IN RE J & L SPECIALTY PRODUCTS CORP.

NPDES Appeal No. 92-22

FINAL ORDER

Decided June 20, 1994

Syllabus

On February 2, 1994, this Board granted review and sought briefs concerning two subjects raised in a petition for review of the NPDES permit issued by U.S. EPA Region V to J&L Specialty Products Corp. ("J&L") for its Louisville, Ohio facility.

Specifically, the Board granted review of whether it has the authority to review listing decisions made pursuant to Clean Water Act section 304(l), 33 U.S.C. § 1314(l), and asked the parties to brief three issues: Are section 304(l) listing decisions administratively reviewable? If so, when? And if so, can they be reviewed apart from a challenge to an NPDES permit condition implementing section 304(l)? Both parties state that listing decisions are subject to some type of "administrative review," and both parties agree that these NPDES permit proceedings are the proper vehicle for administratively reviewing listing decisions. Concerning the third question, J&L contends that administrative review is appropriate even if the permit contains no conditions based on a listing decision, while the Region asserts that a listing decision can be administratively reviewed only in the context of a challenge to a specific permit condition that allegedly resulted from the listing decision.

The Board also directed the parties to brief the issue of whether J&L discharges cyanide into the receiving waters as the term "discharge of pollutants" is defined in Clean Water Act section 502(12), 33 U.S.C. § 1362(12), assuming that the facts are as represented by J&L. These facts are that J&L's industrial process is not the source of the cyanide in J&L's process wastewater discharge, but the source of the cyanide is roadsalt washed into J&L's stormwater sewer system. The cyanide appears in J&L's process wastewater discharge because J&L uses some of the stormwater it collects to meet its process intake water needs.

Held: Listing decisions under section 304(l) are not subject to direct review by this Board. The applicable regulations make no provision for Board review of listing decisions while providing for review of NPDES permits. Listing decisions are merely preliminary steps in determining permit conditions, and thus should not be reviewed by this Board prior to or apart from permit issuance. Because review under 40 C.F.R. Part 124 is limited to challenges to particular permit conditions, it is the permit condition allegedly based on the listing decision which is subject to review, rather than the listing decision *per se*. However, if a permit condition is adopted based upon a listing decision, a petitioner can allege that the permit condition attributable to the listing decision be set aside because of legal or factual errors in the listing decision, and thereby collaterally attack the listing decision.

Here, J&L attempts to obtain review of the listing decision by arguing that the Region lacked a basis to assume the authority to issue this permit under 40 C.F.R. § 123.46(f), which

provides the process for a Region to assume a State's authority to implement section 304(l). This attempt must fail because even if the listing decision was improper for the reasons alleged by J&L, the Region also assumed the authority to issue J&L's permit under 40 C.F.R. § 123.44(h), an exercise of authority that was upheld in the Board's February 2, 1994 order, and therefore the listing decision did not affect the Region's authority to issue the permit.

J&L also attempts to obtain review of the listing decision by arguing that as a result of the listing decision, it has been given tighter deadlines in its permit for achieving compliance with copper and nickel effluent limitations than it would have received had 304(l) not applied to it and the permit's compliance dates been determined in accordance with an Ohio regulation providing authority for compliance schedules if certain preconditions are met. Because the authority to grant compliance schedules under the Ohio regulation is discretionary and subject to preconditions, the Board rejects J&L's contention that it was entitled to a compliance schedule under the Ohio regulation, and concludes that at most J&L was entitled only to have its request for a compliance schedule considered.

With respect to the permit's compliance date for nickel, J&L was not entitled to any consideration of its request for a compliance schedule under the Ohio regulation because the Region determined that J&L's discharge of nickel would not exceed the permit's effluent limitation for nickel, and therefore, in effect, determined that one of the Ohio regulation's preconditions for exercising the authority to grant a compliance schedule was not met. Because J&L was not entitled to consideration of its request for a compliance schedule for nickel under the Ohio regulation, there is no merit to J&L's contention that the Region's allegedly wrongful listing decision resulted in a more limited time for compliance with the nickel effluent limitation than would have otherwise been available under the Ohio regulation, and any issues relating to the listing decision are not material to the permit.

With respect to the permit's compliance date for copper, it is clear that the Region relied upon section 304(l) in allowing J&L a compliance schedule. However, unlike the situation with nickel, the Region did not make any factual determination that would allow the Board to conclude whether J&L was entitled to consideration of its request for a compliance schedule for copper under the Ohio regulation, even though there is evidence in the record that appears to suggest that J&L was not so entitled. Accordingly, the permit's compliance date for copper is remanded for the Region to determine if J&L is entitled to consideration of its request for a compliance schedule under the Ohio regulation, and if so, for the Region to exercise its discretion under that regulation. If the Region determines that J&L is not entitled to consideration of its request, as with nickel, J&L's claims relating to the listing decision are not material to the permit. If, however, the Region concludes that J&L is entitled to such consideration, and if the Region determines that it would otherwise have granted J&L a compliance schedule under the Ohio regulation greater than that allowed by section 304(l), J&L's claims relating to the listing decision are material to the permit. In that event, J&L's claims would warrant an evidentiary hearing because J&L has demonstrated a factual issue as to the propriety of the listing decision.

As to the cyanide issue, J&L discharges cyanide into the receiving waters because J&L collects stormwater containing the cyanide and diverts it for use in its industrial process, thereby introducing the cyanide into the receiving waters. A pollutant is added to a receiving water if it is introduced to that water by the discharger. The cyanide does not merely pass through J&L's facility because it was not taken from the receiving water and then returned to the receiving water by J&L. Instead, it was taken from stormwater surface runoff, which is included in the definition of "discharge of a pollutant" at 40 C.F.R. §122.2. Stormwater surface runoff is subject to NPDES requirements if it is discharged from a point source, like J&L's. Therefore, J&L's factual allegations are not material to the permit because they do not affect the Region's authority to regulate cyanide and thus do not warrant an evidentiary hearing.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

On February 2, 1994, this Board issued an order ("Feb. 2 Order") granting review of two subjects raised in the petition for review in the above-captioned matter. These subjects are whether the Region's approval of Ohio's decision to identify, or "list," J&L Specialty Products Corporation ("J&L") and its receiving waters under Clean Water Act section 304(l) is administratively reviewable, and whether J&L "discharges" cyanide as that term is defined in Clean Water Act section 502(12), assuming the facts as presented by J&L. Pursuant to the Board's order, J&L and U.S. EPA Region V have submitted supplemental briefs on these issues. For the reasons set forth below, we conclude that the Region did not err in denying J&L's evidentiary hearing request on the section 304(l) listing decision with respect to the permit's compliance date for the nickel effluent limitation, and on whether J&L discharges cyanide subject to NPDES regulation. However, we are remanding the permit condition requiring compliance with the copper effluent limitation by February 5, 1994, for the Region to clearly articulate its basis for that compliance date. This will then determine whether J&L's claims concerning the section 304(l) listing decision are material to that permit condition, and thus deserving of an evidentiary hearing.

