable to a state's section 401 certification. Second, this brief identifies the conditions in JBLM's permit that are attributable to Ecology's Section 401 Certification and therefore fall outside the EAB's jurisdiction to review. Finally, this brief explains why the conditions in the Section 401 Certification are necessary to assure that stormwater discharges from JBLM will comply with Washington's water quality standards and other appropriate requirements of State law.

II. ARGUMENT

A. JBLM's Petition Requires The EAB To Review Conditions Attributable To Ecology's Section 401 Certification And The EAB Should Dismiss The Petition For Lack Of Subject Matter Jurisdiction

It is well-established that permit conditions attributable to state certification under section 401 of the Clean Water Act ("CWA"), 33 U.S.C § 1341, must be challenged through *state procedures* and that any such challenge falls outside the authority of a federal court or federal agency to review. *City of Tacoma v. Fed. Energy Regulatory Comm'n (FERC)*, 460 F.3d 53, 67–68 (D.C. Cir. 2006); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107–11 (2d Cir. 1997); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.,* 684 F.2d 1041, 1056 (1st

Cir. 1982); *City of Fitchburg*, 5 E.A.D. 93 (EAB 1994). This rule derives from the CWA itself, in which Congress expressly empowered states to impose and enforce water pollution control requirements that are more stringent than those required by federal law, *see* 33 U.S.C. § 1370, and crafted the section 401 certification process as "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them." *Keating v. FERC,* 927 F.2d 616, 622–23 (D.C. Cir. 1991).

Under CWA Section 401(d), a state's certification of a federal permit must set forth the "limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with . . . applicable effluent limitations and other limitations . . . and with any other appropriate requirement of State law . . . ." 33 U.S.C. § 1341(d). Under this language a state may set limitations it deems necessary to ensure that the permitted activity will comply with the state's laws related to water quality, including compliance with state water quality standards. *American Rivers,* 129 F.3d at 107 ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."). *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994) (state water quality standards are appropriate "other limitations" and "other appropriate requirements of State law").

After the state identifies the conditions it believes are required to assure compliance with state law, the limitations set out in the state's certification "*shall* become a condition on any Federal license or permit . . . ." 33 U.S.C. § 1341(d) (emphasis added). As long as the limitations imposed by the state relate broadly to water quality, the federal permitting agency

has no authority to reject the conditions or to decide whether such conditions are legally required under state law or under the CWA. *American Rivers*, 129 F.3d at 107–11 (holding that FERC lacked authority to reject substantive aspects of state-imposed conditions as *ultra vires*). Permit conditions attributable to a state's section 401 certification are thus the product of the state's evaluation of what conditions are necessary to meet the requirements of substantive state environmental law, "an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Keating,* 927 F.2d at 622.

"Limitations contained in a State certification must be included in a NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law." *Roosevelt Campobello,* 684 F.2d at 1056 (quoting EPA, Decision of the General Counsel No. 58 (Mar. 29, 1977)). "[C]ourts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification." *Id.*

Consistent with CWA's section 401 certification and federal case law, the EAB's procedural regulations preclude EAB review of conditions attributable to a state's section 401 certification. "Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." 40 C.F.R. § 124.55(e). The EAB's Practice Manual also notes that "the EAB does not have jurisdiction to review state certification decisions under

section 401 of the Clean Water Act, 33 U.S.C. § 1341, even though such certifications may determine certain conditions of a federally-issued permit." EAB Practice Manual at 38 n.39 (EPA, Aug. 2013) (citing *City of Fitchburg*, 5 E.A.D. 93, 97 (EAB 1994)). The EAB applied 40 C.F.R. § 124.55(e) and denied review of NPDES permit conditions attributable to New Hampshire's section 401 certification in *General Electric Co. Hooksett, New Hampshire*, 4 E.A.D. 468 (1993):

> Challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. Rather, such challenges must be made through applicable State procedures. *See* 40 C.F.R. § 124.55(e). It is well established that the Agency may not "look behind" a State certification issued pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, for the purpose of relaxing a requirement of that certification.

