

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

In re:

Joint Base Lewis-McChord Municipal
Separate Storm Sewer System

United States Department of the Army, Joint
Base Lewis-McChord, *Permit Applicant*

NPDES Permit No. WAS-026638

NPDES Appeal No. 13-09

**PETITION FOR REVIEW OF NPDES PERMIT FOR JOINT BASE LEWIS-McCHORD
MUNICIPAL SEPARATE STORM SEWER SYSTEM
AND REQUEST FOR ORAL ARGUMENT**

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the United States Department of the Army (“Petitioner” or “Army”) submits this petition for review of the final National Pollutant Discharge Elimination System (“NPDES”) Permit No. WAS-026638 issued on August 22, 2013, by the United States Environmental Protection Agency, Region 10. A copy of this NPDES Permit for Joint Base Lewis McCord [hereinafter JBLM Permit] is attached as Attachment A. This petition is timely filed in accordance with the orders issued on September 24, 2013, and October 24, 2013.

Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. A copy of Joint Base Lewis-McChord’s comments [hereinafter JBLM Comments, p. __, comment __] is attached as Attachment B. Additionally, a copy of the Response to Comment on National Pollutant Discharge Elimination System (NPDES) Permit For Discharges from the Joint Base Lewis-McChord Municipal Separate Storm Sewer System (JBLM MS4) NPDES Permit No. WAS-026638 [hereinafter EPA RTC, p. __, response __] is attached as Attachment C.

The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review. Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 124.

II. ISSUES PRESENTED FOR REVIEW

1) Whether EPA has the legal authority to include prescriptive post-construction stormwater management requirements and abused its discretion in doing so? *See* JBLM Comments, pp. 2 & 11-12, comments 10 & SS18.

2) Whether EPA has the authority under the NPDES Program to require a permittee to retrofit existing structures or to reduce stormwater flow? *See* JBLM Comments, pp. 2 & 14, comments 6 & SS22.

3) Whether EPA has the authority to regulate stormwater flow? *See* JBLM Comments, p. 14, comment SS22.

4) Whether EPA's compliance timelines are an abuse of discretion and raise important matters of public policy? *See* JBLM Comments, p. 3, comment 12.

III. STATEMENT OF FACTS

Joint Base Lewis-McChord ("JBLM") is approximately 90,000 acre Department of Defense ("DoD") installation located in Pierce and Thurston Counties, Washington. The population of JBLM is estimated at 95,000, which includes military personnel, military dependents residing on post, civilian employees, and visitors. It supports more than 40,000 active, National Guard, and Reserve Service members, their families, and about 15,000 civilian workers. JBLM exists to provide state-of-the-art training and infrastructure, responsive quality of life programs to service members and their families, and a fully-capable mobilization and deployment platform for Army, Navy, Air Force, and Marines.

In 2003, prior to the issuance of the JBLM Permit, then Fort Lewis submitted a NPDES permit application to EPA with a Storm Water Management Program ("SWMP") for the portion of its the municipal separate storm sewer system ("MS4") located within the Seattle Urbanized Area. In 2004, Fort Lewis submitted a SWMP report, and in 2007, submitted the Watershed Management Plan for the Murray/Sequalitchew Watershed. In 2007, at EPA request, then McChord Air Force Base ("AFB") submitted a separate MS4 permit authorization for municipal stormwater discharges not covered under McChord's NPDES Multi-Sector General Permit for

Stormwater Associated with Industrial Activity, #WAR05-000F. In 2010, Fort Lewis and McChord AFB ceased to exist when JBLM was established. This new entity is cooperatively operated by the Army and Air Force. It combines the former Fort Lewis Army post and the former McChord AFB. *See* Fact Sheet NPDES Permit # WAS-026638, Joint Base Lewis-McChord MS4, p. 5 [hereinafter Fact Sheet, p.] (attached as Attachment D). In 2010 and 2011, JBLM submitted additional matters to supplement Fort Lewis's previous MS4 application information and to revise the NPDES MS4 permit application to reflect the base realignment action which created JBLM. *Id.*

On January 26, 2012, the U.S. Environmental Protection Agency ("EPA") Region 10 proposed a draft NPDES permit for discharges from the MS4 owned and operated by JBLM. *See* EPA RTC, p. 3. At this time Region 10 also issued the Fact Sheet. Public comment on the draft permit ended on March 30, 2012. *See* Fact Sheet, p. 1. Comments were received from a number of parties including JBLM and DoD. This draft permit was the first MS4 permit for a federal facility in the Puget Sound region of Washington State.

The 401 certification by the State for the JBLM Permit effectively consists of two letters. First, in January 2012, the Department of Ecology responded to an EPA request for "a preliminary (CWA) 401 Water Quality Certification." Letter from Robert W. Berquist, Sw. Region Manager, Dep't of Ecology, to Michael Lidgard, NPDES Permits Unit Manager, U.S. EPA Region 10 (Jan. 17, 2012) [hereinafter Ecology Letter, Jan. 2012]. Although the Department did specify that this was not a "formal" certification, they stated that some issues, including the section on new and redevelopment sites, "must" be addressed for the State to certify the permit. *Id.* In a second letter, the Department certified the permit on the basis that EPA had "include[d] those provisions" mentioned in Washington's first letter. Letter from

Deborah Cornett, Acting Section Manager, Dep't of Ecology, to Michael Lidgard, NPDES Permits Unit Manager, U.S. EPA Region 10 (Aug. 7, 2013) [hereinafter Ecology Letter, Aug. 2013]. Because this second certification letter was issued based on the first letter's demands, both letters effectively compose the State's 401 certification of the JBLM Permit.

Personnel from JBLM and DoD Regional Environmental Counsel's Office submitted written comments to various drafts of the proposed Permit and attended several meetings with Region 10 regarding language in the Permit. The parties were unable to come to an agreement on mutually acceptable language regarding certain provisions in the Permit prior to EPA issuance of the JBLM Permit.

IV. ARGUMENT

The Environmental Appeals Board may review and remand permits when the regional office of EPA has made determinations based on clearly erroneous findings of fact or conclusions of law, where the permit appeal raises important matters of public policy, or constitute an abuse of discretion. 40 C.F.R. § 124.19(a). As set forth below, the Army seeks review of certain provisions of the JBLM Permit. All provisions of the JBLM Permit that are not appealed by this Petition are severable from the appealed provisions that became effective on October 1, 2013.

A. EPA lacks any legal authority to include prescriptive post-construction stormwater management requirements and abused its discretion in doing so.

Section II B.5. of the JBLM Permit contains what are referred to as the "minimum control measures" for stormwater management in areas of new development and redevelopment. These minimum control measures significantly deviate from the regulatory requirements for post-construction storm water management. In the JBLM Permit, EPA has added several prescriptive design and construction requirements, inserted predevelopment hydrology requirements to

comply with section 438 of the Energy Independence and Security Act (“EISA”), arbitrarily copied large portions of unpromulgated State guidance into the permit, added flow restrictions to the minimum control measures, and failed to incorporate the site-specific flexibility established in regulatory and statutory requirements. These provisions are inconsistent with EPA’s authority for CWA stormwater permits for MS4s under section 402(p)(3)(B), and should be remanded for consistency with CWA statutory and regulatory requirements. In addition to increasing the cost of construction projects in a time of significant budget constraints, with little or no demonstrated environmental benefit, these requirements will interfere with JBLM’s careful real property master planning and facility design standards, which support DoD’s unique mission requirements.

The JBLM Permit includes the following contested provisions in Section II.B.5¹:

Stormwater Management for Areas of New Development and Redevelopment. Not later than one year from the effective date of this permit, the Permittee must implement a program to manage stormwater from developed areas in a manner that preserves and restores the area’s predevelopment hydrology. The Permittee must use an ordinance (or other regulatory mechanism available under the legal authorities available to JBLM) to implement and enforce a program to control stormwater runoff from all public and private new development or redevelopment project sites that will disturb 5,000 square feet or more of land area.

Preparation of a Stormwater Site Plan. For all new development and redevelopment project sites disturbing 5,000 square feet or more, the Permittee must require a project-specific Stormwater Site Plan. Stormwater Site Plans must be prepared consistent with Chapter 3, Volume 1-*Minimum Technical Requirements and Site Planning* of the 2012 *Stormwater Management Manual for Western Washington*; and with Chapter 3 of the *Low Impact Development Technical Guidance Manual for the Puget Sound (2012)*. For new development or redevelopment sites disturbing 5,000 square feet or more within Airport Operations Areas (AOA), stormwater site plans must be prepared consistent with the *Aviation Stormwater Design Manual (2008)*.