I. *SECTION 304(1) ISSUE*

A. *Background*

A detailed explanation of Clean Water Act section 304(l), 33 U.S.C. § 1314(l), and of the complicated factual and procedural history of this permit proceeding, was provided in the Board's Feb. 2 Order, and need not be repeated here. For the purposes of this opinion, the following summary is sufficient.

Section 304(l)(1)(B) requires States to prepare and submit for Agency approval a list (hereinafter "B List") consisting of waters that are not expected to meet water quality standards, on or before February 4, 1989, even after the application of the technology-based limitations, due entirely or substantially to toxic pollution from point sources. Copper and nickel are toxic pollutants for the purposes of this statutory provision. Further, section 304(l)(1)(C) requires that for each water segment identified on the B List, States must identify the specific point sources discharging the toxic pollutants believed to be preventing or impairing water quality in that segment. Lastly, under section 304(l)(1)(D), States must prepare and submit for Agency approval an

"individual control strategy" ("ICS") for each listed water segment that will produce a reduction in the discharge of toxic pollutants from the identified point sources sufficient to meet water quality standards for the toxic pollutants as soon as possible but no later than three years after the establishment of the ICS.[1] An ICS, generally, is defined as a final NPDES permit. If a final permit cannot be issued before February 4, 1989, an ICS may be a draft NPDES permit. 40 C.F.R. § 123.46(c).[2]

As detailed in the Board's Feb. 2 Order, Region V approved Ohio's determination that the East Branch Nimishillen Creek, the water segment receiving J&L's discharge, belonged on Ohio's B List because it was not expected to meet Ohio's water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to point source discharges. In addition, Region V approved Ohio's identification of J&L under section 304(l)(1)(C) as a point source of the copper and nickel impairing the East Branch Nimishillen Creek. *See* 55 Fed. Reg. 36,309 (Sept. 5, 1990).

J&L disagreed with the Region's approval decisions, and, claiming that Ohio's listing decisions under section 304(l) are reviewable in this NPDES permit proceeding, sought an evidentiary hearing on the factual question of whether the East Branch Nimishillen Creek was not expected to meet water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to discharges of copper and nickel by J&L. It is J&L's position that the Region's approval decisions lack a factual basis. The Region denied this evidentiary hearing request, and J&L sought review of this denial. J&L also sought review of numerous legal issues pertaining to the procedures used to implement section 304(l) in this case.[3] In essence, J&L contends that alleged factual and legal deficiencies invalidate the Region's approval of Ohio's listing decisions under section 304(l). As a result of these

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[1] If a State fails to comply with section 304(l), or the Agency disapproves an ICS, the Agency must implement section 304(l) by June 4, 1990. Clean Water Act section 304(l)(3), 40 C.F.R. §§ 123.46(f), 130.10(d)(9). As explained in the Board's Feb. 2 Order, Region V disapproved the ICS submitted by Ohio for J&L, and assumed the authority to issue the ICS in this case. Feb. 2 Order at 10.

[2] The draft permit issued by the Region on February 4, 1991, served as the ICS for J&L. Feb. 2 Order at 11.

[3] In sum, the legal deficiencies claimed by J&L are: 1) the Region did not consider all of J&L's arguments concerning the implementation of section 304(l), including those based on 1990 data, prior to the issuance of the final permit, 2) the procedures used by the Region to implement section 304(l) violated both the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and the plain language of section 304(l), 3) the adoption of an ICS for a single point source without addressing all point and non-point sources of pollution on the entire water segment is contrary to federal law, 4) EPA was without statutory authority to define an ICS as an NPDES permit, and 5) the establishment of an ICS for the purpose of determining a compliance date occurs when an NPDES permit is effective.

allegedly erroneous listing decisions, J&L claims that it has been harmed in that "[t]he ultimate result of [the East Branch Nimishillen Creek's] inclusion on the Section 304(l)(1)(B) list is that J&L was placed in a category of toxic pollution sources * * * upon which are imposed separate, tighter deadlines than the rest of the regulated community." Comments at 72.

Before resolving the issues raised by J&L, the Board determined that a more fundamental issue needed to be addressed, that is, whether the listing decisions made pursuant to section 304(l) in this case are reviewable in these proceedings. J&L's pleadings assumed that the listing decisions were subject to administrative review, and the Region did not explicitly respond to this assumption. Accordingly, the Board granted review and directed the parties to file supplemental briefs addressing the following questions:

> (1) Are the listing decisions made by Region V in this case subject to administrative, as opposed to judicial review? If so, when and in what forum should administrative review occur?
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> (2) If listing decisions are subject to administrative review, under what circumstances, if any, can a listing decision be reviewed apart from any challenge to an ICS decision, that is, an NPDES permit decision implementing §304(l)? When challenging a listing decision, is it necessary to demonstrate that a permit condition would have been different had the listing decision not been made as it was?

As noted above, the parties have filed supplemental briefs on these issues, which we now address.

B. *Analysis*

The Feb. 2 Order, in essence, asked the parties to address three issues: Are section 304(l) listing decisions administratively reviewable? If so, when? And, if so, can they be reviewed apart from a challenge to an NPDES permit condition implementing section 304(l)? While the parties essentially agree on the first two of these issues, they disagree on the third. Both parties state that listing decisions are "subject to administrative review" although, as will be seen, they mean somewhat different things by their use of this term. Both parties also agree that NPDES permit proceedings are the proper vehicle for administratively challenging listing decisions, and thus that listing decisions are subject to administrative review only after a final NPDES permit has issued.

