



DEPARTMENT OF THE ARMY  
OFFICE OF THE GENERAL COUNSEL  
104 ARMY PENTAGON  
WASHINGTON DC 20310-0104

July 29, 2009

Ms. Catherine A. McMullen  
Chief, Disclosure Unit  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Re: Whistleblower Investigation— Fort Lewis  
Public Works, Fort Lewis, Washington (Office of  
Special Counsel Case File Numbers DI-07-1058  
through DI-07-1070

Dear Ms. McMullen:

The Department of the Army appreciates the opportunity to provide its recommendations to the Office of Special Counsel (OSC) regarding the release of its report in the above referenced case.

*Background –*

On December 1, 2008, the Department of the Army submitted to the OSC its report in the captioned case. The report and its exhibits contained the names, titles, and job locations of individuals involved in this investigation. Because this information would allow a reader to identify the subject and the witnesses from the investigation, the Army requested the opportunity to coordinate on any subsequent release of the report outside the OSC.

We understand that the report has been processed to the stage at which its public release is required. In accordance with our personal discussions with your office, the Army has reviewed for public release the entire case file of the Department of the Army report submitted regarding the above captioned case. The report submitted by the Army to the OSC contains the names and other identifying information of witnesses relating of the subject of the investigation. The Army interposes no objection to the OSC's disclosure of the report, in its entirety, to the complainant, the President, and Congress for review. We understand, however, that the OSC places copies of reports in an open reading room for review by the general public, as well as on a publicly accessible website. Pursuant to the rationale set forth below, the copy of the report

made available to the public should be redacted in compliance with the Privacy Act (PA), as reflected in Enclosure 1.

*Analysis Pertaining to the Redaction of Department of the Army Information -*

The Office of Special Counsel (OSC) is required to make available to the public reports from heads of agencies made under 5 U.S.C. § 1213(g)(1), but only to the extent that these reports do not contain any information, the disclosure of which is prohibited by law. 5 U.S.C. §§ 1219(a) and (b). The Privacy Act (PA) prohibits an agency from disclosing any record which is contained in a system of records, except pursuant to the prior written consent of the individual to whom the record pertains or in those cases in which an exception applies. 5 U.S.C. § 552a(b). As discussed below, it appears as though OSC's investigative case files, to include the instant file, are contained in a system of records regulated by the PA. Therefore, under our reading of the statute, records made available to the public under § 1219 may be released only to the extent that disclosure is consistent with the PA.

OSC's system notice indicates that OSC's investigation case files are contained in a PA system of records. See OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files. (Enclosure 2). This suggests that OSC would not render its investigative case files public absent either the consent of the individual to whom the record pertains, or an exception that allows for disclosure without consent.

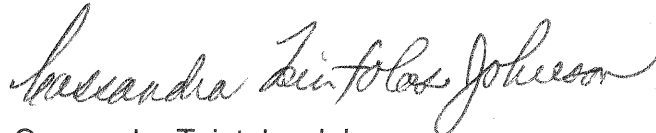
In this case, there is no indication that the consent of the individuals named in the report will be sought. Absent such consent, the only exception we have identified that might permit the disclosure of the OSC record to the general public is that of a routine use. The OSC system notice governing this system of records contains a routine use permitting the disclosure of these files to the public in only the following circumstances: 1) the matter under investigation has become public knowledge; 2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate accountability of OSC officers, employees, or individuals covered by this system; or 3) the Special Counsel determines that there exists a legitimate public interest, except to the extent that the Special Counsel determines that disclosure would constitute an unwarranted invasion of personal privacy.

At this point, we are not aware of any information that would lead us to believe that the investigation has become public knowledge nor does it appear to us that disclosure would be necessary to demonstrate the integrity of the OSC. Therefore, under our view of the PA, the OSC may disclose this investigative file if it determines that there is a legitimate public interest in doing so. If you choose to do so, we recommend that the record be redacted to ensure that its release would not constitute an unwarranted invasion of personal privacy.

Consistent with our discussions with OSC personnel, we are providing you with a copy of the case file that is redacted in a manner designed to protect the privacy of the individuals involved in and associated with this investigation. (Enclosure 1). Because the language of the applicable PA routine use mirrors the language of the Freedom of Information Act's (FOIA) exemption (b)(6), we have relied upon FOIA principles in redacting the report. Additionally, we have relied upon several DoD policy memoranda that have interpreted exemption (b)(6) of the FOIA to permit the redaction of information that personally identifies DoD personnel. (Enclosure 3). Furthermore, consistent with our discussions with OSC personnel, regarding this particular case file, given the nature of allegations and the documents gathered by the Department of the Army and which comprise the Army's report to OSC, we have redacted a number of sexually obscene images and language contained in Tab 6, Exhibit F, that will render it appropriate for public release in whatever medium you chose to disclose the Army report.

We note that the Department of the Army and the OSC were sued in Federal Court by the individual subject of an OSC investigative case file that was released publicly, in its entirety, by OSC. (Enclosure 4). The plaintiff in this case alleges that this public release violated his rights under the PA. We believe that limiting public release of the redacted report in the instant case complies with the PA, fulfills the mandate of OSC accountability to the public as set forth in your constituting statute, and minimizes litigation risk to both Army and OSC.

We appreciate the opportunity to present the Department of the Army's views on these matters. Should you have any questions, please do not hesitate to contact me at 703-614-3500.



Cassandra Tsintolas Johnson  
Associate Deputy General Counsel  
(Human Resources)

Enclosures

# Federal Register

## Privacy Act

66 FR 36611, \*

## FEDERAL REGISTER

Vol. 66, No. 134

Notices

## OFFICE OF SPECIAL COUNSEL

## Privacy Act of 1974, System of Records

66 FR 36611

DATE: Thursday, July 12, 2001

**ACTION:** Notice of technical revisions to system of records and proposed revision of system descriptions and routine uses.

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To view the next page, type .np\* TRANSMIT.

To view a specific page, transmit p\* and the page number, e.g. p\*1  
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[\*36611]

**SUMMARY:** Pursuant to the provisions of the Privacy Act of 1974, 5 USC 552a, notice is given that the U.S. Office of Special Counsel (OSC) is making non-substantive technical revisions to the Privacy Act system notice for the system of records designated "OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files," proposing to change descriptions of certain features of the system of records; and proposing the amendment of two current routine uses, and the addition of a new routine use. The affected system of records is maintained in connection with OSC program responsibilities under 5 U.S.C. 1212, et seq., and 38 U.S.C. 4324.

**DATES:** The non-substantive technical revisions described in this notice are effective upon publication. Other changes proposed in the notice will become effective on [30 days after publication of this notice], unless comments received by OSC before then warrant further changes.

**FOR FURTHER INFORMATION CONTACT:** Erin M. McDonnell, U.S. Office of Special Counsel, at (202) 653-8971.

OSC/GOVT-1

## SYSTEM NAME:

OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files.

## SYSTEM LOCATION:

Human and Administrative Resources Management Branch, U.S. Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.

## CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The principal categories of individuals covered by the system are persons filing allegations of prohibited personnel practices, improper political activity, or other prohibited activities; persons identified as engaging or participating in such practices or activities; persons filing disclosures of alleged wrongdoing by federal agencies, and persons identified as engaging or participating in such wrongdoing; persons requesting advisory opinions on political activity; persons

charged by OSC in disciplinary action complaints filed by OSC with the Merit Systems Protection Board (MSPB); and plaintiffs seeking remedies against OSC in litigation related to the performance of its official functions.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence with persons (or their representatives) filing allegations of prohibited personnel practices, improper political activity, or other prohibited activities; correspondence with other agencies, entities, or individuals referring matters to OSC for review and/or investigation; exhibits and other documentation from complainants, governmental entities or other third parties; interview records, including notes, summaries, or transcripts; affidavits, reports or other summaries of investigation; factual and legal summaries and analyses; administrative determinations; referrals to other agencies for appropriate action; records created or compiled in connection with litigation by or against OSC, or pertinent to OSC operations; requests and decisions under the Freedom of Information and/or Privacy Acts; and other correspondence and documents arising out of the performance of official OSC functions under *5 U.S.C. 1211-1221, 1501-1508, and 7321-7326; 38 U.S.C. 4324*, and other applicable law or regulation.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

*5 U.S.C. 552, 552a, 1211-1221, 1501-1508, and 7321-7326; and 38 U.S.C. 4324.*

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

- a. To disclose the fact that an allegation of prohibited personnel practices or other prohibited activity has been filed;
- b. To disclose information to the Office of Personnel Management (OPM) pursuant to Civil Service Rule 5.4 (*5 CFR 5.4*), or to obtain an advisory opinion concerning the application or effect of civil service laws, rules, regulations or OPM guidelines in particular situations;
- c. To disclose to the Equal Employment Opportunity Commission or any other agency or office concerned with the enforcement of the anti-discrimination laws, information concerning any allegation or complaint of discrimination based on race, color, religion, sex, national origin, age, or handicapping condition;
- d. To disclose information to the MSPB or the President upon the filing or referral of a disciplinary action complaint against an employee on the basis of an OSC investigation;
- e. To disclose information to an agency, the MSPB, OPM, and the President reporting, under *5 U.S.C. 1214*, the results of investigations which disclose reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken;
- f. To disclose information to Congress in connection with the submission of an annual report on activities of the Special Counsel;
- g. To disclose information to any agency or person regarding allegations of prohibited personnel practices or [\*36613] other prohibited activity or prohibited political activity filed against an agency or any employee thereof, for the purposes of conducting an investigation, in transmitting information to an agency under *5 U.S.C. 1213(c)(1)* and the OSC procedures established thereunder; or to give notice of the status or outcome of the investigation;
- h. To disclose information to any source from which additional information is requested (to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and to identify the type of information requested), where necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the conducting of a security or suitability investigation of an individual, the letting of a contract, or the issuance of a license, grant, or other benefit;
- i. To disclose information to the Office of Management and Budget (OMB) at any stage in the legislative coordination and clearance process in connection with private relief legislation, as set forth in OMB Circular No. A-19;
- j. To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office (made at the request of that individual);
- k. To furnish information to the National Archives and Records Administration (NARA) in records management inspections conducted under authority of *44 U.S.C. 2904* and *2906*;

l. To produce summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related work force studies;

m. To disclose records to the Department of Justice (DOJ) when:

- (1) The OSC, or
- (2) Any employee of the OSC in his or her official capacity, or
- (3) Any employee of the OSC in his or her individual capacity where the DOJ has agreed to represent the employee, or
- (4) The United States, where the OSC determines that litigation is likely to affect the OSC, is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ is deemed by the OSC to be relevant and necessary to the litigation, provided, however, that the OSC determines that disclosure of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

n. To disclose records maintained by the OSC in a proceeding before a court or adjudicative body before which the OSC is authorized to appear, when:

- (1) The OSC, or
- (2) Any employee of the OSC in his or her official capacity,
- (3) Any employee of the OSC in his or her individual capacity where the OSC has agreed to represent the employee, or
- (4) The United States, where the OSC determines that litigation is likely to affect the OSC, is a party to litigation or has an interest in such litigation, and the OSC determines that use of such records is relevant and necessary to the litigation, provided, however, that the OSC determines that disclosure of the records is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

o. To disclose information to the MSPB to aid in the conduct of special studies by the Board under *5 U.S.C. 1204(a)(3)*;

p. To disclose information to the Office of Inspector General (OIG) or comparable internal inspection, audit, or oversight office of an agency for the purpose of facilitating the coordination and conduct of investigations and review of allegations within the purview of both the OSC and the agency OIG or comparable office;

q. To disclose information to the news media and the public when (1) the matter under investigation has become public knowledge, (2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate the accountability of OSC officers, employees, or individuals covered by this system, or (3) the Special Counsel determines that there exists a legitimate public interest (e.g., to demonstrate that the law is being enforced, or to deter the commission of prohibited personnel practices, prohibited political activity, and other prohibited activity within the OSC's jurisdiction), except to the extent that the Special Counsel determines in any of these situations that disclosure of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy; and

r. To disclose information to the U.S. Department of Labor (DOL) about OSC's referral of a complaint alleging a violation of veterans preference requirements to DOL for further action under the Veterans' Employment Opportunities Act of 1998 further; action under the Veterans' Employment Opportunities Act of 1998 (VEOA); to disclose information to DOL or any agency or person as needed to develop relevant information about matters referred by DOL to OSC under *38 U.S.C. 4324* (the Uniformed Services Employment and Reemployment Rights Act of 1994) the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA); to disclose information to DOL or any agency or person as needed to advise on the status or disposition of matters referred by DOL to OSC for disciplinary action under *5 U.S.C. 1215*, or corrective action litigation under *538 U.S.C. 4324*.

#### POLICIES AND PRACTICES FOR STORAGE, RETRIEVAL, ACCESS CONTROLS, RETENTION AND DISPOSAL OF RECORDS IN THE SYSTEM:

Storage:

These records are stored in a variety of media, primarily consisting of file folders, and computer storage equipment.

**RETRIEVABILITY:**

Files in this system of records are retrievable by the names of key individuals or agencies involved (e.g., complainants or requesters; subjects identified in corrective action or disciplinary proceedings, warning letters, or other determinations; legal, congressional, or other representatives or points of contact, or key witnesses), although files are generally retrieved by the name of: (a) The complainant alleging a prohibited personnel practice, or other prohibited activity; (b) the alleged subject of a complaint about prohibited political activity; (c) the person filing an allegation through the OSC whistleblower disclosure channel; (d) the name of the person filing a request for an advisory opinion on political activity; (e) the name of the person on whose behalf OSC seeks corrective action, or the person against whom OSC seeks disciplinary action, in litigation before the MSPB; and (f) the plaintiff in litigation against OSC.

**SAFEGUARDS:**

These records are located in lockable file cabinets or in secured areas. The required use of computer password protection identification features and other system protection methods also restrict access. Access is limited to those agency personnel who have an official need for access to perform their duties.

**RETENTION AND DISPOSAL:**

NARA keeps records about prohibited personnel practices and other prohibited activity for three years after the matter or case is closed, or for six years if the file has been the subject of a Freedom of Information Act request. [\*36614] NARA is responsible for disposal of OSC records pursuant to law and regulation.

**SYSTEM MANAGER(S) AND ADDRESS:**

The official responsible for records management functions associated with OSC program and administrative files, including those in the OSC/GOVT-1 system of records, is the Records Management Officer, Human and Administrative Resources Management Branch, U.S. Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.

**NOTIFICATION PROCEDURE:**

Individuals who wish to inquire whether this system contains information about them should contact the system manager. To assist in the process of locating and identifying records, individuals should furnish the following:

- a. Name and address;
- b. Date and place of birth;
- c. Social Security number;
- d. A description of the circumstances under which records may have been included in the system.

**RECORD ACCESS PROCEDURES:**

Same as notification procedure, above.

**CONTESTING RECORD PROCEDURES:**

Individuals who wish to contest records about them should contact the system manager, identify any information they believe should be corrected, and furnish a statement of the basis for the requested correction along with all available supporting documents and materials.

**RECORD SOURCE CATEGORIES:**

Information in this system of records is obtained from a variety of sources, consisting of complainants or others on whose behalf allegations, or requests for information, have been submitted or referred to OSC; legal, congressional, or other representatives or points of contact; other government bodies; witnesses and subjects in matters under review;



principals involved in litigation matters, including parties and their representatives; and other persons or entities furnishing information pertinent to the discharge of functions for which OSC is responsible.

#### EXEMPTIONS CLAIMED FOR THE SYSTEM:

a. Complaint, Litigation and Political Activity files containing investigatory material compiled by OSC for law enforcement purposes are exempt to the extent allowed under subsections (k)(2) and (5) of the Privacy Act. This exemption is necessary to protect confidential sources and facilitate the voluntary cooperation of witnesses during inquiries into allegations of prohibited personnel practices or other prohibited activities.

b. Testing or examination material compiled by OSC solely to determine individual qualifications for appointment or promotion in the Federal service is exempt to the extent allowed under subsection (k)(6) of the Privacy Act. This exemption is necessary to prevent the disclosure of information that would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures.

c. OSC reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency in responding to a request, and OSC may refuse access to information compiled in reasonable anticipation of a civil action or proceeding, pursuant to subsection (d)(5) of the Privacy Act.

Dated: June 29, 2001.

Elaine Kaplan,

*Special Counsel.*

[FR Doc. 01-17418 Filed 7-11-01; 8:45 am]

BILLING CODE 7405-01-P

**SUPPLEMENTARY INFORMATION:** OSC is an independent investigative and prosecutorial agency. Its responsibilities include investigation of allegations of: (a) Prohibited personnel practices under 5 U.S.C. 2302(b), and other prohibited employment practices under 5 U.S.C. 1216; (b) prohibited political activity by federal and District of Columbia employees under 5 U.S.C. 7321-7326, and by certain state and local government employees under 5 U.S.C. 1501-1508; and (c) prohibited personnel practices in cases referred to OSC by the Merit Systems Protection Board (MSPB) under 5 U.S.C. 1221(f)(3). OSC is authorized to seek appropriate corrective and/or disciplinary action in these matters through litigation before the MSPB. Under 5 U.S.C. 1213, OSC operates a hotline channel for confidential whistleblower disclosures by current and former federal employees or former federal employees. Section 1212(f) of title 5 authorizes OSC to provide advisory opinions on request to government employees and others about whether or not they may engage in specific political activities under the Hatch Act. Finally, OSC is authorized to represent claimants in cases arising under provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), at 38 U.S.C. 4311, *et seq.*

Information developed in connection with these OSC responsibilities is maintained in the OSC/GOVT-1 system of records, which includes certain records subject to the Privacy Act. These include records in complaint files, disclosure files, Hatch Act advisory opinion files, and litigation files (in connection with litigation filed by or against OSC or its employees). The last full notice of the system was published at 64 FR 63359-63361 (November 19, 1999); minor numbering corrections were published at 65 FR 6436 (February 9, 2000).

OSC is revising the OSC/GOVT-1 system notice to: (1) Make non-substantive technical revisions; (2) propose changes in the descriptions of certain features of the system of records to update information shown in prior system notices; and (3) propose the amendment of current routine uses "p" and "q," and the addition of a new routine use "r," addressing disclosures in furtherance of OSC and U.S. Department of Labor (DOL) responsibilities for the protection of federal employment rights of veterans and reservists.

Non-substantive technical revisions are made in this notice to correct editorial errors in the November 1999 system notice; add useful citations; reflect changes in the administrative location of the system manager and the system of records; update OSC's official mailing address; and correct the description of routine use "o" by restoring the word "under" in place of "use." ("U]nder" had appeared in prior system notices, but was inadvertently changed to "use" in the November 1999 notice.)

This notice also proposes to change descriptions of categories of individuals covered by the system of records, retrievability of records in the system, and system safeguards, to update information shown in prior system notices.

Finally, this notice proposes to amend current routine use "p," by deleting "and" at the end of the text, and current routine use "q," by striking the period at the end and adding "; and". The notice also proposes a new routine use "r," to disclosures of information by OSC to DOL and others, in furtherance of OSC and DOL responsibilities for protection of federal employment rights under USERRA and the Veterans' Employment Opportunities Act of 1998 (VEOA) (amending title 5). Current routine uses cover OSC disclosures during the processing of all complaints within its jurisdiction, including for investigative and litigation purposes. OSC believes, however, that a routine [\*36612] use tailored to certain responsibilities of OSC and DOL in processing alleged violations of veterans' and reservists' federal employment rights will facilitate implementation of those responsibilities, consistent with procedures agreed to by OSC and DOL. A brief summary of the responsibilities addressed by the proposed new routine use follows:

*Violations of veterans' preference requirements (5 U.S.C. 2302(b)(11)).* OSC initially refers alleged violations of veterans' preference requirements to DOL for further action under the VEOA. (The MSPB lacks authority to order corrective action for violations alleged under 5 U.S.C. 2302(b)(11), which makes it a prohibited personnel practice to knowingly take, recommend, or approve, or fail to take, recommend, or approve any personnel action, if doing so would violate a veterans' preference requirement.) OSC has agreed to notify DOL of each such referral. DOL, in turn, will refer matters as appropriate to OSC for possible disciplinary action under 5 U.S.C. 1215.

*Violations of employment/re-employment rights (USERRA).* Upon request by a claimant, DOL refers unresolved complaints alleging violations of veterans' rights to OSC pursuant to 38 U.S.C. 4324. If OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, it may represent that person in litigation seeking corrective action before the MSPB (and, as necessary, the Federal Circuit Court of Appeals). In reviewing issues identified in the initial referral, OSC may contact DOL or any agency or person as needed to obtain relevant information on the claimant's entitlement to relief, and may consult with DOL on representation issues. If OSC declines representation, it notifies the claimant. OSC may also notify the agency involved. (No information about the basis for OSC's decision or OSC's assessment of the case is provided to the agency.)

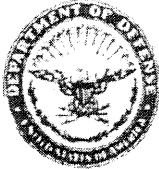
For ease of reference by other government entities and the public, the entire system notice is printed below. It includes all non-substantive technical revisions, proposed changes to descriptions of system features listed above, proposed revisions to routine uses "p" and "q," and the proposed new routine use "r."

In accordance with 5 U.S.C. 552a(r), OSC has provided a report to the Office of Management and Budget (OMB) and the Congress on significant changes proposed in this notice.

**COMMENTS:** In accordance with 5 U.S.C. 552a(e)(4) and (11), members of the public are given a 30-day period in which to comment. (OMB, which has oversight responsibility under the Privacy Act, also requires an opportunity for its review of significant changes proposed in the notice.) Any comments should be submitted to OSC in writing by August 13, 2001. Comments should be sent by mail to Erin M. McDonnell, Planning and Advice Division, U.S. Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington DC 20036-4505; comments may also be sent to the same addressee by fax, at (202)-653-5161.

DOD

# Policy Memoranda



ADMINISTRATION AND  
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE  
1950 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1950

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION  
DIRECTOR, NET ASSESSMENT  
DIRECTOR, FORCE TRANSFORMATION  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

OSD 17746-05

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.



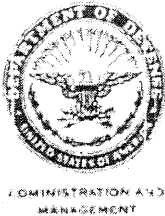
Howard G. Becker  
Deputy Director

Attachments:

As Stated

cc: Secretary of Defense

Deputy Secretary of Defense



OFFICE OF THE SECRETARY OF DEFENSE  
1950 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1950

FEB 03 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
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DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

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The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level

OSD 02421-05

may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Will Kammer, Office of Freedom of Information, at 703-697-1171.

  
Raymond F. DuBois  
Director

Attachments:  
As Stated

cc: Secretary of Defense  
Deputy Secretary of Defense



ADMINISTRATION &  
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE  
1950 DEFENSE PENTAGON  
WASHINGTON, DC 203014950



November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise



security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.
- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.



D. O. Cooke  
Director

Attachment:  
As stated



COMMAND, CONTROL,  
COMMUNICATIONS, AND  
INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE  
6000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-6000  
December 28, 2001



MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, NET ASSESSMENT  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from  
Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy ([www.defenselink.mil/webmasters](http://www.defenselink.mil/webmasters)), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and



Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail [Linda.Brown@osd.mil](mailto:Linda.Brown@osd.mil). Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.

  
John P. Stenbit

Attachment  
As stated

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**Encl 4**

**Mudd  
Case**

James Mudd

v.

United States Army

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

05 APR -1 PH 2:26

U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS, FLORIDA

JAMES V. MUDD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
UNITED STATES ARMY, )  
UNITED STATES OFFICE OF SPECIAL )  
COUNSEL, and UNITED STATES )  
DEPARTMENT OF DEFENSE, )  
)  
Defendants. )  
)

CASE NO. \_\_\_\_\_

2:05-cv-137-FtM-29DNE

COMPLAINT AND JURY DEMAND

Plaintiff JAMES V. MUDD (hereinafter "MUDD"), by and through his undersigned attorneys, sues Defendants, the UNITED STATES ARMY, the UNITED STATES OFFICE OF SPECIAL COUNSEL, and the UNITED STATES DEPARTMENT OF DEFENSE (hereinafter individually, "ARMY", "SPECIAL COUNSEL", and "DOD", and collectively, "Defendants"), and alleges as follows:

PARTIES

1. MUDD is an individual residing in Collier County, Florida who retired honorably as a Colonel in the United States Army after serving the United States of America with distinction for 26 years.
2. ARMY is a department of the United States Government with its principal location in Alexandria, Virginia.
3. SPECIAL COUNSEL is a department of the United States Government with its principal location in Washington, D.C.

4. DOD is a department of the United States Government with its principal location in Alexandria, Virginia.

#### JURISDICTION AND VENUE

5. This Court has jurisdiction over the claims in this complaint pursuant to 28 U.S.C. § 1331.

6. This Court has venue over the claims in this complaint pursuant to 28 U.S.C. § 1402.

#### GENERAL ALLEGATIONS

7. MUDD graduated from the United States Military Academy at West Point and was commissioned as a Second Lieutenant in the ARMY in 1974.

8. MUDD served in the ARMY with distinction rising to the rank of Colonel until his retirement on September 1, 2000, having served his country faithfully for 26 years.

#### Upper Mississippi River Navigation Study

9. The Upper Mississippi River is a portion of the Mississippi River which extends from Minneapolis, Minnesota, to the confluence of the Ohio River just north at Cairo, Illinois. The Upper Mississippi River is 854 miles long and has 29 locks and dams located on it. The Illinois Waterway which serves as the connecting link between the Great Lakes, the Saint Lawrence Seaway, and the Mississippi River has 8 locks and dams located on it. The system of locks and dams on the Upper Mississippi River and the Illinois Waterway is referred to as the Upper Mississippi River-Illinois Waterway navigation system. The Upper Mississippi River-Illinois Waterway navigation system provides a transportation network linking the upper Midwestern United States to domestic and overseas markets.

10. During the 1980s, the U.S. Army Corps of Engineers (the "Corps") was given Congressional authorization to undertake a formal study of the Upper Mississippi River-Illinois Waterway navigation system.

11. As part of the Corps' Civil Works Project Development Process, separate reconnaissance studies of the Illinois Waterway and the Upper Mississippi River were undertaken from 1989 to 1991. The results of these studies indicated that major capital improvements would be needed on at least five locks in the navigation system.

12. A single Upper Mississippi River - Illinois Waterway Navigation Study (the "Study") was initiated by the Corps beginning in 1993 to describe and evaluate alternative project plans, assess environmental impacts and determine if a solution could be economically beneficial.

13. From the beginning, the Study was not without controversy. Environmental and taxpayer organizations argued that major capital improvements to the system were neither cost effective nor environmentally sound for the Mississippi River ecosystem. The navigation industry, on the other hand, argued that system modernization was vital to protecting the economic well being of the Upper Mississippi River basin.

14. By the year 2000, the estimated cost for the Study was almost \$21 million over the original estimate.

#### Involvement of Dr. Sweeney in the Study

15. The Economic Work Group (the "EWG") for the Study was responsible for determining the economic benefits of the various project alternatives. To fulfill its mission, the EWG's technical manager, Dr. Donald Sweeney, who was also referred to as the Study's lead economist, devised a new economic modeling technique for the Study.



16. According to the lead economist, his new modeling technique was a distinct improvement over the modeling technique utilized by the Corps for years because it, for the first time, attempted to account for the willingness of the navigation system users to continue using the system as user costs increase.

17. Under the new modeling technique, the elasticity of demand, or the willingness of the users to use the system as costs increase, is a vitally important component which was referred to as the "N" value.

#### Involvement of MUDD in Study

18. In April 1997, as a result of a Corps wide restructuring, the Mississippi Valley Division of the Corps became the division directly responsible for the Study. Prior to this time, responsibility had been shared between two different divisions within the Corps. The Rock Island District maintained the lead district status for the Study throughout the restructuring.

19. In July 1997, MUDD took over as Commander of the Rock Island District, Mississippi Valley Division of the U.S. Army Corps of Engineers.

20. After assuming command of the Rock Island District and familiarizing himself with the current status of the Study, MUDD became concerned with the apparent repeated failure of the lead economist and his team to meet deadlines.

21. MUDD also became concerned regarding some of the assumptions being made by the lead economist particularly as those assumptions related to the "N" value in the economic model.

22. MUDD asked the lead economist and the EWG for the fundamental basis surrounding the proposed N-value of 1.5 and was informed that the various economists could not determine an absolute N-value. The EWG informed MUDD that some economists had argued

for a value of 2.0 (very elastic) and others had argued for a value of 1.0 (very inelastic), and so ultimately they had compromised by consensus on the value of 1.5.

23. MUDD informed the lead economist and the EWG that as the N-value was a key component to the economic model, the Corps needed an N-value that could be logically defended and empirically supported during the public review process that followed the release of the draft and final reports. MUDD then asked the EWG to come up with a N-value that could be defended and supported.

24. Around this time, MUDD, in consultation with his Division Commander, had the lead economist reassigned off of the Study due to the repeated failures of he and his team to meet deadlines.

25. While the EWG was exploring options for a new N-value for the economic model, MUDD also approached experts in the area regarding the historical elasticity of grain on the Mississippi River and was advised that approximately 70% of the grain transported on the navigation system which originated in Iowa, the only state for which such data existed, was derived from eastern Iowa, 20% was derived from central Iowa, and 10% was derived from western Iowa, and was also informed that the elasticity of demand for use of the navigation system would depend in large measure on where the grain to be shipped was derived. MUDD presented this information, including some proposed elasticities derived from the experts and from the Iowa Grain Flow Survey, to the new lead economist and suggested that perhaps a more defensible position was to take a weighted average of the elasticities of the grain.

26. Shortly thereafter, the new lead economist approached MUDD and suggested an N-value of 1.2, which was the weighted average of the elasticities obtained by MUDD. In June

of 1999, MUDD accepted this recommendation and ordered that an N-value of 1.2 be utilized by the EWG in its efforts to utilize the economic model developed by Dr. Sweeney.

#### Sweeney Whistleblower Claims

27. After his removal from the Study in February 2000, the former lead economist, and the creator of the economic modeling system that is contingent on an appropriate N-value, filed an affidavit with the U.S. Office of Special Counsel accusing Corps officials of altering Study data in order to justify major capital improvements to the navigation system.

28. Specifically, the former lead economist charged that MUDD and others had intentionally altered the proposed N-value of 1.5 to 1.2 in order to support additional capital improvements on the navigation system.

29. Based solely upon this affidavit, the U.S. Office of Special Counsel found a substantial likelihood that the Corps violated regulations and wasted millions of dollars of taxpayer funds and requested that the Department of Defense investigate the allegations contained in the affidavit.

#### Investigations

30. In the Spring of 2000, the Department of the Army Inspector General ("DAIG") began an investigation into the alleged misconduct of Corps officials.

31. Also during this time, various environmental groups, who generally opposed any major capital improvements to the navigation system, assisted the lead economist in gaining wide media coverage of his allegations.

32. This large media coverage lead to hearings being called by Congress regarding the Study in the Spring of 2000. The Congressional hearings did not yield any allegations of fraud or criminal intent by any Corps officials, including MUDD. In fact, subsequent

Congressional findings indicate the exact opposite that Corps officials acted appropriately in attempting to fix a fundamentally flawed economic model.

33. In June of 2000, the National Academy of Sciences initiated a review of the Corps' methodology for the conduct of the Study, particularly the methodology being utilized in the economic model proposed by the former lead economist, which was initially scheduled to be released in November of 2000.

34. On September 1, 2000, MUDD retired from the Army and received an honorable discharge.

#### Release of the Report

35. On September 28, 2000, the Secretary of the Army approved the DAIG Report of Investigation (the "DAIG Report") and forwarded the same to the Secretary of Defense. Clearly printed at the bottom of each page of the DAIG Report was the language "For Official Use Only. Dissemination Is Prohibited Except As Authorized By AR 20-1."

36. The Report indicated among other things that MUDD took or directed actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study failing to meet standards established in law and regulation.

37. On November 13, 2000, the Secretary of Defense forwarded the DAIG Report to the Office of the Special Counsel with an admonition that the Report contained information that may be considered as a basis for adverse actions against individuals and therefore it should only be distributed to those whose duties and official responsibilities required access to it in order to protect the privacy of those individuals and witnesses who requested confidentiality.

38. On November 17, 2000, the Department of the Army responded to an inquiry from the Office of Special Counsel regarding the timeline for the release of the National

Academy of Sciences review and informed the Office of the Special Counsel that the National Academy of Sciences had requested a three month extension within which to release the results of its investigation. Consequently, the National Academy of Sciences was not going to release the results of its investigation until February of 2001 at the earliest.

39. On November 20, 2000, the Office of Special Counsel gave a copy of the DAIG Report to Dr. Sweeney for his review and comments, which he placed in writing on December 1, 2000.

40. MUDD was not given a copy of the DAIG Report prior to its release, nor was he given the opportunity to comment on all of the allegations against him contained in the DAIG Report prior to it being released to the media.

41. On December 6, 2000, the Office of Special Counsel held a press conference whereby it released copies of the complete DAIG Report to all of the members of the press that were present and the Office also posted a complete copy of the DAIG Report on the Internet on its web-site.

42. By correspondence dated December 12, 2000, MUDD received a Memorandum of Admonishment from General John M. Keane, the Vice Chief of Staff for the Army. According to the Memorandum of Admonishment, MUDD was admonished for improperly taking or directing actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study that would fail to meet standards established in law and regulation. General Keane did not officially admonish MUDD because he believed that MUDD's decision to change the N-value in the study was based on methodology that MUDD believed was more appropriate and reasonable.

43. By correspondence dated December 14, 2000, MUDD was informed by the DAIG that the investigation was concluded, that the findings had been approved by the Secretary of the Army and that the Vice Chief of Staff for the Army would be taking action that he deems appropriate.

44. In February of 2001, the National Academy of Sciences released its report finding that the economic model developed by Dr. Sweeney was fundamentally flawed.

#### MUDD Follow-Up

45. Both before its release by the Office of Special Counsel, and after, MUDD filed four separate requests with ARMY to receive a copy of the completed Report and copies of the transcripts of his own testimony in the investigation. Each of these requests were forwarded also to the Office of Special Counsel. Ultimately, MUDD was informed that the DAIG could not provide him with a copy of the Report, but was directed by a representative of ARMY to download a copy of the Report from the web-site for SPECIAL COUNSEL. Copies of these requests and responses are attached hereto at Tabs D and E of Composite Exhibit "1".

46. By correspondence dated January 28, 2001, MUDD informed ARMY that the Report was posted on the web-site for the Office of Special Counsel. ARMY did nothing to protect MUDD's rights to privacy regarding the improper dissemination of his private information. A copy of this correspondence is attached hereto at Tab G of Composite Exhibit "1".

