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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the December 5, 2013 Order Granting Motion for Extension of Time to File Response issued by the Environmental Appeals Board (“EAB”), the U.S. Environmental Protection Agency (“EPA”), Region 10 (“Region”) respectfully submits this response to the U.S. Department of the Army’s (“Petitioner”) Petition for Review (“Petition”) of National Pollutant Discharge Elimination System (“NPDES”) Permit No. WAS-026638 (“Permit”). The Permit was issued to Joint Base Lewis-McChord (“JBLM”) and authorizes discharges from JBLM’s municipal separate storm sewer system (“MS4”) to waters of the United States. ER 87.¹ The Petition was filed on November 5, 2013.

Petitioner challenges, on numerous grounds, permit provisions that require implementation of post-construction stormwater controls based on maintaining pre-development conditions as well as permit provisions that require the development and implementation of a retrofit plan. Petition at p. 1-2. Some of Petitioner’s arguments reach well beyond this Permit and, if successful, would have broad implications on the MS4 NPDES permit program. This includes a challenge to EPA’s Clean Water Act (“CWA”) authority to include performance standards for post-construction stormwater discharges and retrofit plan requirements. Contrary to Petitioner’s assertions, CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), confers upon the Region broad authority to establish post-construction stormwater controls and retrofit plan requirements in NPDES MS4 permits. Moreover, the Region adequately explained that these conditions constitute “maximum extent practicable” (“MEP”) as required by CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii).

¹ All documents cited in this brief are contained in “Region 10’s Excerpts From The Administrative Record.” To prevent duplication, the Region has cited to the documents as “ER” instead of including these documents as attachments to the Response Brief.

Petitioner also raises issues concerning the Region's authority to require consistency with a State guidance manual. Petition at p. 1-2. Contrary to Petitioner's contention, the Region was well within its authority under CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), to establish these requirements. Further, the Region was required to include the provisions pursuant to CWA Section 401(d), 33 U.S.C. § 1341(d). Last, Petitioner raises issues concerning various deadlines in the Permit; however, Petitioner failed to raise these concerns during the public comment period.

For the reasons discussed below, the EAB should deny the Petition.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to waters of the United States unless authorized by, among other things, a NPDES permit. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA, or an authorized State, must issue NPDES permits that authorize the discharge of pollutants subject to limitations and requirements imposed pursuant to CWA Sections 301, 304, 306, 401, and 403, 33 U.S.C. § 1311, 1314, 1316, 1341, and 1343. Here, the State of Washington does not have the authority to issue NPDES permits to federal facilities in Washington; therefore, the Region issues the relevant NPDES permits to JBLM.

In 1987, Congress passed the Water Quality Act of 1987 which, among other things, added Section 402(p) of the CWA, 33 U.S.C. § 1342(p). *See* 55 Fed. Reg. 47,990, 47,992 (Nov. 16, 1990). Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires NPDES permits for four types of stormwater discharges: (1) discharges with respect to which a permit had been issued prior to February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from MS4s serving populations over 100,000; and (4) any discharge for which the permitting authority

determines to be contributing to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 55 Fed. Reg. at 47,992. In addition, CWA Section 402(p)(6), 33 U.S.C. § 1342(p)(6), expands the types of regulated stormwater discharges by requiring EPA to “issue regulations ... which designate storm water discharges ... to be regulated to protect water quality.” 33 U.S.C. § 1342(p)(6); *see also* 64 Fed. Reg. 68,722, 68,731 (Dec. 8, 1999).

Pursuant to CWA Section 402(p)(6), 33 U.S.C. § 1342(p)(6), EPA promulgated the Phase II stormwater regulations in 1999.² 64 Fed. Reg. 68,722 (Dec. 8, 1999). The Phase II stormwater regulations set forth the permitting requirements for small MS4s and stormwater discharges associated with construction sites that disturb between one to five acres. *Id.* Small MS4s are defined as a conveyance or system of conveyances owned or operated by federal, State, Tribal, or local governments, including “systems similar to separate storm sewer system in municipalities, such as systems at military bases....” 40 C.F.R. § 122.26(b)(16). Regulated small MS4s are MS4s that are either (1) located within an urbanized area as determined by the latest Decennial Census by the Bureau of the Census or (2) designated by the NPDES permitting authority. 40 C.F.R. § 122.32(a); *see also* 64 Fed. Reg. at 68,748-68,752.

The CWA requires NPDES permits for regulated MS4 discharges to “reduce the discharge of pollutants to the maximum extent practicable” and “effectively prohibit non-storm water discharges” into an MS4. 33 U.S.C. § 1342(p)(3)(B). In addition, the permitting authority may include “other provisions” that it determines to be “appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii). In *Defenders of Wildlife v. Browner*, the Court

² EPA promulgated the Phase I stormwater regulations in 1990. 55 Fed. Reg. 47,990 (Nov. 16, 1990). The Phase I stormwater regulations set forth the requirements for stormwater discharges associated with industrial activity, including construction sites disturbing more than five (5) acres, and discharges from large and medium size MS4s (*i.e.*, MS4s serving a population over 100,000). 55 Fed. Reg. at 47,990; *see also* 40 C.F.R. § 122.26.

explained that CWA Section 402(p)(3)(B)(iii) allows the permitting authority the discretion to require less than strict compliance with state water quality standards as well as the “authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.” *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161 (9th Cir. 1999). In other words, for NPDES permits issued to MS4s, the permitting authority *must* include provisions that reduce the discharge of pollutants to the MEP and *may* include additional provisions that ensure compliance with state water quality standards where necessary to control pollutants.

The Phase II storm water regulations require that NPDES permits contain conditions that require the regulated small MS4 operator to develop, implement, and enforce a stormwater management program (“SWMP”) that is designed to reduce the discharge of pollutants from the MS4 to the MEP, protect water quality, and satisfy the appropriate water quality requirements of the CWA. 40 C.F.R. § 122.34(a); *see also* 64 Fed. Reg. at 68,752-68,753. The SWMP must include the following six minimum control measures: (1) public education and outreach on stormwater impacts; (2) public involvement and participation; (3) illicit discharge detection and elimination; (4) construction site stormwater runoff control; (5) post construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. 40 C.F.R. § 122.34(b). The “post construction storm water management in new development and redevelopment” minimum measure includes a requirement to develop and implement a program “to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre” and requires “strategies which include a combination of structural and/or non-structural best management practices (“BMPs”) as appropriate for your community.” 40 C.F.R. § 122.34(b)(5).

When issuing an individual NPDES permit to a small MS4, EPA incorporates into the NPDES permit the specific BMPs for the SMWP that are required to meet the six minimum control measures. These BMPs can include those set forth in the NPDES permit application submitted by the MS4 operator as well as additional requirements or BMPs necessary to meet the six minimum control measures, an approved total maximum daily load (“TMDL”), or approved water quality standards. *See* 40 C.F.R. § 122.34(a) and (e); *see also* 64 Fed. Reg. at 68,752.

