

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

_____)	
In re:)	
)	Appeal No. CWA 11-01
Service Oil, Inc.,)	
)	
Respondent)	
)	
Docket No. CWA-08-2005-0010)	
)	
_____)	

COMPLAINANT'S RESPONSE BRIEF

Amanda J. Helwig
Enforcement Attorney
U.S. Environmental Protection Agency
Office of Civil Enforcement
Water Enforcement Division
1200 Pennsylvania Avenue, NW (2243-A)
Washington, DC 20460
Tel: (202) 564-3713

OF COUNSEL:

Paul Bangser
Water Law Office
Office of General Counsel
U.S. EPA

Wendy I. Silver
Senior Enforcement Attorney
U.S. EPA, Region 8

Dated: March 2, 2011

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....1

 A. The Applicable Legal Standards.1

 B. Procedural Background.....2

 C. Factual Background.....4

 1. Initial Decision Penalty Determination.....4

 2. Initial Decision on Remand Penalty Determination.....7

 D. Standard of Review.....9

II. ARGUMENT.....10

 A. The Administrative Law Judge Complied with the
 Eighth’s Circuit’s Decision, Judgment, and Mandate
 in Retaining the Tenfold Increase of the Economic Benefit
 in the Recalculated Penalty based on the Application of the
 CWA Section 309(g)(3) Factors.....10

III. CONCLUSION.....15

COMPLAINANT'S RESPONSE BRIEF

I. STATEMENT OF THE CASE

On December 7, 2010, the Chief Administrative Law Judge (“ALJ”) of the United States Environmental Protection Agency (“EPA”) issued an Initial Decision on Remand, recalculating the penalty for Service Oil, Inc.’s (“Service Oil” or “Respondent”) violations of the Clean Water Act (“CWA” or “Act”), consistent with a decision, judgment, and mandate published by the United States Court of Appeals for the Eighth Circuit in this matter. Service Oil presents only one challenge to the ALJ’s Initial Decision on Remand in its appeal to the Environmental Appeals Board (“Board”). Service Oil claims that the ALJ violated the law of the case doctrine and the mandate rule by retaining the tenfold increase of the economic benefit in her penalty calculation on remand. Since the ALJ fully complied with the Eighth Circuit’s decision, judgment, and mandate in her revised penalty analysis, she did not clearly err or abuse her discretion in retaining the tenfold increase of the economic benefit in her recalculated penalty in this matter. Accordingly, the Board should affirm the Initial Decision on Remand and uphold the total penalty assessment of \$32,287 imposed on Respondent.

A. The Applicable Legal Standards

The CWA authorizes the assessment of civil administrative penalties for violations of the statute, pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g). Under this section, EPA may assess civil penalties whenever it finds, on the basis of any information available, that a regulated entity has violated Section 301 of the CWA, 33 U.S.C. § 1311, or any condition or limitation contained in a permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, that implements the requirements of the Act. 33 U.S.C. § 1319(g)(1). In determining the amount of any penalty

assessed, Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), provides that EPA must take into account the “economic benefit or savings...resulting from the violations,” as well as the “nature, circumstances, extent, and gravity of the violations.” 33 U.S.C. § 1319(g)(3).

The consolidated rules of practice, set forth at 40 C.F.R. Part 22, govern EPA’s administrative assessment of civil penalties in this enforcement proceeding. Pursuant to 40 C.F.R. § 22.27(b), a presiding officer must determine the amount of the recommended civil penalty for violations, in this case of the CWA and its implementing regulations, based on the evidence in the administrative record and the penalty criteria detailed in the relevant statute. As noted above, the CWA sets forth the applicable penalty criteria in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). According to 40 C.F.R. § 22.27(b), the presiding officer must also consider any civil penalty guidelines issued under the Act. EPA, however, has not issued any penalty policies specific to the CWA. *In re City of Marshall*, 10 E.A.D. 173, 189, n. 28 (EAB 2001). Since no precise formula exists for computing CWA penalties, the Supreme Court has noted that the calculation of penalties under the Act remains “highly discretionary.” *Tull v. United States*, 481 U.S. 412, 427 (1987). *See In re Pepperell Associates*, 9 E.A.D. 83, 107 (EAB 2000), *aff’d*, 246 F.3d 15 (1st Cir. 2001). Nevertheless, the presiding officer must “explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act.” 40 C.F.R. § 22.27(b).

