UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
General Motors Corporation,	)	**Docket No. CWA-A-O-011-93**
CPC–Pontiac Fiero Plant,	)	
	)	
Respondent	)	

Clean Water Act – NPDES Permits – Where outfall on Respondent's premises discharged copper, lead, and zinc into navigable waters in amounts exceeding the limits in Respondent's NPDES permit from Michigan, Respondent was held to have violated the Act because:
(1) copper, lead, and zinc are "pollutants" within the meaning of the Act;
(2) Respondent's discharges "added" these pollutants to navigable waters despite the pollutants' apparent origin in the metallic content of rainfall plus metals leached by the rain from building surfaces on Respondent's premises; and
(3) Respondent's challenges to the validity of its Michigan NPDES permit were not reviewable in this federal enforcement action, as it is not the right forum for such review.

Appearances

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Before

Thomas W. Hoya, Administrative Law Judge

RULING ON CROSS MOTIONS FOR ACCELERATED DECISION

I. Introduction

This Ruling addresses cross motions for accelerated decision filed by the parties[1] in a case conducted under the authority of the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("the Act"). Complainant is the Water Division Director, Region V, U.S. Environmental Protection Agency; Respondent is the General Motors Corporation. This Ruling addresses also Respondent's requests for discovery, oral argument, and acceptance of additional pleadings.[2]

Complainant initiated this case with a March 1, 1993 Administrative Complaint, amended November 10, 1993,[3] charging Respondent with violations of the Act at its CPC--Pontiac Fiero Plant located in Pontiac, Michigan. Specifically, Respondent was charged with violating the Act on 92 occasions in 1989-93 by discharging from this plant more of the "pollutants" copper, lead,

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[1] Complainant's Motion for Accelerated Decision, and Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision (July 27, 1994); Respondent's Cross Motion for Accelerated Decision, and Respondent's Response in Opposition to Complainant's Motion for Accelerated Decision and Memorandum in Support of Respondent's Cross Motion for Partial Accelerated Decision (August 25, 1994); Complainant's Reply to Respondent's Cross Motion for Partial Accelerated Decision (September 9, 1994); Respondent's Rebuttal to Complainant's Reply to Respondent's Cross Motion for Partial Accelerated Decision (September 27, 1994); Complainant's Reply to Respondent's Rebuttal to Complainant's Reply to Respondent's Cross Motion for Partial Accelerated Decision (October 7, 1994); Respondent's Addendum to Respondent's Reply to Complainant's Prehearing Exchange and to Respondent's Response in Opposition to Complainant's Motion for Accelerated Decision, and Memorandum in Support of Respondent's Cross Motion for Partial Accelerated Decision (January 6, 1995); Complainant's Response to Respondent's Addendum to Respondent's Reply to Complainant's Prehearing Exchange and to Respondent's Response in Opposition to Complainant's Motion for Accelerated Decision, and Memorandum in Support of Respondent's Cross Motion for Partial Accelerated Decision (January 23, 1995); Respondent's Reply to Complainant's January 23, 1995, Response to Respondent's Addendum (February 6, 1995); Complainant's Reply to Respondent's Reply to Complainant's January 23, 1995 Response to Respondent's Addendum; Respondent's Motion to Accept the Pleadings, to Supplement its Prehearing Exchange, and to File an Additional Pleading (June 26, 1995).

[2] Respondent's Motion for Discovery, and Respondent's Memorandum in Support of General Motors CPC-Pontiac Fiero Plant's Motion for Discovery (June 17, 1994); Respondent's Reply to Complainant's Response to Respondent's Motion for Discovery (July 29, 1994); Respondent's Motion for Extension of Time to Respond to Motion for Accelerated Decision and Request for Oral Argument (August 10, 1994); Respondent's Motion to Accept the Pleadings, supra note 1.

[3] Administrative Complaint, Findings of Violations, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing (March 1, 1993); Amended Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing (November 10, 1993).

and zinc than allowed by a 1988 NPDES permit from the Michigan Department of Natural Resources. The proposed civil penalty was $125,000.[4] Respondent's March 26, 1993 and December 3, 1993 Answers denied the charges and advanced affirmative defenses.[5]

Respondent's Pontiac plant has been closed since 1988. The discharges in question flowed from an outfall on the premises into nearby navigable waters, and consisted of rainwater containing metals. The metals were apparently partly present in the rainwater as it fell and partly leached by it from roofing, gutters, and other exterior components of a building on the facility.[6] Pursuant to its 1988 Michigan NPDES permit, Respondent filed monthly Discharge Monitoring Reports; and it was excesses thus reported in its discharges of the three metals over the permit's limits that served as the basis of the Complaint.

Complainant's motion for accelerated decision requested a ruling that Respondent had violated the Act as charged, and Respondent's cross motion requested a ruling "that Respondent has not discharged pollutants and that ... [the Michigan NPDES permit] is void ab initio."[7] These cross motions raise three principal legal issues. These issues are listed below and, after a ruling on Respondent's requests for discovery, oral argument, and acceptance of additional pleadings, are discussed in the order listed.

1. Did the copper, lead, and zinc in Respondent's discharges constitute "pollutants" under the Act?

2. If these metals were "pollutants," did Respondent "add" them to navigable waters and therefore "discharge pollutants" as these terms are used in Section 502(12) of the Act?

3. Is the validity of the 1988 Michigan NPDES permit, which is the basis for the charge that Respondent's 1989-1993 discharges of these metals exceeded allowable limits, reviewable in this proceeding?

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[4] The Amended Complaint increased the number of alleged violations from 88 to 92 and increased their alleged time period from 1988-1992 to 1988-1993, but left the proposed civil penalty at $125,000.

[5] Answer of Respondent, General Motors Corporation--Affirmative Defenses, Objections, and Request for Hearing (March 26, 1993); Respondent, General Motors Corporation's Answer to Amended Administrative Complaint, and Its Defenses, Objections and Request for Hearing (December 3, 1993).

[6] Answer of Respondent, supra note 5, at 2; Respondent, General Motors Corporation's Answer, supra note 5, at 2; Respondent's Prehearing Exchange, at 2 (March 31, 1994).

[7] Respondent's Cross Motion, supra note 1, at 2.

II. Discovery, Oral Argument, Additional Pleadings

II.A. Discovery

Respondent's motion for discovery sought admissions, the production of documents, and answers to interrogatories. Complainant opposed this discovery on the ground that it "lacks significant probative value. "[8] Such "probative value" is one of the requirements for discovery under Section 22.19(f)(1) (40 C.F.R. § 22.19(f)(1)) of the Agency's Consolidated Rules of Practice (40 C.F.R. Part 22), which govern this proceeding.[9]

Respondent's motion for discovery is denied, because the information sought does fail to have the requisite "significant probative value." One portion of Respondent's requested discovery concerned elements of Respondent's argument that are not in dispute. Such discovery included requests for Complainant's admission that, for example, "copper, lead, and zinc commonly and naturally occur in the environment," and that "corrosion may occur in natural and manmade objects exposed to rainwater."[10] The quoted statements are not contested in this case, and admissions as to their correctness do not meaningfully relate to those questions that are at issue.

Another portion of Respondent's requested discovery asked about Agency theory and practice in regulating stormwater discharges. This portion lacks significant probative value because, as discussed below in Part V.D of this Ruling (see especially third last paragraph), the Agency's stormwater regulation is not a factor in this Ruling.[11]

Still another portion of Respondent's requested discovery asked for admissions by Complainant of issues that have been joined by the parties' submissions. This portion included requested admissions such as "that when copper, lead, and zinc naturally occur in rainwater, they

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[8] Complainant's Response in Opposition to Respondent's Motion for Discovery, at 1 (July 18, 1994).

[9] Section 22.19(f)(1) states, in pertinent part, that "further discovery shall be permitted only upon determination by the Presiding Officer:

(I) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value."

See, e.g., In re: Chautauqua Hardware Corp., 3 E.A.D. 616 (Order, CJO, June 24, 1991); In re: E.I. du Pont de Nemours and Co., FIFRA 93-H-09 (Order, June 30, 1995); In re: Safety-Kleen Corp., V-W-003-93 et seq. (Order, July 1, 1994).

[10] Respondent's Motion for Discovery, and Memorandum, supra note 2, Exhibit A, at 2, nos. 4, 14.

