BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In Re:	)	EAB Appeal No. _____
	)	
Service Oil, Inc.,	)	
	)	
Respondent.	)	
	)	
Docket No. CWA-08-2005-0010	)	
	)	

APPEAL BRIEF

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APPEAL BRIEF

Service Oil, Inc. ("Service Oil," or "Respondent"), appeals from the Initial Decision Upon Remand of the administrative law judge ("ALJ"), issued December 7, 2010, imposing a civil penalty of $32,287 for violations of the Clean Water Act.

I. Introduction.

This case was the subject of an Initial Decision by the ALJ rendered on August 3, 2007. Respondent appealed that 8/3/07 Initial Decision to the Environmental Appeals Board ("EAB"), and on July 23, 2008, the EAB rendered its Final Decision & Order (in CWA Appeal No. 07-02), affirming the administrative law judge's 8/3/07 Initial Decision in its entirety.

Service Oil then appealed the EAB's 7/23/08 Final Decision & Order to the United States Court of Appeals for the Eight Circuit. In a December 28, 2009, decision, Service Oil, Inc. v. United States EPA, 590 F.3d 545 (8th Cir. 2009), *rehearing denied*, April 14, 2010, the Eighth Circuit reversed the EAB's 7/23/08 Final Decision & Order, and remanded this case to the Environmental Protection Agency ("EPA") for redetermination of the amount of the penalty assessable against Service Oil, in accordance with 33 U.S.C. § 1319(g)(1)(A) and the Eighth Circuit's 12/28/09 opinion.

A copy of the Eight Circuit's opinion in this case is annexed hereto as Attachment "1;" a copy of the Eight Circuit's Order denying EPA's petition for rehearing is annexed hereto as Attachment "2;" and a copy of the Department of Justice's (DOJ's) 7/13/10 "Submittal of Opinion, Judgment, and Mandate from the United States Court of Appeals for the Eighth Circuit" is annexed hereto as Attachment "3."

II. Issue presented for review.

There is only one issue presented for review in the instant appeal to the EAB, and that issue is a legal one: Did the ALJ violate the law of the case doctrine and the mandate rule, when she

imposed a $32,287 penalty against Service Oil (a decrease of $3,353 in the penalty previously imposed in the EAB's 7/23/08 Final Decision & Order) in her 12/7/10 Initial Decision on Remand?

III. Argument.

1. The ALJ on remand violated the law of the case doctrine and the mandate rule.

An analysis of the ALJ's 12/7/10 Initial Decision on Remand must begin with a look at the Eighth Circuit's mandate, which provides in part as follows:

> In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. **EPA based the amount of the penalty not on unlawful discharges, but on Service Oil's failure to comply with the agency's permit application regulations**. Concluding that this is an expansion of EPA's remedial power not authorized by the governing statutes, we reverse and remand for redetermination of the penalty.
>
> * * *
>
> Applying the penalty factors mandated by 33 U.S.C. § 1319(g)(3), the ALJ assessed a $35,640 penalty for all violations. The ALJ began the penalty analysis by assessing Service Oil for the "rather nominal economic benefit" of $2,700 it obtained from non-compliance (delayed and avoided compliance costs). **The ALJ then increased the penalty to $27,000 based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction."** The ALJ increased the $27,000 penalty by ten percent because Service Oil, "albeit however slightly, had certainly caused the Red River to become more impaired," and increased the penalty another twenty percent to reflect Service Oil's culpability. On appeal, **the Environmental Appeals Board (EAB) affirmed the ALJ's § 1318 analysis and the penalty assessed, specifically upholding a ten-fold increase in the base economic benefit penalty because of Service Oil's "complete failure to apply for its storm water permit prior to starting construction."** *In re Service Oil, Inc.*, CWA Appeal No. 07-02, Final Decision & Order at pp. 34-35 (EAB July 23, 2008).
>
> Service Oil petitions for review of the EAB's final agency action, renewing its argument that failure to apply for an NPDES permit prior to construction in the time prescribed by EPA's permit regulations does not violate § 1318 and therefore cannot be the basis of a civil monetary penalty under § 1319(g)(1). Service Oil concedes that it is subject to an administrative penalty for its minimal storm water discharges prior to obtaining coverage under the general permit, and for failing to conduct required site inspections after it obtained permit coverage. We review the penalty assessment for abuse of discretion. *See* 33 U.S.C. § 1319(g)(8). **The**

amount of the penalty assessed, which must be determined in accordance with § 1319(g)(3), **was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations**. If that failure was not a violation of § 1318, triggering liability for an administrative monetary penalty under § 1319(g)(1), the penalty was based upon an impermissible factor and must be reversed. *See, e.g., Kelly v. EPA,* 203 F.3d 519, 523 (7th Cir.2000) ("An abuse of discretion by an agency involves ... a decision that rests on an impermissible basis.").

* * *

[T]he issue here is whether the failure to submit a timely permit *application* is a violation of § 1318(a). The regulations require that a person "proposing a new discharge," such as Service Oil in this case, "shall submit an application ... before the date on which the discharge is to commence." 40 C.F.R. §§ 1221(c)(1), 122.26(c). Failure to comply with that requirement *cannot* be a violation of § 1318(a) because that statute's record-keeping requirements are expressly limited to "the owner or operator of any point source." Before any discharge, there is no point source. . . .

* * *

As the Second Circuit held in invalidating a portion of EPA's regulations governing concentrated animal feeding operations, "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. E.P.A.,* 399 F.3d 486, 504 (2d Cir.2005). While acknowledging "the policy considerations underlying the EPA's approach," the court concluded that "it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges--not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original). *Accord NRDC,* 822 F.2d at 128 n. 24 ("The Act does not prohibit construction of a new source without a permit.... The Act only prohibits new sources from discharging pollutants without a permit, 33 U.S.C. § 1311(a), or in violation of existing NSPS standards, *id.* § 1316(e).") The same limitations apply in this case.

Our conclusion that EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application . . . .

The decision of the EAB based the amount of monetary penalty assessed primarily on Service Oil's "complete failure to apply for its storm water permit prior to starting construction." As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A), this was a statutorily impermissible factor. Accordingly, **we grant the petition for review, vacate the order assessing a civil penalty of $35,640, and remand to the agency for**

redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion.

Service Oil, Inc. v. United States EPA, 590 F.3d at 546, 548-51 (footnote omitted, emphasis added).

A. The law of the case doctrine and the mandate rule.

In 18 *Moore's Federal Practice*, § 134.23 (Matthew Bender 3d ed.), it is noted as follows:

> Appellate courts often remand a case to the lower federal courts for further proceedings. It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. This is the almost universal language describing the law determined by the mandate. Although this terminology has been widely adopted, the Supreme Court has noted that the mandate rule is not, strictly speaking, a matter of law of the case.[1] The nondiscretionary aspect of the law of the case doctrine is sometimes called the "mandate rule[1.1] and this terminology is more precise than the phrase "law of the case." On remand, the doctrine of the law of the case is **rigid**; the district court **owes obedience** to the mandate of the Supreme Court or the court of appeals and **must carry the mandate into effect according to its terms**.[1.2]

(Emphasis added, footnote references in original, but actual footnotes--the verbiage itself--is omitted).

The Supreme Court case referenced id. at footnote 1 is United States v. Wells, 519 U.S. 482, 487-88 n. 4 (1997).

As to the "nondiscretionary aspect of the mandate rule "referenced at footnote 1.1 in the above blocked quote, *Moore's Federal Practice* cites cases from the 2nd Circuit and the D.C. Circuit for the proposition that "the 'mandate rule,' an application of the 'law of the case' doctrine, states that a district court is bound by the mandate of a federal appellate court and generally may not reconsider issues decided on a previous appeal."

As to the notion that "the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry the mandate into effect according to its terms" referenced at footnote 1.2 in the above blocked quote, *Moore's Federal Practice* cites and summarizes cases from

the United States Supreme Court and from the 1st Circuit, 2nd Circuit, 3rd Circuit, 7th Circuit, 9th Circuit and 11th Circuit (once case is remanded circuit court is **bound by** decree; mandate is **completely controlling**; rule bars district court from reconsidering or modifying prior decisions ruled on by court of appeals; on remand, trial court **must proceed** in accordance with mandate of appellate court, which includes appellate court's opinion if mandate requires trial court to proceed in manner "consistent" with that opinion; law of the case **requires** district court to **follow mandate**; district court **may not vary or examine mandate except to execute it**; trial court must enter order in strict compliance with mandate).