B. Factual and Procedural Background

JBLM is cooperatively operated by the U.S. Departments of the Army and the Air Force.³ ER 56 at p. 5. A portion of JBLM, known as the “cantonment” area, is located within the Seattle Urbanized Area as defined by the Year 2000 Census. *Id.* at p. 7. Thus, JBLM was required to submit a NPDES permit application that included a description of a SWMP. On March 5, 2003, Fort Lewis submitted a NPDES permit application. ER 5. JBLM supplemented this application in August 2010, October 2011 and November 2011. ER 37, 50, and 51.

JBLM’s MS4 serves a population of approximately 95,000, which includes military personnel, military dependants residing on base, civilian employees, and visitors. ER 56 at p. 9. Most development on JBLM occurs within the cantonment areas. *Id.* The MS4 is comprised of curbs and gutters, ditches and storm drains, lift stations, treatment systems, and associated outfalls. *Id.* at p. 9-10. The MS4 discharges to various receiving waters including, but not limited to, Clover Creek, Murray Creek, the JBLM Stormwater Canal, American Lake, wetlands associated with Sequalitchew Creek and Sequalitchew Lake, and ultimately, Puget Sound. *Id.* Clover Creek and American Lake are listed on the State of Washington Department of Ecology’s (“Ecology’s”) 2008 Water Quality Assessment Report (*i.e.*, 303(d) list) as not meeting state

³ JBLM was established in 2010. Prior to 2010, the area that comprises JBLM was operated as two separate bases, Fort Lewis Army Base (“Fort Lewis”) and McChord Air Force Base (“McChord AFB”). *See* ER 56 at p. 5-6.

water quality standards.⁴ *Id.* at p. 13. Clover Creek is listed as impaired for fecal coliform, dissolved oxygen, and pH. *Id.* at p. 13, Table 2. American Lake is listed as impaired for phosphorus. *Id.*

Puget Sound is located on the western edge of the JBLM area and receives flows from the JBLM Stormwater Canal, Clover Creek/Chambers Creek, and Muck Creek/Nisqually River. ER 56 at p. 11-12. Puget Sound is a unique marine ecosystem that has been impacted by urban development. ER 22. Puget Sound is home to numerous species of salmon as well as a distinct orca whale population. *Id.* at 21. It provides some of the finest shellfish habitat in the world making Washington the nation's leading producer of farmed bivalve shellfish. *Id.* at p. 164. In addition, the Ports of Tacoma and Seattle make Puget Sound a major international shipping center. *Id.* at p. 169. Due to the decline of the health of Puget Sound, twenty-one species are listed as threatened or endangered, more than 1,000 rivers and lakes are listed as impaired and there are dead zones in Hood Canal and the South Sound that endanger not only indigenous shellfish but the commercial shellfish beds in Washington. *Id.* at p. 21.

In 2007, the Washington Legislature created a new state agency called the Puget Sound Partnership ("PSP") to halt Puget Sound's decline and restore the health of Puget Sound by 2020.⁵ ER 22 at p. 2. JBLM is a member of the Puget Sound Partnership's Federal Caucus. ER 63 at p. 1. According to the PSP's Puget Sound Action Agenda ("Action Agenda"), it is critical

⁴ CWA Section 303(d), 33 U.S.C. § 1313(d), requires a State to identify waters "for which effluent limitations ... are not stringent enough to implement any WQS applicable to such waters." This is known as the State's 303(d) list.

⁵ The PSP was directed to implement three goals:

- (1) Define a 2020 Action Agenda that identifies work needed to protect and restore Puget Sound;
- (2) Determine accountability for achieving results; and,
- (3) Promote public awareness and communication.

ER 22 at p. 2.

to reduce stormwater volumes and pollutant loadings through a comprehensive and integrated approach to managing urban stormwater and rural stormwater runoff in order to reduce the largest source of pollution to Puget Sound. ER 22 at p. 51-53. To reduce stormwater volumes and pollutant loadings in urban stormwater runoff, the Action Agenda identifies, among other action items, the following: (1) implementation of Ecology's municipal stormwater NPDES Phase I and Phase II permits, which contain post-construction performance standards; (2) use of low impact development ("LID") approaches to stormwater managements; and (3) prioritization and implementation of stormwater retrofits. *Id.* at p. 52, 91-92. All of these action items are reflected in some manner into the Permit. ER 87 at Sections II.B.5 and II.C.

In August 2012, Ecology issued the Phase I Municipal Stormwater Permit and the Western Washington Phase II Municipal Stormwater Permit (collectively referred to as "Ecology's MS4 Permits"). *See* ER 68 and 69. Ecology's MS4 Permits contain post-construction performance standards that are the same as the performance standards in JBLM's Permit. *See* ER 56 at Appendix F.

In preparing the draft NPDES permit, the Region provided JBLM with a pre-draft permit and fact sheet in June 2011. ER 44. JBLM provided written comments on these documents in October 2011 and November 2011. ER 50 and 51. In addition, the Region met with JBLM on at least three occasions in 2010, 2011 and 2012 to discuss various provisions in the draft permit. ER 33, 46, and 85. At no point in these conversations did JBLM raise the fact that it could not meet the post-construction performance standards in the draft Permit. ER 46, 50 and 51. In fact, the only comment that JBLM raised with regard to the post-construction performance standards was that the Region could not rely on the Energy Independence and Security Act ("EISA") Section 438 to include the standards. *Id.* As explained in detail below, the Region did not rely on EISA Section 438.

On January 26, 2012, the Region published a notice seeking public comment on a draft NPDES permit that proposed to authorize discharges from JBLM's MS4 to waters of the United States. ER 55. The draft NPDES permit included the post-construction performance standards and retrofit plan requirement. *Id.* at Section II.B.5 and II.C. In addition, the permit contained various deadlines for completing specific requirements of the SWMP. *Id.* at Section III.

The public comment period ended on March 30, 2012. ER 54. During the public comment period, on March 19, 2012, the Region held a public meeting at the Lakewood Public Library. ER 59. A representative from JBLM attended that public meeting. *Id.*

JBLM and the Department of Defense ("DoD") Regional Environmental Coordinator submitted comments on the draft permit during the comment period. ER 62 and 63. Among the comments submitted by JBLM and DoD were comments concerning the inclusion of the post-construction performance standards and the retrofit plan requirement as well as broad statements concerning the deadlines for various SWMP requirements and specific requests to change some of the SWMP deadlines. *Id.*

After reviewing all of the comments, on August 22, 2013, the Region issued the final Permit with a response to comments document. ER 86 and 87. The effective date of the Permit was October 1, 2013. ER 87.

On September 19, 2013, Petitioner filed an unopposed Motion for Extension of Time to File Petition for Review with the EAB. The EAB granted a 30-day extension on September 24, 2013. Subsequently, due to the federal government shutdown, Petitioner filed a Motion for Additional Extension of Time to File Petition for Review on October 22, 2013. This motion was granted by the EAB on October 24, 2013. On November 5, 2013, Petitioner filed a timely Petition with the EAB. On November 25, 2013, the Region filed a Motion for Extension of Time

to File Response Brief. The EAB granted the Region's motion, thus, setting a response brief due date of January 15, 2014.

III. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a)(4)(i), Petitioner must demonstrate that the challenge to the permit decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See In re Three Mountain Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001). It is not enough that the petitioner merely repeat the objections that it made during the comment period. Instead, where the petition raises an issue that was addressed in the response to comments document, the petitioner must explain why the permit decision maker's "response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). Moreover, the EAB assigns a heavy burden on petitioners seeking review of issues that are technical in nature. *See In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). As stated by the EAB, "[i]f the Board is satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the Board typically will defer to the permit issuer." *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 08-18 & 09-06, slip op. at 44 (EAB May 28, 2010).

Furthermore, issues and arguments raised by a petitioner that are not raised during the public comment period will not be considered preserved for review without a demonstration that they were not reasonably ascertainable at the time. *See In re AES Puerto Rico, L.P.* 8 E.A.D. 324, 335 (EAB 1999); *In re Masonite Corp.*, 5 E.A.D. 551, 585 (EAB 1994). Issues must be raised during the public comment period to "ensure that the permit issuer has an opportunity to adjust its permit decision or to provide an explanation of why no adjustment is necessary." *In re*

AES Puerto Rico, L.P., 8 E.A.D. at 335. If an issue was not properly preserved for review, the EAB will generally deny review of the issue. *Id.*

IV. ARGUMENT

Petitioner raises the following issues in this appeal: (1) whether the Region has the authority to regulate stormwater flow through the post-construction performance standards and the retrofit plan requirement; (2) whether the Region has the legal authority to include post-construction performance standards in the Permit; (3) whether the Region has the authority to require JBLM to develop and implement a retrofit plan to reduce stormwater flow into impaired waterbodies; and, (4) whether the Region's SWMP deadlines are an abuse of discretion and raise important matters of public policy. For the reasons set forth below, the EAB should deny the Petition.

A. **The Region Has The Legal Authority To Include The Post-Construction Performance Standards And The Retrofit Plan Requirement In The Permit.**

Petitioner argues that EPA cannot regulate stormwater flow through the post-construction performance standards and the retrofit plan requirement in the Permit because stormwater is not a pollutant under the CWA. *See* Petition at p. 35. To bolster its argument, Petitioner cites to a recent decision in the Eastern District of Virginia. *Id.*; *see Virginia Department of Transportation v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013) (“*Accotink*”). However, this decision concerns the establishment of a total maximum daily load (“TMDL”) under CWA Section 303(d), 33 U.S.C. § 1313(d), and, thus, is not informative as to the Region's authority to control stormwater discharges in NPDES permits under CWA Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B).

In the *Accotink* case, the Virginia Department of Transportation challenged EPA's establishment of a TMDL under CWA Section 303(d), 33 U.S.C. § 1313(d). The TMDL expressed load and wasteload allocations of sediment in terms of the stormwater flow rate of the

impaired stream. In other words, the TMDL used the instream stormwater flow rate as a surrogate for sediment. For the purposes of the TMDL, EPA asserted that the “sediment load in Accotink Creek [is] a function of the amount of stormwater runoff generated within the watershed.” *Id.* at *8. In making its decision, the district court looked at the specific language of CWA Section 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). That section states: “Each State shall establish for the water identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the [TMDL], for those pollutants which the Administrator identifies ... as suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(C). The district court held that the plain language of CWA Section 303(d) precludes establishing TMDLs for anything other than “pollutants.” *Id.* at *12 (“The Court considers the language of [CWA Section 303(d)(1)(C)] to be unambiguous....EPA’s authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants.”).

Here, CWA Section 402(p)(3)(B), not CWA Section 303(d), provides the statutory authority for the Region to regulate stormwater discharges. 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). In other words, CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), authorizes EPA to control and regulate stormwater itself, recognizing that all stormwater contains pollutants. This section provides the permit writer with broad authority to determine what controls are necessary to include in a MS4 permit to ensure that the pollutants in the stormwater are reduced to the MEP, including post-construction performance standards for stormwater discharges from new

and redevelopment sites and retrofit plan requirements for existing stormwater discharges. *Id.*; *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 966 F.2d 1292, 1308 (9th Cir. 1992) (“Congress gave the Administrator discretion to determine what controls are necessary”); *City of Abilene v. EPA*, 325 F.3d 657, 661 (5th Cir. 2003) (“The plain language of § 1342(p) clearly confers broad discretion on the EPA to impose pollution control requirements when issuing NPDES permits”). In particular, in determining MEP, the permit writer must include “management practices, control techniques and system, design and engineering methods” that reduce the discharge of pollutants to the MEP. *Id.* Moreover, CWA Section 402(p)(3)(B)(iii) allows the permit writer to include more stringent requirements necessary to meet state water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (“Under [the] discretionary provision [of CWA Section 402(p)(3)(B)(iii)], the EPA has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.”).

As explained in detail below, based on the specific circumstances occurring at and around JBLM, the Region included the post-construction performance standards and retrofit plan requirement in the Permit to reduce the discharge of pollutants in the stormwater discharges to the MEP and to protect the water quality of the receiving waters, some of which are impaired waterbodies. Specifically, these Permit conditions require JBLM to choose from a list of known and available management practices and control techniques set forth in the Western Washington Stormwater Manual to reduce the discharge of pollutants to the MEP and to protect water quality. The *Accotink* case has no bearing on the Region’s authority to establish these provisions because the court in *Accotink* was specifically looking at CWA Section 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C), not CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), which expressly requires NPDES permits for “discharges from municipal storm sewers.”

B. The Region Was Well Within Its Authority Under CWA Section 402(p)(3)(B)(iii) In Establishing The Post-Construction Performance Standards In The Permit.

In the Petition, Petitioner lists the provisions in Section II.B.5 of the Permit that it challenges. Petition at p. 5-7. The crux of Petitioner's appeal, however, pertains to the post-construction performance standards in the Permit as well as requirements that JBLM comply with specific sections of the Western Washington Stormwater Manual.

Essentially, there are two post-construction performance standards in the Permit. These standards only apply to new and redevelopment sites that meet a specific size threshold. Both of these standards are the same as the post-construction performance standards in Ecology's MS4 permits.

