UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of
Leed Foundry, Inc.
Wade Road
St. Clair, PA 17970,

THIS VERSION DOES NOT CONTAIN POTENTIAL CBI

Docket No. RCRA-03-2004-0061 Respondent.CWA-03-2004-0061

COMPLAINANT'S POST-HEARING REPLY BRIEF

Complainant, the Director of the Office of Enforcement, Compliance and Environmental Justice of the United States Environmental Protection Agency, Region III, through counsel, herebysubmits this post-hearing reply brief in the above-captioned matter pursuant to the Court's verbal order and 40 C.F.R. § 22.7.

I. LIABILITY UNDER COUNTS XIV AND XV (CLEAN WATER ACT)

With respect to Count XV of the Complaint (failure to obtain a National Pollutant DischargeElimination System ("NPDES") permit for the discharge of storm water associated with industrial activity), Respondent has conceded liability. Tr. 178; Respondent's post-hearing brief at 2, 3, 6, 7.

With respect to Count XIV of the Complaint (discharge without an NPDES permit), Complainant must establish that Respondent is (1) a person, (2) who discharged a pollutant (3) froma point source (4) into a water of the United States (5) without complying with Section 402 of the Act (33 U.S.C. § 1342). *See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308, 38 ERC 1001, 1003 (9th Cir. 1993), *cert. denied,* 513 U.S. 873 (1994).

It is clear from the record, the stipulations and Respondent's initial post-hearing brief that the only disputed element of Complainant's *prima facie* case on liability under Count XIV is whether

the hundreds of storm water discharges from Respondent's facilty constituted discharge of pollutants: "In summary, Leed does not contest that the Leed Facility is a "facility" or that Mill Creek and its tributary stormwater collection systems qualify as `navigable waters' of the United States for purposes of 33 U.S.C. § 1311(a). Leed also does not dispute that stormwater falling on theLeed Facility, if it fell in sufficient quantities to run-off would in certain areas have discharged through one or all of its four point sources discharges. [sic] Leed contests only EPA's bald assertion that any such discharges reflected the `addition of a pollutant' to a water of the United States ...." Respondent's Post-Hearing Brief at 10.

With respect to liability under Count VIX, Leed's post-hearing brief does ***not*** contest thefollowing evidence adduced at the hearing or otherwise in the record:

- That Respondent is a "person" as defined in CWA § 502, 33 U.S.C. § 1362(5). *Additional Stipulations of Complainant and Respondent* No. 1 (Nov. 2005) (hereafter *"Additional Stipulations ");* Respondent's post-hearing brief at 4.

- That Respondent operates a grey iron foundry at which Respondent produces grey iron castings, such as manhole covers and collars from scrap iron. *Additional Stipulations* Nos. 2 & 3; Respondent's post-hearing brief at 4.

- That the primary Standard Industrial Classification Code for Respondent's grey iron foundry is 3321. *Additional Stipulations* No. 4.

- That at all relevant times, Respondent has stored raw materials, including scrap iron, coke and limestone, outdoors, uncovered and exposed to precipitation at a "topographic high," meaning that fromthe point where the materials are stored, the adjacent roadway and non paved areas on the facility run downhill both north and south. Tr. 205-06; 210-11(Cox); CX 4C; 4F; 4G; 4J; Tr. 488-92 (Harsh); *see also* CX 18; Tr. 988 (Quinn).[1]

- That at all relevant times, Respondent has stored baghouse dust behind the cupola baghouse adjacent to a road that runs behind the buildings at the Leed Foundry facility, at a "topographic high." Tr. 211-12 (Cox).

- That, prior to April 2001, Respondent. stored piles of baghouse dust openly, i.e., uncovered. RX 9; Answer of Respondent; Tr. 1070-71 (Quirin).

---

[1] The hearing transcript is cited herein as "Tr. _ (witness name)." Complainants' exhibits are cited as "CX _"; Respondent's Exhibits are cited as "RX and the Stipulated Exhibits are cited as "Srip. Ex. - "

- That, as of EPA's September 2002 inspection, a blue tarp covered the baghouse dust. Tr. 228; CX 6A, 6B. The piles, which were as high as eight feet, were surrounded on three sides by a four-foot high concrete barrier and open to the roadway. Tr. 214 (Cox).

- That after EPA's inspection of the Leed Foundry facility in September 2002, Leed Foundry placed a concrete "jersey" barrier between the baghouse dust piles and the adjacent roadway.Tr. 258, 261 (Cox).

- That the baghouse dust has been sampled and analyzed by EPA, DEP and Respondent. The baghouse dust generally has contained high levels of lead and cadmium, both when analyzed for solubility using the Toxicity Characteristic Leaching Procedure ("TCLP") and when analyzed for total metals. *Stipulation of Complainant and Respondent (Oct.* 19, 2005); *Additional Stipulations of Complainant and Respondent* No. 9 (Nov. 1, 2005); CX 22; CX 23; CX 24; CX 25; CX 29; CX 33A; CX 33B; CX 33C; CX 33D; CX 33E; CX 33F; CX 33G; *see* Tables 1 a & lb, Complainant's Proposed Findings of Fact and Conclusions of Law.

- That at all relevant times the roadway and areas surrounding the baghouse were extremely dusty. The dust was sufficiently deep that vehicles made tracks, and the EPA inspectors could not see the pavement underneath the dust. Tr. 227 (Cox); CX 6B; CX 4C; 4F; 4J; 40; 4GG;4MM; 4NN; CX 5J; CX 5M; CX 5N; CX 50; ; CX 5P; CX 5Q; Tr. 485-86; 487-88; 489; 491-92; 505-07, 534-46 (Harsh).

- That analysis of the chemical and physical properties material characterized by DEP and EPA inspectors as "dust" on the ground near the baghouse demonstrate that the material contained high levels of lead and cadmium and was physically similar to baghouse dust. Tr.316-18 (Feher); CX 21; Tr. 863-87 (Hennessy); CX 31I; CX 31J; CX 31M; CX 31N; CX 31C; CX 31D. *See* Tr. 222-24, 233-35 (Cox) (Mr. Cox also observed dust on the ground).

- That raw materials and baghouse dust stored outdoors and the dust covering the ground and roadway at the Leed facility is subject to transport by storm water, which would come in contact with these materials, flow onto the road and downhill to the storm water collection system on the Leed facility, and then discharge out Outfalls 1-4. Tr. 418-19, 490-92, 538-39 *(Harsh). Seealso CX* 32D; Tr. 304-08 (Feher).

- That storm water discharged from Outfalls 1-4 and sampled by Respondent on November 19, 2003 contained lead, cadmium, and other pollutants. Stip. Ex. 1.