¹ JBLM has only included language for the provisions to which it objects. There are other provisions within Section II.B.5. to which JBLM has no objection.

New Development and Redevelopment Site Design to Minimize Impervious Areas, Preserve Vegetation, and Preserve Natural Drainage Systems.

- The Permittee must require site design that minimizes the project's roadway surfaces and parking areas, incorporates clustered development, and ensures that vegetated areas are designed to receive stormwater dispersion from all developed project areas.

Hydrologic Performance Requirement for On-site Stormwater Management.

- *For lawn and landscape areas on the new development or redevelopment project site*, the Permittee must ensure the soil quality meets the specifications within BMP T5.13 (Post-Construction Soil Quality and Depth) in Chapter 5 of Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington (2012)*. Lawn and landscape areas associated with project sites occurring within Airport Operations Areas must ensure the soil quality meets specifications of source control BMPs must be selected, designed and maintained in accordance with the *Aviation Stormwater Design Manual (2008)*.
- *For new or redevelopment project sites creating or replacing 2,000 \geq 4,999 square feet of hard surfaces*, the Permittee must ensure that stormwater dispersion or infiltration BMPs are used consistent with those specified in the 2012 *Stormwater Management Manual for Western Washington* and/or the *Low Impact Development Technical Guidance Manual for the Puget Sound (2012)*. Such project sites within Airport Operations Areas must ensure that stormwater dispersion or infiltration BMPs are used consistent with those specified in the *Aviation Stormwater Design Manual (2008)*.
- *For new development or redevelopment project sites creating or replacing 5,000 square feet or more of hard surfaces*, the Permittee must ensure stormwater controls are designed to retain on-site the volume of stormwater produced from the 95th percentile rainfall event.
- As an alternative, the Permittee may instead comply with this requirement to manage stormwater runoff from new or replaced hard surfaces \geq 5,000 square feet by ensuring the post-development stormwater discharge flows from the project site 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 (or other continuous runoff model).
- For the purposes of this permit, the modeled pre-development condition for all new development and redevelopment project sites must be "forested land cover" (with applicable soil and soil grade), unless reasonable historic information indicates the site was prairie prior to settlement (and may be modeled as "pasture" when using the Western Washington Hydrology Model).

Hydrologic Performance Requirement for Flow Control. The Permittee must ensure that the following new development and redevelopment project sites are designed to control post development discharge flows: 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 *Joint Base Lewis-McChord MS4* Permit No. WAS-026638 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. For these new development or redevelopment project sites, post-development stormwater discharge flows must 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, as calculated by using the Western Washington Hydrology Model (or other continuous runoff model).

- For the purposes of this permit, the modeled pre-development condition for all new development and redevelopment project sites must be “forested land cover” (with applicable soil and soil grade), unless reasonable historic information indicates the site was prairie prior to settlement (and may be modeled as “pasture” when using the Western Washington Hydrology Model).
- The Permittee must prioritize the use of small scale dispersion or infiltration practices, or other appropriate Low Impact Development practices to meet this flow control requirement. The Permittee may not design new development or redevelopment sites to meet this hydrologic performance requirement for flow control solely through the use of large scale retention or detention practices.
- New development or redevelopment project sites that will discharge directly to the JBLM Canal, or indirectly through Outfalls #OF-4 or #OF-5, are exempt from this hydrologic performance requirement for flow control.

Operation and Maintenance. The Permittee must ensure long term operation and maintenance (O&M) of all permanent stormwater facilities used for onsite management, flow control, and treatment.²

JBLM Permit, pp. 16- 20.

² JBLM does not object to operation and maintenance of stormwater facilities that would be required under the MS4 NPDES permitting regulations, as that is one of the minimum control measures in the regulations. 40 C.F.R. § 122.34.

1. EPA has impermissibly included in the Permit a requirement to comply with EISA section 438.

JBLM's comments objected to EPA's inclusion of predevelopment hydrology provisions based on EISA section 438, as there is no promulgated CWA requirement to preserve or restore predevelopment hydrology:

The JBLM draft permit contains stormwater management requirements that are based on section 438 of the Energy Independence and Security Act (EISA). Although, the permit does not reference EISA § 438 by name, we note that the Fact Sheet and statements in public meetings have made it clear that EPA based the requirements in II.B.5 on EISA 438. EISA and the Clean Water Act (CWA) are two separate statutes having related, but distinct, underlying purposes and enforcement mechanisms. The CWA is designed to eliminate the discharge of pollutants into navigable waters of the United States; EISA § 438 is designed to maintain or restore to the maximum extent technically feasible the pre-development hydrology of the property with regard to the temperature, rate, volume, and duration of flow. That is, EISA is designed to retain stormwater on-site, consistent with pre-development hydrology, to allow infiltration into groundwater rather than entry into navigable waters of the United States. We also note Congress did not amend the CWA when it passed EISA § 438. Rather, EISA § 438 was written to be self-executing by federal agencies, in the management of stormwater from federal development and redevelopment projects. The Department of Defense has already instructed its installations to implement EISA § 438, consistent with the EPA's Technical Guidance, through its policy memorandum issued January 19, 2010.

JBLM Comments, p. 1, comment 2.

We do not believe the CWA authorizes the inclusion of EISA §438 standards in JBLM's MS4 Permit. The CWA contains broad enforcement authorities to ensure compliance by the entire regulated community, including federal facilities, in applicable circumstances, but Congress did not extend that authority to the substantive EISA § 438 requirements. Prior to the inclusion of requirements based on EISA § 438 in an MS4 Permit, we believe the EPA is required to complete federal rulemaking under the Administrative Procedures Act to amend its stormwater regulations, providing all stakeholders notice and the opportunity to comment on the standards, their effectiveness, and the economic impact of the imposition of such standards.

JBLM Comments, p. 1, comment 3. *See also* JBLM Comments, p. 11, comment SS18.

EPA's response regarding incorporation of EISA 438 requirements into permit is as follows:

EPA's Permit does not purport to implement Section 438 of EISA, 42 U.S.C. § 17094. Further, EPA disagrees that the CWA and EISA §438 are mutually exclusive unless Congress directs otherwise. Post-construction performance standards for development sites are established by EPA in Permit Part II.B.5 pursuant to CWA Section 402(p)(3). EPA's FS at page 32 explains that these provisions are intended to "*...protect water quality in Puget Sound and its tributaries to the maximum extent practicable, [such that] all new development and redevelopment sites within the surrounding watersheds must be planned, designed, and constructed in a manner that minimizes the negative impact of urbanization by mimicking natural hydrology.*"

EISA §438 and EPA's 2009 Technical Guidance for EISA Implementation are cited in EPA's fact sheet as relevant illustrations of the Permit's performance standards. These references represent only two of several references EPA considered when establishing the new development/redevelopment requirements for the Permit. Additional references include: the 2008 National Research Council Report, "*Urban Stormwater Management in the United States*;" Ecology's Phase II Municipal Stormwater Permit for Western Washington, as issued in 2009; Ecology's Phase II Municipal Stormwater Permit for Western Washington, as proposed October 2011; the U.S. Department of Army Memorandum, entitled "*Sustainable Design and Development Policy Update (Environmental and Energy Stormwater Requirements under Section 438 of the Energy Independence and Security Act (EISA)*," dated January 2010; and several research studies regarding Puget Sound related stormwater management. These materials are included in the Administrative Record for the Permit.

EPA RTC, pp. 28-29, response 50.

EPA has inserted several predevelopment hydrology requirements into the JBLM Permit, including, for example, the requirement to retain on-site the volume of stormwater produced by the 95th percentile rain event into the permit. This requirement appears in JBLM's permit provisions relating to minimum control measure #5 (post-construction stormwater management in new development and redevelopment). The retention of the 95th percentile storm event

volume comes from EPA's own guidance document regarding the implementation of EISA section 438.

In December of 2007, EISA section 438, 42 U.S.C. § 17094, established stormwater design requirements for Federal development and redevelopment projects. Under these requirements, Federal facility projects over 5,000 square feet must "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 full, this provision states:

The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to 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.