[11] See infra Part V, third last paragraph.

are not considered 'pollutants' as defined by the CWA," or "that metals that leach from building structures as a result of acid rain are not 'pollutants' as defined by the CWA."[12] Complainant's submissions for its accelerated decision motion adequately set forth the grounds for its contention that these metals in this case are "pollutants,"[13] and accordingly this portion of Respondent's requested discovery also lacks significant probative value.

A final portion of Respondent's requested discovery concerned the calculation of any civil penalty to be imposed on Respondent. This portion lacks significant probative value because this stage of this case does not address the calculation of any penalty. At issue now is only the question of whether Respondent violated the Act as charged; Complainant's accelerated decision motion asked only for a ruling to that effect, and Respondent's cross motion sought a ruling to the contrary. Consideration of an appropriate civil penalty will be the next stage; if during that stage Respondent believes its requested discovery regarding penalty calculation is relevant, it may resubmit its request then.

II.B. Oral Argument

Respondent requested oral argument because "important legal and policy issues are raised by this case which justify the opportunity for oral arguments."[14] Complainant opposed Respondent's request on the ground that "[o]ral arguments would require the expenditure of public funds which is unnecessary because the issues can be fairly and adequately addressed in the written briefs."[15]

Respondent's request for oral argument is denied. The filings by the parties were substantial,[16] and they are sufficient to serve as a reasonable basis for ruling on the parties' cross motions for accelerated decision.

II.C. Additional Pleadings

Respondent moved "for an order 1) to accept certain pleadings filed previously ... 2) to supplement its prehearing exchange material with attached Exhibit A, and 3) for leave to file an

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[12] Respondent's Motion for Discovery and Memorandum, supra note 2, Exhibit A, at 2, nos. 7, 11.

[13] See infra Part III.A.

[14] Respondent's Motion for Extension ... and Request for Oral Argument, supra note 2.

[15] Complainant's Opposition to Respondent's Request for Oral Argument (August 15, 1994).

[16] See the parties' filings listed in supra note 1.

additional pleading."[17] Respondent said that the filing of these additional documents "has been necessary because the facts and legal issues of this case have continued to evolve ... [and] [b]cause the filing of these ... [documents] is neither expressly authorized nor prohibited by the applicable prehearing procedures."[18]

Respondent's motion is granted. Complainant made no objection, and the additional materials help to illuminate this complex case.

III. Pollutants

III.A. Complainant

Complainant alleged that Respondent's Pontiac plant discharged into navigable waters more of the "pollutants" copper, lead, and zinc than allowed by Respondent's Michigan NPDES permit. A basic principle of the Act is that, under Sections 301(a) and 402, the discharge of pollutants into navigable waters is generally prohibited except as allowed by a National Pollution Discharge Elimination System ("NPDES") permit.[19] Respondent's Michigan permit was such an NPDES permit. To show that the copper, lead, and zinc were "pollutants" within the meaning of the Act, Complainant cited the Act itself and the regulations, case law, and the Michigan NPDES permit.

III.A.1. Act and Regulations. Complainant began by asserting that "[i]t is well established that copper, lead and zinc are 'pollutants' as well as 'toxic pollutants' as defined by Section 502(6) and (13) of the [Act]."[20] Section 502(6), as summarized by Complainant, "defines 'pollutant' as 'dredged spoil, solid waste ... chemical wastes, biological materials, ... heat, ... discharged into water."[21] Section 502(13), in Complainant's words, "defines 'toxic pollutant' as

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[17] Respondent's Motion to Accept the Pleadings, supra note 1, at 1.

[18] Id. at 2. Procedure in this case is governed by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22.

[19] See e.g., Train v. Colorado Public Interest Research Group, 426 U.S. 1, 7 (1976); National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165 (D.C.Cir. 1982).

[20] Complainant's Reply to Respondent's Cross Motion, supra note 1, at 2.

[21] Complainant's Motion, supra note 1, at 9. Section 502(6) in full states as follows.

> The term 'pollutant' means 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. This term

'pollutants or combinations of pollutants ... which after discharge and upon exposure ... cause death, disease, ... or physical deformities ...'."[22]

Finally as to the Act and the regulations, Complainant pointed to a table contained in a House Committee Print that lists copper, lead, and zinc as "toxic pollutants."[23] Complainant noted that this table is cited twice in the Act (in Section 301(b)(2)(C), titled "Effluent limitations--Timetable for achievement of objectives," and in Section 307(a), titled "Toxic and pretreatment effluent standards--Toxic pollutant list ..."). Complainant observed further that the table is reproduced in the regulations implementing the Act (in 40 C.F.R. § 401.15, titled "Toxic pollutants"). In addition, Complainant noted another regulatory listing of the three metals as "toxic pollutants" (in 40 C.F.R. Part 122, Appendix D, titled "NPDES Permit Application Testing Requirements," Table III, titled "Other Toxic Pollutants (Metals and Cyanide) and Total Phenols").

III.A.2. Case Law, Michigan NPDES Permit, Burden of Proof. For case law, Complainant claimed that "[f]ederal courts have long recognized that the metals in question are 'pollutants' subject to regulation."[24] Complainant cited one administrative case and two judicial

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does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

[22] Id. Section 502(13) states in full as follows.

The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunction in reproduction) or physical deformation, in such organisms or their offspring.

[23] Complainant's Reply to Respondent's Cross Motion, supra note 1, Exhibit A. The House Committee Print is Committee on Public Works and Transportation, Data Relating to H.R 3199 (Clean Water Act of 1977), Committee Print 95-30 (1977), and the table is titled "Table I--Section 307--Toxic Pollutants."

[24] Complainant's Reply to Respondent's Cross Motion, supra note 1, at 2.

cases, including Reynolds Metals Co. v. U.S. EPA, 760 F.2d 549 (4th Cir. 1985). In that case, the court said (at 551 n.3) that "[t]he pollutants sought to be removed from the nation's waterways are divided into three types: (1) 'conventional pollutants' ... (2) 'toxic pollutants' which are subject to regulations if they are contained in the list of 65 'priority' toxic pollutants listed in ... 40 C.F.R. § 401.15; and (3) 'non-conventional pollutants'...."

Respondent's Michigan NPDES permit was also a focus of Complainant's case. As argued by Complainant, "Respondent itself identifies copper, lead and zinc as pollutants discharged from" its Pontiac plant.[25] More specifically, Complainant stated that "[i]n its application for its NPDES Permit dated May 23, 1984, Respondent indicates the concentration of pollutants including copper, lead and zinc present in its effluent...."[26] Thus, Complainant asserted that "Respondent did not deny that these metals were pollutants in 1984 at permit application, in 1988 at permit issuance, or in 1990 when it submitted a letter in lieu of a formal application for renewing the permit."[27]

Lastly, Complainant rejected an argument by Respondent that the source of the three metals was an element of Complainant's burden of proof. Complainant contended that its "[r]esponsibility ...[was not] to determine the sources of the pollutants ... [but rather] to regulate the excessive discharge of pollutants ...."[28]

III.B. Respondent

In its reply, Respondent rejected Complainant's claim that copper, lead, and zinc are "pollutants," disputing Complainant's interpretation of the Act and the regulations, the case law, and the Michigan NPDES permit. Respondent raised additional issues that related the sources of these three metals to Complainant's burden of proof and to the Agency's stormwater rulemaking.

III.B.1. Act, Case Law. As for the Act, Respondent argued that the definition of "pollutant" in Section 502(6) is "broad,"[29] and reveals a lack of Congress's "specific intent to include the metals in question in this proceeding ... within the defined term 'pollutant.'"[30] Rather, according to Respondent, "the legislative history ... indicates that Congress intended EPA to

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[25] Id. at 3.

[26] Id.

[27] Id..

[28] Id. at 5.

[29] Respondent's Response in Opposition, supra note 1, at 5.