47. By correspondence dated March 10, 2001, MUDD appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army, in light of the findings of the National Academy of Sciences and provided additional materials that appeared to have been overlooked by the DAIG during its investigation. A copy of this correspondence is

attached hereto at Tab A of Composite Exhibit "1". As the issuing officer of the Memorandum of Admonishment and the individual in the chain of command that oversees the activities of the DAIG, the Vice Chief of Staff of the Army is the appropriate individual to receive MUDD's appeal. MUDD received no response to his appeal.

48. By correspondence dated January 3, 2003, MUDD advised the Vice Chief of Staff of the Army that he had received no response to his earlier appeal and requested a response. MUDD received no response to his appeal. A copy of this correspondence is attached hereto at Tab B of Composite Exhibit "1".

49. By correspondence dated April 16, 2003, MUDD, by and through the undersigned counsel, again appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto at Tab H of Composite Exhibit "1".

50. By correspondence dated June 6, 2003, ARMY finally responded to MUDD's appeal with notice that his concerns were being reviewed. A copy of this correspondence is attached hereto at Tab I of Composite Exhibit "1".

51. By correspondence dated July 31, 2003, MUDD provided ARMY with additional support for his appeal in the form of notice that after two years of study and review, the Corps had determined that MUDD's N-value of 1.2 was an appropriate value for the elasticity of grain on the navigation system. A copy of this correspondence is attached hereto at Tab J of Composite Exhibit "1".

52. By correspondence dated October 2, 2003, MUDD provided ARMY with additional support for his appeal which corroborated the information contained in the July 31,

2003 correspondence. A copy of this correspondence is attached hereto at Tab K of Composite Exhibit "1".

53. After receiving no updates from ARMY since June 6, 2003, MUDD again contacted ARMY by correspondence dated December 9, 2003, requesting an update on the status of the appeal. A copy of this correspondence is attached hereto at page 1 of Tab L of Composite Exhibit "1".

54. By correspondence dated December 16, 2003, ARMY finally responded that the DAIG had completed its review of MUDD's appeal on September 26, 2003, but in light of the additional information provided in October, there was a delay in responding as they considered the additional evidence. A copy of this correspondence is attached hereto at page 2 of Tab L of Composite Exhibit "1".

55. Finally, by correspondence dated January 26, 2004, ARMY responded that the information provided by MUDD did not merit a change in the findings of the DAIG Report. A copy of this correspondence is attached hereto at page 3 of Tab L of Composite Exhibit "1".

56. MUDD attempted to informally achieve a resolution of this matter, but his efforts were rebuffed.

57. By correspondence dated August 10, 2004, because he had never received any response from the Vice Chief of Staff of the Army, the only individual who could effect a change in his admonishment and/or the DAIG Report findings, MUDD attempted one last effort to appeal the findings to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto as Composite Exhibit "1".



58. By correspondence dated October 1, 2004, ARMY again denied MUDD's attempts to appeal his Memorandum of Admonishment and the DAIG Report findings. A copy of this correspondence is attached hereto as Exhibit "2".

59. As demonstrated by the above correspondence, MUDD has exhausted his administrative remedies.

#### Additional Studies

60. In August of 2003, the United States Department of Agriculture released a study of the elasticity of grain on the navigation system and found it, contrary to the assumptions of Dr. Sweeney and the EWG prior to the questioning by MUDD, to be highly inelastic.

61. In April of 2004, the Tennessee Valley Authority also released the results of a study that examined the economic model developed by Dr. Sweeney, and particularly his concept of the elasticity of grain on the navigation system, and found that the elasticity assumptions of Dr. Sweeney and the EWG, prior to the questioning by MUDD, were inaccurate.

62. Also in April of 2004, the Corps released its draft Study Report. Interestingly, despite the admonition of the National Academy of Sciences in February of 2001, the Corps continued to utilize the economic model developed by Dr. Sweeney. Moreover, the elasticity values utilized by the Corps in the draft Study Report are exactly the same as the N-value of 1.2 adopted by MUDD, and for which he was admonished.

63. In late 2004, after the appropriate public comment periods, the Corps issued its Final Report which continues to utilize the N-value adopted by MUDD.

#### Review Process

64. Once a draft feasibility report is issued by the Corps district responsible for the study, there is a two to three month public review and comment period for the draft report.

65. Once the public review and comment period is completed, the Corps then reviews the public comments and make appropriate adjustments, if any are required, to the draft and a final report is issued by the Corps district responsible for the study.

66. Upon issuance of a final report by the district, there is a second public review and comment period for one to two months. During this time, there are additional reviews of the final report by various state and federal agencies.

67. At the conclusion of the two review phases, the Corps Division Commander submits a final report to Corps headquarters, where it undergoes yet another review before the Chief of Engineers for the Corps issues a final report containing recommendations for improvement to the navigation system.

68. This final report is then reviewed by the Department of the Army, the Department of Defense and the Office of Management and Budget prior to any recommendations arising out of the report are submitted to the Congress.

69. Consequently, in 2000, when Dr. Sweeney first raised his claims, the Corps had not even begun to prepare its draft report, nor had any of the work been subjected to any public review or comments.

70. MUDD has retained the law firm of Porter, Wright, Morris & Arthur, LLP to represent him with regard to his claims in this action and is responsible to pay it fees for the services it provides in connection with the representation.

#### COUNT I – VIOLATIONS OF PRIVACY ACT

71. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

72. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

73. On December 6, 2000, SPECIAL COUNSEL held a press conference where it released the complete DAIG Report to members of the media and posted the complete report on its web-site.

74. The DAIG Report contained personal information of MUDD's that is protected by the Privacy Act.

75. SPECIAL COUNSEL did not request prior permission from MUDD to release the protected information contained in the DAIG Report, nor has MUDD ever given SPECIAL COUNSEL permission to release his personal information to any third-party.

76. SPECIAL COUNSEL improperly released this personal information for the express purpose of injuring MUDD's reputation.

77. Prior to its release, SPECIAL COUNSEL was advised by the Secretary of Defense that disclosure of the DAIG Report should be limited to protect MUDD's personal information.

78. At all times relevant herein, the employees of SPECIAL COUNSEL were acting within the scope of their employment.

79. As a direct result of SPECIAL COUNSEL's improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES OFFICE OF SPECIAL COUNSEL pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

#### COUNT II – VIOLATIONS OF PRIVACY ACT

80. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

81. MUDD realleges the allegations set forth in paragraphs 1 through 70 and 73 through 79 as if fully set forth herein.

82. After SPECIAL COUNSEL released MUDD's personal information in violation of the Privacy Act, DOD and ARMY were advised by MUDD that his personal information was being improperly disseminated by SPECIAL COUNSEL.

83. Shortly thereafter, ARMY notified MUDD that it could not release the DAIG Report to him, nor could it release its investigation materials to him pursuant to the Privacy Act, but that he could obtain the complete DAIG Report containing his personal information on the Internet on the SPECIAL COUNSEL's web-site.

84. Upon receiving notice of this improper release of MUDD's personal information, neither DOD nor ARMY took any actions to halt the unauthorized release of the information.

85. DOD and ARMY refused to halt the improper release of MUDD's personal information with the intent of injuring MUDD's reputation.

86. At all times relevant herein, the employees of DOD and ARMY were acting within the scope of their employment and/or acting in the line of duty.

87. As a direct result of DOD's and ARMY's refusal to stop the improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendants UNITED STATES ARMY and the UNITED STATES DEPARTMENT OF DEFENSES pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

### COUNT III – FAILURE TO FOLLOW ARMY REGULATIONS

88. This is an action for damages for failure to follow Army Regulations.

89. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

90. Pursuant to paragraph 8-6 of Army Regulation 20-1, a suspect or subject is entitled to be told of any unfavorable information uncovered during the Inspector General's investigation and is to be given the opportunity to comment on the unfavorable information.

91. MUDD was never told of the unfavorable information contained in the DAIG Report, nor was he given an opportunity to comment on the unfavorable information prior to its being improperly released to the media.

92. Moreover, pursuant to Army Regulation 20-1, the DAIG report was not to be distributed beyond those individuals whose duties and official responsibilities require access to it to protect the privacy of the individuals and witnesses who requested confidentiality.

93. Contrary to Army Regulation 20-1, ARMY allowed the DAIG report to be released to the general public and did not protect the privacy of MUDD.

94. As a direct result of ARMY's failure to allow MUDD to comment on the unfavorable information prior to it being issued in final form, or to provide additional information to the investigators prior to the DAIG Report being issued in final form, MUDD has suffered and continues to suffer damages to his personal and professional reputation.

95. As a direct result of ARMY's failure to protect MUDD's privacy, he has suffered damages and continues to suffer damages to his personal and professional reputation.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES ARMY for damages, and for such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff JAMES V. MUDD hereby demands a trial by jury on all issues so triable.

Dated this 1st day of April, 2005.

Porter, Wright, Morris & Arthur LLP

By: 

Joseph G. Foster, Esq.  
Florida Bar No. 0301980  
Attorneys for Plaintiff  
5801 Pelican Bay Blvd., Suite 300  
Naples, Florida 34108  
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(239) 593-2990



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON, DC 20310-0111

December 1, 2008

The Honorable Scott J. Bloch  
The Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Re: Whistleblower Investigation—Fort Lewis  
Public Works, Fort Lewis, Washington (Office  
of Special Counsel Case File Numbers DI-07-  
1058 through DI-07-1070)

Dear Mr. Bloch:

In accordance with Title 5, United States Code (USC), Sections 1213(c) and (d), the enclosed report is submitted in response to the Office of Special Counsel (OSC) referral of information requesting an investigation and report of findings in the above referenced case. The Secretary of the Army (SA) has delegated to me his authority, as agency head, to review, sign, and submit to you the report required by Title 5, USC, Sections 1213(b), (c), and (d) **Tab 1**.

This report and its exhibits contain the names and duty titles of employees of the Fort Lewis Directorate of Public Works (DPW) as well as of other Department of the Army soldiers and civilian employees. Release of this information may result in violations of the Privacy Act<sup>1</sup> and breaches of personal privacy interests. Accordingly, releases required by Title 5, USC, Section 1213(e) excepted, the Department of the Army requests the opportunity to coordinate in advance, on any proposed release of this report outside of OSC.

This report provides the information required by Title 5, USC, Section 1213(d). In addition, the report includes a "Background" section that describes the organization of the Fort Lewis DPW and details the wastewater treatment process employed at the Fort Lewis Waste Water Treatment Plant (WWTP).

#### INFORMATION INITIATING THE INVESTIGATION

By letter dated May 24, 2007 **Tab 2**, OSC referred to the SA its conclusion of a substantial likelihood that information provided by a class of twelve present and former employees of the

<sup>1</sup> The Privacy Act of 1974, Title 5, USC, Section 552a.

DPW, Fort Lewis, Washington<sup>2</sup> disclosed violations of law, rule, or regulation; gross mismanagement; and a substantial and specific danger to public health and safety related to activities at the Fort Lewis WWTP, Fort Lewis, Washington.

Summary of the Allegations:

The OSC referral of the instant case to the Department of the Army comprised five allegations, briefly summarized below:

**Allegation 1: Unlawful Discharge of Oil and Contaminants.**

**1a:** That since May of 2006, the Fort Lewis WWTP had discharged unacceptable quantities of oil and other contaminants into the waters of Puget Sound,<sup>3</sup> in violation of the *Clean Water Act*, Title 33, USC, Section 1251 *et seq.*, and the plant's National Pollutant Discharge Elimination System (NPDES) permit.<sup>4</sup>

**1b:** That the presence of excess oil in the influent water clogged WWTP machinery, rendering the plant less efficient in removing contaminants from the water. The oil and other contaminants released from the WWTP adversely impacted the Puget Sound ecosystem.

**1c:** That excess oil had accumulated in the plant's sludge (*i.e.*, the bio-solids that settle out of the influent water<sup>5</sup>), creating a danger to public health when the sludge was used as fertilizer in residential areas across Fort Lewis.

**1d:** That the high levels of oil in the effluent water<sup>6</sup> resulted from the combined effects of multiple factors: the improper dumping of oil products into the Fort Lewis sewer system; the plant's failure to pretreat influent water as required by federal and state regulations; and the failure of WWTP management to procure the proper oils and polymers for use with plant equipment and to maintain other plant equipment as required.

**Allegation 2: Failure to Maintain Equipment.**

**2a:** That the illegal discharge of oil and other contaminants into the waters of Puget Sound was caused by the fact that the plant's equipment is old, in poor condition, and poorly maintained due to a lack of tools and replacement parts.

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<sup>2</sup> The Fort Lewis Directorate of Public Works (DPW) exercises responsibility and oversight for the operations of the Fort Lewis WWTP.

<sup>3</sup> Following treatment at the Fort Lewis WWTP, treated waste water is discharged into Puget Sound, adjacent to the plant.

<sup>4</sup> The Federal National Pollutant Discharge Elimination System (NPDES) permit program, created by the *Clean Water Act*, governs the discharge of pollutants from point sources into waters of the United States. The Fort Lewis WWTP currently operates pursuant to a federally-issued NPDES permit, which imposes qualitative and quantitative limits on the various pollutants that may be discharged lawfully from the WWTP into the receiving waters of Puget Sound.

<sup>5</sup> "Influent" refers to the wastewater, containing raw sewage and other contaminants, that flows **into** the WWTP for treatment.

<sup>6</sup> "Effluent" refers to the water that flows **out of** the WWTP subsequent to treatment.



**2b:** That bio-solid waste was discharged into the waters of Puget Sound when excessive rainwater leaked into the sewer system and became part of the influent water treated by the plant, exceeding the plant's treatment capacity.

**Allegation 3: Failure to Properly Test and Monitor Water.**

**3a:** That plant managers did not conduct mandatory testing of the water and properly record and report test results as required by the NPDES permit.

**3b:** That test results were not provided to operators or lab technicians as required by the NPDES permit.

**Allegation 4: Gross Mismanagement by Plant Supervisor, Mr. Al Long.**

**4a:** That [REDACTED] was not qualified to supervise the Fort Lewis WWTP because he did not possess the appropriate Group III WWTP certification.

**4b:** That [REDACTED] frequently required operators to perform work at other locations on Fort Lewis, leaving the WWTP unattended. This practice violated the plant's NPDES permit and jeopardized public health and safety; an operator always should have been present at the plant in the event of a malfunction, break-down, or other emergency situation.

**Allegation 5: Occupational Health and Safety Hazards.**

**5a:** That [REDACTED] repeatedly exhibited a flagrant disregard for employee safety: he frequently assigned members of the WWTP staff to perform dangerous work at the outfalls, but failed to provide prerequisite training; failed to notify employees when contractors were performing maintenance on WWTP gas lines; and failed to hold monthly safety meetings in violation of Occupational Health and Safety Administration (OSHA) requirements and the plant's Standard Operating Procedures (SOPs). Despite repeatedly having received reports of these problems, both [REDACTED] and his supervisor, [REDACTED], failed to take corrective action.

**5b:** That toxic gases continually leaked from a cracked digester, causing both short and long-term ill effects. Despite repeatedly having received reports of this problem, both [REDACTED] and his supervisor, [REDACTED], failed to take corrective action.

## CONDUCT OF THE INVESTIGATION

Receipt of OSC Allegations and Referral to the U.S. Army Installation Management Command (IMCOM) for Investigation:

On May 30, 2007, the Army Office of the General Counsel (OGC) forwarded the OSC request for investigation to IMCOM for action [Tab 3]. This referral was appropriate because

the Fort Lewis WWTP reports to the Fort Lewis Garrison Commander, who in turn reports to IMCOM on matters related to installation services and support.

On June 6, 2007, Mr. Philip Sakowitz, Executive Director, IMCOM, appointed [REDACTED], then Assistant to the Deputy Director, IMCOM West Region, as an investigating officer (IO) under provisions of Army Regulation (AR) 15-6, *Procedures for Investigating Officers and Board of Officers*,<sup>7</sup> with a mandate to investigate the allegations forwarded by OSC [Tab 4]. An IMCOM team of experts was assembled to assist the IO.<sup>8</sup> [REDACTED] received and reviewed the documents provided by the OSC in support of the referred allegations.

[REDACTED] conducted a comprehensive investigation.<sup>9</sup> Among the most significant of his investigative activities, [REDACTED] interviewed 20 key witnesses, to include the 12 whistleblower complainants and conducted an on-site assessment of the Fort Lewis WWTP. He also reviewed the report of a U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) Performance Evaluation of the Fort Lewis WWTP, conducted from November 29 through December 7, 2006. Although this Performance Evaluation had been effected prior to, and independent of, any investigation of the OSC allegations, its subject matter and findings bore directly on the matters referred by OSC [ROI-I, Exhibit 4].<sup>10</sup> [REDACTED]

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<sup>7</sup> AR 15-6 promulgates guidelines for Army administrative investigations. Army commands and organizations appoint investigating officers under provisions of AR 15-6 to investigate all manner of allegations and concerns.

<sup>8</sup> The other team members were [REDACTED], Attorney, IMCOM West, Fort Sam Houston, San Antonio, Texas; and [REDACTED], Environmental Specialist, IMCOM West, Rock Island Arsenal.

<sup>9</sup> [REDACTED] first completed his investigation on July 19, 2007 [ROI-I]. Upon review, it was determined that the investigation did not address certain of the allegations referred by the OSC. [REDACTED] was directed to continue his investigation and on November 9, 2007, submitted his supplemental report [ROI-II] to the appointing authority. Given the extensive evidence and other materials comprising the investigative record, this Department of the Army report to the OSC report employs a citation convention designed to facilitate ready reference to the specific document from which facts or assertions set forth herein are drawn. The IO's first investigation is maintained in two binders labeled "Fort Lewis WWTP Investigation (Binder 1)/(Binder 2)." His second, supplemental investigation is maintained in a third binder, labeled "Supplemental Report to AR 15-6 Investigation Fort Lewis Waste Water Treatment Plant." Information drawn from the narrative of the first report of investigation is cited herein as "ROI-I," followed by a reference to the page number from which the information is drawn. If the information is drawn from an exhibit or enclosure to the first report of investigation, the "ROI-I" designation is followed by numerical reference to the exhibit or enclosure to the report from which the reference is drawn, and, as appropriate, a brief description and reference to the applicable page or paragraph of that exhibit or enclosure (e.g., ROI-I, Exhibit 5, Statement of [REDACTED] para 2c). Information drawn from the second investigation is cited in the same format, but with the identifier "ROI-II."

<sup>10</sup> The U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) is an agency of the U.S. Army charged with the mission to "provide worldwide technical support for implementing preventive medicine, public health, and health promotion/wellness services into all aspects of America's Army and the Army Community, anticipating and rapidly responding to operational needs and adaptable to a changing work environment." [ROI-I, Exhibit 4, Cover p 2]. The USACHPPM provides services to Army installation, upon request, and on a reimbursable basis. The USACHPPM conducted a Performance Evaluation Study of the WWTP from November 29—December 6, 2006 [ROI-I, Exhibit 4]. Fort Lewis requested this performance evaluation to "[e]valuate the performance of the Solo Point WWTP and verify compliance." [ROI-I, Exhibit 4, Executive Summary, para 1]. The USACHPPM Performance Evaluation was not driven by any federal, state, or local regulatory concern or requirement [ROI-I, Exhibit 4]. As explained in ROI-II, pp. 6-7, paras 4d-e, the final USACHPPM report and recommendations were issued solely for consideration by installation management. There was no requirement that Fort Lewis report its acceptance or rejection of any recommendation back to the

██████████ also gathered and reviewed documentary evidence, to include the EPA-issued NPDES permit and the State of Washington Bio-solids Management permit [ROI-II, Exhibit 139] governing the operation of the Fort Lewis WWTP [ROI-I, Exhibit 3] and correspondence between the WWTP, the EPA, and the State of Washington Department of Ecology. He further analyzed WWTP Discharge Monitoring Reports (DMRs)<sup>11</sup> dating from June 2005 to August 2007 [ROI-I, Exhibits 74-97, ROI-II, Exhibits 192-194], Facility Operating Logs dating from June 2005 to August 2007 [ROI-I, Exhibits 50-73, ROI-II, Exhibits 197-199], and the plant's Annual Bio-solids Reports for calendar years 2003 through 2006 [ROI-II, Exhibits 190-191]. He also considered Workplace Assessment Evaluations (WEA) of the WWTP prepared by industrial hygiene experts from the Madigan Army Medical Center, Fort Lewis [ROI-II, pp. 7-8, Exhibits 98, 101, 169, 171, 175-176].<sup>12</sup> Finally, the IO reviewed and incorporated in his investigative record, a prior AR 15-6 investigation conducted by ██████████, the Fort Lewis Security Officer, into eleven allegations associated with management practices at the WWTP [ROI-I, p. 19, para 8b(13), ROI-I, Exhibit 9].<sup>13</sup>

The concerns set forth by OSC also were the subject of significant media investigation and reporting in the Fort Lewis, Washington area.<sup>14</sup> The IO continuously monitored and assessed

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USACHPPM, nor was the installation required to report actions taken in response to any USACHPPM recommendation.

<sup>11</sup> Discharge Monitoring Reports (DMRs) are described at Section II.F. of the NPDES, which provides "[t]he Permittee shall summarize monitoring results each month on the Discharge Monitoring Report (DMR) for (EPA No. 3320-1). The Permittee shall submit reports monthly, postmarked by the 10<sup>th</sup> day of the following month."

<sup>12</sup> The Fort Lewis Industrial Hygiene Workplace Exposure Assessment (WEA) program exists to assist the garrison directors and their staffs in performing their missions safely while providing a healthy workplace environment for employees. The program is administered by the Madigan Army Medical Center (MAMC), located at Fort Lewis, with oversight by the Installation Safety Office. Industrial hygienists (IH) examine installation facilities and processes, and then establish reviews and inspections prioritized by exposure and risk level [ROI-II, p. 7, para 4g]. Directors are responsible for taking corrective action on reported shortcomings. The IO considered MAMC WEA reviews of the Fort Lewis WWTP dated June 8, 2005 and August 30, 2006 [ROI-I, Exhibit 99, p. 2, Exhibit 98, p. 2, para 5], and of the Water and Sewer Shop, dated June 1, 2005 [ROI-I, Exhibit 100, p. 2], June 7, 2005 [ROI-I, Exhibit 101, p. 4], and April 27, 2004 [ROI-II, Exhibit 175, p. 6, para 5e], all of which observed that with respect to personal protective equipment (PPE), personnel in work areas were provided with appropriate safety gear and equipment, including face shields, chemical goggles, rubber aprons and rubber gloves to protect them from "hazards of the job." All PPE was found to be in good repair and sufficient to protect workers. In the August 2006 WEA review, IH technicians identified issues with both the WWTP confined space program and the hazard communication program [ROI-II, Exhibits 98, 169]. All shortcomings listed in that report were corrected or are in the process of being corrected [ROI-I, Exhibits 98, 163, 169]. The most recent WEA review of the WWTP, on June 27, 2007, addressed three additional occupational health concerns raised by WWTP management, all of which were subsequently corrected [ROI-II, pp. 7-8, para 4g(1), ROI-II, Exhibits 169, 176].

<sup>13</sup> On April 17, 2007, the Fort Lewis Garrison Commander appointed ██████████ as an IO under provisions of AR 15-6, to investigate eleven allegations related to the hiring of ██████████ as the supervisor of the WWTP and other specific WWTP management practices. ██████████ submitted her completed AR 15-6 ROI on June 7, 2007. The Garrison Commander concurred in the report and approved Ms. Powell's recommendations on July 25, 2007, then forwarded the report to ██████████, the Deputy Director of Fort Lewis Public Works, for corrective action [Tab 26a].

<sup>14</sup> In late March 2007, reports that the Fort Lewis WWTP was unlawfully discharging oil and other contaminants into Puget Sound appeared in three news sources in the Fort Lewis locality: KING 5 News, a Seattle, Washington based television station, whose March 29, 2007 report addressed alleged contaminant dumping into Puget Sound [ROI-II, Exhibit 182]; a March 30, 2007 *Seattle Times* article that reported on why and how it was believed that oil could be reaching the waters of Puget Sound [ROI-II, Exhibit 183]; and KNDU-KNDO, a Yakima, Washington-

this media coverage for additional facts and information that might bear on his investigation. At the mid-point in his investigation, ██████████ was transferred to a new job with another Army command. A special agreement between the losing and gaining commands facilitated ██████████ continued service as the IO in this matter, but his new duties complicated his ability to focus exclusively on the investigation of the OSC-referred allegations.

By law, an agency is allotted 60 days to investigate and submit to the OSC a written report of findings as to the matters referred.<sup>15</sup> In the instant case, however, the breadth and complexity of the allegations referred by OSC, coupled with the ██████████ competing duties and responsibilities, resulted in completion of his supplemental investigation on November 7, 2007. On behalf of IMCOM, the OGC requested, and the OSC granted, a series of nine extensions, generally in increments of 60 days, to bring to closure the investigation and submit the Department of the Army report to the OSC [Tabs 5-13].<sup>16</sup>

## BACKGROUND INFORMATION

### Fort Lewis Mission and Organization:

Located in the Pacific Northwest on Puget Sound, Fort Lewis is situated south of the City of Tacoma and adjacent to McCord Air Force Base. Fort Lewis is one of 15 Power Projection Platforms<sup>17</sup> located in the continental United States and is the home of "I Corps", a component of the U. S. Army Forces Command (FORSCOM). The I Corps' primary geographic focus is the Pacific Rim.

The Fort Lewis installation is managed through a "garrison" organization [ROI-II, pp. 12-13; ROI-II Exhibit 171], commanded by a garrison commander,<sup>18</sup> and comprised of several subordinate installation Directorates and support offices. These Directorates and support offices provide all of the services required by a total military and civilian population of approximately 92,000, to include the operation and maintenance of more than 23 million

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based television station, whose March 30, 2007 article briefly reported some of the same general facts associated with the OSC-referred allegations [ROI-II Exhibit 184].

<sup>15</sup> Title 5, USC, Section 1213(c)(1)(B).

<sup>16</sup> See *id.* (authorizing the Special Counsel to agree to a longer period of time for the agency to investigate and report its findings). See Extension 1, requested July 23, 2007 (granted by OSC on July 24, 2007, through September 25, 2007) [Tab 5]; Extension 2, requested September 20, 2007 (granted by OSC on September 20, 2007, for 60 days, through November 26, 2007) [Tab 6]; Extension 3, requested November 23, 2007 (granted by OSC on December 3, 2007, through January 28, 2008) [Tab 7]; Extension 4, requested January 28, 2008 (granted by OSC on February 4, 2008, through March 31, 2008) [Tab 8]; Extension 5, requested March 28, 2008 (granted by OSC on April 1, 2008, for 60 days, through May 27, 2008) [Tab 9]; Extension 6, requested May 23, 2008 (granted by OSC on May 27, 2008, through July 28, 2008) [Tab 10]; Extension 7, requested July 24, 2008 (granted by OSC on July 29, 2008, for 60 days through September 29, 2008) [Tab 11]; Extension 8, requested September 25, 2008 (granted by OSC on September 30, 2008, for 60 days) [Tab 12]; Extension 9, granted on September 30, 2008, for 60 days, through December 1, 2008 [Tab 13].

<sup>17</sup> A Power Projection Platform is an Army installation that strategically deploys one or more high priority active component brigades or larger-sized units and/or mobilizes and deploys high priority Army reserve component units.

<sup>18</sup> At most Army installations, the garrison commander is typically an Army officer in the grade of Colonel.

square feet of facilities under purview of the installation. Many Fort Lewis garrison facilities mirror those common to a medium sized U.S. city (e.g., offices, housing units, medical and dental clinics, schools, etc.); however, the garrison also services numerous facilities designed to support military-unique missions (e.g., an airfield, ranges, training areas, and rail facilities).

One of the seven Fort Lewis Garrison Directorates is the DPW [ROI-II, Exhibits 171, 172]. The primary mission of this Directorate, led by a senior Army civilian, is to provide maintenance, repair, construction, and utilities services to the Fort Lewis installation.

As of July 2008, the WWTP was moved organizationally directly under the Deputy Director, DPW. Previously, ██████████, Chief, of the Operations and Maintenance Division, an element of the DPW, had exercised supervisory responsibility over the Fort Lewis WWTP [ROI-I, Exhibit 173]. The Operations and Maintenance Division's other primary missions included providing maintenance and repair to real property facilities at Fort Lewis, the operation of the Fort Lewis Water Treatment Plant (WTP),<sup>19</sup> and the operation and maintenance of several installation boiler plants. In 2003, the Fort Lewis DPW completed a study pursuant to Office of Management and Budget Circular A-76<sup>20</sup> to determine whether, in the interests of efficiency and cost-savings, the public works function should be retained "in-house" or contracted out. As part of the study, an in-house organization of government employees developed a "Most Efficient Organization (MEO)" with a view to competing against private industry bids to manage the DPW. As part of the MEO, the Fort Lewis WWTP and the Fort Lewis WTP were conjoined under a single supervisor and reorganized as the *Wastewater Treatment Plant and Water Treatment Plant Branch*, under the jurisdiction of the Operations and Maintenance Division, DPW [ROI-II, Exhibit 174]. This reorganization significantly expanded the assigned supervisor's span of control to *two geographically separate facilities, performing very different functions* and doubled the number of employees for which the supervisor was responsible.<sup>21</sup>

<sup>19</sup> The WTP treats and distributes drinking water to the installation. The WWTP treats wastewater generated on the installation.

<sup>20</sup> Office of Management and Budget Circular A-76, *Performance of Commercial Activities*, dated May 29, 2003. This Circular implements the Federal government's longstanding policy of reliance on the private sector for necessary commercial services. The Circular requires agencies to identify all activities performed by government personnel as either "commercial" or "inherently governmental" and to use a streamlined or standard competition to determine if government personnel should perform a commercial activity or if that activity should be contracted out. The operation of the WWTP is considered to be a commercial activity. In the context of an A-76 process, government employees competed against commercial bidders to manage the DPW and won the competition.

<sup>21</sup> ██████████ was the first supervisor of the joint *Wastewater Treatment Plant and Water Treatment Plant Branch*. When ██████████ departed in 2005, ██████████ assumed those duties. ██████████'s primary area of expertise was wastewater treatment whereas ██████████'s experience was primarily in the field of water treatment. Whereas ██████████ had maintained his office at the WWTP, ██████████'s primary office was at the WTP. These differences between ██████████ and ██████████ appear to have generated a perception among employees of the WWTP of ██████████ as an "outsider," who did not have hands-on experience in wastewater treatment management. From September 2005 through March 2007, ██████████ served as supervisor of the *Wastewater Treatment Plant and Water Treatment Plant Branch*. In April 2007, ██████████ was relieved of his responsibilities as WWTP supervisor and replaced on an interim basis by ██████████, an engineer graduate from the U.S. Military Academy. In January 2008, Fort Lewis decided to split the merged WWTP and WTP and return each branch to its separate, pre-MEO status. This decision resulted from a recognition of the organizational challenges created by the merger of the WWTP and the WTP; the fact that each branch required different knowledge and skill sets; and the geographic separation between the units resulting in a very large

## The Wastewater Treatment Process.<sup>22</sup>

The Fort Lewis WWTP<sup>23</sup> was constructed in 1955 for the *primary treatment*<sup>24</sup> of both domestic and industrial wastewater. The facility was upgraded to provide *preliminary*<sup>25</sup> and *secondary*<sup>26</sup> treatment capabilities in 1974 and was upgraded again in 2005.

Wastewater enters the Fort Lewis WWTP from users at Fort Lewis, McCord Air Force Base, nearby Camp Murray, and a Department of Veterans Affairs medical facility located within Fort Lewis boundaries.<sup>27</sup> The Fort Lewis WWTP is designed to treat an average influent flow of 7.0 million gallons per day (MGD). The current average daily flow is approximately 3.4 MGD. The WWTP uses physical, biological, and chemical means to treat wastewater and remove the vast majority of pollutants, subsequent to which the effluent is discharged to the Puget Sound.

Critical to an understanding of the wastewater treatment process is the recognition that neither the *Clean Water Act* nor the NPDES permit applicable to the Fort Lewis WWTP mandates the removal of *all* pollutants. The Fort Lewis WWTP need only conform its processes and product to the qualitative and quantitative requirements of its NPDES permit. Of greatest concern to wastewater treatment plant regulators and employees is the condition of the discharge or effluent water released from the WWTP into Puget Sound; the condition of

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supervisory span of control [Tab 25: Statement of [REDACTED] dated October 29, 2008, para 11]. In March 2008, [REDACTED] left his position with the WWTP to assume duties with his military reserve component unit. At that time, [REDACTED] was detailed to the position of WWTP supervisor. [REDACTED] remained so detailed for 120 days when she was replaced by third interim supervisor, [REDACTED]. On June 26, 2008, [REDACTED] was selected as the permanent supervisor of the WWTP. [REDACTED] reported for duty on August 4, 2008. After [REDACTED] was relieved of his supervisory responsibilities at the WWTP in March 2007, he continued to serve as supervisor only for the WTP and for the Sewer Shop. However, on March 2, 2008, he was reassigned officially from his supervisory position in the WTP to a lower-graded position as a Maintenance Mechanic (Utility System Repairer), WG-4749-09 in the Operations and Maintenance Division, DPW. [REDACTED] retired from federal service on September 2, 2008.

<sup>22</sup> ROI Exhibit 170 provides a schematic diagram and narrative summary of the Fort Lewis WWTP wastewater treatment process. Additional detail is provided in photographs at ROI Exhibits 108-159.

<sup>23</sup> The facility's formal name is the Solo Point Waste Water Treatment Facility.

<sup>24</sup> *Primary treatment* removes certain suspended solid materials that can be easily collected from raw wastewater after it enters the WWTP headworks. The typical materials removed during primary treatment include fats, oils, and grease, sand, gravels and rocks (also referred to as grit), and larger settleable solids including human waste and floating materials.

<sup>25</sup> *Preliminary treatment* screens out, grinds up, or separates debris, and is the first step in the wastewater treatment, occurring prior to wastewater entering the headworks. Sticks, rags, large food particles, sand, gravel, toys, etc., are removed at this stage to protect the pumping and other equipment in the treatment plant. Treatment equipment such as bar screens, comminutors (a large version of a garbage disposal), and grit chambers are used as the wastewater first enters a treatment plant. The collected debris is usually disposed of in a landfill.

<sup>26</sup> *Secondary treatment* is a biological treatment process to remove dissolved organic matter from wastewater. Sewage microorganisms are cultivated and added to the wastewater. The microorganisms absorb organic matter from sewage as their food supply.

<sup>27</sup> *Id.* Camp Murray is a Washington State National Guard facility located adjacent to Fort Lewis. The American Lake Medical Facility of the Veterans Administration is located on Fort Lewis pursuant to a revocable license issued by the Secretary of the Army in 1923.

the wastewater as it proceeds through the treatment process inside the plant is of only secondary import.

