BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: JOINT BASE LEWIS-MCCHORD MUNICIPAL SEPARATE STORM SEWER SYSTEM NPDES Permit No. WAS-026638	NPDES Appeal No. 13-09

BRIEF OF *AMICI CURIAE* THE LEADING BUILDERS OF AMERICA, NAIOP-THE COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL MULTIFAMILY HOUSING COUNCIL, AND THE REAL ESTATE ROUNDTABLE[1]
IN SUPPORT OF THE PETITIONER

[1] The *Amici* listed above filed a motion today to request that the EAB approve the following additional associations' participation as amicus curiae in this filing: Associated Builders and Contractors, Associated General Contractors of America, Building Owners and Managers Association, International Council of Shopping Centers, and The National Association of Realtors.

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(e), The Leading Builders Of America, NAIOP-The Commercial Real Estate Development Association, The National Association Of Home Builders, The National Multifamily Housing Council, and The Real Estate Roundtable[2] (*Amici*) file this amicus brief in support of Petitioner, the U.S. Department of the Army, Joint Base Lewis McChord (JBLM).

The JBLM petitioned this Environmental Appeals Board (the "Board" or EAB) for review of a National Pollution Discharge Elimination Permit (NPDES) permit (Permit No. WAS-026638) (the Permit) for the JBLM Municipal Separate Storm Sewer System (MS4). Petitioner argues that the Environmental Protection Agency (EPA) lacks authority to include certain prescriptive stormwater management requirements in the Permit, including those relating to post-construction stormwater discharge limitations and EPA's attempt to regulate stormwater flow into the MS4, not the discharge of pollutants from the MS4.

Amici agree with Petitioners arguments and further suggest that the EPA exceeded its authority for several reasons. First, the Clean Water Act (CWA) limits EPA's NPDES authority to regulating the discharge of pollutants from point sources to waters of the United States. Second, EPA cannot regulate post-construction stormwater discharges because it does not have authority under the CWA to regulate "flow" in lieu of pollutants or impervious surfaces in lieu of point source discharges. Furthermore, EPA's authority over discharges of pollutants does not allow it to control land use decisions or to control the facility itself. Finally, EPA did not follow

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the necessary administrative rulemaking procedures for regulating post-construction stormwater discharges into the JBLM MS4.

II. INTERESTS OF AMICI

Amici and their many members across the country have a long-standing interest in the Clean Water Act's and EPA's NPDES stormwater permitting program. Their interests here include developing, constructing, managing, owning, purchasing and selling newly and redeveloped properties that are located within and discharge stormwater into MS4s, including at military bases such as JBLM.

Since 2009, EPA engaged *Amici* or their members to inform its national strategy for controlling discharges from newly or redeveloped sites. Specifically, EPA has: (1) required many members of the Amici to respond to Information Collection Requests (*see* http://cfpub.epa.gov/npdes/stormwater/rulemaking/icr.cfm); (2) enrolled Amici and/or members to participate as small entity representatives in EPA's Small Business Enforcement Fairness Act review of future regulatory options (*see* EPA Docket No. EPA-HQ-OW-2009-0817 *and* http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm); and (3) invited Amici and their members to engage in public outreach sessions. But now, in permits such as the JBLM permit before the EAB, EPA is attempting to carry out the objectives of its national rulemaking effort through individual permits, forcing *Amici* to engage in a permit-by-permit review.

Amici and their members would be adversely affected by potentially precedent-setting mandates found in the JBLM NPDES permit. *Amici* have successfully intervened in similar litigation elsewhere to challenge comparable mandates to those raised in this case as contrary to EPA's Clean Water Act and NPDES permitting authority (*see e.g., Va. Dep't of Transp. v. U.S. EPA*, 2013 WL 53741)

Amici support the issues raised in Petitioner's permit challenge, but their interests are not entirely consistent with nor fully represented by Petitioners. If EPA's permit is allowed to stand, MS4 operators (such as Petitioners) must regulate new or redevelopment within the MS4 with direct and significant impacts on *Amici* and their members. Further, the new MS4 mandates in the JBLM Permit would apply to newly or redeveloped properties *ad infinitum* (unaffected by or impacted by the termination of an NPDES construction stormwater permit).

III. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a)(4)(i), Petitioner must demonstrate that the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 9 & n.7 (EAB Nov. 16, 2011).