[30] Id.

exercise common sense when interpreting and applying the statutory definition of 'pollutants.'"[31] Respondent cited particularly a statement during floor debate by "Senator Edmund Muskie, the principal sponsor of the legislation" regarding "whether a particular material is a pollutant for the purposes of the CWA [Clean Water Act]."[32] As quoted by Respondent, Senator Muskie said that point "is an administrative decision to be made by the Administrator ... .I am very reluctant to make it."[33] Further per Senator Muskie as quoted by Respondent: "Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another" (emphasis added by Respondent).[34]

Moreover, contended Respondent, "[t]his case-specific approach to determining whether a material is or is not a 'pollutant' under a given set of circumstances has been approved and applied by reviewing courts."[35] Thus, stated Respondent, citing judicial cases, "[c]ourts which have reviewed whether a particular substance is a CWA 'pollutant' have concluded that the list in section 502(6) is neither exclusive nor all inclusive."[36]

With regard to Section 502(13) of the Act, Respondent gave two reasons why it supplied no support for Complainant's case. First, since its definition of "'toxic pollutants' incorporates and rests upon the term 'pollutants' for its meaning ... for tautological reasons, [it] cannot be used to define the term 'pollutants.'"[37] Second, "the very definition of 'toxic pollutants' incorporates the concept of dose-response."[38]

That is, per this concept "[a]ny material ... may be toxic if it occurs in concentrations which result in sufficient exposures ... [but] substances such as water, copper, lead, and zinc are not always toxic at every concentration and in every form, and are not necessarily 'pollutants.'"[39]

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[31] Id.

[32] Id.

[33] Id., citing Senate Debate on S.2770, Nov. 2, 1971, reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 1347-48 (1973).

[34] Id., citing Senate Debate on S.2770, Nov. 2, 1971, reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 1347-48 (1973).

[35] Id.

[36] Id. at 6.

[37] Id. at 8.

[38] Id.

[39] Id.

Respondent's point, again citing the Act's legislative history, was that "Congress, in establishing the definition of the term 'pollutant' recognized that it could not define, as a matter of law, when a material was a pollutant and when it was not" (emphasis in original),[40] but rather "intended the term to be interpreted on a case-by-case approach."[41]

III.B.2. Regulations, Case Law, Michigan Permit. As for the table in the House Committee Print, Respondent denigrated its significance. Referring to Complainant's citation of the table as it appears in 40 C.F.R. Part 122, Appendix D, Respondent stated that it "merely sets forth NPDES testing requirements."[42] Further, "Table III is a list of common metals ... [that] occur naturally in the environment, and two, in fact, are important human dietary minerals."[43] In sum, "Table III of Appendix D defines nothing ... [and provides no] support[] [for] a conclusion that, as a matter of law, the metals in question under these facts are pollutants" (emphasis in original).[44]

As to case law, Respondent chiefly advanced its judicial cases, noted above,[45] for Respondent's thesis that "the courts have recognized that Congress intended the term [pollution] to be interpreted on a case by-case approach."[46] As for the Michigan NPDES permit, Respondent contended that it was "void ab initio,"[47] and therefore should be accorded no significance.

III.B.3. Burden of Proof, Stormwater Rulemaking. Respondent raised an additional issue regarding burden of proof and the source of the copper, lead, and zinc. The source, argued Respondent, "is an element of Complainant's prima facie case."[48] Respondent supplied "evidence that the source of [the] metals ... either is rainfall or the corrosive effect of rainfall on building

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[40] Id.

[41] Id. at 6.

[42] Id. at 8.

[43] Id. The two dietary minerals are apparently copper and zinc. Id., Exhibit A.

[44] Id. at 8.

[45] See supra text accompanying notes 35-36.

[46] Respondent's Response in Opposition, supra note 1, at 6.

[47] Respondent's Cross Motion, supra note 1, at 2.

[48] Respondent's Rebuttal, supra note 1, at 9.

structures and components."[49] Thus, contended Respondent, "because Complainant has presented no evidence to support its conclusion that the metals in question are from sources other than precipitation or the corrosive effects of acidic precipitation on structural materials, Complainant has not met its burden of proof."[50]

Respondent connected also the Agency's stormwater rulemaking to the sources of the three metals. Respondent averred that "EPA's actions and words over the past 20 years of regulatory history have indicated that it does not view either ambient contaminated rainfall or the effects of acid rain on ubiquitous building materials as CWA 'pollutants.'"[51] Further, "previously, EPA explicitly has concluded that metals from these same sources are not pollutants discharged from a point source."[52] Finally, "[i]n the current rule, EPA also states that the NPDES permit application requirements will apply to stormwater discharges from plant areas that are 'no longer used for industrial activities' if, and only if, 'significant [industrial process] materials remain and are exposed to storm water'"(emphasized phrase and bracketed insert supplied by Respondent).[53] Consequently, concluded Respondent, "contrary to Complainant's assertions in this case, and as a matter of law, the metals in question in this proceeding are not 'pollutants.'"[54]

III.C. Ruling

Complainant's authorities are the more persuasive. The Act establishes generally that copper, lead, and zinc are "pollutants" within the meaning of the Act, and the Michigan NPDES permit confirms the point specifically for this case.

III.C.1. Act. As to the Act, the definitions of "pollutant" in Section 502(6) and of "toxic pollutant" in Section 502(13) are both phrased so broadly that the exact status of these three metals is left unclear.[55] On the other hand, the Act's references to the table in the House Committee Print listing these three metals is reasonably conclusive.[56]

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[49] Respondent's Response in Opposition, supra note 1, at 7. See also Respondent's Prehearing Exchange, at 3-4 (March 31, 1994).

[50] Respondent's Rebuttal, supra note 1, at 9.

[51] Respondent's Response in Opposition, supra note 1, at 9.

[52] Id.

[53] Id. at 10, quoting from 55 Fed. Reg. 47,990, 48,008 col. 1 (Nov. 16, 1990).

[54] Id. at 10.

[55] For these sections, see supra notes 21 and 22.

[56] For Complainant's reference to this table, see supra note 23 and accompanying text.

Section 301, titled "Effluent limitations," is a core provision of the Act. It begins with Section 301(a), titled "Illegality of pollutant discharges except in compliance with law." It declares unlawful any discharge of a pollutant from a point source except as authorized by the Act, and the Act generally provides for such discharges only pursuant to an NPDES permit that imposes conditions based on such factors as technology, water quality, and cost.

Then Section 301(b) is titled "Timetable for achievement of objectives." It provides that "In order to carry out the objectives of this chapter there shall be achieved--," and subsections (1)-(3) prescribe different time limits for various facilities, point sources, and pollutants. Subparagraph 301(b)(2)(C) provides as follows.

> with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations ... in no case later than March 31, 1989[.]

Table 1, cited in the Act and contained in the Committee Print, is preceded in the Committee Print by a page titled "Introduction," which states that "Table 1 includes those toxic pollutants to be regulated under section 307 ...."[57] Table 1, titled "Section 307--Toxic Pollutants," lists 65 entries, including "Copper and compounds," "Lead and compounds," and "Zinc and compounds."[58]

Therefore certainly the plain meaning of this listing and Section 301(b)(2)(C) is that copper, lead, and zinc for purposes of the Act are not just "pollutants," but "toxic pollutants." This conclusion is supported by further references in Sections 301 and 307 involving this table. Immediately after subparagraph 301(b)(2)(C) provides its time limit for "all toxic pollutants referred to in table 1," subparagraph (D), referring back to subparagraph (C), states as follows.

> For all toxic pollutants listed under paragraph (1) of subsection (a) of ... [Section 307 of the Act] which are not referred to in subparagraph © of this paragraph compliance with effluent limitations ... in no case later than March 31,1989;

Section 307 is titled "Toxic and pretreatment effluent standards," and subsection (a) is titled "Toxic pollutant list; revision ; ... promulgation of standards...." Paragraph (1) of this subsection (a), which is the paragraph referenced in the indented quotation immediately above, states as follows.

> On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in

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[57] Complainant's Reply, supra note 1, Exhibit A.

[58] Id.

> table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator [of the Agency] shall publish ... that list. From time to time thereafter the Administrator may revise such list....

Subparagraph 301(b)(2)(D) thus provides a time limit for compliance with effluent limitations regarding toxic pollutants that are added to the list in table 1.

> In Section 307, paragraph (2) of subsection 307(a) then states as follows.
>
> Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable ....

Section 307 goes on to describe the manner in which these effluent limitations or standards are to be promulgated.

Consequently the table in the House Committee Print listing copper, lead, and zinc as "toxic pollutants" is a basic component of the timetable of Section 301, which provides that all discharges of pollutants are unlawful except as authorized by the Act, and of Section 307, which provides for the issuance of effluent standards. Thus the Act itself clearly characterizes these three metals as "toxic pollutants."