Many elements of the Fort Lewis wastewater treatment process are supported by redundant "back up" or auxiliary equipment and processes. These duplications provide for continuity of the treatment process when a particular piece of equipment is taken off-line for repair or normal maintenance.<sup>28</sup> The Fort Lewis NPDES permit requires redundancies, back-ups, and auxiliary equipment and processes, as necessary to ensure WWTP compliance with the conditions of its permit [ROI-I, Exhibit 3, p. 16, para III(E)].

*Preliminary Treatment Phase—Headworks*—Turning to the process of wastewater treatment within the WWTP, wastewater is first monitored and treated at the headworks [ROI-I, Exhibit 170, p. 2]. The headworks receive the wastewater from the sewer collection system. Located near the headworks is an influent composite sampler [ROI-I, Exhibit 108], that each day collects raw wastewater samples for analysis by lab technicians. The samples are analyzed for Total Suspended Solids (TSS) and 5-day Biochemical Oxygen Demand (BOD<sub>5</sub>)<sup>29</sup> concentrations. The findings pertaining to the raw wastewater are later compared to the TSS and BOD<sub>5</sub> concentrations in treated effluent leaving the WWTP prior to discharge into Puget Sound. The comparison indicates how efficiently the WWTP is operating and determines if the WWTP is removing a minimum of 80% of the TSS and BOD<sub>5</sub> as required by the NPDES permit [ROI-I, Exhibit 3, p. 6, Section II(A)(1), Table \*\*\* comment].

*Preliminary Treatment Phase—Screening and Grit Removal*—As it enters the headworks, wastewater is treated preliminarily, to include screening and grit removal. The influent fine screens [ROI-I, Exhibit 109] strain out suspended solids and floating debris, such as pieces of wood, plastics, bags, and bottles. These solids are then mechanically removed from the screens by conveyor to a dumpster [ROI-I, Exhibit 110] and disposed of as solid waste. The grit basins remove sand, gravel and other fine grit that have entered the wastewater, such as eggshells, bone chips, seeds, and coffee grounds. The grit basins also operate to reduce the velocity of the wastewater traveling through the WWTP. This slowing allows for heavy solids such as sand to settle to the bottom of the basin through simple gravity. Screw augers at the bottom of the basin then remove the settled grit. Accumulated grit is then amassed in dumpsters and disposed of as solid waste. The grit basins are aerated to prevent lighter

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<sup>28</sup> Examples of such redundancies include the WWTP's two chlorine contact chambers, consisting of two tanks each; four primary clarifiers; two trickling filters; two secondary clarifiers; two primary digesters; two aerated grit chambers, each with grit removal augers and back-up surge capacity pumps.

<sup>29</sup> TSS is a measure of the total amount of solid matter in water. It includes all sediments and other constituents that are suspended in water. TSS is measured by filtering water and then weighing the sediment remaining on the filter. BOD<sub>5</sub> is the amount of oxygen required by aerobic microorganisms to decompose organic matter in a water sample, based on the maximum rate of O<sub>2</sub> consumption in a water sample over a five-day period in the absence of sunlight at 20 degrees Celsius. It is used to estimate the total amount of "biodegradable" organic matter in the system and therefore serves as a measure of the degree of water pollution. If water contains large quantities of organic waste, one would expect to observe also a significant amount of bacteria working to decompose the waste. In such a case the bacteriums' demand for oxygen will be high, resulting in a high BOD levels. As the waste is consumed or dispersed through the water, BOD levels will decline. A low BOD is therefore an indicator that water contains less organic waste. Thus, a low BOD<sub>5</sub> measurement is favorable and indicative of a higher quality of water.

organic solids from settling with the grit [ROI], Exhibits 111-115]. This ensures that organic solids continue through the treatment process.

*Primary Treatment Phase—Clarification and Skimming*—Following the preliminary treatment, the wastewater enters the primary treatment phase of the WWTP. The first stage of primary treatment involves the removal of suspended matter through sedimentation, but this phase removes little or no matter that has dissolved in the wastewater. This is called “primary clarification” [ROI], Exhibits 116-119]. The settled material at the bottom of the primary clarifier (called “sludge”) is then mechanically collected by a bottom scraper and pumped to the sludge thickeners for additional treatment and disposal. After passing the length of the primary clarifier, the settled wastewater flows under a scum collector, then to an outlet, a v-notched metal plate weir,<sup>30</sup> and into a trough that leads to a pump [ROI], Exhibit 119]. Here the collected wastewater is pumped to the next treatment phase [ROI], Exhibit 120]. The scum collector and the baffle at the end of the weir retain floating matter, to include grease and free floating oil [ROI], Exhibit 121]. WWTP operators manually operate the scum collector to draw off the accumulated floating matter, as needed, to prevent it from reaching the next treatment phase. The collected skimmings are pumped to a grease or scum pit for storage, further treatment, and ultimately, disposal.

*Secondary Treatment Phase*—After exiting the weir, the clarified wastewater enters the secondary treatment process, consisting of biological treatment through the use of trickling filters. Biological treatment involves the oxidation or breaking down of the organic matter that remains in the wastewater. The wastewater is pumped to the top of the trickling filter and distributed across the surface of a plastic filter media [ROI], Exhibits 127-129]. The wastewater then travels down through the media, coming into contact with microorganisms growing on the filter. The microorganisms use the organic material in the passing wastewater as food for continuing their metabolism. When operating correctly, the filter media becomes coated with a zooglear<sup>31</sup> film, which sloughs off and is carried away by the effluent leaving the trickling filter.

After leaving the trickling filter, the wastewater enters the secondary clarifier [ROI], Exhibits 130-131], which removes the solids that remain, primarily the zooglear film. Most of the solids settle to the bottom of the clarifier, where the resulting sludge is collected and pumped to the sludge thickener for further treatment and disposal. The clarified wastewater leaves the secondary clarifier, passing under a baffle and through another v-notched weir, ultimately flowing into a trough to the next treatment stage. Similar to their role in the Primary Treatment Phase process described above, the baffle and weir operate to retain any remaining floating solids and scum, which are removed by a floating scum collector and pumped to the sludge thickener.

At the front end of the secondary clarifier in the Fort Lewis WWTP process is a chemical feed system that permits the addition of a polymer to enhance the removal of solids entering

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<sup>30</sup> A “weir” is a fence or enclosure in a waterway that diverts the water’s flow.

<sup>31</sup> A “zooglear” is an aggregate of bacteria forming a jellylike mass with cell walls swollen by the absorption of water or other fluid.



the clarifier. The chemical feed/polymer system is not in use currently because the Fort Lewis WWTP treatment system meets permit limitations for TSS without it.

*Disinfection Phase*—On leaving the secondary clarifier, wastewater is pumped to detention tanks known as chlorine contact chambers to begin the disinfection treatment process. Chlorine is used as a disinfectant to kill disease causing organisms that may be present in the wastewater. A liquid chlorine solution, sodium hypochloride, is added to the detention tanks and diffused into the wastewater. The detention tanks hold the wastewater for a sufficient period of time to allow the chlorine solution to act on and kill the bacteria. After passing the length of the detention tanks, the disinfected wastewater exits to the outfall, passing under another scum collector and baffle, and over another weir. The scum collector and baffle retain any remaining floating matter, grease, or free floating oil. WWTP operators then manually operate the scum collector to draw off the accumulated matter, pumping it to a grease pit for storage, further treatment, and disposal.

Removal of the chlorine disinfection agent is the final step in the treatment process prior to discharge of the effluent into Puget Sound. As the disinfected wastewater passes over the effluent weir, a chemical, sodium thiosulfate, is added to the discharge. The sodium thiosulfate removes the free chlorine that was not consumed in destroying the disease-causing bacteria. As required by the NPDES-permit, two compliance samples are taken each day at the discharge end of the detention tanks. The samples<sup>32</sup> are tested for fecal coliform (FC) and total residual chlorine (TRC).

The final wastewater effluent is then analyzed prior to discharge from the WWTP through the use of an "effluent composite sampler." The sampler is programmed to collect samples of effluent at various times throughout the day. A qualified laboratory technician analyzes the samples for TSS and BOD<sub>5</sub>, with a view to determining if the effluent meets the requirements of the NPDES permit. The test results are compared to the TSS and BOD<sub>5</sub> concentrations in samples of the raw wastewater influent that entered the WWTP at the headworks to determine if the WWTP is removing a minimum of 80% of the TSS and BOD<sub>5</sub>, as required by its NPDES permit.

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<sup>32</sup> In layman's terms, these samples, called "grab samples" are literally "grabbed" by the operator/technician and placed into small vials prior to testing. Grab samples need not be taken at a specified time, nor do they require a certain flow velocity for the test results to be considered valid. The NPDES permit describes a "grab sample" for monitoring requirements as a single "dip and take sample or measurement taken at a specified time or over as short a period of time at a representative point anywhere in wastewater treatment or bio-solids land application processes, as is feasible." [ROI-I, Exhibit 3, p. 22, Section V(10)].

## SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION AND AGENCY DISCUSSION

### **Allegation 1: Unlawful Discharge of Oil and Contaminants.**

**1a:** That since May of 2006, the Fort Lewis WWTP had discharged unacceptable quantities of oil and other contaminants into the waters of Puget Sound,<sup>33</sup> in violation of the *Clean Water Act*, Title 33, USC, Section 1251 *et seq.*, and the plant's National Pollutant Discharge Elimination System (NPDES) permit.<sup>34</sup>

**1b:** That the presence of excess oil in the influent water clogged WWTP machinery, rendering the plant less efficient in removing contaminants from the water. The oil and other contaminants released from the WWTP adversely impacted the Puget Sound ecosystem.

**1c:** That excess oil had accumulated in the plant's sludge (*i.e.*, the bio-solids that settle out of the influent water<sup>35</sup>), creating a danger to public health when the sludge was used as fertilizer in residential areas across Fort Lewis.

**1d:** That the high levels of oil in the effluent water<sup>36</sup> resulted from the combined effects of multiple factors: the improper dumping of oil products into the Fort Lewis sewer system; the plant's failure to pretreat influent water as required by federal and state regulations; and the failure of WWTP management to procure the proper oils and polymers for use with plant equipment and to maintain other plant equipment as required.

### References:

- *Federal Water Pollution Control Act*, Title 33, USC, Section 1251 *et. seq.*,<sup>37</sup> **excerpted at Tab 14**. Commonly referred to as the *Clean Water Act*, this is the principal federal statute governing efforts to eliminate pollution of the nation's surface waters. The law provides that all discharges of pollutants into the nation's surface waters are unlawful, unless specifically authorized by a permit. Accordingly, a wastewater treatment plant must obtain a discharge

<sup>33</sup> Following treatment at the Fort Lewis WWTP, treated wastewater is discharged into Puget Sound, adjacent to the plant.

<sup>34</sup> The Federal National Pollutant Discharge Elimination System (NPDES) permit program, created by the *Clean Water Act*, governs the discharge of pollutants from point sources into waters of the United States. The Fort Lewis WWTP currently operates pursuant to an NPDES permit issued by the Environmental Protection Agency (EPA). The permit imposes qualitative and quantitative limits on the various pollutants that may be discharged lawfully from the WWTP into the receiving waters of Puget Sound.

<sup>35</sup> "Influent" refers to the wastewater, containing raw sewage and other contaminants, that flows into the WWTP for treatment.

<sup>36</sup> "Effluent" refers to the water that flows out of the WWTP subsequent to treatment.

<sup>37</sup> Federal Water Pollution Control Act, Title 33, USC, Sections 1251-1387. Originally enacted in 1948, the Act was revised by amendments in 1972, which gave the law its current structure. The 1972 legislation declared as its objective the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters. The amendments also set two goals: zero discharge of pollutants by 1985 and, as an interim goal, water quality that is both "fishable" and "swimmable" by July of 1983. Because the United States still has not complete achieved either goal, the goals remain in effect, and efforts to attain them continue through the present day.

permit in accordance with the *Clean Water Act's* NPDES program, established by Title 33, USC, Section 1342.

The *Clean Water Act* defines "pollutant" to include "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." The breadth of this definition was meant to embrace all human-induced alterations of natural water quality that may arise from both point sources<sup>38</sup> and non-point sources<sup>39</sup>. Federal jurisdiction, as established by the *Clean Water Act*, is broad, and covers all "waters of the United States."<sup>40</sup> While the federal courts continue to consider what constitutes a "water of the United States,"<sup>40</sup> there is no debate that waters that are "navigable in fact"<sup>41</sup> fall within the purview of federal jurisdiction. Puget Sound, the receiving body of water relevant to this investigation, is "clearly navigable in fact," and is without question, a "water of the United States."

Like many federal environmental laws, the *Clean Water Act* embodies a philosophy of federal-state partnership in which the federal government sets the agenda and standards for pollution abatement, with states carrying out many of the day-to-day enforcement responsibilities. The Environmental Protection Agency (EPA), the federal agency charged with implementation of the NPDES program under the *Clean Water Act*, issues regulations setting forth the standards applicable to different categories of sources or facilities and delegates certain elements of NPDES program responsibility to the states. Among the authorities delegated by the EPA to "authorized" states is the authority and responsibility for issuance of NPDES permits within that state. Currently forty-one (41) states are "authorized" to administer the NPDES permitting program with respect to federal facilities. Washington State is not "authorized" to permit federal facilities under the NPDES program, and therefore the EPA retains the authority to issue NPDES permits to federal facilities inside the State of Washington, to include the Fort Lewis WWTP.

- 40 Code of Federal Regulations (CFR), Part 122, *EPA Administered Permit Programs: The National Pollutant Discharge Elimination System* [Tab 15]. In accordance with this federal regulation, Fort Lewis is authorized to discharge from the WWTP pursuant to its current, EPA-controlled, NPDES Permit, No. WA-002195-4, issued on December 30, 2003, with an effective date of February 1, 2004, and an expiration date of midnight, February 1, 2009 [ROI-1 Exhibit

<sup>38</sup> The term "point source" is defined 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. This term does not include agricultural storm water discharges and return flows from irrigated agriculture." Title 33, USC, Section 1362(14).

<sup>39</sup> Although not expressly defined by the *Clean Water Act*, the term "non-point source," includes all sources of pollutants that enter waters of the United States from other than a "point sources." An example of non-point source discharge would be storm water runoff that enters streams, lakes, and rivers following rainfall events. Non-point sources are not required to be permitted under the NPDES program.

<sup>40</sup> As recently as 2006, in *Rapanos, et ux., et al., v. United States*, 547 U.S. 715; 126 S. Ct. 2208; 165 L. Ed. 2d 159; 2006 U.S. LEXIS 4887, the U.S. Supreme Court struggled to articulate a clear test for determining when intermittently flowing water that travels through a variety of channels and ditches many miles from actually navigable water constitutes "waters of the United States."

<sup>41</sup> To implement the *Clean Water Act*, Congress chose to define broadly the waters covered by the Act.

3].<sup>42</sup> The NPDES permit establishes non-numerical<sup>43</sup> and numerical<sup>44</sup> standards with which Fort Lewis WWTP effluent must comply prior to its discharge into the receiving waters of Puget Sound. The permit also requires the WWTP to summarize monitoring results each month in a Discharge Monitoring Report (DMR) provided to the EPA.

- 40 CFR, Part 403, *General Pretreatment Regulations for Existing and New Sources of Pollution* [Tab 16]. These federal regulations establish responsibilities for government and industry to: (1) prevent the introduction into a Publicly Owned Treatment Work (POTW)<sup>45</sup> of pollutants that will interfere with the operation of the POTW, including interference with its use or disposal of municipal sludge; (2) prevent the introduction into a POTW of pollutants that will pass through the treatment works or otherwise be incompatible with such works; and (3) improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges. The OSC whistleblowers alleged that the Fort Lewis WWTP had violated this regulatory provision. Given that the Fort Lewis WWTP is federally owned, rather than owned by a State or municipality,<sup>46</sup> 40 CFR Part 403 is inapplicable to its operations. Accordingly, there are no pretreatment requirements in Fort Lewis' NPDES permit.

- 40 CFR, Part 503, *Standards for the Use or Disposal of Sewage Sludge* [Tab 17a]. This regulation promulgates the primary, federal-level, technical regulations for the use and disposal of bio-solids. The Clean Water Act prohibits any use or disposal of bio-solids not in compliance with these standards. EPA has authority under the Clean Water Act to enforce these standards directly, i.e., even when they are not expressly incorporated in a permit. Because the EPA does not issue bio-solids permits pursuant to this subpart in EPA Region 10, to which Washington State belongs, Fort Lewis complies with the Washington State Bio-solids program, prescribed in Washington Administrative Code (WAC), Chapter 173-308. The Washington State program includes technical requirements, a permitting program, a fee program, and an annual reporting requirement. It is through this reporting mechanism that the EPA monitors Fort Lewis' bio-solids management, as the report is submitted to both the EPA and Washington State.

- WAC, Chapter 173-216, *State Waste Discharge Permit Program* [Tab 17b]. This Washington State regulation requires a permit for the discharge of "industrial, commercial, and municipal" waste into surface and ground waters of the state. Permits under this chapter incorporate pretreatment requirements. This law does not apply to the Fort Lewis WWTP because the discharge from Fort Lewis is predominantly made up of domestic sewage, rather

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<sup>42</sup> Prior Fort Lewis NPDES permit documentation is found at [ROI] Exhibit 1.

<sup>43</sup> The term "non-numerical" standards, also called "qualitative standards," includes such measurements as "no visible sheen" or "no floating solids."

<sup>44</sup> The term "numerical compliance" standards, also called "quantitative standards," means compliance with specified mass and concentration limits, such as "milligrams per liter" (mg/L) or "pounds per day" (lbs/day).

<sup>45</sup> As defined by Section 212 of the CWA, the term "Publicly Owned Treatment Works" (POTW) refers to a treatment works owned by a State or municipality (as defined by Section 502(4) of the CWA). This definition includes any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances if they convey wastewater to a POTW treatment plant.

<sup>46</sup> The difference between a FOTW and a POTW is that a FOTW is owned by the federal government, as opposed to a state or municipality.

than “industrial, commercial or municipal,” and there are no discharges of any industrial wastes to waters of the state.

- WAC, Chapter 173-303, *Dangerous Waste Regulations* [Tab 18]. This Washington State regulation applies to the handling of solid<sup>47</sup> and hazardous waste. As with its counterpart on the federal level, the Resource Conservation and Recovery Act (RCRA), this law excludes from its coverage domestic sewage under certain conditions. This “domestic sewage exclusion” in the Washington State dangerous waste regulations applies when a discharger has obtained either a state waste discharge permit, a temporary permit, or a pretreatment permit from a local sewage utility with delegated pretreatment responsibilities from the State of Washington. There has been some confusion relating to the ability of Fort Lewis to avail itself of the domestic sewage exclusion under WAC 173-303, given that the Dangerous Waste Regulations only allow the exclusion for WWTPs that comply with legal requirements that are not applicable to the Fort Lewis WWTP. As discussed above, the federal pretreatment regulations do not apply to the Fort Lewis WWTP as it is not a “POTW.” Additionally, the incorporation of pretreatment requirements into permits issued under WAC 173-216 would also not apply as the Fort Lewis WWTP is not an industrial discharger. In short, a pretreatment program is not legally required for the Fort Lewis WWTP, yet this is one of the prerequisites for application of the domestic sewage exclusion under the Dangerous Waste Regulations.

In order to clarify the situation, the Fort Lewis Garrison Commander, [REDACTED] and the Washington State Department of Ecology, executed a Memorandum of Understanding (MOU) on June 6, 2007.<sup>48</sup> This MOU formalized the installation’s voluntary commitment to establishing a wastewater pretreatment program [ROI-I, Exhibit 179, p. 1, para 2b]. The MOU outlined plans for Fort Lewis to develop an industrial pretreatment program and established tasks and milestones that Fort Lewis expects to attain over the course of program implementation [ROI-II, Exhibit 178, pp. 2-3]. The objective of the pretreatment program established under the MOU is to reduce the amount of petroleum, oil products, and other contaminants that actually enter the WWTP system with influent wastewater, resulting in decreased treatment load and system demand, and improving the ultimate quality of the effluent.<sup>49</sup> This pretreatment MOU is consistent with the 1997 version of AR 200-1, paragraph 2-4(c), which encourages Army activities to “develop pretreatment programs to ensure NPDES

<sup>47</sup> “Solid waste” is a term of art in waste regulations, and includes solid, liquid and gaseous material.

<sup>48</sup> The MOU acknowledges that the State of Washington Department of Ecology “has no [legal] authority to regulate” Fort Lewis’s WWTP program, given that WWTP NPDES permit is issued by EPA [ROI-II, Exhibit 178, p. 1, para A(3), ROI-II, Exhibit 178, p. 1, para A(3), ROI-II, Exhibit 179, p. 1, para 2b]. This understanding is emphasized in the MOU’s “Understandings” section, which states, “[n]othing herein should be interpreted as imposing any legally-binding requirement on Fort Lewis or the Department of the Army.” [ROI-II, Exhibit 178, p. 2, para B]. It is also important to note that the MOU was not generated in response to any EPA requirement or enforcement action [ROI-II, pp. 13-14, paras 5c(1)-(2)], and that the actions to which Fort Lewis commits in the MOU were actions that Fort Lewis had intended to undertake regardless of any agreement with Washington State. [ROI-II, Exhibit 179, p. 1, para 2(b)].

<sup>49</sup> The program described in the MOU will enhance Fort Lewis WWTP processes to “intercept, capture, and appropriately manage industrial wastes, providing an even stronger measure of protection against petroleum contaminates discharging into Puget Sound.” [ROI-I, p. 13, para 5c; ROI-I, Exhibit 8, para 3f; ROI-II, Exhibits 161-162, 178; ROI-I, p. 8, para 5b(15)]. As summarized by [REDACTED] interim plant supervisor, the MOU “v help the WWTP immensely, because inflow will be [at] a higher water standard, and there will be controls over what comes into the WWTP.” [ROI-I, Exhibit 29, Statement of [REDACTED], p. 6, Answer 27].

permit requirements are met." The Fort Lewis wastewater pretreatment program is now in the execution phase and is operating well.

- WAC, Chapter 173-308, *Bio-solids Management* [Tab 19]. Fort Lewis complies with the Washington State Bio-solids Management Program, implemented pursuant to a delegation from the EPA. The Fort Lewis WWTP operates pursuant to a general permit for bio-solids management, No. BA-0021954, issued by the State of Washington Department of Ecology, effective January 16, 2004 [ROI-II, Exhibit 189]. The permit requirements applicable to the Washington State Bio-solids Management Program are patterned after those established by 40 CFR, Part 503, *Standards for the Use or Disposal of Sewage Sludge*, the federal regulation governing the management of bio-solids, to include their final use and disposal [Tab 17].

- AR 200-1, *Environmental Protection and Enhancement*, 28 August 2007.<sup>50</sup> This Army regulation, both in its current version published after the initiation of this investigation [Tab 21], and its precursor edition, published on February 21, 1997 [Tab 22], requires all Army installations to comply with all applicable requirements, substantive and procedural, for control and abatement of water pollution, as outlined and required by the *Clean Water Act*. Paragraph 2-4(b) of the 1997 edition of the regulation (in effect during the period relevant to this OSC investigation), provides that "[i]nstallations will obtain and comply with all necessary NPDES or state discharge permits." Further, at paragraph 2-4(c) the regulation stated, "Army activities *should* develop a pretreatment program to ensure NPDES permit requirements are met and to improve opportunities for the beneficial use of sewage sludge" (*emphasis added*).

#### Evidentiary Summary:

To assess the validity of OSC-referred Allegation 1 and its subcomponents, the IO interviewed 16 witnesses [ROI-I, Exhibits 29-49; ROI-II, Exhibits 163-169], reviewed Fort Lewis's NPDES permit [ROI-I, Exhibit 3] and the State of Washington Bio-solids Management permit [ROI-II, Exhibit 189] governing the operation of the Fort Lewis WWTP [ROI-I, Exhibit 3]. He further analyzed WWTP DMRs dating from June 2005 to August 2007 [ROI-I, Exhibits 74-97; ROI-II, Exhibits 192-194], Facility Operating Logs dating from June 2005 to August 2007 [ROI-I, Exhibits 50-73; ROI-II, Exhibits 197-199], the plant's Annual Bio-solids Reports for calendar years 2005 and 2006 [ROI-II, Exhibits 190, 191]. The IO further reviewed correspondence between the WWTP, the EPA, and the State of Washington Department of Ecology [ROI-I, Exhibits 27-28] and the WWTP Performance Evaluation Report prepared by the USACHPPM [ROI-I, Exhibit 4].

- **Allegation 1a.**

The whistleblowers alleged that since May of 2006, the Fort Lewis WWTP had discharged unacceptable quantities of oil and other contaminants into the waters of Puget Sound, in violation of the plant's NPDES permit, issued pursuant to the *Clean Water Act*.

#### *NPDES Standards Applicable to Oil and Other Contaminants—*

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<sup>50</sup> This current version of AR 200-1, published on August 28, 2007, superseded the previous edition, dated February 21, 1997.

The Fort Lewis NPDES permit, Permit Number WA-002195-4, issued by the EPA and applicable at all times relevant to the OSC-referred allegations, provides that the “Fort Lewis Army Base . . . is authorized to discharge from the wastewater facility located at Fort Lewis to receiving waters named Puget Sound . . . in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein.” [ROI-I, Exhibit 3, p. 4, Section I(A)]. The NPDES permit provides detailed instructions as to what, where, when, and how samples of both incoming wastewater and post-treatment water are to be collected and tested to determine if the effluent water content complies with NPDES permit requirements and limitations. As to oil and other petroleum products, the permit establishes both non-numerical/qualitative and numerical/quantitative standards, providing—

“[t]here shall be no discharge of floating solids, visible foam *in other than trace amounts*, or oily wastes which produce *sheen on the surface of the receiving water*,” of Puget Sound.<sup>51</sup> [ROI-I, Exhibit 3, p. 4, Section I(C)(1)(b), *emphasis added*].

Accordingly, assessment of the Fort Lewis WWTP effluent for non-numerical/qualitative compliance with the NPDES permit as it regulates the discharge of oily waste involves a visual assessment as to whether floating solids or foam are visible in other than trace amounts<sup>52</sup> exiting the discharge weir (chlorine contact chamber effluent weir) as the treated wastewater flows over the effluent weir at the end of the detention tank [ROI-II, Exhibit 170, p. 4, Disinfection Treatment/Detention Tanks, and Exhibit 4, photo 40]. The compliance point for an assessment of “visible sheen” is the surface of the receiving water at the end of the Puget Sound outfall, “located about 600 feet from the WWTP and 70 feet below the surface.” [ROI-I, Exhibit 3, p. 4, ROI-I, Exhibit 142, ROI-II, Exhibit 170, p. 5, Outfall section, ROI-I, pp. 5-6, paras. 5b(1)–(3)].

Furthermore, the NPDES permit requires that “[t]wo samples for total petroleum hydrocarbons (TPH) are to be collected during the wet season (October—March) and analyzed using the Hydrocarbon Identification Method for Soil and Water.” This quantitative analysis is required to determine if TPH is present in the *effluent* at levels of concern and was only required during the first year of the permit.<sup>53</sup> Results of this monitoring were, and continue to be submitted to EPA with the annual Inflow and Infiltration report.” [ROI-I, Exhibit 3, p. 6, Section II(A)(1), *emphasis added* (Note Table \*\*\* comment limiting collection requirement to first year of the permit)]. This permit requirement reflects both qualitative and quantitative requirements regarding oily wastes. “No visible sheen” reflects a purely qualitative assessment of the nature and quality of the effluent that is discharged from the WWTP. Regarding other contaminants, however, the permit provides specific quantitative limits that may not be exceeded by the WWTP effluent [ROI-I, Exhibit 3, p. 4, Section I(C)(1)(e)].

<sup>51</sup>The “receiving water,” as stated in Fort Lewis’s NPDES permit application to the EPA, is Puget Sound (Solo Point). It is the water body to which the outfalls, or pipes leaving the WWTP, will drain. [ROI-I, Exhibit 1, EPA Form 3510-2F, ROI-I, Exhibit 3, p. 1].

<sup>52</sup>In consultation with USACHPPM, the IO “[v]erified that the term ‘trace amounts’ is a judgment call. The language used in the permit is standard permit language.” [ROI-I, Exhibit 12, paras. 1, 4].

<sup>53</sup>Although the first year of the permit has passed, Fort Lewis continues to conduct TPH testing, even though it is not required to do so.

Regarding all other contaminants, the permit prescribes specific quantitative limits that may not be exceeded in the WWTP effluent, as follows—

### Effluent Limitations

- The pH shall not be less than 6.0 nor greater than 8.5 standard units.
- There shall be no discharge of floating solids, visible foam in other than trace amounts, or oily wastes which produce a sheen on the surface of the receiving water.
- The following limitations shall apply:

Effluent Characteristics	Units of Measure	Average Monthly	Average Weekly	Daily Maximum
5-day Biochemical Oxygen Demand* (BOD <sub>5</sub> )	mg/L	30	45	—
BOD <sub>5</sub>	lbs/day	1902	2852	—
Total Suspended Solids* (TSS)	mg/L	30	45	—
TSS	lbs/day	1902	2852	—
Fecal Coliform Bacteria** (FC)	col/100ml	200	400	—
Total Residual Chlorine (TRC)	mg/L	—	—	0.5

\*Monthly average BOD<sub>5</sub> and TSS effluent concentrations shall not exceed 30 mg/L or 20% of the influent concentrations, whichever is more stringent.

\*\*Report as the geometric mean of all samples collected during the weekly and monthly reporting periods. The average monthly FC count must not exceed a geometric mean of 200 colonies/100ml. The average weekly FC must not exceed a geometric mean of 400 colonies/100 ml.

See ROI-1 Exhibit 3 p 4, para I(C)(1).

Concerning monitoring, recording, and reporting requirements, the permit requires Fort Lewis to monitor the *final effluent*, for oil (Total Petroleum Hydrocarbon) and other contaminants, as follows—

### Monitoring Requirements

Effluent Characteristics	Units of Measure	Sample Frequency	Sample Type
Total Flow	MGD	Continuous	Recording
Biochemical Oxygen Demand (5 day)* (BOD <sub>5</sub> )	mg/L	Daily Composite	24-hour
Total Suspended Solids (TSS)	mg/L	Daily Composite	24-hour
Fecal Coliform Bacteria (FC)	Number 100 ml	Daily	Grab
Total Residual Chlorine (TRC)	mg/L	Daily	Grab
pH	Standard Units	Daily	Grab
Total Copper	mg/L	Semi-Annual	Grab
Total Nickel	mg/L	Semi-Annual	Grab



Total Chromium	mg/L	Semi-Annual	Grab
Total Lead	mg/L	Semi-Annual	Grab
Total Mercury	mg/L	Semi-Annual	Grab
Total Molybdenum	mg/L	Semi-Annual	Grab
Total Selenium	mg/L	Semi-Annual	Grab
Total Zinc	mg/L	Semi-Annual	Grab
Total Nitrogen**	mg/L	Semi-Annual	Grab
Total Petroleum Hydrocarbon***	mg/L	Semi-Annual	Grab

\*Representative daily influent and effluent monitoring for BOD<sub>5</sub> and TSS is required to demonstrate % removal efficiencies. Monthly average percent removal for BOD<sub>5</sub> and TSS shall be reported on monthly discharge monitoring reports (DMRs).

\*\*Nitrogen analyses shall determine and report total Kjeldahl nitrogen, ammonia as N, nitrate and nitrite nitrogen.

\*\*\*Two samples for total petroleum hydrocarbon (TPH) analyses are to be collected during the wet season (October—March) and analyzed using the Hydrocarbon Identification Method for Soil and Water. This analysis is required to determine if TPH is present in the effluent at levels of concern and only required during the first year of the permit. Results of this monitoring are to be submitted to EPA with the annual Inflow and Infiltration report (condition S.I.D.3.c)

See ROI-I Exhibit 3, p. 5, para II(A)(1).

Samples and measurements drawn for purposes of monitoring must be “representative of the volume and nature of the monitored discharge.” ROI-I Exhibit 3, p. 10, Section II(E). The permit does not specify physical locations for collecting the samples used to determine permit compliance, requiring only that samples of the final effluent be taken after all treatment has been completed, but prior to the treated water’s discharge into Puget Sound ROI-I Exhibit 3, p. 5, Section II(A)(1). Monitoring samples are thus taken from the discharge side of the chlorine contact chamber after de-chlorination ROI-II Exhibits 170, 174, photo 40.

The permit also stipulates that the WWTP “shall collect additional samples at the appropriate sampling points and analyze them for the parameters limited in Part I, Table 1 of this permit, whenever any discharge occurs that may reasonably be expected to cause or contribute to a violation that is unlikely to be detected by a routine sample” and shall report all additional monitoring in accordance with Part II, Para H.” ROI-I Exhibit 3, p. 10, Section II(E). Paragraph H of the permit requires that if Fort Lewis “monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR, Part 136 or as specified in this permit,” the results of that enhanced monitoring are to be included in the calculation and reporting of the data submitted in the DMR. [Fort Lewis] must indicate in its DMR whenever it has performed additional monitoring, and . . . explain why it performed such monitoring.” ROI-I Exhibit 3, p. 11, Section II(H).

In assessing compliance with the *Clean Water Act* and the EPA-issued NPDES permit, it is critical to remain cognizant of the fact that, the condition of the discharge or effluent released from the WWTP into the receiving waters of Puget Sound is of greatest importance. The status of wastewater as it proceeds through the treatment process is of secondary import.

Second, neither the *Clean Water Act* nor the NPDES permit applicable to the Fort Lewis WWTP mandates the removal of all pollutants from treated wastewater. The Fort Lewis WWTP need only conform its processes and product to the requirements set forth in its permit.

*The IO's Assessments as to Floating Solids and Visible Foam—*

Fourteen witnesses interviewed by the IO stated they had neither observed, nor had knowledge of a report of, floating solids in "other than trace amounts" leaving the WWTP, and none indicated they had observed foam in "other than trace amounts" leaving the plant.<sup>54</sup>

Three witnesses indicated having observed, or having knowledge of a report of, floating solids leaving the WWTP,<sup>55</sup> but all three conceded that such were probably in "trace amounts."

The IO also reviewed a random sample of operator log book entries and DMRs, none of which revealed any report of foam or floating solids in the effluent leaving the WWTP [ROI-I, Exhibit 5, p. 2; ROI-I, Exhibits 74-97; ROI-I, p. 6, paras 5b(5), 5b(7)].

In conducting its 2006 Performance Evaluation of the WWTP, the USCHPPM team checked for foam and floating solids in other than trace amounts and detected none [ROI-I, Exhibit 4, p. 22, para 9b]. Further, in the course of his personal, on-site inspection of the WWTP on June 14, 2007, the IO observed no floating solids or foam in the effluent leaving the WWTP [ROI-I, p. 6, paras 5b(6), 5b(8)].