In United States v. Bartsh, 69 F.3d 864 (8th Cir. 1995), the Eighth Circuit addressed the "law of the case" doctrine, and its corollary, the "mandate rule," as follows:

> This appeal is governed by the "law of the case" doctrine and its close relation, the mandate rule. . . . The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy. . . . Under this doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." . . .
>
> "Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system." . . . "If there are no explicit or implicit instructions to hold further proceedings [on remand], a district court has no authority to re-examine an issue settled by a higher court." . . . When an appellate court remands a case to the district court, all issues decided by the appellate court become the law of the case, *id.*, and the district court on remand must "adhere to any limitations imposed on its function at resentencing by the appellate court." . . . "Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms."

Id. at 866 (citations omitted).

B. An administrative agency is bound by the law of the case doctrine and the mandate rule, in the same manner as a trial court.

As noted in Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4478.3, '[a]n administrative agency is bound by the mandate of a reviewing court much as a lower court is bound by the mandate of a higher court," citing, among other cases, Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997) (EPA bound by law of the case doctrine); Starcon International, Inc. v. National Labor Relations Board, 450 F.3d 276, 278 (7th Cir. 2006) (NLRB and union bound by law of the case doctrine); Key v. Sullivan, 925 F.2d 1056, 1061 (7th Cir. 1991) (Secretary of Health and Human Services bound by law of case doctrine and the mandate rule, in a Social Security disability case); Rios-Pineda v. United States Department of Justice, Immigration & Naturalization Service, 720 F.2d 529, 532-33 (8th Cir. 1983), *reversed on other grounds*, 471 U.S. 444 (1985) ("[t]he law of the case is equally applicable in instances of remand to administrative agencies and remand to lower courts"); Scott v. Mason Coal Company, 289 F.3d 263, 267-68 (4th Cir. 2001) ("when we remand a case, the lower court must 'implement both the letter and the spirit of the . . . mandate." . . . This rule applies with equal authority to the Board and to the ALJ as administrative agencies.").

In the EAB's Remand Order in this case, the EAB directed the ALJ to "render a new initial decision that is consistent with the Eighth Circuit's decision." Remand Order at p. 2. The EAB thus concedes that the "law of the case doctrine" and its corollary, "the mandate rule," applied to the ALJ in the rendering of "a new initial decision."

C. The ALJ's task on remand.

Pursuant to the Eighth Circuit's mandate in Service Oil, Inc., all the ALJ was permitted to do on remand was redetermine the amount of the penalty to be imposed against Service Oil, "in accordance with 33 U.S.C. § 1319(g)(1)(A) and [the Eighth Circuit's] opinion."

In terms of a "redetermination of the amount of the penalty," such "redetermination" is limited to a deletion from the original penalty of the **entire amount** previously assessed against Service Oil (in the EAB's 7/23/08 Final Decision & Order), for Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction" Service Oil, Inc., 590 F. 3d at 548-51.

D. The ALJ's error on remand.

Rather than do what was mandated of her, the ALJ decided on remand to do indirectly what she was prohibited from doing directly--i.e., she left the penalty essentially unchanged, by leaving in her penalty calculation the "ten-fold increase in the base economic benefit penalty because of Service Oil's 'complete failure to apply for its storm water permit prior to starting construction.'" Service Oil, Inc., 590 F.3d at 548, quoting the EAB's 7/23/08 Final Decision & Order at pp. 34-35. She did so under the guise of simply slipping that ten-fold increase into an increase in the penalty for some other violation of the CWA, a slight-of-hand that is barred by the law of the case doctrine and the mandate rule.

The Eighth Circuit's mandate states in part:

> In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. **EPA based the amount of the penalty not on the unlawful discharge, but on Service Oil's failure to comply with the agency's permit application regulations.** Concluding that this is an expansion of EPA's remedial power not authorized by the governing statutes, we reverse and remand for redetermination of the penalty.

* * *

> **The ALJ then increased** the [$2,700 "economic benefit"] penalty **to $27,000** [i.e., a ten-fold increase] **based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction."** . . . On appeal, **the** . . . **EAB** . . . **affirmed** the ALJ's § 1318 analysis and the penalty assessed, **specifically upholding a ten-fold increase in the base economic benefit penalty because of Service Oil's "complete failure to apply for its storm water permit prior to starting construction."**
>
> * * *
>
> We review the penalty assessment for abuse of discretion. . . . **The amount of the penalty assessed**, which must be determined in accordance with § 1319(g)(3), **was based primarily on the failure to apply for a permit prior to starting construction**, as required by the EPA regulations. **If that failure was not a violation of § 1318, triggering liability for an administrative monetary penalty** under § 1319(g)(1), **the penalty was based on an impermissible factor and must be reversed**.
>
> * * *
>
> **The decision of the EAB based the** amount of [the] **monetary penalty assessed primarily on Service Oil's "complete failure to apply for its storm water permit prior to starting construction**." As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 13919(g)(1)(A), this was a statutorily impermissible factor. Accordingly, we . . . vacate the order assessing a civil penalty of $35,640, and remand to the agency for redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion.

Service Oil, Inc., 590 F.3d at 546, 548-49, 551 (emphasis and bracketed language added).

The Eighth Circuit having ruled that the ALJ's and EAB's prior decisions impermissively increased the $2,700 economic benefit penalty ten-fold, to $27,000, based on Service Oil's "complete failure to apply for and obtain a storm water discharge permit prior to the start of construction," the unlawfulness of that ten-fold increase became the law of the case. Id. at 546, 548-49, 551. The ALJ on remand cannot lawfully re-examine or recompute **any** penalty amounts she previously assessed against Service Oil, for any other CWA violation, and increase them ten-fold instead. All such other

penalty amounts likewise became the law of the case, in both the EAB's 7/23/08 Final Decision & Order and in the mandate of the Eighth Circuit.

The ALJ on remand took the position that she could keep the same ten-fold increase in the base penalty amount in her penalty calculation by simply calling it something else--something other than a penalty for Service Oil's "complete failure to apply for and obtain a storm water discharge permit prior to the start of construction." The ALJ on remand says, in her 12/7/10 Initial Decision Upon Remand, that the ten-fold increase in the base penalty amount for Service Oil is "now" for a "violation of what the Eighth Circuit properly recognized as the 'core prohibition of the CWA, that is Section 301's prohibition on discharging pollutants without a permit.'" See ALJ's 12/7/10 Initial Decision on Remand at p. 10.

As the Eighth Circuit ruled in United States v. Bartsh, "[t]he law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." 69 F.3d at 866.

The Eighth Circuit's mandate does not allow the ALJ to dress up the "ten-fold" increase as something else, and thereby do indirectly what she cannot legally do directly--i.e., penalize Service Oil for its "complete failure" to obtain a storm water discharge permit prior to the start of construction.

The mandate rule requires that EPA, on remand, delete--in total--**the entirety** of the penalty it previously assessed for Service Oil's "complete failure" to obtain a storm water discharge permit prior to commencement of construction. EPA cannot simply label that penalty as something else, and assess it against Service Oil for some other CWA violation that was already litigated, decided, and penalized (or not penalized) in the ALJ's and the EAB's prior decisions in this case, and was not

modified by the Eighth Circuit in Service Oil, Inc. v United States EPA. Resolution of that "some other CWA violation" in the ALJ's and the EAB's prior decisions in this case became **the law of the case** when neither side appealed it, and the Eighth Circuit left it untouched.

2. What the EAB must do in the instant appeal.

In keeping with the Eighth Circuit's mandate and the limitations it imposes upon remand--in redetermining the penalty in this case "in accordance with" 33 U.S.C. § 1319(g)(1)(A) and the Eighth Circuit's opinion--the EAB is now tasked with fixing the error committed by the ALJ in her 12/7/10 Initial Decision on Remand, by recomputing the penalty assessable against Service Oil as follows:

$2,446 -- Economic benefit[1]

$2,446 -- Nature, circumstances, and extent of the violations (in effect, a doubling of the economic benefit)[2]

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[1]This figure, $2,446, is $254 less than the original "economic benefit" figure set forth in the ALJ's Initial Decision of 8/3/07, which was affirmed in total in the EAB's 7/23/08 Final Decision & Order. In the ALJ's 12/7/10 Initial Decision Upon Remand, she made that $254 reduction by deleting from the $2,700 "economic benefit" amount that portion of it ($254) which had earlier been assessed by EPA because of Service Oil's failure to obtain a storm water discharge permit prior to the start of construction. See the ALJ's 12/7/10 Initial Decision Upon Remand at p. 9. The ALJ was correct in doing so.