Respondent's argument that the definitions of "pollutant" and "toxic pollutant" in Section 502(6) and (13) fail so to characterize these three metals may well be true, but it does not rebut this characterization of these metals in Sections 301 and 307. Nor does the legislative history cited by Respondent showing a Congressional desire for some Agency flexibility in administering the Act contradict the specific characterization of these three metals by Sections 301 and 307. Nor do the cases cited by Respondent that endorse Agency flexibility in determining pollutants and in applying Section 502(6) rebut this specific characterization of these three metals.

III.C.2. Regulations. Whereas the Act characterizes the three metals as toxic pollutants by referring to a table in which they are so listed, the regulations implementing the Act state directly that they are toxic pollutants. In a portion of these regulations titled "Part 401--General Provisions" (40 C.F.R. Part 401), Section 401.15 is titled "Toxic Pollutants." That Section states: "The following comprise the list of toxic pollutants designated pursuant to Section 307(a)(1) of the Act," and it then essentially reproduces from the Committee Print the table that lists 65 items including "copper and compounds," " lead and compounds," and "zinc and compounds."[59] Thus Section 401.15 is a straightforward statement that these three metals are "toxic pollutants" under the Act.

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[59] See supra text paragraph accompanying notes 57-58.

A second regulatory reference to these three metals appears in Part 122, which is titled "EPA Administered Permit Programs: The National Pollution Discharge Elimination System" (40 C.F.R. Part 122). As noted previously, these NPDES permits are the major means by which the Act is implemented.[60] Appendix D to Part 122, with the title "NPDES Permit Application Testing Requirements," contains five tables. Table III, titled "Other Toxic Pollutants (Metals and Cyanide) and Total Phenols," lists 15 items, including "Copper, Total," "Lead, Total," and "Zinc, Total."

It was this table III that Respondent said "merely sets forth NPDES testing requirements," "defines nothing, " and is simply "a list of common metals."[61] In the first place, however, Respondent's comments about this table leave unanswered the Act's references in Sections 301 and 307 to the table in the House Committee Print, as well as the reproduction of the table in regulatory Section 401.15. In the second place, even if the purpose of this table III in this Appendix D is prescribing NPDES testing requirements, the listing of the three metals still constitutes a statement that, under the Act, they are "toxic pollutants." Therefore Respondent's suggestion to the contrary regarding this table III is unconvincing, both as to the meaning of the table itself and also as to the meaning of Sections 301 and 307 of the Act and of Section 401.15 of the regulations.

III.C.3. Case Law. More relevant than Respondent's cases endorsing Agency flexibility in administering the Act are those cases that use the list in Section 401.15 to characterize various substances as pollutants. In Reynolds Metals Co. v. U.S. EPA, 760 F.2d 549 (4th Cir. 1985), cited by Complainant, the court approved effluent limitations issued by the Agency under the Act for the canmaking industry. As noted above,[62] the court said: "The pollutants sought to be removed from the nation's waterways are divided into three types: (1) 'conventional pollutants' ... (2) 'toxic pollutants' which are subject to regulations if they are contained in the list of 65 'priority' toxic pollutants listed in ... 40 C.F.R. § 401.15; and (3) 'non-conventional pollutants'...." 760 F.2d at 551 n.3.

Other cases used 40 C.F.R. § 401.15 to determine that particular substances were pollutants. In Dague v. City of Burlington, 732 F.Supp. 458, 469-70 (D.Vt. 1989), aff'd, 935 F.2d 1343 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 557 (1992), the court held that chemical wastes leaching from a landfill were "pollutants" under Section 502(6) of the Act because water samples "indicate[d] the presence of various chemical wastes specifically listed as toxic pollutants under 40 C.F.R. § 401.15." In Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), the Fifth Circuit ruled that the oil company's discharges contained "pollutants." Citing Dague, the court said: "several of the components of Cedar Point's produced water, including

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[60] See supra Part III.C.1, second paragraph.

[61] See supra text paragraph accompanying notes 42-44.

[62] See supra text paragraph accompanying note 24.

benzene, naphthalene, and zinc, are listed as 'toxic pollutants' in regulations promulgated by EPA. 40 C.F.R. § 401.15...." 73 F.3d at 568. In United States v. Alcan, 755 F.Supp. 531, 538 (N.D.N.Y. 1991), modified, 990 F.2d 711 (1993), the court granted summary judgment for the federal government on liability for costs associated with hazardous waste cleanup. The court stated that "'copper and compounds,' 'lead and compounds,' and 'zinc and compounds,' are expressly so included in 'the list of toxic pollutants designated pursuant to section 307(a)(1) of the [Clean Water] Act,' 40 C.F.R. § 401.15 (1990)."

A case before the Agency's Environmental Appeals Board has special relevance for the second basic question raised by the instant case--whether Respondent "added" pollutants to navigable waters and therefore "discharged" them within the meaning of the Act[63]--and is discussed in more detail below in Part IV of this Ruling.[64] At issue in In re: J&L Specialty Products Corp., NPDES Appeal 92-22, 5 E.A.D. 31, 1994 NPDES LEXIS 1 (Feb. 2, 1994), among other matters, were various aspects of an NPDES permit for the respondent's stainless-steel finishing plant. On one point the Board held that copper and nickel, "two of the pollutants discharged" by the respondent, were on a list "derived from the 65 classes of compounds identified as 'toxic' under CWA § 307(a)(1) and listed at 40 C.F.R. § 15 ... and therefore are 'toxic pollutants." [65] Thus the Environmental Appeals Board also used the list in Section 401.15 to characterize substances as pollutants.

III.C.4. Michigan NPDES Permit. Respondent's argument that its permit was void ab initio is discussed below in Part V.D. As to the disputed characterization of copper, lead, and zinc, the Act and the regulations establish that these three metals are "toxic pollutants" for purposes of the Act generally, and Respondent's Michigan NPDES permit confirms that classification specifically for this case. Respondent's 1984 application for the permit identified the three metals as pollutants,[66] as did the 1988 Michigan NPDES permit.[67]

This same point was made in Cedar Point Oil, the recent Fifth Circuit case noted above.[68] In addressing the construction of "pollutant" in citizen suits filed under the Act in response to violations of an effluent limitation or an NPDES permit, the court wrote: "In such cases, the

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[63] See supra text paragraph accompanying note 7.

[64] See infra text paragraphs accompanying notes 76-85, and see infra Part IV.B.4. See also infra text paragraph accompanying notes 70-71.

[65] 5 E.A.D. 31, 37; 1994 NPDES LEXIS 1, *19.

[66] Complainant's Prehearing Exchange (March 31, 1994), Exhibit 3, at V-3 (May 23, 1984).

[67] Id. Exhibit 4, at 4 (June 30, 1988).

[68] See supra Part III.C.3, second text paragraph.

question of whether the discharged substance is a pollutant is not in issue because EPA will have already made that determination through the effluent limitation or permit."[69]

III.C.5. Burden of Proof; Stormwater Rulemaking. Respondent's argument regarding stormwater rulemaking is treated below in Part V.D (see especially third last paragraph). As to burden of proof, Respondent argued that Complainant's failure to establish the source of the three metals meant that its case lacked an essential element of its burden of proof. A review of the cases discussing the elements required to prove a violation of the Act, however, demonstrates that the Agency need not establish the underlying sources of pollutants when alleging discharges without a permit. In National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165 (D.C.Cir. 1982), the D.C. Circuit wrote that "five elements must be present" for an NPDES permit to be required: "(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*" (italics in original). See also Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305, 309 (9th Cir. 1993), cert. denied 115 S.Ct. 198 (1994). In United States v. Law, 979 F.2d 977, 978-79, the Fourth Circuit cited these five elements in affirming felony convictions below for violations of the Act: "The origin of pollutants in the treatment and collection ponds is therefore irrelevant. The proper focus is upon the discharge from the ponds into [navigable waters]."

The Environmental Appeals Board's opinion in J&L Specialty Products, 5 E.A.D. 333, 1994 NPDES LEXIS 6, Final Order (June 20, 1994), an earlier order of which was mentioned above,[70] also addressed this issue. There the Board ruled that the source of cyanide discharged by the respondent was "not material" to a consideration of the respondent's NPDES permit.[71] Thus Respondent's argument regarding burden of proof is rejected by the relevant case law.

IV. Addition of Pollutants

IV.A. Positions of the Parties

The second principal question in this case[72] is whether, within the meaning of the Act, Respondent "added" the copper, lead, and zinc to navigable waters. Respondent's alleged offense was the "discharge of pollutants" in excess of the amounts allowed by its Michigan NPDES

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[69] 73 F.2d 546, 566.

