IN RE GENERAL MOTORS CORPORATION, CPC-PONTIAC FIERO PLANT

CWA Appeal No. 96-5

FINAL DECISION

Decided December 24, 1997

Syllabus

General Motors Corporation ("GM") appeals from an Initial Decision assessing a civil penalty of $62,500 for numerous violations of the Clean Water Act ("CWA") at GM's Pontiac Fiero plant in Pontiac, Michigan. By complaint dated March 1, 1993, and amended November 10, 1993, U.S. EPA Region V charged GM with violating the CWA on 92 occasions between May 1992 and August 1993, by discharging more pollutants (copper, lead, and zinc) than allowed by GM's 1988 National Pollutant Discharge Elimination System ("NPDES") permit issued by the Michigan Department of Natural Resources ("MDNR"). By accelerated decision dated June 28, 1996, the Presiding Officer found GM liable for the violations alleged in the complaint. By separate ruling dated October 31, 1996, the Presiding Officer assessed the above-mentioned penalty.

The permit at issue here was first applied for by GM on July 6, 1984, to cover stormwater discharges from an outfall at its facility now known as outfall 002. GM's application identified copper, lead, and zinc as among the pollutants discharged from the outfall. On June 16, 1988, MDNR issued a permit containing, among other things, numerical discharge limits for copper, lead, and zinc. The permit provided for an appeal to the Michigan Water Resource Commission within 60 days of permit issuance. GM did not, however, file an administrative challenge to the permit within the 60-day period or at any other time. The permit also stated that in order to discharge beyond the permit's October 1, 1990 expiration date, GM must submit a renewal request no later than 180 days prior to the date of expiration (*i.e.*, April 1, 1990). GM did not submit its renewal application until May 18, 1990.

The discharges from outfall 002 consisted of stormwater collected at GM's facility. According to the Presiding Officer, the stormwater contained metals that were apparently partly present in the rainwater and partly leached from roofs and exterior components of buildings at the facility. It is undisputed that discharges from outfall 002, as reported by GM in its discharge monitoring reports, exceeded the permit's limitations for copper, lead, and zinc.

In May and December of 1991, prior to filing the complaint, the Region issued two notices of violation and orders for compliance requiring that GM take certain actions necessary to come into compliance with the permit. On May 7, 1993, two months after the Region filed its complaint in this matter, GM requested that MDNR terminate the permit. MDNR denied the request due to GM's continued noncompliance with the permit's effluent limitations. GM filed a second request for termination, which MDNR also denied. GM's third request for termination was granted by MDNR on December 20, 1994, after MDNR had confirmed that GM had completed the cleaning and coating of roofs at the facility and had come into compliance.

GM has raised the following three issues in the present appeal: (1) whether the permit was void *ab initio* because the State of Michigan lacked the authority to issue the permit. In support of this assertion, GM cites to CWA § 402(p), 33 U.S.C. § 1342(p), added to the Act by the Water Quality Act of 1987. Subject to certain exceptions, CWA § 402(p) prohibits EPA or States from requiring permits for discharges consisting solely of stormwater prior to October 1, 1994; (2) whether, under the circumstances of this case, copper, lead, and zinc may be considered "pollutants" under the CWA; and (3) whether (assuming the permit was valid when issued) the permit expired by operation of law in 1990 because GM did not file a timely request for renewal.

Held: (1) Because GM failed to exhaust its administrative remedies under State law, GM may not now raise objections to the permit five years later in this federal enforcement proceeding. GM's allegation that the permit is void *ab initio* because of legislation passed prior to issuance of the permit is insufficient to excuse GM's failure to exhaust its remedies under State law. Whatever the merits of GM's arguments as to Michigan's alleged lack of authority to issue the permit in light of the 1987 CWA amendments, those arguments could and should have been raised before the State entity that issued the permit or to the Michigan Water Resource Commission in an administrative appeal following issuance of the permit in 1988. Similarly, GM's assertion that regulation of outfall 002 was the result of the MDNR's erroneous assumption that the metals in the discharge resulted from some cross connection from process or other operations at the plant may not be raised in this enforcement proceeding; (2) Having failed to raise a timely challenge under State law to the inclusion of the permit limitations for copper, lead, and zinc, GM may not now collaterally attack their inclusion in the context of this enforcement proceeding; (3) The permit did not expire by operation of law in 1990. Although GM's renewal application was not submitted 180 days prior to expiration of the permit, it is clear that MDNR decided to consider the renewal application timely filed. Both GM and MDNR continued to behave as if the permit were in full force and effect until it was formally terminated. By requesting renewal of the 1988 permit prior to its expiration, behaving as if the permit remained in effect, and failing to file a timely objection to continuation of the permit, GM cannot now be heard to deny that the permit continued in effect beyond October 1, 1990.

