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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR ENVIR. APPEALS BOARD

IN THE MATTER OF: )  
 )  
SERVICE OIL, INC., ) Docket No. CWA-08-2005-0010  
 )  
Respondent. )

INITIAL DECISION

By Accelerated Decision previously issued, Respondent Service Oil, Inc. was found liable for failing to conduct storm water inspections and/or record or maintain on-site inspection records in violation of its NPDES Permit as alleged in Count 2 of the Amended Complaint. In regard to Count 1, Respondent is found liable for failing to timely acquire an NPDES Permit for construction activities, in violation of Section 308 of the Clean Water Act (CWA) (33 U.S.C. § 1318) and implementing regulation 40 C.F.R. § 122.21, and/or discharging a pollutant without a permit in violation of CWA Section 301 (33 U.S.C. § 1311). Pursuant to Subsection 309(g) of the CWA, 33 U.S.C. §1319(g), a civil administrative penalty in the amount of \$35,640 is imposed on Respondent for these two violations.

Before: Susan L. Biro  
Chief Administrative Law Judge

Issued: August 3, 2007

**Appearances:**

For Complainant:

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<sup>1</sup> Complainant was represented at hearing of this matter by Assistant Regional Counsel Elyana R. Sutin, Esq., from EPA Region 8, Denver, and Mark Ryan, Esq., from the Idaho Operations Office, EPA Region 10. During the proceedings prior thereto, Complainant was also represented by Assistant Regional Counsel, EPA Region 8, Alicia N. Hoegh, Esq. After the hearing, by Notice dated December 7, 2006, David J. Janik, Esq., Supervisory Enforcement Attorney, EPA Region 8, was substituted for all said counsel, and by a subsequent Notice dated February 9, 2007, Wendy I. Silver, Esq., Senior Enforcement Attorney, replaced Mr. Janik as counsel in this case.

## I. PROCEDURAL HISTORY

This matter was initiated on February 22, 2005 by Complainant, the United States Environmental Protection Agency, Region 8, filing an Administrative Complaint under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g). The Complaint alleged in Count 1 that Respondent, Service Oil, Inc., violated Sections 301(a) and 402(p) of the CWA (33 U.S.C. §§ 1311(a) and 1342(p)) and an implementing regulation (40 C.F.R. § 122.26), by failing to obtain, on or before the date it commenced construction activities related to its Starnart Travel Center, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from the facility. The Complaint alleged in Count 2 that, after Respondent obtained a NDPDES permit for the site, it failed to conduct storm water inspections at the requisite frequency and/or to record or maintain inspection records on-site, in violation of parts 3.B.1.a and 3.C of the permit. The Complaint proposed a single penalty of \$80,000 for the two alleged violations.

In its Answer filed on April 18, 2005, Respondent admitted failing to obtain a permit prior to commencing construction and failing to conduct the requisite number of inspections and/or maintain inspection records, but contested the amount of the proposed penalty and requested a hearing. Subsequently, the parties filed their prehearing exchanges and engaged in extensive motions practice as a result of which a variety of orders were issued including an Order Denying Respondent's Motion to Dismiss dated November 9, 2005; an Order on Respondent's Motions to Dismiss and Motion for Additional Discovery dated January 24, 2006; an Order on Motions in Limine, Motions to Supplement and Amend Prehearing Exchange, and Motion to Compel Discovery dated March 17, 2006; and an Order on Motion to Strike Addendum, Motions for Leave to File, and Motion for Reconsideration dated March 27, 2006.

On November 23, 2005, Complainant filed a Motion for Accelerated Decision on Liability and Penalties. Respondent opposed the Motion, raising, *inter alia*, an issue as to whether Complainant had established through uncontested facts a necessary legal element for liability under the two statutory sections (CWA §§ 301(a) and 402(p)) cited in Count 1 of the Complaint: that it had, *in fact*, discharged a pollutant to waters of the United States. By Order dated March 7, 2006, Accelerated Decision was granted as to Respondent's liability under Count 2 of the Complaint, but denied as to Count 1 and as to the matter of establishing an appropriate penalty.

Thereafter, on April 10, 2006, with permission of this Tribunal, Complainant filed an Amended Complaint.<sup>2</sup> The Amended Complaint added to Count 1 the allegation that Respondent's failure to obtain a NDPDES permit prior to commencing construction violated

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<sup>2</sup> By Order dated April 10, 2006, granting Complainant's Motion to Amend filed on March 13, 2006, the Amended Complaint was deemed filed as of the date of the Order and the Respondent's Answer to the original Complaint was deemed its Answer to the Amended Complaint.

CWA Section 308 (33 U.S.C. § 1318) and implementing regulation 40 C.F.R. § 122.21, as well as CWA Sections 301(a) and 402(p) and 40 C.F.R. § 122.26 as previously pled. Additionally, on April 6, 2006, Complainant filed a Notice of Reduced Penalty indicating that it was reducing the total penalty it was seeking in this case to \$40,000.

A hearing was held on this matter from April 25-27, 2006 in Moorhead, Minnesota.<sup>3</sup> Complainant presented the testimony of four witnesses at hearing: Leonila Hanley, Mark Bittner, Sandra Doty, and Aaron Urdiales. Respondent presented seven witnesses' testimony at hearing: Steven Dirk Lenthe, Steven Whaley, Brock Storrusten, John Wirres, Abbie Krebsbach, Nordan J. Lunde and Gary Bracht. In addition, during the hearing, 35 exhibits numbered 1-6, 8-15, 21, 22, 24, 25, 30-38, and 40-42, 42A, 43-45, and 45A were offered by Complainant and admitted into evidence (cited hereinafter as "C's Ex. \_\_\_"). Tr. Vol. I at 14, 101, 130, 133, 135, 139, 181, 277. Thirty-Five exhibits numbered 1-17, 19-23, and 26-38 were offered by Respondent and admitted into evidence (cited hereinafter as "R's Ex. \_\_\_"). Tr. Vol. I at 14, 57, 64, 102. Further admitted into evidence were the parties' two sets of Stipulations, dated December 1, 2005 and April 19, 2006, identified respectively as Joint Exhibits 1 and 2 (cited hereinafter as "Jt. Ex. \_\_\_"). Tr. Vol. I at 14.

Complainant filed its Initial Post-Hearing Brief (C's Brief) in this case on October 2, 2006. A Post-Hearing Brief on behalf of Respondent (R's Brief) was filed on November 14, 2006, and Complainant filed its Reply to Respondent's Brief (C's Reply Brief) on January 12, 2007, on which date the record closed.<sup>4</sup>

## **II. FACTUAL BACKGROUND**

Respondent, Service Oil, Inc., (Respondent or Service Oil) is a privately held company which was incorporated in 1978 under the laws of North Dakota. Tr. Vol. II at 50, 53; Jt. Ex. 1, Stip. 11. It is engaged in the business of retailing gasoline and diesel fuel at 12 sites situated in that State and in Minnesota. Tr. Vol. II at 10, 44, 51. Steven Dirk Lenthe is the company's owner and CEO. Tr. Vol. II at 41. Service Oil has approximately 300 employees and, in 2005, its gross revenues totaled 140 million dollars. Tr. Vol. II at 52, 53.

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<sup>3</sup> The transcript of the hearing, received by the undersigned on May 10, 2006, consists of three volumes identified by Roman numerals I, II, and III. Therefore, citations to it are in the following form "Tr. Vol. \_\_\_ at \_\_\_."

<sup>4</sup> Filing dates for the post-hearing briefs were extended in response to requests made by both parties for myriad reasons, among which was to provide Complainant with an adequate opportunity to consider the impact on this case of the plurality decision issued by the United States Supreme Court in *Rapanos, et ux. v. United States*, 126 S. Ct. 2208 (June 19, 2006), prior to filing its brief. Having been given such opportunity, Complainant indicates in its Brief that it has concluded that the *Rapanos* decision has no effect on this case. C's Brief at 4, n. 6.

In the early 1990s, Service Oil purchased from the Burlington Northern Railroad a 65 acre tract of land in Fargo, North Dakota. Tr. Vol. II at 7; R's Ex. 27. It subsequently sold off some portion of the land, and in the mid-1990s the City of Fargo installed a public street (35<sup>th</sup> Street Northwest, between 7<sup>th</sup> and 12<sup>th</sup> Avenues North) through the property. Tr. Vol. II at 7-8, 67. At the time, storm sewer inlets and associated piping connecting to the City's municipal separate storm water sewer system were incorporated into that portion of 35<sup>th</sup> Street. C's Ex. 15; R's Exs. 27, 28; Jt. Ex. 1, Stips. 16, 18. As a result, storm water discharging from the site could then flow into those inlets, through the City's storm water system, and be ultimately discharged into the Red River of the North. Complaint and Answer ¶¶ 24, 25; Jt. Ex. 1, Stips. 18, 19, 20; C's Exs. 14, 15.

In or about April 2002, Respondent began construction of its largest truckstop, the "Stamart Travel Center," on an approximately 15 to 20 acre portion of the tract located south and west of 12<sup>th</sup> Avenue North and 35<sup>th</sup> Street Northwest in Fargo, right off of Interstate Highway 29. Tr. Vol. II at 6, 52; Tr. Vol. I at 103; R's Exs. 27, 29; C's Ex. 3; C's Ex. 10, p. 60; Jt. Ex. 1, Stips. 14, 15, 23. On this site it built a building with a restaurant, fueling islands for trucks and cars, and large paved parking lots. Tr. Vol. II at 14, 101, 102; C's Ex. 10, p. 60.

Not being in the construction business itself, Respondent hired a variety of prime contractors to facilitate its 9 to 10 million dollar buildout of the site. Tr. Vol. II at 53, 55, 57, 68-69. Among the professionals it hired were Moore Engineering, Inc. (Moore), which designed the plans and specifications for the construction, including the specifications for the site work, erosion measures, and new on-site storm water inlets and pipes connecting to the existing City system; and Steven Whaley of Whaley Construction, who served as the design and project construction manager with day-to-day supervisory and management responsibility for the site during construction. Tr. Vol. II at 11, 40, 47, 65, 131, 152, 176; C's Exs. 3, 15, 3, p. 3; R's Exs. 29, 36, 38.

In late October 2002, in response to a concern regarding the low number of CWA storm water discharge permits being issued by the State in comparison to the level of regional growth, EPA inspectors traveled to Fargo to conduct joint permit inspections of construction sites with State inspectors from the North Dakota Department of Health, Division of Water Quality. Tr. Vol. I at 38-39, 88, 90. On October 24, 2002, about 10 months after construction began, Respondent's Stamart site was inspected as part of this compliance effort. C's Ex. 1; R's Ex. 1; Tr. Vol. II at 230, 235; Tr. Vol. I at 36-37, 65; Jt. Ex. 1, Stip. 24. At the time of the inspection, the site had been cleared, graded and excavated, new on-site storm drains had been installed, building and fueling stations construction was underway, and concrete/asphalt paving of the site had started, but was not yet completed, leaving large areas of exposed disturbed dirt on site. See, C's Ex. 1, R's Ex. 12.