[70] For an earlier Board order in this case, see supra text paragraph accompanying notes 64-65. See also infra text paragraphs accompanying notes 76-85, and Part IV.B.4.

[71] 5 E.A.D. 333, 351, 1994 NPDES LEXIS 6, *51.

[72] See supra text paragraph accompanying note 7.

permit. As noted,[73] Sections 301(a) and 402 of the Act generally prohibit the "discharge of any pollutant" from a point source into navigable waters except as authorized by an NPDES permit. Section 502(12) defines "discharge of pollutants," in part, as "any addition of any pollutant to navigable waters from any point source" (33 U.S.C. § 1362(12)). Respondent argued that the presence of the three metals in the plant's discharge, allegedly originating in the content of the rainwater itself plus metals leached from building surfaces, did not constitute such "addition of any pollutant."

The thrust of Respondent's argument was that a violation of its Michigan NPDES permit could occur only with "a finding of causation on the part of the discharger,"[74] citing several judicial cases in which parties were relieved of responsibility even though discharges into navigable waters from their point sources had contained pollutants. Complainant countered by asserting that the Act imposes strict liability, and especially by disputing Respondent's interpretation of case law and by advancing several cases of its own.

According to Complainant, the key issue is the addition of pollutants to navigable waters, not to discharge, and Respondent here "caused these pollutants to be added to a navigable water from its point source" (emphasis in original).[75] Among the cases that Complainant cited, it urged as particularly relevant the Environmental Appeals Board's decision in In re J&L Specialty Products Corp., NPDES Appeal No. 92-22, Final Order, 1994 NPDES LEXIS 6 (June 20, 1994).[76]

Respondent challenged the relevance of J&L Specialty on two grounds: that it was factually different from the instant case, and that it departed from previous judicial cases on the subject. Respondent argued further that, under Complainant's theory of liability, "all dischargers of rainwater through point sources would be subject to permitting under ... the CWA ... [and] EPA would be obligated to require permits for all similarly situated sources."[77]

IV.B. Ruling

The authorities cited by Complainant are the more pertinent and therefore the more

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[73] See supra text accompanying note 19, and Part III.C.1, second paragraph.

[74] Respondent's Cross Motion, supra note 1, at 12-13.

[75] Complainant's Reply to Respondent's Cross Motion, supra note 1, at 7.

[76] For prior references to this case, on which the Board issued orders in both February 1994 and June 1994, see supra text paragraphs accompanying notes 64-65 and 70-71. See also infra Part IV.B.4.

[77] Respondent's Rebuttal, supra note 1, at 10.

persuasive. As to what constitutes "any addition of any pollutant" under the Act, the decision by the Environmental Appeals Board in J&L Specialty effectively answers the question for cases brought before the Agency. And that answer dictates a decision in favor of Complainant on this issue in the instant case.

IV.B.1. J&L Specialty. In J&L Specialty, the respondent's facility used stormwater collected in its stormwater sewers for its industrial process, and the discharge from its process wastewater outfall included cyanide. The respondent claimed that none of the cyanide originated on its premises, but rather in road salt outside of the premises that was washed into the stormwater collected in its stormwater sewers. The discharge of this cyanide should not be held a violation of its NPDES permit, argued the respondent. Its argument (as stated by the Board) was "that it does not 'add' cyanide ... [because] the cyanide in its discharge comes from a non-point source beyond its control."[78] Further, per the Board, "According to J&L, inherent in the section 502(12) definition of 'discharge' is an element of causation, such that if the discharger does not itself cause the addition of pollutants to a navigable water, the Clean Water Act does not give the Agency jurisdiction to regulate the discharge."[79]

The Board rejected this argument. "As a matter of law," the Board declared, "J&L discharges cyanide as the term 'discharge of a pollutant' is defined in section 502(12) because J&L collects stormwater containing cyanide and diverts it for use in its industrial process, thereby introducing the cyanide into ... [navigable waters] via J&L's process wastewater outfall."[80] "A pollutant is 'added' to a navigable water," according to the Board, "if it is introduced to the water segment by the discharger."[81] Thus, "[b]ecause J&L introduces cyanide found in the stormwater it collects and channels into [navigable waters], it adds pollutants to a navigable water."[82]

As noted above, Respondent attempted to avoid the force of J&L Specialty by claiming that that case was different factually from Respondent's situation and by arguing that that decision departed from prior judicial cases.[83] Neither of Respondent's efforts succeeds.

The factual difference suggested by Respondent is that "J&L Specialty involved the use of an undisputed chemical pollutant (road salt with cyanide) ... [whereas in Respondent's case] no

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[78] 1994 NPDES LEXIS at *49-50.

[79] Id. at *50.

[80] Id. at *51.

[81] Id. at *52.

[82] Id. at 54.

[83] See supra text paragraph accompanying note 77.

chemical is being [used] ... nor is a 'pollutant' even involved."[84] This suggested difference, however, was rejected above in Part III.C of this Ruling, wherein it was determined that the copper, lead, and zinc in the discharges from Respondent's plant do constitute "pollutants" under the Act. The extent to which the three metals may be less dangerous than other pollutants is a matter for consideration in determining the amount of any sanction, but it is unrelated to the present determination of whether a violation has occurred.

In one factual respect, Respondent may, on the other hand, be more culpable than the respondent in J&L Specialty. Some of Respondent's pollutants--that portion leached from a building surface--originated on Respondent's property, whereas all of the cyanide for the J&L Specialty respondent may have originated off of its premises. Further, compliance with the Michigan NPDES permit turned out to be within Respondent's control. After Respondent implemented such actions as cleaning and coating the building roof, the discharges from the premises fell within the permit's limits, beginning apparently May 31, 1992.[85]

Respondent argued also that, under Complainant's theory of liability, consistency would require a permit for all similarly situated point source discharges of rainwater.[86] This argument is discussed below in Part VI.A., second last paragraph.

IV.B.2. Prior Cases--Two Lines--Respondent's Cases. As for the prior judicial cases, there are two general lines of federal cases interpreting what constitutes "addition of any pollutant" under the Act. In one line, a company essentially obtains its incoming water from the same navigable water system into which its discharges return the water; a typical example is the operation of a dam. In these cases, the company is usually relieved of liability for any pollutants in its discharges when those pollutants were present also in the water as the company initially obtained it. Respondent tended to cite cases from this line.

In the other line of cases, the company did not obtain its water initially from the same navigable waters into which its discharges went, and the company was usually held responsible for any pollutants in its discharges. Complainant tended to draw the cases that it cited from this line.

An illustration of the first line of cases is National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C.Cir. 1982), in which the Agency's exclusion of dams from the NPDES scheme was challenged. In the words of the D.C. Circuit, "EPA responds that addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside

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[84] Respondent's Cross Motion, supra note 1, at 14.

[85] Respondent's Reply, supra note 1, at 7-9; Complainant's Response, supra note 1, at 1-4.

[86] See supra text accompanying note 77.

world."[87] Further as stated by the court, the Agency believes that "the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)."[88] The Agency's exclusion of dams from the NPDES scheme was upheld by the court.

In National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 586 (6th Cir. 1988), the defendant pumped water from Lake Michigan to store energy and then discharged the water back into the Lake. Fish were included in the water pumped in, and the discharge contained them as entrained fish and fish parts. The court held that the defendant needed no permit for the "addition of any pollutant" because "the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added."[89]

Finally, in Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976), power companies successfully challenged Agency regulations on the discharges from their plants into navigable waters. "[T]he Act prohibits only the addition of any pollutant to navigable waters from a point source," according to the Fourth Circuit; "[t]hose constituents occurring naturally in the waterways, or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass."[90] Accordingly, the Agency regulations were set aside by the court.

IV.B.3. Complainant's Cases. In the other line of federal judicial cases--sometimes involving runoff and leachate--are decisions ruling that pollutants in water discharged from point sources external to navigable waters are "added" and are therefore subject to NPDES permitting requirements. One leading case, Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305 (9th Cir. 1993), cert. denied, 115 S.Ct. 198 (1994), dealt with the collection and channeling of surface runoff from an abandoned mine site. The discharges were held subject to NPDES permitting requirements. According to the Ninth Circuit, this case "clearly is distinguishable from Gorsuch and Consumers Power Co. because the (East Bay) facility does not pass pollution from one body of navigable water into another."[91] The defendants' argument that they had violated the Act only if the facility had added pollutants by causing a net increase in the acidity of the surface runoff was rejected. "The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically

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[87] 693 F.2d at 175.

