STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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August 4, 2014

Mr. Michael Lidgard
NPDES Permits Unit Manager
Office of Water and Watersheds
U.S. EPA Region 10
1200 6th Avenue, Suite 900 OWW-130
Seattle, WA 98101

**RE: Draft Clean Water Act (CWA) Section 401 Conditional Certification for EPA Modifications to National Pollutant Discharge Elimination System (NPDES) Permit No. WAS-026638 Joint Base Lewis-McChord Municipal Separate Storm Sewer System**

Dear Mr. Lidgard:

With this Draft 401 Conditional Certification, the Washington State Department of Ecology (Ecology) conditionally certifies the modifications to NPDES Permit No. WAS-026638 (Permit), subject to conditions listed in the attachment. The attached conditions are necessary to assure that discharges from the municipal separate storm sewer system (MS4) of Joint Base Lewis-McChord (JBLM) will comply with Chapter 173-201A (Surface Water Quality Standards) of the Washington Administrative Code (WAC); Groundwater Standards (Chapter 173-200 WAC); Sediment Management Standards (Chapter 173-204 WAC); human health-based criteria in the national Toxics Rule (Federal Register, Vol.57, No. 246, Dec. 22, 1992, pages 60848-60923); and other appropriate requirements of State law.

The U.S Environmental Protection Agency (EPA) submitted on June 7, 2013 a final NDPES Permit to the Washington State Department of Ecology (Ecology) for review and to request CWA Section 401 Certification. Ecology issued certification, subject to certain conditions, of the final permit on August 7, 2013 and the final permit became effective October 1, 2013. The United States Department of the Army (Army) appealed the final permit and after negotiations with EPA came to a settlement. The settlement agreed to by the Army and EPA requires EPA to modify the permit, including a public notice, comment and appeal period, and seek a draft 401 certification from Ecology on the proposed permit modification.

Draft JBLM 401 Conditional Certification

This Draft 401 Conditional Certification is based on the language EPA provided Ecology for the proposed permit modification required by the settlement between EPA and the Army. Ecology reserves final certification of the JBLM permit until Ecology is provided the proposed final permit which incorporates any and all changes EPA may make as a result of the public comment period. Ecology specifically reserves its right to modify this Draft 401 Conditional Certification in response to any changes made to the draft modification of the JBLM permit.

Ecology notes that many of the issues that the Army appealed in the final 2013 permit were, in fact, requirements under Ecology's August 7, 2013 401 certification. Ecology strongly encourages the Army to engage in a dialogue with Ecology to discuss Washington State water quality standards and take advantage of the many resources and flexibility offered in its *2012 Stormwater Management Manual for Western Washington.*

If you have any questions or would like to discuss these matters further, please contact Bill Moore at bill.moore@ecy.wa.gov or (360) 407-6460.

Sincerely,

Kathleen Emmett for Bill Moore

Kathleen Emmett
WA Department of Ecology
Water Quality Program

Enclosure

By Certified Mail: 7010 0780 0002 3523 6330

**Washington State Draft 401 Conditional Certification for Modification to Permit No. WAS-026638 Joint Base Lewis-McChord Municipal Separate Storm Sewer System**

Final 401 certification of the modifications to the permit is conditional upon the final permit meeting the below conditions. No condition may be made less stringent. This draft 401 conditional certification addresses only the proposed modification to the permit and in no way limits Ecology's August 7, 2013 401 certification, which is hereby incorporated by reference. The below conditional certification is based upon and in accordance with Chapter 90.48 of the Revised Code of Washington (RCW), under which the discharge of toxicants to waters of the State of Washington which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited. RCW 90.48 requires the permittee to use all known, available, and reasonable methods of prevention, control and treatment (AKART) to prevent and control pollution of waters of the state of Washington. Additionally, CWA § 402(p)(3)(B)(iii) requires the permittee to reduce the discharge of pollutants to the maximum extent practicable (MEP). Conditional certification of the Permit does not authorize JBLM's MS4 discharges to cause or contribute to a violation of applicable State water quality standards (Surface Water Quality Standards Chapter 173-201A WAC); Groundwater Standards (Chapter 173-200 WAC); Sediment Management Standards (Chapter 173-204 WAC); and human health-based criteria in the national Toxics Rule (Federal Register, Vol.57, No. 246, Dec. 22, 1992, pages 60848-60923); and other appropriate requirements of State law. Furthermore, nothing in this conditional certification absolves or releases JBLM from liability for contamination or any subsequent cleanup of surface waters, ground waters, or sediments resulting from discharges from JBLM's MS4.