IV. ARGUMENT

A. EPA'S AUTHORITY OVER JBLM IS LIMITED TO THE DISCHARGE OF POLLUTANTS ONLY.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). CWA § 301(a) prohibits "the discharge of any pollutant" by any person, except as authorized by the Act. 33 U.S.C. § 1311(a). To regulate these discharges, CWA Sections 301 and 304 authorize EPA to establish "effluent limitations," defined as restrictions placed upon pollutants that "are discharged from *point sources* into navigable waters." *Id.* §§ 1311, 1314(b), 1362(11) (emphasis added); *see also id.* § 1342(a)(1).

Under CWA § 301, EPA must develop effluent limitations for "pollutants." 33 U.S.C. § 1311. "'[P]ollutant' means dredged spoil, solid waste,… chemical wastes, biological materials,… heat,… rock, sand, cellar dirt and industrial… waste discharged into water." 33 U.S.C. § 1362(6).

The Supreme Court has held that the term "means" in a definition is restrictive; it excludes anything unstated. *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1978); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). Therefore, EPA cannot add to the list.

CWA Section 402 provides an exception to CWA Section 301's prohibition by allowing pollutant discharges to be authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342(a). Thus, the Clean Water Act, through the NPDES permit program, limits the discharge of pollutants into waters of the United States based upon the capabilities of the practices or technologies available to control such discharges. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B).

The Clean Water Act and related Supreme Court decisions make clear that the permitting authority granted to EPA under Section 402 is limited solely to the discharge of pollutants. As explained below, several permit conditions imposed by EPA Region 10 through the JBLM MS4 permit at issue exceed the Agency's Clean Water Act authority because they are not directly related to the "discharge of pollutants from an MS4" but rather focus on other unregulated characteristics of stormwater – such as its quantity, flow, or velocity – or on the amount of impervious surface area for new or redeveloped properties that may drain into the MS4.

1. The Clean Water Act Clearly Limits EPA's Authority to the Discharge of Pollutants.

EPA's NPDES permitting authority over MS4s is limited to controlling the *discharge of pollutants from* the MS4 system to the maximum extent practicable (MEP). The limits of this authority does not stretch to encompass any agency role to independently regulate stormwater flow or volume absent pollutants, or to mandate that the MS4 establish new laws to achieve an end that EPA itself cannot independently achieve.

EPA properly identifies the statutory limitation on its powers:

> CWA Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B)(iii), *requires* the Region to issue permits for stormwater discharges from regulated MS4s that contain controls designed to "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, *and* such other provisions that [the permitting authority] determines appropriate for *the control of such pollutants.*" 33 U.S.C. § 1342(p)(3)(B)(iii). (Response Brief at 11) (emphasis supplied).

However, EPA then attempts to expand its authority beyond the discharge of pollutants from a point source by maintaining that Congress also provided authority for the agency to "control and regulate stormwater itself." In attempt to support its reasoning, EPA (gratuitously) asserts "that all stormwater contains pollutants." *Id*. This assertion is irrelevant. Even if all stormwater contains pollutants, Congress did not give EPA authority to regulate rainfall before it picks up pollutants, is channelized into a point source, and is discharged to a water of the U.S. Congress specifically limited EPA's MS4 permitting powers to "reduce the discharge of pollutants from the MS4" to the MEP. As the CWA further states, Congress reiterated that all such methods of MEP must be to "control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

Congress' mandate to EPA to focus on the discharge of pollutants is not unique to the MS4 program, but is inherent in the overarching NPDES permit program within which the MS4 provisions fit. CWA § 402(a) authorizes the "issu[ance of] permit[s] for the discharge of any pollutant, or combination of pollutants." 33. U.S.C. § 1342(a). Section 402(p)(3)(B) then sets forth specific conditions applicable to discharges from MS4s. 33 U.S.C. § 1342(p)(3). The language Congress used in CWA § 402(p)(3)(B) is important because it only prohibits "non-stormwater" discharges *into* storm sewers while then directing EPA to develop "controls to reduce the discharge of pollutants" *from* MS4s "to the maximum extent practicable." *Id.*

In addition, Congress did not require MS4 discharges to comply strictly with state water quality standards (33 U.S.C. § 1311(b)(1)(C). In *Defenders of Wildlife v. Browner,* 191 F.3d

1159, 1165 (9th Cir. 1999), the Ninth Circuit Court of Appeals found that Congress did not mandate strict compliance with state water quality standards, but that Congress provided EPA with limited discretionary authority contained in 33 U.S.C. § 1342(p)(3)(B)(iii), to require such other provisions that the Administrator determines are appropriate "for the control of such pollutants." *Id.* at 1166 (emphasis added). Hence, Congress delegated to EPA the authority to regulate pollutant discharges from MS4s through a combination of the MEP technology standard and limited discretionary authority to impose additional limitations on pollutants being discharged from the MS4.