Finally, because GM has not pointed to any error in the Presiding Officer's penalty calculation, and because the Board finds nothing erroneous in that calculation, the Board upholds the Presiding Officer's October 31, 1996 penalty ruling assessing a penalty of $62,500.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

By complaint dated March 1, 1993, and amended on November 10, 1993, U.S. EPA Region V ("Region") charged the General Motors Corporation ("GM") with numerous violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387, at GM's Pontiac Fiero plant in Pontiac, Michigan. In particular, the Region charged GM with violating the CWA on 92 occasions between May 1992 and August 1993 by discharging more pollutants (copper, lead, and zinc) than allowed by GM's 1988 National Pollutant Discharge Elimination System ("NPDES") permit[1]

[1] Under the Clean Water Act, discharges into waters of the United States by point sources must be authorized by a permit in order to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. CWA § 402, 33 U.S.C. § 1342.

issued by the Michigan Department of Natural Resources ("MDNR").[2] The permit is enforceable by both the State and EPA. *See* CWA § 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A) (authorizing EPA to assess a civil penalty for violation of a State-issued NPDES permit).

By accelerated decision issued on June 28, 1996, Administrative Law Judge Thomas W. Hoya ("Presiding Officer") determined that GM was liable for the violations alleged in the complaint. *See* Ruling on Motions for Accelerated Decision ("Accelerated Decision"). For these violations the Presiding Officer assessed a penalty of $62,500. *See* Initial Decision (Oct. 31, 1996) (hereinafter referred to as "Penalty Ruling").[3] GM has appealed. Notice of Appeal of Appellant General Motors Corporation and attached Brief in Support of Notice of Appeal to Environmental Appeals Board ("Appeal") (filed on November 29, 1996). On December 17, 1996, the Region, joined by the U.S. EPA Office of General Counsel, filed a reply asking that the Board affirm the Presiding Officer's decision. Complainant-Appellee's Reply Brief ("Region's Reply"). For the reasons stated below, we affirm.

I. *BACKGROUND*

By letter dated July 6, 1984, GM applied to MDNR for a permit at its Pontiac Fiero plant for stormwater discharges from an outfall now referred to as "outfall 002."[4] *See* Exhibit ("Exh.") 1 to Region's Reply. The application filed by GM identified copper, lead, and zinc as being among the pollutants discharged from that outfall. In its initial response to the application, dated July 30, 1984, MDNR advised GM that the application would not be processed at that time but would be processed when GM submitted its renewal application for GM's previously existing NPDES permit governing process-related discharges from another outfall. *See* Exh. 3 to Region's Reply.[5]

On November 19, 1984, GM submitted a renewal application for its existing permit as well as a request for a permit governing stormwater discharges from outfall 002. *See* Exh. 4 to Region's Reply. MDNR issued the renewed permit on June 16, 1988, containing numerical discharge limits for copper, lead, and zinc from outfall 002.

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[2] The MDNR is now known as the Michigan Department of Environmental Quality.

[3] Together, the liability and penalty rulings constitute an initial decision pursuant to 40 C.F.R. § 22.20(b).

[4] At the time of the application, outfall 002 was referred to as outfall C-5.

[5] The plant was subsequently shut down and has been idle since August of 1988.

See Exh. 5 to Region's Reply. The permit stated that in order to discharge beyond the permit's October 1, 1990 expiration date, GM must submit a renewal request "no later than 180 days prior to the date of expiration" (or April 1, 1990). *Id*. at 1. The permit also stated that "[a]ny person who feels aggrieved by this permit may file a sworn petition with the [Michigan Water Resource] 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." *Id*. GM did not file an administrative challenge to the permit with the Michigan Water Resource Commission within the 60-day period or at any subsequent time.

The discharge from outfall 002 consisted of stormwater collected at GM's facility. According to the Presiding Officer, the stormwater contained metals that were apparently partly present in the rainwater and partly leached from roofs and exterior components of buildings at the facility.[6] Accelerated Decision at 3. Pursuant to the 1988 permit, GM submitted discharge monitoring reports ("DMRs") on the content of the effluent at outfall 002, and these reports served as the basis of the Region's complaint.[7] It is undisputed that GM's discharges from this outfall, as reported in the DMRs, exceeded the permit limitations for copper, lead, and zinc. In May and December of 1991, prior to filing the complaint, the Region issued two notices of violation and orders for compliance requiring that GM take certain actions necessary to come into compliance with the permit. *See* Exhs. 7-8 to Region's Reply.