- That Respondent's facility consists of four drainage areas or zones. Storm water falling on Drainage areas 1, 2 and 3 is discharged from Outfalls 1, 2, and 3, which are pipes located in the southeastern portion of Respondent's facility. Storm water shoots out of Outfalls 1-3 and flows in erosion scars and gullies down the steep hill below the pipes to a drainage ditch or swale at the bottom of the hill, and then flows south toward a larger swale and into a large inlet to the St. Clair municipal separate storm sewer located slightly south and east of Respondent's facility. Stip. Ex. 3, Tr. 803-06 (Epps); CX 4S; 4BB; 4CC; 4KK; 4LL; 5A; 5B; 5C; 5E; 5F; Tr. 449-62, 466-79. 508-09, 511-12, 514, 517-18, 528-31 (Harsh). Storm

water falling on Drainage area 4 flows to two inlets, one in the northern portion of the facilityand one just outside the property line at the northeastern portion of the facility. Stip. Ex. 3, page 0163 & 0175a. Both are inlets to St. Clair Borough's municipal separate storm sewer. Tr. 465-78 (Harsh); CX 13.

- That storm water entering St. Clair Borough's municipal separate storm sewer from Outfalls 1, 2, 3 and 4 flows through a series of pipes and ultimately is discharged untreated to Mill Creek, a tributary of the Schuylkill River. CX 13; Tr. 466-79, 512-14 (Harsh); Respondent's post-hearing brief at 4 (noting that Mill Creek "directly or indirectly is the eventual recipientof Leed's point source stormwater discharges"); Stip. Ex. 1 (identifying Mill Creek as the receiving water for Outfalls 1-4).

- That mill Creek and its tributary St. Clair municipal separate storm sewer are waters of the United States as defined in 33 U.S.C. § 1362(7) & 40 C.F.R. § 232.2. Respondent's post-hearing brief at 4; *Additional Stipulations* No. 6.

- That Respondent's consultant determined that any measurable amount of rainfall in excess of one one-hundredth inch (0.01 inches) over a 24-hour period would result in the discharge of storm water from Outfalls 1-4 of Respondent's facility. Stip. Ex. 6.

- That a rain event equal to or greater than 0.23 inches over a 24-hour period will cause storm water falling on Drainage area 4 of Respondent's facility to discharge to the St. Clair Borough municipal storm sewer. *Stipulated Testimony of Dr. Jack Hwang.*

- That a rain event equal to or greater than 0.6 inches over a 24-hour period will cause storm water falling on Drainage areas 1, 2, and 3 of Respondent's facility to discharge to the St. Clair Borough municipal storm sewer. *Stipulated Testimony of Dr. Jack Hwang.*

- That Respondent was required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of storm water associated with its industrial activities. Tr. 178; Respondent's post-hearing brief at 2, 3, 6, 7.

- That, prior to February 23, 2004, Leed Foundry had neither applied for nor obtained an NPDES permit for the discharge of storm water associated with industrial activity. *Additional Stipulations of Complainant and Respondent* No. 5 (Nov. 1, 2005); Respondent's post-hearing brief at 4. Respondent did not obtain an NPDES permit until March 25, 2004. Respondent's post-hearing brief at 6.

As stated more fully in Complainant's Initial Post-Hearing Brief, the foregoing undisputed evidence establishes that precipitation falling on Respondent's facility picks up pollutants from piles of raw material and waste stored at the facility and associated with Respondent's industrial activities

and discharges through point sources in the form of pipes, erosion scars, ditches, and swales to St. Clair Borough's municipal separate storm sewer, from which it discharges untreated to Mill Creek.

The precipitation data (CX 34) establishes that, from March 1999 - March 2004 there were at least 148 precipitation events greater than 0.6 inches, i.e., sufficient (using Dr. Hwang's uncontested and conservative calculations) to cause storm water falling on Drainage areas 1, 2 and 3 of Respondent's facility to reach the St. Clair Borough municipal separate storm sewer. There were at least 316 rain events greater than 0.2 inches, i.e., sufficient (again using Dr. Hwang's uncontested and conservative calculations) to cause storm water falling on Drainage area 4 of Respondent's facility to reach the municipal separate stone sewer. Tr. 642-44 (Harsh); *Stipulated Testimony of Dr. Jack Hwang.* There were approximately 417 precipitation events greater than 0.01 inches, which Respondent's consultant calculated would cause a discharge of storm water from Outfalls 1-4 at Respondent's facility. Tr. 617-19 (Harsh); Stip. Ex. 6. This evidence of a pollutional discharge from Respondent's facility is confirmed by the results of Respondent's storm water sampling, showing that storm water discharged from Outfalls 1-4 contains high levels of lead, cadmium, and other pollutants associated with the materials exposed to precipitation at the Leed facility. Stip. Ex. 1.

The rainfall data presented at the hearing in CX 34 should be credited. St. Clair Borough maintains rainfall records as government records and in the ordinary course of business. Tr. 558-59 (Harsh). The St. Clair Borough rainfall data was included with Complainant's original pre-hearing exchange filed more than five months before the start of the hearing. Despite ample opportunity to investigate St. Clair Borough's rainfall data or to submit its own rainfall data, Respondent submittedno evidence that the rainfall data maintained by St. Clair Borough is inaccurate. The data in CX 34, therefore, is unreeated. Accordingly, Complainant has carried its burden of establishing numerous

unpermitted discharges of storm water associated with industrial activity from Respondent's facilityfrom March 1999 - March 2004.

Respondent's various arguments as to its liability fail both legally and factually. Respondent's main argument is that there is insufficient direct evidence of storm water discharge from its facility. That argument, however, is belied (as even Respondent begrudgingly concedes) by the Notice of Intent ("NOI") submitted by Respondent to the Pennsylvania Department of Environmental Protection ("DEP"). Stip. Ex. 1. The NOI reports results of Respondent's sampling of storm water discharges from Outfalls 1-4 on November 19, 2003. These samples contained lead, cadmium, and other pollutants consistent with the materials exposed to precipitation at Respondent's facility. Stip. Ex. 1. As Respondent's NPDES permit was not effective until March 25, 2004 (Stip. Ex. 2), the storm water discharge on November 19, 2003 was not authorized by an NPDES permit.

Respondent unsuccessfully tries to do away with, or at least minimize, the direct evidence in its NOI of an unauthorized storm water discharge. First, Respondent points out that the sampling was undertaken by Respondent and not Complainant. Whether Respondent or Complainant took the sample, however, is irrelevant to its probative value, especially in light of the substantial reliance on self-monitoring and self-reporting that is manifest by the CWA. *Cf. Sierra Club v. Union Oil Co.,* 813 F.2d 1480, 1491-92 (9th Cir. 1987) (NPDES program fundamentally relies on self-monitoring), *certiorari granted and judgment vacated for reconsideration (in light of Gwaltney v. Chesapeake Bay Foundation,* 484 U.S. 49 (1987)), 485 U.S. 931 (1988), *judgment reinstated,* 853 F.2d 667 (9th Cir. 1988); *United States v. Smithfield Foods, Inc.,* 972 F. Supp. 338, 348 (E.D. Va. 1997) (CWA . relies on self-reporting of permittees), *aff'd in part, reversed in part on other grounds,* 191 F.3d 516 (4th Cir. 1999), *cert. denied,* 531 U.S. 813 (2000); *United States v. Material Service Corp.,* 1996 WL563462 (N.D. Ill. Sept. 30, 1996) (in context of applying "discovery rule" to statute of limitations,

court referred to CWA's reliance on self-reporting by companies as the only practical way toenforce).