Gen. Elec. Co. Hooksett, N.H., 4 E.A.D. at 470 (citing numerous NPDES appeals to the EAB). Despite this well-established rule, Petitioner asks the EAB to do exactly what 40 C.F.R. § 124.55(e) and *Hooksett* prohibit—to look behind Ecology's Section 401 Certification for the purpose of relaxing permit requirements.

While the Army acknowledges that EPA included conditions from the Stormwater Manual in the JBLM Permit because Ecology's Section 401 Certification required EPA to include those conditions, the Army argues that EPA was required to look behind Ecology's Certification and reject requirements from the Stormwater Manual absent "a showing that the controls reduce the discharge of pollutants to the MEP." Petition at 24. Petitioner's argument is not only an impermissible collateral attack on Ecology's Section 401 Certification, but also completely ignores the purpose behind a section 401 certification, which is to assure compliance

with "appropriate conditions of State law." 33 U.S.C. § 1341(d).[1] The flow control requirements the Army challenges are necessary to assure compliance with state law, including state water quality standards. While the MEP standard may limit the conditions EPA can place in a municipal stormwater permit, the CWA specifically preserves the ability of states to regulate water pollution more stringently than the minimum requirements of the CWA. 33 U.S.C. § 1370. The Army is simply incorrect when it argues that EPA was required to reject conditions in Ecology's Section 401 Certification absent "a showing that the controls reduce the discharge of pollutants to the MEP." Petition at 24.

If Petitioner wanted to challenge the conditions in Ecology's Section 401 Certification, it was required to do so under state procedures. *See PUD No. 1 of Jefferson Cnty.,* 511 U.S. at 709–10 (discussing state procedures used to appeal a section 401 certification in Washington). Pursuant to 40 C.F.R § 124.55(e), the EAB's Practice Manual, and relevant caselaw, the EAB should dismiss JBLM's Petition because it asks the EAB to review conditions attributable to Ecology's Section 401 Certification.

B. The Conditions Related To The Stormwater Manual, Groundwater, And The Common Plan Of Development Are Attributable To State Certification And Therefore Outside The EAB's Jurisdiction To Review

As discussed above, under 40 C.F.R § 124.55(e) the EAB lacks jurisdiction to review "conditions attributable to State certification." A permit condition is "attributable to State

[1] Maximum Extent Practicable ("MEP") is a requirement of federal law that EPA is required to implement. 33 U.S.C. § 1342(p)(3)(B)(iii). The section 401 certification includes conditions necessary to assure compliance with state law. As discussed below, in Washington that includes compliance with water quality standards and all known, available, and reasonable methods to control toxicants ("AKART"). The Stormwater Manual includes the conditions necessary to assure compliance with Washington's water quality standards and AKART requirements.

certification" if the state's certification indicates that the condition is required in order for the permitted activity to comply with state water quality law:

> [P]ermit conditions are "attributable to State certification" when, inter alia, the State indicates (in writing) that these conditions are necessary in order to comply with State law and cannot be made less stringent and still comply with State law.

City of Fitchburg, 5 E.A.D. 93, 98 (EAB 1994) (quoting *In re: Gen. Elec. Co. Hooksett, N.H.*, 4 E.A.D. 468).

The state need not use any magic language such as "cannot be made less stringent" but must simply *communicate* the *idea* that the condition is required to meet the requirements of state water quality law. *Gen. Elec. Co. Hooksett, N.H.*, 4 E.A.D. at 471 ("Although this certification does not explicitly say that the permit conditions are necessary or that they cannot be made less stringent, we are confident that the words employed by the [state environmental agency] Director were intended to *communicate these exact ideas*." (emphasis added)). In *Hooksett,* the EAB found permit conditions to be attributable to state certification and not subject to EAB review where New Hampshire's certification consisted of an initial letter responding to EPA's draft permit with a list of changes, followed up by a one-page letter granting formal certification to the final permit after revisions incorporating those changes. *Id.* at 470–71.