[2]As explained in Service Oil's 9/16/10 "Respondent's Post-Remand Brief to the Administrative Law Judge" at pp. 6-7, given what the Eighth Circuit ruled as to the "ten-fold increase" in the economic benefit penalty (i.e., Service Oil was assessed a "ten-fold increase in the base economic penalty because of Service Oil's 'complete failure to apply for its storm water permit prior to starting construction'"), the entirety of that ten-fold increase in the economic benefit penalty must be deleted from the penalty now to be assessed against Service Oil. However, as set forth in Service Oil's 9/16/10 "Respondent's Post-Remand Brief to the Administrative Law Judge" (copy annexed hereto as Attachment "4" for ease of reference, minus its own attachments), Service Oil voluntarily consents to a doubling of the economic benefit penalty in this case for the "nature, circumstances, and extent of the violations," because otherwise the penalty assessable for the "nature, circumstances, and extent of the violations" would be zero (-0-), which is exactly where it was left by the Eighth Circuit.

As the Eighth Circuit noted:

> Service Oil concedes that it is subject to an administrative penalty for its minimal storm water discharges prior to obtaining coverage under the general

$489 -- Gravity of violations (10% of $4,892)

$1,076 -- Culpability (20% of $5,381)

$6,457 -- TOTAL PENALTY

CONCLUSION

A lower court or administrative agency, in this case EPA, may not vary or examine the Eighth Circuit's mandate except to execute it. United States v. Cote, 51 F.3d 178, 181 (9th Cir. 1995). A lower court or administrative agency, in this case EPA, must enter its decision on remand in strict compliance with the Eighth Circuit's mandate.. Aldridge v. Lily-Tulip, Inc., 40 F.3d 1202, 1208 (11th Cir. 1994).

Respondent, Service Oil, respectfully requests that the penalty assessed against Service Oil in this case be redetermined as set forth above, and that a Final Decision & Order on Remand be rendered by the EAB accordingly.

Dated: January 4, 2011.

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permit, and for failing to conduct required site inspections after it obtained coverage.

Service Oil, Inc., 590 F.3d at 549.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **Appeal Brief** was served by me, by First Class Mail, this 4th day of January, 2011, upon the following:

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Westlaw.

590 F.3d 545, 69 ERC 1993
(Cite as: 590 F.3d 545)

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United States Court of Appeals,
Eighth Circuit.
SERVICE OIL, INC., Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.
No. 08-2819.

Submitted: May 13, 2009.
Filed: Dec. 28, 2009.

Background: Construction site owner petitioned for review of an order of the Environmental Appeals Board (EAB), 2008 WL 2901869, affirming the Environmental Protection Agency's (EPA's) assessment of a civil penalty based on the owner's failure to apply for a storm water discharge permit prior to starting construction, as required by EPA regulations.

Holding: The Court of Appeals, Loken, Chief Judge, held that the EPA did not have authority under the Clean Water Act to assess administrative penalty for failing to timely submit application.

Petition granted; order vacated.

West Headnotes

[1] Environmental Law 149E ⚿196

149E Environmental Law
149EV Water Pollution
149Ek194 Permits and Certifications
149Ek196 k. Discharge of pollutants. Most Cited Cases
Regulations governing the timing and content of applications for discharge permits are within the broad rule-making authority delegated by the section of the Clean Water Act authorizing the Environmental Protection Agency (EPA) to prescribe such regulations as are necessary to carry out its functions under the Act. Clean Water Act, § 501(a), 33 U.S.C.A. § 1361(a).

[2] Environmental Law 149E ⚿223

149E Environmental Law
149EV Water Pollution
149Ek223 k. Penalties and fines. Most Cited Cases
Construction site owner's failure to apply for a National Pollution Discharge Elimination System (NPDES) permit within the time prescribed by the Environmental Protection Agency's (EPA's) regulations did not violate the record-keeping requirements of the Clean Water Act and, thus, could not be the basis for a civil monetary penalty under the Act; regulations required that a person proposing a new discharge submit an application before the date on which the discharge was to commence, Act's record-keeping requirements were expressly limited to the owner or operator of any point source, and there was not a point source before any discharge. Clean Water Act, §§ 308(a), 309(g)(1), 33 U.S.C.A. §§ 1318(a), 1319(g)(1); 40 C.F.R. §§ 122.21(c)(1), 122.26(c).

[3] Environmental Law 149E ⚿206

149E Environmental Law
149EV Water Pollution
149Ek204 Compliance and Enforcement
149Ek206 k. Violations and liability in general. Most Cited Cases
Unless there is a discharge of any pollutant, there is no violation of the Clean Water Act, and point sources are, accordingly, neither statutorily obligated to comply with Environmental Protection Agency (EPA) regulations for point source discharges, nor are they statutorily obligated to seek or obtain an National Pollution Discharge Elimination System (NPDES) permit. Clean Water Act, §§ 301, 402(a), 502(12), 33 U.S.C.A. §§ 1311(a), 1342(a), 1362(12).

[4] Environmental Law 149E ⚿223

Attachment "1"

149E Environmental Law
149EV Water Pollution
149Ek223 k. Penalties and fines. Most Cited Cases
The Environmental Protection Agency's (EPA) authority under the Clean Water Act to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants. Clean Water Act, §§ 301, 309(g), 33 U.S.C.A. §§ 1311, 1319(g).

***546** Michael Dan Nelson, argued, West Fargo, ND, for Petitioner.

Adam J. Katz, argued, U.S. Dept. of Justice, Environmental & National Resource Division, Washington, DC, for Respondent.

Before LOKEN, Chief Judge, BYE, Circuit Judge, and MILLER,[FN*] District Judge.

FN* The HONORABLE BRIAN STACY MILLER, United States District Judge for the Eastern District of Arkansas, sitting by designation.

LOKEN, Chief Judge.

Congress substantially amended the Clean Water Act in the Water Pollution Control Act Amendments of 1972, directing the Environmental Protection Agency (EPA) to adopt effluent limits for the discharge of various pollutants, and providing that "it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" that incorporates those effluent limits. *City of Milwaukee v. Illinois & Mich.*, 451 U.S. 304, 311-12, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981); *see generally* S.Rep. No. 92-414 (1972), reproduced in 1972 U.S.C.C.A.N. 3668, 3675-77, 3708-39. The Water Quality Act of 1987 expanded this regime by directing EPA to require permits for storm water discharges associated with industrial activity. *See* 33 U.S.C. § 1342(p)(2)-(4). In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. EPA based the amount of the penalty not on unlawful discharges, but on Service Oil's failure to comply with the agency's permit application regulations. Concluding that this is an expansion of EPA's remedial power not authorized by the governing statutes, we reverse and remand for redetermination of the penalty.

***547 I.**

The Clean Water Act prohibits the discharge of any pollutant into navigable waters from a point source except in compliance with an NPDES [FN1] permit issued by EPA or by an authorized state agency. *See* 33 U.S.C. §§ 1311(a), 1342(a), 1362(12); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir.1988). EPA's regulations provide that one intending to discharge "storm water associated with industrial activity" must apply for an individual NPDES permit, or for coverage under a "promulgated storm water general permit." 40 C.F.R. § 122.26(c)(1). "Industrial activity" includes "[c]onstruction activity ... except operations that result in the disturbance of less than five acres of total land area." 40 C.F.R. § 122.26(b)(14)(x). EPA's permit regulations provide that operators of facilities described in § 122.26(b)(14)(x) shall submit permit applications at least ninety days before the start of construction, or when required by an applicable general permit. 40 C.F.R. §§ 122.21(c)(1), 122.26(c). The North Dakota Department of Health, an authorized state agency, has issued a general permit applying to new and existing discharges of "storm water associated with construction activity." The general permit provides that, to obtain coverage, an operator "shall submit" a Notice of Intent and a Stormwater Pollution Prevention Plan thirty days prior to the start of construction.

FN1. NPDES is an acronym for National Pollution Discharge Elimination System.