Upon inspection of the Stamart site, the inspectors discovered that no National Pollutant Discharge Elimination System (NPDES) or North Dakota Pollutant Discharge Elimination System (NDPDES) permit for storm water discharge had been obtained for the site, the site had

no storm water pollution prevention plan in place, the requisite storm water inspections were not being conducted, and no best management practices were installed to prevent, minimize or control sediment moving off the construction site. C's Ex. 1; Jt. Ex. 1, Stips. 25, 26, 28. In addition, the inspectors reported observing concrete truck washing near a newly installed storm drain on the site, and sediment tracking onto 35<sup>th</sup> Street and into storm inlets due to uncapped or improperly capped storm drains. C's Ex. 1; R's Ex. 2; Tr. Vol. II at 253-54; Tr. Vol. I at 41-42, 48-49, 54-56, 93-95.

Immediately after completing the inspection, EPA inspector *Leonila Hanley* notified Mr. Lenthe by telephone of the inspection results. Tr. Vol. I at 57. Mr. Lenthe in turn promptly contacted Brock Storrusten of Moore and Steven Whaley and requested that they apply for the requisite storm water permit. Tr. Vol. II at 18-19, 81, 142-44, 151, 163. At hearing, Mr. Lenthe and both contractors indicated that they were unaware of the need for such a permit prior to the inspection. Tr. Vol. II at 85, 99-100. About 10 days after the inspection, on or about November 3, 2002, Mr. Storrusten prepared for Mr. Lenthe's signature and submitted to the State on Respondent's behalf a "Notice of Intent to Obtain Coverage Under NDPDES General Permit for Stormwater Discharges Associated With Construction Activity" for the site. C's Ex. 3; Tr. Vol. II at 19-22, 142, 144-45, 163-165; Tr. Vol. I at 239-40. On November 8, 2002, by telephone, and on November 15, 2002, by letter, State inspector Abbie Krebsbach responded to the filing, advising Mr. Storrusten that the filing was incomplete and that certain additional forms concerning best management practices needed to be completed and submitted. C's Ex. 4; R's Ex. 10; Tr. Vol. I at 241-42; Tr. Vol. II at 23-24, 145-146, 233-34, 250. On November 25, 2002, Mr. Storrusten submitted the two additional forms required by the State and, as Storm Water Permit No. NDR03-0571, perfected Respondent's coverage of the site under the State's General Permit for Stormwater Discharges (no. NDR03-0000). C's Exs. 5, 6, 25; R's Ex. 14; Tr. Vol. I at 238-39, 243; Jt. Ex. 1, Stip. 29.

Service Oil took occupancy of the site in March 2003 and the project was deemed essentially complete in May 2003. Tr. Vol. II at 29. A Certificate of Occupancy was issued with regard to the Travel Center building by the City of Fargo on July 7, 2003. R's Ex. 13.

Thereafter, on July 14, 2003, EPA issued to Respondent its written report on the inspection of the Stamart site conducted on October 24, 2002. C's Ex. 1; Tr. Vol. I at 37, 58. Mr. Lenthe responded to the inspection report a week later, on July 24, 2003, acknowledging and apologizing for the initial lack of a storm water permit and the related requisite site inspections, noting that after the EPA inspection the company had promptly applied for a permit and submitted a storm water pollution prevention plan, and promising to timely comply with such requirements in regard to any future construction. C's Ex. 2; Tr. Vol. I at 58-59. He further advised EPA that best management practices were currently installed to prevent sediment loading offsite, that concrete washing into storm drains would not be condoned and would be prevented in the future, and that the project was essentially complete. C's Ex. 2; Tr. Vol. I at 59-61.

Approximately a year later, on June 30, 2004, State authorities issued to Service Oil a

"Letter of Apparent Noncompliance" indicating that they had reviewed the findings in EPA's Inspection Report and Service Oil's response thereto, and determined that "activities at the site were not compliant with the North Dakota's [sic] water protection laws and administrative rules" in that the requisite storm water permit had not been obtained and construction storm water discharges had occurred in the absence of best management practices (BMPs) to minimize sediment discharges. C's Ex. 11; R's Ex. 5. However, the State concluded that "[b]ased on the circumstances related to the incident, mitigation of the potential discharge through implementing BMPs or final stabilization, and contingent upon submittal of the requested information [regarding other current or future construction projects], the Department will close this review with no further action." C's Ex. 11; R's Ex. 5. *See also*, R's Exs. 1, 2; Tr. Vol. II at 242, 262, Tr. Vol. III at 60. Perhaps in response, on the same date (June 30, 2004), Service Oil submitted to the State its "Notice of Termination to Cancel Coverage under (NDPDES) General Permit for Storm Water Discharges Associated with Construction Activity." C's Ex. 8. About two weeks later, on July 12, 2004, Respondent advised the State by facsimile that it had no current construction projects on-going and had none planned for the following year. C's Ex. 11; R's Ex. 6; Tr. Vol. II at 33-34. Upon receipt of this response, the State "closed" out its inspection case against Service Oil with no further action taken and no fine or penalty imposed. R's Exs. 3, 7.

On November 2, 2004, citing an inability to fully determine compliance at the site due to a lack of documentation, EPA issued to Service Oil a Request for Information (RFI) under CWA Section 308 (33 U.S.C. § 1318). C's Ex. 9; Tr. Vol. II at 34; Tr. Vol. I at 230. At Mr. Lenthe's request, on November 23, 2004, Mr. Storrusten responded on Service Oil's behalf to the Request, providing EPA with Site Inspection Records and other documents. C's Ex. 10, pp. 29, 45; Tr. Vol. II at 35, 152, 154, 170-72; Tr. Vol. I at 232-234.

Based upon the response to the RFI, EPA concluded that Respondent had not fully complied with the terms of the NDPDES permit issued to it. Tr. Vol. I at 247. Specifically, Part III of the Permit required that site inspections be conducted every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period, that inspection results be summarized and recorded on a Site Inspection Record, and that the Site Inspection Records be maintained on-site. Jt. Ex. 1, Stip. 30-34, 36, 37; C's Exs. 6, 25; R's Ex. 14; Tr. Vol. I at 247. Respondent's records evidenced that it failed to do such inspections at the requisite frequency and/or failed to maintain records on-site of such inspections, and according to Complainant's calculations, thereby missed conducting some 65 required inspections required *after* the permit was issued to it. Tr. Vol. I at 254-57; C's Ex. 10, pp. 29, 45; R's Ex. 37 dated March 22, 2004 (Moore counter-signed proposal to perform inspections *every two weeks*).

EPA filed this action on February 22, 2005, seeking a monetary penalty for Respondent's failure to obtain a NPDES permit prior to undertaking construction at the Stamart site and failure to conduct requisite stormwater inspections after obtaining a NDPDES permit for the site.

### III. BURDENS OF PROOF

The Consolidated Rules of Practice state that “the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.” 40 C.F.R. § 22.24(a). The standard of proof under the Rules of Practice is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Therefore, at this point, Complainant has the burden of demonstrating by a preponderance of the evidence the Respondent’s liability on Count 1 of the Amended Complaint and the appropriateness of its proposed penalty in regard to both counts.

### IV. APPLICABLE LAW AND REGULATIONS

The objective of the Federal Water Pollution Control Act, also known as the Clean Water Act (“CWA” or “the Act”), enacted largely in 1972, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by eliminating the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a); Jt. Ex. 1, Stip. 1. Pursuant thereto, Sections 301(a) and 402(a) and (b) of the Act prohibit the discharge of any pollutant from any point source into waters of the United States *unless* done in compliance with a permit issued by EPA or an authorized state, pursuant to the National Pollutant Discharge Elimination System (NPDES) established under the Act. 33 U.S.C. §§ 1311(a), 1342(a) and (b); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1145 (9<sup>th</sup> Cir. 2000); Jt. Ex. 1, Stips. 4, 5. CWA Section 308(a) provides that in order to carry out the Act’s objectives, including the NPDES permit requirements under Section 402 (33 U.S.C. § 1342), EPA can, *inter alia*, require the owner or operator of any point source to establish records, make reports, or provide other reasonably required information. 33 U.S.C. § 1318(a).

Finding that pollutants in the previously generally unregulated area of municipal and industrial stormwater discharges were causing deterioration in rivers and streams, Congress amended the CWA with the “Water Quality Act of 1987” to, *inter alia*, clearly and explicitly extend the Act’s permit requirements to those discharges by adding Section 402(p) thereto.<sup>5</sup> *See*,

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<sup>5</sup> CWA Section 402(p) is actually written in the negative in that it provides that, prior to October 1, 1994, “discharges composed entirely of stormwater” “shall not require a permit” except for, *inter alia*, a “discharge associated with industrial activity.” 33 U.S.C. § 1342(p)(1), (2)(B). The affirmative statutory requirement that a permit be obtained for stormwater discharges is created by CWA Section 301’s general *prohibition* on the discharge of any pollutant except as in compliance with, *inter alia*, the NPDES permit system set out in CWA Section 402 on the basis that storm water can transport “pollutant(s)” (*i.e.* rock, sand, dirt), as defined by 33 U.S.C. § 1362(6) and 40 C.F.R. § 122.2, from construction sites which are “point sources,” as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2, which are then “discharged,” *i.e.* added, to navigable waters, as defined by 33 U.S.C. § 1362(12) and 40 C.F.R. § 122.2. The term

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133 Cong. Rec. S733-02 (1987)(Remarks of Sen. Burdick of North Dakota, *et al.*, in support of proposed Act noting it addresses on-going "serious water pollution problems" including the 30% of rivers still not meeting water quality standards due to pollution and that stormwater runoff containing toxic and conventional pollutants is the cause of half the remaining water quality problems); Section 405 of Pub. L. No. 100-4, 101 Stat. 7 (Feb. 4, 1987) (codified as 33 U.S.C. § 1342(p)); Tr. Vol. I at 33; C's Ex. 22.