On May 7, 1993, two months after the Region filed its complaint in this matter, GM requested that MDNR terminate the permit. Letter from David E. Rugg, GM Senior Environmental Engineer, to Roy E. Schrameck, District Supervisor, MDNR (Exh. 10 to Region's Reply). MDNR denied the request on September 27, 1993, due to GM's continued noncompliance with the permit's effluent limitations. Letter

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[6] According to GM, at the time the permit was issued, neither it nor MDNR were able to determine the source of these metals in the discharge and the parties assumed the discharges were in some way related to industrial activity at the facility. *See* Appeal at 5-6. The parties now appear to agree that the effluent discharged from outfall 002 consisted solely of stormwater collected at the facility and that the metals were either already present in the rainwater or leached from outside structures at the facility.

[7] DMRs filed by a permittee indicating violations of a permit's effluent limitations constitute admissions that the violations reflected in the reports actually occurred. *See Sierra Club v. Simpkins Indus., Inc.*, 847 F.2d 1109, 1115 n.8 (4th Cir. 1987); *NRDC v. Texaco Refining & Marketing, Inc.*, 800 F. Supp. 1 (D. Del. 1992).

from Roy E. Schrameck, to David E. Rugg (Exh. 11 to Region's Reply). GM filed a second request for termination on October 1, 1993. Letter from David E. Rugg, to Peter Ostlund, MDNR Surface Water Quality Division (Exh. 12 to Region's Reply). MDNR also denied that request pending further monitoring of the effluent. Letter from Peter Ostlund to David E. Rugg (March 18, 1994) (Exh. 13 to Region's Reply). GM's third request for termination, filed on September 7, 1994,[8] was granted by MDNR on December 20, 1994,[9] after MDNR had confirmed that GM had completed the cleaning and coating of roofs at the facility and had come into compliance.[10]

GM has raised the following three issues in the present appeal:[11] (1) whether the permit was void *ab initio* because the State of Michigan lacked the authority to issue the permit; (2) whether, under the circumstances of this case, copper, lead, and zinc may be considered "pollutants" under the CWA; and (3) whether (assuming the permit was valid when issued) the permit expired by operation of law in 1990 because GM did not file a timely request for renewal.

A. *Validity of the 1988 Permit*

GM argues that the permit was void from the date of issuance because MDNR had no authority to issue a permit regulating discharges consisting solely of stormwater. In support of this assertion, GM cites to CWA § 402(p), 33 U.S.C. § 1342(p), added to the Act by the Water Quality Act of 1987. That section, which established a phased approach to bringing stormwater discharges under regulatory coverage,[12] states, in pertinent part, as follows:

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[8] Letter from David E. Rugg, to Hae-Jin Yoon, MDNR Environmental Quality Analyst and Peter Ostlund (Exh. 14 to Region's Reply).

[9] Exh. 15 to Region's Reply ("Permit Termination").

[10] *Id*.

[11] GM has attached two exhibits to its appeal, a letter from Franz Morsches, President, Jones & Henry Engineers, Inc., to David Rugg, GM Site Operations (April 24, 1994), and a draft permit dated November 5, 1995. The Region has objected to the submission of these documents to the Board because they "were not provided to the ALJ for his consideration * * *." Region's Reply at 2. GM does not dispute that the documents were not presented to the Presiding Officer for his consideration. In any case, as neither of these exhibits is relevant to our determination we need not rule on their admissibility in this proceeding.

[12] Previously, throughout the 1970's and early 1980's, the Agency's attempts to regulate point source discharges of stormwater were challenged in court. Regulations promulgated in 1973 were invalidated in *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd NRDC v. Costle*,
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Municipal and industrial storm water discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of storm water.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following storm water discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

According to GM, because the permit regulated stormwater but did not fall within any of the above-listed exceptions, MDNR had no authority to issue the permit and the permit must therefore be considered void *ab initio*.

The Presiding Officer did not reach the merits of GM's argument regarding the validity of the permit. Because GM never timely challenged the 1988 permit, the Presiding Officer declined to consider the permit's validity several years later in the context of an enforcement

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568 F.2d 1369 (D.C. Cir. 1977). Regulations promulgated in 1976 and revised in 1979 and 1980 were challenged in *NRDC v. EPA*, 673 F.2d 392 (D.C. Cir. 1980). As part of the settlement in that case, the Agency proposed new stormwater regulations in 1982 that were finally adopted in 1984. The 1984 regulations were challenged and vacated at the Agency's request, in *NRDC v. EPA*, No. 80-1607 (D.C. Cir. 1987). For a detailed history of the EPA's stormwater regulations, *see* 53 Fed. Reg. 49,416 (Dec. 7, 1988).

proceeding. According to the Presiding Officer: "[t]he crucial point that rebuts Respondent's challenges to its Michigan NPDES permit is * * * the unavailability of this federal enforcement action as a forum for reviewing the permit." Accelerated Decision at 27. On appeal, GM argues that it is not challenging any individual permit provisions, but asserting that under CWA § 402(p)(1) the permit never existed. GM contends that the Presiding Officer erred in concluding that GM was precluded from making this assertion.