In April 2002, Service Oil began construction of a

Stamart Travel Plaza on more than five acres of land in Fargo, North Dakota. When construction began, the site became a "point source." *See* 33 U.S.C. § 1362(14). A point source lacking a permit is subject to the core Clean Water Act prohibition-"the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The parties stipulated that storm water contains "pollutants." *See* 33 U.S.C. § 1362(6). "Discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The site's storm water discharges flow through Fargo's storm sewer system into the Red River of the North, part of the navigable waters of the United States. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

In October 2002, EPA and state Department of Health officials inspected thirteen construction sites in the Fargo area. Twelve, including Service Oil's Stamart site, lacked an NPDES permit or coverage under the Department of Health's general permit. Service Oil submitted a Notice of Intent to the Department and obtained coverage under its general permit. State officials closed their review in June 2004 without further action. EPA continued its review, ultimately concluding that Service Oil had not fully complied with the NPDES permit because it failed to conduct site inspections every seven days and after heavy storms and to record inspection results in a Site Inspection Record. This administrative enforcement action followed.

The Clean Water Act includes a variety of enforcement provisions found primarily in 33 U.S.C. § 1319. *See generally Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). Section 1319(g)(1) authorizes EPA to assess a civil monetary penalty if it "finds that any person has violated [33 U.S.C. §§] 1311, 1312, 1316, 1317, 1318, 1328, or 1345," or has violated a condition in an NPDES permit issued under § 1342. In this case, EPA's Complaint sought an $80,000 administrative penalty, alleging that Service Oil violated 33 U.S.C. §§ 1311(a) and 1342(p), ***548** and 40 C.F.R. § 122.26(c) by not obtaining a permit prior to commencing construction (Count 1), and by failing to comply with the permit's terms once issued (Count 2).

After Service Oil answered, EPA moved for accelerated decision (summary judgment). The ALJ denied summary judgment on Count 1, concluding that the failure to obtain an NPDES permit does not violate § 1311(a) absent proof of a discharge, and Service Oil disputed whether any discharge occurred after construction began but before it obtained coverage under the Department of Health's general permit. The ALJ noted that the regulations require a new storm water discharger to apply for a permit before construction, and therefore a statutory provision listed in 33 U.S.C. § 1319(g)(1) other than § 1311 "may provide a statutory basis for an enforcement action for failure to apply for a storm water permit as required by 40 C.F.R. § 122.26(c)." The ALJ granted summary judgment on Count 2-it was undisputed that Service Oil violated conditions of the general permit after obtaining coverage-but denied summary judgment on the question of penalty.

EPA then amended Count 1 to allege that Service Oil's failure to apply for a storm water discharge permit before commencing construction violated 33 U.S.C. § 1318 and 40 C.F.R. § 122.21. Service Oil opposed the amendment, arguing that § 1318 does not apply to the agency's permit application regulations, thereby preserving this *issue of law* for judicial review. After a hearing, the ALJ concluded that § 1318's record-keeping requirements encompass agency regulations requiring the pre-construction submission of a completed permit application. As a violation of § 1318 is enforceable under § 1319(g)(1), the ALJ concluded that Service Oil is liable on Count 1 regardless of whether EPA proved that a discharge occurred prior to obtaining coverage under the general permit. After a lengthy review of conflicting expert testimony, the ALJ further found that "dirt, sediment and concrete, did flow off-site during construction" and "would have reached the Red River." Therefore, Service Oil also

violated § 1311(a) by discharging pollutants without a permit.

Applying the penalty factors mandated by 33 U.S.C. § 1319(g)(3), [FN2] the ALJ assessed a $35,640 penalty for all violations. The ALJ began the penalty analysis by assessing Service Oil for the "rather nominal economic benefit" of $2700 it obtained from non-compliance (delayed and avoided compliance costs). The ALJ then increased the penalty to $27,000 based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction." The ALJ increased the $27,000 penalty by ten percent because Service Oil, "albeit however slightly, had certainly caused the Red River to become more impaired," and increased the penalty another twenty percent to reflect Service Oil's culpability. On appeal, the Environmental Appeals Board (EAB) affirmed the ALJ's § 1318 analysis and the penalty assessed, specifically upholding a ten-fold increase in the base economic benefit penalty because of Service Oil's "complete failure to apply for its storm water permit prior to starting construction." *In re Service Oil, Inc.,* ***549** CWA Appeal No. 07-02, Final Decision & Order at pp. 34-35 (EAB July 23, 2008).

> FN2. § 1319(g)(3) provides in relevant part: "In determining the amount of any penalty assessed under this subsection, the Administrator ... shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

Service Oil petitions for review of the EAB's final agency action, renewing its argument that failure to apply for an NPDES permit prior to construction in the time prescribed by EPA's permit regulations does not violate § 1318 and therefore cannot be the basis of a civil monetary penalty under § 1319(g)(1). Service Oil concedes that it is subject to an administrative penalty for its minimal storm water discharges prior to obtaining coverage under the general permit, and for failing to conduct required site inspections after it obtained permit coverage. We review the penalty assessment for abuse of discretion. *See* 33 U.S.C. § 1319(g)(8). The amount of the penalty assessed, which must be determined in accordance with § 1319(g)(3), was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations. If that failure was not a violation of § 1318, triggering liability for an administrative monetary penalty under § 1319(g)(1), the penalty was based upon an impermissible factor and must be reversed. *See, e.g., Kelly v. EPA,* 203 F.3d 519, 523 (7th Cir.2000) ("An abuse of discretion by an agency involves ... a decision that rests on an impermissible basis."). We review EPA's interpretation of § 1318 under the familiar standards of *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

II.

The Clean Water Act prohibits discharges without a permit. 33 U.S.C. § 1311(a). NPDES permits prescribe effluent limitations and pretreatment standards that will apply to the permit-holder's discharges. *See* §§ 1312, 1317, 1342(a)(1). EPA and state permitting authorities obviously need detailed data from a new point source applicant in order to fashion and issue an appropriate permit *before discharges commence.* EPA's regulations governing permit applications serve this purpose. *See Natural Resources Defense Council v. E.P.A.,* 822 F.2d 104, 111 (D.C.Cir.1987) ("the comprehensive NPDES regulations are pivotal to implementation of the Clean Water Act's permit scheme").

The 1972 Clean Water Act amendments authorized EPA to "prescribe such regulations as are necessary to carry out [its] functions under this Act." Pub.L. 92-500, § 501(a), 86 Stat. at 885, codified at 33 U.S.C. § 1361(a). Indeed, Congress included this

broad rule-making authority in the very first federal water pollution control act, enacted in 1948. *See* Pub.L. 845, ch. 758, § 9(d), 62 Stat. 1155, 1160 (1948). The 1987 Water Quality Act included specific authority to issue regulations governing industrial stormwater discharge permits. Pub.L. 100-4, § 405, 101 Stat. 7, 69, codified at 33 U.S.C. § 1342(p)(6).

[1] EPA first issued regulations specifying the timing and content of NPDES permit applications in 1972 and 1973. The agency issued substantially revised regulations in 1979 and 1983, and added regulations governing applications for storm water discharge permits in 1990. As one would expect, each set of regulations has provided that permit applications for a proposed point source must be submitted prior to the initial discharge.[FN3] EPA has ***550** consistently cited the entire statute as its authority for these regulations *See* 44 Fed.Reg. at 32,899; 55 Fed.Reg. at 48,062 (citing "Clean Water Act, 33 U.S.C. 1251 *et seq.* "). Regulations governing the timing and content of permit applications are clearly within the broad rule-making authority delegated by 33 U.S.C. § 1361(a).

> FN3. *See* 37 Fed.Reg. 28,390, 28,393, § 124.21(b) (Dec. 2, 1972) (requirements for state permit programs); 38 Fed.Reg. 13,528, 13,531, § 125.12(c) (May 22, 1973) (EPA-issued permit requirements); 44 Fed.Reg. 32,854, 32,903, § 122.10(c) (Jun. 7, 1979); 48 Fed.Reg. 14,145, 14,159, § 122.21(c) (Apr. 1, 1983); 55 Fed.Reg. 47,990, 48,062, § 122.21(c) (Nov. 16, 1990).

