

establishing that Respondent discharged from its facility without a permit for seven months, the ALJ recalculated the delayed costs for this time period, as opposed to 9.6 months, in her analysis on remand. *Id.* The ALJ found that Respondent derived an economic benefit of \$686 from these delayed costs. *Id.* Since the economic benefit associated with Respondent's failure to conduct and/or record site inspections remains unaffected by the Eighth Circuit's opinion, the ALJ retained the avoided cost figure of \$1,760 for these violations. *Id.* Accordingly, the ALJ calculated a revised economic benefit figure of \$2,446 for Respondent's discharges without a permit and failure to conduct and/or record site inspections. *Id.* Respondent supports the ALJ's redetermination of the economic benefit amount. *Respondent's Appeal Brief* (January 4, 2011) ("*Appeal Brief*") at 10, n. 1.

After determining Respondent's economic benefit, the ALJ again considered the "nature, circumstances, and extent" of the violations, pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). *Initial Decision on Remand* at 10. Based on her analysis, the ALJ maintained the tenfold increase of the revised economic benefit amount. *Id.* at 10, 12. In support of this determination, the ALJ cited to the same facts in the administrative record that she used to support her initial tenfold increase based on the "nature, circumstances, and extent" of the violations. *Id.* at 10-12.

Specifically, with regard to Respondent's discharges without a permit under Count I, the ALJ referenced Respondent's failure to install BMPs for seven months to prevent, minimize, or control the sediment in stormwater runoff from the site; the 22.59 inches of precipitation that the site received during this time period; and the 49 tons of sediment that flowed off Respondent's site into the municipal storm sewer system and ultimately into the Red River of the North ("Red River"). *Id.* at 11, citing *Initial Decision*, 2007 EPA ALJ 21 at \*10-12, \*60-\*133, \*150. *See*

also *Initial Decision*, 2007 EPA ALJ 21 at \*153, \*158. The ALJ reemphasized that the Red River constitutes a drinking water source and is impaired for turbidity, caused, at least in part, by sediment runoff, impacting its aquatic life. *Initial Decision on Remand* at 11, citing *Initial Decision*, 2007 EPA ALJ 21 at \*161-162. See also *Initial Decision*, 2007 EPA ALJ 21 at \*158-\*163. In addition, with regard to Respondent's failure to conduct and/or record site inspections under Count II, the ALJ reiterated that, without inspections, no entities could determine whether Respondent properly installed and maintained BMPs to prevent pollutants in stormwater from running off the site. *Initial Decision on Remand* at 11, citing *Initial Decision*, 2007 EPA ALJ 21 at \*157-\*158. See also *Initial Decision*, 2007 EPA ALJ 21 at \*151-\*152.

Based on this analysis, the ALJ determined that a tenfold increase of the \$2,446 economic benefit amount remained "fully warranted." *Initial Decision on Remand* at 11-12. The ALJ increased the penalty amount by the same percentages as used in the Initial Decision for the gravity of the violations (10% increase) and culpability (20% increase), which Respondent does not dispute. *Id.* at 12; *Appeal Brief* at 11. Accordingly, the ALJ imposed a total revised civil penalty of \$32,287 based on Respondent's discharges without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its failure to conduct and/or record site inspections, in violation of its NPDES permit. *Initial Decision on Remand* at 12.

#### **D. Standard of Review**

In enforcement proceedings under 40 C.F.R. Part 22, the Board must "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion. 40 C.F.R. § 22.30(f). The Board, accordingly, reviews an ALJ's factual and legal conclusions on a *de novo* basis. See *In re Vico Construction Corporation and Amelia Venture Properties, LLC*, 12 E.A.D. 298, 313 (EAB 2005). While the Board reviews penalty determinations *de novo*, it will generally

defer to the presiding officer's penalty assessment, provided that the presiding officer considered each of the statutory penalty factors. *In re Britton Construction Corporation*, 8 E.A.D. 261, 293 (EAB 1999); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999), *appeal dismissed*, 237 F.3d 681 (D.C. Cir. 2001). The Board "generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty." *In re Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 390 (EAB 2004); *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998).

## II. ARGUMENT

### 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.**

Respondent presents only one argument on appeal. It claims that the ALJ violated the law of the case doctrine and the mandate rule in her recalculation of the penalty on remand. *See Appeal Brief* at 1-2, 4-10. Contrary to Respondent's assertions, however, the ALJ strictly complied with the Eighth Circuit's decision, judgment, and mandate in her recalculation of the penalty in this matter.