In its reply, the Region states that GM failed to challenge the permit in the appropriate forum and now seeks to have the Board void the action of an authorized permitting authority. According to the Region "[n]ot only is such a remedy inconsistent with EPA's role in the oversight of State programs, it is also inconsistent with the general administrative law principle of finality embodied in the structure of the CWA." Region's Reply at 9. The Region also addresses the merits of GM's argument. In particular, the Region argues that CWA § 402(p)(1) does not prohibit States from *issuing* permits to applicants who request them. Rather, that section only prohibits States from *requiring* certain stormwater permits. The Region argues that Michigan did not require the permit but merely responded to GM's request.[13]

The Region also contends that an exception to the prohibition on requiring stormwater-only permits, specifically, the exception provided by CWA § 402(p)(2)(E), applies in this case. The exception on which the Region relies states that the prohibition does not apply where the State determines that the discharge is a "significant contributor of pollutants to waters of the United States." Similarly, at the time the permit was issued, Michigan law required permits for stormwater discharges making a significant contribution to pollution.[14] Although the record does not contain any formal finding or determination by MDNR that GM's stormwater discharges are a significant source of pollution, the Region takes the position that the "issuance of the permit containing water quality based effluent limitations constituted an implicit finding under § 402(p)(2)(E) that GM was a significant contributor of pollutants * * * [and that] [b]y applying for the NPDES permit, GM requested

[13] GM asserts that its application for a permit is irrelevant in this case because it was merely responding to a then-existing requirement that it seek a permit. Appeal at 12 n.7.

[14] In particular, Michigan water permitting regulations at the time the permit was issued stated that a permit is not required for discharges from storm sewers "unless a particular storm water discharge has been identified by the [Michigan Water Resource] Commission or the regional administrator as a significant contributor to pollution." Mich. Admin. Code r. 323.2109 (1988).

that Michigan make such a determination." Region's Reply at 13. GM disputes that any such finding was made. Appeal at 15.

B. *Whether Copper, Lead, and Zinc are "Pollutants"*

GM also asserts that the Region erred by classifying the copper, lead, and zinc discharged from outfall 002 as "pollutants" within the meaning of Act. Specifically, GM argues that although the term "pollutants" is defined broadly under the Act,[15] the Agency has the discretion to treat certain chemicals as pollutants in some circumstances but not in others. According to GM, under the circumstances of this case, the Region should have used this discretion and determined that copper, lead, and zinc are not "pollutants" within the meaning of the Act. GM asserts that EPA has not required permits for other similarly situated dischargers and states that EPA's inaction with regard to these other dischargers "demonstrates that [EPA] viewed the discharge of these 'metals' without a permit as permissible." Appeal at 24. GM's argument in this regard constitutes a challenge to the inclusion of effluent limitations for copper, lead, and zinc in GM's permit when, according to GM, the Region has not placed similar restrictions on other dischargers.[16]

C. *Permit Expiration*

Finally, GM argues that if the permit was valid when issued, it expired by operation of law on October 1, 1990, because GM failed to file a timely application for renewal. If this were the case, it would bar 53 of the 92 violations alleged in the complaint since these 53 violations occurred after the claimed expiration date. As noted above, the 1988 permit indicated that it would expire on October 1, 1990, and that renewal was to be requested no later than 180 days prior its expiration (or by April 1, 1990). GM submitted its renewal request by

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[15] The Act defines "pollutant" 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.

CWA § 502(6), 33 U.S.C. § 1362(6).

[16] The Presiding Officer concluded that both the CWA and its implementing regulations make clear that copper, lead, and zinc are indeed "pollutants" within the meaning of the Act. *See* Accelerated Decision at 11-15.

letter dated May 18, 1990. Thus, GM argues that the permit expired by operation of law on October 1, 1990.

In response, the Region points out that GM's renewal letter stated that it was being submitted in lieu of a formal application pursuant to a conversation between the MDNR and GM. The Region asserts that as a result of this conversation and the letter, the renewal was timely and the permit therefore administratively continued pursuant to Michigan law.[17] Region's Reply at 13-14. The Region also points out that the renewal was submitted well before expiration of the permit, MDNR accepted the late renewal request, both parties continued to operate as if the permit were still effective, and GM itself requested termination of the permit in 1993.