First, the Region established a performance standard for on-site stormwater management (the "LID performance standard"). This performance standard applies to new and redevelopment projects that create or replace greater than or equal to 5,000 square feet of hard surfaces. The performance standard requires that stormwater controls must be designed to retain on-site the volume of stormwater produced from the 95th percentile rainfall event. ER 87 at Section II.B.5.e. In addition, the Region performed an analysis and concluded that this standard was functionally equivalent to the LID performance standard in Ecology's MS4 permits. ER 56 at Appendix F. As such, alternatively, JBLM can choose to meet the LID performance standard by ensuring the post-development stormwater discharge flows from the project do not exceed the pre-development discharge flows for the range of 8% of the 2-year peak flow to 50% of the 2-year peak flow, as calculated by using the Western Washington Hydrology Model. ER 87 at Section II.B.5.e. This is the same LID performance standard that is set forth in Ecology's MS4 permits.⁶ ER 68 at Appendix 1, p. 22 and ER 69 at Appendix 1, p. 21. The purpose of the LID

⁶ The LID performance standard in Ecology's MS4 Permits states:

Stormwater discharges shall match developed discharge durations to pre-developed durations for the range of pre-developed discharge rates from 8% of the 2-year peak flow

performance standard is to retain, infiltrate, and evaporate stormwater from small and medium storm events on-site through the use of LID controls thereby avoiding or minimizing the discharge of pollutants. ER 56 at Appendix F.

In addition to the LID performance standard, for large new and redevelopment projects⁷ that cannot effectively manage all stormwater on-site, the Region included the flow control performance standard in the Permit that requires JBLM to impose design requirements to limit discharge flows from the site to receiving waters such that post-development discharge flows do not exceed the pre-development discharge flows for the range of 50% of the 2-year peak flow to 100% of the 50-year peak flow. ER 87 at Section II.B.5.f. Pre-development is defined as forested land cover, unless historical information indicates that the site was originally a prairie. *Id.* Similar to the LID performance standard, this same flow control standard is contained in Ecology's MS4 permits. ER 68 at Appendix 1, p. 30 and ER 69 at Appendix 1, p. 29.⁸ The

to 50% of the 2-year peak flow.

ER 68 at Appendix 1, p.22 and ER 69 at Appendix 1, p. 21.

⁷ Large new/redevelopment projects are defined as: sites which create $\geq 10,000$ square feet effective impervious surface area; sites which convert $\frac{3}{4}$ acres or more from native vegetation to lawn/landscaping, and from which there is a surface discharge to a natural or manmade conveyance system; and, sites which convert 2.5 acres or more of native vegetation to pasture, and from which there is a surface discharge to a natural or manmade conveyance system. ER 87 at Section II.B.5.f.

⁸ The flow control performance standard in Ecology's MS4 Permits states:

Stormwater discharges shall match developed discharge durations to pre-developed durations for the range of pre-developed discharge rates from 50% of the 2-year peak flow up to the full 50-year peak flow. The pre-developed condition to be matched shall be a forested land cover unless:

- Reasonable, historic information is available that indicates the site was prairie prior to settlement (modeled as "pasture" in the Western Washington Hydrology Model); or
- The drainage area of the immediate stream and all subsequent downstream basins have had at least 40% total impervious area since 1985.

ER 68 at Appendix 1, p. 30 and ER 69 at Appendix 1, p. 29 (Phase I).

purpose of this requirement is to regulate the rate at which stormwater flows off the site to prevent large scale impairment of water quality and aquatic habitat through stream bank erosion. ER 56 at Appendix F.

1. The Region Did Not Base Its Decision To Include The Post-Construction Performance Standards On EISA Section 438.

Petitioner argues that, in establishing the post-construction performance standards, the Region exceeded its authority under the CWA and included the post-construction performance standards pursuant to the Energy Independence and Security Act (“EISA”) Section 438. During the public comment period, JBLM and DoD submitted comments that asserted that the Region based the establishment of the post-construction performance standards on EISA Section 438. ER 62 and 63. In response to that comment, the Region explained that the post-construction performance standards do not implement EISA Section 438. Instead, the Region established the post-construction performance standards pursuant to its authority under CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). ER 86 at p. 28-29. Petitioner has failed to explain why the Region’s response to the comment was inadequate and has merely reiterated the comment that was submitted during the comment period—that the Region based the establishment of the post-construction performance standards on EISA Section 438.

EISA Section 438 requires that federal facility projects over 5,000 square feet “maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume and duration of flow.” 42 U.S.C. § 17094. In December 2009, EPA issued the *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (“EISA Technical Guidance”). ER 90. The EISA Technical Guidance recommends two alternative options for maintaining or restoring predevelopment site hydrology: (1) designing, constructing, and maintaining stormwater management practices that manage rainfall onsite, and

prevent the off-site discharge of the precipitation from all rainfall events less than or equal to the 95th percentile rainfall event to the maximum extent technically feasible; or (2) designing, constructing, and maintaining stormwater management practices that preserve the pre-development runoff conditions determined through site-specific hydrologic analysis using continuous simulation modeling techniques, published data, studies or other established tools. *Id.* at p. 12. In August 2011, JBLM provided the Region with supplemental application information which included an October 27, 2010 Army Memorandum (“2010 Army Memo”). ER 48. The 2010 Army Memo states that federal facility construction projects will comply with EISA 438 consistent with the EISA Technical Guidance. ER 39 at p. 4. At no time during the permitting process did JBLM object to the post-construction performance standards on the basis that it could not meet the standards.

CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), requires the Region to establish conditions in a NPDES permit for MS4 discharges that reduces the discharge of pollutants to the MEP and authorizes additional provisions that the Region determines are appropriate for the control of such pollutants. *See* 33 U.S.C. § 1342(p)(3)(B)(iii). EPA has intentionally declined to define MEP to allow for maximum flexibility in MS4 permitting. 64 Fed. Reg. 68,722, 68,754 (Dec. 8 1999). Instead, as explained in the preamble to the Phase II stormwater regulations:

MS4s need flexibility to optimize reductions in stormwater pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving water, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.

Id.; *see also In Re: Gov’t of the D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323 at *22 (EAB Feb. 20, 2002) (“The CWA requires permit writers to “tak[e] into account the full range of

considerations before it [determines] that the BMPs required by the permit collectively represent the maximum practicable effort to reduce pollution.”). EPA further explained that:

For [MS4s], EPA ... may determine that other permit provisions ... are appropriate to protect water quality, to achieve reasonable further progress toward the attainment of water quality standards pending implementation of a total maximum daily load [A SWMP] designed to reduce the discharge of pollutants from the [MS4] ‘to the [MEP]’ is also designed to protect water quality.

64 Fed. Reg. at 68787; *see also id.* at 68,788 (“Section 402(p)(3)(B)(iii) specifically preserves the authority for EPA ... to include provisions determined appropriate to reduce pollutants in order to protect water quality.”).

Contrary to Petitioner’s assertion, EISA Section 438 and the recommendations in the EISA Technical Guidance were not the basis for establishing the post-construction performance standards in the Permit, nor does the Permit implement and enforce EISA Section 438. Instead, as explained in the Fact Sheet and response to comments document, the Region looked at numerous factors to determine that the post-construction performance standards constitute MEP, including the fact that the Army directed its installations to implement EISA Section 438 consistent with the EISA Technical Guidance. ER 56 and 86.