Id.

Unlike the CWA, EISA does not contain a waiver of sovereign immunity, or provisions concerning enforcement.³ EISA did not amend the CWA, and is thus a self-implementing provision.

Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance* (October 5, 2009), directed the EPA to issue EISA section 438 guidance, which was issued in December of 2009. Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009). Appropriately, this nonbinding guidance does not mention enforcement of this provision and instead states that "[e]ach agency or department is responsible for ensuring compliance with

³ EISA contains a section on its relationship to other law.

Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

42 U.S.C. § 17002.

EISA section 438. EPA's *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*, 2 (Dec. 2009) available at

http://www.epa.gov/greeningepa/documents/epa_swm_guidance.pdf [hereinafter *EISA Technical Guidance*]. The *EISA Technical Guidance* states:

The purpose of this document is to provide technical guidance and background information to assist federal agencies in implementing EISA Section 438. Each agency or department is responsible for ensuring compliance with EISA Section 438. The document contains guidance on how compliance with Section 438 can be achieved, measured and evaluated. In addition, information detailing the rationale for the stormwater management approach contained herein has been included.

This document is intended solely as guidance. This document is not a regulation nor does it substitute for statutory provisions or regulations. This guidance does not impose any legally binding requirements on federal agencies and does not confer any legal rights or impose legal obligations upon any member of the public. This document does not create a cause of action against the EPA, other federal agencies, or the United States.

Id.

Notwithstanding the clear understanding that the *EISA Technical Guidance* is not a regulation and does not substitute for statutory provisions or regulations, EPA has inserted in the JBLM Permit, almost word-for-word, its chosen method for compliance with EISA section 438, that is, to retain the 95th percentile storm event on-site: EPA *EISA Technical Guidance*:

"Option 1: Retain the 95th Percentile Rainfall Event." See *EISA Technical Guidance*, at 12.

The JBLM Permit states: "*For new development or redevelopment project sites creating or replacing 5,000 square feet or more of hard surfaces, the Permittee must⁴ ensure stormwater*

⁴ While JBLM objects to the inclusion of this requirement in the permit, it notes that EPA has failed to include the flexibility that EISA 438 provides for its implementation: "to the maximum extent technically feasible."

controls are designed to retain on-site the volume of stormwater produced from the 95th percentile rainfall event."⁵ See JBLM Permit, p. 18.

The CWA and EISA section 438 are two separate statutes having related but distinct underlying purposes and enforcement mechanisms. The CWA is designed to eliminate or regulate the discharge of pollutants into navigable water of the United States and CWA permit terms are enforceable. See 33 U.S.C. § 1365. In contrast, EISA section 438 is designed to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology (volume, temperature, rate) of the property prior to a construction project. In other words, EISA section 438 is designed to retain stormwater on-site to allow infiltration into groundwater and evapotranspiration at a similar rate as existed prior to the project. As previously mentioned, EISA section 438 does not contain any specific enforcement provisions.

Section 402(p)(3)(B) of the CWA specifies the maximum extent practicable (“MEP”) as the pollution control standards for a MS4 NPDES permit, and EPA regulations implementing section 402 require the use of best management practices (“BMPs”) to achieve pollutant reductions to the MEP. While the retention of stormwater should result generally in a reduction in pollution, it is not clear that the retention of the 95th percentile storm event is practicable for each specific construction project, nor is there any evidence in the administrative record that this standard represents the MEP. Neither the *EISA Technical Guidance* nor the administrative record for this permit contains any factual basis to determine that this standard is the MEP; nor has there been any evaluation comparing this standard to other possible BMPs.

⁵ The JBLM Permit then offers an alternative to this requirement, which was copied from the Western Washington Stormwater Manual and which will be discussed later in this brief. JBLM notes that a recommendation to retain the 95th percentile rain event is found nowhere in the one-thousand thirty five pages of the Western Stormwater Manual.

The requirement to retain the volume equivalent to the 95th percentile storm event goes beyond the statutory authority contained in section 402(p)(3)(B) of the CWA. The EPA has not demonstrated that: (1) this specific stormwater retention measure is the MEP; (2) is as successful as BMPs to reduce point source discharges to waters; or (3) that this requirement is the only option for the JBLM.

2. EPA has impermissibly deviated from federal statutory and regulatory requirements and substituted recommendations from State guidance.

JBLM objected to the Permit's prescriptive post-construction stormwater management requirements that deviate from federal MS4 regulations and the statutory requirement to reduce pollutant discharges the MEP:

The requirements for small MS4 permits are set forth in 33 USC 1342(p)(3)(B), requiring the reduction of pollutants to the maximum extent practicable, and 40 CFR 122.34, requiring implementation of six specified minimum control measures. According to 40 CFR [sic] 122.34, narrative effluent limitations and application of BMPs are considered the most appropriate. Application of these measures, according to the regulation, satisfies the CWA statutory requirement to reduce pollutants "to the maximum extent practicable." 40 CFR 122.34(a). Inclusion of the prescriptive standards in the draft permit is inconsistent with the existing regulatory requirements in EPA's regulations.

JBLM Comments, p. 11, comment SS18. JBLM also provided specific examples of the detrimental impacts to JBLM from not using the flexible site-specific approach provided in federal small MS4 regulations, such as native soil requirements, and how airfield specifications are not amenable to certain predevelopment hydrology requirements. JBLM Comments, p. 11, comment SS18, and JBLM Comments, p. 2, comment 10.

EPA's response regarding inconsistency with EPA regulations on Minimum Control Measures and the MEP is as follows:

EPA declines to revise the Permit as suggested. CWA Sections 402(p) and 301(b)(1)(c) require EPA to impose stormwater management requirements

in MS4 Permits to the MEP, and allows EPA to impose additional requirements to meet water quality standards to the extent that EPA deems to be appropriate. See also *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161 (9th Cir.) amended by 197 F.3d 1035 (9th Cir. 1999). The FS for EPA's Permit explained on pages 14-19 that these requirements represent appropriate, technology-based narrative provisions determined to represent the MEP standard as required by 40 CFR §§ 122.44(a)(1) and 122.34, and as well as provisions necessary to meet state water quality standards per Ecology's final CWA Section 401 certification.

EPA RTC, pp. 29-30, response 51.

Clean Water Act Section 402(p)(3)(B) provides the permit standards for discharges composed of stormwater from an MS4:

Permits for discharges from municipal storm sewers

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into storm sewers; and

(iii) shall require "controls 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 as the Administrator or the State determines appropriate for the control of such pollutants.

C.W.A. § 402(p)(3)(B) (emphasis added).

Courts construing the requirements of section 402(p)(3)(B) have explained that this section replaces the requirements of section 311's effluent limitations with a "maximum extent practicable" test and that the "maximum extent practicable" is the standard imposed by the CWA and EPA for MS4s. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Conservation Law Found. v. Bos. Water & Sewer Comm'n*, 2010 U.S. Dist. LEXIS 134838 (D. Mass. 2010).

EPA permitting regulations for small MS4 permits, such as JBLM's Permit, repeat this standard, requiring the permittee to develop, implement, and enforce a stormwater management

program designed to reduce the discharge of pollutants from the MS4 to the MEP. 40 C.F.R. § 122.34. The management program must include the six minimum control measures described in the regulation: (1) public education and outreach on stormwater impacts, (2) public involvement/participation, (3) illicit detection and elimination, (4) construction site stormwater runoff control, (5) post-construction storm water management in new development and redevelopment, and (6) pollution prevention/good housekeeping for municipal operations. *Id.*

Post-construction stormwater management in new development and redevelopment requirements apply to projects that are one acre or more and smaller projects that are part of a larger common plan of development. The permittee must develop strategies that include a combination of structural and/or non-structural BMPs appropriate for the community the MS4 serves, use regulatory mechanism to address runoff from the development, and ensure adequate long-term operation and maintenance of the BMPs. 40 C.F.R. § 122.34(b)(5). In a section called "Guidance" following the regulatory requirements, EPA makes several recommendations for structural and non-structural BMPs.

EPA has defined BMPs in its regulations as “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ Best management practices also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” 40 C.F.R. § 122.2.

The entirety of the federal regulatory requirements for post-construction stormwater management (minimum control measure #5) is as follows:

(5) Post-construction storm water management in new development and redevelopment.