In 1990, pursuant to Congressional authority granted to it, EPA began issuing regulations implementing Section 402(p)'s permit requirements to storm water discharges associated with industrial activity and municipal separate storm water systems in two phases.<sup>6</sup> 33 U.S.C. §1342(p)(6); Tr. Vol. I at 33; Jt. Ex. 1, Stip. 6. Phase I regulations, issued in 1990, focused on large construction sites (*i.e.* those over 5 acres), 11 categories of industrial facilities, and major metropolitan municipal separate storm sewer systems (*i.e.* those serving populations over 250,000). 55 Fed. Reg. 47990 (Nov. 16, 1990); Tr. Vol. I at 120, 237. Phase II regulations, issued in 1999, broadened regulatory coverage to include smaller construction sites (those over 1 acre), smaller municipalities (those with populations of less than 100,000), and smaller municipal separate storm sewer systems. 64 Fed. Reg. 68722 (Dec. 8, 1999); C's Exs. 21, 22; Tr. Vol. I at 87, 120-21, 237.

In its regulations, EPA defined "stormwater" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). *See also*, Tr. Vol. I at 33 (Hanley) ("Storm water is runoff that's the result of precipitation from like snow melt, rain, hail."). "Storm water discharge[s] *associated with industrial activity*" are defined as encompassing those from "[c]onstruction activity including clearing, grading and excavation." 40 C.F.R. § 122.26(b)(14)(x)(italics added). *See also*, Jt. Ex. 1, Stip. 7. Under the regulations, dischargers of storm water associated with construction activity are required to apply for an individual permit or seek coverage under a general permit. 40 C.F.R. § 122.26(c)(1); Jt. Ex. 1, Stip. 8. An individual

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<sup>5</sup>(...continued)

"discharge" is defined to include additions through "surface runoff which is collected or channeled" "through pipes, sewers or other conveyances owned by a State [or] municipality." 40 C.F.R. § 122.2.

<sup>6</sup> EPA defined the term "municipal separate storm sewer" as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city . . . ; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works . . . ." 40 C.F.R. §§ 122.26(b)(8), (b)(19). A municipal separate storm sewer system is often referred to as "MS4." A combined sewer system is one that, by design and function, carries *both* sanitary sewage (wastewater from homes, offices, factories) and storm water. 40 C.F.R. § 122.26(a)(7). Under the NPDES system, sanitary sewage in a single or combined municipal system is treated to minimize pollutants prior to discharge into public waters, whereas storm water is not.



permit is one tailored to a single specific facility and its particular discharges. General permits, issued by EPA or authorized states, establish identical permit conditions for broad categories of discharges by similarly situated facilities. 40 C.F.R. § 122.28(a)(2)(ii). Once a general permit is issued, any potential discharger who thinks it meets the general permit criteria can submit a "Notice of Intent" to the permitting authority requesting coverage under the general permit and promising to comply with the conditions therein. 40 C.F.R. § 122.28(b)(2)(I). The permitting authority can then grant coverage under the general permit or require the facility to apply for an individual permit. 40 C.F.R. § 122.28(b).

The State of North Dakota has had an EPA approved NPDES permit program under CWA Section 402(b) (33 U.S.C. § 1342(b)) since 1975 and has been approved by EPA to issue general NPDES permits since 1990. 40 Fed Reg. 28663 (July 8, 1975); 55 Fed. Reg 5560 (Feb. 16, 1990); <http://cfpub2.epa.gov/npdes/statestats.cfm>; Jt. Ex. 1, Stip. 9.

In 1999, North Dakota issued a NPDES Authorization/General Permit no. NDR03-0000 providing that "facilities both qualifying for and satisfying the requirements identified in Part I of this permit are authorized to discharge stormwater associated with CONSTRUCTION ACTIVITY to waters of the state in accordance with the effluent limitations, monitoring requirements, and other conditions set forth in Parts I-VI, hereof."<sup>7</sup> C's Ex. 25 (capitals in original); R's Ex. 15; Tr. Vol. I at 74; Jt. Ex. 1, Stip. 10. Part I of the General Permit provides that "[t]he operator of the construction activity shall submit a Notice of Intent [NOI] . . . to obtain coverage for stormwater discharges and a SWPP [Stormwater Pollution Prevention] plan for the construction project, 30 days prior to the start of construction," and that "[i]f the applicant does not receive a request for additional information or a notification of denial . . . authorization to discharge *in accordance with the conditions of this permit* shall be deemed granted." C's Ex. 25, Part I C.1. & D.1. (italics added); Tr. Vol. I at 74.

Part II of the Permit mandates that "[s]tormwater discharges from construction sites shall not cause pollution, contamination or degradation to waters of the state." C's Ex. 25, Part II D. The "main objective" of the SWPP plan submitted with the NOI therefore is to "identify potential sources of pollution which may reasonably be expected to affect the quality of stormwater discharges associated with construction activity; and to describe Best Management Practices (BMPs) which will be used to reduce the pollutants in the stormwater discharges associated with construction activity."<sup>8</sup> C's Ex. 25, Part II C.1. "Implementation of the plan shall be at the start

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<sup>7</sup> This General Permit was modified on March 10, 2003, after the inspection at issue here, to address construction sites of 5 acres or less, which is of no import to the matters at issue in this case. C's Ex. 6; R's Ex. 14; Tr. Vol. I at 236-37.

<sup>8</sup> The Permit requires the SWPP plan submitted to include as "key elements" thereof: a site description including information on the erodibility of soils on site and location of storm sewer discharges with a map identifying areas of soil disturbance, locations of proposed and

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of construction.” C’s Ex. 25, Part II C.2. Visible erosion (deposits of mud, dirt, sediment, *etc.* exceeding one-half cubic foot per 100 square feet) leaving the site, evidence of concentrated flows of water over bare soils, turbid or sediment-laden flows, where runoff water is not filtered or captured on site in accordance with the SWPP plan, and sediment or concrete being washed into storm sewers are explicitly prohibited by the Permit. C’s Ex. 25, Part II D. In terms of effluent limitations, the Permit establishes that “[t]he quality of stormwater discharges associated with construction activity shall reflect the best which is attainable through the proper implementation of all items in the SWPP plan for the construction site.” C’s Ex. 25, Part III A. As such, it imposes monitoring requirements including that “[t]he permittee shall inspect the construction site to ensure that the stormwater controls identified in the SWPP plan are effective and properly maintained;” that such inspections for erosion, sediment accumulation, sediment material shall occur “every 7 calendar days and within 24 hours after any storm event of greater than 0.50 inches of rain per 24-hour period;” and that the inspection results be summarized and recorded on a Site Inspection Record maintained on-site. C’s Ex. 25, Part III; Jt. Ex. 1, Stips. 30, 32. Finally, the Permit notes that “[t]he permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action . . .” C’s Ex. 25, Part IV.

Similarly, with regard to enforcement, Section 309(g)(1) of the CWA provides in pertinent part that:

Whenever on the basis of any information available --

(A) the Administrator finds that any person has violated section 1311 [prohibiting pollutant discharges], . . . 1318 [regarding records and reports]. . . of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State . . .

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<sup>8</sup>(...continued)

existing stormwater controls, and stormwater runoff drainage patterns; a “Significant Material Inventory” describing potential pollution sources; as well as a description of the BMPs which will be implemented and maintained including erosion and sediment controls such “structural practices” to divert flows from exposed soil, store flows, or otherwise limit runoff from exposed areas on site, and other controls to reduce sediment tracking onto roads. C’s Ex. 25, Part II C.3. *See also*, Tr. Vol. I at 34-35, 42-43. BMPs are targeted to prevent pollutants from initially entering the storm water system rather than treating polluted water. Tr. Vol. I at 127-28. Structural BMP practices to control sediment range from those that are simple and inexpensive to those that are complex and costly and include straw bale dikes, silt fences, drain inlet and outlet protection, sediment traps, and temporary sediment basins. C’s Ex. 25, Part II C.3.d(i)(b); Tr. Vol. I at 43, 95. Barriers at the edges of curbs and designated parking area and vehicle track out gravel pads can reduce sediment tracking off site. Tr. Vol. I at 95-98.

\* \* \*

the Administrator . . . may . . . assess a . . . civil penalty under this subsection.

33 U.S.C. § 1319(g)(1).

#### V. LAW OF THE CASE ESTABLISHED BY ACCELERATED DECISION

As previously indicated, prior to hearing, Complainant sought accelerated decision on the two counts of violation alleged in the original Complaint. Count 1 of that Complaint alleged that Respondent violated Sections 301(a) and 402(p) of the CWA (33 U.S.C. §§ 1311(a) and 1342(p)) and implementing regulation 40 C.F.R. § 122.26, by failing to obtain, on or before the date it commenced construction activities at its facility, a NDPDES permit authorizing storm water discharges from its facility. The Complaint alleged in Count 2 that, after Respondent obtained a NDPDES general permit, it failed to conduct storm water inspections at the requisite frequency and/or to record or maintain inspection records on-site, in violation of parts 3.B.1.a and 3.C of the permit.

In the March 7, 2006 Order on Complainant's Motion for Accelerated Decision, with regard to Count I, this Tribunal held that an element of liability under Section 301(a) of the CWA (33 U.S.C. § 1311(a)) is the occurrence of a "discharge" of a pollutant. In that whether a discharge had actually occurred was a factual issue in dispute, accelerated decision was denied as to Count 1 on the basis of Section 301(a). See, *Service Oil, Inc.*, 2006 EPA ALJ LEXIS 6, \*13-26 (ALJ, March 7, 2006)(Order on Complainant's Motion for Accelerated Decision). Further, it was held that Section 402(p) (33 U.S.C. § 1342(p)) regarding storm water permit requirements, read in conjunction with Section 309(g)(1) (33 U.S.C. § 1319(g)(1)), only imposes liability for violating a "condition or limitation" in a permit issued thereunder and, since Complainant had not alleged in Count 1 that Respondent had violated a "condition or limitation" in a permit issued under Section 402, this section did not create a basis of liability under Count 1.<sup>9</sup> *Id.* 2006 EPA ALJ LEXIS 6 at \*15.

With regard to the second count, the Order stated --

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<sup>9</sup> In regard to Count 1, this Tribunal also noted in its Order that the implementing regulation cited in the (original) Complaint, 40 C.F.R. § 122.26(c), read in conjunction with another (40 C.F.R. § 122.21), states that "[d]ischargers of storm water associated with industrial activity . . . are required to apply for an individual permit or seek coverage under a promulgated storm water general permit" 90 days prior to commencing construction, and that undisputably Respondent did not do so. The regulation(s), however, could not eliminate an element of liability, *i.e.* that of actual discharge, under Section 301, the statutory section alleged as violated in the Complaint. As such, accelerated decision would not be granted on the Complaint *as written*. *Service Oil, Inc.*, 2006 EPA ALJ LEXIS 6, \*19-22 (ALJ, March 7, 2006)(Order on Complainant's Motion for Accelerated Decision).