Respondent next would have the court hold that sample results submitted by Respondent in connection with its application for an NPDES permit were not representative of discharges of stormwater associated with Respondent's industrial activities. There is no contemporaneous indication, however, either in the NOI or elsewhere, that Respondent thought that the data submitted on its NOIwas not representative of storm water discharges from its facility. It was not until its post-hearing brief in this matter that Respondent ever asserted or inferred otherwise. *Compare with United States v. Sheyenne Tooling & Mfg. Co., Inc.,* 952 F. Supp. 1414 M.N.D. 1996) (defendant may not question its own reports as a way of avoiding liability). Of course, the expectation is that discharge data submitted on an NPDES permit application will be representative of the applicant's discharge.

Mr. Feher, the DEP inspector, also provided direct evidence that pollutant-laden storm water associated with industrial activity discharges from Respondent's facility during precipitation events. Mr. Feher observed the black sand on top of one of Leed's buildings, open to the weather.[2]He photographed it. Tr. 304-05, C.Ex.32-D. He personally observed the sand washing off the building's rooftop, and he photographed that as well. Tr. 305, C.Ex. 32-E. He observed it moving along with the rain along the concrete and asphalt and going into a drain. Feher photographed this aswell. Tr. 305, C.Ex. 32-E, C.Ex. 32-A. Mr. Feher was also careful to point out that the water was so laden with the black sand, that on film it is indistinguishable from the black asphalt over which it was flowing. Tr. 306, C.Ex. 32-A.

---

2 Respondent's brief claimed that Feher observed a "silty material." However, Respondent does not cite to any description by Mr. Feher of this material as "silt." To the cont, aryW.Feher referred to the material as "sand" six times. Why Respondent's brief persistently and incorrectly attributes the term "silty material" to Mr. Feher is unclear. There is no great secret that Respondent uses a black colored sand in its manufacturing process. Tr. 986 (Quinn describing way Respondent makes a black colored sand which is then used in the molding process).

While Respondent's brief asserts that Feher "offered no description of the physical characteristics or visual appearance of the final discharge" (Respondent's post-hearing brief at 14), W. Feher in fact went to the location where that drainpipe discharged and confirmed that black sand-laden stormwater was, in fact, pouring out of the pipe - and it was. Tr. 309-11 (Feher); C.Ex. 18 (pipe termination point on hillside marked by Feher in pink and initialled "BF"); Tr. 309 (Feher) (discharge he saw was "[t]h sand that showed in the previous drains leaving the property."). Although Respondent correctly notes that Mr. Feher made his observations in 2005, i.e., after the effective date of Respondent's NPDES Permit, W. Feher's testimony still provides evidence of how storm water picks up, transports, discharges exposed pollutants at Respondent's facility. As discussed in more detail below, Respondent apparently would agree that Mr. Feher's observations ofconditions in 2005 are consistent with what happened at the facility prior to issuance of the NPDES Permit because Respondent has not changed its operations to conform to the requirements of the NPDES Permit. *See* Respondent's post-hearing brief at 5 ("[I]t is not possible to discern any difference in the manner in which Leed manages its operation before or after issuance of the permit").

As stated in Complainant's initial post-hearing brief (and somewhat reluctantly conceded in Respondent's post-hearing brief at page 13), the direct evidence provided in the NOI, by itself, establishes liability for the unauthorized discharge of storm water *associated* with industrial activity under Count XIV. *See United States v. Chemetco, Inc.,* 274 F.3d 1154, 1158-60 (7thCir. 2001) (for criminal conviction under CWA, it was sufficient to establish a single violation. The number of days of violation was a sentencing factor, and not an element of a CWA criminal offense).

Regardless, the uncontested evidence unequivocally demonstrates that Respondent discharged storm water associated with industrial activity without an NPDES permit not just once

but hundreds of times. As set forth in more detail above,that-vidence includes that: (1) raw materials, baghouse dust, other dust, and other substances are stored on Respondent's site and subject to transport via storm water, (2) the conclusions of Respondent's own consultant that 0.01inch of rain will cause a discharge of storm water from Respondent's facility, and (3) the uncontested testimony of Dr. Hwang that 24-hour rain events of 0.23 inches and 0.6 inches will cause storm water falling on Drainage areas 4 and 1, 2 and 3 respectively to reach the municipalstorm sewer.

Respondent argues that this uncontested evidence is insufficient because Complainant did not directly observe and sample each of the hundreds of storm water discharges from Respondent's facility. Respondent'spost-hearing brief at 10-11. In other words, Respondent argues that circumstantial evidence cannot be used to establish the violation. Not surprisingly, Respondent cites no legal authority for its theory that circumstantial evidence is insufficient to prove a fact. That is because it is well established in criminal and civil cases that circumstantial evidence may be used to prove contested facts, including violations of the CWA. "At the outset, we note that in our legal system, juries in both civil and criminal cases are charged that they may rely on both direct and circumstantial evidence as proof of a fact. It is thus absurd for [the defendant] to complain about the use of circumstantial evidence in this case." *Colbro Ship Management Co., Ltd. v. United States,* 84 F. Supp. 2d 253, 259 M. Puerto Rico 2000) (circumstantial evidence can be used to establish liability under Section 311 of the CWA even under a "substantial evidence" standard). "Litigants routinely rely on circumstantial evidence to prove any number of contested issues. And if a prosecutor may rely wholly on circumstantial evidence to prove that a criminal defendant is guilty beyond a reasonable doubt, there is no apparent reason - and certainly not a reason apparent from the Constitution, the Federal Rules, or the Clean Water Act itself - to regard this type of proof as *per*

se deficient ...." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corporation,* 204 F.3d 149, 163 (4th Cir. 2000) (accepting circumstantial evidence to establish standing in a CWA citizen suit).

Equally unavailing is Respondent's theory that discharges from Respondent's facility to the municipal storm sewer are not an "addition of pollutants.[s3] The storm water discharged from Respondent's facility does not consist entirely of storm water, but rather consists of storm water associated with industrial activity. It is undisputed that precipitation falling on Respondent's property comes into contact with raw materials and waste associated with Respondent's industrial activities and eventually makes its way to waters of the United States. This scenario clearly constitutes an unauthorized discharge of pollutants under the CWA. *See* 40 C.F.R. § 122.2 (definition of "discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works").

> A discharge from [a facility engaged in industrial activity as defined at 40 C.F.R. § 122.26(b)(14)] through a conveyance that is used for collecting and conveying storm water that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant, constitutes `storm water discharge associated with industrial activity.' Complainant has established that Respondent's facility discharged storm water associated with industrial activity and that the discharge was through a conveyance which is a point source within themeaning of Secton 502(14) if the CWA. Such a discharge is a `discharge of a pollutant'and ... requires an NPDES permit.