The Eighth Circuit, in granting Service Oil's petition for review, remanded the case to EPA "for redetermination of the amount of the penalty in accordance with [Section] 1319(g)(3) [of the CWA] and this opinion." *Service Oil*, 590 F.3d at 551. Respondent claims that the ALJ violated this mandate by retaining the tenfold increase of the economic benefit in her penalty recalculation, which it asserts the ALJ based primarily on its failure to apply for an NPDES permit in the Initial Decision. *Appeal Brief* at 7-10. Given that the ALJ, consistent with the Eighth Circuit's opinion, removed the penalty associated with Respondent's failure to apply for an NPDES permit prior to the start of construction under Section 308 of the CWA, 33 U.S.C. §

1318, and considered, pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the “nature, circumstances, and extent” of Respondent’s remaining violations, including its discharges without a permit and failure to conduct and/or record site inspections, the ALJ explicitly complied with the Eighth Circuit’s mandate. *See Initial Decision on Remand* at 8-12. Accordingly, the ALJ did not clearly err or abuse her discretion in retaining the tenfold increase of the economic benefit in her recalculation of the penalty on remand in this matter.

In arguing for the removal of the tenfold increase, Respondent relies heavily on the Eighth Circuit’s statement attributing this increase to Service Oil’s “complete failure to apply for its stormwater permit prior to starting construction.” *Appeal Brief* at 2-3, 7-8, citing *Service Oil* at 548-551, referencing *In re Service Oil, Inc.*, 14 E.A.D. \_\_\_ at 34-35. Based on this language in the Eighth Circuit’s opinion, Respondent claims that the ALJ should have eliminated the tenfold increase of the economic benefit in her revised penalty assessment. *See Appeal Brief* at 7-10. While the ALJ, in her Initial Decision, did ascribe the “nature, circumstances, and extent” of the violations in Count I to Service Oil’s failure to apply for and obtain an NPDES permit prior to starting construction and continuing for seven months after construction commenced, the ALJ noted on remand that Service Oil’s references to this language mischaracterize her penalty analysis and the facts of the case related to the “nature, circumstances, and extent” of the violations. *Initial Decision*, 2007 EPA ALJ 21 at \*155; *Initial Decision on Remand* at 10.

In the ALJ’s Initial Decision, she based the tenfold increase of the economic benefit component of the penalty not on one factor alone, as Service Oil contends, but on the “nature, circumstances, and extent” of Respondent’s discharges of pollutants without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its failure to apply for a permit, in

violation of Section 308 of the CWA, 33 U.S.C. § 1318, as well as its failure to conduct and/or record site inspections, in violation of its NPDES permit. *See Initial Decision*, 2007 EPA ALJ 21 at \*150-\*158. The ALJ did not differentiate between Respondent's illegal discharges and failure to apply for a permit in her analysis of the applicable statutory penalty factors under Count I. *See Id.* Furthermore, the ALJ did not distinguish between the violations in Counts I and II in her application of the tenfold increase to the economic benefit. *See Id.* The "nature, circumstances, and extent" of the violations alleged in Counts I and II cumulatively formed the basis for the ALJ's decision to impose a tenfold increase on the economic benefit. *See Id.*

Given that Count I encompassed both Respondent's failure to apply for a permit and its resulting discharges without a permit, the ALJ jointly analyzed the "nature, circumstances, and extent" of these violations. *Id.* Since Respondent's discharges without a permit resulted from its failure to apply for, obtain, and comply with an NPDES permit, the ALJ's discussion of the impacts, including the "nature, circumstances, and extent," of these violations remain inextricably intertwined. While the ALJ, in her Initial Decision, framed this analysis in terms of Respondent's failure to apply for a permit, the ALJ's evaluation of the "nature, circumstances, and extent" of the Count I violations centered largely on Service Oil's illegal discharges. *Id.*; *See, i.e., In re Service Oil, Inc.*, 14 E.A.D. \_\_\_ at 34 (holding, in regard to the ALJ's upward adjustment of the economic benefit, that administrative record demonstrated "well over half a year of unpermitted activity").

In the ALJ's Initial Decision, for instance, she emphasized Respondent's failure to install BMPs on the site necessary to prevent, minimize, or control sediment in stormwater runoff flowing from the construction site and into the municipal storm sewer system, ultimately leading to the Red River. *Initial Decision*, 2007 EPA ALJ 21 at \*133, \*150-\*158. The ALJ noted that

the site received 22.59 inches of rain following Service Oil's commencement of construction, prior to its attainment of permit coverage. *Id.* at \*150. The ALJ further focused on the evidence in the administrative record indicating that Respondent discharged 49 tons of sediment from the site during the seven months that it engaged in construction prior to obtaining a permit. *Id.* at \*60-\*133, \*153, \*158. These facts, grounded in the administrative record, supported the ALJ's analysis of the "nature, circumstances, and extent" of the Count I violations, including Respondent's discharges without a permit and its failure to apply for a permit.

The ALJ pointed to the same supporting facts from the administrative record in her revised penalty analysis on remand for the Count I violations, limited, in this instance, to Respondent's discharges without a permit. *Initial Decision on Remand* at 10-12. In the Initial Decision on Remand, the ALJ did not alter her analysis of the "nature, circumstances, and extent" of the Count I violations. *See Id.* The ALJ did not reference any additional supporting facts, nor did she exclude any facts contained in the original penalty calculation, in her analysis on remand of the statutory penalty factors, set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).<sup>1</sup> *See Id.* In addition to the penalty factors applicable to Count II for Service Oil's "failure to an overwhelming extent" to conduct the required inspections, the foregoing evidence formed the basis for the ALJ's determination to retain the tenfold increase of the economic benefit figure. *See Id.*; *Initial Decision*, 2007 EPA ALJ 21 at \*157.