[2] The issue in this case is one of remedial power, not regulation validity. Congress in § 1319(g)(1) granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory provisions related to the core prohibition against discharging without a permit, or contrary to the terms of a permit. The agency may not impose those penalties for violations of other Clean Water Act regulatory requirements, though it may be authorized to take other enforcement action by other subsections of § 1319. One of the specified statutes is § 1318(a), which authorizes the EPA Administrator, "when required to carry out the objective of this chapter," to "require the owner or operator of any point source" to (i) establish and maintain records, (ii) make reports, (iii) install and use monitoring equipment, (iv) sample effluents, and (v) "provide such other information as he may reasonably require." It also authorizes EPA representatives to enter any premises where an effluent source is located or records are kept, and to copy records, inspect monitoring equipment, and sample effluents. § 1318(a)(A) and (B). The Clean Water Act provides that NPDES permits must include comparable inspection, monitoring, entry, and reporting requirements. *See* 33 U.S.C. § 1342(b)(2)(B). These provisions were based upon a finding by Congress that the prior Federal water pollution control program "suffers from a lack of information concerning dischargers, amounts and kinds of pollution, abatement measures taken, and compliance." S.Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3673.

Though § 1318(a) is broadly worded, it is clearly aimed at ensuring proper and effective recording, monitoring, and sampling of *discharges* of pollution. *See generally NRDC,* 822 F.2d at 118-21. Much of the information required of permit applicants would fall within its literal terms. *See United States v. Allegheny Ludlum Corp.,* 366 F.3d 164, 175 (3d Cir.2004). But the issue here is whether the failure to submit a timely permit *application* is a violation of § 1318(a). The regulations require that a person "proposing a new discharge," such as Service Oil in this case, "shall submit an application ... before the date on which the discharge is to commence." 40 C.F.R. §§ 1221(c)(1), 122.26(c). Failure to comply with that requirement *cannot* be a violation of § 1318(a) because that statute's record-keeping requirements are expressly limited to "the owner or operator of any point source." Before any discharge, there is no point source. Thus, the obvious authority for EPA's permit application regulations was its general rule-making authority under §

1361(a), not its authority in § 1318 to require record-keeping by existing point sources. The plain meaning of § 1318(a) is controlling and resolves the issue. *See Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778. "We consider the agency's interpretation only after finding that [the] statute is silent or ambiguous on the question at issue." *In re Lyon County Landfill,* 406 F.3d 981, 984 (8th Cir.2005).

[3][4] The Clean Water Act contains other provisions confirming that the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants. Permits for storm water discharges associated with construction activity "shall meet all applicable provisions of this section and ***551** section 1311." 33 U.S.C. § 1342(p)(3)(A). Section 1311 prohibits discharges "[e]xcept in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." There is no cross reference to § 1318 in § 1311, only to § 1342. EPA cannot assess monetary penalties under § 1319(g) for a violation of § 1342 until a permit issues. As the Second Circuit held in invalidating a portion of EPA's regulations governing concentrated animal feeding operations, "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. E.P.A.,* 399 F.3d 486, 504 (2d Cir.2005). While acknowledging "the policy considerations underlying the EPA's approach," the court concluded that "it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges-not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original). *Accord NRDC,* 822 F.2d at 128 n. 24 ("The Act does not prohibit construction of a new source without a permit.... The Act only prohibits new sources from discharging pollutants without a permit, 33 U.S.C. § 1311(a), or in violation of existing NSPS standards, *id.* § 1316(e).") The same limitations apply in this case.

Our conclusion that EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application does not mean, as the EAB posited, that the agency must either guess the identities of potential new point sources, or allow unpermitted discharges to ensue. Prudent builders know that permits do not issue overnight and that storm water discharges can happen any time after the start of construction makes the site a point source. They will apply and obtain permits before starting construction to avoid penalties for unlawful discharge that may prove to be severe. That is the regulatory regime Congress crafted. By contrast, under the EAB's interpretation of § 1318(a), a person about to commence construction could apply to EPA for a storm water discharge permit less than the ninety days "before the date on which construction is to commence" prescribed in 40 C.F.R. § 122.21(c)(1); obtain the permit before construction commences and any discharge occurs; and still face a costly administrative enforcement proceeding and potential monetary penalties for failing to comply with the regulation. The statute is to the contrary.

The decision of the EAB based the amount of monetary penalty assessed primarily on Service Oil's "complete failure to apply for its storm water permit prior to starting construction." As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A), this was a statutorily impermissible factor. Accordingly, we grant the petition for review, vacate the order assessing a civil penalty of $35,640, and remand to the agency for redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion.

C.A.8,2009.
Service Oil, Inc. v. U.S. E.P.A.
590 F.3d 545, 69 ERC 1993

END OF DOCUMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2819

Service Oil, Inc.,

Petitioner

v.

United States Environmental Protection Agency,

Respondent

Appeal from Environmental Protection Administration
(07-02)

ORDER

The petition for rehearing by the panel filed by respondent is denied. Petitioner's motion for leave to file a response to the petition for rehearing is also denied.

April 14, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Attachment "2"

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Service Oil, Inc.	CWA Appeal No. 07-02
Docket No. CWA-08-2005-0010	

SUBMITTAL OF OPINION, JUDGMENT, AND MANDATE FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Per the request of the U.S. Environmental Appeals Board ("Board"), the U.S. Environmental Protection Agency ("EPA" or "Agency") files certified copies of the opinion and judgment, dated December 28, 2009, as well as the mandate, dated April 22, 2010, issued by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit" or "Court") in *Service Oil, Inc.* v. *EPA*, Case No. 08-2819, a petition for review of the Board's final decision and order, dated July 23, 2008, in the above-referenced matter.

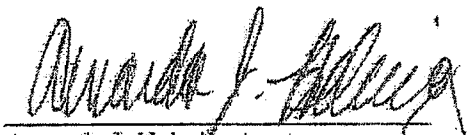
Upon request by the Board that EPA file the aforementioned documents with the Board, the Department of Justice ("DOJ") transmitted such request to the Eighth Circuit on behalf of EPA. The Chief Deputy Clerk for the Eighth Circuit informed DOJ that the Court uses an entirely electronic filing system. When the Court instituted this system, it stopped issuing paper copies of opinions, judgments, and mandates. The Court, therefore, considers mandates issued through its electronic system as sufficient to confer jurisdiction back to the Agency. Based on the Board's request, however, the Eighth Circuit issued certified copies of its opinion, judgment,

Attachment "3"

and mandate in *Service Oil, Inc.* v. *EPA* to DOJ, which EPA now submits to the Board in fulfillment of its request.

Dated: July 13, 2010

Respectfully submitted,



Amanda J. Helwig, Attorney
U.S. Environmental Protection Agency

Katz, Adam

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-2819

Service Oil, Inc.,	*	
	*	
Petitioner,	*	
	*	Petition for Review of an
v.	*	Order of the Environmental
	*	Appeals Board.
United States Environmental	*	
Protection Agency,	*	
	*	
Respondent.	*	

Submitted: May 13, 2009
Filed: December 28, 2009

Before LOKEN, Chief Judge, BYE, Circuit Judge, and MILLER,* District Judge.

LOKEN, Chief Judge.

Congress substantially amended the Clean Water Act in the Water Pollution Control Act Amendments of 1972, directing the Environmental Protection Agency (EPA) to adopt effluent limits for the discharge of various pollutants, and providing that "it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" that incorporates those effluent limits. City of Milwaukee v. Illinois & Mich., 451 U.S. 304, 311-12 (1981); see generally S. Rep. No. 92-414

*The HONORABLE BRIAN STACY MILLER, United States District Judge for the Eastern District of Arkansas, sitting by designation.

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90-5-1-7-18373

(1972), reproduced in 1972 U.S.C.C.A.N. 3668, 3675-77, 3708-39. The Water Quality Act of 1987 expanded this regime by directing EPA to require permits for storm water discharges associated with industrial activity. See 33 U.S.C. § 1342(p)(2)-(4). In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. EPA based the amount of the penalty not on unlawful discharges, but on Service Oil's failure to comply with the agency's permit application regulations. Concluding that this is an expansion of EPA's remedial power not authorized by the governing statutes, we reverse and remand for redetermination of the penalty.

II.