In contrast, in *Boise Cascade Corp.*, 4 E.A.D. 474 (EAB 1993), the EAB found that permit conditions were not attributable to state certification and were therefore subject to EAB review where Louisiana's certification letters left open the possibility that the permit could be made less stringent and still comply with Louisiana's water quality standards by certifying only

that it was "reasonable to expect that the discharge will comply with the applicable provisions of Section 301, 302, 303, 306 & 307 of the Water Pollution Control Act as amended." *Boise Cascade Corp.*, 4 E.A.D. at 483 n.7. If a state communicates the idea in its certification documents that it believes a limitation is needed in order for the permitted activity to comply with state water quality law, the condition EPA incorporates into the permit at the state's request is "attributable to State certification" under 40 C.F.R § 124.55(e), and unreviewable by the EAB. *City of Fitchburg*, 5 E.A.D. at 97 (conditions required on the face of a state's section 401 certification are attributable to state certification and unreviewable by the EAB).

In the instant case, Petitioner correctly notes that Ecology's Section 401 Certification consisted of two letters, the first letter analyzing the draft permit and indicating required changes, and a second letter certifying the permit on the basis that EPA had included the provisions required in Ecology's first letter. Petition at 3–4. Ecology's Section 401 Certification was procedurally akin to New Hampshire's certification in *General Electric Co. Hooksett, New Hampshire*. As in *Hooksett*, Ecology's first letter presented a detailed list of changes to the draft permit that Ecology found to be necessary for the permitted activity to meet appropriate requirements of state law.

Ecology's first letter contains the limitations and conditions that were incorporated into JBLM's permit and are therefore attributable to state certification and not subject to review in this proceeding. Ecology clearly indicated in its first letter that it was providing two distinct categories of comments: "The verb *should* is used to indicate recommendations. The verb *must* is used for issues critical for the state's certification of the permit." Letter from Robert

Bergquist to Michael Lidgard (Jan. 17, 2012) at 1. Ecology's initial Certification letter clearly communicated that the *must* comments represent required limitations to be incorporated into the permit, without which Ecology would be unable to certify that the permitted activity would comply with appropriate requirements of state law, and which could not, therefore, be made less stringent. Ecology made three such *must* comments on pages 1 and 2 of the January 17, 2012 certification letter. The conditions EPA incorporated into JBLM's permit resulting from these three requirements in Ecology's Section 401 Certification are "attributable to State certification" and are therefore not subject to review in this appeal.

A summary of the three required conditions in Ecology's Section 401 Certification is provided below:

- Comment 1 addressed the need to regulate groundwater discharges: "The JBLM permit requirements *must* also be applied to groundwater discharges to comply with all state water quality standards."

Ecology's Jan. 17, 2012 letter at 1–2 (emphasis added).

- Comment 2 addressed the need to require runoff controls for new development, redevelopment, and construction sites: "The permit *must* retain runoff controls for new and redevelopment and construction sites that are functionally equivalent to *2005 Stormwater Management Manual for Western Washington* requirements including at a minimum applicable thresholds and definitions in Appendix 1 of the *Western Washington Phase II Municipal Stormwater Permit* issued by Ecology on January 17, 2007."

Id. at 2 (emphasis added).

- Comment 4 requires that JBLM *must* be treated as a common plan of development.

Id.

EPA was required to incorporate these three requirements into JBLM's permit, as it did, because these conditions are "attributable to State certification" and are therefore not subject to review in this proceeding. The Army focuses much of its argument on permit conditions that implement Ecology's Section 401 Certification requirement regarding runoff controls for new development, redevelopment, and construction sites, which includes the use of low impact development techniques to reduce the amount of stormwater generated by new development, redevelopment, and construction sites. However, these permit requirements are attributable to Ecology's Section 401 Certification. Consequently, EPA was required to include these requirements in the JBLM Permit, and, pursuant to 40 C.F.R. § 124.55(e), the conditions are not subject to review in this proceeding. *See American Rivers,* 129 F.3d at 107–11 (federal licensing agency does not have authority to reject conditions in a state's Section 401 Certification). To the extent the Army challenges the permit's application to groundwater or the permit's treatment of JBLM as a common plan of development, those conditions are also not subject to review in this proceeding because they are attributable to Ecology's Section 401 Certification.

