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

In re:

JOINT BASE LEWIS-MCCHORD MUNICIPAL
SEPARATE STORM

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I. INTRODUCTION

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

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

Amici agree with Petitioners arguments and further suggest that the EPA exceeded its authority for several reasons. First, the Clean Water Act (CWA) limits EPA's NPDES authority to regulating the discharge of pollutants from point sources to waters of the United States. Second, EPA cannot regulate post-construction stormwater discharges b13 Tm[-int Base(S[illegible]

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

Amici support the issues raised in Petitioner's permit challenge, but their interests are not entirely consistent with nor fully represented by Petitioners. If EPA's permit is allowed to stand,

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

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

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

EPA properly identifies the statutory limitation on its powers:

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

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

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

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

2. The Clean Water Cevøu"Fghkpkvkqp"qh"Rqnnwvkqp"c

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

Thus, when substances redistribute within a waterbody, that substance is not being

controlling pollutant discharges into waters of the U.S. – applies with equal force in the context of the NPDES permitting program, because both the NPDES permit program and TMDLs that are incorporated into NPDES permits are expressly limited to the authority conferred by the CWA to regulate the "discharge of pollutants." After citing a line of cases –

EPA's Clean Water Act authority because it goes beyond the regulation of a point source to regulate activities on the land and "flow." Moreover, EPA has failed to show any relationship between pre- or post-

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

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

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

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

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

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

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

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

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

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

[5] The Supreme Court has held that Congress may not "commandeer the leg]M

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

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

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

Since at least 2009, EPA has believed that it must promulgate new rules and regulations to expand the existing stormwater program to establish its own post-construction stormwater performance standards. *See* 74 Fed. Reg. 68,617 (December 28, 2009); *see also* EPA's rulemaking webpage at http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm; *and* EPA Semiannual Regulatory Agenda – Fall 2013 (RIN 2040-AF13)

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

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

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

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

In Ecology's January 2012 letter, it provides that the "permit must retain runoff controls… that are <u>functionally equivalent</u> to *2005 Stormwater Management Manual for Western Washington* requirements… .(emphasis added). Subsequently, in its final certification, Ecology required EPA to cite to the 2012 SMMWW. However, in the JBLM Permit, EPA has required compliance with the 2012 Manual, but left out the "functionally equivalent" language. For example, Part II.B.5(b) provides that "Stormwater Site Plans must be prepared consistent with Chapter 3, Volume 1…of the [SMMWW]… .

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

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

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

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

Thus, EPA sought to impose new permitting requirements onto Clean Air Act Title V permit holders through the permit in a manner outside its statutory authority. EPA's illegal actions in *Appalachian Power* mimic its unlawful attempt to include in JBLM's Permit obligations it has no authority to require. However, instead of using a "ukase"-styled guidance document of its own creation, it unlawfully seeks to render the SMMWW (a state guidance document that the state clearly intends to be non-binding) into a federfullW (a stateBT1to.800446004700030052

making procedures." *Id*. at 619. "Interpretive statements" or guidelines, on the other hand, are advisory on

V. CONCLUSION

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

Respectfully submitted,

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Dated: March 7, 2014

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

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

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I hereby certify that copies of the foregoing Property Builders and Owners *Amici Curiae* brief was sent to the following persons, in the manner specified, on March 7, 2014:

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