The Clean Water Act prohibits the discharge of any pollutant into navigable waters from a point source except in compliance with an NPDES[1] permit issued by EPA or by an authorized state agency. See 33 U.S.C. §§ 1311(a), 1342(a), 1362(12); Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988). EPA's regulations provide that one intending to discharge "storm water associated with industrial activity" must apply for an individual NPDES permit, or for coverage under a "promulgated storm water general permit." 40 C.F.R. § 122.26(c)(1). "Industrial activity" includes "[c]onstruction activity . . . except operations that result in the disturbance of less than five acres of total land area." 40 C.F.R. § 122.26(b)(14)(x). EPA's permit regulations provide that operators of facilities described in § 122.26(b)(14)(x) shall submit permit applications at least ninety days before the start of construction, or when required by an applicable general permit. 40

[1]NPDES is an acronym for National Pollution Discharge Elimination System.

C.F.R. §§ 122.21(c)(1), 122.26(c). The North Dakota Department of Health, an authorized state agency, has issued a general permit applying to new and existing discharges of "storm water associated with construction activity." The general permit provides that, to obtain coverage, an operator "shall submit" a Notice of Intent and a Stormwater Pollution Prevention Plan thirty days prior to the start of construction.

In April 2002, Service Oil began construction of a Stamart Travel Plaza on more than five acres of land in Fargo, North Dakota. When construction began, the site became a "point source." See 33 U.S.C. § 1362(14). A point source lacking a permit is subject to the core Clean Water Act prohibition -- "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The parties stipulated that storm water contains "pollutants." See 33 U.S.C. § 1362(6). "Discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The site's storm water discharges flow through Fargo's storm sewer system into the Red River of the North, part of the navigable waters of the United States. See 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

In October 2002, EPA and state Department of Health officials inspected thirteen construction sites in the Fargo area. Twelve, including Service Oil's Stamart site, lacked an NPDES permit or coverage under the Department of Health's general permit. Service Oil submitted a Notice of Intent to the Department and obtained coverage under its general permit. State officials closed their review in June 2004 without further action. EPA continued its review, ultimately concluding that Service Oil had not fully complied with the NPDES permit because it failed to conduct site inspections every seven days and after heavy storms and to record inspection results in a Site Inspection Record. This administrative enforcement action followed.

The Clean Water Act includes a variety of enforcement provisions found primarily in 33 U.S.C. § 1319. See generally Tull v. United States, 481 U.S. 412 (1987). Section 1319(g)(1) authorizes EPA to assess a civil monetary penalty if it

"finds that any person has violated [33 U.S.C. §§] 1311, 1312, 1316, 1317, 1318, 1328, or 1345," or has violated a condition in an NPDES permit issued under § 1342. In this case, EPA's Complaint sought an $80,000 administrative penalty, alleging that Service Oil violated 33 U.S.C. §§ 1311(a) and 1342(p), and 40 C.F.R. § 122.26(c) by not obtaining a permit prior to commencing construction (Count 1), and by failing to comply with the permit's terms once issued (Count 2).

After Service Oil answered, EPA moved for accelerated decision (summary judgment). The ALJ denied summary judgment on Count 1, concluding that the failure to obtain an NPDES permit does not violate § 1311(a) absent proof of a discharge, and Service Oil disputed whether any discharge occurred after construction began but before it obtained coverage under the Department of Health's general permit. The ALJ noted that the regulations require a new storm water discharger to apply for a permit before construction, and therefore a statutory provision listed in 33 U.S.C. § 1319(g)(1) other than § 1311 "may provide a statutory basis for an enforcement action for failure to apply for a storm water permit as required by 40 C.F.R. § 122.26(c)." The ALJ granted summary judgment on Count 2 -- it was undisputed that Service Oil violated conditions of the general permit after obtaining coverage -- but denied summary judgment on the question of penalty.

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expert testimony, the ALJ further found that "dirt, sediment and concrete, did flow off-site during construction" and "would have reached the Red River." Therefore, Service Oil also violated § 1311(a) by discharging pollutants without a permit.

Applying the penalty factors mandated by 33 U.S.C. § 1319(g)(3),[2] the ALJ assessed a $35,640 penalty for all violations. The ALJ began the penalty analysis by assessing Service Oil for the "rather nominal economic benefit" of $2700 it obtained from non-compliance (delayed and avoided compliance costs). The ALJ then increased the penalty to $27,000 based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction." The ALJ increased the $27,000 penalty by ten percent because Service Oil, "albeit however slightly, had certainly caused the Red River to become more impaired," and increased the penalty another twenty percent to reflect Service Oil's culpability. On appeal, the Environmental Appeals Board (EAB) affirmed the ALJ's § 1318 analysis and the penalty assessed, specifically upholding a ten-fold increase in the base economic benefit penalty because of Service Oil's "complete failure to apply for its storm water permit prior to starting construction." In re Service Oil, Inc., CWA Appeal No. 07-02, Final Decision & Order at pp. 34-35 (EAB July 23, 2008).

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to obtaining coverage under the general permit, and for failing to conduct required site inspections after it obtained permit coverage. We review the penalty assessment for abuse of discretion. See 33 U.S.C. § 1319(g)(8). The amount of the penalty assessed, which must be determined in accordance with § 1319(g)(3), was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations. If that failure was not a violation of § 1318, triggering liability for an administrative monetary penalty under § 1319(g)(1), the penalty was based upon an impermissible factor and must be reversed. See, e.g., Kelly v. EPA, 203 F.3d 519, 523 (7th Cir. 2000) ("An abuse of discretion by an agency involves . . . a decision that rests on an impermissible basis."). We review EPA's interpretation of § 1318 under the familiar standards of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

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[3] See 37 Fed. Reg. 28,390, 28,393, § 124.21(b) (Dec. 2, 1972) (requirements for state permit programs); 38 Fed. Reg. 13,528, 13,531, § 125.12(c) (May 22, 1973) (EPA-issued permit requirements); 44 Fed. Reg. 32,854, 32,903, § 122.10(c) (Jun. 7, 1979); 48 Fed. Reg. 14,145, 14,159, § 122.21(c) (Apr. 1, 1983); 55 Fed. Reg. 47,990, 48,062, § 122.21(c) (Nov. 16, 1990).

sample effluents, and (v) "provide such other information as he may reasonably require." It also authorizes EPA representatives to enter any premises where an effluent source is located or records are kept, and to copy records, inspect monitoring equipment, and sample effluents. § 1318(a)(A) and (B). The Clean Water Act provides that NPDES permits must include comparable inspection, monitoring, entry, and reporting requirements. See 33 U.S.C. § 1342(b)(2)(B). These provisions were based upon a finding by Congress that the prior Federal water pollution control program "suffers from a lack of information concerning dischargers, amounts and kinds of pollution, abatement measures taken, and compliance." S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3673.

Though § 1318(a) is broadly worded, it is clearly aimed at ensuring proper and effective recording, monitoring, and sampling of *discharges* of pollution. See generally NRDC, 822 F.2d at 118-21. Much of the information required of permit applicants would fall within its literal terms. See United States v. Allegheny Ludlum Corp., 366 F.3d 164, 175 (3d Cir. 2004). But the issue here is whether the failure to submit a timely permit *application* is a violation of § 1318(a). The regulations require that a person "proposing a new discharge," such as Service Oil in this case, "shall submit an application . . . before the date on which the discharge is to commence." 40 C.F.R. §§ 1221(c)(1), 122.26(c). Failure to comply with that requirement *cannot* be a violation of § 1318(a) because that statute's record-keeping requirements are expressly limited to "the owner or operator of any point source." Before any discharge, there is no point source. Thus, the obvious authority for EPA's permit application regulations was its general rule-making authority under § 1361(a), not its authority in § 1318 to require record-keeping by existing point sources. The plain meaning of § 1318(a) is controlling and resolves the issue. See Chevron, 467 U.S. at 842-43. "We consider the agency's interpretation only after finding that [the] statute is silent or ambiguous on the question at issue." In re Lyon County Landfill, 406 F.3d 981, 984 (8th Cir. 2005).