The Army argues that EPA was free to ignore Ecology's Section 401 Certification because, according to the Army, Ecology failed to identify conditions in the draft JBLM Permit that could be made less stringent, as required by 40 C.F.R. § 124.53(3). Petition at 25.[2] However, as discussed above, Ecology's January 17, 2012, certification letter identified

[2] Petitioner inaccurately cites to this requirement as 40 C.F.R. § 122.53. Petition at 25. The correct citation is 40 C.F.R. § 124.53.

conditions that "*must*" be included and conditions that "*should*" be included in the JBLM Permit. The "*should"* conditions indicate where JBLM's permit could be made less stringent. The "*must*" conditions indicate where JBLM's permit could not be made less stringent and still comply with state law. As was the case with New Hampshire's section 401 certification in *Hooksett*, 4 E.A.D. at 471–72, while Ecology may not have explicitly stated what draft permit conditions could be made less stringent, the words employed by Ecology demonstrated compliance with 40 C.F.R. § 124.53. This is especially true with respect to the flow control requirements for new development, redevelopment, and construction sites, which Ecology indicated must be included in order for Ecology to certify the JBLM Permit. January 17, 2012, certification letter at 1–2. EPA properly implemented this condition of Ecology's Section 401 Certification by giving the Army the option of either complying with flow control requirements taken from the Stormwater Manual, JBLM Permit at 16–19, or demonstrating that the Army has an "equivalent document, plan or program." *Id.* at 7.

C. Ecology's Section 401 Certification Properly Included Conditions To Regulate Stormwater Flow From New Development, Redevelopment, And Construction Sites Because The Conditions Are Necessary To Assure Compliance With Washington's Water Quality Standards

As discussed above, the conditions in Ecology's Section 401 Certification are not subject to review in this proceeding. In the event the EAB elects to consider the Army's challenge to the requirements in Ecology's Section 401 Certification related to flow control at new development, and redevelopment sites, Ecology takes this opportunity to explain why these requirements are appropriate.

The permit conditions that the Army challenges are conditions related to controlling the flow of stormwater from new development and redevelopment. Petition at 5–7. These are Conditions II.B.5.b, d, e, f, and j in the JBLM Permit. These conditions establish thresholds for the use of low impact development techniques to minimize the amount of stormwater generated at a development or redevelopment project, as well as a flow control requirement to minimize the adverse impact to Washington's waters from JBLM municipal stormwater discharges. As discussed below, these conditions are appropriate because they are necessary to assure compliance with Washington's water quality standards, in particular, the aquatic life uses that are designated uses under Washington's water quality standards.

Under section 401, "States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirements of State law' . . . ." *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 713. There is no requirement that the conditions themselves be laws or regulations, only that the state determine that the conditions are necessary to assure the permitted activity will comply with laws or regulations. For example, the section 401 certification requirement at issue in *PUD No. 1* involved a minimum stream flow requirement that was based on Ecology's judgment of the minimum flow necessary to protect the salmon and steelhead fishery in the bypass reach of the proposed dam. *Id.* at 709. The minimum flow condition, between 100 and 200 cubic feet per second, was not promulgated as a law or regulation, but in Ecology's judgment was the minimum flow necessary to protect fish habitat in the bypass reach, which was a designated use under Washington's water quality standards. *Id.* at 709, 714. As the Court properly held, a condition

in a section 401 certification that requires an applicant for a federal license or permit to operate its project consistent with the designated uses in a state's water quality standards "is both a 'limitation' to assure 'compl[iance] with … limitations' imposed under § 303, and an 'appropriate' requirement of state law." *Id.* at 715. The Court concluded that Washington "may include minimum stream flow requirements in a certification issued pursuant to section 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard." *Id.* at 723. The same is true with respect to the flow control requirements in Ecology's Section 401 Certification for the JBLM Permit.