However, here the views of the parties diverge. J&L contends that administrative review of a listing decision is appropriate even if the permit contains no conditions that are based on the listing decision. The Region disagrees with J&L's last argument. According to the Region, saying that a listing decision is "subject to administrative review" means only that a listing decision can be reviewed in the course of administrative review of an NPDES permit that serves as an ICS, and in particular, in the context of a challenge to a specific permit condition that allegedly resulted from the listing decision. For the reasons set forth below, we conclude that only NPDES permit conditions, not listing decisions *per se*, are subject to review by this Board but that in the course of such review, the Board can consider a petitioner's collateral attack upon the Agency's actions in implementing section 304(l) where the listing decision is material to the permit condition at issue.

Our conclusion hinges upon what is meant by the term "administrative review," which for the purposes of this decision means review by this Board. We think the relevant inquiry is whether the Board has the authority to review the listing decision directly, or only collaterally, or not at all. In this context, direct review means "an attempt to void or correct [an action] in some manner provided by law,"[4] such as through an appeal, which is a procedure specifically designed for that purpose. If the Board has the authority to directly review the listing decision, it could uphold or overturn the listing decision itself.

In determining whether the Board has authority to directly review the listing decision, it is important to recognize that there are actually two different Agency actions involved in this proceeding: the section 304(l) listing decision, for which J&L seeks "administrative review," and the NPDES permit. The Board's review authority is as defined by the applicable regulations. Under the applicable regulations, it is clear that direct review is available only for NPDES permits, and not for listing decisions. The procedural regulations applicable to NPDES permits are set forth in 40 C.F.R. Part 124. Section 124.91 expressly provides for review, by this Board, of NPDES permits. In contrast, the procedural regulation applicable to section 304(l) listing decisions, 40 C.F.R. § 130.10(d), does not provide for Board review as part of the process of finally promulgating a listing decision.

There is an obvious reason why the regulations make no provision for Board review of listing decisions while providing it for NPDES permits. A listing decision, in and of itself, imposes no obligations upon a discharger, which obligations can only be imposed through an

[4] Black's Law Dictionary 459 (6th ed. 1990) (definition of "direct review").

NPDES permit. A listing decision under section 304(l) serves only as an indication that some type of NPDES permitting action may be necessary to attain and maintain compliance with water quality standards for toxic pollutants. Until that permit action is taken, there is no obligation upon the discharger flowing from the listing decision that could possibly be the subject of review. In plain terms, the listing decision is merely a preliminary step in determining later NPDES permit action,[5] and should not be reviewed by this Board prior to or apart from the issuance of an NPDES permit implementing section 304(l).[6] Such piecemeal review of the preliminary steps leading to the promulgation of an NPDES permit implementing section 304(l) would seriously undermine the efficacy of the section 304(l) program, which Congress intended to rectify "toxic hot spots" as quickly as possible.[7]

Our conclusion that listing decisions are not subject to direct review by this Board does not mean that the propriety of a listing decision can never be raised in an appeal. What cannot be directly reviewed may be collaterally attacked in certain circumstances. Generally, a collateral attack is a challenge to the validity of an action in a proceeding that has a legal purpose other than overturning the challenged action—that is, in a proceeding intended to provide direct review of a different action.[8] Here, these proceedings are, by the express terms of the applicable regulations, established to provide direct review of NPDES permit conditions, and therefore any attack upon a listing decision in these proceedings could, at most, be collateral. Based upon our understanding of the role of a listing decision, described above, and, more importantly, the procedures detailed in 40 C.F.R.

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[5] *See* 55 Fed. Reg. 26,203 (June 27, 1990) ("The section 304(l) listing process is an important step in the development of water quality-based limitations in permits and thus in ensuring that water quality standards for toxic pollutants are met.").

[6] *See Municipal Authority of the Borough of St. Marys v. EPA*, 945 F.2d 67, 72-73 (3rd Cir. 1991) (EPA approval of section 304(l) lists was not the final act in implementation of section 304(l), and therefore review of such approval prior to promulgation of the final NPDES permit would be inefficient and impractical); *P.H. Glatfelter Co. v. EPA*, 921 F.2d 516 (4th Cir. 1990) (EPA approval of section 304(l) lists is merely a preliminary step in permitting process, and review of the approval prior to completion of that process would lead to undesirable piecemeal review).

[7] *P.H. Glatfelter Co. v. EPA*, 921 F.2d at 518 ("In enacting section 304(l), Congress clearly intended to address 'toxic hotspots' in an expeditious manner. * * * Piecemeal review of EPA decisions under section 304(l) before final permit issuance would thwart this ambitious goal and should not be allowed.").

[8] *See* Black's Law Dictionary at 261, which defines "collateral attack" as "an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning" the challenged action. This resource also distinguishes collateral attacks from direct review by noting that the former is "an attempt to impeach the validity of the [challenged action] as a side issue or in a proceeding instituted for some other purpose." *Id.* at 459.

Part 124, which apply here, we conclude that a listing decision is not itself subject to direct review, but can be subject to collateral attack during the course of a challenge to an NPDES permit condition that allegedly resulted from the listing decision.

The regulations in Part 124 create a process, culminating in review by this Board under 40 C.F.R. § 124.91, whereby a permittee (or other interested party) can challenge specific conditions contained in the permit. *See* 40 C.F.R. § 124.74(c)(5) (an evidentiary hearing request must set forth "[s]pecific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the" Clean Water Act). Indeed, this Board has held that review should not be granted if a petitioner does not identify the particular conditions in the permit that are affected by its legal and/or factual claims. *In re Town of Seabrook, N.H.*, NPDES Appeal Nos. 93-2, 93-3, at 4-6 (EAB, Sept. 28, 1993). It would serve no purpose, and thus be a waste of limited Agency resources, to review any objection raised by a petitioner that was not linked to a particular obligation imposed upon a permittee by an NPDES permit.

However, if a permit condition is adopted *based upon a listing decision*, a petitioner can allege that the specific permit condition attributable to the listing decision should be set aside because of legal or factual errors in the listing decision, since the listing decision forms the basis for the Region's action, even though this amounts to a collateral attack on the validity of the listing decision. *Cf. Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) ("Once Indiana amends the permit [based upon the listing decision], Roll Coater may obtain review [of the amendment] in state court—and it may urge as a reason to set aside the amendment its belief that Indiana and EPA erred in putting Travis Ditch on the B list."). If successful, the result would be a change to the permit condition that flowed from the listing decision. It would not be a change to the listing decision itself.