Matter of J.S. Chemical Corp., D.No. CWA-02-2000-3407 (Aug. 10, 2001) (Order on Motion for Default and accelerated decision on issue of liability) (Biro, Chief AU) (citations omitted); *see also*

---

a This theory is the only one for which Respondent offers legal citation. However, the cases cited by respondent do not involve the discharge of storm water associated with industrial activity. Instead, they address the question of whether material taken from and then returned to a wetland or other water of the United States constitutes an addition of pollutant. In this case, Leed is discharging storm water and is not returning water or other materials to the St. Clair municipal separate storm sewer or Mill Creek. Thus, the cases cited in Respondent's brief are not relevant.

Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004) (discharge of storm water from debris piles, large trucks, and construction equipment on site to stream behind property that held to be discharge of pollutants from a point source); *Committee to Save the Mokelumne River. v. East Bay Mun., 13* F.3d at 308-09 (surface water collected and channeled was a discharge of pollutants); *North Carolina Shellfish Growers Ass 'n v. Holly Ridge Associates, L.L.C.,* 278 F. Supp. 2d 654 (E.D.N.C. 2003) ("It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary." *(quoting Natural Resources Defense Council v. EPA,* 966 F.2d 1292, 1304 (9th Cir. 1992))); *In re J&L Specialty Products Corp.,* 5 E.A.D. 333, 351-54 (EAB 1994).

Respondent asks the Court to accept, against the weight of the evidence (indeed, without a scintilla of evidence), that storm water falls on the piles of raw materials and waste and the thick layer of loose dust covering Respondent's facility, flows across the various drainage areas, and is discharged through the outfalls without picking up or transporting any dust, particles or pollutants.That proposition flies in the face of the evidence and common sense.

That precipitation falling on Respondent's facility picks up and carespollutants from raw . materials and waste is confirmed by Respondent's own sampling, which demonstrates that storm water discharging from Outfalls 1-4 contained substantial quantities of the same pollutants, including lead, cadmium, total suspended solids, etc., that are in the dust, baghouse dust, and raw materials exposed to precipitation at Respondent's facility. Stip. Ex. *1; see also* Tr. 94-96 (Wojciechowski) (scrap metal used by Leed may contain a variety of metals, including but not limited to, lead, cadmium, Molybdenum, manganese and chromium). Respondent's assertion that there is no evidence that materials sampled near storm sewer inlets came from the Leed facility is incorrect. With respect to Sample 3 (CX 66) (discussed in Respondent's post-hearing brief at pages

16-17), that sample was taken at an inlet at the bottom of the rock-lined channel depicted on CX 18 and Stip. Ex. 3, page EPA 0175a. Respondent's own PPC states that storm water from the Leed facility flows into the rock-lined channel downhill to this inlet and then is directed to Outfall 4 (i.e., the municipal storm sewer). Stip. Ex. 3, page EPA 0163 & EPA 0175a. This was confirmed by physical evidence showing that this inlet lies along the path of storm water flow from Leed facility, and the way the solids were deposited indicated they had been conveyed by storm water flow from the Leed facility. TR. 531-32, 768-69 (Harsh); CX 5G. Not surprisingly, the very same pollutants found in Respondent's storm water discharge were then found in solids deposited along the established flow path of storm water from Respondent's facility.[4] *Compare* Stip. Ex. 1, *with CX* 66.

Apparently grasping at straws, Respondent tries to obfuscate by hypothesizing (without evidentiary support) other sources of discharge to the municipal storm sewer. However, even if true, the presence of other discharges does not negate or detract from the fact and the seriousness of Respondent's incontrovertible discharge of pollutants. *See United States v. Gulf Park Water Co., Inc.,* 14 F. Supp. 2d 854, 859-60 (S.D. Miss. 1998); *Public Interest Research Group v. Powell Duffryn Terminals, Inc.,* 720 F. Supp. 1158, 1167 (D.N.J. 1989), *aff'd in part, rev'd in part on other grounds,* 913 F.2d 64 (3d Cir. 1990), *cert. denied,* 498 U.S. 1109 (1991). Moreover, Respondent has failed to offer *any* evidence (beyond the "testimony" of its counsel at the hearing and in its brief) thatany other source discharges or contributes the same type of pollutants to the portions of the municipal storm sewer to which Respondent discharges. For example, Respondent's brief at page 17 merely states that "lead and cadmium ***can*** be naturally occurring in soils (Tr. 946) and ... lead ... ***can*** be found in soils due to *inter* alia, historical deposition from leaded gasoline ...." (emphasis

---

Respondent tries to make something of Mr. Harsh's distinction between soils and solids. Respondent's brief at 17. Mr. Harsh's testimony, however, was clear that the observable physical characteristics of the sample area demonstrate that the sample areas lay in the path of storm water flows from Respondent's facility and that the materials sampled were deposited as a result of storm water flows from Respondent's facility.

added). Respondent offers no evidence that the soils at or near the Leed facility in fact do contain naturally occurring lead and cadmium or lead from the historical deposition of leaded gasoline, let alone any evidence as to what those levels might be. Although Respondent cites the transcript at page 945, the only testimony on that transcript page or anywhere in the record (other than counsel'sassertions) is that there are variable levels of background lead in the environment.[5]Respondent has offered no evidence to support its inference that Complainants' samples reflect background lead levels or anything other than the lead that incontrovertibly is present and available for transport in storm water from the Leed facility.

Despite Respondent's references to the presence of a coal mine and the use of coal dust or cinders on nearby roads, the only evidence in the record demonstrates that neither lead nor cadmiumare pollutants associated with coal. Stip. Ex. 2, page EPA 0928; Tr. 757 (Harsh). While Respondent states that there was a landfill near the Leed facility, Respondent offers no evidence as to what was in the landfill, the boundaries of the landfill,[6]or whether storm water might have been collected and retained on the landfill premises. Respondent offers absolutely no evidence that the landfill

---

5 Q: And it's true that in urban environments and developed areas the concentrations of lead in soil from lead depositions from gasoline emissions alone is still present and evident. You would agreewith me on that?

A: I'm not sure I can from direct experience.

Q: But as a risk assessor and toxicologist, you understand that it's a common assumption that lead contamination is ubiquitous in urban areas due to the deposition of lead from leaded gasoline, aren't you?

A: From my experience in correct - on corrective action sites there's actually quite a bit of variability inwhat we now call background lead.

Q: But you agree with me that there is background lead in the environment?

A: There is lead naturally in the

environment.Tr. 945-46 (Prince).

6 The only testimony on that point is that the boundary of the landfill extends southward off CX 18, and therefore south of the storm inlet to which some of Leed's storm water discharges. Tr. 1182 (Quinn).

discharged lead and/or cadmium. Likewise, while Respondent offers some evidence that storm water from part of State Route 61 might enter the same sewer inlet as the discharges from Leed Outfalls 1, 2, and 3 (but ***not*** Outfall 4 which is not adjacent to Route 61), Respondent offers no evidence that any discharge from State Route 61 contained lead or cadmium.