Congress did not provide EPA with unbridled authority. Rather, the CWA "authorizes the EPA to regulate, through the NPDES permitting system, *only* the discharge of pollutants." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added)." As the D.C. Circuit has explained, "[t]he statute is clear" and contains no language that "undercuts the plain meaning of the statutory text;" EPA may not "meddl[e] inside a facility" because it only has authority over the discharge of pollutants from a point source, and "Congress clearly intended to allow the permittee to choose its own control strategy." *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997).

In short, EPA "is powerless to impose conditions unrelated to the discharge itself." *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th Cir 2009) ("the Clean Water Act gives EPA jurisdiction to regulate… only *actual* discharges—not potential discharges, and certainly not point sources themselves.")(emphasis in original).

2. The Clean Water Act's Definition of Pollution and Pollutant Demonstrate the Limits of EPA's Authority Over Discharges of Pollutants.

The definition of "*pollution*" underscores that Congress only provided EPA with authority over the discharge of pollutants. Congress defined "pollution" as "the man-made or man-induced alteration of the chemical physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19). The Supreme Court of Washington, in a case affirmed by the U.S. Supreme Court, succinctly provided that under CWA § 1362(19) "man-induced alteration of streamflow level is 'pollution.'" *State of Washington, Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wash.2d 179, 187 (1993), *aff'd* 511 U.S. 700 (1994); *see also United States v. Tennessee Water Quality Control Board*, 717 F.2d 992, 998-99 (6th Cir. 1983) ("Although alterations in the properties of the water are 'pollution'… all alterations do not fit the narrower definition of 'pollutants'… ."). Hence, EPA's efforts to restrict volume and flow from the JBLM MS4 to protect against down-stream erosion and "pollution" are go beyond the Agency's authority to control the discharge of pollutants through the NPDES permit program.

The Supreme Court has affirmed the importance of the distinction between "pollutants" added to a waterbody versus "pollution" already contained therein. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court described the difference between the discharge (addition) of pollutants to a water body and the movement of pollutants within a waterbody. 568 U.S. ___ (2013)(Slip Opinion at 3)(further explaining the Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe* 541 U.S. 95, 109-112 (2004)). Quoting the Second Circuit, the Court explained that "[i]f one takes a ladle of

soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot*."* *Id.* (internal quotations omitted).[3]

Thus, when substances redistribute within a waterbody, that substance is not being "added" to the waterbody under the CWA. In light of the Court's holding that the movement of pollutants within a waterbody does not constitute an "addition" or discharge, the EPA cannot now credibly take the position that it can regulate flow to prevent streambank erosion down-stream or the impacts of sediment already contained in the streambanks.

3. Flow is Not a Pollutant.

Petitioners properly reference (Petition at 35) *Virginia Department of Transportation v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013) (hereafter referred to as "*Accotink*," the name of the creek at issue in that case). In that case, the federal district court held that the Clean Water Act did not confer authority to regulate stormwater flow because stormwater is not a "pollutant," under that term's statutory definition. *Id.* at 5. The court rejected EPA's argument that stormwater flow could be regulated as "proxy" or "surrogate" to effect levels of pollutants already present within a waterbody, while acknowledging that it may be appropriate, in different circumstances, to impose stormwater flow restrictions as a means to regulate *specific pollutant levels demonstrated to be discharged into a waterway within the stormwater flow*. *Id.* at 5-6.