J&L argues that even if a permit contains *no* condition attributable to a section 304(l) listing decision, "administrative review" by this Board of that listing decision should nevertheless be available to determine whether "delisting" is appropriate. We find no merit in this contention. First, as discussed above, we have determined that there is no direct Board review available for listing decisions. Second, assuming that J&L really means to say that a collateral attack upon a listing decision should be permissible in NPDES permit proceedings even if such an attack is not linked to a challenge to a permit condition, J&L

cites no persuasive authority for this contention. For example, J&L specifically relies upon the language quoted above from *Roll Coater*, even though that case clearly contemplated an attack upon a listing decision in the context of an argument to set aside the particular permit condition that resulted from the listing decision.

To further its position, J&L also relies upon two Agency documents it contends suggest that a water segment or facility might be "delisted" if the basis for the listing was later found to have been erroneous.[9] Thus, J&L argues it has a right to challenge a listing decision for purposes of obtaining "delisting," even if no particular permit condition is implicated by the listing decision. However, even if these documents are as J&L represents, they have no persuasive value in light of later statements made by the Agency in the preamble to the final rules implementing section 304(l). These final rules provide for notice, comment and response procedures in finalizing the lists required by section 304(l), *see* 40 C.F.R. § 130.10(d), but do not provide for any procedures for removing a water segment or facility from a list once a list is finally adopted. In response to a comment that such "delisting" procedures should be provided, the Agency explained:

> Listing of waters and point sources under section 304(l) is a one-time activity. Therefore, it is unnecessary to develop regulations for removing waters and point sources from a list. The public comment and review period provided by EPA or the state provides opportunity for waters or point sources to be deleted from, or added to, a list.

54 Fed. Reg. 23,886 (June 2, 1989). J&L objects to the regulations failure to provide any mechanism for removing point sources from the section 304(l) lists despite the "stigma" that is attached to being included on such lists. J&L's Supp. Brief at 9-10. These NPDES permit proceedings, however, are not the proper forum for considering such challenges to the applicable regulations.[10]

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[9] These documents are Final Guidance for Implementation of Requirements Under Section 304(l) of the Clean Water Act (Office of Water, March 1988), and Memorandum from J. Elder and M. Prothro (Sept. 21, 1988) (re: "Answers to Question from May 17, 1988 Water Management Division Directors Meeting on Implementation of §304(l) of the CWA").

[10] Feb. 2 Order at 28 n.33; *In re City of Anacortes*, NPDES Appeal No. 86-3, at 5-6 n.5 (CJO, Sept. 16, 1986); *In re Georgia Pacific Corp.*, NPDES Appeal No. 84-2, at 2-3 (CJO, Apr. 29, 1985). *Cf. In re Suckla Farms, Inc. and City of Fort Lupton, Colorado*, UIC Appeal Nos. 92-7, 92-8, at 14-15 (EAB, June 7, 1993) (disallowing a permit appeal under 40 C.F.R. § 124.19 to be used as a vehicle for collaterally challenging the applicable regulations).

Having concluded that a listing decision is not directly reviewable and can be collaterally attacked only in the context of a challenge to a particular NPDES permit condition allegedly resulting from the listing decision, we turn now to J&L's efforts to collaterally attack the listing decision in this case.

In any given case, there are only two possible ways in which a listing decision can affect an NPDES permitting decision.[11] First, under 40 C.F.R. § 123.46(f), a section 304(l) listing decision may provide the basis for the Region to assume a State's authority to issue a draft or final NPDES permit (in the form of an ICS), as the Region did in this case.[12] J&L contends that because the listing decision was improper, the Region lacked a legal basis to assume the authority to issue the ICS/draft NPDES permit for J&L under § 123.46(f). (In essence, J&L is contesting every condition of the permit on the ground that the State, not the Region, was the proper permitting authority in this case.) However, we conclude that the listing decision had no impact on the Region's authority to issue the draft permit in this case. Even if the listing decision were improper for the reasons alleged by J&L, it would not have affected the Region's authority to issue the draft permit because the Region also assumed the State's authority to issue the NPDES permit for J&L pursuant to 40 C.F.R. § 123.44(h),[13] an exercise of authority that we have already upheld. Feb. 2 Order at 51-55. Therefore, even if the Region did not have the authority to issue the ICS/draft permit for J&L under § 123.46(f), it had the authority to issue the NPDES permit for J&L under § 123.44(h). Accordingly, the section 304(l) listing decision did not have an effect upon the Region's authority to issue the challenged permit.

Second, a section 304(l) listing decision may affect the period of time allowed for a permittee to come into compliance with the appli-

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[11] As we stated in our Feb. 2 Order, a section 304(l) listing decision has no effect on a permit's effluent limitations. *See Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1319 (9th Cir. 1990) ("The effect of the individual control strategy is simply to expedite the imposition of water quality-based limitations on polluters—limitations which otherwise would have been imposed when the polluters' NPDES permits expired."); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1385 (4th Cir. 1990) ("Section 304(l) did not change the basic requirements of the CWA; rather it simply established a mandatory schedule for the completion of a toxic pollutant subset of the water quality-related activities that the CWA already imposed.").

[12] *See* notes 1 and 2, *supra*.

[13] Section 123.44 provides the procedures for EPA review of proposed State permits. Subsection (h) of that provision provides that if the Region objects to a permit submitted for its review, and the "State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit * * *." 40 C.F.R. § 123.44(h)(1).

cable effluent limitations and/or water quality standards for the toxic pollutants identified in the listing decision. As we noted in our previous decision, section 304(l) is not intended to change any of the substantive water quality-based requirements of the Clean Water Act, but merely to hasten their implementation with respect to toxic pollutants. Feb. 2 Order at 8. Here, for the toxic pollutants identified in the listing decision, nickel and copper, the permit requires J&L to achieve compliance with the effluent limitation for nickel immediately upon permit issuance, and with the effluent limitation for copper by February 5, 1994, three years from the date of the draft permit that served as the ICS in this case, and approximately one and one-half years from the permit's effective date. J&L contends that as a result of the erroneous listing decision, it "was placed in a category of toxic pollution sources * * * upon which are imposed separate, tighter deadlines than the rest of the regulated community." Comments at 72. Implicit in this assertion is the assumption that if the listing decision had not been made, J&L would have been entitled to more time than the permit provides to achieve compliance with the effluent limitations for copper and nickel.