In addition to the 2010 Army Memo, the Region considered Ecology’s MS4 permits, and included essentially the same post-construction performance standards in the JBLM Permit. ER 68 and 69. With regard to the LID performance standard, the Permit requires that JBLM design stormwater controls to retain on-site the volume of stormwater produced from the 95th percentile rainfall event. ER 87 at Section II.B.5.e. As the Region acknowledged in the Fact Sheet, this standard is one of the options set out in the EISA Technical Guidance. ER 56 at p. 38. The Region, however, also concluded that this standard is the functional equivalent of the LID performance standard in Ecology’s MS4 permits. *Id.* at Appendix F. As such, the Region provided flexibility to JBLM by establishing an alternative LID performance standard that is

exactly the same as the LID performance standard in Ecology's MS4 permits. ER 68 at Appendix 1, p. 22 and ER 69 at Appendix 1, p. 21 (Phase I). Further, the Permit requires JBLM to implement a flow control performance standard for large projects. ER 87 at Section II.B.5.f. This is the same flow control performance standard that is in Ecology's MS4 permits. ER 68 at Appendix 1, p. 30 and ER 69 at Appendix 1, p. 29.

The Region also analyzed whether JBLM would be able to meet the post-construction performance standards. In doing so, the Region concluded that soils throughout JBLM are suitable for infiltration, which is the primary method for complying with the LID performance standard. *See* ER 78 at p. 40. Moreover, JBLM has already successfully constructed a stormwater treatment facility that the Region has determined currently complies with the performance standards in the Permit through infiltration and volume control. ER 25 at p. 1, 4, ER 43 at p. 15, and ER 56 at Appendix F. To account for the potential that JBLM may not be able to meet the post-construction performance standards at a particular new or redevelopment project, the Region established permit provisions that exempt new and redevelopment projects from full attainments with the performance standards if certain criteria are met. ER 87 at Appendix C & D.

Since the post-construction performance standards in the Permit are the same as the post-construction performance standards in Ecology's MS4 permits, all the jurisdictions surrounding JBLM are required to implement these standards. CWA Section 313, 33 U.S.C. § 1323, provides that federal facilities are required to meet requirements concerning the control and abatement of water pollution in the same manner and the same extent as any nongovernmental entity. Here, in requiring JBLM to meet the post-construction performance standards, the Region is ensuring a level playing field amongst all regulated MS4s in the Seattle Urbanized Area. The Region also considered the fact that the State of Washington Pollution Controls

Hearing Board (“PCHB”) has already found that MS4 permits in Western Washington must require the implementation of LID to meet the MEP standard. *See Puget SoundKeeper Alliance, et al. v. State of Washington Department of Ecology*, Findings of Fact, Conclusions of Law and Order, Phase I at p. 65, Phase I, PCHB Nos. 07-021, et al. (PCHB Aug. 7, 2008), ER 19.

The Region also relied upon various water quality reports concerning the impact of stormwater to Puget Sound as well as the general impacts of stormwater. The PSP Action Agenda has identified the use of LID approaches to stormwater management as an action item for managing stormwater runoff in urban and urbanizing areas to reduce stormwater-related impacts. ER 22 at p. 91-92. The Action Agenda also recognizes that implementation of Ecology’s MS4 permits, which include the post-construction performance standards, is an action item. *Id.* As previously stated, JBLM is a member of the PSP Federal Caucus. In addition, the Region reviewed a report issued by the National Research Council entitled Urban Stormwater Runoff in the United States as well as other scientific research that highlight the inadequacies of conventional stormwater management techniques and recommend control measures to harvest, infiltrate, and evaporate stormwater to reduce the volume and pollutant loadings of stormwater runoff. ER 56 at 30-32.

Further, the U.S. Fish and Wildlife Service (“FWS”) and the National Oceanic and Atmospheric Administration – Fisheries (“NOAA Fisheries”) (collectively referred to as the “Services”) concurred with the Region’s finding that the Permit action is not likely to adversely affect species listed as endangered or threatened under the Endangered Species Act (“ESA”). The Region’s findings in the Biological Evaluation (“BE”) were based, in part, on the fact that JBLM would be implementing the post-construction performance standards.⁹ ER 78. The Region requested that the Services informally consult on the permit action in accordance with

⁹ When EPA issues a NPDES permit, it is required to comply with ESA. 40 C.F.R. § 122.49(c).

ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2). The Region received concurrence letters from the Services in June 2013 and July 2013. ER 82 and 83.

Finally, EPA has been encouraging permitting authorities to include post-construction performance standards in MS4 permits. ER 30 at p. 51-56. In fact, in states where the Region is the permitting authority, the Region has been including post-construction performance standards in MS4 permits it has issued. ER 27 and 77.

Based on all these facts, the Region concluded that the post-construction performance standards along with the specified stormwater management techniques in the Western Washington Stormwater Manual, and the performance standard exemption provisions constitute MEP and are appropriate and necessary to protect water quality. *See* ER 56 at p.16. As such, the Region included these performance standards in the Permit. Petitioner has failed to explain why the Region's rationale constitutes clear error and merely reiterates what JBLM and DoD stated during the comment period. Therefore, the EAB should deny review of this issue.

2. The Region Was Reasonable In Requiring JBLM To Use Or Be Consistent With Specified Sections Of The Western Washington Stormwater Manual.

Petitioner next contends that the Region exceeded its authority under CWA Section 402(p)(3)(B)(iii) by requiring compliance with specific provisions of the Western Washington Stormwater Manual ("Stormwater Manual"). Petitioner argues that the Region has ignored the flexible approach set forth in the Phase II regulations by requiring JBLM to use or be consistent with the Stormwater Manual. Petition at p. 13-20. Moreover, Petitioner argues that the Stormwater Manual does not meet the MEP standard. Petition at p. 27-30. Again, Petitioner fails to understand the MEP requirement in the CWA and its implementation through the six minimum measures of the Phase II stormwater regulations.

i. The Permit is Consistent With The Requirements Set Forth In 40 C.F.R. § 122.34.

Under the Phase II stormwater regulations, a SWMP must include the six minimum control measures.¹⁰ 40 C.F.R. § 122.34(b). Nothing precludes the permitting authority from going beyond what is required in the six minimum control measures if needed to protect water quality. 64 Fed. Reg at 68,753 (“Regardless of the basis for the development of effluent limitations (whether designed to implement the six minimum measures or more stringent or prescriptive limitations to protect water quality) ...”). Moreover, it is the permitting authority’s task to establish the effluent limits in the permit, which set forth the requirements for each of the minimum measures in the SWMP.¹¹ One of the six minimum control measures is the requirement to develop, implement and enforce a program to address post-construction stormwater runoff from new development and redevelopment projects (hereinafter referred to as the “post-construction minimum measure”). 40 C.F.R. § 122.34(b)(5). At a minimum, the post-construction minimum measure must: (1) develop and implement strategies which include a combination of structural and/or non-structural best management practices (“BMPs”); (2) use an ordinance or other regulatory mechanism to address post-construction runoff from new and redevelopment projects; (3) ensure adequate long-term operation and maintenance of BMPs; and (4) ensure that controls are in place that would minimize water quality impacts. *Id.* 40 C.F.R. §

¹⁰ The following are the six minimum control measures that must be contained in the SWMP: (1) public education and outreach on stormwater impacts; (2) public involvement and participation; (3) illicit discharge detection and elimination; (4) construction site stormwater runoff control; (5) post construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. *See* 40 C.F.R. § 122.34(b).