In its Response Brief (at 10), EPA improperly attempts to limit the applicability of *Accotink* to the development of Total Maximum Daily Loads (TMDLs) under CWA §303(d), but this argument is unavailing. The *Accotink* court's logic – based upon the Act's explicit focus on

[3] *See also National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (upholding EPA's interpretation of "addition" that required pollutants be introduced "from the outside world."); *but see AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-32 (4th Cir. 2009) (explaining that under CWA section 401(a)(1), the word "discharge" does encompass water flowing into areas where dredging was to occur.)

controlling pollutant discharges into waters of the U.S. – applies with equal force in the context of the NPDES permitting program, because both the NPDES permit program and TMDLs that are incorporated into NPDES permits are expressly limited to the authority conferred by the CWA to regulate the "discharge of pollutants." After citing a line of cases – all of which focus on the "discharge of pollutants" (*see* Response Brief at 12) – EPA attempts to confuse that central issue by concluding that the mere fact that *Accotink* was framed as a TMDL controversy somehow eliminates its applicability to NPDES permitting cases even though the limitation on statutory authority at issue in *Accotink* over the discharge of pollutants is equally and directly applicable to NPDES permitting as it is to setting TMDLs that must be implemented through effluent limitations in those permits. 33 U.S.C. §§ 1311(a), 1313(d), 1314, 1342(a).

After failing to distinguish *Accotink's* applicability to the discharge of pollutants in NPDES permits, EPA's Response Brief proceeds to discuss performance standards relating to post-construction without relating those standards to the actual discharge of pollutants. *See* Response Brief Section IV.B. The word "pollutant" appears to vanish from EPA's effort to regulate stormwater flow, other than a passing and unsupported gratuitous statement that preventing stormwater flows will avoid the discharge of pollutants. Response Brief at 14. Nowhere does EPA explain its legal authority for preventing stormwater discharges from occurring or the specific relationship between the discharges it would allow and any need to control any specific pollutants contained therein. CWA §402(p)(3)(B)(iii) does not authorize EPA to eliminate or control stormwater flow or mandate the prevention of stormwater discharges, but rather requires the pollutants in the discharge to be reduced to the MEP standard.

Further, EPA freely admits that the entire purpose of the post-construction-related flow restrictions is not to limit pollutant discharges, but to "regulate the rate at which stormwater flows off the site to prevent large scale impairment of water quality and aquatic habitat through streambank erosion." *Id.* at 15. That requirement does not relate to the discharge of pollutants and raises again the central issue in *Accotink* – the limits of EPA's Clean Water Act authority.

While EPA may argue that limiting stormwater flows helps it to achieve the goals of the Clean Water Act, it is still bound by the specific limitations in the Act that require it to focus on the discharge of pollutants from point sources to waters of the U.S. Executive agencies may not sidestep specific legislative requirements in their zeal to achieve a statute's overall objective. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)("No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); *Nat'l. Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998)("In a press release accompanying the adoption of the Tulloch Rule, the White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach (Aug. 24, 1993). While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule.").

B. EPA'S CLEAN WATER ACT AUTHORITY OVER DISCHARGES OF POLLUTANTS APPLIES TO POINT SOURCES ONLY.

Under the Clean Water Act, the term "discharge of a pollutant" means "the addition of any pollutant to navigable waters from any *point source*." 33 U.S.C. § 1362(12) (emphasis added). In the JBLM MS4 permit, EPA has attempted to regulate everything from the discharges of pollutants from point sources over which it has authority, to specific land use decisions (*e.g.,* requiring cluster development) over which the Clean Water Act grants no authority. EPA's authority to control pollutant discharges does not encompass the ability to mandate land use decision-making. This is not to say that JBLM could not develop a standard or regulation to, for instance, limit impervious surfaces or other stormwater flows into the MS4. But EPA is limited to regulating the discharge of pollutants from the MS4 and cannot force JBLM to do what EPA is not otherwise authorized to do, including imposing restrictions on local land use decisions.

1. EPA Has No Authority To Regulate The "Facility."

The Petitioner has challenged certain provisions of the permit as exceeding EPA's authority. (Petitioner's Brief at 5). One provision provides that the Permittee must "manage stormwater from developed areas in a manner that preserves and restores the area's predevelopment hydrology," and another "requires site design that minimizes the project's roadway surfaces and parking areas, incorporates cluster development, and ensures that vegetated areas are designed to receive stormwater dispersion from all developed project areas." (Petitioner's Brief at 5-6).