Our analysis of J&L's contention begins with a review of the legal framework governing the determination of the date upon which a permittee must comply with an effluent limitation. The effluent limitations in J&L's permit for both copper and nickel are water quality-based effluent limitations imposed in the permit under the authority of Clean Water Act section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). *See* Region's Supp. Brief at 18-19, n.10. Section 301(b)(1)(C) requires that water quality-based effluent limitations, that is, effluent limitations more stringent than technology-based effluent limitations that are necessary to assure attainment of applicable water quality standards, shall be met by July 1, 1977. As the Agency has previously stated:

> By including the July 1, 1977 deadline in the statute, Congress was, in effect, providing a "grace period" as part of a timetable for implementation of the requirements of the [1972 amendments to the Act]. Once the grace period has lapsed, EPA must ensure that all permits contain limitations necessary to meet whatever state water quality standards are in effect at the time of permit issuance, regardless of when [*i.e.*, before or after July 1, 1977] the standards were adopted or revised.

In re Star-Kist Caribe, Inc., NPDES Appeal No. 88-5, at 10 (Order on Petition for Reconsideration, Adm'r, April 16, 1990), *modif. den.* (Order Denying Modification Request, EAB, May 26, 1992). In other words, "[t]he Clean Water Act does not authorize EPA to establish schedules of

compliance in the permit that would sanction pollutant discharges that do no meet applicable state water quality standards." *Id.* at 5.[14] Therefore, as a general rule, NPDES permits issued after July 1, 1977, must require compliance with water quality-based effluent limitations immediately upon the effective date of the permit.

There are two exceptions to this general rule. One is if the State's water quality standard itself, or the implementing regulations, "can be fairly construed as authorizing a schedule of compliance." *Id.* The other exception is section 304(l), which allows applicable water quality standards to be achieved, via water quality-based effluent limitations imposed under section 301(b)(1)(C), as soon as possible but not later than three years after the establishment of the ICS.[15]

Here, Ohio's NPDES regulations specifically provide authority for schedules of compliance if a permittee's discharge exceeds the applicable water quality-based effluent limitations. Ohio Admin. Code § 3745-33-04(A)(3). Under the Ohio regulation, each NPDES permit shall contain "authorized discharge levels," or effluent limitations, reflecting the maximum amount of pollutants that may be discharged to insure compliance with, *inter alia*, the applicable water quality standards. Ohio Admin. Code § 3745-33-04(B)(1)(a)(i). Indeed, under subparagraph (A)(1) of that regulation, an NPDES permit cannot be issued (except as noted below) unless the Director of the Ohio EPA determines that, *inter alia*, "[t]he authorized discharge levels * * * are not being ex-

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[14] *See also In re City of Hollywood, Florida*, NPDES Appeal No. 92-21, at 8 n.8 (EAB, Mar. 21, 1994); *In re City of Haverhill, Wastewater Division*, NPDES Appeal No. 92-29, at 6 (EAB, Apr. 14, 1994).

[15] Section 304(l)(1)(D) (emphasis added) provides, in pertinent part:

> (1) Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval an implementation under this subsection—
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> * * * * * * *
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> (D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard *as soon as possible, but not later than 3 years after the date of the establishment of such strategy.*

ceeded by the applicant * * *." Ohio Admin. Code § 3745-33-04(A)(1)(a). Nevertheless, the regulation further provides that "*[i]f* the director determines that the requirements of (A)(1) cannot be met, he *may* grant the point source an Ohio NPDES permit with a satisfactory schedule of compliance, which shall become a condition of the permit." Ohio Admin. Code § 3745-33-04(A)(3) (emphasis added). Thus, under this regulation, the permit issuer may, in its discretion, grant a permittee a compliance schedule, provided that certain preconditions exist, such as the discharger's inability to meet the applicable effluent limitation.

Thus, in Ohio, there are two possible sources of authority for including a compliance schedule in a permit: the Ohio regulation authorizing compliance schedules, and section 304(l). The Ohio regulation does not limit the schedule term, and therefore if it applies exclusively, the schedule presumably could be for a full permit term of five years if the permit issuer determined that this period was appropriate.[16] In contrast, section 304(l) limits the time allowed for compliance to three years from the establishment of the ICS. These sources of authority may operate concurrently, and if so, section 304(l) might serve to limit the amount of time for compliance that may otherwise be available under the Ohio regulation, because the State regulation cannot grant more time than that allowed under the federal statute. It is this situation that J&L argues is involved here. J&L argues that the time for compliance with the permit's effluent limitations for copper and nickel to which it would otherwise have been "entitled" under the State regulation has been limited as a result of an erroneous listing decision, that is, as a result of a wrongful application of section 304(l).

To examine the validity of this contention, we will first focus on J&L's contention that it is *entitled* to a schedule of compliance under the Ohio regulation. The authority to grant a compliance schedule under the Ohio regulation is purely discretionary. Ohio Admin. Code § 3745-33-04(A)(3) ("the Director * * * *may* grant the point source an Ohio NPDES Permit with a * * * schedule of compliance") (emphasis added). Thus, under that regulation, J&L is entitled at most only to have its request for a compliance schedule *considered* by the permit issuer. Further, in order for the permit issuer to exercise its discretion to grant a compliance schedule, the Ohio regulation requires that certain preconditions be met, *id.*, including the precondition that the discharger is unable to meet the requirement that its discharge not exceed the applicable effluent limitations.

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[16] *See* Clean Water Act section 402(b)(1)(B), 33 U.S.C. § 1342(b)(1)(B), which provides that the term of a State issued NPDES permit may not exceed five years. Thus, if J&L is successful in challenging the section 304(l) listing decision, the possibility exists that J&L could be granted a compliance schedule under the Ohio regulation extending until 1997 (five years after the permit's May, 11, 1992 issuance). Therefore,J&L's claims are not moot.