*The IO's Assessments as to Oil and other Petroleum Products and TPH (gasoline, diesel, and lubricating oil)—*

The IO found that sixteen witnesses had neither personally observed nor professed knowledge of a report of a visible oil sheen at the outfall of Puget Sound.<sup>56</sup> One witness,

<sup>54</sup> ROI-I, p. 5, para 5b(2); ROI-I, Exhibit 29, Statement of [REDACTED], pp. 2-3, Question and Answer 11; Exhibit 33, Statement of [REDACTED], p. 3, Question and Answer 10; Exhibit 34, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 35, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 36, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 37, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 38, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 39, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 40, Statement of [REDACTED], p. 3, Questions and Answers 10 and 11; Exhibit 41, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 43, Statement of [REDACTED], p. 2, Question and Answer 10; Exhibit 46, Statement of [REDACTED], pp. 2 and 3, Question and Answer 10; Exhibit 47, Statement of [REDACTED], p. 3, Question and Answer 10; and Exhibit 48, Statement of [REDACTED], p. 3, Question and Answer 10.

<sup>55</sup> One witness, [REDACTED] indicated that it was "[t]race is a difficult word. There are some solids that do go over, but none on a consistent basis. I can't say how much or quantify. But some solids go out. Perhaps more than trace." [ROI-I, Exhibit 44, Statement of [REDACTED], p. 2, Question and Answer 10]. [REDACTED] stated that [REDACTED] told him that "there are things in the detention tanks that are released to the Sound, and I've seen it myself. Most of this will settle out in the bottom of the Sound and not come to the surface." [ROI-I, Exhibit 42, Statement of [REDACTED], pp. 2 and 3, Question and Answer 10]. However in his statement, [REDACTED] indicated that the amount leaving "would be trace amounts." [ROI-I, Exhibit 35, Statement of [REDACTED], p. 2, Question and Answer 10]. [REDACTED] stated "solids accumulate in the detention tanks, and they contain petroleum. Then the suspended solids flow over the detention tank weir and carry petroleum with them." [ROI-I, Exhibit 45, Statement of [REDACTED], p. 2, Question and Answer 10].

[REDACTED], advised that he had observed or had knowledge of a report of an oil sheen at the outfall of Puget Sound, but qualified his response by explaining that the outfall is deep down in the sound, and the release is emulsified. Thus, "the oil will not become a sheen on the surface, as it is carried away by the currents." [ROI-I, Exhibit 42, Statement of Mr. Robert Kodon, p. 2, Question and Answer 9]. Three of the remaining sixteen witnesses reported observing a visible oil sheen on wastewater inside the WWTP, before its discharge into the outfall.<sup>57</sup>

A review of the DMRs for the period of 2005 through 2007 also revealed no report of an oily sheen at the outfall [ROI-I, Exhibits 74-97, ROI-I, p. 6, para 5b(5)].

The USACHPPM evaluated the outfall for oil sheen during its 2006 Performance Evaluation of the WWTP and detected none.

Finally, during his personal, on-site inspection of the Fort Lewis WWTP, the IO observed no oil in the effluent leaving the WWTP [ROI-I, p. 6, para 5b(8); ROI-I, Exhibit 5].

The IO concluded that a preponderance of the evidence supported a finding that the WWTP was in compliance with both non-numerical/qualitative components of the NPDES permit standard as it pertained to the oil content of the effluent water discharged from the plant [ROI-I, p. 6, para 5b(4)].

As mentioned above, the permit required two samples for TPH to be collected during the wet season (October—March) in 2004, the first year of the current permit [ROI-I, Exhibit 3, p. 6, Section II (A)(1), Table \*\*\* comment limiting collection requirement to first year of the permit]. Analysis of the two samples was required to determine if TPH was present in the effluent at "levels of concern." The results of both samples evidenced that TPH was measured at less

<sup>56</sup> ROI-I, Exhibit 29, Statement of [REDACTED], p. 2, Question and Answer 10; ROI-I, Exhibit 32, Statement of [REDACTED], p. 2, Question and Answer 6; Exhibit 33, Statement of [REDACTED], p. 3, Question and Answer 9; Exhibit 34, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 35, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 36, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 37, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 38, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 39, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 40, Statement of [REDACTED], p. 3, Question and Answer 11; Exhibit 41, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 43, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 44, Statement of [REDACTED], p. 2, Question and Answer 10 (but see his qualified statement, *infra* note 57 about oil sheen observed prior to the outfall); Exhibit 45, Statement of [REDACTED], p. 2, Question and Answer 9; Exhibit 46, Statement of [REDACTED], pp. 2 and 3, Question and Answer 10 (but see her qualified statement, *infra* note 57 about oil sheen observed prior to the outfall); Exhibit 47, Statement of [REDACTED], p. 3, Question and Answer 9; and Exhibit 48, Statement of [REDACTED], p. 3, Question and Answer 10 (but see his qualified statement, *infra* note 57 about oil sheen observed prior to the waterfall).

<sup>57</sup> [REDACTED] explained that he had not seen an oil sheen at the outfall "as far as the diffusers in Puget Sound," but he had seen an oil "sheen going over the WWTP weir out of the detention tank." [ROI-I, Exhibit 44, Statement of [REDACTED], p. 2, Question and Answer 10]. [REDACTED] stated, "I see it approximate twice per shift going over the weir. It goes over the weir, gets chlorinated, and then goes out to the outfall. I've never actually seen it at the outfall." [ROI-I, Exhibit 46, Statement of [REDACTED], pp. 2-3, Question and Answer 10]; and [REDACTED] indicated that he had observed an oil sheen prior to the effluent's discharge into Puget Sound [ROI-I, Exhibit 48, Statement of [REDACTED], p. 3, Question and Answer 10].

than 1.51 mg/l [ROI-I, Exhibit 11]. This is consistent with the permit application showing TPH at 1.01 mg/l [ROI-I, Exhibit 1].<sup>58</sup> These "first year" TPH statistics were reported to, and received by, the EPA without comment, indicative of the fact that the two TPH sample results were below the concentrations that EPA would consider a "level of concern," [ROI-I, Exhibit 3 p. 6, Section II(A)(1), Table \*\*\* comment in block regarding "level of concern"]. Had EPA perceived the results of TPH sampling violated the WWTP's NPDES permit or generated cause for concern, it could have requested that Fort Lewis clarify the information, requested a sample of water for EPA testing, or issued a Notice of Violation. None of these occurred.

Although some of the witnesses testified to having observed oil in the water within the WWTP, the IO determined that this oil was being properly removed by the treatment process. This finding replicated that of the 2006 USACHPPM study.<sup>59</sup> Following its on-site evaluation, the USACHPPM made recommendations for improving operations and treatment at the WWTP, noting that TPH, which indicate the presence of oil, "was detected in influent, effluent, and sludge grab samples." [ROI-I, Exhibit 4, Executive Summary, para 2(c)(1)]. The USACHPPM concluded that the WWTP "removed approximately 79 percent of influent TPH, some of which accumulated in the sludge with solids." [ROI-I, Exhibit 4, Executive Summary, para 2(c)(1)]. The USACHPPM report notes, however, that while the NPDES discharge permit requires TPH monitoring, "it does not limit the amount of TPH in the effluent, and that the bio-solids management regulations (*i.e.*, WAC 173-308) do not address TPH concentrations in bio-solids." [ROI-I, Exhibit 4, Executive Summary, para 2(c)(1)].

Accordingly, the IO concluded that although test results from a variety of sources indicated that some oil was present in the effluent leaving the WWTP, the amount of oil consistently fell within the quantitative standards established by the NPDES permit.

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<sup>58</sup> This is relevant in that it shows that TPH levels after the issuance of the permit were consistent with the estimates of TPH levels Fort Lewis submitted as part of its permit application. As indicated by the NPDES Permit Section II(A)(1), Table \*\*\*comment, TPH analysis is only required during first year of permit "to determine if TPH is present in the effluent at levels of concern." Although the term "levels of concern" remains undefined, the consistency between application and follow-on TPH levels and the absence of any comment from the EPA regarding those levels permits the inference that TPH levels of 1.01 and 1.51 are not "levels of concern."

<sup>59</sup> The IO relied on the 2006 USACHPPM Performance Evaluation extensively in his ROI [ROI-I, pp. 5-6, paras 4b(2)-(3)]. The 2006 USACHPPM Performance Evaluation study of the Fort Lewis WWTP monitored oil, grease, and TPH to determine the WWTP's removal efficiency using various treatment processes. TPH is a mixture of chemicals. The chemical concentrations are combined and reported as falling within three ranges: gasoline, diesel, and heavy oil. USACHPPM found that the WWTP's primary clarifiers were removing about 71% of the oil and grease applied, while the trickling filters were removing about 52% of the oil and grease. The evaluation did not detect any oil and grease in the final effluent within the limits of the test method used. The primary clarifiers were found to be removing about 81% of diesel range TPH and about 77% of heavy range TPH; the trickling filters were removing about 75% of the diesel range TPH and about 44% of the heavy range TPH; the secondary clarifiers were removing about 47% of the diesel range TPH and about 38% of the heavy range. Overall the WWTP was removing an estimated 79% of the TPH. As to the TPH that remained after treated water was discharged through the outfall: the diesel range concentrations of TPH were 0.69 to 4 milligrams per liter (mg/l); the heavy range (such as lubricating oil) at 1.6 to 6.9 mg/l; the gasoline range was not detected in final effluent samples. The final effluent test results from the USACHPPM study, consisting of TPH, oil and grease, and other contaminants was submitted to the EPA in March 2007 [ROI-I, Exhibit 207]. Because the EPA *did not* impose additional TPH limits or monitoring in response to this submission, the TPH concentration levels were deemed to have been below those that the EPA considered "levels of concern."

The NPDES permit does not establish pollutant standards for wastewater *in* the treatment process—there is no permit standard limiting the amount of oil that can be observed or measured within the treatment plant or its processes—standards apply only to the wastewater that has completed treatment and is discharged from the plant [ROI-II]<sup>60</sup> As acknowledged by the IO, however, the “monitoring of the treatment processes on a daily basis within the plant through observations, measurements and sampling are essential to ensure continued and reliable operation of the plant,” and “the repeated occurrences of operator observations have led to the need for better control of oil sources both inside and outside the WWTP.” [ROI-II, pp. 4-5, para 4b(1)(B)].

Additionally, in June 2006, following the detection of an “unknown chemical” that “affected the . . . filters at the Fort Lewis Solo Point Wastewater Treatment Plant (WWTP)” in May of that year, Fort Lewis proactively began a *voluntary* monthly program to monitor petroleum components (diesel and lubricating oil) [ROI-I, Exhibit 27c, Letter from ██████████, Chief, Environmental and Natural Resources Division, Installation Management Agency, Fort Lewis, to EPA Region 10, dated July 7, 2006, ROI-I, Exhibit 27d, Anatek Labs, Inc. Report, dated July 6, 2006]. Additionally, effluent was monitored to determine the presence of gasoline over a four month period starting in December 2006 [ROI-I, Exhibit 6]. Although neither the NPDES permit nor any other regulatory guidance required these additional samplings, ██████████ the Fort Lewis Water Program Manager, elected to conduct this monitoring in response to WWTP operator concerns. After four months, gasoline monitoring was stopped because gasoline has not been detected in any of the effluent samples. Nine of eleven monthly samples detected lubricating oil in the effluent with a range of 0.36 to 2.01 parts per million (ppm). Diesel fuel was detected in five of eleven monthly samples with a range of 0.12 to 0.78 ppm [ROI-I, Exhibit 6]. The data showed TPH ranging from “not detected” to 2.79 ppm. The NPDES permit application reported TPH present at 1.01 ppm.<sup>61</sup> [ROI-I, Exhibit 1]. ██████████ reported all testing data to the EPA in the monthly DMRs, as required by the Fort ██████████ NPDES permit [ROI-II, p. 11, para 4m, ROI-I, Exhibit 40, Statement of ██████████, p. 5, Question and Answer 16, ROI-I, Exhibits 86, 88-97, 192-194]. The reported levels did not result in any action by the EPA to further regulate TPH under the Fort Lewis NPDES permit.<sup>62</sup>

██████████ emphasized that with respect to the samplings, “[t]he operators sometimes think we should do additional samplings and that we should report certain things on DMRs that are not required by the permit or law. We must be very detailed with the operators, because

<sup>60</sup> The NPDES permit required two samples to be collected from the final effluent and analyzed for TPH during the wet season of the first year of the permit to determine if TPH is present at “levels of concern,” but, subsequent to the first-year’s requirement, the permit does not establish mass or concentration limits for TPH in the final effluent or within treatment plant processes [ROI-I, Exhibit 3].

<sup>61</sup> See *supra* note 60 and *infra* note 62 regarding these samples “not reaching levels of concern.”

<sup>62</sup> The EPA has the authority to re-evaluate the need to impose additional limits when test data shows TPH present at “levels of concern”. Since the EPA has not imposed additional limits, the IO concluded that “these concentration levels are below that [sic] the EPA considers ‘levels of concern.’” [ROI-I, p. 7, para 5b(10), ROI-II, AR 15-6 Supplemental Report Memorandum, p. 11, para 4m, ROI-I, Exhibit 3, p. 6, Section IIA(1), Table \*\*\* comment, wherein EPA notes that analysis is required to determine if TPH is present at “levels of concern”; ROI-II, p. 5, para 4b(2)].

their understandings are sometimes not consistent with one another or the permit.” [ROI-1 Exhibit 40, Statement of ██████████ p. 5, Answer 16].

*The IO's Assessments as to Non-Petroleum Contaminants (TRC, FC, BOD<sub>5</sub>), and TSS—*

The IO examined DMRs for the period relevant to the OSC-referred allegations to determine if any of the non-petroleum contaminants for which the EPA required monitoring: TSS, BOD<sub>5</sub>, FC, and TRC, were being discharged from the WWTP into Puget Sound in amounts exceeding NPDES permit limits for mass and concentration [ROI-1 Exhibits 74-97]. Although the IO's inspection of the Fort Lewis WWTP DMRs for the period June 2005 through May 2007 revealed that discharges from the WWTP of non-petroleum contaminants never exceeded the permit's mass and concentration limits, the review did document that several pH excursions<sup>63</sup> had occurred in April and May 2006 and again in April 2007 [ROI-1 Exhibits 60-61, 72, 84-85, 96].<sup>64</sup>

Wastewater treatment science cautions that an elevated or decreased pH reading, or “excursion,” often indicates that something toxic has been introduced into the wastewater. Given presumably higher levels of influent toxicity, pH excursions serve as a “wake-up call” to monitor WWTP effluent for higher levels of contaminants.<sup>65</sup> With this in mind, the IO evaluated Fort Lewis WWTP TSS and BOD<sub>5</sub> removal efficiencies on the days of the pH excursions. On April 14, 2006, the date of the first pH excursion, TSS removal efficiency was 89%, consistent with the April 2006 monthly average of 89%. The BOD<sub>5</sub> removal efficiency was 91%, consistent with the April 2006 monthly average of 89%.<sup>66</sup> The following month's pH excursions occurred on May 17, 19, 20, 21, 24 and 25, 2006 [ROI-1, Exhibit 27b]. TSS removal efficiencies on these dates ranged from 91% to 96% with an average of 93%, consistent with the May 2006 average of 93%. BOD<sub>5</sub> removal efficiencies ranged from 89% to 92% with an average of 91%, mirroring the May monthly average of 91%. Additional pH excursions occurred on April 19 and 21, 2007. The TSS removal efficiencies for these dates were 86% and 88%, respectively, with an average of 87%, consistent with the April 2007 monthly average of 88%. The BOD<sub>5</sub> removal efficiencies were 88% and 80% with an average of 84%, also consistent with the April monthly average of 86%. These TSS and BOD<sub>5</sub> removal efficiencies appear to indicate that even during pH excursions, WWTP processes continued to

<sup>63</sup> A “pH excursion” is a term for any period in which the wastewater's alkalinity or acidity exceeded that which is permitted by the NPDES permit. The Fort Lewis WWTP permit indicates that the pH of the wastewater may not be less than 6.0 or greater than 8.5 [ROI-1, Exhibit 3, p. 4, Section 1(C)(a)]. Biological processes necessary for proper treatment of wastewater can be affected if the pH falls outside of these parameters.”

<sup>64</sup> pH excursions occurred on April 14, 2006 and on May 17, 19, 20, 21, 24 and 25, 2006. pH excursions again occurred on April 19 and 21, 2007. The pH excursion samples were measured at approximately 5.8 and 5.9; “[u]sually, this type of violation is considered a ‘minor’ violation of the *Clean Water Act*.” [ROI-1, Exhibit 40, Statement of ██████████ p. 3, Answer 9].

<sup>65</sup> “. . . pH will fluctuate when something toxic goes into the system. When we notice this, it's too late to stop it, but it gives us notice. We can't pinpoint what it was, but we know something happened . . . this equates to contaminants being released in the effluent, but [we] don't know what they are . . . pH is an alarm to start paying attention.” [ROI-1, Exhibit 33, Statement of ██████████ p. 2, Answer 8].

<sup>66</sup> Keep in mind that a lower BOD<sub>5</sub> is more favorable. See *supra* note 29.

remove contaminants from the wastewater with efficiency and effectiveness commensurate with periods of normal plant operation [ROI-I, p. 7, paras 5b(11)-(12)].<sup>67</sup>

The USACHPPM team was made aware of, and discussed the 2006 pH excursions in its WWTP Performance Evaluation report,<sup>68</sup> but concluded that “[b]ased on a review of WWTP records (2004 to 2006), [and except for these excursions] the WWTP was operated in compliance with permit effluent limitations.” [ROI-I, Exhibit 4, p. 21, para 8(b) and p. 22, para 9(b), ROI-I, Exhibit 4, Executive Summary, section 2(b), ROI-I, p. 8, para 5b(14); ROI-II, pp. 6-7, para 4e].

On June 8, 2006, Fort Lewis reported the April and May 2006 pH excursions to the EPA [ROI-I, Exhibit 27b].<sup>69</sup> On August 7, 2006, the EPA responded by serving Fort Lewis with a Warning Letter and Request for Information [ROI-I, Exhibit 27e]. The Fort Lewis response, dated August 23, 2006, provided the EPA with information regarding an alleged fuel spill, included a detailed discussion of the pH excursions, and discussed the detection of hydrocarbons in WWTP effluent and bio-solids [ROI-I, Exhibit 27a]. The EPA took no further adverse action against Fort Lewis [ROI-I, Exhibit 40, Statement of Ms. Joyce Chavez, p. 3, Answer 9]. Subsequently, on April 19, 2007, Fort Lewis advised the EPA, by telephone and by email, of two April 2007 excursions [ROI-I, Exhibit 28]. The EPA took no follow-on action on this occasion. No Notices of Violation or enforcement actions were issued by the EPA in response to either the 2006 or 2007 reports [ROI-I, Exhibits 25 and 40, Statement of Ms. Joyce Chavez, p. 3, Answer 9]. This indicates that the EPA did not view these pH excursions as serious permit violations meriting action above and beyond Fort Lewis’s compliance with reporting requirements.

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<sup>67</sup> The IO evaluated TRC and FC measurements during the pH excursions, but only to assess the WWTP’s compliance with permit requirements. TRC and FC data was not otherwise relevant to an understanding of the pH excursion. As stated by the IO, “[w]e evaluated TSS and BOD for the pH excursions because they are by far more directly affected by pH during the treatment process. A TSS and BOD removal reduction during the pH excursions would indicate that an elevated level of pollutants may have passed through the plant.” The IO further explained that, by contrast, “[c]hlorine residual and FC would not be reliable indicators. The disinfection process is automatic and performed at the final stage of treatment. Any momentary real time decline in chlorine residual during the pH excursions would automatically be compensated for by the WWTP’s automatic disinfection control system. Essentially, chlorine residual data would not indicate a pass through of pollutants during the pH excursions because the instantaneous control system would keep the residual within preset limits.” (It is possible that massive amount of pollutants could overwhelm the operating capabilities of the disinfection process but there was no indication that this occurred from any of the WWTP’s data). “Regarding FC, the automatic disinfection system keeps the FC count down so if the chlorine residual data is not going to show anything, certainly neither will the FC data. More importantly, the FC samples are grab samples taken once a day so the limited amount of FC data during the pH excursions would not be sufficient to draw any supportable conclusions.” [Tab 40].

<sup>68</sup> The USACHPPM report was published in May 2007; the first 2007 pH excursion would not occur until April 2007. The USACHPPM report did reference the May 2006 excursions, but did not mention the April 2006 excursion [ROI-I, Exhibit 4, Executive Summary, section 2b, Exhibit 4, p. 22, para 9b].

<sup>69</sup> With respect to the pH violations in May 2006, [REDACTED] stated that “[t]he operators did not report this to the supervisor, so we did not catch [the pH excursions] until the end of the month during the DMR process. We notified EPA that we were initiating our environmental management system process to identify the problem and implement corrective actions. [REDACTED] noted that EPA did not issue an enforcement action even though the WWTP exceed the allotted 24-hour period in which to report a permit violation to the EPA [ROI-I, Exhibit 40, Statement of [REDACTED], p. 3, Question and Answer 9].

Accordingly, the IO concluded that even given the 2006 and 2007 pH excursions, the WWTP consistently complied with the standards established by the NPDES permit for the discharge of other contaminants into the waters of Puget Sound.

The USACHPPM Performance Evaluation included recommendations for WWTP modernization, to include staffing, system, and health and safety enhancements [ROI-1, Exhibit 4, ROI-II, p. 7, para 4f]. These recommendations were not presented as permit compliance issues, but rather were submitted for consideration by Fort Lewis management interested in enhancing WWTP performance and for long-term planning purposes. The IO pointed out that Fort Lewis has accepted most of the USACHPPM recommendations and is taking appropriate action such as initiating a wastewater pretreatment program [ROI-1, Exhibit 4, p. ES-2 and p. 24, para 10a].

- **Allegation 1b.**

The whistleblowers asserted that excess oil in the influent water clogged WWTP machinery, rendering the plant less efficient in removing contaminants from the water and that the oil and other contaminants released from the WWTP adversely impacted the Puget Sound ecosystem.

As set forth above in the discussion of Allegation 1a, there is no evidence that the presence of oil in the influent water ever rendered plant machinery less efficient in removing contaminants from the water. Rather, all evidence supports a finding that the WWTP consistently complied with the standards established by the NPDES permit for the discharge of other contaminants into the waters of Puget Sound. Even during so-called "pH excursions," which serve to signal that some unknown substance disruptive to regular plant operations has been introduced into the wastewater, the WWTP continued to operate efficiently; there was no evidence that the plant's ability to remove contaminants from the wastewater had been compromised.

Of particular relevance to the allegation that effluent discharged from the Fort Lewis WWTP adversely impacted the Puget Sound ecosystem is the EPA Fact Sheet accompanying the WWTP NPDES permit [ROI-1, Exhibit 2]. The Fact Sheet indicates that, as required by the *Clean Water Act* and its implementing regulations, the EPA took the water quality standards of the receiving waters of Puget Sound into consideration prior to reissuing the Fort Lewis NPDES permit [ROI-1, Exhibit 2, p. 3, Section 4]. The Fact Sheet designates the waters of "Puget Sound, in the vicinity of the discharge . . . as 'Class AA.'" [ROI-1, Exhibit 2, p. 3, Section 4]. The uses established in the Washington State Water Quality Standards for Surface Water for Class AA waters include: "water supply; wildlife habitat; recreation; fish and shellfish propagation; aesthetic enjoyment; and commerce and navigation." [ROI-1, Exhibit 2, p. 3, Section 4]. The EPA concluded that "discharges in compliance with existing permit limitations and monitoring requirements have no reasonable potential to cause or contribute to a violation of state water quality standards" [ROI-1, Exhibit 2, p. 3, Section 4] and that "discharges in compliance with the proposed effluent limitations and monitoring requirements shall not cause any violation of water quality standards established for the protection of aquatic life nor affect listed, threatened, or endangered species." [ROI-1, Exhibit 2, p. 4, Section 5(b)].



The Fort Lewis WWTP complied at all times with the qualitative and quantitative limitations on the discharge of oil and other contaminants into Puget Sound, as imposed by the EPA-issued NPDES permit. Accordingly, the IO determined that the allegation that any such discharge affected adversely the ecosystem of the Sound was unsubstantiated.

- **Allegation 1c.**

The whistleblowers alleged that excess oil had accumulated in the plant's sludge (*i.e.*, the bio-solids that settle out of influent water), endangering public health when the sludge was used as fertilizer in residential areas across Fort Lewis.

The Fort Lewis NPDES permit [ROI-I, Exhibit 3] does not address bio-solids monitoring, monitoring frequency, or reporting,<sup>70</sup> but requires Fort Lewis to comply with the standards for sewage sludge use and disposal established under section 405 of the *Clean Water Act*. [ROI-II, pp. 22-23, para 6b(1)(E)]. 40 CFR, Part 503, *Standards for the Use or Disposal of Sewage Sludge (Bio-solids)*, implements the *Clean Water Act* as to bio-solids use and disposal and requires the permitting of facilities engaged in bio-solids (sludge) treatment. EPA Region 10, in which the Fort Lewis WWTP is located, does not maintain a bio-solids permitting program; however, Fort Lewis complies with Washington State permitting standards for bio-solids management [ROI-II, Exhibit 164, Statement of Mr. [REDACTED], pp. 3, 4, Question and Answer 17 and Exhibit 189]. Of importance is the fact that the Washington State permit imposes only monitoring and reporting standards; it promulgates no limitation on the concentrations of TPH or oils in bio-solids [ROI-II, Exhibit 164, Statement of [REDACTED], pp. 3, 4, Questions and Answers 17-20 and Exhibit 189].<sup>71</sup>

The State of Washington permit, issued pursuant to coverage under the Statewide General Permit for Bio-solids Management,<sup>72</sup> prescribes the requirements for Fort Lewis monitoring and reporting of bio-solids data [ROI-II, p. 28, para 6b(5)(E)].<sup>73</sup>

<sup>70</sup> The monthly DMR submitted to the EPA in accordance with the Fort Lewis NPDES permit does not include the reporting of bio-solids monitoring data [ROI-II, p. 28, para 6b(5)(E)]. Both [REDACTED] and [REDACTED] noted that sludge and bio-solids information is not, and should not, be included in the DMRs [ROI-II, Exhibit 164, Statement of [REDACTED], p. 4, ROI-II, Exhibit 165, Statement of Mr. Al Long, pp. 3, 4, Questions and Answers 16-17].

<sup>71</sup> See also the USACHPPM Performance Evaluation report (espousing the conclusion that "bio-solids management regulations (*i.e.*, WAC 173-308) do not address TPH concentrations in bio-solids"). [ROI-I, Exhibit 4, Executive Summary, p. 1, para 2c(1)].

<sup>72</sup> The State of Washington defines "bio-solids" as "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all applicable requirements under Chapter 173-308 WAC. Bio-solids includes a material derived from bio-solids and septic tank sludge, also known as septage, that can be beneficially recycled and meets all application requirements under Chapter 173-308 WAC. For purposes of the state permit, semisolid products include bio-solids or products derived from bio-solids ranging in character from mostly liquid to fully dried bio-solids." [ROI-II, Exhibit 189, p. 1, para 1.1].

<sup>73</sup> The state's technical standards are patterned on the federal standards set forth in 40 CFR, Part 503. The Washington State program regulates bio-solids used in land application (to condition the soils or fertilize crops or other vegetation), bio-solids transferred from one facility to another, and bio-solids disposed of in a municipal solid waste landfill. The Washington State program does not regulate surface disposal or incineration of bio-solids [ROI-II, Exhibit 189, Introduction, p. 1].

The Washington State bio-solids management permit [ROI-II, Exhibit 189] establishes pollutant limitations (encompassing nine metals)<sup>74</sup> and requirements for the reduction of pathogens (disease-causing organisms)<sup>75</sup> and vectors (rodents, flies, and mosquitoes) commonly associated with bio-solids.<sup>76</sup> Given the quantity of bio-solids produced by the Fort Lewis WWTP,<sup>77</sup> Washington State requires monitoring of these pollutants at a minimum frequency of once per year and reporting of monitoring results in an Annual Bio-Solids Report.<sup>78</sup>

The IO reviewed the Fort Lewis Annual Bio-solids Reports for calendar years 2004, 2005, and 2006 [Tab 24; ROI-II, Exhibits 190-191].<sup>79</sup> As set forth in these reports, Fort Lewis met the mandatory monitoring requirement for metals, and for pathogen, and vector attraction reduction [ROI-II, p. 28, para 6b(5)(E)]. Further, Fort Lewis exceeded State requirements, reporting two rounds of metals monitoring in each annual report, as well reporting as other

<sup>74</sup> Pollutant ceiling concentration limits (e.g., pollutant limits) in milligrams per kilogram dry weight basis are as follows: arsenic—75; cadmium—85; copper—4300; lead—840; mercury—5; molybdenum—75; nickel—420; selenium—100; and zinc—7500 [ROI-II, Exhibit 189, p. 82, Appendix 1].

<sup>75</sup> Pathogen reduction is demonstrated by any one of six alternative means for *Class A bio-solids* and any one of three alternative means for *Class B bio-solids*. Class B bio-solids are bio-solids that have undergone a required degree of pathogen reduction so that they can be land applied, subject to site management and access restrictions. For example, livestock must not be allowed to graze on agricultural land for thirty days after application of the Class B bio-solids, and public access to the agricultural land must be restricted for thirty days after application. Class A bio-solids result from the treatment of Class B bio-solids such that they are no longer harmful and can be used without restriction. Essentially, through treatment, sludge metamorphosizes into enriched "dirt" or "compost" that can be purchased at a local hardware store and used for soil conditioning [ROI-II, Exhibit 189, p. 77, Section 19]. This metamorphosis of sludge into Class A bio-solids occurs in the Fort Lewis's compost center known as the "Earthworks Center." [Tab 23, Statement of [REDACTED], dated June 30, 2008]. The six alternative means for achieving pathogen reduction for Class A bio-solids are: time and temperature, alkaline stabilization, process verification, batch verification, and application of one of seven processes to further reduce pathogens (such as composting). The three alternative methods for achieving pathogen reduction for Class B bio-solids are: verification of maximum density of fecal coliform bacterial from seven samples, application of one of five processes to significantly reduce pathogens, and an equivalency determination [ROI-II, Exhibit 209]. Fort Lewis has produced Class A bio-solids by both the time and temperature methods and has produced Class B bio-solids by three alternative methods: air drying, anaerobic digestion, and documentation of maximum density of FC bacteria from seven samples [ROI-II, Exhibit 190, pp. 1, 4, Section D(1); ROI-II, Exhibit 191, pp. 1, 4, Section (E)].

<sup>76</sup> Vector (rodents, flies, mosquitoes) attraction reduction is achieved by meeting any one of ten alternative methods: 38% volatile solids reduction; bench-scale test for anaerobically digested solids; bench-scale test for aerobically digested solids; specific oxygen uptake rate test; aerobic treatment meeting time and temperature, pH adjustment; 75% (or greater) solids content for bio-solids containing only stabilized solids; 90% (or greater) solids content for bio-solids containing any unstabilized solids; injection below the surface of the ground; and incorporation into the soil within six hours after application [ROI-II, Exhibit 189]. Fort Lewis has achieved vector attraction reduction through 38% volatile solids reduction [ROI-II, Exhibit 190, pp. 1, 5, Section (D)(2); ROI-II, Exhibit 191, pp. 1, 4, Section (F)].

<sup>77</sup> The Fort Lewis WWTP produces approximately 110 US tons (dry-weight) of bio-solids per year [ROI-II, Exhibit 190, Annual Bio-solids Report, dated February 28, 2006, p. 1, Section (B)(1); ROI-II, Exhibit 191, Annual Bio-solids Report, dated February 16, 2007, p. 1, Section (B)(1)]. The Washington State Bio-solids Management system imposes enhanced requirements on treatment facilities producing more than 320 US tons (dry weight) of bio-solids annually [ROI-II, Exhibit 189, p. 32, Table 7.1].

<sup>78</sup> The permit stipulates that the Fort Lewis WWTP shall submit its Annual Bio-solids Report by March 1 for the preceding calendar year [ROI-II, Exhibit 189, cover letter, p. 1; ROI-II, pp. 20-21, para 6a(7)].

<sup>79</sup> After he had completed his supplementary investigation, the IO also reviewed the Bio-solids Report for 2004 [Tab 24]. The 2004 report was consistent with those of all subsequent years.

toxics monitoring data above and beyond that required by the Bio-solids Management Permit [ROI-II, p. 28, para 6b(5)(E)].<sup>80</sup> In all cases, the bio-solids produced by Fort Lewis complied with the metal content limitations set forth in Appendix 1 of the Bio-solids Permit [ROI-II, Exhibit 190, pp. 13-15; ROI-II, Exhibit 191, pp. 9-11]; calculations provided in the Annual Reports demonstrate Fort Lewis compliance with pathogen and vector attraction reduction requirements. Accordingly, the IO concluded that Fort Lewis properly executed its bio-solids monitoring and reporting requirements as mandated by the State of Washington Bio-solids Management Permit.

In investigating witness statements alleging management failure to record toxic pollutants found in WWTP bio-solid **sludge**, the IO noted that [REDACTED] reported a June 2005 incident in which oil was detected in the digester in amounts exceeding the NPDES permit threshold. [REDACTED] was concerned that this incident was not recorded or reported as required by the NPDES permit [ROI-II, Exhibit 166, Statement of [REDACTED], p. 4, Question and Answer 13]. The IO determined that the material in the digester is considered to be bio-solid sludge, not wastewater; Fort Lewis bio-solid management is governed by the State of Washington Bio-solids Management Permit, not by the NPDES permit [ROI-II, p. 28, para 6b(5)(e)]. Thus, no requirement existed to record or report on the monthly DMRs the presence of oil in the bio-solids found in the digester.