Count 2 alleges that after Respondent obtained the general North Dakota NPDES permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. It alleges a violation of a condition of the permit. It appears that this condition implements Section 308(a) of the CWA, 33 U.S.C. Section 1318, which provides in pertinent part, that "... the Administrator shall require the owner or operator of any point source to (I) establish and maintain such records . . . [and] (iii) . . . use . . . such monitoring equipment or methods . . . ." CWA Section 309(g) in turn provides, in pertinent part, "Whenever on the basis of any information available . . . the Administrator finds that any person has violated Section 1311 . . . [or] 1318. . . or has violated any permit condition or limitation implementing any of such sections in a permit issued under Section 1342 of this title . . . the Administrator . . . may . . . assess a . . . class II civil penalty . . . ." The plain language of the statute indicates that a violation of a Section 402 permit condition that implements Section 308 of the CWA constitutes a violation of the CWA Section 309(g) *regardless of whether a discharge has occurred*.

The parties do not dispute that Respondent failed to conduct stormwater inspections at the weekly frequency required by the permit, and that Respondent failed to record and/or maintain site inspection records on-site. Stip ¶¶ 31, 33. The parties do not dispute that these were conditions of the NDPDES permit. Stip ¶¶ 30, 32. Respondent has not raised any issues of fact that are material to Count 2. Accordingly, Complainant has demonstrated that there are no genuine issues of material fact, and it is entitled to judgment as a matter of law, as to liability on Count 2.

*Id.*, 2006 EPA ALJ LEXIS 6 at \*26-27 (italics and bold added).

On the basis of these rulings, this Tribunal denied Complainant's Motion for Accelerated Decision as to Count 1 of the original Complaint, granted the Motion as to Count 2, and denied the Motion as to the issue of penalties in that Complainant had only sought an undifferentiated aggregate penalty of \$80,000 on both counts. *Id.*, 2006 EPA ALJ LEXIS 6 at \*29.

## **VI. RESPONDENT'S LIABILITY UNDER SECTION 308**

### **A. Elements of Liability Under Section 308**

As indicated above, after the issuance of the Order on Complainant's Motion for Accelerated Decision, Complainant filed an Amended Complaint adding as additional bases of liability under Count 1 an allegation that Respondent violated CWA Section 308 (33 U.S.C. § 1318) and implementing regulation 40 C.F.R. § 122.21 by failing to obtain a NDPDES permit

authorizing storm water discharges from its facility prior to commencing construction.<sup>10</sup>

Whether an actual discharge of pollutants occurred in this case is a matter in dispute. However, resolution of that issue may be unnecessary if the failure to apply for and obtain a permit for storm water discharges could constitute a violation of Section 308 regardless of whether an actual discharge occurred. Complainant argues that it does constitute a violation and Respondent argues that it does not. C's Reply Brief at 5-8; R's Brief at 47-49.

Section 308(a) of the CWA states in pertinent part that -

*Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any . . . limitation, prohibition, or . . . standard of performance under this chapter; (2) determining whether any person is in violation of any such . . . limitation, prohibition or . . . standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to state permit programs), 405, and 504 of this Act -*

(A) the *Administrator shall require* the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods . . . (iv) sample such effluents . . . ; and (v) provide such other information as he may reasonably require . . .

33 U.S.C. § 1318(a) (italics added).

Further, CWA Section 309(g)(1) provides in pertinent part that:

Whenever on the basis of any information available --

(A) the Administrator finds that any person has violated section . . . 1318 [CWA § 308]. . .

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<sup>10</sup> Complainant did not allege in Count 1 of the original Complaint nor in the subsequently filed Amended Complaint, and therefore it is not considered herein, whether the requirement contained in the General Stormwater Permit issued by North Dakota to file a Notice of Intent for coverage 30 days prior to the start of construction, *by itself*, imposes a legal obligation, the violation of which would be actionable by an EPA enforcement action brought pursuant to Section 309(g), upon those who implicitly fall within the ambit of such requirement, *i.e.* owners/operators of impending construction sites within the State, but who have not yet obtained *individual* permit coverage under the General Permit, on the basis that such individuals have violated a "permit condition or limitation . . . in a permit issued under section 1342 . . . by a State." 33 U.S.C. § 1319(g).

\* \* \*

the Administrator . . . may, after consultation with the State in which the violation occurs, assess a . . . civil penalty under this subsection.

33 U.S.C. § 1319(g)(1).

While at first glance, it appears that the language of Section 308(a) does not impose a general statutory obligation upon owners and operators of point sources, but rather imposes an duty only upon “the Administrator”<sup>11</sup> - that he or she “shall require” such persons “to establish and maintain records,” *etc.*,<sup>12</sup> construing that section in such a limited manner would render meaningless that portion of Section 309(g)(1) quoted above authorizing that same Administrator to assess a civil penalty when he or she finds that “any person”<sup>13</sup> has violated Section 308. Moreover, such interpretive result would breach the cardinal rules of statutory construction that “[n]o clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute” and “. . . each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” 2A Sutherland Statutory Construction §§ 46:05, 46:06 (6<sup>th</sup> Ed. 2000). Therefore, a fair interpretation of Section 308 would be to read it as imposing a statutory obligation not only upon the Administrator, but also an implied corollary obligation upon “owners and operators of point sources” to *comply* with the Administrator’s requirements issued under that section regarding such records, enforceable by the Administrator through the authority granted him or her under CWA Section 309(g)(1). *See e.g., United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1109 (W. D. Wis. 2001)(noting under CWA section 308 and its regulations issued pursuant thereto a permittee “must establish and maintain records, install and use monitoring equipment, sample its effluent according to a prescribed schedule, and report the results to the permitting agency”). *Cf. San Francisco Baykeeper v. Tidewater Sand & Gravel Co.*, No. C 96-01531 CW, 1997 U.S. Dist. LEXIS 22602 \*17-19 (N.D. Cal. 1997)(unlawful acts under the CWA are not limited to discharges of pollutants and permit

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<sup>11</sup> “Administrator” is defined under the CWA as the “Administrator of the United States Environmental Protection Agency.” 40 C.F.R. § 122.2.

<sup>12</sup> Although Section 308 contains other subsections, none of those subsections impose a general public statutory obligation or prohibition. Rather, those subsections establish certain limited rights regarding public accessibility to records acquired by the Administrator and criminal penalties for unlawful disclosure of confidential information by the Administrator’s staff (308(b)), provide for the Administrator’s approval of state procedures for inspection, monitoring and entry of point sources (308)(c), and grant Congressional access to information reported to the Administrator under the CWA (308(d)). 33 U.S.C. § 1318(b)-(d).

<sup>13</sup> For the purposes of the CWA, “[t]he term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

violations).

Respondent does not appear to dispute this point but argues that “Section 308 does not create liability for the failure to apply for a storm water permit absent a request or order for information by the administrator” and “a subsequent refusal by an individual to comply,” particularly where, as in this case, the owner/operator and the construction specialists it hired were all unaware of the need to apply for a permit, citing as support *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 375 F. Supp. 1148, 1152 (D. Md. 1974). R’s Brief at 48-49, 51. Respondent argues further that since EPA never “actually requested Respondent, prior to construction, . . . obtain an NPDES permit” and it never failed to comply with such a request, it cannot be held liable under Section 308. *Id.* at 50. Additionally, Respondent notes that it did respond to a Request for Information issued by EPA under Section 308, referring to Complainant’s Exhibits 9 and 10. *Id.*

Complainant, on the other hand, states that Section 308 liability is *not* limited to instances where “EPA singles out a specific discharger with an individually-tailored ‘request’ for information,” but can generally impose though “broad, general regulat[ions]” “requirements that fall easily within the ambit of section 308.” C’s Reply Brief at 6. Complainant argues that the regulatory requirement in 40 C.F.R. § 122.21 that an owner or operator of a point source who discharges or proposes to discharge pollutants into navigable water apply for a permit is within the ambit of the Administrator’s authority under Section 308 to “require the owner or operator of any point source to . . . provide . . . information as [the Administrator] may reasonably require,” to determine whether that operator “is in violation of any limitation [or] prohibition” and is “carrying out section 402 of the Act.” C’s Reply Brief at 7. EPA notes that Respondent has not articulated a challenge to the validity of this regulation, that the time (120 days from promulgation) provided to do so has expired, and that, in any case, such a challenge is not permitted in an enforcement action, citing CWA Section 509(b)(1) (33 U.S.C. § 1369(b)(1)). *See also*, 40 C.F.R. § 22.38(c)(providing that action of the Administrator for which review could have been obtained under CWA Section 509(b)(1) shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under CWA Section 309(g)). Further, EPA asserts that its NPDES permit application requirement set forth in 40 C.F.R. § 122.21(g), which it claimed was promulgated pursuant to Section 308, was upheld as a reasonable exercise of the Agency authority in *NRDC v. EPA*, 822 F.2d 104, 118-122 (D.C. Cir. 1987) and that *Jones Falls Sewage* is “neither controlling nor instructive in the case at hand” since the court did not address therein the issue of whether EPA may exercise its authority under Section 308 through regulations. C’s Reply Brief at 6-7. Finally, EPA argues that the fact that neither EPA nor the State made Respondent or its contractors aware of the regulatory requirement to file a permit is not a defense to liability as ignorance of the law is no defense, citing *Roger Barber d/b/a Barber Trucking*, EPA Docket No. CWA-05-2005-0004 (ALJ, Dec. 7, 2005)(Order on Motion for Accelerated Decision). C’s Reply Brief at 6-8.

Thus, the first issue here as framed by the parties is whether the Administrator can by validly promulgated regulations broadly implement the authority granted to him or her by Section

308 (33 U.S.C. § 1318) that “[w]henever required to carry out the objective of the [CWA]” he or she “shall require the owner or operator of any point source,” to establish records, make reports, use monitoring, sample effluents, or provide other information, or whether such authority is limited to individually tailored requests. It is the foremost rule of statutory interpretation that “where . . . the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)(quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *U.S. v. Revis*, 22 F. Supp. 2d 1242, 1250 (N.D. Okla. 1998). In this regard, it is noted that Section 308 does not explicitly refer to the issuance of regulations by the Administrator regarding implementing his or her obligations under that section, whereas other sections of the CWA do contain such provisions. *See e.g.*, CWA Section 402(p)(6)(establishing a date by which the Administrator “shall issue regulations” regarding storm water discharges); CWA Section 301(b)((1)(C), (2)(A) (establishing a date for achieving water quality standards established by Federal regulation and effluent limitations “as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title”); CWA Section 303(b) (“The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards . . .”); CWA Section 304(b)(“ . . . the Administrator shall . . . publish within one year . . . regulations, providing guidelines for effluent limitations . . .”); CWA Section 307(a)(7)(“Prior to publishing any regulation pursuant to this section [on toxic and pretreatment standards] the Administrator shall . . . consult with appropriate advisor[s] . . .”). However, the Administrator’s authority to issue regulations implementing his or her authority under the CWA is not limited to sections explicitly referring to regulations, in that CWA Section 501(a) (33 U.S.C. § 1361(a)) provides the Administrator with the broad general authority “to prescribe such regulations as are necessary to carry out his functions under this chapter.”