The Presiding Officer, although finding this issue "less clear cut" than the issue of whether GM could challenge the validity of the entire permit in an enforcement proceeding, agreed with the Region. In particular, the Presiding Officer stated:

> The actions of Respondent and the State of Michigan, such as Respondent's continuing submission of monthly reports and the 1992-94 correspondence that led to the State's 1994 termination of the permit, reflect an apparent assumption by both, as noted by Complainant, that the permit remained in force until the 1994 termination.

Accelerated Decision at 27-28 (footnote omitted).[18]

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[17] Under the Michigan Administrative Procedures Act, "[w]hen a licensee makes timely and sufficient application for renewal of a license * * *, the existing license does not expire until a decision on the application is finally made by the agency * * *." Mich. Comp. Laws § 24.291(2). The term "license" is defined as "includ[ing] the whole or part of an agency permit." *Id*. at § 24.205(1); *see also Bois Blanc Island v. The Natural Resource Commission*, 158 Mich. Ct. App. 239, 242, 404 N.W.2d 719, 721 (1987) (the broad definition of "license" in the Administrative Procedures Act includes practically any form of permission required by law). MDNR did not make a final determination on the renewal application prior to termination of the permit.

[18] In his penalty determination, the Presiding Officer concluded that even if the permit had expired in 1990, thus reducing the number of violations from 92 to 39, the violations would still be significant enough to warrant the same penalty amount ($62,500). Penalty Ruling at 12.

II. *ANALYSIS*

A. *Validity of the 1988 Permit*

As previously stated, GM's 1988 permit provided for an appeal to the Michigan Water Resource Commission within 60 days of issuance. GM did not file such an appeal within this time period or at any other time. Nevertheless, GM argues that it may challenge the "existence" of the permit in the present enforcement proceeding. We disagree.

It is well established that where, as here, a permittee fails to take advantage of the opportunity to challenge a State-issued permit under applicable State administrative procedures, objections to the permit may not be raised years later in the context of an enforcement proceeding. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 77-78 (3rd Cir. 1990) (by failing to challenge State-issued NPDES permit under applicable State law, permittee lost "'forever the right to do so, even though [an enforcement action] might eventually result in the imposition of substantial penalties.'") (quoting *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484-85 (5th Cir. 1988)); *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480, 1486-87 (9th Cir. 1987) (permittee's failure to follow administrative steps that would have allowed issuing State agency to address NPDES permit objections precludes raising permit objections in an enforcement proceeding), *vacated and remanded on other grounds*, 485 U.S. 931 (1988); *Public Interest Research Group of New Jersey v. Yates Indus., Inc.*, 757 F. Supp. 438, 445-446 (D.N.J. 1991) (permittee is responsible for the terms of its permit; by failing to challenge NPDES permit provisions through proper State agency procedures, permittee lost the right to challenge these provisions), *modified on other grounds* 790 F. Supp. 511; *United States v. CPS Chemical Co., Inc.*, 779 F. Supp. 437, 453-54 (E.D. Ark. 1991) ("Having failed to appeal its 1984 [federal permit] limits, [permittee] cannot now challenge in this enforcement action the merits of the limitations and the conditions imposed in the 1984 permit on the grounds that it was impossible to comply with those limits."); *Connecticut Fund for the Environment v. The Job Plating Company, Inc.*, 623 F. Supp. 207, 216 (D. Conn. 1985) ("By failing to challenge its NPDES permit under state law at the time when its purported legal deficiency should have been as apparent to [permittee] as it is now, the [permittee] is precluded from doing so * * *.").

In the present case, it is abundantly clear that GM has failed to exhaust its State administrative remedies. If GM had objections to any condition of its 1988 permit (or to the permit itself), it had the oppor-

tunity as well as the obligation to raise such objections at the time the permit was issued under existing State procedures. The permit on its face stated that challenges could be filed with the Michigan Water Resources Commission within 60 days of issuance. Such a challenge would have allowed the Commission "to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors * * *." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972) (discussing rationale for requiring exhaustion of administrative remedies). GM did not, however, raise a timely challenge to the permit in that forum. Indeed, GM *never* raised an administrative challenge to the validity of the permit, and it did not even request termination of the permit until after the Region had issued two compliance orders and filed the complaint in this matter. Having failed to exhaust its State administrative remedies, GM may not now raise objections to its permit five years later in this federal enforcement proceeding. *See Sierra Club*, 813 F.2d at 1486-87 (declining to consider challenge to permit terms in an enforcement proceeding and stating that by failing to exhaust its administrative remedies under state law, a permittee is bound by the terms of its permit);[19] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588, 598 (D.S.C. 1997) (declining to consider challenge to State-issued NPDES permit in an enforcement proceeding; if permittee believed the permit to be invalid for any reason its remedy "was to seek an administrative adjudication pursuant to [state] law * * * [which] provided the [permittee] with the opportunity to challenge its permit in an administrative proceeding * * * and to have the administrative determination reviewed by a state court * * *."). Thus, we agree with the Presiding Officer that GM may not challenge the validity of the permit in the present enforcement proceeding.[20]