There is no evidence to support a conclusion that sludge from the Fort Lewis WWTP was applied to Fort Lewis lawns or vegetable gardens. All Fort Lewis Annual Bio-solids Reports reviewed by the IO, dated January 31, 2005 (for calendar year 2004), February 28, 2006 (for calendar year 2005) and February 16, 2007 (for calendar year 2006), list as "zero" the amounts of bio-solids or sludge that were land applied (e.g., used as fertilizer or for other beneficial uses) to a lawn or home garden [ROI-II, Exhibit 190, 2005 Annual Bio-solids Report and cover letter, p. 2, Section (B)(12); ROI-II Exhibit 191, 2006 Annual Bio-solids Report and cover letter, p. 1, Section (B)(12); Tab 24, 2004 Annual Bio-solids Report and cover letter, p. 1]. Rather, the Annual Reports indicate that all sludge was treated and processed at the Fort Lewis WWTP and then transferred to Fire Mountain Farms in Clinebar Washington, the Fort Lewis Composting Pilot Facility, or at an off-site landfill facility in Pierce County, Washington [ROI-II, Exhibit 190, 2005 Annual Bio-solids Report and cover letter, p. 1, Sections (B)(3) and (B)(6); ROI-II, Exhibit 191, 2006 Annual Bio-solids Report and cover letter, p. 1, Sections (B)(4) and (B)(6); Tab 24, 2004 Annual Bio-solids Report and cover letter, p. 1]. Further, the USACHPM Performance Evaluation report indicated that after drying, the bio-solids were "typically composted to Class A standards at Fort Lewis's Sequelitchew Creek Eco-Park and Earth Works or hauled off-site by a licensed bio-solids handler to a permitted beneficial use facility." [ROI-I, Exhibit 4, p. 6, para 5g(4)]. [REDACTED] confirmed that in 2006, Fort Lewis bio-solids were disposed of in a landfill, not land applied, and that all requirements for landfill disposal were being met [ROI-II, Exhibit 164, Statement of [REDACTED], pp. 4-5].

[REDACTED] Chief, Civil Law, Fort Lewis Legal Office, also obtained testimony from [REDACTED] a government contractor employed since 2004 with the Fort Lewis Solid

<sup>80</sup> According to [REDACTED] Fort Lewis's "current requirement is to conduct at least one sampling event per year. However, Fort Lewis "monitor[s] metals twice a year to ensure no issue exists half way thru [sic] the year." [ROI-II, Exhibit 164, p. 4].

Waste Program. [REDACTED] attested to the fact that Class A compost derived from the recycling of Class B WWTP sludge was not provided to the Fort Lewis Family Housing developer or to the general public, even though it was of such high quality as to be safe for such uses.<sup>81</sup>

In view of the fact that Washington State bio-solids management standards promulgate no limitation on the concentrations of TPH or oils in bio-solids, the IO determined that the allegation that excess oil has accumulated in the plant's sludge was unsubstantiated. Further, there is no evidence that WWTP bio-solids were used as fertilizer in residential areas across Fort Lewis.

- **Allegation 1d.**

The whistleblowers asserted that the high levels of oil in the effluent water produced by the WWTP resulted from the combined effects of multiple factors: the improper dumping of oil products into the Fort Lewis sewer system; the plant's failure to pretreat influent water as required by federal and state regulations; and the failure of WWTP management to procure the proper oils and polymers for use with plant equipment and to maintain other plant equipment. This allegation was grounded in the presumption that the WWTP effluent contained oil in excess of that authorized by the plant's NPDES permit. To the contrary, the Army's investigation of Allegation 1a, discussion of which is set forth above, established that no illegal discharges of oil occurred and that the WWTP was at all times compliant with the terms of its NPDES permit.<sup>82</sup> Notwithstanding the inaccuracy of the presumption on which this allegation was based, the IO assessed each of the whistleblowers' specific concerns.

*The IO's Assessment of Allegations that the High Levels of Oil in WWTP Effluent Water Resulted from Dumping—*

In response to Fort Lewis's June 2006 report of the pH excursions affecting the WWTP in April and May of that year, the EPA issued an August 7, 2006 Warning Letter and Request for

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<sup>81</sup> [REDACTED] testified that when he first began working at Fort Lewis in 2004, the method for disposing of bio-solids was to send them to Fire Mountain Farms in Cinebar, Washington. Fire Mountain is a permitted solid waste handling facility that took *Class B bio-solids* and applied them to the land under restricted conditions. Fort Lewis stopped shipping its bio-solids to Fire Mountain at the end of 2005. Since then, WWTP-produced bio-solids have been sent to the Pierce County, Washington Landfill under a Waste Disposal Authorization issued by Tacoma-Pierce County Health Department (TPCHD) or taken to the Fort Lewis Earthworks recycling facility for composting. Fort Lewis Earthworks, which has been in existence since 2004, operates pursuant to a Solid Waste Handling Permit issued by the TPCHD. The Earthworks runs a variety of recycling programs and produces a number of products. One of the products produced is a *Class A compost* considered to be of an exceptional quality that is safe for use by the general public. Earthworks compost is made by taking the WWTP bio-solids and mixing them with other organic materials. The micro organisms that naturally occur in the piles break down undesirable contents such as petroleum products. The compost goes through a process to further reduce pathogens. This process includes heating the product to 131 degrees Fahrenheit for at least three days. The compost is then mixed with topsoil to create "amended topsoil." This amended topsoil is used by Fort Lewis Public Works and other Government contractors for construction projects on Fort Lewis. The amended topsoil is not provided to either the Family Housing developer or the general public. Although the Earthworks continues to expand its composting program, it still does not recycle all of the bio-solids produced by the WWTP." **Tab 23**  
Statement of [REDACTED] dated June 30, 2008.

<sup>82</sup> See *supra* pp. 13-30.

Information [ROI], Exhibit 27e, Letter from EPA]. The EPA letter acknowledged receipt of Fort Lewis's report of the pH excursions [ROI], Exhibit 3, p. 4, Section I(C)(1)(b)] and noted that it had also received a report that "a spill of some type of fuel to the Fort Lewis Water Pollution Control Plant had occurred around the time of these violations." The letter requested that Fort Lewis provide a "separate written report with a detailed description of the spill, including, but not limited to, what was spilled, when the spill occurred, amount involved, impact of the spill on the Fort Lewis Water Pollution Control Plant, and any relationship between the spill and the pH exceedances." [ROI], Exhibit 27e, Letter from EPA, dated August 7, 2006, para 3].

The Deputy Director of Fort Lewis Public Works, [REDACTED], responded to the EPA by letter of August 23, 2006 [ROI], Exhibit 27a, Letter from Fort Lewis, dated August 23, 2006]. The letter described Fort Lewis's comprehensive investigation into the alleged fuel spill, but advised that Fort Lewis was "unable to substantiate that any spill occurred during this period." [ROI], Exhibit 27a, Letter from Fort Lewis, dated August 23, 2006, para 3]. [REDACTED] noted that the investigation had revealed "various situations on the installation that could have contributed oil products to [Ft. Lewis's] wastewater" during the time period at issue [ROI], Exhibit 27a, Letter from Fort Lewis, dated August 23, 2006, para 3]. For example, the investigation had "found a contractor cleaning vehicles, who was discharging excessive oil and grease to a large oil-water separator without adequate pretreatment . . . and . . . another oil-water separator at the Directorate of Logistics that was inappropriately used by another contractor as a receptacle for oily wastes from cleaning other oil-water separators." [ROI], Exhibit 27a, Letter from Fort Lewis, dated August 23, 2006, para 3]. The Fort Lewis letter correctly pointed out that, while these incidents were "of concern," they did not qualify as "spills or intentional releases" that would trigger reporting to the EPA. [REDACTED] clarified that the investigative findings "[d]id not mean that a spill did not occur; it simply mean[t] that Fort Lewis could find no direct evidence of one." [ROI], Exhibit 27a, Letter from Fort Lewis, dated August 23, 2006, para 3].

The EPA took no follow-up action in response to [REDACTED]'s August 23, 2006 letter. That the EPA viewed this incident as meriting only a warning letter to Fort Lewis and did not issue a Notice of Violation or take other enforcement action is significant. The EPA's decision not to initiate adverse action would appear to reflect an EPA determination that the pH excursions and the associated events, to include the alleged "spill," did not constitute a violation of the NPDES permit.

In the context of the investigation conducted in response to the OSC referral, only two witnesses offered testimony regarding alleged inappropriate dumping of oil or petroleum products at or around Fort Lewis. [REDACTED] stated that he had "heard from others that there has been some dumping of petroleum products around base," and that on or about April 2006 "I personally observed environmental division staff dumping petroleum products from a division truck into manhole covers."<sup>83</sup> [REDACTED] clarified that "I know nothing about oil going

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<sup>83</sup> In his statement, [REDACTED] explained that he was "not aware of any dumping of petroleum products in manholes by members of the Environmental Division. A while back, I became aware of such a rumor and recall asking [REDACTED] to look into it. He was unable to obtain enough specific facts to justify continuing the investigation. It is my belief that if anyone had seen environmental personnel dumping anything into a manhole, was not a petroleum product. Occasionally they are authorized to discharge certain substances to the sanitary

into the Sound," however [ROI-I, Exhibit 41, Statement of ██████████, p. 2, Answer 6]. ██████████ testified that as a general matter, "people dump things we can't survey. Get dumps from other places we service [sic]. Service McCord AFB, VA Hospital, Madigan Hospital and Fort Lewis." [ROI-I, Exhibit 47, Statement of ██████████, p. 2, Answer 7]. Further, it is reasonable to conclude that Fort Lewis residential and administrative office users were disposing of oil products through drain systems and that these oil products were introduced into the Fort Lewis WWTP through the sewer system. ██████████ also acknowledged that ". . . we have also had some illegal dumping into our system. About four or five years ago, a diesel truck dumped into our system." [ROI-I, Exhibit 33, Statement of Mr. Al Long, p. 2, Answer 8].

The evidence reveals that Fort Lewis aggressively investigated a report from EPA that some type of toxic "spill" had caused the pH excursions in April and May of 2006. That investigation and the 2006 USACHPPM Program Evaluation study both revealed evidence of TPH in the *influent* entering the WWTP, indicative of the introduction of oily waste into the system. But there exists only anecdotal evidence that petroleum products were improperly dumped into the Fort Lewis sewer system. Further, as set forth above in the discussion accompanying allegation 1a, there is no evidence that the Fort Lewis WWTP effluent ever exceeded NPDES permit-imposed limits for oil.

*The IO's Assessment of Allegations that High Levels of Oil in WWTP Effluent Water Resulted from a Failure to Pretreat Water in Accordance with Federal and State Regulations—*

The whistleblowers alleged that the Fort Lewis WWTP failed to pretreat influent in accordance with the requirements of 40 CFR, Part 403. This federal regulation governs only publicly owned treatment works (POTW), not federally owned treatment works (FOTW) like the Fort Lewis WWTP. Accordingly, 40 CFR, Part 403 is inapplicable to Fort Lewis WWTP operations.

As set forth in the discussion associated with Allegation 1a, WAC Chapter 173-216, State Waste Discharge Permit Program [Tab 17b], which would ordinarily incorporate pretreatment requirements, does not apply to the Fort Lewis WWTP because Fort Lewis is not an industrial discharger."

Further, there has been some confusion relating to the ability of Fort Lewis to avail itself of the domestic sewage exclusion under WAC 173-303, given that the Dangerous Waste Regulations allow the exclusion only for WWTPs that comply with legal requirements that are not applicable to the Fort Lewis WWTP. As discussed above, the federal pretreatment regulations do not apply to the Fort Lewis WWTP as it is not a "POTW." Additionally, the incorporation of pretreatment requirements into permits issued under WAC 173-216 would als

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sewer. These could include something like IDW (investigation derived waste), which is usually purge water from a monitoring well that has been determined to be harmless. It could also be residual water from pumping an oil water separator that might have had a trace of petroleum. These could have been drummed, and an untrained observer might thus conclude, (erroneously), that they contained a petroleum product." [Tab 25, Statement of ██████████, dated October 29, 008, pp 1-2, para 8].

not apply as the Fort Lewis WWTP is not an industrial discharger. In short, a pretreatment program is not legally required for the Fort Lewis WWTP, yet this is one of the prerequisites for application of the domestic sewage exclusion under the Dangerous Waste Regulations.

The USACHPPM Performance Evaluation report of 2006 recommended that Fort Lewis "[i]nitiate a pretreatment program to verify the presence/absence of non-domestic pollutants. . . and identify pollutants of concern (POCs) and discharges that may interfere with the operation of [the] WWTP, pass through the WWTP, or interfere with sludge management (digestion, use, or disposal). A pretreatment program will serve to trace POCs (e.g., TPH, metals, toxic organic compounds) back to discharge source areas in the collection system and provide a mechanism to enforce limits on dischargers of POCs." [ROI-I, Exhibit 4, p. 24, para 10(a)].

In view of the need for clarity regarding the applicability of the domestic sewage exclusion, the USACHPPM recommendation and the Fort Lewis leadership's commitment to environmental stewardship<sup>84</sup> and protection of natural resources, on June 6, 2007, [REDACTED] executed a Memorandum of Understanding (MOU) with the Washington State Department of Ecology.<sup>85</sup> This MOU formalized the installation's voluntary commitment to establishing a wastewater pretreatment program [ROI-I, Exhibit 179, p. 1, para 2b]. The MOU outlined plans for Fort Lewis to develop an industrial pretreatment program and established tasks and milestones that Fort Lewis expects to attain over the course of program implementation [ROI-II, Exhibit 178, pp. 2-3]. The objective of the pretreatment program established under the MOU is to reduce the amount of petroleum, oil products, and other contaminants that actually enter the WWTP system with influent wastewater, resulting in decreased treatment load and system demand, and improving the ultimate quality of the effluent.<sup>86</sup> This pretreatment MOU is consistent with the 1997 version of AR 200-1, para 2-4(c), which encourages Army activities to "develop pretreatment programs to ensure NPDES permit requirements are met. The Fort Lewis wastewater pretreatment program is now in the execution phase and is operating well."<sup>87</sup>

<sup>84</sup> Also, one of the suggestions made by an OSC whistleblower was that Fort Lewis establish a wastewater pretreatment program [ROI-I, Exhibit 46, [REDACTED], p. 5, Answer 21].

<sup>85</sup> The MOU acknowledges that the State of Washington Department of Ecology "has no [legal] authority to regulate" Fort Lewis's WWTP program, given that WWTP NPDES permit is issued by EPA [ROI-II, Exhibit 178, p. 1, para A(3); ROI-II, Exhibit 178, p. 1, para A(3); ROI-II, Exhibit 179, p. 1, para 2b]. This understanding is emphasized in the MOU's "Understandings" section, which states, "[n]othing herein should be interpreted as imposing any legally-binding requirement on Fort Lewis or the Department of the Army." [ROI-II, Exhibit 178, p. 2, para B]. It is also important to note that the MOU was not generated in response to any EPA requirement or enforcement action [ROI-II, AR 15-6 Supplemental Report Memorandum, pp. 13-14, paras 5c(1)-(2)], and that the actions to which Fort Lewis commits in the MOU were actions that Fort Lewis had intended to undertake regardless of any agreement with Washington State. [ROI-II, Exhibit 179, p. 1, para 2(b)].

<sup>86</sup> The program described in the MOU will enhance Fort Lewis WWTP processes to "intercept, capture, and appropriately manage industrial wastes, providing an even stronger measure of protection against petroleum contaminates discharging into Puget Sound." [ROI-I, p. 13, para 5c; ROI-I, Exhibit 8, para 3f; ROI-II, Exhibits 161-162, 178; ROI-I, p. 8, para 5b(15)]. As summarized by [REDACTED] interim plant supervisor, the MOU "will help the WWTP immensely, because inflow will be [at] a higher water standard, and there will be controls over what comes into the WWTP." [ROI-I, Exhibit 29, Statement of Mr. Nate Barto, p. 6, Answer 27].

<sup>87</sup> Resources to support the MOU have already been programmed, and in most cases, executed [ROI-II, Exhibit 179, p. 1, para 2(e)]. These included a \$700K contract which was awarded to contractor CH2M Hill to develop the pretreatment program [ROI-II, Exhibit 179, p. 1, para 2(e)]. A wastewater pretreatment program is not a

*The IO's Assessment of Allegations that the High Levels of Oil in WWTP Effluent Water Resulted from the Failure of WWTP Management to Procure Proper Lubricating Agents for the Plant's Gas Compressors and to Maintain other Plant Equipment—*

*Failure to Use the Manufacturer-Recommended Oil in the Sliding Vane Gas Compressor*

In the context of his investigation, the IO asked witnesses, "Do you know of [WWTP] treatment processes and equipment that are or were not functioning properly due to inadequate maintenance or lack of necessary chemicals?" [REDACTED], a civilian employee in the DPW [ROI-I, Exhibit 45, Statement of Mr. Jimmy Chambers] responded that ". . . the gas compressor manufacturer required a non-emulsifying oil. When I requested this, my request was denied. Instead they gave me 10-30 motor oil, which emulsifies and passes straight through to the digester." [ROI-I, Exhibit 45, Statement of [REDACTED] p. 3, Question and Answer 12].

[REDACTED] had previously been appointed by Fort Lewis leadership to investigate certain management practices at the WWTP and the WTP [ROI-I, Exhibit 9].<sup>88</sup> In her ROI, dated June 7, 2007, [REDACTED] addressed whether Fort Lewis "[f]ail[ed] to use the proper oil in the WWTP compressor." [ROI-I, Exhibit 9, p. 8, Section 3(a)]. [REDACTED] determined that the Operations and Maintenance Instruction Manual for the Sliding Vane Gas Compressor, the type of compressor used in the Fort Lewis WWTP, did not mandate a particular type or weight of oil. Rather, the Instruction Manual suggested the use of Chevron-EP Industrial 220x or Gulf Marine Engine Oil 220 [ROI-I, Exhibit 9, p. 8, Section 3(a)(1)(b)].<sup>89</sup>

building or a piece of equipment. Rather, such a program entails the use of technologies to pretreat a targeted set of materials that are routinely discharged into the sewer system. Accordingly, a critical component of the Fort Lewis pretreatment program includes the identification of industrial, residential, and administrative (office) contributors to the Fort Lewis wastewater system (e.g., solvents may be used to clean oil and lubricants from industrial-type machinery in the Fort Lewis motor pool; paint brushes are cleaned of oil based and latex paint, the residual of which is washed down the drain; cooking oil and bacon grease are disposed of in kitchen sinks across the Fort Lewis residential housing areas), the cataloging of the systems through which each contributor routinely discharges products into the sewer, and the modification of existing systems to intercept and separate the most significant contaminants from the wastewater before it enters the WWTP. For example, the pretreatment program modified the Fort Lewis car wash facility so that the wastewater from the wash process first drained into an on-site oil/water separator in which the oil products were filtered from the water. Only the remaining water was then discharged into the Fort Lewis sewer system; the oily residue was disposed of separately. Although the pretreatment program formally established for Fort Lewis is targeted at industrial users, it can be applied readily to residential and administrative contributors. Such successes notwithstanding, given that the petroleum and oil products that eventually make their way into wastewater influent may derive from numerous sources, no pretreatment program could reasonably be expected to control totally the entry of all such products into the WWTP.

<sup>88</sup> On April 17, 2007, prior to the Army's May 24, 2007 receipt of the OSC-referred allegations, the Fort Lewis Garrison Commander appointed [REDACTED] as an IO under provisions of AR 15-6 to assess the appropriateness of the hiring actions related to Army vacancy WTEU05004308 for Utility Systems Repairer-Operator Supervisor, WS-4742-10 as well as several specific management practices at the Fort Lewis WWTP and WTP [ROI-I, Exhibits 9, 26].

<sup>89</sup> Regarding the proper oil to use in the compressor, the Operations and Maintenance Instruction Manual for the Sliding Vane Gas Compressor does not mandate an oil type or weight, however, it does suggest certain oils to utilize [ROI-I, Exhibit 9, p. 8, Section 3(a)(1)(b)]. The suggested oil for wet compressor service is Chevron-EP



[REDACTED] investigation revealed that “[a]ll WWTP employees stated that they have previously used an unsuitable oil in the WWTP gas compressor because it was all they had available in on-hand supplies.” [ROI-], Exhibit 9, p. 8, Section 3(a)(1)(c)]. [REDACTED] also noted assertions by [REDACTED] WWTP supervisor, that “employees may have used the incorrect oil by grabbing the wrong can. We keep multiple oils on site and it’s their job to use the correct oil.” [ROI-], Exhibit 9, p. 8, Section 3(a)(1)(c)]. [REDACTED] also informed [REDACTED] that he “[did not] recall employees asking me to buy oil for the gas compressor.” [ROI-], Exhibit 9, p. 8, Section 3(a)(1)(c)].

In apparent contradiction of [REDACTED] recollection, [REDACTED] report mentioned that on December 6, 2005, [REDACTED] submitted to [REDACTED] an “exhibit 6 request” for 30 gallons of the proper oil for the compressor and that a copy of this request was attached at “Tab 24Q” of her report [ROI-], Exhibit 9, p. 8, Section 3(a)(1)(c)].<sup>90</sup> [REDACTED]’s statement to the IO appointed to investigate the OSC-referred allegations also referenced this “exhibit 6 request.” [ROI-], Exhibit 45, Statement of [REDACTED] p. 3, Question and Answer 12].

[REDACTED] concluded that “[a]lthough the O&M Manual is not prescriptive, the suggested oil should be used to ensure the proper functioning of the gas compressor.” [ROI-], Exhibit 9, p. 9, Section 3(a)(2)(a)]. Further, “[t]here have been occasions when a suitable oil type and weight has not been available in on-hand supplies,” and “when [REDACTED] has failed to action [sic] employee requests to order a suitable oil type and weight.” [ROI-], Exhibit 9, pp. 9, 10, Section 3(a)(2)(b)].

[REDACTED] made three recommendations related to the oil to be used in the WWTP Sliding Vane Gas Compressor. She recommended that the Director of DPW be directed “to order sufficient quantities of the proper oil so that there is enough on-hand supplies to deal with unplanned maintenance emergencies,” to “educate WWTP employees on what oil type and weight is required” in the compressor, and finally, to “visibly post what oil type and weight is required on or in close proximity to the WWTP gas compressor.” [ROI-], Exhibit 9, p. 9, Section 3(a)(3)(a)-(c)].

In response to [REDACTED]’s recommendation, [REDACTED] researched the matter, ordered and maintained on hand sufficient quantities of the proper lubrication oil for the compressor at the WWTP.<sup>91</sup> In a June 22, 2007 telephone conversation with the IO, [REDACTED] then the interim plant manager, verified that the WWTP had procured the appropriate non-emulsifying oil for use in the Sliding Vane Gas Compressor [ROI-], Exhibit 5, p. 1, para 2]. WWTP

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Industrial 220x or Gulf Marine Engine Oil 220. The number “220” in this context does not denote oil weight or viscosity, but rather references “ISO 220,” the International Standardization Organization, which requires oils so designated to have certain properties for the application envisioned.

<sup>90</sup> However, Tab 24Q of [REDACTED]’s report contains only an information sheet regarding the proper oil to be used in the Compressor. An examination of the other exhibits and attachments to [REDACTED]’s report revealed no other document that could be construed as a request from [REDACTED] for the purchase of Gulf Marine Engine Oil 220 for use in the WWTP Sliding Vane Gas Compressor.

<sup>91</sup> [REDACTED] addressed all of [REDACTED]’s recommendations in a memorandum to the Garrison Commander, dated October 25, 2007, wherein he advised that he had taken corrective action on twenty out of the twenty-four recommendations [Tab 26b].

employees also confirmed to the IO that the proper oil was being used [ROI-I, Exhibit 34, Statement of ██████████, p. 3, Answer 12]. However, in September 2007, the oil cooled compressor at issue was replaced by a water cooled compressor, eliminating the need for this oil [Tab 25, Statement of ██████████, dated October 29, 2008, Tab 26, ██████████ corrective action memo, pp. 2-3, para 2e].

Notwithstanding the use, at times, of a less than optimum oil product to facilitate operation of the Sliding Vane Gas Compressor, the Fort Lewis WWTP always operated in full compliance with both its NPDES permit and its Washington State General Permit on Bio-solids Management.

### *Bypass of the Oil/Water Separator and the Missing Oil Filter*

The Fort Lewis WWTP contains only one oil/water separator, located on the digester bio-gas system. This separator is *not* designed to remove oil from influent wastewater; rather the separator functions to remove oil introduced by the Sliding Vane Gas Compressor *during* the wastewater treatment process [ROI-II, Exhibit 170, p. 5; ROI-I, Exhibit 5, p. 2-3, para 1].

On June 14, 2007, while conducting an on-site inspection of the WWTP as part of his investigation of the OSC-referred allegations, the IO was advised by ██████████ that he had recently become aware that the oil/water separator had been bypassed<sup>92</sup> and that the separator was missing its oil filter [ROI-I, Exhibit 5, p. 2, para 1]. According to ██████████ it was impossible to determine who had directed the bypass of the separator or when the bypass had occurred.<sup>93</sup> ██████████ estimated that the bypass was "allowing up to five gallons of oil per week to escape into the digesters." [ROI-I, Exhibit 5, p. 2, para 1]. In the same June 22, 2007 telephone conversation with the IO referenced above, ██████████ verified that the bypass had been corrected [ROI-I, Exhibit 5, p. 1, para 2]. It was later confirmed that the appropriate filter had been procured and was in use [ROI-I, Exhibit 34, Statement of ██████████, p. 3, Answer 12].

<sup>92</sup> A "bypass" is a diversion of a wastewater stream from any portion or process of a treatment facility. [ROI-I, Exhibit 3, p. 22, Section V.3.]

<sup>93</sup> The IO inquired of several witnesses as to their knowledge about the bypass of the oil separator on the number two digester compressor. ██████████ stated that he had no knowledge of the bypass, but that "I know that some operators would make this type of change and not notify me." [ROI-I, Exhibit 33, Statement of ██████████, p. 8, Answer 32]. On the other hand, ██████████ indicated that he had found out about the bypass only a few days prior to his interview with the IO, but stated "[t]his condition apparently existed for a number of years. Operator ██████████ had previously mentioned to me that he thought excessive oil was in the WWTP cycle. He told me about his concerns about six months ago. The pumps are old and in bad shape and we had been planning on replacing them. In response to ██████████ concerns, I talked with ██████████ and he prepared repair requests. The requests are still pending. In response to finding out this week about the oil by-pass, I talked to the new WWTP manager ██████████. He placed it back on line with an appropriate filter." [ROI-I, Exhibit 34, Statement of ██████████, p. 3, Answer 12 and p. 9, Answer 45]. ██████████ further elaborated on the lack of initiative the operators showed when it came to maintaining the equipment. He testified that "[t]here are duties that the operators should be doing that they are not doing. This included such things like the . . . oil bypass problem. Some equipment is not functional and has not been identified. I agree that the Plant Manager ultimately has responsibility. But there is an operator mindset that 'I don't do maintenance, I am an operator.' This is a tough attitude to change." [ROI-I, Exhibit 34, Statement of ██████████, p. 7, Answer 38].

Notwithstanding the bypass of the oil/water separator and the missing oil filter, the Fort Lewis WWTP operated at all times in full compliance with both its NPDES permit and its Washington State General Permit on Bio-solids Management.

Failure to Use the Proper Polymers in the Secondary Clarifier's Chemical Feed System

As discussed in the summary of the Secondary Treatment Phase of the Fort Lewis WWTP wastewater treatment process,<sup>94</sup> a chemical feed system operates at the front end of the secondary clarifier, permitting the addition of a polymer to enhance the removal of solids entering the clarifier [ROI-II, Exhibit 170, p. 4]. During his on-site inspection of the WWTP, the IO found that "[t]he secondary clarifiers were operational, but the chemical (poly aluminum chloride) intended to be used intermittently to enhance the removal of solids was not being used," and that "[t]here was no polymer in [the] storage tank." [ROI-I, Exhibit 5, p. 1, para 7]. During his first interview with the IO, ██████ explained that to the best of his knowledge, the polymer feed component of the secondary clarifier system had not operated for several years.<sup>95</sup> Two other witnesses asserted that the use of polymers would have contributed to the removal of trace oils from WWTP wastewater, but that the requisite polymers often were not available.<sup>96</sup>

The IO inquired further as to the status of the "inactive polymer system" in a second interview with ██████ on September 27, 2007 [ROI-II, Exhibit 163, Statement of ██████, p. 6, Question 26]. ██████ advised that the system was "still offline," but noted that Fort Lewis was in the process of "conduct[ing] a feasibility study"<sup>97</sup> to produce Class A reuse wastewater under a contract with Army Environmental Center and SAIC," and that a "more

<sup>94</sup> See *supra* pp. 8-11.

<sup>95</sup> ██████ explained that purpose of the polymers was to introduce a flocculating agent to the secondary clarifier in order to help further settle the solids, just prior to the discharge of the effluent into the sound. The addition of polymer[s] . . . "do help the plant by reduc[ing] floatable solids in [the] contact chamber and help the thickening process in the gravity thickener." [ROI-I, Exhibit 30, Statement of ██████, p. 2, para 3d].

<sup>96</sup> ██████ stated that "[w]e could have gotten rid of the trace oils if we could have gotten polymers when we needed it. We could not get it." [ROI-I, Exhibit 44, Statement of ██████, p. 3, Answer 12].

██████ asserted that "there was a time, on or about March 2006, when we needed polymers to cause the oil to demulsify (sic)," but "[w]e were told we did not have the money and we did not order the polymers." [ROI-I, Exhibit 45, Statement of ██████, p. 3, Answer 12].

<sup>97</sup> Completion of a study evaluating options for wastewater discharge and reuse is one of the important long-term goals outlined in the Joint Sustainability Implementation Plan of the Washington Military Sustainability Partnership [Tab 27, Email from ██████ to ██████ with attachment entitled Sustainable Fort Lewis 2005-2006 Annual Progress Report, p. 2, "Leading the Way" and pp. 9-12, "Water Resources Team Strategic Goals"]. Fort Lewis's ultimate objective is to treat all wastewaters to Class A reclamation standards by 2025 and to improve the water quality of Puget Sound. [Tab 28, Statement of ██████, p. 2, para 9]. Washington State Class A reclamation standards require water to be "oxidized, coagulated, filtered and disinfected, with a total coliform level of less than 2.2 colony forming units per 100 ml. Reclaimed Class A wastewater may be used for a variety of purposes including landscape irrigation, decorative fountains, street cleaning, fire protection, and toilet flushing [Tab 28, Statement of Ms. Joyce Chavez, p. 2, para 9, Tab 41, EPA Guidelines for Water Reuse, Table A-1, pp. 309-310]. In addition, it should be noted that to Fort Lewis's credit, Fort Lewis is one of the two Army installation that lays out its environmental goals over a period of 25 years. 2008 marks the 5<sup>th</sup> year of Fort Lewis's 25 year program.

robust polymer system” might be a part of that new program [ROI-II, Exhibit 163, p. 6, Answer 26].<sup>98</sup>

The Fort Lewis NPDES permit addresses the maintenance of WWTP equipment and systems, in as much as such applies to achieving compliance with permit standards. The permit provides that Fort Lewis “shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used . . . to achieve compliance with the conditions of this permit.” [ROI-I, Exhibit 3, p. 16, Section III(E)]. The permit goes on to state that “[t]his provision requires the operation of back-up or auxiliary facilities or similar systems . . . only when the operation is necessary to achieve compliance with the . . . permit.” [ROI-I, Exhibit 3, p. 16, Section III(E), *emphasis added*]. There is no requirement in the NPDES permit to operate this specific piece of equipment; rather the requirement is to maintain and operate equipment in such a way that the WWTP meets its effluent limitations. As discussed above, the WWTP was in compliance at all times with the terms of its NPDES permit.

Notwithstanding the inoperability of the chemical feed system or the lack of requisite polymers, the Fort Lewis WWTP remained at all times in full compliance with both its NPDES permit and its Washington State General Permit on Bio-solids Management.

#### Findings:

- **Allegation 1a.** The allegation that the Fort Lewis WWTP discharged unacceptable and unlawful quantities of oil and other contaminants into the waters of Puget Sound, in violation of the *Clean Water Act* and the plant’s NPDES permit, is unsubstantiated.

The NPDES permit does not require that effluent discharged from the WWTP be completely free of oil and petroleum products, but establishes both qualitative and quantitative limits on the oil that may persist in effluent discharged into the Sound. The IO uncovered no evidence that more than “trace amounts” of floating solids or foam ever were observed or reported in WWTP effluent; the presence of such trace amounts is permitted by the WWTP’s NPDES permit. While one witness indicated that an oily sheen was visible on wastewater undergoing treatment within the WWTP, an oily sheen on water undergoing treatment is not prohibited by the permit, which regulates only the quality of the effluent wastewater discharged by the plant into Puget Sound. Although sampling and laboratory testing supported a conclusion that the water discharged from the WWTP into Puget Sound contained some oil and petroleum products, all such discharges were within permit tolerances and were reported to the EPA in DMRs, as required. The EPA never initiated sanctions or other adverse action against the Fort Lewis WWTP in response to any such report.

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<sup>98</sup> Even after [REDACTED] left his position as the first interim WWTP supervisor in March 2008, [REDACTED] continued to pursue the completion of the feasibility study. She explained that the development of a Class A reuse wastewater capability would be important to Fort Lewis because it would allow the upgrade of WWTP process to provide tertiary treatment (the third stage of the wastewater treatment process). Tertiary treatment produces water that could be reused for a number of things, to include watering and irrigation. Adding polymers may be part of this tertiary treatment [ROI-II, Exhibit 40, Statement of [REDACTED], dated June 12, 2008].

The allegation that the Fort Lewis WWTP discharged unacceptable and unlawful quantities of "other contaminants" into the receiving waters of Puget Sound is unsubstantiated. A review of all available evidence revealed no instances in which contaminants: TRC, FC, TSS, and BOD<sub>5</sub>, were discharged into Puget Sound in concentrations exceeding the standards imposed by the WWTP NPDES permit. Even during pH excursions in April and May of 2006 and in April of 2007, the WWTP continued to remove contaminants from the wastewater effectively; the effluent was at all times in compliance with NPDES permit limitations. The pH excursions were reported to the EPA, as required, but no adverse action resulted.

- **Allegation 1b.** The allegation that excessive oil in WWTP wastewater clogged plant machinery, thereby decreasing the facility's capability to remove contaminants from the water is unsubstantiated. All evidence supports a finding that the WWTP consistently complied with the standards established by the NPDES permit for the discharge of other contaminants into the waters of Puget Sound. Even during so-called "pH excursions," which serve to signal that some unknown substance disruptive to regular plant operations has been introduced into the wastewater, the WWTP continued to operate efficiently; there was no evidence that the plant's ability to remove contaminants from the wastewater had been compromised.

The allegation that oil and other contaminants released from the plant had a detrimental impact upon the Puget Sound ecosystem is unsubstantiated. As required by the *Clean Water Act* and its implementing regulations, the EPA-issued NPDES permit contained an express reference to the fact that the effluent limitations and monitoring requirements established by the permit were set at levels that protect the Class AA water quality and aquatic life within the receiving waters of the Sound. Accordingly, compliance with the NPDES permit was presumed to ensure protection of the Puget Sound ecosystem. There is no evidence that the effluent discharged from the WWTP violated any provision of the NPDES permit. Thus, there can be no finding that the WWTP had or is having a detrimental impact on the ecosystem of Puget Sound.