Moreover, while the language of Section 308(a) appears to be singular, *i.e.* “require the owner or operator of any point source,” rather than owners or operators of point sources, suggesting perhaps an individually directed administrative request rather than broad general regulations, such singularity has no interpretive significance where 1 U.S.C. §1 clearly provides that “[i]n determining the meaning of any Act of Congress . . . words importing the singular include and apply to several persons, parties or things . . .” *See also*, 2A Sutherland Statutory Construction 47:34 (6<sup>th</sup> Ed. 2000)(it is a well established rule of statutory construction that “legislative terms which are singular in form may apply to multiple subjects,” noting that there is a presumption in favor of multiple subjects). Further, there is nothing contained in the language of Section 308 which otherwise suggests that the Administrator’s authority “to carry out the objective of this chapter [or Act]” cannot be implemented through regulations. Indeed, such objective specifically includes “any requirement *established* under this section,” suggesting that Congress anticipated the Administrator broadly “establishing” requirements under Section 308 and not merely issuing individual requests to owners and operators of point sources, as the word “establish” means to “settle firmly” or “fix unalterably” “place on permanent footing,” or “*to regulate.*” Black’s Law Dictionary 490 (5<sup>th</sup> Ed.1979).

In addition, it has been recognized that: “[w]here administrative powers are granted for the



purpose of effectuating broad regulatory programs which are deemed essential to the public welfare, interpretive attention may concentrate on the remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the program to be realized." 3 Sutherland Statutory Construction § 65:3 (6<sup>th</sup> Ed. 2000)(citing *inter alia*, *Continental Pipe Line Co. v. Belle Fourche Pipeline Co.*, 372 F. Supp. 1333 (D. Wyo. 1974)("In construing [a statute] . . . the court should attempt . . . to leave no operation unregulated and in a "no-man's land."). As noted by the court in *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 108, 111, 119 (D.C. Cir. 1987), "[t]he cornerstone of the Clean Water Act's pollution control scheme is the National Pollution Discharge Elimination System (NPDES) permit program," and "the comprehensive NPDES regulations are pivotal to implementation of the Clean Water Act's permit scheme" and "[t]he breadth of this statutory grant of authority is obvious. . . . the statute's sweep is sufficient to justify broad information disclosure requirements relating to the Administrator's duties, as long as the disclosure demands which he imposes are 'reasonable.'" As such, there is simply no basis for restricting the Administrator's authority granted to him under CWA Section 308 to imposing "requirements" on a case-by-case basis rather than by broad regulations, especially with regard to owners and operators of point sources generally applying for a NPDES permits prior to discharge. See, *Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1366 (7th Cir. 1983)("Where the agency must make a large number of individual discretionary decisions, it is entirely appropriate for it to issue regulations informing the public about the standards and procedures the agency intends to apply. . . . Those regulations simplify the administrative task and help guard against arbitrary agency action.").

In support of its opposing position, Respondent cites the singular case of *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 375 F. Supp. 1148, 1152 (D. Md. 1974), *affirmed on other grounds*, 539 F.2d 1006 (4th Cir. 1976), which was brought by a citizen group alleging pollutants were being discharged without a permit in violation of the CWA. The court held in that case that because application for permits had been made under Section 402, although not issued, there could be no permit violations under the interim immunity provisions of CWA Section 402(k). In regard to Section 308, the decision's whole discussion of the matter consists of the following:

Even accepting the application of section 1342(k) to the instant case, plaintiffs argue that defendants are still subject to suit under the Act because the complaint alleges violations of 33 U.S.C. § 1318, which violations are not suspended by section 1342(k). The weakness in this argument is that the defendants could not possibly have violated section 1318. In pertinent part that section provides: "Whenever required to carry out the objective of this chapter \* \* \* the Administrator shall require the owner or operator of any point source" to maintain records, file reports, use monitoring devices, sample effluents and provide such other information as the Administrator might reasonably require. *Obviously, a discharger cannot be in violation of this section or an order issued under this section unless such an order has in fact been issued. It is not alleged in the complaint nor does it appear to be the case that any such order has been issued to*

*any of the defendants herein.*

*Jones Falls Sewage*, 375 F. Supp. at 1152 (italics added).

However, it is important to note that this decision was issued in 1974, *before* the Agency promulgated any regulations even arguably under the authority of Section 308. The regulations implementing the CWA's NPDES program were first promulgated in 1972 and 1973. *See*, 37 Fed. Reg. 28391 (Dec. 22, 1972) (issuing 40 C.F.R. *Part 124*, regarding state issued permits) and 38 Fed. Reg. 13528 (May 12, 1973) (issuing 40 C.F.R. *Part 125*, regarding EPA issued permits). Although both of those sets of regulations contained a requirement that persons wishing to discharge pollutants file a NPDES application (37 Fed. Reg. at 28393; 38 Fed. Reg. at 13531), the Agency narrowly cited as its authority for those two regulatory issuances only CWA Section 304 and CWA Sections 402 and 405, respectively. *See*, 37 Fed. Reg. at 28391 and 38 Fed. Reg. at 13529. In 1979, EPA revised its regulations in light of the 1977 amendments to the CWA and promulgated 40 C.F.R. *Part 122* to avoid duplicity by consolidating the regulations previously issued in Parts 124 and 125. *See*, 44 Fed. Reg. 32854, 32856 (Jun. 7, 1979). This time the Agency broadly cited as its authority for promulgating the regulations the whole of "The Clean Water Act, as amended by The Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*" *See*, 44 Fed. Reg. at 32899. Section 122.10 of Part 122 at that time contained a requirement that persons proposing to discharge pollutants apply for a permit. *See*, 44 Fed. Reg. at 32903. It appears that subsequently, in 1980, EPA consolidated the regulations for its various permit programs, Section 122.10 was renumbered as Section 122.4, and a reference to its applicability to state NPDES programs was added. *See*, 45 Fed. Reg. 33418, 33424 (May 19, 1980). On April 1, 1983, the Agency reorganized its permit program regulations in Parts 122 through 124 and renumbered the provision regarding a general "duty to apply" for a NPDES permit as Section 122.21, continuing to cite "The Clean Water Act, 33 U.S.C. § 1251 *et seq.*" as authority therefor. 48 Fed. Reg. 14146, 14154 (Apr. 1, 1983). In 1990, Part 122 was amended to specifically cover permitting of storm water discharges, Section 122.21 was amended, and Section 122.26 was added in furtherance thereof. *See*, 55 Fed. Reg. 47990, 48062-63 (Nov. 16, 1990). The regulations issued at that time indicated that "[t]he authority citation for part 122 continues to read as follows: Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*" *See*, 55 Fed. Reg. at 48062. Thus, at the time the *Jones Falls Sewage* case was decided, the Administrator had not issued any regulations which could be considered as "requirements" under Section 308, a violation of which could be enforceable under Section 309(g). Under such circumstances, the District Court correctly concluded that a specific "order" directed to an owner or operator pursuant to that section would be necessary. Those circumstances, however, are no longer in effect.

Moreover, a higher authority, the Third Circuit Court of Appeals, after EPA issued regulations under authority granted by the whole of the CWA, recognized in a recent decision the enforceability of regulations imposing requirements within the ambit of the Agency's authority under Section 308 without a specific order. *See, United States v. Allegheny Ludlum Corp.*, 366 F. 3d 164 (3<sup>rd</sup> Cir. 2004). *Allegheny Ludlum* involved, *inter alia*, a permittee whose discharge monitoring reports (DMR) erroneously indicated that it had discharged pollutants in amounts in

excess of its permit, when it in fact had not. *Id.* The Third Circuit in that case explicitly noted that the regulatory provision 40 C.F.R. § 122.41(l)(8), requiring a permittee who becomes aware of any inaccuracy in a Discharge Monitoring Report (DMR) to promptly notify the EPA, “was promulgated pursuant to the Administrator’s authority under 33 U.S.C. § 1318(a) to impose reporting requirements.” 366 F.3d at 175-176. Moreover, it held that, “[s]ince 33 U.S.C. § 1319 authorizes administrative, civil, and even criminal penalties for violations of § 1318, the failure to correct an inaccurate DMR is *an independent violation of the CWA and regulations thereunder.*” *Id.* (italics added). Thus, even where there was no violative discharge, and thus no liability under CWA Section 301, a violation for failing to comply with regulations issued under Section 308 could still be found. *See also, United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1109 (W. D. Wis. 2001) (recognizing Section 308 and certain regulations (40 C.F.R. §§ 122.41, 122.48, 123.25, 122.2, & 122.22) as imposing enforceable requirements on permittees regarding records and reports).

Therefore, based upon the foregoing, I find, contrary to Respondent’s position, that the issuance of an individualized request or order by the Administrator under Section 308 is *not* a precondition to finding a violation under Section 308, and that violations of validly promulgated regulations requiring the making of records or reports, monitoring, sampling effluent, or providing information, falling within the ambit of the authority granted to the Administrator by Section 308, can be a basis for a penalty action under CWA Section 309(g). *Cf. United States v. Liviola*, 605 F. Supp. 96, 100 (N. D. Ohio 1985)(holding with regard to a request for information issued under RCRA that “it is clear that [42 U.S.C.] § 6927(a) imposes a ‘requirement of this subchapter’ for purposes of § 6928(g), and that EPA need not issue a compliance order or administrative subpoena prior to seeking civil penalties.”).

Moreover, I find that the relevant regulation (40 C.F.R. § 122.21) can be a basis for finding a violation for failing to obtain a permit prior to commencing construction as alleged in Count 1 of the Complaint, as it falls within the ambit of the Administrator’s authority under Section 308.<sup>14</sup>

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<sup>14</sup> I recognize that Count 1 also alleges that, by not obtaining a permit prior to commencing construction, Respondent violated 40 C.F.R. § 122.26. However, it is noted that while that regulation reiterates that “[a]n operator of an existing or *new* storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section” is required to apply for an individual permit or seek coverage under a general permit and enumerates the information to be included in such application (such as the location of the construction activity; total area of site; “*proposed* measures” including BMPs to control pollutants in stormwater discharges during and after construction; “an *estimate* of the runoff coefficient” and increased impervious area after construction; and the name of the receiving water), the regulation does not explicitly establish a *time* for filing such application. 40 C.F.R. § 122.26(c)((1)(ii)). Since Respondent did eventually file for a permit which was granted, and Complainant has not alleged that it failed to provide the requisite information when it did so, but

(continued...)