B Procedural Background

On August 3, 2007, the ALJ issued her Initial Decision in this matter. *In the Matter of Service Oil, Inc.*, Initial Decision, 2007 EPA ALJ LEXIS 21, Docket No. CWA-08-2005-0010 (EPA ALJ 2007) (“*Initial Decision*”). The ALJ found Service Oil liable on two counts. *Id.* at *1-*2. On Count I, the ALJ found Respondent liable for discharging pollutants without a

National Pollutant Discharge Elimination System (“NPDES”) permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, as well as for failing to obtain an NPDES permit, in violation of Section 308 of the CWA, 33 U.S.C. § 1318. *Id.* On Count II, the ALJ found Respondent liable for failing to conduct stormwater inspections and/or failing to record or maintain on-site inspection records, in violation of its NPDES permit. *Id.* The ALJ imposed a civil administrative penalty of \$35,640 on Respondent for these violations. *Id.* at *1-*2, *202. On July 23, 2008, the Board issued a Final Decision and Order, upholding the ALJ’s liability findings and civil penalty assessment. *In re Service Oil, Inc.*, 14 E.A.D. ___, CWA Appeal No. 07-02 (EAB 2008).

On December 28, 2009, the Eighth Circuit issued a decision in this matter, upholding the ALJ’s liability findings and authority to assess civil penalties under the CWA for Respondent’s discharges of pollutants without an NPDES permit and failure to conduct on-site stormwater inspections. *Service Oil, Inc. v. U.S. EPA*, 590 F.3d 545, 549 (8th Cir. 2009). The Court, however, held that EPA could not assess civil penalties for Respondent’s failure to apply for an NPDES permit, under Section 308 of the CWA, 33 U.S.C. § 1318, prior to the start of construction on the site. *Id.* at 550-551. Accordingly, the Eighth Circuit remanded the case to the ALJ for redetermination of the penalty amount, in accordance with the statutory factors set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and the Court’s opinion. *Id.* at 551.

On December 7, 2010, the ALJ issued her Initial Decision on Remand with a recalculated civil penalty, based on the application of the statutory factors set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and the Eighth Circuit’s opinion. *In the Matter of Service Oil, Inc.*, Initial Decision on Remand, Docket No. CWA-08-2005-0010 (EPA ALJ 2010) (“*Initial*

Decision on Remand”). The ALJ modified the civil administrative penalty based on Respondent’s liability under Count I for the discharge of pollutants without an NPDES permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its liability under Count II for the failure to conduct stormwater inspections and/or record or maintain on-site inspection records, in violation of its NPDES permit. *Id.* at 8-12. The ALJ imposed a revised civil penalty of \$32,287 on Service Oil for these violations. *Id.* at 12.

C. Factual Background

1. Initial Decision Penalty Determination

In the ALJ’s Initial Decision, she calculated the civil penalty utilizing the “bottom-up” methodology, one of the schemes employed by the federal courts to calculate penalties, which begins with the economic benefit of noncompliance and then adjusts that amount upward to reflect the applicable remaining statutory factors. *See Initial Decision*, 2007 EPA ALJ LEXIS 21 at *140-*145, *citing United States v. Municipal Authority Union Township*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff’d*, 150 F.3d 259 (3d Cir. 1998). *See also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 87 (2nd Cir. 2006); *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir. 1999). The ALJ evaluated Respondent’s economic benefit associated with Count I, involving Respondent’s discharge of pollutants without an NPDES permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its failure to apply for an NPDES permit, in violation of Section 308 of the CWA, 33 U.S.C. § 1318, as well as the economic benefit resulting from Count II, involving Respondent’s failure to conduct stormwater inspections and/or record or maintain on-site inspection records, in violation of its NPDES permit. *See Initial Decision*, 2007 EPA ALJ LEXIS 21 at *146-*149.

In calculating the economic benefit, the ALJ assessed the delayed and avoided costs of Respondent's noncompliance with the CWA and its NPDES permit. *Id.* The delayed costs of Respondent's noncompliance resulted from its discharge of pollutants without an NPDES permit and its failure to apply for an NPDES permit. *Id.* at *146-*148. The ALJ determined that Respondent's delayed costs, amounting to \$940, specifically included its failure to timely submit a notice of intent ("NOI"), prepare a stormwater pollution prevention plan ("SWPPP"), and install and maintain the required best management practices (BMPs) on site for a period of .8 years, or 9.6 months. *Id.* The avoided costs of Respondent's noncompliance resulted from its failure to conduct and/or record site inspections. *Id.* The ALJ found that Respondent's avoided costs, totaling \$1,760, included the 97 required stormwater inspections that Service Oil failed to conduct after it began construction on the site. *Id.* Accordingly, the ALJ's analysis resulted in a total economic benefit calculation of \$2,700. *Id.* at *149. Respondent did not dispute that this amount represented the economic benefit it derived from its noncompliance with the CWA and its NPDES permit. *Id.*