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[19] *See also McKart v. United States*, 395 U.S. 185, 193 (1969) (a party must exhaust its administrative remedies before it can obtain judicial review of an agency decision); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (stating the general rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

[20] This conclusion is consistent with Congress' desire to limit the scope of enforcement proceedings under the CWA. *See* S. Rep. No. 92-414, at 64 (1972) (discussing the Act's enforcement provision at CWA § 309, 33 U.S.C. § 1319) ("[The Act] establishes and makes precise new requirements imposed on persons and [sic] subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay."); CWA § 509(b)(2), 33 U.S.C. § 1369(b)(2) (stating that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [including the issuing of an NPDES permit] shall not be subject to judicial review in any civil or

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GM makes much of the fact that it is challenging the validity of the permit itself rather than any particular permit provisions. GM provides no reasonable explanation, however, as to why this challenge was not raised in the appropriate State forum. GM's allegation that the permit is void *ab initio* because of legislation passed prior to issuance of the permit is simply insufficient to excuse GM's failure to exhaust its remedies under State law. *See United States v. City of Geneva*, 1986 U.S. Dist. LEXIS 23515 (N.D. Ill. 1986) (permittee's failure to challenge State-issued permit under applicable State procedures bars challenge to permit during civil enforcement proceeding even where permittee alleges that the permit was void *ab initio*).

Whatever the merits of GM's arguments as to Michigan's alleged lack of authority to issue the permit in light of the 1987 CWA amendments (specifically, CWA § 402(p)),[21] those arguments could and should have been raised before the State entity that issued the permit or to the Michigan Water Resource Commission in an administrative appeal following issuance of the permit in 1988. In this way, the State could have evaluated whether, for example, it agreed with the argument GM now makes that the State lacked legal authority to issue the permit or whether the permit came within one of the statutory exceptions to CWA § 402(p). If GM disagreed with the State agency's final decision, GM could then have appealed that decision in State court. *See* Mich. Comp. Laws § 24.301 ("Exhaustion of remedies; reviewable decisions"). Thus, not only is GM years too late with its challenge, but it is also plainly in the wrong forum. GM was well aware of the proper forum for raising such challenges. When GM sought termination of the permit following the filing of the complaint, it sought relief from the State. The State twice denied such relief, and granted it on the third occasion only after its concerns were addressed. *See* Exh. 15 to Region's Reply. Under these circumstances and in light of GM's failure to exhaust its administrative remedies, as outlined above, we

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criminal proceeding for enforcement."); Conf. Rep. No. 92-1236, at 147-48 (1972) ("The conferees intend that [section 509(b)(2)] limit the availability of judicial review of a standard or requirement where judicial review was available at the time the standard or requirement was established."); *see also* S. Rep. No. 92-414, at 79 (discussing the Act's citizen suit provision at CWA § 505, 33 U.S.C. § 1365) ("An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.").

[21] As stated above, subject to certain exceptions CWA § 402(p) prohibits EPA or States from requiring permits for discharges consisting solely of stormwater prior to October 1, 1994. This provision was passed into law prior to issuance of the permit in 1988.

decline to review the merits of GM's argument that the permit was void *ab initio*.[22]

GM has also asserted that regulation of outfall 002 was the result of the MDNR's erroneous assumption that the metals in the discharge resulted from some cross connection from process or other operations at the plant. Appeal at 13-14. According to GM, GM disputed the need to regulate discharges from outfall 002 prior to issuance of the permit but "could not conclusively rule out possible contributions by process or other operations, such as drinking water fountain cross connections." *Id*. at 13. GM states that it "ultimately has demonstrated, however, [that] stormwater only discharges are involved and the metals in question result from atmospheric deposition and the leaching effect of acidic precipitation on metal building structures at the site." *Id*. at 14. Thus, according GM, the issuance of the permit resulted from a mutual mistake and the State-issued permit should therefore be subject to challenge in this federal enforcement proceeding. We disagree.