1. All references in the Permit to the *Stormwater Management Manual for Western Washington* (2012 SWMMWW) and the *Low Impact Development Technical Guidance Manual for the Puget Sound* must cite to the 2012 versions of those documents.

2. Certification of Part II.A.7 (Equivalent Documents, Plans or Programs) is denied. As written, Part II.A.7 allows for EPA to review a permittee-submitted document, plan or program for equivalency with the required Stormwater Management Program (SWMP) components. If EPA determines the submission to be equivalent to the SWMP component(s) then it may be substituted for any part of the SWMP, the heart of the permit. While Ecology can review the SWMP components in the Draft Permit for meeting Washington State water quality standards, Ecology cannot review a hypothetical, yet to be written alternative plan and thus has no basis to judge whether it would meet Washington State water quality standards. Additionally, a substitution for one or more SWMP components could constitute a modification of the permit because it has the potential to change substantive requirements. Such a substantive change must have a guarantee of public notice, comment and appeal period and a new 401 certification from Ecology. A permit modification process for the Part II.A.7 equivalent document, plan or program as outlined in 40 C.F.R. § 122.62 or § 124.5 would remedy this defect.

3. Part II.B.5.b (Preparation of a Stormwater Site Plan) must require stormwater site plans be prepared consistent with *Chapter 3, Volume 1 Minimum Technical Requirements and Site Planning* of the *2012 SWMMWW*, with the exception of sites within Airport Operations Areas (AOA), where stormwater site plans must be prepared consistent with the *Aviation Stormwater Design Manual (2008)*.
4. Certification of Appendix C.6 (Exemptions from the Hydrologic Performance Standard under Part II.B.5.e.iii) is denied. As written, Appendix C.6 allows the permittee to opt out of any hydrologic performance standard for on-site stormwater management in Part II.B.5.e.iii if the permittee determines compliance is "not practicable." This would exempt the permittee from MEP/AKART standards required to meet State Water Quality Standards, reducing requirements to what is merely "practicable." Rather than create an appendix to deal with exemptions to the hydrologic performance standard, EPA must modify Part II.B.5.e.iii. See below.
5. Part II.B.5.e.iii (Hydrologic Performance Requirement for On-site Stormwater Management) must be modified to refer to the *2012 SWMMWW Volume 1 Minimum Technical Requirements* and Minimum Requirements one through nine, allowing the permittee to choose between the "list approach" or using the LID Performance Standard under Minimum Requirement #5. For the alternative performance standard (retain on-site the "95$^{th}$ percentile rainfall event") infeasibility must be judged using either a.) Infeasibility as determined by evaluation against design criteria, limitations, and infeasibility criteria identified for each BMP in the *2012 SWMMWW* or b.) Infeasibility as determined by whether it is possible for 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 as stated in Section 438 of the Energy Independence and Security Act of 2007 (EISA) and EPA's Technical Guidance on implementation (EPA document 841-B-09-001). For any permittee-exempted new development or redevelopment projects under Part II.B.5.e the permittee must document its determination in written record, to be submitted with the Annual Report.
6. Part II.B.5.f (Hydrologic Performance Requirement for Flow Control) must incorporate Minimum Requirement #7 of the *2012 SWMMWW Volume 1 Minimum Technical Requirements*.