¹¹ The U.S. Court of Appeals for the Ninth Circuit rejected the Phase II Rule’s general permit process on the grounds that it allowed the MS, rather than the permitting authority, to determine what stormwater controls constitute MEP and that it failed to provide opportunity for public comment on the MS4’s choice of stormwater controls. *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832, 854-858 (9th Cir 2003) (“*EDC* decision”). The deficiencies identified in the *EDC* decision with respect to general MS4 permits are also relevant to individual permits; *i.e.*, it is up to the permitting authority, and not the permittee, to determine in the permit what controls are necessary to reduce pollutants in the MS4’s discharges to the MEP, and the public must have the opportunity to comment on those controls.

122.34(b)(5)(iii) states that “EPA recommends that the BMPs chosen... minimize water quality impacts; and attempt to maintain pre-development runoff conditions.” As explained in the preamble to the regulations, the recommendation that BMPs attempt to maintain pre-development runoff conditions was intended to “prevent water quality impacts resulting from increased discharges of pollutants which may result from increased volume runoff. In many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality standards, and to prevent degradation of receiving streams.” 64 Fed. Reg. at 68,761.

Petitioner wrongly asserts that the Region has added additional control measures beyond the six minimum control measures by requiring JBLM to be consistent with specific sections of the Stormwater Manual. In fact, all the Region has done is define what JBLM is required to do as part of the post-construction minimum measure. The Region is requiring JBLM to use or be consistent with portions of the Stormwater Manual as a way to define what constitutes MEP in this Permit for the post-construction minimum measure of the SWMP. As explained in the Fact Sheet and the response to comments document, the WWSWM provides guidance on the measures necessary to control the quantity and quality of stormwater produced by new and redevelopment activities, to comply with water quality standards, and protect beneficial uses of the receiving waters. ER 56 at p.16 and ER 86 at p. 26. The Region’s requirements concerning the WWSWM help to define the post-construction minimum measure, they do not add additional control measures. Even assuming that the Region has added additional measures, there is nothing that prevents the Region from doing this under the CWA and Phase II regulations. *See Defenders of Wildlife v. Browner* at 1161. The Region is within its authority under the Phase II regulations to conclude that additional measures are necessary to ensure that the permit protects

water quality and satisfies the “appropriate water quality requirements of the CWA” as directed by 40 C.F.R. § 122.34(a).

ii. The Western Washington Stormwater Manual Constitutes MEP.

Under the Washington Water Pollution Control Act, NPDES permits must contain requirements which provide “all known and reasonable methods of treatment, prevention and control” (“AKART”). RCW 90.52.0404 and 90.48.010. In *Puget SoundKeeper Alliance, et al. v. State of Washington Department of Ecology*, Findings of Fact, Conclusions of Law And Order, Phase I, PCHB Nos. 07-021, et al. (PCHB Aug. 7, 2008) (“PCHB Decision”), the PCHB looked at whether Ecology was required to include LID requirements in Ecology’s Phase I stormwater permit to meet the MEP and AKART standards of federal and state law. ER 19 at p. 4. The PCHB held that Ecology was required to include LID provisions in the permit to meet the MEP and AKART standards. *Id.* at p. 65. In so holding, the PCHB noted that “[t]he [Stormwater Manual] represents Ecology’s generalized determination of what constitutes AKART for stormwater management.” *Id.* at p. 33, Fn 17. The PCHB concluded that “the Phase I Permit must be modified to require the use of LID where feasible, as it is necessary to meet the MEP and AKART standards of federal and state law The Permit, including the [Stormwater Manual], merely sets forth the methods” by which local governments must address stormwater runoff in order to mitigate or cleanse discharges of water pollution. *Id.* at 65.

Petitioner contends that since the PCHB did not mandate the use of the Stormwater Manual, the Region cannot require JBLM to comply with specific sections of the manual. However, the question is whether it was *reasonable* for the Region to include permit provisions that require JBLM to use or be consistent with specific sections of the Stormwater Manual, not whether the Region was *required* to do so. Not only did the Region look to the statements made by the PCHB, the Region also looked at the fact that Ecology requires the use of the measures

described in the Stormwater Manual in Ecology's MS4 permits to comply with the new and redevelopment requirements. *See e.g.*, ER 68 at Appendix 1, p. 25-27 (Phase II permit requires the use of BMPs set forth in the Stormwater Manual to comply with the LID performance standard). Since all of the regulated MS4s surrounding JBLM are using the Stormwater Manual, it is reasonable to require that JBLM use or be consistent with specified sections of the Stormwater Manual. Moreover, JBLM has reported to the Region that it adopted the Stormwater Manual. ER 7 at p. 10. Since AKART and MEP are similar standards and since the Stormwater Manual addresses stormwater management techniques for Western Washington, the Region's decision to require JBLM to comply with specific sections of the WWSWM was not an abuse of discretion or unreasonable. Indeed, Petitioner has failed to explain why the Region's rationale was arbitrary and capricious or unreasonable.

3. **EPA's Stormwater Regulations Allow The Region To Include A Requirement That Hydrology Be Modeled To Pre-Settlement Conditions And EPA Does Not Have To Complete Rulemaking To Include This Provision In The Permit.**

The Permit states that "the modeled pre-development condition for all new development and redevelopment project sites must be 'forested land cover' ... unless reasonable historic information indicates the site was prairie prior to settlement." ER 87 at Section II.B.5.e. Petitioner argues that the Region exceeded its authority under the CWA in establishing this requirement and further argues that to include such a requirement, EPA must complete rulemaking. Petition at p. 20-22.

First, Petitioner failed to raise this argument during the comment period. Issues and arguments raised by a petitioner that are not raised during the public comment period will not be considered to be preserved for review without a demonstration that they were not reasonably ascertainable at the time. *In re Masonite Corp.*, 5. E.A.D. 551, 585 (EAB 1994). This particular

Permit provision was set forth in the draft Permit that was subject to public comment. ER 87 at Section II.B.5.e. Petitioner had the opportunity to raise this argument during the comment period and failed to do so. ER 62 and 63. Moreover, Petitioner has failed to demonstrate that this issue was not reasonably ascertainable during the comment period. Therefore, Petitioner failed to preserve this argument for review.