(i) You must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into your small MS4. Your program must ensure that controls are in place that would prevent or minimize water quality impacts.

(ii) You must:

(A) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for your community;

(B) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; and

(C) Ensure adequate long-term operation and maintenance of BMPs.

40 C.F.R. § 122.34(b)(5).

EPA has discarded this straightforward and reasonable approach to post-construction stormwater management from its own regulations and inserted in its place inflexible, prescriptive requirements that replicate recommendations from an unpromulgated, unenforceable State guidance document (the WASH. DEP'T OF ECOLOGY, STORMWATER MANAGEMENT MANUAL FOR WESTERN WASHINGTON, Ch. 2 (2012) *available at*

<https://fortress.wa.gov/ecy/publications/publications/1210030.pdf> [hereinafter WWSWM]).

EPA has offered no evidence that its own regulations are insufficient to reduce pollutants in stormwater to the MEP, as required by the CWA. Nor has it provided any factual basis establishing that these WWSWM recommendations are the MEP.

In comparison to the federal NPDES regulations, the WWSWM *recommends* nine potential "Minimum Requirements" for stormwater management. *See* WWSMW, Ch. 2.

According to the WWSWM, not all of the "Minimum Requirements" are needed for every development or redevelopment project. Rather, the applicability varies depending on the project

type and size. WWSWM, pp. 2-9. Nonetheless, EPA has placed every one of the nine "Minimum Requirements" from the WWSWM into the JBLM Permit for almost every project involving 5,000 square feet or more. The result is that the JBLM permit requires both sets – the six minimum control measures (as required by the NPDES MS4 regulations), plus the nine "Minimum Requirements" (embedded within minimum control measure #5).

The "Minimum Requirements" are listed below, along with the page numbers where they appear in the JBLM Permit (and thus replace the NPDES MS4 regulatory post-construction requirements as quoted above).

Minimum Requirement #1: Preparation of Stormwater Site Plans – JBLM Permit II.B.5.a) – (page 16).

Minimum Requirement #2: Construction Stormwater Pollution Prevention (SWPP) – JBLM Permit II.B.5.b) – (page 16-17).

Minimum Requirement #3: Source Control of Pollution - JBLM Permit II.B.5.c) – (page 17).

Minimum Requirement #4: Preservation of Natural Drainage Systems and Outfalls - JBLM Permit II.B.5.d) – (page 17).

Minimum Requirement #5: On-site Stormwater Management - JBLM Permit II.B.5.e) – (page 17-18).

Minimum Requirement #6: Runoff Treatment - JBLM Permit II.B.5.g) and Appendix B – (page 19, 62-65).

Minimum Requirement #7: Flow Control - JBLM Permit II.B.5.f) (page 18-19).

Minimum Requirement #8: Wetlands Protection - JBLM Permit II.B.5.h) (page 19).

Minimum Requirement #9: Operation and Maintenance - JBLM Permit II.B.5.j) (page 20).

JBLM objected to the inclusion of State guidance in its permit, see JBLM comments, p. 11, comment SS18, and to the deviation from federal statutory (i.e., the MEP) and regulatory

flexibility, as further described in the following sections. EPA's stormwater permitting regulations do not require prescriptive flow control designs for Minimum Control Measure #5

Neither the existing CWA regulations, nor CWA statutory provisions provide the basis for the specific stormwater retention provisions in the draft permit. To the contrary, EPA envisioned application of the MEP standard as an iterative process. Preamble to Phase II Rule, 63 Fed. Reg. 68,754 (Dec. 8, 1999).

If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process may take two to three permit terms."

Id.

EPA stormwater permitting regulations envision the permittee developing the appropriate BMPs to be applied at its property, so long as they meet the minimum control measures specified in the regulations. "The pollutant reductions that represent the MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process." *Id.* EPA regulations recognize that MS4s need flexibility to optimize reductions in stormwater pollutants on a location-by-location basis, and that BMP programs would be evaluated during each successive term of the MS4 permit. *Id.*

EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, 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.

EPA stormwater permitting regulations never intended to mandate the maintenance of "pre-development runoff conditions." Preamble to Phase II Rule, 63 Fed. Reg. 68,761 (Dec. 8, 1999). In response to commenters' concerns that maintaining predevelopment runoff conditions is impossible and cost-prohibitive, EPA assured the regulated community that references in the Phase II MS4 permitting regulation relating to predevelopment runoff conditions "are intended as *recommendations to attempt* to maintain pre-development runoff conditions." *Id.* (emphasis in original). Ten years after the promulgation of the Phase II regulation, EPA reiterated that the Phase II rule does not include specific management practices or standards to be implemented, and "recommends (but does not require) that the program to address stormwater from new development and redevelopment should attempt to maintain pre-development runoff conditions by installing and implementing stormwater control measures." Stakeholder Input; Stormwater Management Including Discharges from New Development and Redevelopment, 74 Fed. Reg. 68,617, 68,620 (Dec. 2009).

EPA has turned this flexible, adaptive approach to stormwater permitting on its head in the JBLM Permit. The permit issued in August 2013 is the first stormwater permit issued to JBLM. Fort Lewis applied for the permit on time, as required, in 2003. As part of its application and subsequent information provided to EPA, JBLM stated that it planned to incorporate LID principles into plans for new construction, would ensure new construction plans include provisions to properly manage post-construction stormwater runoff, and would adopt the WWSWM. *See* Fact Sheet. JBLM also described how the Base Public Works staff engages with their counterparts responsible for JBLM's comprehensive master planning, operations, design consultants, and the U.S. Army Corps of Engineers to include appropriate stormwater management techniques in any development project at the earliest possible phase. This work

includes participating in “deconfliction meetings” to locate facilities on JBLM, and design charettes to establish specific project features. Due to favorable soil conditions, on-site stormwater management is promoted by the Public Works staff for most projects. When necessary, new connections to existing stormwater infrastructure are justified through both a technological requirement and a system capacity evaluation. *See* Fact Sheet. Additionally, both DoD and Army policy promote the use of LID for on-site water retention. These actions and measures are precisely what are envisioned by the Phase II MS4 permitting regulations for the minimum control measure #5.

Given that the Permit signed on August 22, 2013, is the first MS4 permit issued to JBLM, EPA has provided no opportunity to evaluate the above practices and policies or any particular BMPs or LID practices to determine their effectiveness in reducing pollutants to the MEP.

3. EPA's stormwater regulations do not require hydrology to be modeled to pre-settlement conditions nor has EPA completed a rulemaking to change post-construction stormwater controls.

The flow control design requirements contained in the JBLM Permit require that the post-development flow not exceed the predevelopment flow by certain amounts. The JBLM Permit states that "the modeled pre-development condition for all new development and redevelopment project sites must be 'forested land cover' (with applicable soil and soil grade), unless reasonable historic information indicates the site was prairie prior to settlement." JBLM Permit, p.18. The requirement to model based on pre-settlement conditions to determine predevelopment flow directly contradicts EPA's long-standing interpretation of what is meant by predevelopment conditions within the context of redevelopment. "Predevelopment refers to runoff conditions that exist onsite immediately before the planned development activities occur. Predevelopment is not intended to be interpreted as that period before any human-induced land disturbance

activity has occurred." Preamble to Phase II Rule, 63 Fed. Reg. 68,761 (Dec. 8, 1999).

Additionally, some areas of JBLM are already developed, making the use of green technology practices to retain stormwater more difficult. The "unavailability of land in highly developed areas often make[s] the use of structural controls infeasible." NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,055 (Nov. 16, 1990).

Retaining the volume that would have infiltrated prior to human settlement is even less feasible in areas where there is existing development.

EPA has not promulgated a regulation that would standardize minimum requirements for construction and post-construction BMPs. As noted above, EPA stormwater permits generally do not contain specific requirements for BMP design or performance. EPA, to date, has not considered the merits and performance of all appropriate management practices.

Such a rulemaking would provide all stakeholders with notice and the opportunity to comment on establishing these types of standards under the CWA, their effectiveness in reducing pollutants in stormwater discharges to the MEP, the feasibility of their implementation, and the economic impact of such standards. The EPA initiated a rulemaking effort in 2009 to establish a program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program. Stakeholder Input; Stormwater Management Including Discharges from the New Development and Redevelopment, 74 Fed. Reg. 68,617 (Dec. 28, 2009). EPA sought input on the following preliminary regulatory considerations:

- Expand the area subject to federal stormwater regulations
- *Establish specific requirements to control stormwater discharges from new development and redevelopment*

- *Develop a single set of consistent stormwater requirements for all MS4s*
- *Require MS4s to address stormwater discharges in areas of existing development through retrofitting the sewer system or drainage area with improved stormwater control measures*
- Explore specific stormwater provisions to protect sensitive areas

Id. (emphasis added).