Section 122.21 provides in pertinent part that -

(a) Duty to apply. (1) Any person who discharges or *proposes to discharge pollutants* . . . must submit a completed application to the Director . . . .

(c) Time to apply. (1) . . . Facilities proposing a *new discharge* of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity. Facilities described under §122.26(b)(14)(x) [*i.e.* those engaged in construction activity] . . . shall submit applications at least 90 days before the date on which construction is to commence.

40 C.F.R. § 122.21(a), (c)(italics added).<sup>15</sup>

The provisions of this regulation issued by the EPA Administrator clearly “require the owner or operator of any point source to establish . . . records . . . and provide such other information as [the Administrator] may reasonably require,” *i.e.*, the submission of a “completed” permit application, “to carry out the objective of this chapter [the Act],” 33 U.S.C. §§ 1251-1387, which is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” including “carrying out section[] . . . 1342 [the NPDES permit program] . . . .” 33 U.S.C. §§ 1251, 1318. As such, Section 122.21 can be said to have been promulgated in part to carry out the authority given to the Administrator by CWA Section 308 (33 U.S.C. § 1318).<sup>16</sup>

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<sup>14</sup>(...continued)

rather alleges in Count 1 that Respondent failed to obtain a permit “prior to commencing construction,” it appears that the provisions of § 122.21, rather than § 122.26, are at issue here.

<sup>15</sup> The requirements of this regulation are explicitly made applicable to approved state NPDES programs. *See*, 40 C.F.R. §§ 122.1(a)(5), 122.21, 122.26, and 123.25. Section 122.1(a)(5) provides that “[c]ertain requirements set forth in parts 122 and 124 of this chapter are made applicable to approved State programs by reference in part 123 of this chapter. These references are set forth in § 123.25 of this chapter. If a section or paragraph of part 122 or 124 of this chapter is applicable to States, through reference in § 123.25 of this chapter, that fact is signaled by the following words at the end of the section or paragraph heading: (Applicable to State programs, see § 123.25 of this chapter).”

<sup>16</sup> While the parties stipulated that “[a]s directed by section 402(p) of the Act, 33 U.S.C. 1342(p), EPA had issued regulations “that define requirements for NPDES permits for storm water discharges” and that “[t]hese regulations include those codified at 40 C.F.R. 122.26” (Jt. Ex. 1, Stips. 1, 6 (italics added)), the statutory authority under which the regulations were, in fact, promulgated is a matter of law and as such the parties’ opinion on this matter is not binding. *See, Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 770 (9th Cir. 2006)(whether agency  
(continued...)

Finally, this brings us to the issue of whether evidence of a “discharge” is an element of a violation of Section 308. Unlike Section 301(a)(33 U.S.C. § 1311(a)), Section 308 does not refer to a “discharge” of pollutants. Moreover, Section 309(g)(1) provides, without relevant condition, that violations of Section 308 subjects “any person” to civil penalty.<sup>17</sup> (33 U.S.C. § 1319(g)(1)). As concluded in *Allegheny Ludlum*, violations of regulatory requirements falling within the ambit of Section 308 create an independent basis of liability, even where no violative discharge of pollutants occurred. 366 F.3d at 175.<sup>18</sup> See also, *United States v. Hartz Constr. Co.*, No. 98 C 4785, 2000 U.S. Dist. LEXIS 12405, \*7-14 (N. D. Ill., Aug. 17, 2000) (suggesting that failure to provide responsive information to EPA request made pursuant to Section 308 constitutes a violation which is subject to penalty under § 309(d) without evidence of actual discharge). It is therefore clear that a violation of Section 308 does not require a finding that a discharge has occurred.

Accordingly, if Complainant can prove that Respondent was obliged to, but did not, comply with 40 C.F.R. § 122.21, implementing CWA Section 308, liability can still be found absent evidence of an actual discharge. See generally, *Salt Pond Assocs. v. United States Army Corps of Eng'rs*, 815 F. Supp. 766, 779 (D. Del. 1993)(validly promulgated CWA regulations have the force of law).

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<sup>16</sup>(...continued)

regulations are within its statutory authority is a question of law); *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939)(“We are not bound to accept, as controlling, stipulations as to questions of law.”).

<sup>17</sup> Section 1319 contains one technical precondition on the Administrator assessing a civil penalty for violations of Section 1318, *etc.*, which is that the Administrator first consult with the state in which the violation occurred. However, that condition has not been raised as an issue in this case and the evidence shows that the condition was met in that the State participated in the inspection of Respondent’s site during which the violations were found, received a copy of the inspection report in regard thereto, and was aware that EPA recommended an Administrative Penalty Order in response while it recommended “nothing.” See, R’s Ex. 2; C’s Ex. 1. See also, 40 C.F.R. § 22.38(b)(requiring Agency to consult with the relevant State after filing a CWA violation action).

<sup>18</sup> The court further stated in that case that while the CWA is a strict liability statute, “[s]trict liability relieves the government of the obligation to show *mens rea*, not the *actus reus* [and] means that the CWA is violated if a permittee discharges pollutants in violation of its permit, regardless of the permittee’s *mens rea*. Strict liability does not mean that a permittee may be held liable for violating its permit even if it does not in fact do so.” *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 174-175 (3rd Cir. 2004). Therefore, and because of the independent basis for liability for monitoring violations under Section 308, the court held that a permittee may proffer evidence of laboratory error in response to a claim of a discharge violation, *i.e.* one under CWA Section 301, to show no violative discharge actually occurred. *Id.* at 175-76.

In so holding, I find no merit to Respondent's argument that it is "absurd and unsupported," to hold a person liable for "failing to submit a permit application for a permit he was unaware that he needed to obtain." R's Brief at 50. First, CWA is a strict liability statute; Complainant need only prove that a violation of a prohibition or requirement occurred, and need not prove intent to violate. *Allegheny Ludlum*, 366 F.3d at 174-175. Second, as Complainant noted, Respondent, the contractors it hired in connection with the construction, and everyone else are charged with knowledge of validly promulgated regulations applicable to their activities, and ignorance of the law does not excuse a violation. *U.S. Nameplate Company*, EPA Docket No. RCRA 84-H-0012, 1985 EPA ALJ LEXIS 21, \*30 (ALJ, April 19, 1985)(Respondent is charged with knowledge of regulations from the date they first appeared in the Federal Register) (citing *FDIC v. Merrill*, 332 U.S. 380, 384-85 (1947)(regulations are binding regardless of actual knowledge of what is in the regulations or of the hardship resulting from innocent ignorance)). Third, it is noted that Respondent has not argued that the regulations at issue here fail to provide "fair notice" of the required conduct. See, *Morton L. Friedman and Schmitt Construction Company*, 11 E.A.D. 302, 2004 EPA App. LEXIS 3 \*42, 45 (EAB 2004) (the fair notice doctrine may provide a defense where a regulation "fails to give fair warning of the conduct it prohibits or requires;" but "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.). Therefore, Respondent's argument in this regard is not well founded.

b. Respondent's Regulatory Compliance With Regulations Issued Under Section 308

As indicated above, Section 122.21 provides that -

(a) Duty to apply. (1) Any person who discharges or *proposes to discharge pollutants* . . . must submit a complete application to the Director . . . .

\* \* \*

(c) Time to apply. (1) . . . Facilities *proposing a new discharge* of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which *may* result in a discharge of storm water associated with that industrial activity. Facilities described under § 122.26(b)(14)(x) [*i.e.* those engaged in construction activity] . . . shall submit applications at least *90 days before the date on which construction is to commence*.

40 C.F.R. § 122.21(a), (c)(italics added).<sup>19</sup> The term "new discharger" is defined in relevant part

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<sup>19</sup> Subsection (b) to Section 122.21 provides that: "When a facility or activity is owned by one person *but is operated by another person*, it is the operator's duty to obtain a permit." 40 C.F.R. § 122.21(b)(italics added). Respondent has not raised as a defense to liability in this case that while it is the owner, someone other than it was the "operator" of the facility or activity and  
(continued...)

as "any . . . facility . . . [f]rom which there is *or may be* a "discharge of pollutants . . . and [w]hich has never received a finally effective NPDES permit for discharges at that 'site.'" 40 C.F.R. § 122.2(italics added). *See also, National Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1304 (9<sup>th</sup> Cir. 1992)(discharges of even unpolluted storm water associated with industrial activity are covered by CWA).

Respondent has stipulated that it is a "person" defined by, and therefore subject to, the Act and its implementing regulations (40 C.F.R. Part 122). Jt. Ex. 1, Stips. 12, 13. Further, it has admitted that it was engaged in construction activities, including clearing and grading, at the Starnart Travel Center and therefore was engaged in "industrial activity" under 40 C.F.R. § 122.26(b)(14). Jt. Ex. 1, Stips. 14, 15. Additionally, it acknowledges that "the runoff and drainage from [its] facility is 'stormwater' as defined in 40 C.F.R. § 122.26(b)(13)," that such storm water contains "pollutants" as defined by Section 502 of the Act, and "*flows from Respondent's facility into the City of Fargo's municipal separate storm sewer system*" which "ultimately discharges by gravity flow into the Red River of the North," a "navigable water" and "waters of the United States" under the Act. Jt. Ex. 1, Stips. 16-20 (italics added).<sup>20</sup> Respondent also does not contest that the construction activity at its facility is a point source under the CWA. Jt. Ex. 1, Stip. 22.

Moreover, Respondent admits that "[c]onstruction activities disturbing over 5 acres began at . . . [its] facility in April of 2002." Jt. Ex. 1, Stip. 23. As a result, it appears that under 40 C.F.R. § 122.21(c), Respondent was required to submit to EPA a NPDES application 90 days

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<sup>19</sup>(...continued)

thus, legally burdened with the duty to obtain the permit. To the extent that facts were raised in this proceeding relative thereto, see discussion herein regarding Respondent's culpability, indicating that it retained responsibility for overall site operations and thus responsibility for permit compliance.