Even if this issue were reviewable, Petitioner's argument must fail because the Region did not exceed its authority by defining the pre-development condition as forested land cover. The Supreme Court has firmly established that agencies can act by rulemaking *or* adjudication and the choice "between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Cheney Corp.*, 332 U.S. 194, 203 (1974). As explained in the Fact Sheet, the requirement to model to forested conditions within the Puget Sound basin comes from the Stormwater Manual. This is the same requirement in Ecology's MS4 permits. ER 68 at Appendix 1, p. 5. As such, all the regulated MS4s surrounding JBLM are being held to this same requirement and, in fact, have been required to implement this provision since at least 2010. Moreover, JBLM stated that it planned to adopt the Stormwater Manual. ER 7 at p. 10. Based on these factors, the Region determined that modeling to forested conditions along with the other components of the post-construction minimum measure constitutes MEP for this particular Permit. Since the Region analyzed this requirement based on the site-specific conditions and factors concerning JBLM, general rulemaking is not warranted.

Petitioner correctly notes that in the preamble to the Phase II regulations, EPA stated that "[p]re-development refers to runoff conditions that exist onsite immediately before the planned development activities occur." However, 40 C.F.R. § 122.34(b) sets forth the minimum measures to be implemented. The Region is not precluded from using the adjudicatory process

of permit issuance to define predevelopment as something else if the Region determines that it is necessary to ensure that the MEP standard is met in a specific NPDES permit. As explained above, the Region did just that.

In sum, the Board should not review this provision because Petitioner failed to raise this argument during the comment period. Moreover, even if Petitioner did raise this argument, the Region did not exceed its authority under the CWA and its implementing regulations.

4. The Region Was Required To Include Use Of The Stormwater Manual In The Permit Because Use Of The Stormwater Manual Is A Condition Of Ecology's 401 Certification.

Petitioner does not dispute – because the law is clear - that CWA Section 401(d) requires EPA to include in its permit any limitation or condition necessary to assure compliance with water quality standards or “any other appropriate requirement of State law” as set forth in the state’s certification. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.55(a)(2). Instead, Petitioner argues that the Region was incorrect in stating that it had to require JBLM to comply with the Stormwater Manual based upon CWA Section 401(d), 33 U.S.C. § 1341(d), because the Stormwater Manual is a guidance document and does not constitute State law. Petitioner further argues that Ecology could not use the 401 certification to require use of the Stormwater Manual or provisions from Ecology’s MS4 permits in the Permit. As an initial matter, Petitioner’s primary argument regarding use of the Stormwater Manual is that it does not constitute MEP. If the EAB concludes that it was reasonable for the Region to determine that the Stormwater Manual constitutes MEP, then the EAB does not have to reach this issue concerning CWA Section 401, 33 U.S.C. § 1341. Further, as explained below, Petitioner’s arguments must fail.

First, the EAB should dismiss Petitioner’s CWA Section 401 claim because Petitioner failed to raise it during the public comment period. *See In re Masonite Corp.*, 5 E.A.D. 551, 585 (EAB 1994). In the Fact Sheet to the draft Permit, the Region explained that one basis for

requiring JBLM to use or be consistent with the Stormwater Manual was that Ecology included this condition in the draft 401 certification. ER 56 at p. 16. Moreover, the Region specifically stated that it was soliciting comments on whether it was appropriate to include the references to the Stormwater Manual.¹² *Id.* During the comment period, JBLM and DoD failed to submit a comment that contested the inclusion of the requirements to comply with the Stormwater Manual based upon CWA Section 401(d), 33 U.S.C. § 1341(d). ER 62 and 63. Petitioner has failed to explain why this issue was not reasonably ascertainable during the comment period. Therefore, Petitioner cannot raise this issue on appeal.

The EAB should also dismiss Petitioner's CWA Section 401 claim because the EAB is not the appropriate forum in which to attack Ecology's legal authority to include the Stormwater Manual condition in the 401 Certification. "In most cases, if a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts." *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006); *see also American Rivers v. FERC*, 129 F.3d 99, 110-111 (2d Cir 1997); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir 1991); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (ALJ made "fundamental error by seeking to determine which requirements of state law were appropriately affixed to the state's certification"); 40 C.F.R 124.55(e).

When the Region published the public notice for the Permit, it stated that the public notice also served as the public notice of Ecology's 401 certification. ER 54. The public notice explained that comments on the 401 certification should be sent to Ecology and provided Ecology's contact information. *Id.* The condition concerning compliance with the Stormwater Manual was contained in the draft 401 Certification that was public noticed at the same time as

¹² The Permit also requires JBLM to use or be consistent with the *Low Impact Development Technical Guidance Manual for the Puget Sound*. See ER 87 at Section II.B.5. This is also a State guidance document which was required to be included in the Permit pursuant to CWA Section 401(d). Notably, Petitioner does not seem to have an issue with complying with this guidance document.

the draft Permit. ER 53. Petitioner could have submitted a comment to Ecology on the draft 401 Certification contesting Ecology's legal authority; however, Petitioner failed to do so. Having failed to comment on this condition to Ecology, Petitioner cannot do so now in this venue.

C. The Retrofit Plan Requirement Is Authorized Pursuant to CWA Section 402(p)(3)(B)(iii).

Petitioner argues that the inclusion of the retrofit plan requirement in the Permit is beyond the Region's CWA authority. The retrofit plan provision requires JBLM to develop a stormwater retrofit plan to reduce flows and associated pollutants loadings from existing effective impervious surfaces into water quality degraded waterbodies. ER 87 at Section II.C. The retrofit plan must (1) evaluate the feasible use of LID techniques and other controls that infiltrate, evapotranspire, harvest and re-use stormwater runoff, or which otherwise eliminate stormwater flow volume and pollutants loadings from existing surfaces discharges to specified impaired waterbodies;¹³ (2) evaluate and prioritize existing building locations where the disconnection of existing flows from rooftop downspouts into the MS4 and/or into waters of the United States could be accomplished with priority given to roof disconnection projects within the Clover Creek subbasin; and (3) include a prioritized list of potential projects and project locations for specified waterbodies. *Id.* The retrofit plan must be submitted to EPA as part of the 3rd Year Annual Report. *Id.* The Permit further requires that, prior to the expiration date of the Permit, JBLM initiate or complete one or more structural retrofit projects that are identified in the retrofit plan. *Id.*

As explained in the Fact Sheet, response to comments document, and below, the retrofit plan requirement is a narrative water-quality based effluent limit that can be required pursuant to

¹³ The impaired waterbodies called out in the Permit are American Lake and Clover Creek. In addition, the Permit identifies waters that the Region considers to be degraded including, but not limited to: Murray Creek, Bell-McKay-Hamer Marshes near Sequatchew Creek, and Puget Sound. ER 87 at Section II.C.2.a.

CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). Pursuant to that section, the Region may include provisions that the Region determines are appropriate for the control of pollutants in a MS4 permit. As explained in *Defenders of Wildlife v. Browner*, CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) allows the permitting authority the discretion to “determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.” *Id.* at 1161. In other words, the Region has the discretion to include water-quality based effluent limits and conditions where it determines that such provisions are necessary to meet water quality standards.