[88] Id.

[89] 862 F.2d at 586.

[90] 545 F.2d at 1377.

[91] 13 F.2d at 308.

prohibits any discharge of a pollutant from a point source without a permit."[92]

In United States v. Law, 979 F.2d 977 (4th Cir. 1993), cert. denied, 113 S.Ct. 1844 (1993), the defendants appealed their criminal conviction for the unpermitted discharge of acid mine drainage into navigable waters. Their defense that the Act does not impose liability "upon persons over whose property preexisting pollutants are passed along to flow finally into navigable waters" was specifically rejected.[93] Like the Ninth Circuit in Mokelumne, the Fourth Circuit in this case distinguished those cases involving dams. "Unlike the river and lake waters diverted in Consumers Power, Gorsuch, and Train, appellants' water treatment system collected runoff and leachate subject to an NPDES permit under the CWA, and therefore was not part of the 'waters of the United States'."[94]

Other cases holding that surface runoff of contaminated waters, once channeled or collected, constitutes discharge by a point source include: Sierra Club v. Abston Construction Co., 620 F.2d 41, 45 (5th Cir. 1980)(involving runoff and drainage from a mining site); and O'Leary v. Moyer's Landfill, Inc., 523 F.Supp. 642, 655 (E.D.Pa. 1982)(involving leachate discharges through several point sources at a landfill). Finally, in United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979), the Tenth Circuit ruled that discharges of a leachate solution from sump pumps at a gold mine were subject to the Act even though "the source of the excess liquid (was) rainfall or snow melt."

IV.B.4. Conclusion. In J&L Specialty, the Environmental Appeals Board differentiated between these two lines of cases. After citing Gorsuch, Consumers Power, and Appalachian Power, the Board stated that "in those cases, the facilities' intake water was taken from the receiving water--in other words, the intake water, including the pollutants in it, was taken from navigable water and returned to navigable water via the discharge."[95] "Therefore," the Board continued, "because the pollutants were already in the navigable water, the facilities did not add them to the receiving waters."[96]

The Board contrasted the J&L Specialty facts with this line of cases. "Here, J&L's intake water, and the cyanide in it, is not from the navigable water serving as the receiving water, but

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[92] Id. at 309.

[93] 979 F.2d at 979.

[94] Id.

[95] 1994 NPDES LEXIS at *53. For other discussion of this case, see supra text paragraphs accompanying notes 64-65, 70-71, 76-85.

[96] Id.

from stormwater J&L has collected in its stormwater sewer system."[97] "This stormwater surface runoff is included in the regulatory definition of a 'discharge of a pollutant,'" stated the Board, citing Mokelumne and Law.[98] At a later point, citing Abston and again Mokelumne, the Board said that "several cases have held that surface water runoff is subject to the NPDES permitting requirements if the runoff is discharged via a point source, that is, if it has been collected and channeled by man."[99] Then the Board easily connected J&L Specialty with this line of cases, since "J&L collected and channeled the stormwater runoff containing the cyanide."[100]

Certainly the Board accurately distinguished its fact situation from those judicial cases holding that no "addition" of pollutants had occurred. The crucial factor in those cases--some identity between the navigable water from which the discharge water was initially obtained and the navigable water into which it was ultimately discharged--was absent from the J&L Specialty facts. By the same token, the Board correctly associated its fact situation with the cases ruling that an "addition" of pollutants had taken place. The significant ingredient in these cases--that the pollutants were first introduced into the navigable water by the respondent's discharge, regardless of how the pollutants got into the discharge--was present in J&L Specialty. Thus, contrary to Respondent's challenge, the Board's decision in J&L Specialty represents not a departure from, but rather a sound application of the past judicial cases.

For the instant case, J&L Specialty supplies the controlling precedent. The instant case, like J&L Specialty, lacks any common navigable water from which Respondent's water is obtained initially and discharged into eventually. And, as in J&L Specialty, it was Respondent's discharge that for the first time introduced the three metals contained therein into navigable waters. Consequently, it is ruled that Respondent's discharge containing copper, lead, and zinc did constitute the "addition" of these pollutants to navigable waters.

V. Michigan NPDES Permit

The third principal legal issue raised by the parties' cross motions concerns the NPDES permit issued to Respondent's Pontiac plant in 1988 by the Michigan Department of Natural Resources.[101] This permit was central to Complainant's case. As noted above,[102] the specific

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[97] Id.

[98] Id.

[99] Id. at 56.

[100] Id.

[101] For these three questions, see supra text paragraph accompanying note 7.

[102] See supra text paragraph accompanying notes 3-4.

charge of the Amended Complaint was that on 92 occasions during 1989-1993 discharges of copper, lead, and zinc from the outfall on this plant into navigable waters exceeded the limits for each of these metals set by the permit. Pursuant to the terms of the permit, Respondent submitted monthly Discharge Monitoring Reports during 1989-1993; and it was the information contained in these Reports that served as the basis for Complainant's charge that the three metals in Respondent's discharges had exceeded the permit limits.

Respondent challenged the validity of this permit through three general lines of attack. Respondent claimed that the permit was invalid both because of a mutual mistake by Respondent and the Michigan Department when it was issued, and also because its issuance was precluded by Section 402(p) of the Act (33 U.S.C. § 1342(p)). In addition, Respondent contended that the permit, even if valid when issued, expired in 1990, thus undercutting the 53 of the 92 alleged 1989-1993 violations that followed this claimed termination date. Complainant countered that this administrative proceeding is the wrong forum for Respondent's challenge to the permit, that the permit was indeed valid when issued, and that it remained in effect at least until 1994.

V.A. Respondent's Arguments

Respondent's first attack on the permit was mutual mistake. Respondent argued that it and the Michigan Department "were mutually mistaken in entering into this permit concerning the appropriate levels for the three parameters at issue."[103] The suggested mistakes related to the receiving bodies of Respondent's discharge and aquatic life therein, the effect of acid rain and its leaching capacity at Respondent's plant, the concentration of metals in rainwater, and a suitably representative location for the plant's outfall.

Respondent's main attack on the Michigan NPDES permit was based on Section 402(p) of the Act. Respondent applied for its Michigan NPDES permit in 1984 when, according to Respondent, such a permit was required. But before the Michigan Department issued the permit in 1988, Congress in the Water Quality Act of 1987 added Section 402(p) to the Act. Subsection 402(p)(1) states the "General rule" that the Agency "shall not require a permit ... for discharges composed entirely of rainwater," and Subsection 402(p)(2) provides five exceptions to the General rule. Respondent asserted that its discharges did consist entirely of rainwater. Moreover, argued Respondent, only two of the five exceptions could possibly apply to its Pontiac plant, and the plant actually fit within neither of them. Consequently, Respondent concluded, it came within the "General rule," so that its Michigan NPDES permit was "not require[d]," and indeed was void ab initio.

Respondent's contention regarding expiration of the permit was based on its own lateness in requesting a renewal in 1990. The 1988 permit stated that it expired October 1, 1990, and that

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[103] Respondent, General Motors Corporation's Answer, supra note 5, at 8. See also Respondent's Prehearing Exchange, at 5 ¶ 23 (March 31, 1994); Respondent's Cross Motion, supra note 1, at 29-31.

renewal was to be requested by 180 days before its expiration. Respondent did not, however, submit its request until May 18, 1990, well within the 180 days. Therefore, argued Respondent, the permit expired October 1, 1990 "by operation of law."[104]

V.B. Complainant's Arguments

A major theme of Complainant's arguments was Respondent's failure to utilize an appeal provision contained in the 1988 permit itself. This provision stated as follows.

> Any person who feels aggrieved by this permit may file a sworn petition with the Commission, setting forth the conditions of the permit which are being challenged and specifying the grounds for the challenge. The Commission may reject any petition filed more than 60 days after issuance as being untimely.[105]

As to Respondent's claimed mutual mistake, Complainant asserted that Respondent itself supplied the information on which the permit was based. Moreover, averred Complainant, Respondent did not avail itself of the permit's provision of a 60-day appeal period, nor did Respondent submit anything in response to the permit's requirement that it notify the Michigan Department of "new, different, or increased discharges of pollutants."[106] According to Complainant, Respondent informed the Michigan Department of possible inaccuracies in the permit only in October 1993, after Complainant had initiated the instant action. Complainant contended basically that Respondent's failure to appeal the permit within the allotted 60-day period deprives it of any right to assert mutual mistake now.