In this matter, the "facility" is the Joint Base. However, EPA's authority is necessarily limited to the discharges from the base's storm sewer system (the point source) into navigable waters. The permit provisions above fail to recognize this limitation; they meddle inside the facility itself. Managing stormwater to restore the area to its predevelopment hydrology exceeds

EPA's Clean Water Act authority because it goes beyond the regulation of a point source to regulate activities on the land and "flow." Moreover, EPA has failed to show any relationship between pre- or post-development stormwater flows or the relationship of those flows to any actual pollutant discharges. Similarly, regulating "site design," and requiring "cluster development" well exceeds EPA's jurisdiction over the point source "discharge itself." *N.R.D.C.,* 859 at 170.

2. EPA Has No Authority To Make Local Land Use Decisions.

The Supreme Court has repeatedly rejected assertions of federal authority under the CWA that usurp the "quintessential state and local power" found in the "[r]egulation of land use." *Rapanos v. U.S.,* 547 U.S. 715, 738 (2006) (Scalia, J. plurality) (citations omitted). *See also Solid Waste Agency* v. *U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) (rejecting expansive reading of CWA jurisdiction because of "significant constitutional questions raised" by "impingement of the States' traditional and primary power over land and water use"). These cases turned on the interpretation of the jurisdictional phrases "the waters of the United States" and "navigable waters," and held that even by using those terms to broadly define the proper subject matter of federal jurisdiction under the CWA, Congress did not authorize federal regulators to supplant local land use decision-making. *Rapanos*, 547 U.S. at 738-39 ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies." (citation omitted)); *Solid Waste Agency*, 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation.").

The JBLM Permit goes even further than the "*de facto*" federal regulation of land use prohibited under Supreme Court precedent. *Rapanos*, 547 U.S. at 738 ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board.") By compelling the permittees to make specific choices with regard to post-construction performance standards, EPA is exercising federal land use mandates on a local basis. The Permit is issued under the auspices of the NPDES permitting program that relates to the "discharge of pollutants," a term that is statutorily defined as the "addition of any pollutant to navigable waters." 33. U.S.C. § 1362(12). Thus, the NPDES permitting program is – as it must be – directly limited in its reach by the jurisdictional limits applicable to the CWA as a whole, which bar the federal regulation of local land use.

3. EPA Has No Authority To Regulate Impervious Surfaces.

In the JBLM permit (at pages 16-20), EPA is attempting to regulate impervious surfaces even though such surfaces are not "point sources" under the NPDES permit program. CWA Section 301 prohibits unauthorized point source discharges, but Congress left the "regulation of nonpoint source pollution to the states." *Cordiano v. Metacon Gun Club, Inc.* 575 F.3d 199, 219 (2d Cir. 2009); *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 415 F.3d 1121, 1124 (10th Cir. 2005) (explaining that the CWA deals with nonpoint source pollution merely by "requir[ing] states to develop water quality standards for intrastate waters."); *U.S. v. Plaza Health Labs, Inc*. 3 F.3d 643, 647 (2d Cir. 1993) (providing that the "control of pollutants from runoff is applied pursuant to section 209 and the authority resides in the State or other local agency.") (quoting S. Rep. No. 92-414, 972 U.S.C.C.A.N. 3668, 3744). The CWA focuses on point sources rather than

nonpoint sources because "differences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible. Also, the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature." *Oregon Natural Desert Assoc. v. United States Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Poirier, *Non-point Source Pollution*, § 18.13); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (recognizing that the "[r]egulation of land use . . . is a quintessential state and local power.").

The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Impervious surfaces such as roofs, parking lots, and roads are not point sources. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which is not regulated under the stormwater permitting program.

If EPA now interprets "point source" to include impervious surfaces, it renders that term meaningless and clearly contradicts congressional intent to define the term and differentiate "point sources" from "non-point sources." As noted by the Second Circuit Court of Appeals, "the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the text and structure of the CWA. The Act defines the term "point source," and leaves all other flows of water to be considered "nonpoint sources," the regulation of which is left to the states. *Id*. at 219-220. EPA's NPDES regulations define the extent to which surface runoff can in certain circumstances

constitute point source pollution. The definition of "[d]ischarge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*" 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and, consequentially, is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (relying on "the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other").

C. EPA HAS FAILED TO FOLLOW THE NECESSARY PROCEDURES TO REGULATE POST-CONSTRUCTION STORMWATER AT JBLM.

EPA's attempt to regulate broadly through the JBLM Permit must fail because the Agency cannot point to any grant of authority for such actions. MS4s cannot be coerced to adopt EPA's six minimum control measures, which include the post-construction controls. EPA also cannot require new or redeveloped properties to meet stormwater discharge standards because EPA has not expanded its stormwater program to include such sites. Finally, EPA cannot manipulate the state certification process found in CWA Section 401 to transform a flexible stormwater guide into federally enforceable law. This manipulation has the added effect of violating both state and federal administrative law principles by using guidance that was never intended by its author to be imposed uniformly on all dischargers to circumvent the rulemaking process and the statutory limits on EPA's authority.