Similarly, while Respondent notes that Leed's property line does not extend all the way to Route 61, the channelized erosion scars through which a portion of Leed's discharges from Outfalls 1-3 flow (but again not Outfall 4 which is on the Leed property) are located on an undeveloped hillside consisting of trees and vegetation with no industrial facilities.[7]Tr. 758-59 (Harsh).

The final straw grasped by Respondent is Respondent's theory that DEP's issuance of an NPDES permit in 2004 somehow negates hundreds of unauthorized discharges by Respondent prior to the date of the permit. Respondent's brief at 21. On its face, however, Respondent's NPDES permit is effective March 25, 2004, and nothing in the permit indicates that it applies retroactively.[8]Stip. Ex. 2, page EPA 0898. Moreover, as will be discussed in greater detail below, DEP did not simply look at the information that Leed provided in its Notice of Intent and authorize Leed to carry on. The NPDES permit sets forth effluent limitations in the form of best management practices. Those best management practices were to be developed by Leed in its Preparedness, Prevention and

---

[7] While Respondent's brief repeatedly notes that some (but not all) of the inlets to the municipal storm sewer through which storm water associated th industrial activity from the Leed facility discharges are not on Leed's property (Respondent's brief at 16, 17, 19), Leed's purpose in repeatedly making this point is unclear. Respondent cites no authority. Nothing in the CWA requires that the discharger own the entire point source or path traversed by its discharge, nor does the CWA require that the discharger own the location at which its discharge enters a water of the United States. The CWA merely requires that the discharger cause the discharge. *See Dague v. City of Burlington, 732* F. Supp. 458 470 (D. Vt. 1989) (fact that city did not own land on which culvert is located did not preclude city's liability for discharge from city-owned landfill through culvert); *United States v. VelsicolChemical Corp.,* 438 F. Supp. 945, 947 (D.C. Tenn. 1976) ("The fact that defendant may discharge through conveyances owned by another party doesnot remove defendant's actions from the scope of [the CWA]"); *see also Baykeeper v. City of Saratoga,* 141 F.3d 1178 (Table) (96 Cir. 1998) (1998 WL 108466). In this case, as set forth above and in Complainant's initial post-hearing brief, Respondent has discharged storm water associated with industrial activity that flows through pipes, erosion scars,swales and other point sources and discharges to a water of the United States.

[8] Indeed, consistent with Section 402(b)(1)(B) of the CWA, 33 U.S.C. § 1342(b)(1)(B) (limiting the term of an NPDES permit to five years) and 40 C.F.R. § 122.46 (same), Leed's NPDES permit states that it commences March 25, 2004 and expires March 24, 2009. Stip. Ex. 2, page EPA 0898.

Contingency Plan ("PPC"). The contents of the PPC were specifically described in the NPDES permit. *See infra. To* the extent Leed has not implemented appropriate storm water controls, that is because Leed has violated its NPDES permit, not because the permit did not require controls. ***Leed's own consultant testified that Leed's PPC does not comply with the permit because it does not describe the requisite storm water controls.*** *See infra.*

In sum, the preponderance of the evidence (in fact, *all* of the evidence) in the record, both direct and circumstantial, establishes that Respondent has discharged pollutants in the form of stormwater associated with industrial activity hundreds of times without an NPDES permit.

II. THE EVIDENCE SUPPORTS ASSESSMENT OF A PENALTY OF $157,500 FOR THE VIOLATIONS PROVED UNDER COUNTS XIV AND XV (CLEAN WATER ACT VIOLATIONS)

As set forth more fully in Complainant's initial post-hearing brief, application of the CWAstatutory penalty factors (i.e., the nature, circumstances, extent and gravity of the violations, culpability and history of violations of the Respondent, economic benefit to the Respondent, and Respondent's ability to pay) warrant a penalty of $157,500 for the Clean Water Act violations proved pursuant to Counts XIV and XV of the Complaint. Nothing in Respondent's post-hearing brief warrants a reduction of the penalty.

A. Economic Benefit

With respect to economic benefit, Respondent concedes that Complainant's overall theory of delayed and avoided costs is correct. Respondent also concedes that "if it had timely obtained its NPDES permit, it would have borne the $4,396.18 costs associated with preparation of the permit application.in1999, instead of 2004, and the periodic site inspection costs, *fairly estimated by Mr.* ***Harsh at $500.00.***" Respondent's post-hearing brief at page 30 (emphasis added); *see also* Respondent's post-hearing brief at 5. Thus, Leed disputes two elements of the approximation of

economic benefit offered by Complainant: the avoided costs of semi-annual sampling and thedelayed costs associated with periodic removal of the baghouse dust from the facility.

With respect to the avoided costs of semi-annual sampling, both contests inclusion of this activity as an avoided cost and states that the Presiding Officer need not decide the issue. *Compare* Respondent's post-hearing brief at 29,.n. *8 with* Respondent's post-hearing brief at 30. Leed's position that the NPDES permit does not requirie sampling ignores its own PPC Plan, which as explained below is an enforceable part of the NPDES permit. Leed's PPC Plan calls both for sampling required by the NPDES permit ***and*** sampling during precipitation events: ***"Leed Foundry also monitors the facility's storm water run-off during precipitation events.*** **Semi-annual sampling** events and site inspections are conducted in accordance with the requirements of Pennsylvania's General Industrial Stormwater Permit under the National Pollutant Discharge Elimination System (NPDES)."Stip. Ex. 3, page EPA 0171 (emphasis added). Leed apparently believes that the second sentence quoted above means that Leed will conduct semi-annual sampling only to the extent required by Appendix J of its NPDES Permit. *See* Respondent's post-hearing brief at page 29, footnote 8. Leed's consultant, who prepared the PPC Plan, however, testified that the first sentence means that Leed will conduct sampling after precipitation events regardless of Appendix J. Tr. 820-21 (Epps). Thus, Complainant's use of two sampling events per year as an approximation of avoided costs.actually is quite conservative and underestimates the costs avoided by Leed's failure to monitor during the hundreds of precipitation events that occurred from March 1999 - March 2004.

With respect to the cost of periodic removal of the baghouse dust, Leed apparently arguesthat removal of the baghouse dust and its treatment as hazardous waste by the waste disposal contractor is not relevant to Leed's obligations under the CWA and should not be considered an avoided cost for purposes of the CWA penalty. Leed again, however, ignores its own PPC Plan,

which states that: "Foundry sand from iron casting production is hauled and disposed of or treated by licensed disposal companies such as Process Recovery Corporation, Clean Earth of Maryland, and the Western Berks Refuse Authority. Fly ash is hauled by U.S. Bulk Incorporated and disposed of or treated by U.S. Liquids of Detroit, Incorporated."Stip. Ex. 3, page EPA 0162. Thus, this is not a case where Complainant has proposed for purposes of approximating economic benefit a compliance scenario that Respondent could have, but did not, employ. Rather, Complainant's compliance scenario used the actual cost of the best management practice that Respondent actually implemented. Complainant's approximation of economic benefit, therefore, appropriately reflects reality. *See In re: John A. Capozzi d/b/a Capozzi Custom Cabinets,* RCRA (3008) App. No. 02-01, 11 E.A.D. (EAB March 25, 2003)*(Complainant's compliance scenario for purpose of approximating economic benefit should reflect reality of method that Respondent actually used to come into compliance).