Complainant actually advanced Respondent's failure to appeal within that 60-day period, combined with the difference between this federal administrative proceeding and a state proceeding, as a reply to all of Respondent's challenges to the permit's validity. That is, Complainant contended that a federal enforcement action will not entertain a challenge to a state NPDES permit, particularly when the permittee has let pass the time limit for an appeal to a state tribunal.

As to Section 402(p) of the Act, Complainant argued that Respondent did indeed fit within both of Subsection 402(p)(2)'s relevant exceptions. Thus, according to Complainant, Respondent was excepted from the General rule of Subsection 402(p)(1) that removes the requirement for an NPDES permit. Therefore, Complainant averred, the 1988 issuance to Respondent of a Michigan

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[104] Respondent's Cross Motion, supra note 1, at 28.

[105] Complainant's Prehearing Exchange (March 31, 1994), Exhibit 4, Permit, at 1 (June 16, 1988).

[106] Complainant's Motion, supra note 1, at 12, quoting the permit, Complainant's Prehearing Exchange, Exhibit 4, at 10 (June 16, 1988).

NPDES permit was entirely consistent with Section 402(p).

Complainant advanced an alternative argument if Section 402(p)'s General rule should be held to cover Respondent. The Section simply provides, observed Complainant, that the "Administrator or the State shall not require a permit under this section for discharges composed entirely of stormwater."[107] Thus, asserted Complainant, nothing precludes the issuance of a permit in response to an applicant's request.

As for Respondent's argument regarding expiration of its permit, Complainant made two replies. First, Complainant observed that both Respondent and the State of Michigan continued to act, after Respondent's asserted October 1, 1990 expiration of the permit, as though it were still in effect. Thus Respondent continued to submit its Discharge Monitoring Reports. Respondent's May 18, 1990 renewal request, though submitted within 180 days of the expiration date, was still submitted well before the October 1, 1990 permit expiration; and the State of Michigan accepted the late renewal request and never notified Respondent that the permit had expired. Respondent then cleaned and coated a building roof on the facility and installed new filters, and soon after the substantial completion of that work in May 1992, apparently the plant remained essentially in compliance with the permit. Following some 1992-1994 correspondence between Respondent and the State of Michigan, the State terminated the permit December 20, 1994. Complainant saw all these actions as confirming that the permit was in effect until that December 1994 termination.

Second, Complainant cited a Michigan Court of Appeals case to support its theory of constructive renewal. In Bois Blanc Island Twp. v. Natural Resources Commission, 158 Mich.App. 239, 404 N.W.2d 719 (1987), permittees failed to reapply for permits for their sanitary landfills, but continued to operate them. The court held that the State of Michigan was estopped from claiming that the permits had expired, because it had allowed the permittees to continue operations without applying for new permits.

V.C. Respondent's Reply

Respondent replied to Complainant's 60-day appeal argument and to its citation of Bois Blanc. As for the former, Respondent argued that in 1988, when the permit was issued, the relevant Michigan statute contained no statute of limitations for appealing a permit. In 1990 a 60-day limitation was inserted in the statute. Michigan law, however, according to Respondent, does not apply a new statute of limitation retroactively when the effect is to shorten a limitation period. Hence Respondent contended that no 60-day limit applies to its right to appeal its Michigan permit.

As to Bois Blanc, Respondent sought to distinguish it. In that case, the State of Michigan tried to evict the permittees from state owned land without affording them an administrative hearing, on the ground that their permits had expired because they had not applied for renewal.

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[107] Complainant's Prehearing Exchange, at 19 (March 31, 1994), quoting Section 402(p)(1).

Therefore, contended Respondent, this case means only that the State, not a private party, after taking no action against permittees operating under expired permits, is estopped from evicting them without an administrative hearing.

V.D. Ruling

The decisive factors in ruling on Respondent's challenges to the validity of its Michigan NPDES permit are that the instant case is a federal enforcement proceeding, and that Respondent never appealed the permit to a state tribunal. That the 60-day appeal provision was not inserted into the relevant Michigan statute until 1990 does mean that the appeal period set forth on the first page of Respondent's 1988 permit was without any legal effect. Regardless, Respondent never utilized any state appeals procedures at any time. In this situation, abundant authority holds that a federal enforcement proceeding will decline to hear a challenge to a state permit.

One commentator stated the law as follows.

> Federal enforcement proceedings are not the proper forum for determining the validity or appropriateness of permit conditions as it is well established that only state courts may review the validity of state-issued NPDES permits. Moreover, the time for such challenges is when the permit is issued.[108]

Federal judicial cases confirming this commentator's statement include Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64 (3rd Cir. 1990), cert. denied, 498 U.S. 1109 (1991), in which the Third Circuit described the state agency appeal procedures available to NPDES permit holders. The court concluded: "By failing to challenge a permit in an agency proceeding, PDT has lost 'forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.'" 913 F.2d at 78, quoting Texas Mun. Power Agency v. EPA, 836 F.2d 1482, 1484-85 (5th Cir. 1988).

Another case is Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1488 (9th Cir. 1987), vacated and remanded on other grounds, 485 U.S. 931 (1988). Defendant Union Oil had received an NPDES permit from California in 1974, and unsuccessfully appealed to a state board about the omission of an upset provision. Then, as a defendant in federal court for alleged violations of a new 1980 permit that also lacked an upset provision, Union Oil "essentially ask[ed] the ... court to modify its permit to include an upset provision."[109] The Ninth Circuit rejected Union Oil's effort. "Union Oil failed to seek any type of administrative review of its permit's terms since its appeal of the original permit in 1974 ... Therefore, Union Oil failed to exhaust its

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[108] Craig N. Johnston, *Don't Go Near the Water: The Ninth Circuit Undermines Water Quality Enforcement*, 24 Envtl.L. 1289, 1302-03 (1994).

[109] 813 F.2d at 1486.

administrative remedies and was precluded from raising the upset defense in ... [federal] court."[110] Other federal cases are in accord.[111]

The crucial point that rebuts Respondent's challenges to its Michigan NPDES permit is thus the unavailability of this federal enforcement action as a forum for reviewing the permit. This point disposes of Respondent's arguments claiming invalidity of the permit from mutual mistake, and also from incompatibility with Section 402(p) of the Act and with the Agency's associated stormwater rulemaking.

This point's resolution of Respondent's argument about expiration of the permit is, however, less clear cut. Insofar as the point applies, of course, it dictates a decision for Complainant. Most of the other authorities also favor Complainant. The one case cited by the parties, Bois Blanc, supports Complainant, albeit, as noted by Respondent,[112] that it goes against the state and not a private party. The actions of Respondent and the State of Michigan, such as Respondent's continuing submission of monthly reports and the 1992-1994 correspondence that led to the State's 1994 termination of the permit, reflect an apparent assumption by both, as noted

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[110] 813 F.2d at 1487.

[111] Connecticut Fund for the Environment v. Raymark Industries, 631 F.Supp. 1283, 1285 (D.Conn. 1986) (granting summary judgment against defendant where defendant had failed to pursue state administrative appeals to challenge permit conditions); Connecticut Fund for the Environment v. Job Plating Co., 623 F.Supp. 207, 216 (D.Conn. 1985) ("defendant did not commence an administrative challenge to the NPDES permit within 30 days of its issuance" as allowed by state law and was therefore precluded from doing so in later citizen suit); California Public Interest Research Group v. Shell Oil Co., 840 F.Supp. 712, 718 (N.D.Cal. 1993) ("any challenge to effluent limits in an NPDES permit presents a matter for the [California] Water Board, not this Court, to address"); Public Interest Research Group of New Jersey v. Magnesium Elektron, 34 E.R.C. 2077, 2084 (D.N.J. 1992) (defendant should have challenged measurement procedures as inappropriate within 30 days of issuance of permit through administrative process and state courts); Public Interest Research Group of New Jersey v. Yates Industries, 757 F.Supp. 438, 446 (D.N.J. 1991), modified, 790 F.Supp. 516 (1991), (defendant failed to challenge permit provisions through the proper state agency procedures and thereby "lost its right to challenge these provisions").