After determining Respondent's economic benefit of noncompliance, the ALJ considered the additional statutory penalty factors under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). *See Id.* at *150-*158. This analysis focused on the "nature, circumstances, and extent" of the violations. *See Id.* Through evaluating these penalty factors, the ALJ determined that multiplying the economic benefit figure by ten was appropriate in this matter. *Id.* at *158.

In support of the ALJ's tenfold increase of the economic benefit component of the penalty, she referenced numerous facts contained in the administrative record. In regard to Count I, for instance, the ALJ noted that Respondent began construction of its facility without an NPDES permit, and, as a result, "no SWPPP [or] BMPs were in place then or during the next

eight months of active construction.” *Id.* at *150. The ALJ pointed to evidence in the record demonstrating that the site received 22.59 inches of precipitation after Service Oil commenced construction in April 2002 and before it obtained a permit in November 2002. *Id.* The ALJ further highlighted EPA’s assertion that the implementation of BMPs on the site between April 2002 and November 2002, when the company engaged in active construction on the site, would have minimized the pollutants entering the municipal storm sewer system following the aforementioned rain events. *Id.* Given the lack of BMP implementation on the site, the ALJ discussed evidence in the record indicating that significant amounts of sediment flowed off Respondent’s site and entered storm drains near the facility during rain events. *Id.* at *151-*153. Specifically, expert testimony before the ALJ established that Respondent discharged 49 tons of sediment through runoff from its site into the municipal storm sewer system. *Id.* at *60-*133, *153, *158. The ALJ also noted that no monitoring of discharges occurred on the site during the critical period when Respondent disturbed the land by clearing, grading, and excavating activities. *Id.* at *156.

In addition to the foregoing evidence supporting the ALJ’s evaluation of the “nature, circumstances, and extent” of Respondent’s CWA violations under Count I, the ALJ cited evidence in the record regarding the impacts of Respondent’s failure to conduct inspections and/or record or maintain on-site inspection records in her analysis of the penalty factors associated with Respondent’s NPDES permit violations under Count II. *See Id.* at *151-*152, *157-*158. The ALJ emphasized that Respondent failed to conduct 65 out of 80 required inspections, even once it obtained a permit in November 2002. *Id.* at *151, *157. Based on Respondent’s failure to conduct these inspections, neither EPA nor Respondent could determine

whether BMPs were installed or replaced as needed on the site to prevent sediment discharges through stormwater runoff. *Id.* at *151-*152, *157-*158.

Accordingly, based on the ALJ's analysis of the foregoing factors, she determined that the "nature, circumstances, and extent" of the violations, pursuant to Counts I and II, warranted a tenfold increase of the \$2,700 economic benefit amount. *Id.* at *149. After further increasing the penalty amount to account for the gravity of the violations and culpability, the ALJ imposed a civil penalty of \$35,640 on Respondent. *Id.* at *158-163, *167-*188, *202.

2. Initial Decision on Remand Penalty Determination

Based on the Eighth Circuit's decision, judgment, and mandate, the ALJ recalculated the civil penalty in this matter. Upon remand, the ALJ determined the penalty amount solely based on Respondent's discharge of pollutants without an NPDES permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, under Count I, as well as its failure to conduct stormwater inspections and/or record or maintain on-site inspection records, in violation of its NPDES permit, pursuant to Count II. *Initial Decision on Remand* at 8. The ALJ did not include Respondent's violations of Section 308 of the CWA, 33 U.S.C. § 1318, for failure to apply for a permit in her revised penalty analysis. *Id.*

Using the same "bottom-up" methodology on remand that she employed in the Initial Decision, the ALJ reevaluated Respondent's economic benefit based on the delayed and avoided costs of noncompliance associated with Respondent's discharges without a permit and its failure to conduct and/or record site inspections. *Id.* at 8-9. In determining the delayed costs associated with Respondent's discharges without a permit, the ALJ evaluated Respondent's failure to submit an NOI, prepare a SWPPP, and install and maintain BMPs after Respondent began discharging from the site in May 2002. *Id.* at 9. Based on evidence in the administrative record