In support of its data collection efforts for this rulemaking, EPA explained it needed information relating to "the current burden and expenditures by States and MS4s associated with existing requirements; and technical, financial, and environmental data needed to quantify the incremental pollutant removals, compliance costs, and impacts for various regulatory options that EPA might consider." Stakeholder Input; Stormwater Management Including Discharges from New Development and Redevelopment, 74 Fed. Reg. 68,617, 68,621 (Dec. 2009). This regulatory effort has not proceeded beyond the notice of data collection. Without analysis of this information and public dialog on the effectiveness, feasibility and cost of these BMPs, EPA has no basis to determine that the prescriptive control designs in the JBLM Permit represent the MEP.

4. WWSWM is State guidance, not law, and thus cannot be made enforceable in a 401 certification.

JBLM also objected to the inclusion of Washington guidance in an enforceable CWA permit:

Additionally, many of the requirements in the subsections are based on unpromulgated guidance documents. All references to guidance in an enforceable CWA permit should be deleted. For example, the "Stormwater Management Manual for Western Washington (2005), the Low Impact Development Technical Guidance Manual for the Puget Sound (2005)" and the "Illicit Discharge Detection and Elimination" A Guidance Manual

for Program Development and Technical Assessments, Center of Watershed Protection, October 2004, page 12. were intended as guidance. JBLM does not object to implementing stormwater management requirements based on existing, applicable, promulgated and non-discriminatory regulations. The small MS4 permit regulations already address post-construction stormwater management. 40 CFR 122.34(b)(5). JBLM requests that the entirety of Section II.B.5. be replaced with the requirements in 40 CFR 122.34(b)(5).

JBLM Comments, p. 11, comment SS18.

EPA responded to JBLM's comments regarding the incorporation of non-promulgated guidance into an enforceable permit as follows:

EPA declines to revise the Permit as requested. Reference to other available and specific documents within NPDES permits is common within the NPDES program nationally; such reference provides a Permittee with important supplemental information. To ensure consistency with programs implemented by other regulated MS4s within Western Washington, EPA's Permit requires JBLM to use the most current versions of the relevant and available stormwater management manuals mentioned above.

The 2012 *Stormwater Management Manual for Western Washington* and the 2012 *Low Impact Development Technical Guidance Manual for Puget Sound* outline techniques which fulfill Washington State law for technology based stormwater management requirements which provide "all known and reasonable methods of treatment, prevention and control (AKART, see RCW 90.52.0404 and RCW 90.48.010); therefore these manuals are the sources of the best technical specifications for stormwater management within the Puget Sound area. EPA maintains that the practices and controls considered to be AKART for protecting water quality in Washington also reflect the federal standard to control pollutants in MS4 discharges to the MEP. EPA requires use of these Manuals to express performance expectations which are not otherwise reflected in other available EPA references. JBLM retains the option of selecting appropriate stormwater control methods which work best given the unique circumstances within the installation.

The Center of Watershed Protection's *Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments, (October 2004)* fully outlines EPA expectations for a municipal IDDE program. Ecology also requires this document to be used by regulated MS4 operators in Western Washington. It is therefore appropriate for JBLM as the basis of 401 certification—and other regulated

federal MS4 operators discharging to Puget Sound and its tributaries - to use this document to guide applicable stormwater management activities.

JBLM is free to work cooperatively with other regulated entities, local researchers, or others etc, to refine alternative stormwater control methods. EPA encourages JBLM to use the *Technology Assessment Protocol -Ecology (TAPE)* program, EPA resources, or other available means, to investigate and/or improve upon available technologies to prevent water quality impacts due to runoff volume and quality.

EPA RTC, pp. 25-26, response 46.

EPA purports to require adherence to the WWSWM because the Washington State Department of Ecology required it in its 401 certification letters.⁶ While an outstanding resource for stormwater managers, the WWSWM is unpromulgated guidance. EPA does not have statutory or regulatory authority to include controls from State guidance documents in a federal NPDES permit without a showing that the controls reduce the discharge of pollutants to the MEP.

The 401 certification process provides an opportunity for a State to certify that a federally issued permit complies with the CWA and *State law*. See 33 U.S.C. §§ 1341(a) & (d). The state must certify that discharges under the permit comply with state effluent limitations, water quality related effluent limitations, water quality standards and implementation plans, national standards of performance, toxic and pretreatment effluent standards, and “any other appropriate requirement of State law set forth in such certification.” *Id.*

EPA permitting regulations explain that NPDES permits shall conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of section 124.53 when EPA is the permitting authority. 40 C.F.R. § 122.44(d)(3). The permit must also

⁶ "EPA includes requirements in the JBLM permit which are functionally equivalent to the 2005 Manual. Ecology has conditioned its pending CWA Section 401 certification of the JBLM MS4 permit, stating the final permit must include runoff controls for new and redevelopment and construction sites that are functionally equivalent to the 2005 Manual." Fact Sheet, p. 16.

"[i]ncorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA." 40 C.F.R. § 122.44(d)(4).

In order for EPA to be bound by the State's 401 certification, it must be in writing and include "[c]onditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law" and "[a] statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 C.F.R. § 122.53 (emphasis added). The regulations further state "Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process."⁷ *Id.*

The U.S. Supreme Court has ruled that conditions attached to a certification may extend to "the activity as a whole." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994). However, the Court also noted, "[T]hat authority is not unbounded. The State can only ensure that the project complies with 'any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]' or certain other provisions of the Act, 'and with any other appropriate requirement of State law.'" *Id.* (quoting 33 U.S.C. § 1341(d)).

Thus, EPA may incorporate state laws and regulations in NPDES permits, but not guidance. The WWSWM is not a state law or regulation established under section 301(b)(1)(C) of the CWA. First, these guidance documents are, by their own description, not "State law[s] or regulations." WWSWM. 1-7. The WWSWM admonishes readers: "The *Stormwater Management Manual for Western Washington* is not a regulation. The Manual does not have any

⁷ Neither the Ecology Letter, Jan. 2012 nor the Ecology Letter, Aug. 2013 contain this statement. Thus, EPA can establish less stringent conditions than those contained within the letters, subject to the MEP standard.

independent regulatory authority and it does not establish new environmental regulatory requirements.” WWSWM at 1-7. Because 40 C.F.R. § 122.44 only allows EPA to incorporate provisions of State laws and regulations in a permit, the WWSWM cannot be added to the JBLM Permit under this authority.

Nor may the State use its 401 certification to require provisions from its own State Phase II MS4 permit (that derive from the non-promulgated, unenforceable guidance) be included in the JBLM Permit. In its preliminary 401 certification letter, Ecology stated "The permit must retain runoff controls for new and redevelopment and construction sites that are functionally equivalent to *2005 Stormwater Management Manual for Western Washington* requirements including at a minimum applicable thresholds and definitions in Appendix 1 of the *Western Washington Phase II Municipal Stormwater Permit*." See Ecology Letter, Jan. 2012. While EPA must include conditions in a permit in order to conform to the State 401 certification, 40 C.F.R. § 122.44(d)(3), this does not extend to the inclusion of a State guidance document and a separate State stormwater permit in the 401 certification process.

The State of Washington may only insist upon requirements as conditions to its 401 certification if those requirements are needed to comply with state effluent limitations, water quality related effluent limitations, water quality standards and implementation plans, national standards of performance, toxic and pretreatment effluent standards, or another state law. See 33 U.S.C. § 1341(d); *PUD*, 511 U.S. at 712. The WWSWM does not fall into any of the first five categories, and, as discussed above, the WWSWM “is not a regulation,” has no “independent regulatory authority,” and “does not establish new environmental regulatory requirements.” WWSWM at 1-7. Nor is the Phase II Permit a “requirement of State law.” Rather it is a permit governing the discharges of specific municipalities and not even all discharges statewide. See

STATE OF WASH., DEP'T OF ECOLOGY, WESTERN WASHINGTON PHASE II MUNICIPAL STORMWATER PERMIT, NATIONAL POLLUTANT DISCHARGE ELIMINATE SYSTEM AND STATE WASTE DISCHARGE GENERAL PERMIT FOR DISCHARGES FROM SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS IN WESTERN WASHINGTON, 6 (2013). Because neither of these documents falls within the scope of a 401 certification review, they cannot form the basis of a requirement in the MS4 permit under 40 C.F.R. § 122.44(d)(5).