1. EPA Cannot Coerce MS4s into Implementing the Six Minimum Control Measures.

EPA's Phase II regulation established six minimum control measures that the Agency believed would provide a flexible, iterative mechanism for MS4s to meet the MEP standard.[4] 40 CFR § 122.34(b). The post-construction minimum control measure in particular contemplates that the MS4 operator will "use an ordinance or other regulatory mechanism to address post-construction runoff from new and redevelopment projects." 40 CFR § 122.34(b)(5). Even assuming EPA has the authority to mandate the passage of local ordinances (which would violate the 10th Amendment to the Constitution), it certainly does not follow from any such grant of authority from Congress in CWA § 402(p)(3)(B)(iii) that EPA can dictate the contents of that local ordinance to establish stormwater retention, flow and velocity mandates that it does not otherwise have authority to develop on its own. [5]

The six minimum control measures faced legal challenges from regulated MS4s in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003)(*EDC*). In *EDC*, the municipal petitioners argued that the federal government could not force them to regulate third parties in furtherance of a federal program. *Id.* at 847. The Ninth Circuit Court of Appeals rejected the municipal petitioners' challenge by concluding that EPA was not coercing small MS4s into general permits with the six minimum control measures because such permittees could, instead, request an individual permit pursuant to 40 CFR § 122.26(d). *Id.* ("Therefore, by presenting the option of seeking a permit under § 122.26(d), the Phase II Rule avoids any

[4] The six minimum control measures are: (1) public education and outreach; (2) public participation/involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction runoff control; and (6) pollution prevention/good housekeeping. *See* 40 CFR § 122.34(b)

[5] The Supreme Court has held that Congress may not "commandeer the legislative process of the States by directly compelling them to enact a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (relating to solid waste disposal). *See also Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (the federal government may not compel the states to enact or administer a federal program, relating to regulation of guns).

unconstitutional coercion.") In fact, EPA had argued in that case that small MS4s could avoid constitutional issues by seeking such a permit to avoid the six minimum control measures. *Id.* at 849 (note 23).

In the current case, EPA has mandated compliance with the six minimum control measures as a condition in an individual permit issued pursuant to 40 CFR § 122.26(d). The Petitioner has not been provided with alternative permitting options to avoid the six minimum control measures. Thus, while the Ninth Circuit avoided having to further analyze constitutional issues raised by the six minimum control measures because the municipal petitioners were presented with the option of obtaining an individual permit, JBLM does not have that option because EPA has issued it an individual permit. Thus, the issue raised in EDC but dismissed as not ripe then is clearly ripe for MS4s similarly situated to JBLM in light EPA's strategy for using the adjudicatory process of permit issuance to pursue this strategy. *See* next section below.

2. EPA Should Await the Results of its National Post-Construction Stormwater Rulemaking.

Since at least 2009, EPA has believed that it must promulgate new rules and regulations to expand the existing stormwater program to establish its own post-construction stormwater performance standards. *See* 74 Fed. Reg. 68,617 (December 28, 2009); *see also* EPA's rulemaking webpage at http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm; *and* EPA Semiannual Regulatory Agenda – Fall 2013 (RIN 2040-AF13) (http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0784-0001 at13). EPA still has not yet proposed any rulemaking, but is attempting through its individual permitting process to implement such a program absent the necessary rulemaking effort. 5 U.S.C. §§ 551 et seq. Despite EPA's stated intention that it must promulgate new regulations to expand the stormwater program to create post-construction discharge standards, EPA Region 10 states that a

rulemaking is not necessary and, instead, it can rely exclusively on the "adjudicatory process of permit issuance" to establish discharge limitations for developed sites. Response Brief at 25-26. That assertion should be rejected while EPA is actively pursuing a rulemaking to address post-construction discharges.