Having failed to raise a timely objection in the proper State forum,[23] GM may not now challenge the underlying permit in the context of this enforcement proceeding. *See Connecticut Fund for the Environment v. The Job Plating Company, Inc.*, 623 F. Supp. 207, 216 (D. Conn. 1985); *cf. National Mining Association v. U.S. Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (concluding that to the extent that appellants' challenge to a regulation as *ultra vires* was based on grounds that were available to appellant at the time the regulation was adopted, the court did not have jurisdiction over the challenge).

Moreover, even if, at the time the permit was issued, MDNR and GM erroneously believed that the metals discharged from outfall 002 resulted from contributions from process or other operations, GM subsequently ruled out any such contributions by at least November of 1991. *See* Letter from David E. Rugg, GM Senior Environmental Engineer, to Roy Schrameck, District Supervisor, MDNR (Nov. 11, 1991) (stating that GM has identified the source of the exceedances in outfall 002). Thus, all the information necessary for GM to seek mod-

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[22] In so doing, we do not reach and we express no view as to the merits of the legal arguments concerning the authority of Michigan to issue a "stormwater-only" permit.

[23] GM itself has stated that at the time the permit was issued Michigan law provided for an administrative appeal "[w]henever any person shall feel aggrieved by * * * any * * * order or permit * * *." Respondent's Rebuttal to Complainant's Reply to Respondent's Cross Motion for Partial Accelerated Decision (submitted to the Presiding Officer on Sept. 27, 1994) (quoting Mich. Comp. Laws § 323.8 (1988)). As the Presiding Officer stated, however, GM never utilized any State appeals procedure at any time.

ification or revocation of the permit was available to it in 1991. Nevertheless, despite the existence of provisions in the Michigan regulations for seeking modification or revocation, GM did not pursue these options with the State at that time. *See, e.g.*, Mich. Admin. Code r. 323.2159 ("State and national permits; modification or revocation by the commission"). Rather, GM waited until after the Region filed a complaint in 1993 to request that the State terminate the permit. We agree with the Region that there are sound reasons why the federal government, in the exercise of its enforcement functions, should not seek to revisit the basic terms or validity of a duly issued State permit. Questions concerning whether a permit was issued by mistake are precisely the kinds of questions best evaluated by the entity that issued the permit.

B. *Whether Copper, Lead, and Zinc are "Pollutants"*

For the same reasons explained in Section II.A. above, we also decline to address the merits of GM's assertion that, under the circumstances of this case, copper, lead, and zinc are not "pollutants" within the meaning of the Act. Essentially, GM is asserting that because these metals are not "pollutants," the effluent limitations were erroneously included in the permit. Having failed to raise a timely challenge under State law to the inclusion of these permit limitations, however, GM may not now collaterally attack their inclusion in the context of this enforcement proceeding.

C. *Permit Expiration*

GM argues that even if the permit is considered valid when issued, it expired by operation of law when GM failed to file an application for renewal by April 1, 1990. We disagree.

GM is correct that its letter requesting renewal of the permit was not submitted until May 18, 1990 (47 days after the April 1 deadline). It is important to note, however, that the renewal was submitted more than four months before expiration of the permit. In addition, the letter stated that it was being submitted in lieu of a formal application *per a conversation between GM and MDNR*. Letter from Ernest N. Hawley, Plant Manager, C-P-C Pontiac Operations, to Chang Bek, Chief, Permits Section, MDNR (May 18, 1990). Although the record does not indicate the precise date or nature of this conversation, it is clear that MDNR (presumably at GM's request) decided to consider the renewal application timely filed. Apparently, MDNR determined that the circumstances warranted a relaxation of the filing deadline in this case. *See West Bloomfield Hosp. v. Certificate of Need Board*, 452 Mich. 515, 524,

550 N.W. 2d 223, 227 (1996) (Michigan State agencies may relax or modify procedural rules where the ends of justice so require) (citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970)). Although Michigan regulations require that renewal applications be submitted 180 days prior to a permit's expiration date,[24] this is not a statutory requirement and we see no reason why this requirement could not be relaxed or modified in appropriate circumstances.[25]

Further, following submission of the renewal request, GM and MDNR continued to behave as if the permit were in full force and effect. In particular, GM continued to submit its DMRs as required by the permit, and, as previously stated, GM later made several requests that MDNR terminate the permit. The fact that GM filed its 1993 termination requests with MDNR indicates that not only did GM believe that the permit was in full force and effect at that time, but also that GM knew the appropriate forum within which to raise permit objections.