5. WWSWM does not meet the MEP standard.

Neither the WWSWM nor any provision of Washington State law requires the inclusion of the prescriptive flow control designs in the JBLM Permit. The WWSWM also does not justify EPA's deviation from its regulations. Although the "techniques" in the WWSWM "are *presumed* to meet the technology-based treatment requirement of State law," it admits that it "is not the only way to properly manage stormwater runoff." *See* WWSWM at 1-7 (emphasis added). The WWSWM also does not explain why any particular threshold for development and redevelopment projects might be necessary to reduce the discharge of pollutants to the MEP. In fact, the relevant chapter, "Minimum Requirements for New Development and Redevelopment," only mentions the MEP once over forty-six pages, and even then it is in regards to natural drainage patterns, not the appropriate thresholds for construction projects. *See* WWSWM at 2-27. Where the WWSWM does address thresholds, it only provides requirements with little focus on explaining why such thresholds were chosen. *See* WWSWM at 2-9-15. Without any explanation, these guidance documents cannot justify the conditions EPA has applied against the Army.

Contrary to the discussion in EPA's Fact Sheet, the Washington State Pollution Control Hearing Board ("PCHB") has not required the application of the WWSWM or mandatory

prescriptive control designs to the JBLM Permit or any other permit in the State of Washington. The PCHB did review the Phase I and Phase II MS4 permits issued by the Washington Department of Ecology.

Rather than finding that the WWSWM and its BMPs were the MEP (or the AKART as required under State law), the PCHB stated, "Though many of these treatment BMPs have been in common use for many years, and the 2005 Stormwater Management Manual for Western Washington relies on them as *presumptively* effective, Ecology has only *incomplete information* about their actual pollutant removal capabilities." *Puget Soundkeeper Alliance v. State of Wash., Dep't of Ecology*, Phase I, 16 (Pollution Control Hearings Bd. State of Wash. 2008) [hereinafter PCHB I] (emphasis added) *available at*

<http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseIpermit/5YR/PhaseIPermit.pdf>

The PCHB did conclude that the Phase I MS4 permit must require (as opposed to allow) greater application of low impact development (LID) techniques, *where feasible*, in combination with the flow control standard, to meet the AKART and the MEP standards. PCHB I, p. 58. The PCHB did not mandate the application of any portion of the WWSWM or any prescriptive control designs in the Phase I MS4 permit. The PCHB found that LID was not the AKART or the MEP for Phase II MS4 permits, due to the smaller municipalities being less able financially to manage the costs associated with the review and modification of existing zoning and building regulations that are an obstacle to implementation of LID on a broader scale. *Puget Soundkeeper Alliance v. State of Wash., Dep't of Ecology*, Phase II Municipal Stormwater Permit, 23 (Pollution Control Hearings Bd. State of Wash 2009) *available at*

<http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseIIww/5YR/WWAPhaseIIPermit2013.pdf>.

As stated above, the PCHB declined to find that the WWSMW and its BMPs were the MEP. Specifically, the PCHB upheld challenged monitoring requirements in the Phase I permit precisely because there was inadequate information to understand pollutant loadings in stormwater and to determine whether the BMPs were effective.

The number of samples is intended to establish a sufficient database from which to discern annual and seasonal loading trends over a long time period. Performing a toxicity test on the "seasonal first-flush storm" provides an annual worst case scenario. Ecology believes this data is necessary to evaluate whether stormwater management programs are making progress towards the goal of reducing pollutants discharged and protecting water quality.

PCHB I, p. 15.

So, while there exists national data that allows Ecology to make some general assumptions about how well BMPs perform, Ecology still lacks site-specific, region-specific data to verify that the BMPs perform the way Ecology anticipates they will perform. As a result, Ecology required permittees to evaluate BMP effectiveness in an effort to learn and apply the information in future settings and permit iterations.

Id. at 17.

The monitoring required by S8 is primarily aimed at developing a uniform baseline of information about the pollutant loading discharging from MS4s, and evaluating the effectiveness of the BMPs that permittees use to control and reduce the pollutants discharging from those systems. Ecology determined this data will be the most useful for establishing what constitutes maximum extent practicable reduction in pollutants from MS4 discharges for future iterations of the municipal stormwater permits.

Id. at 18.

In addition, JBLM notes that EPA has correspondingly deleted some of the flexible language in the guidance document, as well as the WWSWM's differing thresholds for different types of projects. For example, the JBLM Permit imposes almost all of these requirements in blanket fashion when the project site will "disturb" 5,000 sq ft or more. In contrast, the WWSWM takes a more sophisticated approach to determining whether a particular management

practice would be appropriate (determine the existing impervious coverage, determine whether the project will *result* in 5,000 sq ft of new or hard surface, etc.). See WWSWM, pp. 2-10. Additionally, according to the WWSWM, "Minimum Requirements" #1 through #5 are often the only practices recommended for many projects, while all nine "Minimum Requirements" are only recommended for some projects. EPA has made all nine "Minimum Requirements" applicable in this federally enforceable NPDES permit.

For all the above reasons, the contested permit conditions identified in Section IV.A should be deleted from the JBLM Permit or modified for consistency with CWA statutory and regulatory requirements.

B. EPA does not have the authority under the NPDES Program to require a permittee to retrofit existing structures or to reduce stormwater flow.

JBLM specifically commented on EPA's ability to require retrofits or regulate reductions in stormwater flow under an NPDES permit. "The inclusion of an arbitrary retrofit program is inappropriate and should be removed. We are unaware of any statutory or regulatory basis to mandate that a federal agency, as part of a Clean Water Act permit, retrofit structures on the federal property." JBLM Comments, p. 2, comment 6. JBLM then expanded on this, stating:

JBLM objects to the inclusion of a retrofit program, including retrofits to 'reduce flows.' JBLM is unaware of any statutory or regulatory basis to mandate that a federal agency, as part of a Clean Water Act permit, retrofit structures on its federal property. To the contrary, the CWA statutory requirement for small MS4s such as JBLM is to reduce pollutants to the maximum extent practicable. Additionally . . . the EPA regulations at 40 C.F.R. 122.34 prescribe the requirements for a small MS4 permit, including implementation of the six minimum control measures. None of the minimum control measures or any other regulation requires retrofit or other construction requirements MS4s have the flexibility to determine where and if retrofits are necessary in order to comply with regulatory requirements for discharges and to improved water quality. The inclusion of an arbitrary and costly retrofit requirement, which may provide little or no benefit for the attainment of water quality standards in receiving waters, is inappropriate.

JBLM Comments, p. 14, comment SS22.

EPA responded stating:

EPA disagrees, and declines to revise the Permit as requested. First, the stormwater retrofit plan requirement in Permit Part II.C represents a narrative water quality based effluent limit specific to Clover Creek and American Lake, water bodies listed as impaired by Ecology under CWA Section 303(d); this section augments the mandatory SWMP requirements in Permit Parts II.B.1-6 consistent with 40 C.F.R. §122.41(d). In addition to the required SWMP activities, identifying and addressing priority retrofit projects is broadly *recommended* as one catalyst for a significant water quality recovery in the Puget Sound basin by 2020. To further protect water quality in tributaries leading to Puget Sound, *EPA uses its discretion to include this provision in the Permit*. EPA and others have noted that, if urban streams are to be restored and water quality to be improved, areas which were originally developed without adequate stormwater controls should be evaluated, prioritized, and addressed through *retrofit improvements where possible*. As the commenter notes, significant capital funding for retrofit projects is often necessary to address significant water quality problems. These facts underscore the importance of *evaluating feasible project opportunities* within a given watershed in order to identify the *most efficient, cost effective investment in future infrastructure repair and environmental improvement*.

EPA RTC, p. 37, response 66 (emphasis added).