We find that with respect to the permit's compliance date for the nickel effluent limitation, J&L was not entitled to any consideration of its request for a compliance schedule under the Ohio regulation because a precondition for exercising the discretion to grant a compliance schedule was not met, the precondition that J&L's discharge would exceed the applicable effluent limitation required in the permit. As stated above, the permit contains no compliance schedule for nickel; instead, it requires compliance with the nickel effluent limitation immediately upon the effective date of the permit. According to the Region, no compliance schedule for nickel was included in the permit because the Region made the factual determination that the effluent limitation for nickel was based on J&L's current level of discharge. Region's Supp. Brief at 20.[17] In other words, "[s]ince the nickel limits in the final permit were based upon discharge levels which J&L could currently meet, allowance of additional time for the facility to come into compliance with the new nickel limitations was not necessary." *Id.* Plainly, the Region determined that as a matter of fact, the discharge of nickel from J&L's facility, as indicated in J&L's permit application, is at a level that will meet the water quality-based effluent limitation for nickel in the permit. J&L does not dispute this conclusion. It noted in its evidentiary hearing request that "the limits for those metals [copper and nickel] in the Final Permit are no more stringent than those that are Antidegredation-based, that is, based on current levels of discharge." Request for Evidentiary Hearing at 10.

Although the Region did not specifically cite the Ohio regulation, the Region's factual determination that J&L's discharge of nickel can meet the permit's effluent limitation for nickel is in effect a determination that one of the preconditions for its authority to entertain a request for a compliance schedule under the Ohio regulation does not exist. Because J&L was not entitled to consideration of its request for a compliance schedule under the Ohio regulation, it could not have obtained a compliance schedule greater than that allowed pursuant to section 304(l), and therefore, there is no merit to J&L's contention that wrongful reliance upon section 304(l) resulted in a more limited time for compliance with the nickel effluent limitation than would have otherwise been available under the Ohio regulation. Thus, any factual issues raised by J&L with respect to the section 304(l) listing decision are not material to the permit's compliance date for nickel,[18] and the Region did not err in denying J&L's evidentiary hearing request in this respect.

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[17] The Region also explained that no compliance schedule for nickel was included in the permit because J&L's previous permit also regulated nickel. Region's Supp. Brief at 20.

[18] *See In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 12-13 (EAB, Aug. 23, 1993) (issue of fact is material if it might affect the outcome of proceeding).

Next, we will focus on the permit's compliance date for copper. As indicated above, the permit requires J&L to achieve compliance with the copper effluent limitation by February 5, 1994, which is three years from the establishment of the ICS (the draft permit) and thus grants J&L the maximum amount of time for compliance allowed under section 304(l).

On appeal, the Region contends that J&L is not entitled to review of the listing decision with respect to the compliance date for copper because section 304(l) was not material to the Region's decision to select the compliance date. Specifically, the Region asserts that it had bases other than section 304(l) for selecting the compliance date, namely, an Ohio policy that allows three-year compliance schedules for copper, and the Region's practice of imposing or approving compliance schedules of three years or less. Region's Supp. Brief at 21-22. We reject this argument as inconsistent with the record of the permit proceedings below.[19] It is clear that prior to filing its supplemental brief in this action, the Region expressly relied only upon section 304(l) in selecting the compliance date for copper. *See* Response to Comments at 21.

As with nickel, J&L argues that the Region's erroneous application of section 304(l) resulted in a more limited time period to achieve compliance with the copper effluent limitation than would have been available if only the Ohio regulation applied. However, unlike the situation with nickel, with respect to copper, the Region did not make any factual determination that would allow us to conclude that J&L was not entitled to consideration of its request for a compliance schedule under the Ohio regulation.[20]

Whether J&L is entitled to consideration of its request for a compliance schedule under the Ohio regulation may be crucial here, for it may determine the materiality of J&L's assertion that the section 304(l)

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[19] We note that neither Ohio's "policy" nor the Region's "practice" is itself a sufficient legal basis for including a compliance schedule in a permit. As explained above, the only legal bases for compliance schedules are State water quality standards or implementing regulations, and section 304(l). It is possible that the Region means that the cited policy and practice were actually limitations on a schedule authorized by the State regulation, rather than authority for the establishment of a schedule in the first instance.

[20] J&L's 1990 permit application, which has remained unchanged throughout these proceedings and upon which the Region is entitled to rely, *In re Liquid Air Puerto Rico Corp.*, NPDES Appeal No. 92-1, at 11-12 (EAB, May 4, 1994), suggests that J&L's discharge will meet the permit's effluent limitation for copper. J&L appears to confirm this, noting that the permit's effluent limitation for copper is "based on current levels of discharge." Request for Evidentiary Hearing at 10. Nonetheless, because of the Region's sole reliance on section 304(l) without any discussion of the Ohio regulation, this issue was not squarely presented in the proceedings below.

listing decision was improper. Our reasoning follows. If J&L is entitled to consideration of its request for a compliance schedule for copper under the Ohio regulation, and if the Region would have exercised its discretion under that regulation to grant a compliance schedule greater than that allowed by section 304(l), the Region's reliance upon section 304(l) may have restricted a compliance schedule that would have otherwise been available, and therefore, whether section 304(l) was properly implemented would be material to the choice of a compliance date for copper. Since the record before us strongly suggests that J&L has demonstrated a factual issue as to the appropriateness of the listing decision,[21] under these circumstances it would be necessary to hold an evidentiary hearing on J&L's factual and legal claims related to the section 304(l) listing decision.[22] On the other hand, if J&L is not entitled to a consideration of its request for a compliance schedule for copper under the Ohio regulation, the only possible basis for the compliance schedule is section 304(l). In this scenario, but for the application of section 304(l), J&L would not have received *any* extra time to comply with the effluent limitation for copper, thus it would have *benefitted* from the application of section 304(l), even if erroneous. In those circumstances, there would be no need to address J&L's factual and legal claims concerning the listing decision.

[21] To show that there is an issue of material fact as to the propriety of the listing decision, J&L contends that the following evidence shows that the East Branch Nimishillen Creek was not expected to fail to meet water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to J&L's discharge: an April 1988 bioassay test, 1985 and 1986 stream surveys, and Ohio's 1988 Report on Water Quality Based Effluent Limitations for J&L Specialty Steel. The Region relied upon data in this same evidence in approving Ohio's listing decision. *See* Letter from Kenneth A. Fenner, Chief, Water Quality Branch, U.S. EPA, to M.A. Gipko, J&L Specialty Steel Products Corp. (Jan. 11, 1990). Each of these pieces of evidence was discussed in our Feb. 2 Order in connection with J&L's challenge to the permit's whole effluent toxicity ("WET") limitation. The Region based its factual determination that WET limitations were required in J&L's permit on this same evidence, and we concluded that J&L's challenges to the reliability of these data demonstrated a material issue of fact as to whether WET limitations are required in its permit. Feb. 2 Order at 34-36. J&L makes the same challenges to the reliability of these data in connection with its assertion that the listing decision was improper, and consequently, has demonstrated an issue of fact with respect to the listing decision by "directly challenging the test results and studies relied upon by the Region in making its factual determination" that approval of Ohio's listing decision was warranted. Feb. 2 Order at 34.