By requesting renewal of the 1988 permit prior to its expiration, behaving as if the permit remained in effect, and failing to file a timely objection to continuation of the permit, GM cannot now be heard to deny that the permit continued in effect beyond October 1, 1990. *See The Job Plating Co., Inc.*, 623 F. Supp. at 218 n.11 (rejecting permittee's challenge to its NPDES permit where the permittee relied on and tacitly accepted the permit for years until it faced an enforcement action); *cf. Bois Blanc Island v. The Natural Resource Commission*, 158 Mich. Ct. App. 239, 242-44, 404 N.W.2d 719, 721-722 (1987)[26] (holding that an otherwise expired permit remained in full force and effect based on the permittees' continued operation under the permit and State's failure to challenge this continued operation).

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[24] Mich. Admin. Code r. 323.2151.

[25] We note that under federal law:

> [P]ermittees with currently effective permits shall submit a new application 180 days before the existing permit expires, except that:
>
> (i) The Regional Administrator may grant permission to submit an application later than the deadline for submission otherwise applicable, but no later than the permit expiration date * * *.

40 C.F.R. § 122.21(d)(2).

[26] In *Bois Blanc*, the Court of Appeals of Michigan found that by allowing certain permittees to continue operating sanitary landfills for nine years without reapplying for new permits, the continued

D. *Penalty*

GM has not filed any specific objections to the Presiding Officer's penalty calculation. Rather, it argues that if the Board agrees with Presiding Officer that copper, lead, and zinc can be considered "pollutants" under the circumstances of this case, "imposition of a penalty is inappropriate because GM was not given fair notice of EPA's interpretation * * *." Appeal at 23 n.14. This assertion has no merit. The inclusion of effluent limitations for copper, lead, and zinc in the 1988 permit put GM on notice that these metals were considered to be pollutants regulated under the Act. Indeed, the permit states that failure to comply with the permit's effluent limitations could subject the permittee "to the criminal and civil enforcement provisions of both state and federal law." Exh. 5 to Region's Reply at 1. Moreover, GM itself identified these metals as pollutants in its 1984 permit application. *See* Exh. 4 to Region's Reply. We therefore reject the assertion that GM lacked fair notice of the Region's position.

As previously stated, the Presiding Officer assessed a total penalty of $62,500. Because GM has not pointed to any error in the Presiding Officer's calculation, and because we find nothing erroneous in that calculation, we uphold the Presiding Officer's October 31, 1996 Penalty Ruling.[27]

MDNR "created an implied agreement that the [existing] permits were to be automatically renewed upon their expiration * * *." *Bois Blanc, supra,* at 722. The court therefore concluded that the permits were still in effect and could not be summarily terminated without a hearing. *Id*. GM argues that the court in *Bois Blanc* created an "equitable permit" and that by relying on that case, the Presiding Officer improperly "impos[ed] civil penalties on the basis of equity." Appeal at 19. We find no merit to this assertion. *Bois Blanc* does not hold that permittees were entitled to "equitable permits" but that their existing permits continued in full force and effect. Similarly, the Presiding Officer in the present case concluded that, based on GM's actions, its existing permit remained effective. Moreover, contrary to GM's assertion, the Presiding Officer did not "rel[y] solely" on *Bois Blanc*. Appeal at 17. Rather, the Presiding Officer simply noted that "[t]he one case cited by the parties, *Bois Blanc*, supports complainant, albeit, as noted by [GM], that it goes against the state and not a private party." Accelerated Decision at 27 (footnote omitted). We therefore reject GM's assertion that the Presiding Officer improperly relied on *Bois Blanc* in assessing a penalty in this case.

[27] We note that the Presiding Officer did not ignore GM's assertion that, but for the fact that GM applied for a stormwater permit, GM might have been left unregulated. *See* Penalty Ruling at 11 ("Finally, there is [GM's] argument that it alone among thousands of stormwater dischargers is being sanctioned, only because it in good faith obtained an NPDES permit."). Although the Presiding Officer found this argument irrelevant on the issue of liability, he found that under the circumstances of this case imposition of the maximum penalty of $125,000 was inappropriate and thus reduced the penalty by 50%. *Id*. The Region has not appealed the Presiding Officer's Penalty Ruling.

III. *CONCLUSION*

For the reasons set forth above, a civil penalty of $62,500 is assessed against respondent GM.[28] GM shall pay the full amount of the civil penalty within sixty (60) days after receipt of this final order, unless otherwise agreed to by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.

[28] Because the Board does not believe that oral argument would be of material assistance in resolving this matter, GM's request for oral argument is denied. We also reject GM's suggestion in its Notice of Appeal that further hearings are necessary in order to determine the validity of the permit. As stated above, GM's failure to exhaust its State administrative remedies precludes it from challenging the validity of the permit in this enforcement proceeding.