Here, JBLM’s MS4 discharges to three primary waterbodies: Clover Creek, Murray Creek, and wetlands associated with Sequalitchew Creek that drain to Puget Sound. ER 56 at p. 9-10. Clover Creek is an impaired waterbody on the State’s 303(d) list and Murray Creek flows into American Lake which is also on the 303(d) list. *Id.* at p. 13. To date, the following watershed management plans have been completed for these waterbodies: *Management Plan for Murray/Sequalitchew Creek*, *Chambers/Clover Creek Basin Plan*, and the *Chambers-Clover Creek Watershed Action Plan*. ER 2, 8 and 16. These plans are collectively referred to as the “watershed management plans.” As explained in the response to comments document, each of these watershed management plans provide for specific recommendations for infrastructure and environmental improvement through stormwater retrofitting. ER 86 at p. 37. Moreover, the PSP’s Action Agenda identifies stormwater retrofit projects as an action item for management of stormwater runoff in urban areas to reduce stormwater related impacts. ER 22 at p. 52-53. Last, in their concurrence letters, the Services specifically stated that retrofit planning activities would benefit the impaired and degraded waterbodies identified in the Permit. ER 83 at p. 7 and ER 82 at p. 4.

The retrofit plan provision itself only mandates (1) that JBLM develop a retrofit plan; (2) that, as part of the plan, JBLM evaluate and prioritize existing building locations where disconnection of rooftop downspouts *could be* accomplished, with priority given to disconnection projects within the Clover Creek subbasin; and (3) that JBLM initiate or complete one or more retrofit projects by the end of the permit term. Petitioner appears to believe that the Region has required disconnection of existing flows from rooftop downspouts within the Clover Creek subbasin. That is not what the Permit requires. Instead the Permit requires that JBLM evaluate and prioritize building locations where disconnection of rooftop downspouts *could be* accomplished with *priority* given to the Clover Creek subbasin. It is unclear why it is impracticable for JBLM to develop a plan that includes this evaluation. Based on the watershed management plans, the PSP's Action Agenda, and the Services concurrence letters, the Region concluded that the retrofit plan requirement was needed to protect water quality and included the provision as a narrative water quality-based effluent limit pursuant to its authority under CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii).¹⁴

D. Petitioner Failed To Raise Objections To The Specific Deadlines That Petitioner Contests In The Petition During The Public Comment Period.

The Permit contains an implementation schedule for completing various components of the SWMP. ER 87 at Section III. These deadlines are summarized in Table III of the Permit. *Id.* During the comment period, JBLM provided specific comments and requests with regard to specified deadlines in the Permit. ER 62 and 63. Where such a request appeared reasonable, the

¹⁴ Petitioner appears to be confused as to the difference between a narrative water quality based effluent limit and narrative water quality criteria. Petitioner argues that the Region failed to tie the retrofit plan provision to limiting the discharge of a specific pollutant to protect the designated use and bases this argument on the definition of "narrative water quality criteria." Petition at p. 34. Narrative water quality criteria are narrative water quality standards that are established by a State and approved by EPA. A NPDES permit must ensure that, among other things, narrative water quality criteria, if any, are not exceeded. In doing that, a NPDES permit may include narrative water-quality based effluent limits. That is what the Region did here – include the retrofit plan provision as a narrative water quality-based effluent limit.

Region granted the request. ER 86. For example, the draft Permit provided for a 12-month period in which JBLM was required to develop an illicit discharge detection and elimination system program. During the public comment period, JBLM requested that this period be extended to 30 months. ER 63. The Region agreed to this request. ER 86 at p. 19.

Petitioner now requests the EAB to order the Region to set new permit deadlines with respect to permit provisions specified in an attachment to the Petition. Petition at Attachment F. Petitioner failed to make this request during the comment period. Petitioner claims that this request is warranted because the Region should have realized it needed more time based on a general comment submitted during the comment period that “[e]xpecting Federal Facilities to be able to successfully react to this proposed level of increase in requirements, in a single permit cycle, is unrealistic.” Petition at p. 38-40. In fact, Petitioner is attempting to raise a new issue in this appeal by claiming that it preserved the issue in a broad general comment submitted during the comment period.

As explained above, issues and arguments raised by a petitioner that are not raised during the public comment period will not be considered to be preserved for review without a demonstration that they were not reasonably ascertainable at the time. *In re Masonite Corp.*, 5 E.A.D. 551, 585 (EAB 1994). Here, Petitioner had the ability to request additional time with respect to the permit provisions it cites to in Attachment F of the Petition during the public comment period. Petitioner failed to do so and now claims that (1) the Region should have realized that Petitioner was requesting changes to the deadlines specified in Attachment F to the Petition when JBLM made a broad comment concerning resources during the comment period and (2) the Region failed to provide timely notice of its expectations when it issued the final permit.

The Region is not a mind reader. If Petitioner failed to raise the comment during the comment period, the Region cannot be expected to know that JBLM was not going to be able to complete a specific condition in the Permit by the date specified. Since JBLM raised concerns about meeting other deadlines during the comment period, it is unclear why it could not request longer compliance dates with regard to the conditions set forth in Attachment F to the Petition during the comment period.

Further, the Region did provide notice of its expectations with regard to the various deadlines in the Permit when it issued the permit for public comment. ER 55 at Section III, Table 3. Petitioner could have commented on the deadlines during the public comment period. It failed to do so. Petitioner appears to be under the mistaken impression that the Region is required to notify JBLM when it was going to issue the final permit. Nowhere in the NPDES regulations is there such a requirement. Moreover, as a courtesy, the Region *did* notify JBLM that it was planning on issuing the Permit at the end of August 2013. ER 85. If JBLM now realizes that it will not be able to meet the deadlines set forth in the Permit, JBLM should request that the Region modify the Permit. Since JBLM failed to request a change to the deadlines of the specific permit provisions it has cited in Attachment F to its Petition during the public comment period, the EAB should not review this issue.

V. CONCLUSION

For the foregoing reasons, the Region respectfully requests that the EAB deny the Petition for Review.

DATED: January 15, 2014

Respectfully Submitted



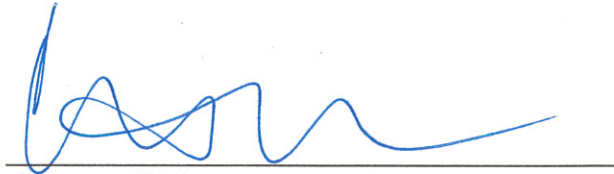
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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Courtney J. Weber, hereby certify, in accordance with 40 C.F.R. § 124.19(d)(1)(iv), that this Response Brief, including headings, footnotes and quotations, contains less than 14,000 words.

DATED: January 15, 2014



Courtney Weber
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing "EPA Region 10's Response Brief" was sent to the following persons, in the manner specified, on the date below:

By electronic filing (and hard copy via U.S. Mail) to:

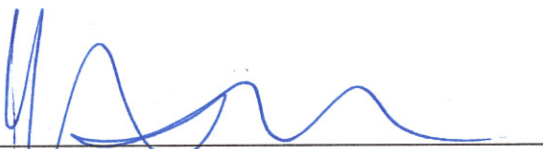
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DATED: January 15, 2014



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