J&L also attempts to rely upon its 1990 permit application and a 1990 study it conducted of its copper and nickel discharges to show a material issue of fact with respect to the listing decision. This information is not sufficient for that purpose, however, as an issue can be demonstrated only by "sufficient *probative* evidence." *Mayaguez* at 13 (emphasis added). The 1990 evidence relied upon by J&L is not probative on whether the East Branch Nimishillen Creek was not expected to meet water quality standards *on or before February 4, 1989*, as that data presumably reflect the circumstances existing at the time of their completion, and not circumstances from the time period relevant under section 304(l).

[22] Legal issues related to factual issues for which an evidentiary hearing has been granted may be addressed in the course of the evidentiary hearing. *Liquid Air Puerto Rico Corp.* at 8.

While the 1990 permit application and J&L's request for an evidentiary hearing may support a finding that J&L would not have been entitled to consideration of its request for a compliance schedule under the Ohio regulation, the Region made no such factual finding. In the absence of any factual analysis by the Region, and in light of the Region's sole reliance on section 304(l) in the proceedings below, the Board cannot definitively determine which of the scenarios detailed above applies here, and thus the permit condition must be remanded for clarification of its legal basis.

Accordingly, we are remanding the permit condition requiring compliance with the copper effluent limitation by February 5, 1994, for the Region to determine whether J&L is entitled to consideration of its request for a compliance schedule for copper under the Ohio regulation, Ohio Admin. Code § 3745-33-04. As explained above, if the Region concludes that J&L is not entitled to such consideration,[23] there is no need to hold an evidentiary hearing to address J&L's factual and legal claims under section 304(l) since J&L would not have been adversely affected by any listing decision, even if erroneous. If the Region adopts this course, appeal of the remand decision is not necessary to exhaust administrative remedies. *See* 40 C.F.R. § 124.19(f)(1)(iii). If the Region, however, concludes that J&L is entitled to such consideration, then the issues related to the section 304(l) listing may be material if the Region would have exercised its discretion under the Ohio regulation to grant J&L a compliance schedule longer than that allowed by section 304(l). Whether this is the case would depend upon how the Region would have exercised its discretion in the absence of section 304(l), which is unclear. Only if the Region relies on section 304(l) as the basis for limiting the compliance schedule which it would otherwise authorize under the Ohio regulation will it be necessary to conduct an evidentiary hearing on J&L's factual and legal claims concerning the listing decision. Only if such an evidentiary hearing is held must J&L pursue its appeal rights under 40 C.F.R. § 124.91 in order to exhaust administrative remedies.

[23] While this conclusion itself involves a factual determination as to J&L's current level of copper discharge, this does not mean that J&L would necessarily be entitled to an evidentiary hearing on this factual issue. As we noted in our Feb. 2 Order, an evidentiary hearing is not required if the "Region's position in the factual dispute is supported by an overwhelming amount of evidence in the administrative record such that a reasonable decisionmaker could not resolve the issue in favor of the party requesting an evidentiary hearing * * *." Feb. 2 Order at 14. This could certainly be the case if the Region relies upon J&L's own statements.

II. *"DISCHARGE" ISSUE*

A. *Background*

J&L's permit contains a limitation on the amount of cyanide allowed in the discharge from Outfall 003, J&L's process wastewater discharge. In its comments on the draft permit and evidentiary hearing request, J&L asserted that there is no cyanide in its process wastewater, and that the source of the cyanide in the discharge is stormwater runoff. Specifically, J&L asserted that the cyanide in the discharge comes not from its industrial process but from roadsalt, and merely passes through J&L's facility on its way to the East Branch Nimishillen Creek. Therefore, J&L contends, the Region has no legal authority under the Clean Water Act to limit the amount of cyanide in J&L's discharge.

In response, the Region stated that under Clean Water Act sections 301(a) and 402(a)(1), 33 U.S.C. §§ 1311(a) and 1341(a)(1), discharges of pollutants into navigable waters are prohibited except pursuant to an NPDES permit. The Region further stated that under Clean Water Act section 502(12), 33 U.S.C. § 1362(12), a "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source," and that because this definition contains no qualification regarding the source of the pollutants being discharged, the Region has the authority to impose an effluent limitation upon the cyanide in J&L's discharge.

The Board concluded that based upon the information it had, it could not determine without further briefing whether the factual issue raised by J&L, (whether J&L generates the cyanide in the discharge or whether the cyanide is generated off-site), is material to the permit decision. Consequently, the Board requested further briefing on whether, assuming the facts are as presented in J&L's comments on the draft permit, J&L discharges cyanide within the meaning of the term "discharge" as it is defined in Clean Water Act section 502(12). The parties have filed briefs on this issue, which is now ready to be decided.

B. *Analysis*

The facts represented in J&L's comments on the draft permit are as follows. J&L's industrial process is not the source of the cyanide in the discharge at Outfall 003, which is the outfall for process wastewater. The source of the cyanide is roadsalt that is washed into J&L's stormwater sewer system. The cyanide appears in J&L's process wastewater discharge because J&L uses some of the stormwater collected in

its stormwater sewers to supply some of its process intake water needs. Comments at 44-45.

J&L challenges the Region's conclusion that J&L discharges cyanide by arguing that it does not "add" cyanide to the East Branch Nimishillen Creek. In essence, J&L contends that the cyanide in its discharge comes from a non-point source beyond its control, *i.e.*, the roadsalt that is washed into its stormwater sewers, and therefore it is not "added" to the East Branch Nimishillen Creek by J&L. 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. J&L's Supp. Brief at 12. J&L further explains that under the relevant case law, causation can be established by demonstrating that the discharger took some affirmative action to collect and channel the runoff, or cause the runoff to become part of the discharge. J&L asserts that it has set forth a material issue of fact as to whether the cyanide is generated off-site and merely passes through J&L's facility without any affirmative action on J&L's part to collect and channel the runoff, and therefore it is entitled to an evidentiary hearing.