EPA has no authority to regulate developed sites that are otherwise exempt from permitting pursuant to CWA Section 402(p)(1). Section 402(p)(1) is a broad exemption from NPDES permitting for all stormwater discharges except those identified in Section 402(p)(2). Developed sites and impervious surfaces are not listed in Section 402(p)(2) or in EPA's Phase I or Phase II regulations implementing the stormwater permitting program. Active construction activities that disturb at least five acres of land have been subject to permitting under EPA's industrial stormwater permit program (40 CFR § 122.26(b)(14)(x)) since 1990 and those disturbing at least one acre of land pursuant to 40 CFR § 122.26(b)(15) since 1999. In each instance, the permittee may terminate permit coverage when the site is stabilized. *Id.* Currently, EPA does not have authority or regulations to control stormwater discharges from developed sites that are not "associated with industrial activity." 40 CFR § 122.26(b)(14).

The CWA sets forth specific processes that allow EPA to designate new sources or categories of sources for NPDES permitting. It may designate an individual site ("a discharge") that contributes to a violation of a water quality standard or is a significant pollutant discharger on a site-specific basis. Or, as it did for the Phase II expansion, EPA may designate classes or categories of pollutant discharges for permitting through a process Congress laid out in CWA § 402(p)(5)-(6) that requires studies, a report to Congress, and formal regulation.

EPA initiated a rulemaking in 2009 to expand the stormwater permit program to include new or redeveloped sites. That rulemaking is ongoing despite several delays, but EPA has not abandoned that rulemaking effort and it is directly applicable and relevant to EPA's actions in the challenged permit. EPA should be prohibited from using the "adjudicatory process of permit issuance" to attempt to implement a regulatory approach outside its current regulations. Congress clearly set forth the process for expanding the stormwater program through CWA Sections 402(p)(5)-(6). The Agency should not be allowed to short-circuit that process through a permit-by-permit approach.

3. EPA Misinterpreted Section 401 By Not Complying With All of the State's Conditions, Principally the Condition That EPA Provide Flexibility in Adherence to the Western Washington Stormwater Manual.

EPA argues that it was compelled to require JBLM to comply with the Stormwater Management Manual for Western Washington (SMMWW)(Wash. Dep't. Ecology, *Stormwater Management Manual for Western Washington* (2012)) because the State included its use as a condition of the State's section 401 certification. (EPA Response Brief 26-28). EPA's assertion is not entirely correct. Section 401(a) provides that an applicant for a federal license or permit must obtain a certification from the state that any discharge will comply with certain sections of the Act. 33 U.S.C. § 1341(a). Similarly, Section 401(d) allows a state to set "forth effluent limits and other limitations" to ensure that the federal permit will comply with water quality standards and "any other appropriate requirement of State law." 33 U.S.C. § 1341(d).

The case law is clear that a licensing or permitting agency (in this case EPA) does not have authority to reject the conditions that a state develops under Section 401.[6] *E.g. Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008); *American Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2nd Cir. 1997) (explaining that an agency does not have "authority to decide which conditions are within the confines of § 401(d) and which are not."). At the same time, however, EPA cannot issue a NPDES permit that contains requirements that exceed the Agency's Clean Water Act authority. Here, however, EPA attempts to manipulate the Section 401 conditions under the auspices of authority it does not possess.

In Ecology's January 2012 letter, it provides that the "permit must retain runoff controls… that are functionally equivalent to *2005 Stormwater Management Manual for Western Washington* requirements… .(emphasis added). Subsequently, in its final certification, Ecology required EPA to cite to the 2012 SMMWW. However, in the JBLM Permit, EPA has required compliance with the 2012 Manual, but left out the "functionally equivalent" language. For example, Part II.B.5(b) provides that "Stormwater Site Plans must be prepared consistent with Chapter 3, Volume 1…of the [SMMWW]… ." Similarly, Part II.B.5(c) explains that BMP's must be selected, designed and maintained in accordance with Volume IV…of the [SMMWW]" (JBLM Permit No. WAS-026638, 16-18). To the extent that EPA relies on Washington's Section 401 certification as a basis to require JBLM to comply with the SMMWW, it has violated CWA § 401(d) by rejecting the State's flexible condition to retain runoff controls that are "functionally equivalent" to its manual.

[6] This is not to say that section 401 allows an agency to include a state condition that exceeds the agency's statutory licensing or permitting authority. See *American Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 110 (2nd Cir 1997) (explaining that if FERC would violate its authorizing statute by including a state's section 401 condition in a license, FERC had the authority to refuse to issue the license).