The JBLM Permit includes the following contested provisions in Section II.C.:

Within three years of the permit effective date, the Permittee must develop a stormwater retrofit plan to reduce flows and associated pollutant loadings from existing effective impervious surfaces into Clean Water Act Section 303(d) listed and other degraded water bodies. The retrofit plan must be consistent with the recommendations contained in the March 2007 *Murray/Sequalitchew Watershed Management plan* and the 2008 *Chambers-Clover Creek Watershed Action Plan*.

. . . The Permittee must 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. The Permittee must accomplish such retrofits as soon as practicable, with priority given to roof disconnection projects within the Clover Creek subbasin.

JBLM Permit, p. 24.

Prior to the expiration date of this permit, the Permittee must initiate or complete one or more structural retrofit project(s) sufficient to disconnect and infiltrate discharges from identified effective impervious surfaces equal to five (5) acres of cumulative area. Calculation of the cumulative total effective impervious surface area to be retrofitted may not include the amount of roof area mitigated through the roof downspout disconnection effort required in Part II.C.2.c. The Permittee must submit a comprehensive retrofit implementation status report to EPA with the 5th Year Annual Report.

JBLM Permit, p. 25.

There is no existing statutory authority for EPA to require a federal agency to retrofit structures on federal property as part of the NPDES Permit program. *See* 33 U.S.C. § 1342. Under CWA section 402 and its implementing regulations, permittees have the flexibility to determine what control techniques, including retrofits, are necessary and practicable in order to reduce the discharge of pollutants and to improve water quality. The regulations themselves are designed to allow for a flexible approach by the permittee in accomplishing the required effluent standards. *See* 40 C.F.R. § 122.34. EPA's inclusion of an arbitrary and costly retrofit requirement, which may provide little or no benefit for the attainment of water quality standards in receiving waters, is erroneous and an abuse of discretion.

As discussed, MS4 permits must be based on section 402(p)(3)(B) of the CWA and its implementing regulations. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The JBLM Permit does not comply with the requirements the CWA section 402(p)(3)(B) concerning NPDES stormwater permits for discharges associated with MS4s. Section 402 (p)(3)(B)(iii) specifically requires “*controls to reduce the discharge of pollutants to the maximum extent practicable.*” 33 U.S.C. § 1342(p)(3)(B) (emphasis added). Courts construing the requirements of section 402(p)(3)(B) have explained that the “maximum extent practicable” is the standard

imposed by the CWA and EPA for MS4s. *Defenders of Wildlife v. Browner*, 191 F.3d at 1165; *Conservation Law Found. v. Bos. Water & Sewer Comm'n*, 2010 U.S. Dist. LEXIS 134838.

Section 402(p)(3)(B) requires the measures being imposed to reduce pollutant discharges to waters, but only to the extent that the measures are practicable. While the retrofitting of existing facilities may result generally in a reduction in pollution, it is not clear that the specific requirement for a retrofit plan for existing facilities are practicable in reducing discharges, especially as compared to other possible options. Furthermore, EPA has not demonstrated that retrofitting existing facilities has been successful in reducing pollutant discharges to waters, or that they are the only option for JBLM.

EPA's Phase II Rule for small MS4s establish a "cost-effective, flexible approach for reducing environmental harms" that requires small MS4 operators to establish measurable, achievable goals that are neither cost-prohibitive nor economically infeasible. NPDES-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999). In contrast to the flexible approach contained in the regulations, the NPDES Permit impermissibly transforms EPA's recommended goal into an absolute mandate by requiring JBLM to retrofit existing structures without any qualifiers such as consideration of costs or feasibility.

EPA regulations implementing section 402 also rely on the use of BMPs. 40 C.F.R. § 122.34 (a). EPA's regulatory framework does not establish an absolute requirement for retrofitting existing structures in MS4 permits. Such a requirement, as included by EPA in the JBLM Permit, is contrary to the flexible approach established by EPA's final regulation for small MS4s. Additionally, EPA failed to (1) provide a reasoned analysis justifying its deviation from

the standard contained in the regulations or, (2) make any connection between the mandatory requirement to retrofit structures and the predicted impact on water quality.

While water quality standards can be imposed through a NPDES permit, the retrofit requirement in the JBLM Permit is not a “narrative water quality based effluent limit specific to Clover Creek and American Lake.” *Narrative water quality criteria* define conditions that must be protected and maintained to support a State designated use, and must be based on sound scientific rationale. *See* 40 C.F.R. § 131.11. The retrofit requirement is not tied to limiting the discharge of any specific pollutant to protect the designated use, nor are retrofits the only established method to protect the designated use. EPA points to 40 C.F.R. § 122.41(d), but this section only requires “all reasonable steps to minimize or prevent any discharge . . . which has a reasonable likelihood of adversely affecting human health or the environment.” Mandating that JBLM remove and replace existing infrastructure on the installation without first attempting other stormwater management practices is not a “reasonable step” nor has it been shown that the stormwater discharges from JBLM have a “reasonable likelihood of adversely affecting human health or the environment.” Instead, this permit provision is similar to the unpromulgated standard that EPA considered to strengthen its stormwater regulations, see above Section IV.A.

Although EPA states in its RTC that retrofit improvements should be used “where possible” and JBLM should evaluate “feasible project opportunities” to “identify the most efficient cost effective investment in future infrastructure repair and environmental improvement,” *none* of these qualifiers appear in the contested permit condition, nor, of course, does the MEP appear. Rather, the permit contains two absolute retrofit provisions: disconnection of existing flows from rooftop downspouts within the Clover Creek subbasin (*see* JBLM Permit, p. 24), and one or more structural retrofit project(s) sufficient to disconnect and

infiltrate discharges from identified effective impervious surfaces equal to five (5) acres of cumulative area. *See* JBLM Permit, p. 25.

Consistent with the Phase II (small MS4) Rule, the NPDES Permit should be goal-oriented and focus on broad measures to control the point source discharge of pollutants in stormwater runoff rather than providing rigid, binding conditions that restrict available options. The base-specific SWMP, developed to support the NPDES Permit, is the appropriate vehicle for JBLM MS4 to provide the specifics on how it will run the stormwater program to reduce the discharge of pollutants under the MEP standard, including the BMPs that will be implemented to satisfy the six control measures described in 40 C.F.R. § 122.34 (b). The arbitrary and unsubstantiated deviation from the Phase II regulatory requirements constitutes clear error. The Board should remand this matter to Region 10 with direction to strike the requirement that JBLM develop a stormwater retrofit plan.

C. EPA does not have the authority to regulate stormwater flow.

Additionally, EPA cannot regulate stormwater flow itself under the CWA as stormwater is not a pollutant subject to regulation under the statute. In the JBLM Permit, EPA is very specifically regulating not only pollutant loads, but overall stormwater flow. As discussed previously, EPA has added a flow control restriction from the WWSWM into minimum control measure #5. *See* JBLM Permit, p. 18. Additionally, the retrofit requirements are included for the express purpose of reducing flows. “[T]he Permittee must develop a stormwater retrofit plan to *reduce flows* . . . from existing effective impervious surfaces.” JBLM Permit, p. 24.

The purpose of the CWA is to regulate the discharge of pollutants to waters of the United States. Except in compliance with law “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). Stormwater is not a pollutant and EPA’s requirement to “reduce flow” is an abuse of discretion. *See Va. Dep’t of Transp. v. U.S. E.P.A.*, 2013 WL 53741

(holding that EPA cannot regulate flow itself as flow is not a pollutant under the statute). The Army objected to the inclusion of reducing flows via retrofits. JBLM Comments, p. 14, comment SS22.

The NPDES permitting program regulates discharges of pollutants from point sources to waters of the United States under section 402 of the CWA, 33 U.S.C. § 1342. “Point source” means “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, landfill leachate collection system, vessel, or other floating craft from which *pollutants* are or may be discharged” C.W.A. § 502(14); 33 U.S.C. § 1362(14) (emphasis added).

“Pollutants” are defined in the CWA, as well as EPA’s implementing regulations, to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” CWA § 502(6); 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2. This definition includes many specific substances, but *not* the flow of water. *See* C.W.A. § 502(6); 33 U.S.C. § 1362(6).