We disagree. We conclude that based upon the facts represented in J&L's comments on the draft permit, as a matter of law, 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 the East Branch Nimishillen Creek via J&L's process wastewater outfall. Therefore, even if the facts as set forth in J&L's comments are sufficient to demonstrate a genuine issue of fact as to the source of the cyanide, such an issue is not material to these proceedings in that it would not change the outcome of the proceedings. In other words, even if all of J&L's factual claims are true, they do not show that the Region lacked the authority to impose an effluent limitation for the cyanide in J&L's discharge.

Under Clean Water Act sections 301(a) and 402(a)(1), the discharge of pollutants into navigable waters is prohibited absent an NPDES permit. Section 502(12) defines a "discharge of a pollutant" for which an NPDES permit is required as "any addition of any pollutant to navigable waters from any point source." We find two concepts in this definition important here: the concept of "addition" and the concept of "from any point source."

A pollutant is "added" to a navigable water if it is *introduced* to the water segment by the discharger. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (addition of pollutant occurs if "the point source itself physically introduces a pollutant into water from the outside world."). In arguing that it does not add cyanide to the East Branch Nimishillen Creek, J&L contends that the cyanide merely passes through its facility. J&L relies upon cases where pollutants in the facility's intake water were merely transmitted to the receiving water. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Gorsuch, supra*; *see also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("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."). J&L fails to recognize, however, 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. Therefore, because the pollutants were already in the navigable water, the facilities did not add them to the receiving waters. *See Gorsuch, supra* at n. 57 (under *Appalachian Power*, EPA cannot order a permittee to remove "preexisting pollution that the polluter had *no* responsibility for."). Here, J&L's intake water, and the cyanide in it, is not from the navigable water serving as the receiving water, but from stormwater J&L has collected in its stormwater sewer system. This stormwater surface runoff is included in the regulatory definition of a "discharge of a pollutant" in 40 C.F.R. § 122.2.[24] *See Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 308 (9th Cir. 1993) (where source of pollutant added to navigable water is surface runoff that is collected or channelled by defendants, defendants have "added" pollutant to navigable water); *U.S. v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("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 * * *."). Therefore, factually, J&L's activities are different than those found not to be the addition of pollutants under section 502(12). Because J&L introduces cyanide found in the stormwater it collects and channels into the East Branch Nimishillen Creek, it adds pollutants to a navigable water.

[24] That regulation repeats the statutory definition of "discharge of a pollutant" found in section 502(12) and adds "[t]his definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man * * *." J&L contests the validity of this additional language, *see* J&L's Supp. Brief at 15-16, but, as indicated above, such a challenge cannot be entertained in these proceedings. *See* note 10, *supra*.

It is also plain that J&L adds cyanide to the East Branch Nimishillen Creek from a point source, Outfall 003, that discharges J&L's process wastewater. There is no dispute in this case that Outfall 003 constitutes a point source. Instead, J&L contends that the cyanide is from a non-point source, that is, the stormwater runoff that was generated off-site, and therefore it is beyond regulation in this permit. Whether a pollutant is discharged from a point source, however, depends not upon where the pollutant was generated, but on whether the pollutant is added to navigable waters from a "discernable, confined and discrete conveyance" constituting a point source under Clean Water Act section 502(14).[25] *See Gorsuch*, 693 F.2d at 175 (upholding EPA's view that "the point or nonpoint character of pollution is established when the pollutant first enters the navigable water."). Because the cyanide first entered the East Branch Nimishillen Creek from Outfall 003, it was added to a navigable water from a point source and is therefore subject to the NPDES requirements.[26]

Moreover, 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. *See Committee to Save Mokelumne River, supra*; *U.S.v. Law, supra*; and *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980). The facts presented by J&L make plain that J&L collected and channeled the stormwater runoff containing the cyanide, and diverted this water to its industrial process to meet intake water needs. J&L notes that if it did not divert this stormwater, but discharged it directly into the East Branch Nimishillen Creek, it may be subject to the NPDES requirements. Comments at 45. The regulation of the stormwater should not be different merely because J&L diverts the water to its industrial process prior to discharge.

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[25] This section of the statute provides that the term "point source" means

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

[26] We agree with the Region that J&L's suggestion that any pollutant originating as stormwater runoff is a non-point source pollutant would remove stormwater entirely from EPA's regulatory authority under the NPDES program, a result directly at odds with Congress' specific direction to issue NPDES permits for stormwater discharges. *See* Clean Water Act section 402(p), 33 U.S.C. § 1342(p).

Accordingly, we conclude that even if the facts alleged by J&L in support of its evidentiary hearing request on this issue are true, they would not affect the outcome of this permit because they demonstrate, as a matter of law, that J&L discharges cyanide to the East Branch Nimishillen Creek as the term "discharge of a pollutant" is defined in Clean Water Act section 502(12). *See Committee to Save Mokelumne River*, 13 F.3d at 308-309 (defendants' admissions show as a matter of law that defendants discharged a pollutant into navigable waters). Consequently, J&L's factual allegations are not material to the permit,[27] and the Region did not err in denying J&L's evidentiary hearing request on this issue.

III. *CONCLUSION*

For the reasons set forth above, we conclude that with respect to the permit's compliance date for the nickel effluent limitation, Region V did not clearly err in denying J&L's evidentiary hearing request on whether the Region properly approved Ohio's section Clean Water Act section 304(l) listing decisions. With respect to the permit's compliance date for the copper effluent limitation, we are remanding that portion of the permit to the Region for it to articulate clearly its basis for the compliance schedule and to make the determinations necessary to resolve whether J&L's claims concerning the section 304(l) listing decision are material to that permit condition, and thus deserving of an evidentiary hearing. We also conclude that Region V did not clearly err in denying J&L's evidentiary hearing request on whether the cyanide in J&L's discharge originates off-site in stormwater runoff for the purpose of determining whether J&L discharges cyanide into the East Branch of Nimishillen Creek as the term "discharge of a pollutant" is defined in Clean Water Act section 502(12).

So ordered.

[27] As to the definition of materiality, *see* note 18 *supra*.