4. EPA Used Its Misinterpretation to Justify Its Transformation of State Guidance Into Federally Enforceable Law, Violating Federal and State Administrative Law Statutes.

It is a well-settled principle of law that an agency cannot use guidance documents to impose regulatory obligations. The federal Administrative Procedure Act (APA) requires agencies to undertake a specific process involving notice and public comment; opportunity for public hearing; and response to comments. 5 U.S.C. § 553. The APA broadly defines a rule as an "agency statement of general or particular applicability and future effect." 5 U.S.C. § 551(4). Nonetheless, agencies are frequently tempted to bypass these procedural safeguards for any number of reasons. As the D.C. Circuit observed:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the command in the regulations…An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretive rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." …The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (citations omitted). This phenomenon now arises within the JBLM Permit. EPA has added unprecedented and unauthorized post-construction stormwater obligations to this permit by simply mandating JBLM's use of the SMMWW, a state guidance that declares on its face that it is non-regulatory in nature. *SMMWW* at 1-7.

The APA requires an agency to follow a prescribed set of procedures when it promulgates a rule. A "rule" is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…." 5 USC § 551(4).

In *Appalachian Power*, EPA developed a "guidance document" to assist state air permitting officials with addressing "periodic monitoring" in the context of Title V permits. *Appalachian Power*, 208 F.3d at 1019. This guidance purported to interpret a previously issued regulation. In reality, however, EPA's guidance would have required states to "amend[] federal emission standards in individual permits, something not even EPA could do without conducting individual rulemakings to amend the regulations containing the federal standards." *Id.* at 1019.

Despite EPA's protestations that the guidance was not binding, the court nonetheless held that, because the guidance would, in pertinent part, "lead[] private parties or State permitting authorities to believe that [EPA] will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Id.* at 1021.

Thus, EPA sought to impose new permitting requirements onto Clean Air Act Title V permit holders through the permit in a manner outside its statutory authority. EPA's illegal actions in *Appalachian Power* mimic its unlawful attempt to include in JBLM's Permit obligations it has no authority to require. However, instead of using a "ukase"-styled guidance document of its own creation, it unlawfully seeks to render the SMMWW (a state guidance document that the state clearly intends to be non-binding) into a federally enforceable directive.

Similarly, like the federal government, the state of Washington has its own Administrative Procedure Act (WAPA), which defines a rule as: "any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings…" RCW 34.05.010(16). In *Washington Education Association v. Washington State Public Disclosure Commission*, 150 Wash.2d 612 (2003), the Washington Supreme Court recognized that in order to effectively promulgate a rule, an agency "must adhere to formal rule-

making procedures." *Id*. at 619. "Interpretive statements" or guidelines, on the other hand, are advisory only, and are "not governed by formal adoption procedures." *Id.* at 618-619. The Washington Supreme Court, in a 5-4 decision, ultimately held that the guidance at issue was properly characterized as such because the language used in the guidance was not framed in a compulsory manner and there was no evidence that the guidance was or would be enforced by the issuing agency. *Id.* at 622.

The SMMWW appears to be framed similarly to the guidance document described in *Washington Education Association.* The Washington Department of Ecology (Ecology) clearly states that "[t]he manual does not have any independent regulatory authority" and is "a guidance document which provides local governments, State and Federal agencies, developers and project proponents with ***a*** stormwater strategy to apply at the project level." *SMMWW* 1-7 (emphasis supplied). Ecology notes that: "[f]ollowing this Manual is not the only way to properly manage stormwater runoff." *Id.* The SMMWW then contains a detailed explanation that compliance with it creates a *presumption* of compliance. If a municipality determines that an alternative stormwater management method is more appropriate, it is free to employ that method; but it will need to demonstrate to the Ecology that this alternate method "will not adversely impact water quality." *SMMWW* 1-8 – 9.

EPA's inclusion of the SMMWW in the JBLM Permit impermissibly transforms it into enforceable law. *See, e.g., Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998)(describing how the "rubber hits the road" upon incorporation into a NPDES permit)(citations omitted). Here, EPA has taken a state document, intended solely as guidance and created without mandatory formal procedures, and turned it into a federally enforceable permitting obligation.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the EAB remand the JBLM Permit.

Respectfully submitted,

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Dated: March 7, 2014

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Amicus Brief, including all relevant portions, contains fewer than 7,000 words.

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