- **Allegation 1c.** The assertion that high levels of oil in sludge used as fertilizer throughout Fort Lewis posed a danger to public health is unsubstantiated. While the evidence supports a conclusion that some oil remains in the bio-solid sludge produced by the WWTP, there is no evidence to support a conclusion that it persists at a "high level," as alleged by the whistleblowers. Neither federal nor Washington State regulations impose quantitative limits on oil concentrations in bio-solid sludge. Further, Fort Lewis consistently has met, and continues to meet, all requirements established by the Washington State General Permit for Bio-solids Management. Finally, regardless of the presence of oil in the bio-solids, there is no evidence to support a conclusion that Fort Lewis has ever applied the untreated sludge or bio-solids produced by the Fort Lewis WWTP on residential lawns or vegetable gardens.

- **Allegation 1d.** The allegation that the high levels of oil in the effluent water resulted from the combined effects of multiple factors: the improper dumping of oil products into the Fort Lewis sewer system; the plant's failure to pretreat influent water as required by federal and state regulations; and the failure of WWTP management to procure proper lubricating agents for the plant's Gas Compressors and to maintain other plant equipment, is unsubstantiated.

A Fort Lewis investigation of EPA-referred allegations of an oil spill uncovered isolated examples of the inappropriate disposal of oily wastes, which likely entered the WWTP. None of these incidents resulted in violations of the WWTP NPDES permit, however. Further, the investigation revealed neither evidence of a large-scale oil spill nor evidence that Fort Lewis personnel systematically engaged in "illegal dumping" or otherwise failed to comply with Army policies mandating the proper disposal of petroleum products.

The allegation that the WWTP failed to pretreat influent water, as required by 40 CFR Part 403 and Washington State Dangerous Waste Regulations Chapter 173-303, is unsubstantiated. 40 CFR, Part 403 applies only to POTWs, not to FOTWs, and is thus inapplicable to the operations at the Fort Lewis WWTP (a FOTW). The state waste discharge permit requirements, which would ordinarily incorporate pretreatment requirements, are not applicable to the Fort Lewis WWTP as it is not an "industrial" discharger.

There has been confusion regarding the ability of the Fort Lewis WWTP to avail itself of the domestic sewage exclusion under the Dangerous Waste Regulations (WAC 173-303) because the conditions for applicability of the exclusion were not requirements for the Fort Lewis WWTP. However, Fort Lewis has entered into a MOU with the Washington State Department of Ecology, pursuant to which Fort Lewis will establish and implement a wastewater pretreatment program. That program is geared to reducing the amount of petroleum, oil products, and other contaminants that actually enter the WWTP system with influent wastewater, resulting in decreased treatment load and system demand, and improving the ultimate quality of the effluent discharged into Puget Sound.<sup>99</sup>

The allegation that WWTP management failures to comply with employee requests to procure non-emulsifying oil for use in the plant's Sliding Vane Gas Compressor resulted in excessive oil content in effluent wastewater is unsubstantiated. Evidence supports a finding that at least one WWTP employee requested the purchase of an oil recommended by the manufacturer of the Gas Compressor, but that management did not act on this request. However, there is no evidence to support a conclusion that the use of a less than optimum oil in the compressor resulted in any violation of the WWTP's NPDES permit. To the contrary, the evidence shows that the plant remained at all times in compliance with its NPDES permit requirements.

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<sup>99</sup> Neither the pretreatment program nor MOU are responses to any type of enforcement action and not required by the EPA. Rather, Fort Lewis's consultation with the State and execution of the MOU are seen as a gesture of comity and good will toward the Department of Ecology [ROI-II, pp. 13-14, paras 5c(1)-(2)]. The IO reported that "this MOU is already paying dividends in improving relations and cooperation between Fort Lewis and Washington State Department of Ecology. In June and December 2006, the . . . State . . . inspected the Fort Lewis wastewater treatment system as a result of an anonymous tip that fuel was being disposed of in the sewer system. An outcome of the inspection is that Ecology logged four violations [ROI-II, Exhibit 180], which they intend to input in the EPA database as RCRA violations. These will be considered, 'informal enforcement' by Ecology, who will then 'close them out' by citing the MOU as the corrected [sic] action. Further evidence of progress is seen in a 10 October 2007, memo in which [REDACTED], Ecology compliance inspector, states, 'Ecology is encouraged by the progress made to date, and commend you on your effort.'" [ROI-II, Exhibit 181].

The allegation that failure of WWTP management to maintain the plant's oil/water separator resulted in excessive oil content in effluent wastewater is unsubstantiated. During the IO's on-site inspection of the WWTP on June 14, 2007, the interim plant supervisor advised that he had recently been informed that, for an indeterminate period, the oil/water separator had been bypassed and its oil filter missing. The purpose of the oil/water separator is not to remove oil from influent, but rather to remove oil that is introduced in the course of the wastewater treatment process. The oil/water separator was brought back on-line and its filter replaced in a timely fashion. This maintenance failure notwithstanding, there is no evidence that Fort Lewis ever violated the terms of either its WWTP NPDES permit or its Washington State General Permit on Bio-solids Management.

The allegation that management's failure to maintain the polymer feed component of the secondary clarifier system resulted in excessive oil content in effluent wastewater is unsubstantiated. Although WWTP management conceded both that the polymer feed system had been inoperable for several years at the time of the IO's on-site inspection of the WWTP and that employee requests for procurement of the polymers necessary to activate the system went unanswered, the polymer feed component has never been required by the NPDES permit. The WWTP NPDES permit requires maintenance and operation of systems as necessary to achieve compliance with the terms of the permit. Because the Fort Lewis WWTP was always in compliance with the conditions of its NPDES permit, there was no requirement to operate this particular system.

Corrective Action:

- **Allegation 1a.** Corrective action not required.
- **Allegation 1b.** Corrective action not required.
- **Allegation 1c.** Corrective action not required.
- **Allegation 1d.** Corrective action was not required because no illegal discharges of oil occurred and the WWTP complied with the terms of its NPDES permit at all times, but for the pH excursions in 2006 and 2007, none of which resulted in the issuance of any Notice of Violation from the EPA. Further, the WWTP complied at all times with the Washington State General Permit on Bio-solids Management. Nonetheless, Fort Lewis has undertaken to remediate certain conditions brought to light by the OSC referral:

The WWTP procured the manufacturer-recommended oil for use in the plant's Sliding Van Gas Compressor. And, in September 2007 the oil cooled compressor at issue was replaced by a water cooled compressor, eliminating completely the need for this oil. Further, WWTP management timely corrected the bypass of the oil/water separator and replaced the separator's missing oil filter.

Fort Lewis is developing an industrial wastewater pretreatment program and has entered into a pretreatment MOU with the Washington State Department of Ecology. The MOU promotes WWTP compliance with state wastewater pretreatment objectives, affords the state

some oversight of the WWTP's pretreatment program, and enhances cooperation between the state and Fort Lewis. It should be noted that when the EPA issues a new NPDES permit for the Fort Lewis WWTP, that permit will include a pretreatment requirement and will supersede the current MOU.

Finally, although the polymer feed component of the secondary clarifier remains off-line (as a system component that is neither expressly required by the NPDES permit nor essential to WWTP operations), the WWTP is proceeding with a study of the feasibility of upgrading plant operations to produce Class A reuse wastewater, which program likely would include a more robust polymer system.

### **Allegation 2: Failure to Maintain Equipment.**

**2a:** That the illegal discharge of oil and other contaminants into the waters of Puget Sound was caused by the fact that the plant's equipment is old, in poor condition, and poorly maintained due to a lack of tools and replacement parts.

**2b:** That bio-solid waste was discharged into the waters of Puget Sound when excessive rainwater leaked into the sewer system and became part of the influent water treated by the plant, exceeding the plant's treatment capacity.

### **References:**

- 40 CFR, Part 122, *EPA Administered Permit Programs: The National Pollutant Discharge Elimination System* [Tab 15]. In accordance with this federal regulation, Fort Lewis is authorized to discharge from the WWTP pursuant to its current, EPA-controlled, NPDES Permit, No. WA-002195-4, issued on December 30, 2003, with an effective date of February 1, 2004, and an expiration date of midnight, February 1, 2009 [ROI-Exhibit 3]. The NPDES permit establishes non-numerical and numerical standards with which Fort Lewis WWTP effluent must comply prior to its discharge into the receiving waters of Puget Sound. The permit also requires the WWTP to summarize monitoring results each month in a Discharge Monitoring Report (DMR) provided to the EPA.

### **Evidentiary Summary:**

- **Allegation 2a.**

The whistleblowers alleged that the WWTP's inability to process adequately the oil in the incoming wastewater was caused, in part, by deficiencies in the plant's equipment, which was old and in poor condition. The whistleblowers specifically contended that much of the plant's equipment, to include the primary sludge pumps, the effluent pumps, the non-potable pumps, the chlorination pumps, the headworks screens, and the grit collector, should be replaced. In addition, operators maintained that they did not have many of the tools—wrenches and chain saws—necessary to repair and maintain the plant's equipment. These employees asserted that although on numerous occasions they had asked [REDACTED] the WWTP supervisor, to procure necessary tools, he had refused to do so. The whistleblowers further asserted that [REDACTED]



Long had refused to procure replacement parts for pumps and other equipment, and, as a result, the plant had no replacement parts in stock.

This allegation was grounded in the presumption that the WWTP did not effectively process oil in the influent wastewater and that the effluent water, containing excess oil, was then discharged into the Puget Sound in violation of the NPDES permit. The Department of the Army investigation of Allegation 1a, discussion of which is set forth above, established that no illegal discharges of oil occurred and that the WWTP complied with the terms of its NPDES permit, but for the pH excursions in 2006 and 2007, none of which resulted in the issuance of any Notice of Violation from the EPA.<sup>100</sup> Nonetheless, the IO appointed to investigate the OSC-referred allegations thoroughly addressed the issues of poor equipment condition, poor maintenance, and the lack of required tools and parts. The IO interviewed 18 witnesses with knowledge of WWTP maintenance, including the 12 whistleblowers [ROI-I, p. 9, paras 6a(4)-(5)]; conducted an on-site inspection [ROI-I, Exhibit 5]; reviewed the USACHPPM WWTP Performance Evaluation report covering the period of November 29 through December 7, 2006 [ROI-I, Exhibit 4]<sup>101</sup>; and considered an earlier Fort Lewis AR 15-6 investigation conducted by [REDACTED] which investigation had addressed several of the same concerns put forth by the OSC whistleblowers.<sup>102</sup>

The Fort Lewis NPDES permit addresses the maintenance of WWTP equipment and systems, in as much as it applies to achieving compliance with permit standards. The permit provides that Fort Lewis "shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used . . . to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures." [ROI-I, pp. 8-9, para 6a; ROI-I, Exhibit 3, p. 16, Section III, E]. Concerning the maintenance of back-up or auxiliary facilities, the permit "requires the operation of back-up or auxiliary facilities or similar systems which are installed by [Fort Lewis] only when the operation is necessary to achieve compliance with the conditions of the permit." [ROI-I, p. 9, para 6a(3); ROI-I, Exhibit 3, p. 16, Section III, E].

The IO inquired into both the current functionality of plant equipment and its maintenance history [ROI-I, p. 9, para 6b]. Testimony offered by witnesses established a general consensus among WWTP management and operators that some plant equipment was inoperable and had not been serviced regularly or properly, and that some tools necessary to service equipment were not available [ROI-I, p. 9, para 6b(2)].<sup>103</sup> Nonetheless, it was

<sup>100</sup> See *supra* pp. 16-26.

<sup>101</sup> The USACHPPM report acknowledges the relative age of some WWTP components, to wit: the primary sludge pumps "were older (~1970s) constant speed pumps and lacked modern electronic controls." [ROI-I, Exhibit 4, p. 4, para 5(b)]. The USACHPPM report acknowledges, however, that the WWTP NPDES permit makes no statement regarding the age limit of the equipment at the WWTP, nor does the permit mandate specific types of controls that must be present [ROI-I, Exhibit 3].

<sup>102</sup> [REDACTED] investigation, dated June 7, 2007, documented and addressed several of the same allegations referred by OSC [ROI-I, Exhibit 9].

<sup>103</sup> See also ROI-I, Exhibit 29, Statement of [REDACTED] to p. 3, Answers 16, 17, 24; Exhibit 30, Memorandum from [REDACTED], Exhibit 32, Statement of [REDACTED] to p. 3, Answer 10; Exhibit 33, Statement of [REDACTED] to p. 3, Answer 12; Exhibit 34, Statement of [REDACTED] to p. 3, Answer 12; Exhibit 35, Statement

undisputed that the WWTP remained operational throughout the relevant time period and functioned in compliance with the terms of the NPDES permit, but for the pH excursions in April and May of 2006 and in April 2007, none of which resulted in adverse action by the EPA.<sup>104</sup>

The IO's on-site inspection of the WWTP on June 14, 2007 revealed that all wastewater treatment processes were in operating condition, with the exception of one primary clarifier that was off-line for cleaning and renovation—the planned repairs included replacement of the mechanism used by the clarifier to remove settled solids with improved parts believed to require less intensive maintenance over time [ROI-I, p. 10, para 6b(5); ROI-I, Exhibit 5, para 5]. Additionally, the IO found that the chemical feed system associated with the secondary clarifier was inoperable due to a lack of polymers, the purpose of which was to enhance the settling and removal of solids entering the clarifier [ROI-I, p. 10, para 6b(5); ROI-I, Exhibit 5, para 7]. However, as discussed above in Allegation 1d,<sup>105</sup> the IO determined that neither the inoperability of the chemical feed system nor the lack of polymers violated the NPDES permit because the permit required only that the WWTP be maintained and operated in order to meet the effluent standards established by its permit [ROI-I, p. 10, para 6b(5)]. The IO found that “[a]ll the solids handling and treatment processes were operating or appeared operational except one of three digesters was out of service for cleaning and repair.” [ROI-I, p. 10, para 6b(5)]. The IO commented that based on his experience, the removal of a treatment process from operation for routine maintenance, repair, and renovation was “a common and necessary practice.” [ROI-I, p. 10, para 6b(5); ROI-I, Exhibit 5, para 10]. He concluded that these “were not violations in effluent quality due to these processes being out-of-service.” [ROI-I, p. 10, para 6b(5)]. This conclusion was based in part on his analysis that no floating solids (e.g., bio-solid waste) in more than trace amounts had exited the discharge weir into Puget Sound [ROI-I, pp. 5-6, paras 5b(1)-(2), 5b(5)-(8)].

During his June 14, 2007 on-site inspection, the IO observed also that the spark arrester and piping on top of the primary Digester Number 2, to include the exposed bolts, had been painted red in 2005, and that the paint on the bolts did not appear ever to have been disturbed [ROI-I, Exhibit 150]. The IO's follow-on report advised that the bolts should be disassembled and removed semi-annually to service the digester, a process that included replacing the digester's internal filters. In his June 22, 2007 telephone conversation with the IO, [REDACTED] had conceded that the digester manufacturer's representative had proffered a similar recommendation about the semi-annual maintenance requirement [ROI-I, p. 11, para 6b(11); ROI-I, Exhibit 5, pp. 1, 2, para 11; ROI-I, Exhibit 13, p. 1, para 5]. The IO noted, however, that his recent on-site observations had led him to believe that the digester had not been serviced

[REDACTED], p. 3, Answer 12; Exhibit 38, Statement of [REDACTED], p. 3, Answer 12; Exhibit 41, Statement of [REDACTED], p. 3, Answer 12; Exhibit 42, Statement of [REDACTED], p. 3, Answer 12; Exhibit 43, Statement of [REDACTED], p. 3, Answers 11, 12; Exhibit 45, Statement of [REDACTED], p. 3, Answer 12; Exhibit 46, Statement of [REDACTED], p. 3, Answer 12; Exhibit 47, Statement of Ms. [REDACTED], p. 4, Answer 12; and Exhibit 48, Statement of [REDACTED], p. 3, Answers 11, 12.

<sup>104</sup> See *supra* pp. 22-23, 28-29. pH excursions are technical violations of the NPDES permit. Although the EPA was notified of all pH excursions, it never issued a Notice of Violation or initiated other adverse action against the Fort Lewis WWTP.

<sup>105</sup> See *supra* pp. 35-36.

in due course [ROI-I, p. 11, para 6b(11); ROI-I, Exhibit 5, pp. 1, 2, para 11; ROI-I, Exhibit 13, p. 1, para 5].

The USACHPPM report identified four components of the wastewater treatment system as out of service during the period covered by the USACHPPM's Performance Evaluation review.<sup>106</sup> In his June 22, 2007 interview with the IO, ██████████ explained that all but one of the items had been inoperable due to scheduled maintenance or service. The remaining item, more properly described as a grit chamber auger, had been inoperable for an extended period of time due to the lack of a hoist system to remove it [ROI-I, Exhibit 13, para 1]. The USACHPPM report did not ascribe any violations in effluent quality to these out-of-service processes [ROI-I, Exhibit 4, Executive Summary, p. 1, para 2(b)]. The USACHPPM report also identified repairs and maintenance issues in the plant.<sup>107</sup> The IO concluded, however, "there were no discharge violations attributed to the lack of proper maintenance." [ROI-I, p. 12, para 6b(16)].

Ten witnesses, including operators and those with knowledge of the status of repair parts, believed that the lack of repair parts was a significant factor in deterring them from properly maintaining equipment [ROI-I, p. 11, para 6b(9)]. Several employees noted specifically that pump repair parts were not available and that the plant supervisor, ██████████ did not maintain an adequate stock of parts and equipment [ROI-I, p. 11, para 6b(a)]. In order to keep equipment operational, at times the operators employed innovative repair solutions such as cannibalizing parts from other equipment and "jerry-rigging" solutions.<sup>108</sup> Although the employees' execution of their duties was certainly made more difficult by these shortcomings, it should be reiterated that the Fort Lewis WWTP continued to operate in compliance with its NPDES operating permit. Ultimately, the IO concluded that "[e]ven though repair parts were scarce at times and various redundant systems were inoperable, the WWTP continued to operate . . . performing its treatment function adequately." [ROI-I, p. 9, para 6b(3)].

Concerning the availability of tools, the IO validated that "[t]o maintain equipment, operators need access both to their personal tool box with hand tools and to common special tools, such as an impact wrench, and that until recently, many special tools were not available." Two witnesses asserted that they lacked the necessary tools to complete routine maintenance operations, and attributed that shortfall directly to ██████████ [ROI-I, p. 10, para 6b(8); ROI-I, Exhibit 35, Statement of ██████████ p. 2, Answer 11; ROI-I, Exhibit 42, Statement of Mr. ██████████

<sup>106</sup> One of two influent fine screens was inoperable; one of four primary clarifiers had been out of service since November 2006 because it "was being renovated." [ROI-I, Exhibit 4, p. 2, para 5(b)]. The report further noted that "[t]he installation plans to renovate the three primary clarifiers as part of a \$1.2 million upgrade project" [ROI-I, Exhibit 4, p. 2, para 5(b)]; one of two primary digesters had been inoperable since October 2006; and one of two chlorine contact chambers was inoperable during February and March 2007 [ROI-I, Exhibit 4, p. 2, para 5].

<sup>107</sup> The USACHPPM report specifically noted a "broken plastic trickling filter media on top of the surface of the trickling filters" [ROI-I, Exhibit 4, p. 4, para 5(c)(2)]; that the "the magnetic flow meters had not [been] calibrated since they were installed in 2005" [ROI-I, Exhibit 4, p. 6, para 5(h)(1)]; and "the existing chlorine feed system has not been calibrated within the last two years." [ROI-I, Exhibit 4, p. 4, para 5(e)(1)]. The accuracy of flow meters is critical to proper operation of a wastewater treatment plant because they influence operator control decisions. The accuracy of a chlorine feed system is likewise critical to ensure that effluent complies with NPDES permit-imposed limitations on FC bacteria and TRC.

<sup>108</sup> ROI-I, p. 9, para 6b(3); ROI-I, Exhibit 44, Statement of ██████████, p. 3, Answer 11; Exhibit 46, Statement of ██████████ p. 3, Answer 11.

[REDACTED] p. 3, Answers 11, 12]. In testimony to the IO, [REDACTED] indicated that since his arrival, he had authorized the purchase of "several thousand dollars worth of special tools in response to operator requests."<sup>109</sup> [ROI-I, p. 10, para 6b(8); ROI-I, Exhibit 29; Statement of Mr. Nate Barto, p. 3, Answer 12].

Related to the issue of ensuring the availability of appropriate tools to perform the needed maintenance work, the IO also observed that many of the witnesses commented that "plant management did not practice sufficient property accountability and employ management controls so that all necessary tools were available to perform maintenance and repair work on plant equipment." [ROI-I, pp. 10, 11, para 6b(8)].<sup>110</sup>

The investigating officer found numerous examples of requests for tools and replacement parts made by employees that were refused or ignored. Nonetheless, there was no evidence to support a finding that these failures caused the Fort Lewis WWTP to violate any provision of its NPDES permit [ROI-I, p. 12, paras 6(c)(1)-(2)].

When queried by the IO as to what actions he had "initiated to improve conditions and operations at the WWTP," [REDACTED] responded that he had: (1) instituted a preventative maintenance program; (2) undertaken the repair of inoperable equipment; (3) instituted a stock of required parts and equipment; (4) ensured operators had the hand tools and equipment they indicated they needed; (5) arranged for communication connectivity with other Fort Lewis computer systems; (6) reclassified Operators as Operators/Repairers, with a view to placing new emphasis on the "repairer" aspect of the jobs; and (7) given operators authority to call in service orders for other shop assistance; and (8) most importantly, ensured consistent supervisor presence and employee ready access to their supervisor." [ROI-I, Exhibit 29; Statement of [REDACTED], p. 5, Question and Answer 25].

#### • Allegation 2b.

The whistleblowers alleged that the situation at the WWTP worsened during the winter rainy season, when the wastewater treatment plant was overburdened by incoming rainwater. According to the whistleblowers, the WWTP, a Class II facility, was authorized to treat only up to 7.6 MGD of wastewater. The whistleblowers reported that during the winter of 2006—2007, the plant had frequently exceeded its flow capacity, especially on rainy days. For example, they reported that on or about January 9, 2007, the plant recorded a flow level of 11 MGD.

<sup>109</sup> [REDACTED] testified that "the initiative to get tools was DPW management top driven. I am ordering tools, but I had to ask operators repeatedly about what they needed. The requests were not spontaneous operator requests. Management has not turned down any requests since I've been in the position, and they are funding my needs adequately. I am also establishing a shop stock of equipment and parts that should be kept on hand. This did not exist before." [ROI-I, p. 11, para 6b(10); ROI-I, Exhibit 29; Statement of [REDACTED], p. 4, Answer 19]. Three employees expressly noted that since [REDACTED] arrival, requests for parts were acted on [ROI-I, Exhibit 44; Statement of [REDACTED], p. 3, Answer 11; Exhibit 46; Statement of [REDACTED], p. 3, Answer 11; Exhibit 48; Statement of [REDACTED], p. 3, Answer 11].

<sup>110</sup> The issue of tool accountability was specifically identified for review in the prior AR 15-6 investigation conducted by [REDACTED]. In response to [REDACTED] findings, [REDACTED] the DPW, "directed that all highly pilferable items be placed on the local hand receipt and inventories in accordance with the applicable supply management regulations." [Tab 25; Statement of Mr. [REDACTED], para 13; ROI-II, p. 14, para 5d; ROI-II, Exhibit 168; Statement of [REDACTED], p. 3, Question and Answer 15].

The whistleblowers attributed the problem to the fact that the Fort Lewis installation's rainwater collection system was old, and consequently, much of the rainwater leaked into the sewer system and became part of the influent water treated by the plant. The whistleblowers explained that when the permissible flow level was exceeded, bio-solids did not have sufficient time to settle properly. Consequently, a significant quantity of bio-solid waste remained in the effluent water released into Puget Sound.

This allegation was based on the assumption that the WWTP discharged bio-solid waste into Puget Sound in violation of the NPDES permit. The discussion set forth in regard to Allegation 1a, above, established that no illegal discharges of oil or other contaminants occurred.<sup>111</sup> Nonetheless, the IO thoroughly addressed the issue of the impact of incoming rainwater on the WWTP and the sufficiency of its treatment processes.

The allegation that the WWTP was overburdened by incoming rainwater requires an examination of Infiltration<sup>112</sup> and Inflow<sup>113</sup> (I/I), which is the occurrence of storm water or ground water entering into municipal wastewater systems. Once this storm water enters the sanitary sewer, it adds to the daily volume of wastewater that must be collected, pumped, and treated by the WWTP.

The Fort Lewis NPDES permit includes a provision concerning I/I that requires Fort Lewis to "conduct an infiltration and inflow evaluation" [ROI-I, Exhibit 3, p. 10, Section II(D)(1)(a)]. The permit also requires the preparation of "[a] report . . . which summarizes any measurable infiltration and inflow [and] [i]f infiltration and inflow have increased by more than 15 percent from baseline flows (established from average influent flow observed during equivalent rainfall events during the previous five years), the report shall contain a plan and a schedule for: (1) locating the sources of the infiltration and inflow; and (2) correcting the problem." [ROI-I, Exhibit 3, p. 10, Section II(D)(1)(b)]. The NPDES permit requires an annual I/I report, to be submitted by June 15<sup>th</sup> of each year, addressing "the I/I related control activities conducted since the previous annual report." [ROI-I, Exhibit 3, p. 10, Section II(D)(1)(c)].

An examination of the 2003 and 2004 Inflow and Infiltration Annual Reports revealed that in 2003, the I/I rate was 11 percent of the total flow and in 2004 the I/I rate was 14 percent of the total flow, both below the 15 percent limitation outlined in the NPDES permit [ROI-II, Exhibit 195, para 3, ROI-II, Exhibit 196, para 3].<sup>114</sup>

<sup>111</sup> See *supra* pp. 16-25.

<sup>112</sup> "Infiltration" refers to water from non-sanitary sewer system sources entering indirectly into the sanitary sewer system. This is a common occurrence in older systems in which a single trench served to install both sewer and storm water pipes. As the pipes age, materials can deteriorate to the point at which escaped water from storm water pipes seeps into cracked sewer pipes or deteriorated joints.

<sup>113</sup> "Inflow" refers to water from non-sanitary sewer system sources entering directly into the sanitary sewer system. An example of inflow is storm water flowing through a sanitary sewer manhole cover that is cracked, broken, or poorly sealed.

<sup>114</sup> In both 2003 and 2004, Fort Lewis completed significant projects to reduce and prevent I/I. In 2003, "approximately 3,600 feet of 36 inch line near the WWTP was repaired or replaced, seven manholes were installed, and approximately 2,000 feet of 24 inch clay line was eliminated." [ROI-I, Exhibit 195, para 5]. Additionally, in 2003, "[a] design to repair 11,300 feet of various sized sewer mains with 'cure-in-place' pipe [was underway]," which included the "rehabilitation of 36 manholes, replacing 3,700 feet of lateral sewer lines, 400 feet of 4-inch lateral lines, and cleanouts and connections" in two blocks of the installation [ROI-II, Exhibit 195, para 3].

The IO also examined copies of the 2005, 2006, and 2007 Inflow and Infiltration Annual Reports obtained from the Fort Lewis DPW. These reports revealed that in 2005, the I/I rate was 13 percent of the total flow; in 2006, the I/I rate was 31.6 percent of the total flow; and in 2007, the I/I rate was 23.6 percent of the total flow [Tabs 29-31].

For the two years—2006 and 2007—in which the I/I rate increased significantly from baseline flows, Fort Lewis properly complied with NPDES permit requirements and reported both the problem and the plan to correct it [ROI-I, Exhibit 3, p. 10, Section II(D)(1)(a)]. In its 2006 report, Fort Lewis explained that, “[t]he Army Corp of Engineers is continuing to manage multimillion dollar new construction projects to upgrade existing sewer lines, as part of the Whole Barracks renewal projects in the North Fort, as well as Fort Lewis Public Works’ programmed \$3.2 million dollars towards slip lining of problem main sewer lines planned for later this year.” [Tab 30, para 5]. In the 2007 report, Fort Lewis reported on ongoing projects and listed several new projects undertaken with a view to reducing I/I rates.<sup>115</sup> These multimillion dollar projects replaced old sewer lines and system components with new materials designed to prevent infiltrations and reduce inflow across a significant portion of the sewer system, to correct material defects, and to reduce I/I rates.

The I/I reports confirm that some non-sanitary sewer water entered the sanitary system each year from 2003 through 2007. [ROI-II, Exhibit 195, para 3; ROI-II, Exhibit 196, para 3; Tabs 29-31]. Inevitably, this water became part of the influent treated by the WWTP; however, none of the available evidence indicates that the WWTP became overburdened by incoming rain water. Plant overburdening, particularly with regard to bio-solid waste, is determined when TSS and BOD<sub>5</sub> exceed permitted mass and concentration limits. The IO examined the DMRs for the investigation period of June 2005 through May 2007 and found no evidence that these limits had been exceeded [ROI-I, pp. 7-8, paras 5b(11)-(13); ROI-I Exhibits 74-97]. He concluded that “[s]ince June 2005, there has been no discharge of other contaminants in unacceptable or unlawful quantities into Puget Sound in violation of the plant’s permit.” [ROI-I, p. 8, para 5c(2)].<sup>116</sup>

#### Findings:

- **Allegation 2a.** The allegation that the management of the WWTP contributed to the illegal discharge of oil and other contaminants into Puget Sound by failing properly to maintain

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This project was undertaken in 2003, and completed in 2004 [ROI-II, Exhibit 196, para 5]. Additionally, in 2004, a project to repair approximately 8,000 feet of 24 inch clay line using ‘cure-in-place’ technology “was submitted . . . for design.” [ROI-II, Exhibit 196, para 5].

<sup>115</sup> “The Whole Barracks renewal project in North Fort is approximately 50% complete. In addition, the \$3.2 million dollars programmed for the end of 2007 to reduce I&I was awarded. Projects included replacing the existing 24-inch clay main sewer line from North Fort Lewis to the 36-inch main line at Solo Point; and replacing/sealing 14 brick sewer vaults from Prescott Avenue in Logistics Center to Interstate 5. The sewer main replacement project is approximately 60% complete. Both projects are scheduled to be completed by 1 July 2008.” [Tab 31, para 4].

<sup>116</sup> This conclusion was based in part on the IO’s determination that no floating solids (e.g., bio-solid waste), in more than trace amounts, had exited the discharge weir into Puget Sound [ROI-I, pp. 5-6, paras 5b(1)-(2), 5b(5)(B)].

and replace plant equipment that was old<sup>117</sup> and in poor condition, is not substantiated. The findings set forth in the discussion of Allegation 1a, above, establish that there was no illegal discharge of oil or contaminants into Puget Sound.<sup>118</sup> The IO fully investigated the condition of plant equipment and maintenance practices. He found evidence that some plant equipment had been inoperable for extended periods of time or had not been serviced or maintained regularly or properly. These concerns notwithstanding, there is no requirement for these specific pieces of equipment to be maintained other than as required in order to maintain compliance with permit effluent limitations. The IO found that some tools and spare parts necessary to service equipment properly were not available to WWTP employees. Notwithstanding these deficiencies, the evidence established that the WWTP remained operational and complied with the conditions of its NPDES permit at all times. Further, given the WWTP's compliance with the conditions of its NPDES permit, there was no evidence that the failure to properly maintain and replace equipment created a substantial and specific danger to public health or safety [ROI-I, p. 12, paras 6c(1)-(2)].

- **Allegation 2b.** The allegation that contaminants (e.g., bio-solid waste) were unlawfully discharged into the waters of Puget Sound because the Fort Lewis WWTP had been overburdened by incoming rainwater, resulting in a reduction in the settling time of bio-solids, and increasing the quantities of bio-solid waste in the effluent is not substantiated. None of the available evidence supported a conclusion that the Fort Lewis WWTP was "overburdened" by I/I from rainfall events. The discussion and findings set forth in Allegation 1a, above, established that there was no illegal discharge of contaminants into Puget Sound.<sup>119</sup> The IO did investigate the increase of rainwater in influent, focusing on the two years, 2006 and 2007, in which the I/I rate increased significantly from baseline flows. The IO found that Fort Lewis had properly reported both the problem and its corrective plan in compliance with the NPDES permit. The evidence shows that the WWTP continued to perform properly, even during periods of heavy rainfall, dependably complying with the terms of its EPA-issued NPDES permit: TSS and BOD<sub>5</sub> contaminant mass and concentration limits were not exceeded and bio-solid waste was not evident in effluent in other than trace amounts.

Corrective Action:

- **Allegation 2a.** Corrective action not required. The IO recommended that the WWTP supervisor continue his efforts to repair inoperable systems and fully implement the preventive maintenance program. The IO recommended that Fort Lewis leadership establish and enforce a quality control program to ensure the WWTP supervisor continued to execute the preventive maintenance and repair programs and that Fort Lewis leadership follow through on a maintenance corrective action plan. All of these efforts are already underway.

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<sup>117</sup> The plant is over fifty years old, but Fort Lewis regularly programs funds to upgrade plant systems and equipment. A notable example is the current \$1.2 million project to upgrade the three primary clarifiers [ROI-I Exhibit 4, p. 2, para 5(b)]. As to the repair of the digester lid and compressor system, [redacted]'s most recent statement on this matter advised that at the end of fiscal year 2008, Fort Lewis awarded a \$4.6 million contract for the repairs of digesters 1 and 2, the related compressor systems, and the non-potable water system. Construction efforts are currently underway with an estimated construction period of 320 days [Tab 25, Statement of [redacted] October 29, 2008, p. 2, para 9].

<sup>118</sup> See *supra* note 108.

<sup>119</sup> See *supra* pp. 16-25.

- **Allegation 2b.** Corrective action not required, however, the evidence demonstrated that Fort Lewis is working aggressively to reduce and prevent infiltration and inflow through the systematic repair, replacement, and rehabilitation, each year, of thousands of feet of sewer pipe. These efforts are documented in the annual I/I reports submitted by Fort Lewis to the EPA under terms of the NPDES permit applicable to the WWTP.

**Allegation 3: Failure to Properly Test and Monitor Water.**<sup>120</sup>

**3a:** That plant managers did not conduct mandatory testing of the water and properly record and report test results as required by the NPDES permit.

**3b:** That test results were not provided to operators or lab technicians as required by the NPDES permit.

References:

- 40 CFR, Part 122, *EPA Administered Permit Programs: The National Pollutant Discharge Elimination System* [Tab 15]. In accordance with this federal regulation, Fort Lewis is authorized to discharge from the WWTP pursuant to its current, EPA-controlled, NPDES Permit, No. WA-002195-4, issued on December 30, 2003, with an effective date of February 1, 2004, and an expiration date of midnight, February 1, 2009 [ROI-I Exhibit 3].<sup>121</sup> The NPDES permit establishes non-numerical and numerical standards with which Fort Lewis WWTP effluent must comply prior to its discharge into the receiving waters of Puget Sound. The permit also requires the WWTP to summarize monitoring results each month in a Discharge Monitoring Report (DMR) provided to the EPA.