<sup>20</sup> It is noted that Respondent does not specifically argue in its Brief that it never "proposed" to discharge stormwater from its site or that there was no chance that its construction "may result in a discharge of stormwater" so it was never required to apply for a permit under 40 C.F.R. § 122.21. However, Respondent's Brief does assert based upon the testimony of its expert Mr. Lunde that the removal of topsoil on the site effectively created a sediment retention pond which totally prevented the discharge of stormwater. R's Brief at 15. This allegedly serendipitous outcome would not, however, by itself effectively exempt Respondent retroactively from liability for failing to apply in advance of construction for a permit. It is clear that the point of the permit process in every instance is to plan for and implement measures to prevent sediment-laden stormwater discharges. The evidence does not show that Respondent and its consultants consciously decided to control routine accumulations of stormwater in this manner prior to construction, having considered, for example, the anticipated volume of stormwater runoff. In any event, Respondent admits that "catastrophic precipitation" could have nevertheless caused pollutants in stormwater to run off or flow from its site. R's Brief at 35.

prior to construction commencing, *i.e.* in or around January or February of 2002, or in lieu thereof comply with State NPDES permit application requirements. Respondent has acknowledged, however, that “[a]s of October 24, 2002 [it] had neither applied for nor received an individual permit authorizing storm water discharges from its facility” and was not authorized at that time by any NPDES permit to discharge storm waters to waters of the United States.” Jt. Ex. 1, Stips. 23, 25, 26, 34. The record evidences that Respondent first applied for a NPDES permit by submitting a Notice of Intent to the State on or about November 3, 2002, approximately eight months after beginning construction on site. C’s Ex. 3; Tr. Vol. II at 19-22, 142, 144-45, 163-165; Tr. Vol. I at 239-40. The parties stipulated that “[i]n a letter dated November 15, 2002, Respondent received coverage under the North Dakota Storm Water General Permit . . .” Jt. Ex. 1, Stip. 29.

As a result of all the foregoing uncontested facts, it appears clear that Respondent violated 40 C.F.R. § 122.21 by not applying for a NPDES permit in a timely manner prior to commencing construction. In that the regulation was promulgated pursuant to the authority granted to the EPA Administrator by the CWA and particularly implements Section 308 thereof, violations of which are enforceable through a penalty action brought by the Administrator under Section 309(g), Respondent would be liable for such violation regardless of whether a discharge of pollutants occurred. Therefore, Respondent is found liable on Count 1 of the Amended Complaint on the basis that it violated 33 U.S.C. § 1318 and the implementing regulation 40 C.F.R. § 122.21 by failing to apply for a NPDES permit prior to commencing construction on its Stamart site.

## **VII. RESPONDENT’S LIABILITY UNDER SECTION 301**

As indicated in the Order on Complainant’s Motion for Accelerated Decision, liability under CWA Section 301 (33 U.S.C. § 1311) is predicated upon an actual “discharge of a[] pollutant.”

The phrase “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). This includes “additions of pollutants into waters of the United States from: surface runoff [*i.e.* storm water] which is collected or channelled [sic] by man; discharges through pipes, sewers, or other conveniences owned by a State, municipality or other person which do not lead to a treatment works.” 40 C.F.R. § 122.2. Rock, sand, and dirt constitute pollutants. 33 U.S.C. § 1362(6). Sediment, the primary components of which are sand and dirt, is a pollutant.<sup>21</sup> *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 676 (E.D. NC 2003); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987). Concrete and cement are pollutants. *United States v. Schallom*, 998 F.2d 196, 199 (4th Cir. 1993), *cert. denied*, 510 U.S. 902 (1993); C’s Ex. 21 (Phase II stormwater regulations)(“The

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<sup>21</sup> “Sediment” is “material or a mass of material deposited (as by water, wind, or glaciers).” Webster’s Third New International Dictionary 2054 (2002).



major pollutant resulting from construction activities is sediment”).

Complainant asserts in its Brief that the evidence in this case shows that from May through September 2002, Respondent discharged from its construction site a pollutant, specifically sediment, in stormwater which flowed off its site into the adjacent street (35<sup>th</sup> Street North), whereupon it entered the City storm sewer system, flowed into Cass County Drain 10, and was eventually discharged into the Red River of the North, which is a navigable water. C’s Brief at 14.

The evidence shows that storm water which is allowed to flow off of Respondent’s site and onto 35<sup>th</sup> Street would be captured by the municipal separate storm sewer system (MS4) drains, and would flow into Cass County Drain 10. Tr. Vol. I at 104-106; C’s Exs. 14, 15, 35. The City’s storm water sewer system is basically Cass County Drain 10 and a series of inlets and pipes leading to it. Tr. Vol. I at 104; Tr. Vol. II at 198; C’s Ex. 14. Drain 10 begins at 7<sup>th</sup> Avenue in Fargo, and runs north until it enters the Red River east of County Highway 31. Tr. Vol. I at 104-05, 109-10; C’s Ex. 14, 35. A “drain” is simply a “conveyance channel,” in this case an open ditch that conveys water from one point to another. Tr. Vol. II at 192. The specific purpose of Drain 10 is to convey water from the Drain 10 watershed to the Red River. Tr. Vol. II at 198. There are inlets to the City sewer system all along 35<sup>th</sup> Street south of 12<sup>th</sup> Avenue adjacent to the Starnart site, connecting to storm pipes which run under and along 35<sup>th</sup> Street to 12<sup>th</sup> Avenue and then turn east along 12<sup>th</sup> Avenue, where stormwater is dropped into Cass County Drain 10, which at that point consists of an 800 foot long concrete lined channel, trapezoidal in shape, with a 16 foot flat bottom, and outwardly reclining side slopes such that the top of the channel is wider than the bottom. Tr. Vol. I at 104-105, 111, 115-16, 172; Vol. II at 193-94, 220; C’s Ex. 14, 36(b); R’s Ex. 31. Drain 10 travels north from 12<sup>th</sup> Avenue to a pump house, Lift Station No. 7, located a quarter of a mile north of 12<sup>th</sup> Avenue, near the railroad tracks. Tr. Vol. I at 106, 110; C’s Exs. 35, 38. Lift Station No. 7 pumps the water from the lower upstream side to the higher downstream side into a 48 inch pipe that crosses underneath the railroad tracks, and then Drain 10 continues north as a natural ditch, generally earthen with grass vegetation. Tr. Vol. I at 110, 112-114, 115, 171-175; C’s Exs. 35, 36(b), 36(c), 38.

Drain 10 then turns east at about 44<sup>th</sup> Avenue, continuing about three miles through private property as well as the Fargo Municipal Airport, continuing for about two miles in a diagonal direction toward Cass County Highway 31 North, where it goes through a culvert beneath the highway, and then discharges east into the Red River. Tr. Vol. I at 104-105, 110; Vol. II at 196-98, 207; C’s Ex. 14; R’s Exs. 31, 35. *See generally*, R’s Ex. 28 (map reflecting route of drain reflecting sites of current photographs of drain marked as R’s Ex. 32), 35; Tr. Vol. II at 200-01. The length of Drain 10 from Lift Station No. 7 to the Red River is about 27,000 feet or five miles. Tr. Vol. II at 197.

Mr. Bittner, an engineer for the City of Fargo who was involved in design and construction of the City’s MS4, explained that there is “normally a trickle of water flowing through that channel at most all times during the year.” Tr. Vol. I at 112. Mr. Wirres, a civil engineer for

Moore who was involved in projects concerning Drain 10, stated that on average, without significant rainfall, the depth of Drain 10 is one or two feet, and flows at the rate of approximately one foot per second. Tr. Vol. II at 199-200, 206, 212-213. The Lift Station has a sump eight feet below the drain channel leading into it, and three vertical propeller pumps suspended from the ceiling which lift all but the bottom 4 to 5 feet of the water in the sump. Tr. Vol. I at 113-14; C's Ex. 38. The pumps have strainers on them and sediment collects in the bottom of the sump. Tr. Vol. I at 114. When the flow of water is "high enough in the channel" and the Lift Station cannot keep up, the water "gravity flows" through two culverts that are in place underneath the railroad tracks. Tr. Vol. I at 112-13; C's Ex. 36(a), 36(b). Mr. Bittner testified that the City's Street Department annually cleans out both the sludge from the concrete channel portion of Drain 10 and the sediment that collects in the Lift Station. Tr. Vol. I at 101-02, 111-12, 114-15. The rural section of the drain is more difficult to access and is cleaned perhaps every 20 to 25 years. Tr. Vol. I at 116,<sup>22</sup> Vol. II at 217.

In support of its position, Complainant relies primarily on testimony of its expert, Sandra Doty, who, based on her analysis of site topography, weather conditions, site conditions and soils, opined at hearing that Respondent discharged approximately 49 tons of sediment from its site during the relevant period and that such sediment ultimately reached the Red River. C's Brief at 15-16 citing Tr. Vol. I at 133-34, 136, 171-75. Additionally, in support, Complainant cites the testimony of EPA inspector Leonila Hanley (Tr. Vol. I at 53-54; C's Exs. 1, 3, p. 3) that she observed sediment both on 35<sup>th</sup> Street North adjacent to the site and in the onsite storm drains. Complainant also cites to testimony of the site construction manager Steven Whaley that no BMPs were in place at the site at the time to control runoff (Tr. Vol. II at 122-23). C's Brief at 14-15.

Respondent, on the other hand, denies that it discharged any pollutants and/or that any pollutants discharged reached the Red River, suggesting that the testimony of Ms. Doty to the contrary is "neither credible nor reliable." R's Brief at 4. Specifically, it asserts that the assumptions Ms. Doty used in her analysis, particularly that the site was at the same elevation as the street and curb thereof, is erroneous. *Id.* Respondent claims that the curb on the surrounding street was in fact 6 inches higher than the site generally and moreover, after the topsoil was stripped off, the bulk of the internal area of the site was even lower, citing in support thereof Ms. Doty's own report wherein she notes that her map indicates that the "highest elevations are around the periphery of the property." R's Brief at 4, 24. In support of its position, Respondent relies upon the testimony of Brock Storrusten of Moore Engineering and site manager Steven Whaley

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<sup>22</sup> Mr. Bittner further testified that in the in the Fall of 2002, sometime after the period relevant here, the City added to its storm water sewer system by installing a water retention basin or pond connected to Stamart facility in 800 block of 34<sup>th</sup> Street North, to capture water flowing southeasterly from 35<sup>th</sup> Street. Tr. Vol. I at 105-08; C's Ex. 35; R's Ex. 22. *See also*, Tr. Vol. I at 109, C's Ex. 37; 42A (noting basin was not constructed and/or connected to city system during period of interest (May - October 2002)); and R's Exs. 22, 30.

that removal of the topsoil from the site created a "depression" into which falling rainwater flowed. R's Brief at 14-15 citing Tr. Vol. II at 71-73, 140-41, 185-86. Respondent also supports its position with the testimony of its expert, Nordan Lunde, who opined at hearing that stormwater did not run off site because the removal of six to 18 inches of topsoil in effect created a sedimentation retention pond on site. *Id.* at 15 citing Tr. Vol. III at 23-24. Further, Respondent asserts that "[e]ven assuming a discharge of storm water containing sediments from the Stamart site [occurred], the water carrying capacity of [Cass County] Drain #10 would cause sediment to be released from the water prior to being discharged into the Red River." R's Brief at 4.