The Clean Water Act contains other provisions confirming that the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants. Permits for storm water discharges associated with construction activity "shall meet all applicable provisions of this section and section 1311." 33 U.S.C. § 1342(p)(3)(A). Section 1311 prohibits discharges "[e]xcept in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." There is no cross reference to § 1318 in § 1311, only to § 1342. EPA cannot assess monetary penalties under § 1319(g) for a violation of § 1342 until a permit issues. As the Second Circuit held in invalidating a portion of EPA's regulations governing concentrated animal feeding operations, "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." Waterkeeper Alliance, Inc. v. E.P.A., 399 F.3d 486, 504 (2d Cir. 2005). While acknowledging "the policy considerations underlying the EPA's approach," the court concluded that "it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges -- not potential discharges, and certainly not point sources themselves." Id. at 505 (emphasis in original). Accord NRDC, 822 F.2d at 128 n.24 ("The Act does not prohibit construction of a new source without a permit . . . . The Act only prohibits new sources from discharging pollutants without a permit, 33 U.S.C. § 1311(a), or in violation of existing NSPS standards, *id.* § 1316(e).") The same limitations apply in this case.

Our conclusion that EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application does not mean, as the EAB posited, that the agency must either guess the identities of potential new point sources, or allow unpermitted discharges to ensue. Prudent builders know that permits do not issue overnight and that storm water discharges can happen any time after the start of construction makes the site a point source. They will apply and obtain permits before

starting construction to avoid penalties for unlawful discharge that may prove to be severe. That is the regulatory regime Congress crafted. By contrast, under the EAB's interpretation of § 1318(a), a person about to commence construction could apply to EPA for a storm water discharge permit less than the ninety days "before the date on which construction is to commence" prescribed in 40 C.F.R. § 122.21(c)(1); obtain the permit before construction commences and any discharge occurs; and still face a costly administrative enforcement proceeding and potential monetary penalties for failing to comply with the regulation. The statute is to the contrary.

The decision of the EAB based the amount of monetary penalty assessed primarily on Service Oil's "complete failure to apply for its storm water permit prior to starting construction." As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A), this was a statutorily impermissible factor. Accordingly, we grant the petition for review, vacate the order assessing a civil penalty of $35,640, and remand to the agency for redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion.

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
BY: Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2819

Service Oil, Inc.,

Petitioner

v.

United States Environmental Protection Agency,

Respondent

Appeal from Environmental Protection Administration
(07-02)

JUDGMENT

This cause was submitted on a petition for review of an order of the Environmental Appeals Board and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the petition for review is granted, the Board's order is vacated, and the matter is remanded to the agency in accordance with the opinion.

December 28, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
BY: Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2819

Service Oil, Inc.

Petitioner

v.

United States Environmental Protection Agency

Respondent

Appeal from Environmental Protection Administration
(07-02)

MANDATE

In accordance with the opinion and judgment of 12/28/2009, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

April 22, 2010

Clerk, U.S. Court of Appeals, Eighth Circuit

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
BY: Michael E. Gans

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Submittal of Opinion, Judgment, and Mandate from the United States Court of Appeals for the Eighth Circuit, in connection with CWA Appeal No. 07-02, were sent to the following persons in the manner indicated:

By Electronic Submission:

Eurika Durr, Clerk of the Board
United States Environmental Appeals Board (MC 1103B)
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

By First Class U.S. Mail:

Michael D. Nelson, Esq.
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Denver, CO 80202

Dated: July 13, 2010

Amanda J. Helwig, Esq.
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Mail Code: 2243-A
Washington, DC 20460
Tel: (202) 564-3713

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Service Oil, Inc.,	)	Docket No. CWA-08-2005-0010
	)	
Respondent.	)	
	)	

RESPONDENT'S POST-REMAND BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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ATTACHMENT "4"

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Pursuant to this Tribunal's 8/3/10 Briefing Order, Respondent submits this Post-Remand Brief of Respondent to the Administrative Law Judge ("ALJ").

A. Eighth Circuit Decision.

This administrative enforcement is back before the ALJ pursuant to the Mandate of the Eighth Circuit Court of Appeals in Service Oil, Inc. v. United States EPA, 590 F.3d 545 (8th Cir. 2009), *rehearing denied*, April 14, 2010. The Eighth Circuit's decision, copy annexed hereto as Attachment "1," provides in part as follows:

> In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. **EPA based the amount of the penalty not on unlawful discharges, but on Service Oil's failure to comply with the agency's permit application regulations**. Concluding that this is an expansion of EPA's remedial power not authorized by the governing statutes, we reverse and remand for redetermination of the penalty.
>
> * * *
>
> Applying the penalty factors mandated by 33 U.S.C. § 1319(g)(3), the ALJ assessed a $35,640 penalty for all violations. The ALJ began the penalty analysis by assessing Service Oil for the "rather nominal economic benefit" of $2,700 it obtained from non-compliance (delayed and avoided compliance costs). **The ALJ then increased the penalty to $27,000 based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction."** The ALJ increased the $27,000 penalty by ten percent because Service Oil, "albeit however slightly, had certainly caused the Red River to become more impaired," and increased the penalty another twenty percent to reflect Service Oil's culpability. On appeal, **the Environmental Appeals Board (EAB) affirmed the ALJ's § 1318 analysis and the penalty assessed, specifically upholding a ten-fold increase in the base economic benefit penalty because of Service Oil's "complete failure to apply for its storm water permit prior to starting construction."** *In re Service Oil, Inc.*, CWA Appeal No. 07-02, Final Decision & Order at pp. 34-35 (EAB July 23, 2008).
>
> Service Oil petitions for review of the EAB's final agency action, renewing its argument that failure to apply for an NPDES permit prior to construction in the time prescribed by EPA's permit regulations does not violate § 1318 and therefore cannot be the basis of a civil monetary penalty under § 1319(g)(1). Service Oil concedes that it is subject to an administrative penalty for its minimal storm water discharges prior to obtaining coverage under the general permit, and for failing to

conduct required site inspections after it obtained permit coverage. We review the penalty assessment for abuse of discretion. *See* 33 U.S.C. § 1319(g)(8). **The amount of the penalty assessed**, which must be determined in accordance with § 1319(g)(3), **was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations**. If that failure was not a violation of § 1318, triggering liability for an administrative monetary penalty under § 1319(g)(1), the penalty was based upon an impermissible factor and must be reversed. *See, e.g., Kelly v. EPA,* 203 F.3d 519, 523 (7th Cir.2000) ("An abuse of discretion by an agency involves ... a decision that rests on an impermissible basis.").

* * *

[T]he issue here is whether the failure to submit a timely permit *application* is a violation of § 1318(a). The regulations require that a person "proposing a new discharge," such as Service Oil in this case, "shall submit an application ... before the date on which the discharge is to commence." 40 C.F.R. §§ 1221(c)(1), 122.26(c). Failure to comply with that requirement *cannot* be a violation of § 1318(a) because that statute's record-keeping requirements are expressly limited to "the owner or operator of any point source." Before any discharge, there is no point source. . . .

* * *

As the Second Circuit held in invalidating a portion of EPA's regulations governing concentrated animal feeding operations, "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. E.P.A.,* 399 F.3d 486, 504 (2d Cir.2005). While acknowledging "the policy considerations underlying the EPA's approach," the court concluded that "it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges--not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original). *Accord NRDC,* 822 F.2d at 128 n. 24 ("The Act does not prohibit construction of a new source without a permit.... The Act only prohibits new sources from discharging pollutants without a permit, 33 U.S.C. § 1311(a), or in violation of existing NSPS standards, *id.* § 1316(e).") The same limitations apply in this case.

Our conclusion that EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application . . . .

The decision of the EAB based the amount of monetary penalty assessed primarily on Service Oil's "complete failure to apply for its storm water permit prior to starting construction." As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A), this was a statutorily impermissible factor. Accordingly, **we grant the petition for review, vacate the**

order assessing a civil penalty of $35,640, and remand to the agency for redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion.

Id. at 546, 548-51 (footnote omitted, emphasis added). A copy of the Eight Circuit's 4/14/10 Order denying EPA's petition for rehearing is annexed hereto as Attachment "2."

1. *The Law of the Case Doctrine and the Mandate Rule.*

In 18 *Moore's Federal Practice*, § 134.23 (Matthew Bender 3d ed.), it is noted as follows:

> Appellate courts often remand a case to the lower federal courts for further proceedings. It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. This is the almost universal language describing the law determined by the mandate. Although this terminology has been widely adopted, the Supreme Court has noted that the mandate rule is not, strictly speaking, a matter of law of the case.[1] The nondiscretionary aspect of the law of the case doctrine is sometimes called the "mandate rule[1.1] and this terminology is more precise than the phrase "law of the case." On remand, the doctrine of the law of the case is **rigid**; the district court **owes obedience** to the mandate of the Supreme Court or the court of appeals and **must carry the mandate into effect according to its terms**.[1.2]

(Emphasis added, footnote references in original, but actual footnotes--the verbiage itself--is omitted).