- WAC, Chapter 173-308, *Bio-solids Management* [Tab 19]. Fort Lewis complies with the Washington State Bio-solids Management Program, implemented pursuant to a delegation from the EPA. The Fort Lewis WWTP operates pursuant to a general permit for bio-solids management, No. BA-0021954, issued by the State of Washington Department of Ecology, effective January 16, 2004 [ROI-II Exhibit 189]. The permit requirements applicable to the Washington State Bio-solids Management Program are patterned after those established by 40 CFR, Part 503, *Standards for the Use or Disposal of Sewage Sludge*, the federal regulation governing the management of bio-solids, to include their final use and disposal [Tab 17].

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<sup>120</sup> The charge to investigate OSC-referred Allegation 3 was inadvertently omitted from the first order appointing [REDACTED] as an IO under provisions of AR 15-6. Army OGC discovered this omission and requested that that command direct [REDACTED] to conduct a Supplemental AR 15-6 investigation into Allegation 3 and into other issues that had arisen. The command complied with the OGC request. The Supplemental AR 15-6 investigation is referred to as ROI-II.

<sup>121</sup> Prior Fort Lewis NPDES permit documentation is found at [ROI-I Exhibit 1].



• AR 200-1, *Environmental Protection and Enhancement*, 28 August 2007.<sup>122</sup> This Army regulation, both in its current version published after the initiation of this investigation [Tab 21], and its precursor edition, published on February 21, 1997 [Tab 22], requires all Army installations to comply with all applicable requirements, substantive and procedural, for control and abatement of water pollution, as outlined and required by the *Clean Water Act*. Paragraph 2-4(b) of the 1997 edition of the regulation (in effect during the period relevant to this OSC investigation), provides that “[i]n installations will obtain and comply with all necessary NPDES or state discharge permits.” Further, at paragraph 2-4(c) the regulation stated, “Army activities *should* develop a pretreatment program to ensure NPDES permit requirements are met and to improve opportunities for the beneficial use of sewage sludge” (*emphasis added*).

#### Evidentiary Summary:

• **Allegation 3a.** The whistleblowers alleged that problems associated with WWTP operations were compounded by the fact that plant managers both failed to test water at the plant, as mandated, and failed to record test results properly. The whistleblowers maintained that regular testing and reporting of test results would have facilitated remediation of the situation. One whistleblower asserted that, among other routine tests, the plant’s NPDES permit required testing of the level of oil and grease in the effluent every six months, and whenever an operator requested additional testing. Plant operators asserted that they frequently requested additional testing, yet management refused to comply with these requests. The whistleblowers further alleged that the WWTP routinely failed to comply with NPDES permit requirements to record and report the levels of any toxic pollutant found in the water or bio-solid sludge in the monthly DMR submitted to the EPA.

In assessing the merits of this allegation, the IO interviewed six witnesses<sup>123</sup> and examined DMRs from June 2005 to August 2007 [ROI-I, Exhibits 74-97, ROI-II, Exhibits 192-194], Facility Operating Logs from June 2005 to August 2007 [ROI-I, Exhibits 50-73, ROI-II, Exhibits 197-199], the USACHPPM Performance Evaluation Report [ROI-I, Exhibit 4], the Fort Lewis EPA-issued NPDES permit [ROI-I, Exhibit 3]; the State of Washington-issued Bio-solids Management Permit [ROI-II, Exhibit 189], and the Annual Bio-solids Reports for 2005 and 2006 [ROI-II, Exhibits 190-191].

<sup>122</sup> This current version of AR 200-1, published on August 28, 2007, superseded the previous edition, dated February 21, 1997. The 1997 edition is cited herein as it was the regulation in effect during the period relevant to the allegations under investigation.

<sup>123</sup> ROI-II, Statement of [REDACTED] to, Exhibit 163; Statement of [REDACTED], Exhibit 164; Statement of [REDACTED], Exhibit 165; Statement of [REDACTED], Exhibit 166; Statement of [REDACTED], Exhibit 167; Statement of [REDACTED], Exhibit 168. Each of these witnesses had direct knowledge of both the requirements for mandatory testing and the nature of the testing actually accomplished. Five of the witnesses were unanimous in their certainty that all required monitoring and reporting of results had been accomplished. [REDACTED], the WWTP lab technician, and the sixth witness, answered “yes” to the question of whether the WWTP had failed to conduct any mandatory testing [ROI-II, Exhibit 166a, Statement of [REDACTED], pp. 1-2, Questions and Answers 4-7]. After some discussion, the IO concluded that although Ms. Lancy was not satisfied with the timing and location of effluent sampling, she had no information indicating that sampling had not been conducted or reported as required by the NPDES permit [ROI-I, pp. 23-24, paras 6b(1)(G), (J), ROI-II, Exhibit 166a, Statement of [REDACTED] Lancy, p. 2, Answer 5].

The NPDES permit requires monitoring of the influent and effluent for enumerated pollutants at specified frequencies [ROI-I, Exhibit 3, p. 5, Section II(A)]<sup>124</sup> and requires additional monitoring of the effluent to characterize the nature and quantity of pollutants discharged whenever any discharge occurs that may reasonably contribute to a violation but is unlikely to be detected by a routine sample [ROI-I, Exhibit 3, p. 10, Section II(E), ROI-II, p. 21, para 6b(1)(A)] and “shall report all additional monitoring in accordance with paragraph H” of the permit [ROI-I, Exhibit 3, p. 10, Section II(E), paras 2-3].<sup>125</sup>

Further, the NPDES permit requires the “Permittee [to] summarize [the above] monitoring results each month on the Discharge Monitoring Report (DMR) form (EPA No. 3320-1). The Permittee shall submit reports monthly . . . [and] shall sign and certify all DMRs, and all other reports, in accordance with the requirements of Part IV of this permit.”<sup>126</sup> [ROI-I, Exhibit 3, p.

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<sup>124</sup> The NPDES permit imposes the following monitoring requirements:

(1) Daily monitoring of the influent for TSS and BOD<sub>5</sub> and daily monitoring of the final effluent for total flow, TSS, BOD<sub>5</sub>, pH, TRC, and FC [ROI-I, Exhibit 3, p. 5, Section II(A)]; (2) During the first year of the permit, one semiannual monitoring of the final effluent for TPH, with samples to be taken during the wet season, October–March [ROI-I, Exhibit 3, pp. 5-6, see Section II(A)(1), Table \*\* comment]; (3) Recurring semiannual monitoring shall be completed for total nitrogen and total copper, nickel, chromium, lead, mercury, molybdenum, selenium and zinc [ROI-I, Exhibit 3, p. 5, Section II(A)].

<sup>125</sup> Paragraph H of the permit provides that “[i]f the Permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR Part 136 or as specified in this permit, the Permittee shall include the results of this monitoring in the calculation and reporting of the data submitted in the DMR. The Permittee shall indicate on the DMR whenever it has performed additional monitoring, and shall explain why it performed such monitoring.” [ROI-I, Exhibit 3, p. 11, Section II(H)]. As an example of this type of monitoring and reporting, in the context of its 2006 Performance Evaluation of the WWTP, USACHPPM conducted certain monitoring above and beyond that required by the NPDES permit. By memorandum of March 30, 2007, Fort Lewis reported the results of this USCHPPM monitoring to the EPA, advising that “Fort Lewis had an external agency conduct engineering samples at the wastewater treatment plant in December 2006.” [ROI-II, Exhibit 207].

<sup>126</sup> To this end, the NPDES permit stipulates that the following monitoring information shall be reported on the monthly DMR:

(a) The monthly average daily influent BOD<sub>5</sub> and TSS loading (in pounds) and concentration in milligrams per liter (mg/l) calculated from the daily composite samples taken of the influent entering the wastewater treatment plant. If additional non-routine samples were taken of the influent for these pollutants, the results must be considered in calculating the monthly average [ROI-I, Exhibit 3, pp. 5, 6, Section II(A)(1), Table \* text comment in block].

(b) The monthly average daily and maximum weekly average daily effluent BOD<sub>5</sub> and TSS loading (in pounds) and concentration (in mg/l) calculated from the routine daily composite sample results from the *final effluent*. If additional non-routine samples were taken of the *final effluent* and analyzed for these pollutants, the results must be considered in calculating and reporting the average [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

(c) The monthly average daily percent of BOD<sub>5</sub> and TSS removed by the wastewater treatment plant calculated from the daily influent and effluent concentration results. If additional non-routine samples were taken of the *final effluent* and analyzed for these pollutants, the results must be considered in calculating and reporting the averages [ROI-I, Exhibit 3, p. 5, Section II(A)(1); ROI-II, Exhibit 170, p. 2, Headworks – Preliminary Treatment, Influent Composite Sampler, p. 2, and p. 4, Effluent Composite Sampler].

(d) The monthly average daily and maximum weekly average daily FC bacteria concentration in number of colonies per 100 milliliters calculated from the daily grab sample of the *final effluent*. If additional non-routine samples were taken from the final effluent (more than one daily sample) the results must be considered in determining and reporting the average concentrations [ROI-I, Exhibit 3, p. 5, Section II(A)(1); ROI-II, Exhibit 170 and Disinfection Treatment, Detention Tanks, p. 4].

(e) The maximum effluent total chlorine residual concentration in mg/l determined from the daily grab samples taken from the *final effluent* during the month. If additional non-routine samples were taken from the *final effluent*, (more than one daily sample), the results must be considered in determining and reporting the maximum concentration [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

11, Section II(F)]. The NPDES permit also mandates acute and chronic toxicity testing pursuant to which a composite wastewater sample must be taken from within the plant, from the effluent discharged from the secondary clarifiers, just prior to the chlorination (disinfection) step [ROI-I, Exhibit 3, p. 9, para II(C)(4)(f); ROI-II, Exhibit 170, pp. 3-4]. The results of this testing are not reported in the monthly DMRs, but are to be submitted with the WWTP's permit renewal application, due no later than August 1, 2008 [ROI-I, Exhibit 3, pp. 6-8, Sections II(C)(1), (C)(3)].<sup>127</sup>

Concerning mandatory monitoring of the influent and final effluent at specified frequencies, the IO reviewed the monthly Facility Engineering Operating Logs for the period of June 2005 through August 2007 [ROI-I, Exhibits 50-68; ROI-II, Exhibits 197-199] and compared them to the NPDES permit monitoring schedule. The IO determined that since June 2005, plant managers had conducted all required mandatory monitoring at specified frequencies in accordance with the provisions of the WWTP's NPDES permit [ROI-II, p. 21, para 6b(1)(B)].

In assessing whether the results of mandatory monitoring had been properly reported, the IO compared the NPDES permit requirements with the corresponding Fort Lewis WWTP reports in which monitoring results are required to be recorded [ROI-II, p. 24, para 6b(2)]. The IO noted that although the NPDES permit requires daily monitoring of influent and final effluent for various named pollutants and semi-annual monitoring of the final effluent for other pollutants [ROI-I, Exhibit 3, p. 5, Section II(A)(1)], not all sampling data is required to be reported on the monthly DMR; rather, the monitoring results for each month are to be summarized and reported to the EPA [ROI-I, Exhibit 3, p. 11, Section II(F)].<sup>128</sup> The IO reviewed all Fort Lewis DMRs from June 2005 through August 2007 [ROI-I, Exhibits 74-97; ROI-II, Exhibits 192-194], and compared the data submitted to the summary of data required by the permit. The IO determined that all routine monitoring data has been submitted on monthly DMRs, with one exception: mercury level reporting appeared to have been omitted from the December 2006 DMR [ROI-I, Exhibit 92]. The DMR indicated that a mercury sample had not been **completed** due to an error but would be reported on the January 2007 DMR

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(f) The minimum and maximum pH measured during the month from the routine daily grab samples taken from the *final effluent*. If additional non-routine pH samples were taken of the final effluent (more than one daily sample), the results must be considered in determining and reporting the minimum and maximum concentrations [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

(g) The monthly average daily flow of wastewater through the plant in millions of gallons per day [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

(h) The concentration of total nitrogen in mg/l from a semiannual grab sample taken from the *final effluent*. If additional samples were taken of the *final effluent* (more than one grab sample semiannually), the results must be reported on the DMR [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

(i) The concentration of total copper, nickel, chromium, lead, mercury, molybdenum, selenium, and zinc in mg/l from grab samples taken semiannually from the *final effluent*. If more than one sample was taken from the *final effluent* semiannually, the additional results must be reported on the DMR [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

(j) The concentrations of TPH in mg/l from two grab samples taken from the *final effluent* during the period of October 2004 to March 2005. If additional samples are taken at any time from the *final effluent*, the results must be reported [ROI-I, Exhibit 3, p. 5, Section II(A)(1)].

<sup>127</sup> The results will be used by the EPA to determine the toxicity of the effluent discharge and may result in the imposition of new permit stipulations (e.g., new toxicity reduction requirements and/or additional monitoring) [ROI-II, p. 6, para 4c(2); ROI-I, Exhibit 3, pp. 6-9, paras II(C)(1)-(4)].

<sup>128</sup> For example, a daily grab sample is required for TRC, but Fort Lewis is required to report on the DMR only the minimum and maximum concentration during the month [ROI-I, Exhibits 74-97; ROI-II, Exhibits 192-194].

[ROI-I, Exhibit 93]. A review of the January 2007 DMR revealed no corrective report, however.<sup>129</sup> Accordingly, the IO determined that since June of 2005, with the one exception in December of 2006, plant managers had properly recorded and reported test results on the required monthly DMRs [ROI-II, p. 27, para 6b(5)(c), ROI-I, Exhibit 92].

In addition, the IO examined the monthly Facility Engineering Operating Logs for the period of June 2005 through August 2007 [ROI-I, Exhibits 50-68; ROI-II, Exhibits 197-199] with a view to assessing the efficiency of the WWTP's current monitoring and sampling methods in detecting unusual conditions in the plant that could result in a non-routine discharge. The inability of extant sampling methods to detect unusual conditions could indicate the need to conduct additional sampling.

The IO found no evidence that additional sampling of the final effluent for TRC, FC, TSS, BOD<sub>5</sub>, and pH was required because routine sampling and monitoring methods appeared sufficient to detect and quantify non-routine discharges [ROI-II, p. 22, para 6b(1)(D)(1)]. The IO determined that on-going 24-hour composite sampler monitoring of WWTP influent and final effluent for TSS and BOD<sub>5</sub>, as a supplement to the plant's effective real-time monitoring and recording systems, properly captured and quantified the non-routine discharge of these two pollutants [ROI-II, p. 22, para 6b(1)(D)(3)]. For example, on November 6, 2006 a mixture of solvents was detected in the WWTP and confirmed by influent testing [ROI-II, Exhibit 204]. Routine influent and effluent composite samples [ROI-I, Exhibit 67] evidenced a substantial decline in the WWTP's BOD<sub>5</sub> removal efficiency for that day—only 67% removal efficiency as compared to the daily average of 87% efficiency for the month. Additionally, on November 9 and 10, 2006 the BOD<sub>5</sub> concentration in the final effluent increased to 40 and 39 mg/l respectively, in both cases more than double the BOD<sub>5</sub> pollutant discharge into Puget Sound over the 18 mg/l daily average for the month. In this case, because the composite samples detected and quantified a non-routine discharge, no non-routine sampling was required.

As to TRC and pH, the IO found that the WWTP monitors and records pH and TRC concentrations in real-time [ROI-II, p. 22, para 6b(1)(D)(2)]. The monitoring system is buttressed by alarms that alert operators to changes in pH levels and TRC concentrations that if uncorrected, may cause a non-routine discharge of pH and/or TRC, potentially resulting in permit violations. The alarms signal plant operators to take additional grab samples. These systems appropriately detected and quantified non-routine pH discharges on May 17, 19, 20, 21, 24, and 25, 2006 [ROI-I, Exhibit 61, Remarks Section]. It is believed that these non-routine pH excursions were caused by oil and chemicals that adversely affected the performance of the trickling filters. These pH excursions were subsequently detected in the WWTP influent and ultimately were reported to the EPA as a permit discharge violation for pH [ROI-I, Exhibit 27, p. 1, para 2].<sup>130</sup> For these reasons, the IO concluded that "routine monitoring provisions currently in place are adequate to detect the nature and quantity of the pollutants discharged for the parameters listed in Part 1, Table 1 of the [NPDES] permit." [ROI-II, p. 22, para 6b(1)(D)(4), ROI-I, Exhibit 3, p. 4, Section (C)].

<sup>129</sup> Ms. Chavez detailed the efforts undertaken to investigate this reporting omission and determine the appropriate follow up action [Tab 28, Statement of [REDACTED] dated July 1, 2008, p. 2, para 11].

<sup>130</sup> See *supra* pp. 22-23, 28-29. This violation and its impact on effluent concentrations of TSS and BOD<sub>5</sub> was discussed in the context of OSC Allegation 1.

As to the acute and chronic toxicity monitoring of wastewater collected within the treatment process prior to treatment in the chlorine contact chamber [ROI-II, Exhibit 170], the NPDES permit required the WWTP to complete such monitoring of the *final effluent* once during the last summer and once during the last winter before the NPDES permit application is due [ROI-I, Exhibit 3, pp. 5-8, Sections II(A)(1), II(C)(1)-(3)]. The permit application is due 6 months prior to the permit expiration date [ROI-I, Exhibit 3, p. 18, Section IV(B)]. Given that the current permit expires on February 1, 2009, the WWTP completed the requisite toxicity monitoring during the winter of 2007-2008 and the summer of 2008 and submitted its application for the follow-on permit by the August 1, 2008 deadline. Although the Army has validated that this mandatory monitoring occurred, it was a future requirement at the time OSC referred its allegations and thus was not within the scope of the IO's investigation [ROI-II, p. 21, para 6b(1)(C)].

As regards the sampling and reporting of bio-solid pollutants, the Fort Lewis NPDES permit imposes no requirement to test WWTP-produced bio-solids or sludge or to report on the results of bio-solids testing in the monthly DMRs submitted to the EPA. The WWTP NPDES permit focuses solely on the wastewater that leaves the WWTP as *effluent*. Bio-solids and sludge are regulated only by the Washington State General Permit for Bio-solids Management. The bio-solids management permit stipulates that the WWTP shall submit an annual report by March 1<sup>st</sup> of each year for the preceding calendar year; the annual report is to include sampling results and other data to demonstrate compliance with pollutant limitations and pathogen reduction and vector attraction reduction methods [ROI-II, pp. 20-21, para 6a(7); ROI-II, Exhibit 189, cover letter, p. 1, para 1].<sup>131</sup> The IO reviewed the 2005 and 2006 Annual Reports to assess WWTP compliance with Washington State-imposed bio-solids sampling and reporting requirements [ROI-II, Exhibits 190-191]. All available evidence supports the conclusion that the Fort Lewis WWTP has acted in full compliance with the terms of its Bio-solids Management permit.<sup>132</sup>

Concerning the specific allegation regarding the testing of effluent for oil and grease, the IO determined that contrary to whistleblower assertions, the NPDES permit includes no requirement to test effluent for oil and grease every six months or when requested by a plant operator [ROI-II, p. 26, para 6b(3)(B)].<sup>133</sup> The IO specifically commented, however, that plant

<sup>131</sup> See *supra* pp. 55-56 and note 124.

<sup>132</sup> The IO determined that the mandatory monitoring requirement for metals was met. Additionally, Fort Lewis reported two rounds of metals monitoring in each annual report, as well as other toxics monitoring data such as PCBs and pesticides." [ROI-II, p. 28, para 6b(5)(E); ROI-II, Exhibits 190, 191]. The IO also concluded that "the annual reports also show that Fort Lewis completed the required monitoring for pathogen and vector attraction reduction and provided the calculations to demonstrate compliance." Furthermore, the IO validated that the "annual report is the proper report for recording mandatory bio-solids monitoring, and not the NPDES-required monthly DMRs." [ROI-II, p. 28, para 6b(5)(E)].

<sup>133</sup> The permit requires only that the WWTP monitor the final effluent for TPH semi-annually in the first year of the permit, during the wet season of October through March and submit the results of this monitoring to the EPA with the annual Inflow and Infiltration Report [ROI-II, p. 25, para 6b(3)(A); ROI-I, Exhibit 3, p. 5, Section II(A)(1) and p. 6; ROI-II, Exhibit 163, Statement of [REDACTED], pp. 2-3, Answers 9, 12; ROI-I, Exhibit 40, Statement of [REDACTED], p. 4, Answer 12; ROI-II, Exhibit 164, Statement of [REDACTED], p. 3, Questions and Answers 8, 9; ROI-II, Exhibit 165, Statement of [REDACTED], 2, Question and Answer 10; ROI-II, Exhibit 166a, Statement of [REDACTED], p. 3, Question and Answer 9.

operators represent a key source of knowledge and experience that may be of great assistance in identifying suspect discharges. The IO advised that "whenever an operator suspects a discharge may contribute to a violation, his or her request for additional *non-routine* testing should be seriously considered by plant management and appropriate action taken." [ROI-II, p. 26, para 6b(3)(4)(A), emphasis added]. Three of the four witnesses questioned by the IO on this issue stated that operators may request testing, and in specific situations, their requests will be honored.<sup>134</sup>

- **Allegation 3b.** The whistleblowers alleged that when the Fort Lewis Environmental Department tested wastewater samples, it failed to report the test results to WWTP operators or lab technicians, even though the operators and lab technicians had, on multiple occasions, specifically requested that information. The whistleblowers asserted that the NPDES permit required that test results be reported to operators to enable them to make necessary adjustments in wastewater treatment processes, to include determining the correct amount of chemicals to be added to the water.

An examination of the Fort Lewis NPDES permit [ROI-I, Exhibit 3] revealed that it does not contain or establish reporting requirements internal to the Fort Lewis organization or the WWTP. [REDACTED] further clarified that the NPDES permit does not require the reporting of pollutant test results to WWTP operators or lab technicians [ROI-II, Exhibit 164, Statement of Ms. Joyce Chavez, p. 4, Answer 21]. Regardless, IO interviews of four

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<sup>134</sup> ROI-II, Exhibit 163, Statement of Mr. Nate Barto, p. 4, Answer 14; ROI-II, Exhibit 164, Statement of Ms. [REDACTED] pp. 2-3, Answers 10 and 11; ROI-II, Exhibit 165, Statement of [REDACTED] p. 3, Answer 12. It does not appear that the method of addressing and assessing operator requests for testing has been routinized in the WWTP. For example, Mr. Barto testified that although WWTP Standard Operating Procedures (SOPs) do not address specific operator requested sampling, the operators collect "samples as an engineering sample for suspicious materials in the influent. It is an unwritten SOP. I have given [a] verbal standing order to sample anything that is a suspect material coming into the plant. For example, within a year to 18 months, a slew of greenish substance came through the plant and resulted in a pH drop. We sampled and did not find anything abnormal. That was the pH excursion incident." [ROI-II, Exhibit 163, Statement of [REDACTED] p. 4, Answer 13]. The fourth witness, [REDACTED] the WWTP lab technician, stated that there is an SOP that was designed by the operators and managers but that "[a]side from the permit there is no written instruction." To that end, she added that she does not perform non-routine testing at the request of other operators [ROI-II, Exhibit 166a, Statement of [REDACTED] p. 3, Answers 8 and 10]. On the other hand, [REDACTED] stated that it was his understanding that pursuant to the permit, if an operator thinks that there are contaminants in the discharge, the operator has "a duty to inform management for testing." Thus, he requested testing in a situation where he felt contaminants were being discharged. Specifically, he requested "a six week testing study for all shifts to establish a baseline of constituents" being discharged. [REDACTED] alleges that he received no leadership response to his request [ROI-II, Exhibit 48, Statement of [REDACTED] p. 2, Answer 8]. When questioned about [REDACTED] report, [REDACTED] stated that he had "not denied any operator requested sampling." [REDACTED] acknowledged [REDACTED] request to sample several points within the wastewater treatment process "to help determined the cause and impact of oil within the plant" and explained that he did not immediately respond as requested" because he "wanted some time to personally evaluate the situation." Mr. [REDACTED] noted that he had discovered "the main source of the oil in the bio-solids to be the gas compressor oil that the plant was injecting into the digester at a high rate without taking it out." [ROI-II, Exhibit 163, Statement of Mr. Nate Barto, p. 4, Answer 14]. As plant supervisor, he decided that since the source had been identified and actions taken to eliminate or reduce the source, no further testing was required [ROI-II, Exhibit 163, Statement of Mr. Nate Barto, p. 4, Answer 14]. This appeared to the IO to be "a reasonable conclusion." Regardless, the IO concluded that "operator-requested non-routine testing would be considered by plant management; however no written guidance exists to specify how such requests are handled." [ROI-II, pp. 26-27, para 6b(4)(B)].

witnesses, [REDACTED] included, were consistent in their revelations that WWTP operators do have access to lab test results [ROI-II, p. 29, para 6b(6)].<sup>135</sup> [REDACTED] testified that the operators and lab technician have access to test results "because the operators list results on the DMR every month." [ROI-II, Exhibit 164, Statement of [REDACTED], p. 5, Answer 25]. [REDACTED] advised that test results are readily accessible to operators and lab technicians, who must simply "contact Joyce Chavez and she would bring them a copy of the test results." [ROI-II, Exhibit 165, Statement of [REDACTED], p. 4, Answer 17]. [REDACTED] commented that in addition to requesting test results [from [REDACTED], "[t]he operators do have access to the test records of every DMR submitted . . . [t]he DMR package is available at the plant . . . and [operators] can access them when they want, it is an open file." [ROI-II, Exhibit 163, Statement of Mr. Nate Barto, p. 5, Answer 19]. In the summer of 2006, Fort Lewis leadership formally directed that lab test results be made available to operators. Operators were authorized to receive copies of lab test results by contacting either the Environmental Division of the DPW or the WWTP lab technician [ROI-II, Exhibit 163, Statement of Mr. Nate Barto, p. 5, Answer 19; ROI-II, Exhibit 165, Statement of [REDACTED], p. 4, Answer 17].<sup>136</sup> Mr. Long did recall a period in mid-2006 when a "disconnect" appears to have precluded operator access to test results, but that once the 'disconnect' was discovered, the matter was "brought to the attention of the Director, [who] ensured that the information was available to both the lab tech and operators." Ms. Judith Carol Lancy, the WWTP lab technician maintains unfettered access to test results in the context of executing her assigned duty to compile and prepare the monthly DMRs. When asked by the IO if operators have access to test results, [REDACTED] replied "No, it is mostly me. The results are sent on to me and the operators only see it if I show it to them." She went on to say, however, "[t]he operators should see the results. I am not prohibited from showing the results." [ROI-II, Exhibit 166a, Statement of Ms. Judith Carol Lancy, p. 5, Answer 17].

#### Findings:

- **Allegation 3a.** The allegation that WWTP managers did not conduct mandatory testing of the water and properly record and report test results in accordance with the NPDES permit is not substantiated. The evidence obtained by the IO supports a conclusion that since June 2005, plant managers have conducted all required monitoring required by, and at the frequencies specified in, the plant's NPDES permit. And, since June of 2005, with one exception in December of 2006, when the results of mercury sampling were omitted from the DMR, plant managers have properly recorded and reported test results on the monthly reports. Fort Lewis is committed to correcting this omission. The Fort Lewis WWTP NPDES permit does not require the plant to test the level of oil and grease every six months, and there exists no requirement in the permit that additional testing must be performed whenever an operator makes a request. The NPDES permit does not require recording and reporting toxic pollutants found in the bio-solids in the monthly DMRs. Plant management is properly monitoring and

<sup>135</sup> ROI-II, Exhibit 163, Statement of [REDACTED], p. 5, Answer 19; ROI-II, Exhibit 164, Statement of [REDACTED], p. 5, Answer 25; ROI-II, Exhibit 165, Statement of [REDACTED], p. 4, Answer 17; and ROI-II, Exhibit 166, Statement of [REDACTED], p. 5, Answer 16.

<sup>136</sup> The IO found this to be a "prudent" management decision with "the potential to enhance WWTP operations by enabling operators to make necessary adjustments in treatment, such as determining the proper amount of chemicals to add to the water." [ROI-II, p. 29, para 6b(6)(C)].

reporting reportable toxic pollutants found in the bio-solids in the Annual Bio-solids Report in compliance with the Bio-solids Management Permit issued by the State of Washington.

- **Allegation 3b.** The allegation that the Fort Lewis Environmental Division failed to report the results of laboratory testing of WWTP wastewater samples to plant operators and lab technicians, as required by the NPDES permit, is not substantiated. The WWTP's NPDES permit promulgates no requirement to report test results and laboratory analyses of water samples to operators and lab technicians. The lack of express permit requirements notwithstanding, operators and lab technicians have long been granted unfettered access to all laboratory test results. In the summer of 2006, Fort Lewis leadership formally directed that lab test results be made available to operators. Operators were authorized to receive copies of lab test results by contacting either the Environmental Division of the DPW or the WWTP lab technician. Test results are maintained in an open file that may be accessed at the convenience of the operator or technician. [REDACTED] the WWTP lab technician, is responsible for preparing the monthly DMRs, and thus reviews testing results as a matter of course. Further, she is authorized to provide the test results to plant operators on request.

Corrective Action:

- **Allegation 3a.** Corrective action not required. However, the Fort Lewis leadership is committed to avoiding errors, to include those that resulted in the omission of mercury from the December 2006 DMR. Further, the IO observed that "[p]lant management has not published nor given WWTP operators written policy guidance on operator-requested testing." Accordingly, he recommended that the WWTP establish and publish written policy guidance regarding operator requested monitoring and testing of both wastewater and bio-solids . . . ." [ROI-II, pp. 30-31, paras 6c(5), 6d(2)]. WWTP management is currently undertaking this effort.

- **Allegation 3b.** Corrective action not required. However, in the summer of 2006, Fort Lewis leadership directed that all lab test results be made available to operators and lab technicians. WWTP employees may request and receive copies of lab test results by contacting either the Environmental Division of the DPW or the WWTP lab technician [ROI-I, Exhibits 163, 165].

Allegation 4: Gross Mismanagement by Plant Supervisor, Mr. Al Long.

4a: That [REDACTED] was not qualified to supervise the Fort Lewis WWTP because he did not possess the appropriate Group III WWTP certification.

4b: That [REDACTED] frequently required operators to perform work at other locations on Fort Lewis, leaving the WWTP unattended. This practice violated the plant's NPDES perm and jeopardized public health and safety; an operator always should have been present at the plant in the event of a malfunction, break-down, or other emergency situation.



## References:

- *Federal Water Pollution Control Act*, Title 33, USC, Section 1251 *et. seq.*, [excerpted at Tab 14]. Commonly referred to as the *Clean Water Act*, this is the principal federal statute governing pollution of the nation's surface waters. The law provides that all discharges of pollutants into the nation's surface waters are unlawful, unless specifically authorized by a permit. Accordingly, a wastewater treatment plant must obtain a discharge permit in accordance with the *Clean Water Act's* NPDES program, established by Title 33, USC, Section 1342.

Like many federal environmental laws, the *Clean Water Act* embodies a philosophy of federal-state partnership in which the federal government sets the agenda and standards for pollution abatement, with states carrying out many of the day-to-day enforcement responsibilities. The EPA, the federal agency charged with implementation of the NPDES program under the *Clean Water Act*, issues regulations setting forth the standards applicable to different categories of sources or facilities and delegates certain elements of NPDES program responsibility to the states. Among the authorities delegated by the EPA to "authorized" states is the authority and responsibility for issuance of NPDES permits within that state. Currently forty-one (41) states are "authorized" to administer the NPDES permitting program with respect to federal facilities. Washington State *is not* "authorized" to permit federal facilities under the NPDES program, and therefore the EPA retains the authority to issue NPDES permits to federal facilities inside the State of Washington, to include the Fort Lewis WWTP.

- 40 CFR, Part 122, *EPA Administered Permit Programs: The National Pollutant Discharge Elimination System* [Tab 15]. In accordance with this federal regulation, Fort Lewis is authorized to discharge from the WWTP pursuant to its current, EPA-controlled, NPDES Permit, No. WA-002195-4, issued on December 30, 2003, with an effective date of February 1, 2004, and an expiration date of midnight, February 1, 2009 [ROI-I, Exhibit 3]. The NPDES permit establishes non-numerical and numerical standards with which Fort Lewis WWTP effluent must comply prior to its discharge into the receiving waters of Puget Sound. The permit also requires the WWTP to summarize monitoring results each month in a Discharge Monitoring Report (DMR) provided to the EPA.

- WAC, Chapter 173-230, *Certification of Operators of Wastewater Treatment Plants* [Tab 20]. This rule applies to "anyone who owns or operates a wastewater treatment plant." It requires that the "operator in charge of the wastewater treatment plant must be certified at least at a level equal to or higher than the classification of the plant." [ROI-I, Exhibit 19, p. 1, Section 173-203-040]. Section 173-230-140 of the WAC classifies WWTPs on the basis of the type of wastewater treatment each conducts (*e.g.*, primary, non-aerated lagoon, aerated lagoon, bio-filtration, extended aeration, activated sludge, wetlands, or tertiary) and its design flow. The Fort Lewis WWTP is an "activated sludge" facility with a design flow of 7.6 MGD [ROI-I, Exhibit 3, p. 4, Section IA]. Given these specifications, the WAC classifies the Fort Lewis WWTP as a "Class III" facility [ROI-I, Exhibit 19, p. 7, WAC Section 173-230-140; ROI-I,

Exhibit 20.<sup>137</sup> Accordingly, Washington State code would require the “operator in charge” of a facility of size and nature of the Fort Lewis WWTP to be certified at the Group III level or above.

While the applicability of this regulation is somewhat ambiguous, it does not appear to apply to Fort Lewis. Neither of the two permitting programs administered by Washington State are applicable to the Fort Lewis WWTP, although the operator certification requirement is not tied to any permit requirement. The definition of “owner” does not appear to include federal facilities. WAC Section 173-230-140 appears to define “owner” of a WWTP only in terms of a town, city, county, sewer district, board of public utilities, association, municipality, or private owner of a WWTP [ROI-I, Exhibit 19, p. 2, WAC Section 173-230-140(18)]. Even if Fort Lewis were considered an “owner,” the regulation provides no requirements applicable to owners, only “operators.”

The definition of “operator” refers to individuals, rather than private or public entities, organizations or institutions such as Fort Lewis or the Army. As discussed above, the only requirements contained in the regulation apply to these individuals (“operator in charge of the wastewater treatment plant,” and “operator in charge of each shift”). [ROI-I, Exhibit 19, WAC Section 173-230-040]

The Washington Department of Ecology considers this regulation inapplicable to Fort Lewis. On December 13, 2005, Fort Lewis requested that the State of Washington Department of Ecology issue a “temporary Group III certification for the current Wastewater Treatment Operator, Al Long.” [ROI-I, Exhibit 23]. The State of Washington responded to the request by advising Fort Lewis that “Washington State Department of Ecology . . . does not have authority over the Fort Lewis Wastewater Treatment Plant. It is unnecessary to issue a temporary certification to the facility.” [ROI-I, Exhibit 20].