B. Nature, circumstances, extent and gravity of the violations

Respondent's theory regarding the gravity component of the penalty is that there should be areduction of the gravity component because Complainant failed to include a sixteenth count in the Complaint for violations of Respondent's NPDES permit (once it finally obtained one). Respondent's argument that its penalty should be reduced because it is guilty of even more violations than those asserted in the Complaint is, of course, ludicrous.

First, it is important to note what Respondent does ***not*** contest. Respondent does not contestthat lead and cadmium are toxic pollutants and that discharge of these pollutants are potentially harmful to human health and the environment. Respondent offered no evidence or argument to contest the testimony of EPA's toxicologist, Dr. Ruth Prince, that lead exerts a toxicological effect on virtually every living organism: humans, animals, birds, aquatic organisms and plants. Nor did

Respondent offer any evidence or argument to contest Dr. Prince's identification of the lead levels ofconcern for each category of organism. Tr. 916-17, 925 (Human: 400 mg/kg (residential), 750 mg/kg (industrial); birds 11 mg/kg; mammals 56 mg/kg, 128 mg/kg benthic acquatic organisms). Nor did Respondent contest that the levels of lead found in waste and sediments that were exposed to precipitation at Respondent's facility or had been transported by storm water flowing from Respondent's facility often exceeded the levels of concern by orders of magnitude. Tr. 926-27, 931-32, 936-37; see alsotr. 391-72 (Fellinger) (bagouse dust: 69,000-144,000 mg/kg); tr. 605-07 (Harsh), 921 (Prince) (sediments: 1130 mg/kg, 1,530 mg/kg). Respondent also did not contest Dr. Prince's expert opinion that, given the foregoing, there was likelihood of risk to humans, birds, mammals and upon organisms in Mill Creek as a result of Respondent's discharges. Tr. 926-27, 930, 934-36. Respondent also does not contest that storm water sampled from Respondent's outfalls contains very high levels of lead and cadmium. Stip. Ex. 1.

In other words, Respondent (quite correctly) does not even attempt to persuade the Court thatthe levels of lead and cadmium discharged in storm water associated with Respondent's industrial activities do not pose a threat to human health and the environment.

While Respondent notes that Complainant did not perform benthic studies or analyze fish tissue, Respondent cites no legal citation for the significance of this point. That is because it is well established that Complainant need not prove an actual increase in pollution in the receiving water attributable to the discharge to demonstrate the seriousness of Respondent's violations. *See, e.g., See Committee to Save Mokelumne River v. East Bay* ***Mun.,*** 13 F.3d at 309; *United States v. Gulf Park Water Co., Inc.,* 14 F. Supp. 2d 854, 862 (S.D. Miss. 1998); *United States v. Smithfield Foods, Inc.,* 972 F. Supp. 338, 344 M.D. Va. 1997), *aff'd in part, reversed in part on other grounds,* 191 F.3d 516 (4th Cir. 1999), *cert. denied,* 531 U.S. 813 (2000). Moreover, the fact that Mill Creek has

been identified as impaired by acid mine drainage is irrelevant. The Environmental Appeals Board and the courts have consistently rejected the theory that there should be a penalty reduction simply by virtue of the fact that the receiving water is impaired by other sources of pollution, particularly asone of the goals of the CWA is to "restore" the integrity of the nation's waters. *See In re Pepperell Associates,* 9 E.A.D. 83, 117 (EAB 2000), affd 246 F.3d 15 (1StCir. 2001) and the cases cited therein.

The remainder of Respondent's arguments regarding gravity rely upon a misreading of its NPDES permit to try to justify its longstanding failure to control the discharge from its facility of storm water associated with its industrial activities. Even accepting that the terms and conditions of an NPDES permit issued in March 2004 are relevant at all to discharges that occurred prior to that date,[9] Respondent's argument still fails.

Respondent's repeated assertion that its NPDES permit does not impose effluent limits (e.g., Respondent'Spost-hearing brief at 5) is simply incorrect as a matter of fact and law. As set forth in more detail below, the NPDES permit clearly requires Leed to implement best management practices(`BMPs") to control the discharge of storm water from its facility. It is well-established that effluent limits need not be numeric, and that BMPs are a type of effluent limitation.[10] *See NRDC v. Costle,* 568 F.2d 1369, 1379-80 (D.C. Cir. 1977) (Permit may prohibit industry practices that aggravate pollution); *In re Government of the District of Columbia Municipal Separate Storm Sewer System,* 10 E.A.D. 323, 336-37 (EAB 2002).

---

9 It is not at all clear that the terms of the NPDES Permit, which post-date the unauthorized discharges at issue here, are relevant. *Cf. United States v. Marine Shale Processors,* 81 F.3d 1329, 1338 (5thCir. 1996) (rejecting argument that permit exceedances could be based upon fast flush samples where subsequent regulatory change allowed consideration of samples taken during entire storm event). Regardless, it is clear that Leed has not complied with its NPDES permit and that its NPDES permit did not authorize uncontrolled discharges from Leed's facility.

10 Respondent's NPDES Permit does contain a numeric effluent limitation for discharges of storm water associated with piles of coal. Stip. Ex. 2 at page EPA EPA 0903. Respondent apparently believes that this particular numeric effluent limitation does not apply to its facility which stores "coke" but not "coal" as a raw material, at least for purposes of the CWA.

There is no doubt that Respondent's NPDES Permit requires the implementation of BMPs.Part C.3 of Respondent's NPDES permit requires Respondent to develop and implement a PPC:

> "in accordance with 25 Pa. Code § 101.3 and [DEP's] `Guidelines for Development and Implementation of Environmental Emergency Response Plans' in conjunction with `Supplemental Guidance for the Development and Implementation of Preparedness, Prevention and Contingency (PPC) Plans under the National Pollutant Discharge EliminationSystem (NPDES) Storm Water Permitting Program.' The PPC Plan shall identify potential sources of pollution which may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the PPC Plan shall describe the implementation of practices which are to be used to reduce the pollutants instorm water discharges at the facility ensuring compliance with the terms and conditions of this permit. The PPC Plan shall also include:
>
> (1) Storm Water Management Practices.
>
> The PPC Plan shall contain a narrative consideration of the appropriateness of traditional storm water management practices (practices other than those which control the source ofpollutants) and the use of BMPs to control stormwater runoff and prevent storm water pollution. Based on an assessment of the potential of various sources at the plant to contribute pollutants to storm water discharges, the PPC Plan shall set forth measures determined to be reasonable and appropriate which shall be implemented and maintained.

Stip. Ex. 2, page EPA 0920.