While the flow control requirements from the Stormwater Manual are not promulgated as a law or regulation, the requirements are necessary to protect fish habitat, a designated use under Washington's water quality standards. *See*, Wash. Admin. Code 173-201A-200(1) (fresh water aquatic life uses), and 173-201A-210(1) (marine water aquatic life uses). Under Washington law, municipal stormwater discharges must comply with Washington's water quality standards in addition to meeting the federal MEP and state AKART requirements.[3] Washington's Water Pollution Control Act, Wash. Rev. Code chapter 90.48, "does not treat municipal stormwater any differently than any other stormwater discharges to state waters. Other permitted discharges must comply with state water quality standards, and so must permitted discharges from Municipal Separate Storm Sewer System (MS4s)." *Puget Soundkeeper Alliance v. Dep't of Ecology,* PCHB Nos. 07-021, 07-022, 07-023, 07-026, 07-

[3] AKART is a technology based requirement similar to the federal MEP requirement. *See* Wash. Rev. Code chapter 90.48.010 (expressing state policy to require the use of all known, available, and reasonable methods to prevent and control the pollution of waters of the state).

027, 07-28, 07-029, 07-030, 07-037, at 30 (Order on Dispositive Motions: Condition S.4) (Wash. Pollution Control Hearings Bd. Apr. 2, 2008).[4] The flow control requirement that the Army challenges "is a water-quality based standard and not just a technical standard . . . . [T]he purpose of the flow control standard [is] to protect beneficial uses in the stream." *Rosemere Neighborhood Ass'n v. Dep't of Ecology,* PCHB No. 10-013, at 22 (Final Findings of Fact, Conclusions of Law and Order) (Wash. Pollution Control Hearings Bd. Jan. 5, 2011).[5] The Stormwater Manual includes measures

> [T]o control the quantity and quality of stormwater runoff from new development and redevelopment projects. These measures are considered to be necessary to achieve compliance with State water quality standards and to contribute to the protection of the beneficial uses of the receiving waters (both surface and ground waters).

Stormwater Management Manual for Western Washington, Vol I (2012) at 1–7.

While the *Stormwater* Manual does not have independent regulatory authority, conditions in the Manual become required conditions through "Permits and other authorizations issued by local, state, and federal authorities." *Id.*

Ecology's Section 401 Certification properly required EPA to include flow control conditions from the Stormwater Manual in JBLM's Permit because those conditions are necessary to achieve compliance with Washington's water quality standards. There is no merit to the Army's argument that Ecology cannot issue a section 401 certification with conditions

[4] This decision is available at: http://www.eho.wa.gov searchdocuments/2008%20archive/pchb%2007-021,026,027,028,029,020,022,023,030,037%20final%20summary%20judgment%20order.pdf. For the EAB's convenience, a copy of this decision is attached hereto as Exhibit A.

[5] This decision is available at: http://www.eho.wa.gov/searchdocuments/ 2011%20archive/pchb%2010-013%20findings%20of%20fact%20conclusions%20of%20law %20and%20order.pdf. For the EAB's convenience, a copy of this decision is attached hereto as Exhibit B.

taken from the Stormwater Manual. Petition at 24–30. Like the minimum stream flows at issue in *PUD No. 1,* the flow control conditions in JBLM's Permit, taken from the Stormwater Manual, are conditions necessary to assure compliance with water quality standards. Even the Army agrees that a section 401 certification can include those conditions "needed to comply with . . . water quality standards." Petition at 26. Consequently, even if Ecology's Section 401 Certification was subject to review before the EAB, the Board would have to conclude that the conditions challenged by the Army are appropriate requirements from Ecology's Section 401 Certification because the conditions are necessary to comply with the designated uses codified in Washington's water quality standards.

III. CONCLUSION

For the reasons discussed above and in EPA Region 10's Response Brief, the State of Washington, Department of Ecology respectfully requests that the EAB deny JBLM's Petition for Review.

RESPECTFULLY SUBMITTED this 7th day of March 2014.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Ronald L. Lavigne, hereby certify, in accordance with 40 C.F.R. § 124.19(d)(1)(iv), that Ecology's Amicus Curiae Brief in Support of Respondent EPA Region 10, including all relevant portions, contains less than 7,000 words.

RESPECTFULLY SUBMITTED this 7th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Ecology's Amicus Curiae Brief in Support of Respondent EPA Region 10 were sent to the following persons, in the manner specified, on the date below:

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