- AR 420-49, *Utility Services*, dated April 28, 1997 [ROI-I, Exhibit 21].<sup>138</sup> This regulation complements applicable statute by establishing policies and procedures for the engineering of facilities that provide utility management and services at Army installations.

“Utility plants” are defined by the regulation to include “heating; refrigeration; air conditioning; liquid and gas fuel storage, distribution, and dispensing; electric generating; water and waste treatment plants, including all systems (for example, apparatus and equipment) necessary to provide utility services and to control environmental pollution.” [ROI-I, Exhibit 21, p. 23, *Utility plants*].

Further, at paragraph 2-4, the regulation provides that “[u]tility plant operators and maintenance and supervisory personnel will be provided sufficient training to operate and

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<sup>137</sup> According to WAC Section 173-230-140 classification matrix, the Fort Lewis WWTP is classified as “Class III” because its design flow is between 1 and 10 MGD.

<sup>138</sup> AR 420-29 was the regulation in effect at all times relevant to these OSC-referred allegations. AR 420-49 was incorporated into a update of AR 420-1, *Army Facilities Management*, issued on November 2, 2007. The substance of the AR 420-29 provisions at issue to this OSC-referred allegation. AR 420-1 was subsequently reissued on February 12, 2008.

maintain the utility plants in a safe, reliable, and efficient manner. Utility plant operators and maintenance personnel will meet applicable Federal, State, local or host nation certification requirements for the State or host nation in which they are located.” [ROI-I, Exhibit 21, p. 2].

Only the first sentence of paragraph 2-4 of AR 420-49 clearly applies to the Fort Lewis WWTP in that “utility plant operators and maintenance and supervisory personnel will be provided *sufficient training* to operate and maintain utility plants in a safe, reliable and efficient manner (emphasis added).” The provisions of the second sentence of paragraph 2-4a, requiring utility plant operators and maintenance personnel to meet the certification requirements of the State in which they are located is germane only to the extent State requirements are “applicable.” Because, the certification requirement does not appear to be “applicable” to Fort Lewis, AR 420-49 imposes no additional requirement for operator certification.

There exists no EPA or other Federal law, rule, or regulation mandating a minimum level of certification or licensure for wastewater treatment plant operators. In the absence of any “applicable” Federal certification requirement, the requirement set forth in the second sentence of paragraph 2-4 of AR 420-49 is rendered moot with regard to the Fort Lewis WWTP.

- *Standard for “Gross Mismanagement.”* There is no statutory definition of “gross mismanagement” set forth in either the whistleblower statute of Title 5, USC, Section 1213 or in other law. Rather, the OSC relies on the definition established in Merit Systems Protection Board (MSPB) case law in connection with prohibited personnel practices and the individual right of action (IRA) to the MSPB. The MSPB has defined “gross mismanagement” as “a decision that creates a ‘substantial risk of significant adverse impact on the agency’s ability to accomplish its mission.’” *Nafus v. Department of the Army*, 57 M.S.P.R. 386 (May 5, 1993), *McDonnell v. Dep’t of Agriculture*, 108 M.S.P.R. 443, paragraph 19 (March 17, 2008). Further, the MSPB has elaborated on what is meant by “gross mismanagement” stating, “‘gross mismanagement’ is more than de minimus wrongdoing or negligence. Thus, gross mismanagement does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing.” *Nafus* at 395-396, *emphasis added*. “A lawful but problematic policy constitutes gross mismanagement when reasonable people could not debate the error in the policy.” *Chambers v. Dep’t of Interior*, 515 F.3d 1362, 1368 (Fed. Cir. 2008). The matter at issue must also be significant. *White v. Dep’t of Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2005).

#### Evidentiary Summary:

- **Allegation 4a.**

The whistleblowers alleged gross mismanagement on the part of [REDACTED] because he did not possess the Group III wastewater treatment certification credential mandated by Washington State for persons supervising a Grade II wastewater treatment plant.<sup>139</sup>

<sup>139</sup> It appears that the whistleblowers incorrectly identified the Fort Lewis WWTP as a Level II WWTP. According to the WAC Section 173-230-140 classification matrix, the Fort Lewis WWTP is classified as “Class III” because its design flow is between 1 and 10 MGD. See *supra* note 144.

Both the vacancy announcement and the associated position description issued by the Army in connection with the position of "Utility Systems Repairer-Operator Supervisor," WS-4742-10, the Fort Lewis WWTP supervisory job held by ██████████ required the individual filling the position to "[p]ossess and maintain a Group III wastewater certification issued by the State of Washington." [ROI-I, Exhibits 17, 18; ROI-I, Exhibit 17, Vacancy Announcement WTEU05004308; ROI-I, Exhibit 18, PD EU200383]. ██████████ maintained only a Group II wastewater certification [ROI-I, Exhibit 16].

In assessing the validity of this allegation, the IO interviewed twenty witnesses [ROI-I, Exhibits 29-49] and examined both the Fort Lewis Garrison AR 15-6 ROI compiled by ██████████ [ROI-I, Exhibit 9], and the USACHPPM Performance Evaluation report [ROI-I, Exhibit 4].

The State of Washington promulgates certification requirements for "operators in responsible charge"<sup>140</sup> of wastewater treatment plants.<sup>141</sup> Ordinarily, for a plant like the Fort Lewis WWTP that is engaged in activated sludge treatment with a flow capacity between one and ten MGD, the State of Washington would require that the "operator in responsible charge" hold a Group III WWTP certification<sup>142</sup> [ROI-I, Exhibit 19; ROI-II, Exhibit 177; WAC 173-230-061; WAC 173-230-140]. Although the Group III certification requirement was cited as a "condition of employment" in the Fort Lewis position description applicable to the WWTP supervisor, the certification does not appear to be required as a matter of law. This was emphasized in a letter by the Department of Ecology in response to Fort Lewis' request for a temporary certification for ██████████<sup>43</sup>

There is no Federal requirement—no law, rule, or regulation—mandating that wastewater treatment plant operators maintain a minimum level of certification or licensure. The EPA has not elected to require particular certification standards or levels for WWTP personnel; the Fort Lewis NPDES permit contains no provision regarding the appropriate level of training or certification required for utility plant operators or maintenance and supervisory personnel.

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<sup>140</sup> The term "operator in responsible charge" is a regulatory term set forth in the WAC [ROI-I, Exhibit 19; WAC 173-230-010]. As defined therein, it refers to "the individual who is routinely on-site and in direct charge of the overall operation of the wastewater treatment plant." [ROI-I, Exhibit 19; ROI-II, Exhibit 177; WAC 173-230-020 (17)]. Washington State also requires that its Director of Ecology classify all wastewater treatment plants according to listed criteria to determine if the plant should be designated as a Class I, Class II, Class III, or Class IV facility [ROI-I, Exhibit 19; WAC 173-230-140; ROI-II, Exhibit 177; WAC 173-230-140; ROI-II, p. 16, para 8a(1)]. The treatment plant classification criteria depend upon the type of treatment a plant conducts (primary, secondary, and tertiary), and the size or design flow of a plant, as expressed in MGD. The State of Washington requires the "operator in responsible charge" to be certified at a level that is equal to or greater than the classification of the wastewater treatment plant. [ROI-I, Exhibit 19; WAC 173-230-010; ROI-II, Exhibit 177; WAC 173-230-010; ROI-I, p. 16, para 8a(1)]. As discussed above, Washington State does not regulate the Fort Lewis WWTP and the State-imposed operator certification requirements do not apply.

<sup>141</sup> WAC, Chapter 173-230 [ROI-I, Exhibit 19].

<sup>142</sup> There are five classes of certification: Operator-in-Training, Group I, Group II, Group III, and Group IV. Higher levels of classification require increasingly higher levels of education and more lengthy experience in operating a WWTP [ROI-I, Exhibit 19; ROI-II, Exhibit 177; WAC 173-230-061].

<sup>143</sup> See *supra* pp. 59-60.

Accordingly, we are left to analyze only whether AR 420-49 serves as the source of any training or certification standard.

AR 420-49 states at paragraph 2-4 that "[u]tility plant operators and maintenance and supervisory personnel will be provided *sufficient training* to operate and maintain the utility plants in a safe, reliable, and efficient manner, [and that] [u]tility plant operators and maintenance personnel will meet applicable Federal, State, local or host nation certification requirements for the State or host nation in which they are located." [ROI-I, Exhibit 21, p. 2, para 2-4]. Yet, neither AR 420-49 nor any other Army regulation defines "sufficient training." As discussed above, the State of Washington certification requirements for wastewater treatment plant operators are not "applicable." Finally, given that the EPA has elected not to impose certification requirements, there are no Federal standards "applicable" to the Fort Lewis WWTP pursuant to AR 420-49, paragraph 2-4.

Even though the job description issued for the "Utility Systems Repairer-Operator Supervisor" listed Group III certification as a condition of employment, Fort Lewis is free to seek higher qualifications in its employees<sup>144</sup> than what is legally required.<sup>145</sup> [REDACTED] was promoted into this position even though he only possessed a Group Level II wastewater operator credential [ROI-I, Exhibit 16]. Fort Lewis leadership subsequently removed Mr. Long from the WWTP supervisory position in the WWTP in April 2007. [REDACTED] then was assigned as the interim supervisor of the WWTP. [REDACTED] as an experienced engineer with expertise in wastewater, water, and storm water systems [ROI-II, p. 10, para 4]. However, Mr. [REDACTED] also lacked a Group III wastewater operator certification.<sup>146</sup>

<sup>144</sup> According to historical data compiled by [REDACTED] in her earlier AR 15-6 investigation of this matter, this requirement has been included in this position description at least as far back as February 1994 [ROI-I, pp. 9-10, para 4k; ROI-I, Exhibit 9, p. 4, para 2a(14)]. In ROI-II, the IO appointed to investigate the OSC-referred allegations commented that Fort Lewis's adoption of the Washington state certification requirements in their supervisory hiring actions was a reasonable means to ensure an appropriate level of technical competency for the individual who essentially is performing the duties of someone who can be viewed as an "operator in responsible charge" as he/she carries out the position's duties with respect to the supervision and operation of the Fort Lewis WWTP [ROI-II, p. 10, para 4k].

<sup>145</sup> The Vacancy Announcement WTEU05004308 and Position Description EEU200383 for the Utility Systems Repairer-Operator Supervisor both required that applicants possess a Group Level III waste water certification issued by the State of Washington, and be able to obtain, within a two year window, a State of Washington Water Distribution Manager III certification and State of Washington Water Treatment Plant Operator II certification [ROI-I, Exhibit 17, p. 1; Exhibit 18, pp. 2-3]. [REDACTED] did not have the Level III waste water certification but already possessed the other two certifications [ROI-I, Exhibit 9, p. 5, para 2a(15)].

<sup>146</sup> [REDACTED] lack of a Group Level III certification, as required by the job description, should have been addressed when he was first selected to fill the position of "Utility Systems Repairer-Operator Supervisor", WS-4742-10, pursuant to Vacancy Announcement WTEU05004308, Position Description EU200383. Mr. Long was first non-competitively and temporarily promoted to Utility Systems Repairer-Operator Supervisor on September 4, 2005, with a not to exceed NTE date of January 2, 2006. [REDACTED] accepted a competitive temporary promotion for the same position on January 3, 2006, with a NTE date of January 2, 2007. [REDACTED]'s promotion was made permanent on a non-competitive basis on April 4, 2006. It appears that on no occasion did the involved civilian personnel offices verify that [REDACTED] met the basic conditions of employment [ROI-I, Exhibit 9, p. 6, para 2(b)(1)]. These civilian personnel offices bore primary responsibility for determining who was or was not qualified before forwarding the names of qualified personnel to the selecting official. Yet, at no time did these civilian personnel offices realize that [REDACTED] did not possess the requisite Group Level III WWTP certification. Because he did not meet the qualifications for the job, [REDACTED] should not have been referred to the selecting official in any of personnel actions relating to [REDACTED]'s placement into the position of supervising the Fort Lewis

Significantly, the IO charged to investigate the OSC-referred allegations did not find Mr. ██████ to be "unqualified" for the position at issue. The IO concluded that ██████ is knowledgeable in the WWTP processes and equipment and [a]lthough [Mr. Long] apparently lacks some knowledge in certain aspects of WWTP operations . . . he is at least minimally technically competent as a WWTP supervisor [ROI-I, pp. 20-21, para 8(b)(15)].<sup>147</sup> The fact that ██████ possessed a Group Level II WWTP certification reflects that Mr. Long had attained a significant level of required education and experience in operating WWTPs, although not at the higher level required for Group III level certification. Group Level III certification requirements exceed Group II requirements only in that the Group Level II certification requires only a high school diploma or GED. The education requirements associated with a Group Level III certification include a high school diploma or GED and 2 years of college credit, but relevant work and/or operating experience at a Class II facility may be authorized in lieu of the college education requirement [ROI-I, Exhibit 19, WAC 173-230-061].

██████ also held more certifications than his peers and colleagues at the WWTP and WTP at the time he was promoted into the supervisory position; he had previously earned the Group Level II WWTP level certification, a Group Water Distribution Manager Group Level III certification, and a Water Treatment Plant Operator Group Level III certification [Tab 32, Email from ██████ WWTP Operator Certifications/Candidate Qualification Table, dated June 30, 2008].

Accordingly, the fact that ██████ did not possess a Group Level III wastewater treatment certification during the period that he encumbered the WWTP supervisor's position does not, without more, constitute "gross mismanagement," as defined by the MSPB. There is no evidence that ██████'s lack of a Level III certification credential created a substantial risk of significant adverse impact on the Fort Lewis's ability to accomplish its mission, a determination that would be required in order to enter a finding of "gross mismanagement" as alleged.

- Allegation 4b.

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WWTP. Either ██████ should have been disqualified from consideration for the position because he lacked the Group III certification, or, more properly, the position description should have been changed to eliminate the Group Level III certification requirement. The position's certification requirements were also disregarded when ██████, who, like ██████ did not possess a Group Level III certification, was placed temporarily in the position; it should be noted, however, that Mr. Barto was never formally reassigned to ██████'s WWTP position, "Utility Systems Repairer-Operator Supervisor" WS-4742-10, against Position Description EU200383. Rather, ██████ was simply detailed to the duties. ██████ was an engineer and was at all times paid as an engineer. ██████ explained that "██████ was detailed to the position because of his strong managerial skills and his expertise in water systems. Although he did not possess a WWTP Operator's Certificate, I believed the fact that he was a licensed engineer with considerable experience in water systems more that made up for his lack of an operator certification. I therefore chose to make a temporary exception to the PW policy of requiring a Class III Operator's Certificate." [Exhibit 26, Statement of ██████, p. 2, para 10].

<sup>147</sup> The IO found that ██████ evidenced essentially three main deficiencies in his management performance—lack of important leadership skills in communications, problems with interpersonal relationships, and demonstrating poor judgment at times [ROI-I, p. 19, para 8b(11); ROI-I, p. 9, para 4i]. The IO concluded that Mr. ██████ "leadership deficiencies created a work environment characterized by friction between employees and management, which contributed to employees resisting management directives and low morale among the work force." [ROI-I, p. 19, para 8b(12)].

The whistleblowers alleged gross mismanagement on the part of the plant supervisor, [REDACTED] because he frequently required operators to leave the WWTP unattended to perform work at other locations on the Fort Lewis installation. The whistleblowers asserted that this practice violated the WWTP's permit and jeopardized public health and safety and that prudence required the constant presence of an operator at the plant in the event of a malfunction, break down, or other emergency situation.

The analysis of this allegation is based on both an examination of the statements collected during the Fort Lewis Garrison AR 15-6 investigation conducted by [REDACTED] as well as clarifying statements gathered from witnesses during the preparation of the instant report to OSC.<sup>148</sup> [REDACTED] Security Office, had previously been appointed by Fort Lewis leadership to investigate certain management practices at the WWTP and the WTP, to include the allegation that the plant often was left unattended [ROI-I, Exhibit 9].<sup>149</sup> Seven witnesses testified to [REDACTED] that the WWTP was, at times, left unattended or staffed at minimal levels to permit operators to perform work or emergency repairs at other locations.<sup>150</sup> Although [REDACTED] investigation yielded evidence appearing to validate assertions that at times Mr. Long left the WWTP unattended [ROI-I, Exhibit 9, p. 13, Section 2(f)(1)(c)] and that "WWTP employees universally believe there is a requirement to man the WWTP 24/7," [ROI-I, Exhibit 9, p. 13, para 3f(1)(b)], [REDACTED] concluded, "[t]here is no written requirement which specifies [that] the WWTP must be attended 24/7 (i.e., 24 hours per day, seven days per week)." [ROI-I, Exhibit 9, p. 13, para 3(f)(2)]. Most notably, the EPA-issued NPDES permit contains no provision addressing manning requirements for the Fort Lewis WWTP. [ROI-I, Exhibit 3].

One witness, [REDACTED] provided [REDACTED] with a document entitled *Operations and Maintenance Manual, Operator Assistance Program, Wastewater Treatment Plant, Fort Lewis, Washington, January 1995*. Chapter 9 of this document, *Manpower Requirements*, states that "[t]he wastewater treatment plant at Fort Lewis is staffed 24 hours a day, 7 days a week. Plant operators work on overlapping 10-hour shifts (emphasis added)." [ROI-I, Exhibit 9, Tab 4L, p. 9-1]. However, [REDACTED] determined that the 1995 *Manual* was a draft only and never was finalized or formally adopted as part of the official Fort Lewis Environmental Management System.<sup>151</sup>

<sup>148</sup> The IO appointed to investigate the OSC-referred allegations, did not expressly address this allegation in his ROIs.

<sup>149</sup> On April 17, 2007, prior to the Army's May 24, 2007 receipt of the OSC-referred allegations, the Fort Lewis Garrison commander appointed [REDACTED] as an IO under provisions of AR 15-6 to assess the hiring actions related to Army vacancy WTEU05004308 for Utility Systems Repairer-Operator Supervisor, WS-4742-10, and several specific management practices at the Fort Lewis WWTP and WTP [ROI-I, Exhibits 9, 26].

<sup>150</sup> [ROI-I, Exhibit 9, p. 13, para 2f(1)(c)] referencing the following Exhibit 9 Tabs: Tab 4, Statement of [REDACTED] p. 6; Tab 5, Statement of [REDACTED] p. 7; Tab 6, Statement of [REDACTED] p. 7; Tab 7, Statement of [REDACTED] p. 7; Tab 8, Statement of [REDACTED] 7; Statement of Mr. [REDACTED] p. 7; Tab 18, Statement of Mr. Robert Koden, p. 7. Three of these witnesses: [REDACTED] and [REDACTED] erroneously stated that the "24/7 manning requirement" is a legally enforceable standard promulgated by the Fort Lewis WWTP NPDES permit or some other authoritative document.

<sup>151</sup> As [REDACTED] explained, "the 1995 O&M Manual is not an SOP and not part of our EMS (Environmental Management System). Its status is unclear. It was simply a product we got from a contractor that was used down at the plant. Last year USACHPM was contracted to review plant operations and make recommendations. They apparently took the only copy of the manual with them." [Tab 42].

Moreover, even if the draft *Manual* were applicable, its use of the word "staffing" would not necessarily be interpreted to require the constant physical presence of an operator at the WWTP. [REDACTED] Deputy Director of the Fort Lewis DPW, stated the Fort Lewis WWTP is "'staffed' 24 hours per day seven days per week (24/7). 'Staffing' means that we have people on staff to respond to a variety of WWTP systems. . . . inside and outside of the plant proper. For years, our WWTP staff has responded to pump station alarms off location (plant proper) during periods of minimal manning. This means that the plant could be left unattended for short periods. Should the problem be more than the operator can address, they are instructed to clear as much of the problem (alarm) as they can, return to the plant and call for additional resources. There is a difference between 'staffing' and 'manning' . . . 'manning' 24/7 means that a facility or complex is physically 'manned' or someone is present all of the time, with no off-site responsibilities. I have no facilities at PW that are 'manned' 24/7, except during crisis events (such as the Nisqually earthquake) or exercises . . . Our decision not to 'man' the WWTP is a risk management decision. Our regulators are aware of this operational condition and have voiced no objection [to] our methods." [Tab 26, Statement of [REDACTED], p. 1, paras 2-5]. It can be presumed that the supervisor and other WWTP management officials will ensure that the WWTP is manned at appropriate levels and the leaving the WWTP unmanned for short period of time would not place the operation of the WWTP in jeopardy. It is a judgment call as to whether to leave the WWTP unmanned in order to perform work or attend to other emergency matters elsewhere at Fort Lewis.

In concluding her investigation, [REDACTED] recommended that the DPW "determine if a 24/7 manning requirement is prudent or necessary to effectively and efficiently execute WWTP operations" and that "[i]f prudent or necessary, DPW should modify the WWTP SOP to specify the 24/7 manning requirement and adjust manpower and lift repair call procedures accordingly." [ROI-I, Exhibit 9, p. 13, para 2(f)(3)]. In response to [REDACTED] recommendations, [REDACTED] reviewed "staffing" levels at the WWTP. After weighing the attendant risks, [REDACTED] determined that 24/7 'manning' was not required by regulation, the NPDES permit, or other special circumstances at the WWTP and concluded that WWTP staffing levels and procedures for responding to off site emergencies should and would remain unchanged [Tab 26, Statement of [REDACTED], p. 1, para 6].

Although the evidence supports a conclusion that the WWTP was periodically left unattended while operators performed work at other locations on Fort Lewis, there is no evidence to support a conclusion that this practice constituted "gross mismanagement." The practice violated no law, rule, or regulation, nor did it breach WWTP NPDES permit conditions. There is no evidence that [REDACTED]'s decision periodically to leave the plant unattended for short periods of time created a substantial risk of significant adverse impact on the ability of Fort Lewis to accomplish its mission.



Findings:

- **Allegation 4a.** The allegation that [REDACTED]'s failure to possess a State of Washington Level III wastewater management certificated constituted "gross mismanagement" is not substantiated. The evidence shows that [REDACTED] did not possess this certification. However, there is no federal or state requirement for the "Utility Systems Repairer-Operator Supervisor" of the Fort Lewis WWTP to possess a Group III WWTP certification. Further, the IO found Mr. Long to be at least minimally technically qualified for the position.

- **Allegation 4b.** The allegation that [REDACTED]'s practice of periodically leaving the WWTP unattended to permit operators to perform work at other locations on Fort Lewis constituted "gross mismanagement" is not substantiated. Although the evidence supports a conclusion that the WWTP was occasionally left unattended while operators performed work at other locations [ROI-I, Exhibit 9, p. 13, Section 2(f)(1)(c)], there exists no law, rule, or regulation requiring that an operator be present in the plant at the at all times [ROI-I, Exhibit 3].<sup>152</sup> Rather, the decision to leave the plant unattended to accomplish emergency work at other locations on Fort Lewis is a judgment call properly left to the discretion of the plant supervisor or senior management official on-shift. There is no evidence to support a conclusion that the plant supervisor, [REDACTED] grossly mismanaged the WWTP by allowing or endorsing this practice.

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<sup>152</sup> There also was no evidence of general "gross mismanagement" outside the scope of these two specific allegations. Although he acknowledge [REDACTED]'s findings with regard to [REDACTED] and considered that Mr. Long's conduct had resulted in some safety violations, the IO found that "there is no clear pattern of documented leadership failures, only sporadic cases." [ROI-I, p. 20, para 8b(13)]. The IO further concluded that "[a]lthough these management conditions are unfavorable and warrant correction, I find that they do not rise to the level of gross mismanagement. My understanding of gross mismanagement is that which applies to conduct that demonstrates persistent, flagrant, shameful disregard for the people and work objectives for which a manager or supervisor is responsible. While evidence reveals that [REDACTED]'s management and supervisory practices are lacking, they must be weighed in the context of [REDACTED]'s total performance. I found [REDACTED] to be a committed hardworking employee with intentions of doing his job well. For instance, he eliminated certain inappropriate past practices such as paid breakfast and lunch on government time, thereby increasing the amount of time available to operate and maintain the plant [ROI-I, Exhibits 33, Statement of [REDACTED], p. 7, Answer 30, ROI-I, Exhibit 34, Statement of [REDACTED], p. 8, Answer 41]. Mr. Long also established policies to organize and clean up the plant, and tried to implement a much needed preventive maintenance program [ROI-I, Exhibit 33, Statement of [REDACTED], p. 7, Answer 30, Exhibit 34, Statement of [REDACTED], p. 8, Answer 41]. However, it is apparent that Mr. Long was promoted to a level of supervisory responsibility above his training and perhaps his abilities. It is noteworthy that [REDACTED] continues to serve as supervisor for the Water Treatment Plant, which includes the external water and sewer shop. Both his first line and next level supervisors report that he is performing satisfactorily in that position, but would not reassign him to the WWTP at this time [ROI-II, Exhibit 167, Statement of [REDACTED], p. 2, Questions and Answers 9, 10, Exhibit 168, Statement of [REDACTED], pp. 2-3, Questions and Answers 10, 11]. While I find [REDACTED]'s management and supervisory practices to be inadequate for the Fort Lewis WWTP requirements, I find that his conduct amounted to episodes of ineptness and mismanagement, but not gross mismanagement. Mr. Long might become an appropriate WWTP supervisor with adequate supervisory training and oversight. I arrive at these conclusions after having personally served as a major installation Director of Public Works." [ROI-II, p. 9, para 4i]. The IO ultimately determined that "[REDACTED]'s undeveloped leadership skills and minimal technical competence, although less than desirable, do not constitute 'gross mismanagement.'" [ROI-I, p. 21, para 8c(3)].

Corrective Action:

• **Allegation 4a.** Corrective action not required. Nevertheless, Fort Lewis took proactive steps to replace ██████████ as supervisor of the WWTP. After Mr. Long was removed from the WWTP supervisory position, he continued to serve as supervisor of the WTP. On March 2, 2008, he was removed officially from this supervisory position as well and was reduced to a lower grade. He served as Maintenance Mechanic (Utility System Repairer) WG-4749-09 in the Operations and Maintenance Division, DPW until he retired from federal service on September 2, 2008. The IO recommended that Mr. Long not be considered "for reinstatement as the WWTP supervisor unless he meets certification requirements and demonstrates an appropriate level of leadership and management skills." [ROI-I, p. 22, para 10d(2)].

The IO found ██████████, who replaced ██████████ on an interim basis, to have made significant improvements in plant operations during his tenure as interim supervisor, despite the fact that he too did not possess a Level III certification credential [ROI-I, p. 21, para 8c(4)]. ██████████ initiated a preventive maintenance program, repaired inoperable equipment, established a shop stock of equipment and parts, procured and received special tools so that operators could better perform their jobs, completed a hand rail project for employee safety, and initiated a project to install fiber optic cable for enhanced information technology capabilities and electronic communications.<sup>153</sup> The IO commented that ██████████ also "transformed the workplace environment into one in which morale was significantly improved . . . a renewed sense of teamwork and satisfaction exists due in large part to ██████████ caring leadership style and willingness to listen."<sup>154</sup>

In March 2008, ██████████ left his position as interim supervisor to assume duties with his military Reserve unit. At that time, ██████████, who possessed a Group IV Wastewater Certification, was detailed to the position of WWTP supervisor. ██████████ remained detailed to the position for a period of 120 days, when she was replaced by a third interim supervisor, ██████████, Jr. On June 26, 2008, ██████████ was selected as the permanent supervisor of the WWTP. On August 4, 2008, ██████████ reported for duty. ██████████ has a Group IV certification.

• **Allegation 4b.** Corrective action not required. However, ██████████ recommended that the DPW "determine if a 24/7 manning requirement is prudent or necessary to effectively and efficiently execute WWTP operations." ██████████ recommended that if deemed prudent or necessary, the Fort Lewis DPW should modify the WWTP SOP to incorporate the 24/7 manning requirement [ROI-I, Exhibit 9, p. 13, para 2(f)(3)]. In response to ██████████'s recommendation and after weighing the attendant risks, ██████████ reviewed

<sup>153</sup> ROI-I, Exhibit 29, Statement of ██████████, pp. 4-6, Answers 19-26; Exhibit 44, Statement of ██████████, p. 4, Question and Answer 20; Exhibit 47, Statement of ██████████, p. 5, Question and Answer 20; ROI-II, Exhibit 167, Statement of ██████████, p. 3, Questions and Answers 11-13.

<sup>154</sup> ROI-II, p. 10, para 4; ROI-I, Exhibit 29, Statement of ██████████, pp. 4-6; Exhibit 34, Statement of ██████████, p. 7, Answer 38; Exhibit 35, Statement of ██████████, p. 4, Answer 20; Exhibit 44, Statement of ██████████, p. 4, Answer 20; Exhibit 47, Statement of ██████████, p. 5, Answer 20; Exhibit 48, Statement of ██████████, p. 5, Answer 19, and ROI-II, Exhibit 167, Statement of ██████████, p. 3, Answers 11-13; Exhibit 168, Statement of ██████████, p. 3, Answers 13 and 14.

"staffing" levels at the WWTP and determined that WWTP staffing levels and procedures for responding to off site emergencies should and would remain unchanged [Tab 26, Statement of Mr. Randall Hanna, p. 1, para 6].

**Allegation 5: Occupational Health and Safety Hazards.**

5a: That ██████████ repeatedly exhibited a flagrant disregard for employee safety: he frequently assigned members of the WWTP staff to perform dangerous work at the outfalls, but failed to provide prerequisite training; failed to notify employees when contractors were performing maintenance on WWTP gas lines; and failed to hold monthly safety meetings in violation of Occupational Health and Safety Administration (OSHA) requirements and the plant's Standard Operating Procedures (SOPs). Despite repeatedly having received reports of these problems, both ██████████ and his supervisor, ██████████ failed to take corrective action.

5b: That toxic gases continually leaked from a cracked digester, causing both short- and long-term ill effects. Despite repeatedly having received reports of this problem, both Mr. ██████████ and his supervisor, ██████████ failed to take corrective action.

References:

• AR 385-10, *The Army Safety Program*, dated February 29, 2000 [Tab 35].<sup>155</sup> Paragraph 2-2, captioned "Operational procedures" provides that "[l]eaders and managers are responsible for integrating risk management into all Army processes and operations." Further, at paragraph 2-2(a), the regulation states that "[l]eaders and managers will ensure that physical standards for facilities and equipment meet or exceed safety and health standards established in pertinent host government, Federal, State, and local statutes and regulations and in Army regulations." Additionally, paragraph 2-2(e)(1) states that "[a]ll Active Army, Army National Guard (ARNG), USAR, and Army civilian employees will be provided the training and education necessary to achieve the skills listed below. This training, as a minimum, will be in accordance with subpart H, part 1960, title 29, Code of Federal Regulations (29 CFR 1960) and will train employees to:

- (a) Recognize the hazards and accident risks associated with their duties and work environment and know the procedures necessary to control these risks and work safely.
- (b) Know their accident prevention related rights and responsibilities as outlined in relevant statutes and regulations.
- (c) As appropriate, know the safety responsibilities of their leaders, supervisors, and commanders."

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<sup>155</sup> The current version of AR 385-10, published on August 23, 2007, superseded the previous edition, dated February 29, 2000. The 2000 edition is cited herein as it was the regulation in effect during the period relevant to the allegations under investigation.

- AR 420-49, *Utility Services*, dated April 28, 1997 [ROI-I, Exhibit 21]. This regulation requires that the design, operation, and maintenance of utility systems and facilities, to include wastewater treatment plants “protect the health and safety of the military and civilian work force” in accordance with AR 385-10, *The Army Safety Program*.

- 29 CFR, Part 1910, *Permit-required Confined Spaces* [Tab 36]. Section 1910.146(b) of this regulation defines a “confined space” as space that is: (1) large enough for a person to enter and perform work; (2) has limited means of entry and exit, such as a tanks, vessels, silos, storage bins, hoppers, vaults and pits; and (3) is not designed for continuous employee occupancy.

Confined spaces are significant from an Occupational Safety and Health Administration (OSHA) perspective only if they are “permit-required confined spaces,” a confined space that: (1) contains or has the potential to contain hazardous atmosphere; (2) contains material that has the potential to engulf an entrant; (3) has an internal configuration such that the entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross section; or (4) contains any other recognized serious safety and health hazard.<sup>156</sup>

This provision of the CFR provides that an employer must evaluate the workplace and inform employees by posting signs or other equally effective means of the existence of hazards, their location, and the danger.<sup>157</sup> Further, an employer must take effective measures to prevent employees from entering permit-required confined spaces or may develop and implement a written permit-confined space program and make it available for inspection by employees.<sup>158</sup> Employers are required to provide at least one attendant outside a permit-required confined space for the duration of an entry operation.<sup>159</sup>

- Fort Lewis Policy Memorandum, *Confined Space Entry, Operations and Maintenance* Division, March 1, 2007 (Originally dated January 7, 2002) [ROI-I, Exhibit 103]. This policy memorandum advises that effective April 15, 1993, OSHA requires that employers develop and manage a program for permit-required confined spaces pursuant to 29 CFR, Section 1910.146, *Permit-required Confined Spaces* . . . which is made applicable to government agencies by Executive Order 12196.” [ROI-I, Exhibit 103, p. 1, para 4(a)]. The Fort Lewis policy memorandum incorporates by reference the requirements of 29 CFR, Section 1910.146 *Permit-required Confined Spaces*; 29 CFR, Section 1910.134, *Respiratory Protection*; 29 CFR Subpart Q, *Welding, Cutting and Brazing*; 29 CFR, Section 1910.147, *Lockout/Tagout*,<sup>160</sup>; and EM 385-1-1-6, *Confined Space—U.S. Army Corps of Engineers Safety and Health Manual*. The Fort Lewis Policy is “intended to meet the [intent of the] above regulation[s] and more importantly, to protect the safety of workers who may enter into confined spaces by minimizing or eliminating the hazards related to such entries.” [ROI-I, Exhibit 103, p. 1, para 4(b)]. The

<sup>156</sup> See 29 CFR, Section 1910 [Tab 36].

<sup>157</sup> See 29 CFR, Section 1910.146(c)(2).

<sup>158</sup> See 29 CFR, Section 1910.146(c)(4).

<sup>159</sup> See 29 CFR, Section 1910.146(d)(6).

<sup>160</sup> A “tagout device” is a prominent warning device which can be securely fastened to an energy isolating device in accordance with an established procedure, to indicate that the energy isolating device and the equipment being controlled may not be operated until the tagout device is removed. 29 CFR, Section 1910.147(b).