Complainant's Exhibit 114 is DEP's *Guidelines for Development and Implementation of Environmental Emergency Response Plans* and the *Supplemental Guidance for the Development and Implementation of Preparedness, Prevention and Contingency (PPC) Plans under the National Pollutant Discharge Elimination System (NPDES) Storm Water Permitting Program,* incorporated by reference in the NPDES Permit. Tr. 825-26 (Epps); *see* Stip. Ex. 2 at page EPA 0920. These guidance documents specifically instruct how the PPC should address Respondent's storm water discharges. Most pertinent for purposes of this action, Respondent was directed to include in its PPC:

> F. Storm Water Management Practices
>
> Provide a narrative considering the appropriateness of traditional storm water management practices (practices other than source control) and the use of BMPs to control storm water

> runoff and prevent storm water pollution. Based on an assessment of the potential of various sources at the plant to contribute pollutants to storm water, provide that measures determinedto be reasonable and appropriate, be implemented and maintained.
>
> Traditional storm water management practices are measures which reduce pollutant discharges by reducing the volume of storm water discharges the volume of storm water discharges, such as swales, or preventing storm water to run onto areas of the site whichconduct industrial activities....

CX 114 at pages 35-36.

Accordingly, it is clear that the NPDES permit requires Respondent to implement effluentlimitations in the form of Bsto control its storm water discharge.

Respondent's own consultant concedes that the PPC Plan he prepared for Respondent (and that Respondent claims it has implemented) does not contain a narrative discussion of appropriate BMPs to control the volume of storm water discharging from the facility as mandated by the NPDESpermit. Tr. 821-23, 827 (Epps). As we know from its repeated representations throughout its brief, Respondent has not implemented any controls on its volume of storm water. This is consistent with Respondent's repeated statements that it has not changed its operations or processes as a result of issuance of the NPDES permit.

Thus, the NPDES permit in no way authorized the uncontrolled discharge of storm water associated with industrial activity from Respondent's facility, nor did the NPDES permit ratify Respondent's status quo. Respondent's argument that its NPDES Permit ratified its unpermitted discharges and its failure to control discharges of storm water from its facility is based on its willful refusal to acknowledge the requirements of its NPDES permit, even in the face of the testimony of its own consultant. Accordingly, Respondent's theory, which flies in the face of the plain language of the NPDES permit and its consultant's testimony, fails. t Respondent is equally incorrect when it

---

" To the extent Respondent states that DEP somehow "approved"its insufficient PPC Plan (Respondent's **post-hearing** brief at 29), there is no evidence to support that assertion. While Mr. Epps testified that he submitted the PPC **Plan** to DEP when he submitted the NOI (Tr. 798-99 (Epps)), there is no evidence anywhere in the record that DEP approved the

asserts that the NPDES Permit authorized or ratified the discharge sampled in November 2003 and reported in its NOI. To the contrary, on the very same page of the NOI directs Respondent that: "A PPC Plan consistent with the regulations at 25 Pa Code § 101.3, must be completed and maintained on-site and implemented.[s12]

C. Culpability

Respondent's brief reflects Respondent's longstanding pattern of environmental negligence and implementation of bare minimum controls only when ordered to do so by a regulatory agency. As described more fully in Complainant's initial post-hearing brief, Leed did not cover its baghouse dust piles until cited by DEP for fugitive emissions. RX 2; RX 9; Answer of Respondent; Tr. 1071-72, 1078-81 (Quinn). Leed did not install a jersey barrier in front of the baghouse dust piles until

---

PPC Plan when it issued the NPDES permit. The only "approval" by DEP refers solely to the Notice of Intent, and that"approval"was explicitly conditioned *"subject to the Department's enclosed **PAG-3 [Le., the general permit], which incorporates all effluent limitations, monitoring and reporting requirements for the discharge of storm water composed** entirely of storm water associated, in whole or in part, with **industrial** activity, as **defined in this General** Permit, to surface waters of the Commonwealth, including to munipal separate **storm** sewers and **non-municipal** separate storm sewer."* Stip. Ex. 2 at page EPA 0898 (emphasis added). Both the Notice of Intent and the NPDES Permit refer to the development of a PPC Plan prospectively. *See* Stip. Ex. 1 at page EPA 0895 ("A PPC Plan, consistent with the regulations at 25 Pa. Code § 101.3, must be completed and maintained on-site and implemented"); Stip. Ex. 2 at page EPA 920 ("Operators of facilities covered under this general permit shall have developed a Preparedness, Prevention and Contingency (PPC) Plan"). Nothing in the permit or NOI requires submission of the PPCto DEP.

I2 To the extent Respondent argues that the gravity portion of its penalty should be mitigated because neither Mr. Harsh nor any other representative of Complainant contacted DEP to object to issuance of the permit or to point out deficiencies in Respondent's PPC Plan, Complainant submits that Respondent would have been the first to complain if considerations of an ongoing enforcement matter had been urged upon the NPDES permitting authority. *Cf. In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 790-94 (EAB 1995), *aff'd,* 81 F.3d 1371 (5thCir. 1996), *cert. denied,* 513 U.S. 1148 (1996). Respondent's brief is also misleading in that it states that Mr. Harsh "had one or more communications with PaDEP regarding the submission prior to ist issuance of the permit to Leed." Mr. Harsh testified that his communications with DEP "regarding the submission" were limited to inquiring whether Leed's NOI had been received and whether the permit had been issued. Tr. 698-701 (Harsh). The NPDES Permit is sufficient in that it instructs Respondent to develop and implement a PPC containing adequate BMPs to control its storm water discharge. The fault lies not in the permit or its issuance, but in Respondent's compliance. Thus, the appropriate response by Complaint would have been to amend the Complaint or file a separate complaint asserting permit non-compliance. That Complainant failed to do so does not warrant a reduction of the gravity component of the penalty. To the extent the Presiding Officer perceives that Complainant should have pursued Respondent's non-compliance, Complainant urges that the Presiding Officer not perpetuate any perceived insufficiency. Not even Respondent contests the toxic nature of its discharge. A reduction of the gravity component of the penalty based solely upon a perception by the Presiding Officer that Complainant should have been more aggressive would send a signal that Respondent's uncontrolled discharge of storm water laden with high levels of toxic pollutants, such as lead and cadmium, is "okay" and not serious so long as Complainant is insufficiently aggressive in its enforcement posture.

after Complainant's first inspection. Tr. 258, 261. Leed did not apply for an NPDES permit for the discharge of storm water associated with industrial activity until February 2004, after receiving an order to do so from EPA in December 2003. Stip. Ex. 1, 4.

Respondent's brief continues this pattern of obfuscation and recalcitrance. Although Respondent attempts to paint itself as an environmental good citizen, that picture is false. For example, in an unnumbered footnote on page 12 of its post-hearing brief, Respondent states: "EPA and Leed entered *a consent* order setting forth a time schedule for Leed's submission of an NPDESpermit application ...." (emphasis added). Leed, however, did not "consent" to the Administrative Order for Compliance issued to Leed by EPA on December 22, 2003. Rather that order was unilaterally issued to Leed. Stip. Ex. 4; CX 8.