Another line of federal cases has held that Discharge Monitoring Reports are conclusive evidence of violations. See, e.g., United States v. Alcoa, 824 F.Supp. 640, 648-49 (E.D. Tenn. 1993); United States v. CPS Chemical Co., 779 F.Supp. 437, 442 (E.D. Ark. 1991). See also Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1492 (9th Cir. 1987).

[112] See supra Part V.C, last paragraph.

by Complainant,[113] that the permit remained in force until the 1994 termination.

In sum, as to Respondent's argument that its Michigan NPDES permit ended October 1, 1990 because of its late renewal request, the preponderance of available authority supports a ruling against the argument. Hence this argument, like Respondent's mutual mistake and Section 402(p) and stormwater regulation challenges to the validity of the Michigan NPDES permit, is rejected.

VI. Other Issues

Respondent in its Answer and Prehearing Exchange advanced several other defenses, which are reviewed below. All are rejected. Finally, the case is appropriate for entering an accelerated decision regarding liability, because no significant questions of fact exist.

VI.A. Other Defenses

As to Respondent's other defenses, it argued that "it should not be held at fault for discharges of ... [pollutants contained in rainfall or leached by rain from Respondent's buildings because] [s]uch events constitute legal defenses of Acts of God and/or Nature."[114] Complainant replied that the Act is a strict liability statute and, moreover, that J&L Specialty held the source of a pollutant to be "not material."[115]

Complainant's reply is well taken. Ample case authority supports the proposition that the Act is a strict liability statute.[116] J&L Specialty also, as Complainant claimed, dismissed the relevance of the source of pollutants.[117] Accordingly, Respondent's Act of God defense is rejected.

Respondent argued also that some of its alleged violations represented slight excesses over the permit limit, and that such charges failed to consider possible inaccuracies in the measurements

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[113] See supra Part V.B, second last paragraph.

[114] Respondent, General Motors Corporation's Answer, supra note 5, at 8. See also Respondent's Prehearing Exchange, at 5 (March 31, 1994).

[115] See supra text accompanying notes 70-71.

[116] See, e.g., SED, Inc. v. City of Dayton, 519 F.Supp. 979, 989 (S.D.Ohio 1981); United States v. Earth Sciences, 599 F.Supp. 368, 374 (10th Cir. 1979); California Public Interest Research Group v. Shell Oil, 840 F.Supp. 712, 715 (N.D.Cal. 1993).

[117] See supra text accompanying notes 70-71.

as the cause of the excesses.[118] Complainant replied that Respondent had supplied no evidence that any of the reported figures were inaccurate and, citing federal decisions, that "case law is clear that no consideration should be given to any claims of inaccurate monitoring and reporting."[119]

Complainant's reply is again persuasive. It is well established in Agency decisions that mere denials of an argument, unsupported by evidence, will not defeat a motion for accelerated decision on the issue in question.[120] In addition, as contended by Complainant, an NPDES permittee normally may not impeach its own reports.[121] Finally, federal courts have held that a "violation is a violation no matter how statistically insignificant."[122] Consequently this argument of Respondent also is rejected.

Respondent contended further that this enforcement action violates the "(d)ue process, notice, and void for vague [sic] doctrines and the Equal Protection Clause," and that Respondent was "being singled out among all regulated entities in violation of the U.S. Constitution."[123] To buttress the last point, Respondent suggested that treating discharges of metals from rainfall and leaching would inundate the Agency with stormwater enforcement actions. In addition, Respondent claimed that Complainant's "inane interpretation of the Act" in bringing this case is outside the Act's Congressionally intended scope and purpose.'[124]

Complainant replied that, as to the constitutional arguments, Respondent failed to identify what protected class it is in, or what due process had been denied. As for notice, Respondent had ample notice, because all the charges are based on the Discharge Monitoring Reports submitted by Respondent itself. Complainant denied that Respondent had been "singled out," because Complainant averred that it requires all NPDES permit holders to comply with permit limits. With

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[118] Respondent, General Motors Corporation's Answer, supra note 5, at 10.

[119] Complainant's Memorandum, supra note 1, at 14.

[120] See, e.g., In re: Borden Chemicals and Plastics Co., EPCRA-003-1992, Order on Motions, at 10-11 (May 10,1994); In re: Panther Valley School Dist., CAA-III-027-T, Order, at 13 (September 21, 1995).

[121] See, e.g., Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1492 (9th Cir. 1987); United States v. CPS Chemical Co., 779 F.Supp. 437, 442 (E.D. Ark. 1991); United States v. Alcoa, 82 F.Supp. 640, 648, 649 (E.D. Tenn.). The Sierra Club case is also discussed supra in the text accompanying notes 109-110.

[122] United States v. Alcoa, 824 F.Supp. 640, 649 (E.D. Tex. 1993), citing Connecticut Fund for the Environment v. Upjohn Co., 660 F.Supp. 1397, 1416 (D.Conn. 1987) and six other cases.

[123] Respondent, General Motors Corporation's Answer, supra note 5, at 11.

[124] Id. at 11.

respect to Congressional intent in the Act, Complainant insisted that this enforcement action regarding Respondent's discharge of pollutants was perfectly consistent with the Act's goal to "restore and maintain the chemical, physical and biological integrity of the Nations's waters."[125]

Complainant's points are sound. Respondent has failed to demonstrate a basis for its constitutional challenges, and enforcing the limits in Respondent's Michigan NPDES permit does support the objectives of the Act. Respondent's objection that it is being treated differently from other similarly situated parties tends inaccurately to characterize this case as one of stormwater enforcement; it is instead simply enforcement of an NPDES permit. Hence Respondent's constitutional, unequal treatment, and Congressional intent arguments are rejected.

This case is complex, and the parties' filings have properly advanced numerous arguments. Any argument in the parties' filings that is not addressed specifically in this Ruling is rejected as either unsupported by the record or as insufficiently persuasive to warrant comment.

VI.B. Accelerated Decision

Section 22.20 (a) of the Agency's Consolidated Rules (40 C.F.R. § 22.20(a)) authorizes an accelerated decision "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." As to most of the important facts in the instant case, no meaningful dispute exists between the parties.

Asserting that "Significant Mistakes of Fact Are at Issue," Respondent claimed that "[t]he permit is vague in that it does not specify precisely where to conduct sampling," and that the sampling done may have been inappropriate.[126] Essentially Respondent's claim represents a challenge to its NPDES permit. It was ruled above, however, that this enforcement action is not the proper forum for reviewing challenges to Respondent's permit.[127] Therefore Respondent's claim does not present a "genuine issue of material fact" that would preclude an accelerated decision in this proceeding.

No other "genuine issue of material fact" has appeared or been suggested by the parties. Consequently, it is concluded that this case is appropriate for an accelerated decision.

VII. Civil Penalty; Negotiation

This Ruling determines only that Respondent violated the Act as charged; the question of

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[125] Complainant's Motion, supra note 1, at 15, quoting Section 101 of the Act, 33 U.S.C. § 1251.

[126] Respondent's Cross Motion, supra note 1, at 29.

[127] See supra Part V.D.

the sanction remains unaddressed. The parties will be directed to negotiate to see if they can agree on a sanction, and they will be directed to report on their negotiations.

In its filings for the cross motions, Respondent has portrayed itself as something of an innocent bystander as a chain of natural events deposited metals into navigable waters. Although Respondent's arguments are insufficient to avoid a ruling that it violated the Act, they do merit attention again as mitigating factors in determining an appropriate sanction.

VIII. ORDER

Respondent's motion for discovery and request for oral argument are denied. Respondent's motion for acceptance of certain pleadings, supplementation of its prehearing exchange, and leave to file an additional pleading is granted.

Respondent is ruled to have violated the Act as charged in the Amended Complaint. Thus Complainant's motion for accelerated decision is granted, and Respondent's cross motion is denied.

The parties are directed to negotiate regarding the determination of an appropriate sanction. Both parties are directed to report by July 31, 1996 on the status of their negotiations.

Thomas W. Hoya

Thomas W. Hoya
Administrative Law Judge

Dated: June 28, 1996

In the Matter of General Motors Corporation, CPC-Pontiac Fiero Plant, Respondent
Docket No. CWA-A-0-011-93

Certificate of Service

I certify that the foregoing **Ruling On Cross Motions For Accelerated Decision**, dated June 28, 1996, was sent this day in the following manner to the addressees listed below.

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Dated: June 28, 1996