Regulation of the flow of water or any other non-pollutant or human activity contravenes the plain limit on EPA’s regulatory authority to control only the substances specifically enumerated in the definition of “pollutant.” *See* C.W.A. §§ 303 (d)(1)(C), 502(6); 33 U.S.C. §§ 1313 (d)(1)(C), 1362(6). EPA has no authority to arbitrarily expand the list of “pollutants” as they are established by statute. The flow or discharge of water itself is not a “pollutant.” *See* C.W.A. § 502(6); 33 U.S.C. § 1362(6).

EPA's regulation of flow in the JBLM Permit is the exact issue that was addressed in *Va. Dep't of Transp. v. E.P.A.*, 2013 WL 53741. In *Virginia Department of Transportation v. EPA*, EPA, agreeing that stormwater is not a pollutant, nonetheless attempted to regulate stormwater as a surrogate for sedimentation, a pollutant. The court held that EPA could not regulate stormwater flow as a means of controlling sediment load, specifically stating, "EPA may not regulate something over which it has no statutorily granted power. . . as a proxy for something over which it is granted power." *Id.* at 3. While EPA is within its authority to regulate pollutants, like sediment, EPA does not have the authority to regulate non-pollutants as surrogates for pollutants. *Id.* at 4.

EPA argued that a surrogate approach "should be allowed because the statute does not specifically forbid it." *Id.* at 3. The court found that the mere fact that EPA is not explicitly forbidden from using a surrogate approach does not mean that the CWA grants EPA such authority; "[t]he question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority." *Id.* EPA then argued that their regulations allow for the use of surrogates to regulate pollutants. The court disagreed, stating that such an approach is "mere bootstrapping" and exceeds the statutory authority of EPA. *Id.* at 4. While the court agreed sediment is a pollutant that EPA can regulate using total maximum daily loads ("TMDL"), stormwater is not. Using the two part *Chevron* test, the court held that the "EPA's authority does not extend to establishing TMDLs for non-pollutants as surrogates for pollutants." *Id.* Furthermore, the court noted that "EPA's attempt to set TMDLs for nonpollutants probably goes beyond the 'permissible gap-filling' and is instead an impermissible construction of the statute." *Id.* at 5.

To the extent that EPA seeks to regulate flow because it believes that the flow or quantity of water, in and of itself, is a concern, EPA is directly regulating a non-pollutant in excess of the EPA's statutory authority. EPA is treating water itself as a pollutant. EPA is very clearly attempting to regulate stormwater flow which in excess of its CWA authority, as stormwater flow is not a defined pollutant that can be regulated by EPA. Furthermore, the court's decision in *Va. Dep't of Transp.*, clearly demonstrates that stormwater flow cannot be regulated as a surrogate for another pollutant.

For the above reasons, the Board must remand this matter to Region 10 with direction to strike the flow control requirement in minimum control measure #5 and the retrofit requirements contained in Section II.C. of the permit.

D. EPA's compliance timelines are an abuse of discretion and raise important matters of public policy.

JBLM commented:

This draft MS4 permit represents a significant deviation from previous permits; not only in the increased scope of aspects proposed for regulation, but also in the sheer volume of new requirements. Expecting Federal Facilities to be able to successfully react to this proposed level of increase in requirements, in a single permit cycle, is unrealistic. Initial estimates indicate that JBLM would have to at least double our manpower resources, from 2 full time employees to 4, in order to comply with all requirements in this permit.

JBLM Comments, p. 3, comment 12.

EPA responded:

EPA disagrees; the Permit is the first MS4 discharge permit authorizing JBLM's regulated MS4 discharges, and is the first EPA-issued MS4 discharge permit for a federal facility in Washington State. JBLM submitted its original NPDES application for its MS4 Permit in 2003. EPA believes that JBLM (and other regulated Federal MS4 operators in Western Washington) have had ample time to establish basic stormwater management programs as outlined through their initial NPDES permit applications. EPA is confident that JBLM can substantively and efficiently

accomplish the actions outlined in the Permit within the five year permit term.

EPA RTC, p. 9, response 12.

A copy of the JBLM Permit Schedule for Implementation and Compliance is attached as Attachment E. A copy of JBLM's Work Schedule Revision Proposal is attached as Attachment F.

The region's response shows that it has not factored in sufficient time for federal facilities to add staff when setting permit deadlines. EPA unrealistically expects facilities to pre-staff and pre-program before the requirements of the final permit are known. The region notes in its response, "EPA believes that JBLM (and other regulated Federal MS4 operators in Western Washington) have had ample time to establish basic stormwater management programs as outlined through their initial NPDES permit applications." This incorrect assumption is the basis for the region's conclusion that the requirements of the permit can be timely met.

The problem with the region's approach is federal facilities cannot reasonably be expected to program and hire staff before the requirements of the permit are disclosed. They cannot act when the effective date of the permit is unknown, before the state has certified the permit, and before a draft permit has even been issued. In JBLM's case, the region expected it to pre-build a program on the basis of an initial 2003 NPDES application. JBLM did not file that application as JBLM did not exist as an entity until 2010. Further, the 2003 application covers only a portion of the MS4 systems operated by JBLM. The application did not anticipate that thousands of acres of undeveloped training land would be subject to regulation in the final permit. It did not anticipate regulation of discharges to groundwater that the state is trying to impose as a certification requirement. It did not anticipate incorporation of substantial portions from four volumes of Washington State 2012 stormwater technical guidance manuals into the

permit. Those manuals did not exist when the application was filed. Much has changed in the regulation of municipal stormwater in the last decade. The region has clearly erred by assuming that JBLM can program and hire for 2013 permit requirements on the basis of a 2003 Fort Lewis NPDES application.

The region also erred by announcing its expectation on August 22, 2013, the same day it released the final draft of the permit. *See EPA RTC, p. 9, response 12 as quoted above.* By August 22, it was too late for the installation to pre-program. Staffing is not an instantaneous process under the federal contracting and civil service rules, but takes many months. In addition, JBLM is under an agency-wide hiring freeze due to sequestration. It must obtain a special waiver from higher command to add the projected eight additional staff needed to meet the requirements of the facility's MS4 permit. Timely notice is a fundamental requirement of procedural fairness. The region failed to give JBLM timely notice.

This Board has jurisdiction to review matters of policy. *See 40 C.F.R. § 124.19.* It can also remand matters to the region for further review. *Id.* Because the deadlines in the initial MS4 permit were set under an erroneous belief that JBLM could pre-staff on the basis of the 2003 NPDES application, those deadlines need to be reviewed. JBLM has provided the region with a list of the permit deadlines it believes cannot be met even with a good faith effort. It has also provided proposed adjustments for those deadlines. *See Attachment F.* JBLM requests the board remand this issue to the region with instructions to set new permit deadlines that incorporate sufficient time for JBLM to hire the additional projected staff to meet permit requirements.

V. CONCLUSION AND RELIEF SOUGHT

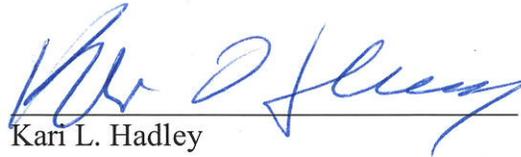
For the foregoing reasons, the Army respectfully seeks for a review by the EAB of the provisions of the JBLM Permit. After such review, the Army requests:

1. the opportunity to present oral argument in this proceeding and a briefing schedule for this appeal to assist the EAB in resolving the issues in dispute;
2. a remand to EPA Region 10 with an order to issue an amended NPDES Permit that conforms to the EAB's findings on the terms and provisions appealed by the Army; and
3. any such other relief that may be appropriate under these circumstances.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Kari L. Hadley, hereby certify, in accordance with 40 C.F.R. § 124.19(d)(1)(iv), that this Petition for Review, including all relevant portions, contains less than 14,000 words.

DATE: November 5, 2013


Kari L. Hadley

CERTIFICATE OF SERVICE

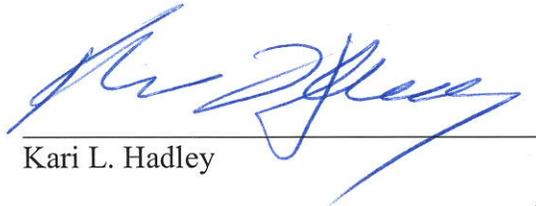
I, Kari L. Hadley, hereby certify that on November 5, 2013, I caused to be served a true and correct copy of the foregoing Petition for Review, via email as agreed by the parties, to the following:

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Dated this 5th day of November, 2013.


Kari L. Hadley