In another example, on page 27 of Respondent's post-hearing brief characterizes the paving of Respondent's facility in 1998 as a "plant-wide dust management initiative undertaken in cooperation with PaDEP." While Respondent's counsel made a similar statement in his remarks to the Presiding Officer ***(see*** Tr. 187), counsel's unsworn remarks are not evidence. By contrast, Mr. Quinn testified that, while DEP representatives did advise Leed to reduce dust, the paving was *not* undertaken "in cooperation with PaDEP," but rather represented a business decision by Leed: "And local DEP representative I believe received a couple of complaints that dust was coming off our property from truck traffic. So he suggested that we do something, perhaps water truck or whatever, but we just decided to go ahead and pave the property." Tr. 993-94 (Quinn).

Equally misleading is Respondent's implication that its failure to obtain an NPDES permit for the discharge of storm water associated with industrial activity was inadvertent because Mr. Quirin thought he had one. Respondent's post-hearing brief at 28. While a former consultant had informed Mr. Quinn that Leed needed an NPDES permit, Mr. Quirin testified: "The next time he

came up to visit out us after we paved he says uh-uh, I think you need a storm water permit now. And I said, what's that? And he said, well it's a permit that, you know, you're going to be required to have. And I said, well, okay, you know, whatever. And I thought he went ahead with it, but - *and I* ***didn't pursue*** *it"* Tr. 999 (Quinn) (emphasis added). Mr. Quinn also admitted under cross-examination that he was aware he had not signed a permit application or paid any consultant bills forpreparing a permit application. Tr. Tr. 1149 (Quinn). Respondent tries to make something of Mr. Quirin's apparent show of looking for a permit when Mr. Harsh visited the facility in 2003. Respondent's post-hearing brief at 27-28. Respondent's effort, however, is undermined by the fact that, even after Mr Harsh's visit, Leed did not actually seek an NPDES permit until ordered to do so by EPA. Stip. Ex. 1, 4.

Continuing its pattern of ignoring its own PPC and not implementing compliance until ordered to do so, Respondent persists in disputing that it has any obligation under the NPDES Permitto sample its storm water discharge (Respondent's post-hearing brief at page 30), apparently because DEP inadvertently directed Respondent to comply with Appendix J of the NPDES Permit (which applies to "additional facilities" and gives the permittee the option of either monitoring or inspection), rather than Appendix B (which applies to primary metals facilities, such as Leed, and requires monitoring).[13]Respondent persists in arguing there is no obligation to monitor, ignoring the portion of the PPC Plan (enforceable through the NPDES permit) representing that Leed samples after precipitation events and even after its own consultant testified that Appendix J did not modify the commitment to conduct sampling after precipitation events. Tr. 820-21 (Epps). In other words,

---

13 Despite its clear knowledge that Appendix B was the appropriate appendix for its facility, Leed failed to notify DEP of its apparent mistake and merely confirmed that it need only comply with whatever Appendix was cited in the permit. *See Tr. 834-35, 838* (Epps).

in the absence of an enforcement action for violating its permit, Respondent apparently will continueto refuse to conduct the monitoring called for in its PPC.

Even more baldly, Respondent actually argues that the gravity portion of the penalty should be reduced because Respondent has, so far, gotten away with violating its NPDES Permit. *As* noted in the previous section, despite the testimony of its own consultant that its PPC violates the NPDES permit because it does not contain the required BMPs and storm water controls, Respondent continues to assert that it is not required to implement BMPs because its PPC does not describe any. Respondent's post-hearing brief at 5. Indeed, Respondent proudly and repeatedly asserts that it has not changed any of its operations in response to issuance of the NPDES permit. Respondent's post-hearing brief at 5, 21, 28-29. In fact, Respondent is not even sure that it has fully implemented even its inadequate PPC. In its brief, it states without citation to the record or to any specific portion of the PPC,[14]only that "it is Leed's ***belief*** that ***most,*** *if* ***not all*** of the "Best Management Practices" that are the subject of the PPC Plan have been in effect ...." Respondent's post-hearing brief at 21 (emphasis added). *See also* Respondent's post-hearing brief at 16 ("Leed ***believes*** the material most likely was cleaned up at the end of the workday ....") (emphasis added). In other words, because Complainant did not include in the Complaint a Count XVI for violating the NPDES permit, Respondent not only thinks it has gotten away with having an inadequate PPC, but that it should be rewarded with a reduced penalty for having done so.

---

14 Which would prove difficult, given that, aside from removal of the baghouse dust and a generic reference to housekeeping without any details, the PPC contains no BMPs related to storm water controls.

15 As noted in Complainant's initial brief, Respondent has no regular schedule even for street sweeping. Tr. 429 (Harsh) (Respondent could not produce housekeeping protocols). Except when the words were actually put in his mouth by his own counsel or the Presiding Officer, W. Quinn was unable even to testify that the street sweeper was operated daily, and simply reiterated only that "we do the best we can." Tr. 1107-08, Tr. 1113, Tr. 1173-74, Tr. 1178-79 (Quinn).

Respondents' longstanding pattern of avoiding its environmental obligations until caught by a regulatory agency and ordered to do something should not be rewarded by mitigation of its penalty. **REDACTED**

REDACTED

REDACTED

III. CONCLUSION

For the reasons set forth herein and in Complainant's initial post-hearing brief, Complainantrespectfully requests that the Presiding Officer assess the full statutory maximum penalty of $157,500 for the CWA violations alleged in Counts XIV and XV of the Complaint.

Respectfully submitted,

Date: Z

Kerry Nelson
Senior Assistant Regional Counsel
U.S. EPA
Region III

rN

Stefatiia D. Shamet
Senior Assistant Regional Counsel
U.S. EPA
Region III

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the original of Complainant's Post-Hearing Reply Brief,EPA Docket Nos. RCRA-03-2004-0061 and CWA-03-2004-0061 to be filed with the Regional Hearing Clerk, US EPA Region III, using appropriate procedures to protect the confidentiality of Confidential Business Information (redaction of claimed CBI material). In addition, I hereby certify that on this date I caused a copy of the Complainant's Post-Hearing Reply Brief, EPA Docket Nos. RCRA-03-2004-0061 and CWA-03-2004-0061 in its unredacted form to be filed with the Regional Hearing Clerk, US EPA Region M. I further certify that on this date I caused an unredacted and redacted copy of Complainant's Post-Hearing Reply Brief, EPA Docket Nos. RCRA-03-2004-0061 and ' CWA-03-2004-0061 to be servedon the following in the manner indicated and pursuant to appropriate procedures to protect the confidentiality of Confidential Business Information:

BY FEDERAL EXPRESS:

Mariah Whiting-Beale, DCO (unredacted
version)Offices of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Suite 350
1099 14th Street, N.W.
Washington, D.C. 20005

Honorable William Moran (redacted
version)Offices of the Administrative Law
Judges U.S. Environmental Protection Agency
Franklin Court Suite 350
1099 14th Street, N.W.
Washington, D.C. 20005

Timothy J. Bergere, Esq. (unredacted and redacted
versions)Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad Street, 24th floor
Avenue of the Arts
Philadelphia, PA 19109

Maria Goodine

Maria Goodine

110(9

Date