The Supreme Court case referenced id. at footnote 1 is United States v. Wells, 519 U.S. 482, 487-88 n. 4 (1997).

As to the "nondiscretionary aspect of the mandate rule "referenced at footnote 1.1 in the above blocked quote, *Moore's Federal Practice* cites cases from the 2nd Circuit and the D.C. Circuit for the proposition that "the 'mandate rule,' an application of the 'law of the case' doctrine, states that a district court is bound by the mandate of a federal appellate court and generally may not reconsider issues decided on a previous appeal."

As to the notion that "the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry the mandate into effect according to its terms" referenced at

footnote 1.2 in the above blocked quote, *Moore's Federal Practice* cites and summarizes cases from the United States Supreme Court and from the 1st Circuit, 2nd Circuit, 3rd Circuit, 7th Circuit, 9th Circuit and 11th Circuit (once case is remanded circuit court is **bound by** decree; mandate is **completely controlling**; rule bars district court from reconsidering or modifying prior decisions ruled on by court of appeals; on remand, trial court **must proceed** in accordance with mandate of appellate court, which includes appellate court's opinion if mandate requires trial court to proceed in manner "consistent" with that opinion; law of the case **requires** district court to **follow mandate**; district court **may not vary or examine mandate except to execute it**; trial court must enter order in strict compliance with mandate).

In United States v. Bartsh, 69 F.3d 864 (8th Cir. 1995), the Eighth Circuit addressed the "law of the case" doctrine, and its corollary, the "mandate rule," as follows:

> This appeal is governed by the "law of the case" doctrine and its close relation, the mandate rule. . . . The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy. . . . Under this doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." . . .
>
> "Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system." . . . "If there are no explicit or implicit instructions to hold further proceedings [on remand], a district court has no authority to re-examine an issue settled by a higher court." . . . When an appellate court remands a case to the district court, all issues decided by the appellate court become the law of the case, *id.*, and the district court on remand must "adhere to any limitations imposed on its function at resentencing by the appellate court." . . . "Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms."

Id. at 866 (citations omitted).

2. *An Administrative Agency is bound by the Law of the Case Doctrine and the Mandate Rule, in the same manner as a trial court.*

As noted in Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4478.3, '[a]n administrative agency is bound by the mandate of a reviewing court much as a lower court is bound by the mandate of a higher court," citing, among other cases, Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997) (EPA bound by law of the case doctrine); Starcon International, Inc. v. National Labor Relations Board, 450 F.3d 276, 278 (7th Cir. 2006) (NLRB and union bound by law of the case doctrine); Key v. Sullivan, 925 F.2d 1056, 1061 (7th Cir. 1991) (Secretary of Health and Human Services bound by law of case doctrine and the mandate rule, in a Social Security disability case); Rios-Pineda v. United States Department of Justice, Immigration & Naturalization Service, 720 F.2d 529, 532-33 (8th Cir. 1983), *reversed on other grounds*, 471 U.S. 444 (1985) ("[t]he law of the case is equally applicable in instances of remand to administrative agencies and remand to lower courts"); Scott v. Mason Coal Company, 289 F.3d 263, 267-68 (4th Cir. 2001) ("when we remand a case, the lower court must 'implement both the letter and the spirt of the . . . mandate." . . . This rule applies with equal authority to the Board and to the ALJ as administrative agencies.").

B. Environmental Appeals Board (EAB) Remand Order.

In the EAB's Remand Order, the EAB directs this Tribunal (the ALJ) to "render a new initial decision that is consistent with the Eighth Circuit's decision." Remand Order at p. 2. EAB thus concedes that the "law of the case doctrine" and its corollary "the mandate rule" apply to this Tribunal (the ALJ), in the rendering of an Amended Initial Decision.

C. **No Additional Proceedings Permitted on Remand (Other than (1) Post-Remand Briefs, (2) Redetermination of Penalty in Accordance With 33 U.S.C. § 1319(g)(3) and Eighth Circuit Opinion, and (3) Rendering an Amended Initial Decision on Remand).**

Pursuant to the Eighth Circuit's mandate, all this Tribunal (the ALJ) is permitted to do on remand is redetermine the amount of the penalty to be imposed against Service Oil, Inc., "in accordance with 33 U.S.C. § 1319(g)(1)(A) and [the Eighth Circuit's] opinion." Of course, once that redetermination is made, it will of necessity result in the rendering of an Amended Initial Decision on Remand in order to complete this Tribunal's work on remand.

In terms of a "redetermination of the amount of the penalty," it is limited to a deletion from the vacated penalty of the **entire amount** previously assessed against Service Oil, for Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction." Service Oil, Inc., 590 F.3d at 548-51.

D. **Redetermined Penalty on Remand.**

In keeping with the Eighth Circuit's mandate and the limitations it imposes on this Tribunal (the ALJ), the redetermined penalty "in accordance with" 33 U.S.C. § 1319(g)(1)(A) and the Eighth Circuit's opinion should be as follows:

$2,700	--	Economic benefit
$2,700	--	Nature, Circumstances, and Extent of the Violations (in effect, a doubling of the economic benefit, given what the Eight Circuit's decision requires as to this Tribunal's now-vacated findings at pp. 56-57 of its 8/3/07 Initial Decision)
$540	--	Gravity of Violations (10% of $5,400)
$1,188	--	Culpability (20% of $5,940)
$7,128	--	TOTAL PENALTY

While the Eight Circuit's reading of what this Tribunal (the ALJ) did in its 8/3/07 Initial Decision, and its view of what the EAB did in its 7/23/08 Final Decision and Order, is entirely

accurate (i.e., Service Oil was assessed a "ten-fold increase in the base economic benefit penalty because of Service Oil's 'complete failure to apply for its storm water permit prior to starting construction'"), it is also true that this Tribunal's 8/3/07 Initial Decision also included in its "nature, circumstances, and extent of the violations" discussion a reference to Count 2, regarding a failure to conduct inspections required under Service Oil's storm water permit once it was issued. In keeping with this Tribunal's finding that "this type of violation is more technical in nature," and in keeping with this Tribunal's finding that Service Oil violated 33 U.S.C. § 1311 by discharging pollutants from its construction site into waters of the United States prior to when it obtained a permit to discharge storm water from its construction site,[1] the additional $2,700 penalty amount for the "nature, circumstances, and extent of the violations" noted above (in effect, a doubling of the economic benefit) is appropriate in this case.

E. Amendment of Initial Decision to Comply With Eight Circuit Mandate and EAB Mandate.

Annexed hereto as Attachment "3" is a Table of Contents--prepared by the undersigned counsel for Service Oil--for this Tribunal's 74-page 8/3/07 Initial Decision, and annexed hereto as Attachment "4" is a marked up copy of this Tribunal's 8/3/07 Initial Decision, with Service Oil's suggested changes noted thereon (for the rendering of an Amended Initial Decision on Remand).

CONCLUSION

Respondent, Service Oil, Inc., respectfully requests that the penalty assessable against Service Oil in this case be redetermined as set forth above, and that an Amended Initial Decision on Remand be rendered as proposed by Service Oil in Attachment "4," annexed hereto.

---

[1]In its "gravity of violations" analysis, this Tribunal found that "Respondent, albeit however slightly, caused the Red River to become more impaired." Initial Decision of 8/3/07, at p. 59.

Dated: September 16, 2010.

Michael D. Nelson
ND ID #03457
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Respondent's Post-Remand Brief to the Administrative Law Judge,** dated September 16, 2010, was overnighted for filing/served by me this 16th day of September, 2010, as follows:

Original and one copy, via Federal Express Overnight Delivery, to:

U.S. Environmental Protection Agency
Region 8
ATTENTION: Tina Artemis, Regional Hearing Clerk
MC8RC
1595 Wynkoop Street
Denver, CO 80202-1129

Copy, via Federal Express Overnight Delivery, to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 - 14th Street, N.W., Suite 350
Washington, D.C. 20005

Copy, via Federal Express Overnight Delivery, to:

Ms. Wendy I. Silver, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Dated: September 16, 2010.

Michael D. Nelson