On appeal, Respondent claims that the ALJ needed to eliminate the entire amount of the penalty associated with its failure to apply for a permit. *Appeal Brief* at 7. Respondent argues

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<sup>1</sup> Respondent improperly cited the ALJ in her Initial Decision on Remand. Service Oil claims that the ALJ stated that the tenfold increase in the base penalty amount is "now" for violations of Section 301 of the CWA, 33 U.S.C. § 1311. *Appeal Brief* at 9, referencing *Initial Decision on Remand* at 10. The ALJ makes no such statement regarding her analysis of the "nature, circumstances, and extent" of the violations in her Initial Decision on Remand. *See Initial Decision on Remand* at 10-12. After all, in her Initial Decision, the ALJ imposed the tenfold increase based on her evaluation of the statutory penalty factors associated with Respondent's illegal discharges, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, in addition to Respondent's failure to apply for a permit and missed inspections. *See Initial Decision* at \*150-\*158.

that, in order to remove this portion of the penalty, the ALJ must strike the tenfold increase of the economic benefit. *Id.* This is not the appropriate analysis. The ALJ removed the portion of the penalty assessed for Respondent's failure to apply for a permit by eliminating the economic benefit associated solely with Respondent's failure to apply for a permit prior to the time period when discharges began to occur from its site.<sup>2</sup> *Initial Decision on Remand* at 8-9. This approach removed approximately 2.6 months from the economic benefit calculation for Count I, as Respondent operated its site and discharged without a permit for the remaining seven months included in the original penalty calculation. *Id.*; *Initial Decision*, 2007 EPA ALJ 21 at \*146-\*150. The ALJ then increased the revised economic benefit figure based on her evaluation of the "nature, circumstances, and extent" of Respondent's remaining violations, including its discharges without a permit and failure to conduct and/or record site inspections, pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). *Initial Decision on Remand* at 10-12. In determining to retain the tenfold increase of the economic benefit on remand, the ALJ analyzed the same supporting facts used to evaluate these violations in her Initial Decision. *Id.*

The ALJ's penalty assessment constitutes the correct analysis in light of the Eighth Circuit's decision, judgment, and mandate. The Eighth Circuit ordered EPA to recalculate the penalty in accordance with Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and its opinion. *Service Oil*, 590 F.3d at 551. The Eighth Circuit nowhere mandated that EPA eliminate the tenfold increase applied based on the "nature, circumstances, and extent" of Respondent's discharges without a permit and its failure to conduct and/or record site inspections, for which the Eighth Circuit found Service Oil liable. *See Id.* at 549. Respondent itself acknowledged, during oral argument before the Eighth Circuit, that the penalty for its discharges without a

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<sup>2</sup> Respondent does not challenge the ALJ's recalculated economic benefit figure based on this analysis. *Appeal Brief* at 10, n.1.

permit and failure to conduct inspections could remain the same as the full penalty calculated in the Initial Decision, even in the absence of its violations for the failure to apply for a permit under Section 308 of the CWA, 33 U.S.C. § 1318.<sup>3</sup> Based on the Eighth Circuit's decision, the ALJ removed the penalty associated with Respondent's failure to apply for a permit prior to the start of construction and appropriately evaluated, consistent with her Initial Decision, the statutory factors under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), for Respondent's discharges without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its failure to conduct inspections and/or record or maintain on-site inspection records, in violation of its NPDES permit. Accordingly, the ALJ's recalculation of the penalty fully conforms with the Eighth Circuit's decision, judgment, and mandate.

### III. CONCLUSION

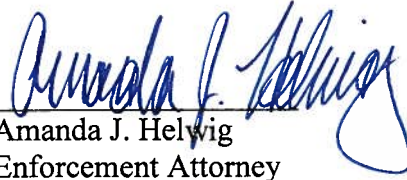
The calculation of penalties under the CWA remains highly discretionary. The ALJ fully justified her decision to retain the tenfold increase of the economic benefit based on Respondent's illegal discharges and missed inspections, which strictly complies with the Eighth Circuit's decision, judgment, and mandate. Accordingly, the ALJ did not err or abuse her discretion in recalculating the penalty. The Board should affirm the ALJ's Initial Decision on Remand in its entirety and uphold the ALJ's civil penalty assessment of \$32,287.

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<sup>3</sup> Audio recording: Service Oil, Inc. v. EPA Oral Argument, United States Court of Appeals for the Eighth Circuit, May 13, 2009, <http://www.ca8.uscourts.gov/oralargs/oaFrame.html>, at 1:00 – 4:00 (*See, i.e.*, Judge at 3:40: “The total fine [for the discharges during construction and missed inspections] could have been the same, [even without the 308 violations]?” Service Oil at 3:44: “Absolutely, your honor.”).



Respectfully submitted,



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

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