In Reply, Complainant challenges the assumptions upon which Mr. Lunde's opinion was based, noting that, unlike Ms. Doty, Mr. Lunde did not undertake his own mathematical or engineering analysis to reach his conclusions, relying instead on an elevation map of site from 1998 (R's Ex. 27) that predates construction by four years, and aerial photographs (R's Ex. 12). C's Reply Brief at 2-3.

#### A. Testimony of Complainant's Expert Sandra Doty

Ms. Sandra Doty is a senior geotechnical engineer with Science Applications International Corporation. Tr. Vol. I at 130; C's Ex. 40. For twenty-five years, she has been professionally performing geotechnical engineering studies evaluating the properties of soil, water and rock. Her studies have involved hundreds of project sites and she is familiar with the modeling tools used in the industry to analyze soils, erosion rates and sediment transport (the movement of soil in water). Tr. Vol. I at 130-33; C's Ex. 40. Based upon her experience, Ms. Doty was qualified, without objection, as an expert in the field of soil erosion and sediment transport. Tr. Vol. I at 134.

At Complainant's request, Ms. Doty analyzed whether any sediment was discharged from the Stamart site between May and November 2002 and, if so, whether such discharges reached the Red River, and prepared a written report memorializing her analysis (C's Exs. 42, 42A).<sup>23</sup> Tr. Vol. I at 134-35. In her analysis, Ms. Doty testified, she considered four factors effecting sediment discharge in stormwater - topography, cover conditions, weather, and soil type, using raw data thereon obtained from the City of Fargo and others. Tr. Vol. I at 136, 143. Based upon her analysis, she concluded that, during the relevant time period, there were three distinct sub-drainage areas within the 21 acre site, collectively covering a total of 12 acres, where storm water drained to 35<sup>th</sup> Street North. Tr. Vol. I at 148-151, 158, 218-19; C's Ex. 42A. Further, she determined that from May until October 2002, 49 tons of sediment or soil were discharged from

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<sup>23</sup> C's Ex. 42A reflects the correction of certain typographical errors appearing in C's Ex. 42, Ms. Doty's report as originally prepared. Tr. Vol. I at 139-41, 197-98. At hearing, it was noted that the revised report also contained typographical errors, including mathematical errors in summing numbers, and that the sums reflected on certain charts in the report were rounded off. Tr. Vol. I at 198-202.

Respondent's site in storm water, and that such sediment reached the Red River.<sup>24</sup> Tr. Vol. I at 136-37, 171, 173l.

The initial step in her analysis, Ms. Doty explained, was the creation of a topography map of the whole site and adjacent street displaying through contour lines,<sup>25</sup> land elevation changes thereon in half foot intervals. She constructed the map by inputting into a geographical system computer program site elevation data obtained by the City of Fargo in May 2002 using "Light Detection and Ranging (LiDAR)." Tr. Vol. I at 147, 184-85; Tr. Vol. III at 80; C's Ex. 42A (Figure 1). LiDAR is a "relatively new technique" for obtaining elevation data whereby a plane carrying the LiDAR equipment flies over a site measuring the time delay between transmission of a light beam and detection of the reflected signal. The time measurements on the thousands of individual data points sent and received are then processed by computer to create a grid of elevation data spaced eight feet apart.<sup>26</sup> Tr. Vol. I at 144, 186. Ms. Doty indicated that LiDAR is at its most accurate, providing elevation data reliable to within 3-6 inches, when used to measure flat ground, lacking the cover of trees or other vertical disturbances, such as the site was in May 2002. Tr. Vol. I at 144; Tr. Vol. III at 90-92. From the contour map thus created, Ms. Doty stated she was able to discern three distinct "subdrainage areas" on the site, which she respectively designated as Areas 1, 2 and 3, where falling water would flow from higher elevations onsite to lower points offsite on 35<sup>th</sup> Street.<sup>27</sup> Tr. Vol. I at 147-51; C's Ex. 42A (Figure 3).149; C's Ex. 42A.<sup>28</sup>

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<sup>24</sup> Initially, Ms. Doty had calculated the total sediment discharge as 50 tons, but upon reviewing R's Ex. 9 at hearing, indicating that the certain soil was fill dirt rather than silty clay, she reduced the amount to 49 tons. Tr. Vol. I at 211-215, Tr. Vol. III at 73-74.

<sup>25</sup> Contour lines are curves drawn to show contiguous points at the same altitude and give a sense of the relative elevations of terrain. Webster's II New Riverside University Dictionary 305 (1988).

<sup>26</sup> In reporting elevation levels, LiDAR relies upon the "North American Vertical Datum of 1988" which set an absolute mean sea level using a monument at Father's Point in Quebec, Canada and all elevation benchmarks are referenced to that monument. The City of Fargo also uses the 1988 datum in its maps. Tr. Vol. II at 136. This 1988 datum replaced the National Geodetic Survey (NGS) of 1929 which used a number of monuments to establish a mean sea level. Tr. Vol. III at 67-70; R's Ex. 8 (Quadrangle map of Fargo dated 1983 referencing elevations shown to National Geodetic Vertical Datum of 1929).

<sup>27</sup> Both Complainant's and Respondent's expert testified at hearing that the natural gravitational flow of water is from high to low points. Tr. Vol. I at 148 (Doty); Tr. Vol. III at 9 (Lunde).

<sup>28</sup> In conducting her analysis, Ms. Doty testified that she also looked at the 1929 or 1927  
(continued...)

As to cover conditions, again relying on the LiDAR data as well as aerial photography procured in connection therewith, Ms. Doty determined that by May 2002, the site had been "cleared, grubbed, and (re)graded," in anticipation of construction, meaning that, by means of a scraper or dozer, the topsoil had been scraped off, rocks, obstructions and essentially all vegetation removed, and the dirt disturbed, *i.e.* moved about to create whatever elevations were required for the planned construction. Tr. Vol. I at 166-67, 220-222; Tr. Vol. III at 67; C's Ex. 42A. *See also*, C's Ex. 41 (b), R's Ex. 9.

In terms of weather, upon review of hourly and daily storm data collected by the National Oceanic and Atmospheric Association (NOAA) (C's Exs. 12, 13), Ms. Doty found 10 days between May and October 2002, during which short term, high intensity storm events (*i.e.* not slow soaking rain), involving greater than 0.5 inches of precipitation in a 24 hour period, occurred in the Fargo area.<sup>29</sup> Tr. Vol. I at 153-58; C's Ex. 42A.

Finally, relying on National Resources Conservation (NRC) Soil Survey Data, Ms. Doty determined that the soil on the site was silty clay (45% silt, 50% clay, and 5% sand), having an "erodibility factor" (representing its relative level of resistance to detachment) of 0.28 at the surface (the top 3 inches) and 0.32 at 8 inches below, on a scale of 0.02 (lowest erodibility) to 0.69 (highest erodibility). She characterized such soil as having "moderate" erodibility. Tr. Vol I at 161-63; Tr. Vol. III at 78-79.

Ms. Doty then employed such data on the site's topography, cover conditions, weather, and soil between May and October 2002 in performing a series of mathematical calculations regarding

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<sup>28</sup>(...continued)

U.S. Geological Survey (USGS) "quad sheet," for the area, which is also a topographical map, but found it unhelpful in that it reflected elevations in 5 to 10 foot contour intervals rather than half foot intervals and so did not provide sufficient detailed data to determine water flow. Tr. Vol. I at 145-46.

<sup>29</sup> C's Exs. 13 and 42A indicate that the 10 specific days and precipitation amounts considered were as follows: 1.29" on May 8<sup>th</sup>; 1.9" on May 28<sup>th</sup>; 3.02" on June 9<sup>th</sup>; 0.89" on June 23<sup>rd</sup>; 1.93" on July 7<sup>th</sup>; 1.68" on July 10<sup>th</sup>; 0.60" on July 25<sup>th</sup>; 0.62" on August 16<sup>th</sup>; 0.86" on August 28<sup>th</sup>; and 0.59" on September 18<sup>th</sup>, for a total of 13.38 inches. C's Ex. 34 indicates that during the seven month period from April through October 2002, the Fargo area incurred a total of 22.44 inches of precipitation, which was 5.4 inches more than normal. It is noted that R's Ex. 20 also contains precipitation data for the Fargo area apparently printed off a website entitled "wunderground.com" copyrighted in 2005 by "The Weather Underground, Inc." The data on that site is consistent with that reported by NOAA for seven of the 10 days considered (May 28<sup>th</sup>, June 9<sup>th</sup>, July 7<sup>th</sup>, July 25<sup>th</sup>, August 16<sup>th</sup>, August 28<sup>th</sup>, and September 18<sup>th</sup>), but reflects less precipitation than NOAA on one day (May 8<sup>th</sup>-0.37") and more on two other days (June 23<sup>rd</sup> - 1.00" and July 10<sup>th</sup>-1.71"). However, neither party has asserted that the slight differences in the data has any significance in this action.

each of the three distinct subdrainage areas she had identified on the site. Tr. Vol. I at 136, 148, 164-70. First, she determined the volume (amount) of storm water runoff and the peak flow rate (speed over time) which could be anticipated to have occurred on the site during that time using the USDA Soil Conservation and Service Report standard for urbanized small watersheds (Technical Report (TR) 55) and its "SCS curved number method." Tr. Vol. I at 164-65, 168-70; C's Ex. 42A. Then, she calculated the amount of soil loss from the site which would be anticipated from such runoff at such rate using the industry empirical model "Revised Universal Soil Loss Equation 1.06" (RUSLE), as modified by the "Modified Universal Soil Loss Equation" (MUSLE). Tr. Vol. I at 164-67; C's Ex. 42A. From these calculations, Ms. Doty determined that the ten storm events on the site between May and October 2002 produced over 2,652,000 gallons of water flow with varying peak flow rates, from a low of 0.26 to a high of 14.92 cfs (cubic feet per second). Tr. Vol I at 169-70; C's Ex. 42A. She concluded that this flow resulted in 32.71 tons of sediment being discharged in storm water from Area 1 (consisting of 9 acres), 11.05 tons from Area 2 (consisting of 2 acres), and 6.52 tons from Area 3 (consisting of 1 acre), during the relevant period. Tr. Vol. I at 155, 170; C's Ex. 42A. In performing her calculations, Ms. Doty testified, she did not consider those portions of site where depressions had been created. Tr. Vol. I at 221-22. See also, C's Ex. 42A (Figure 2). She did, however, consider portions of the subdrainage areas where ponding would be expected to occur in her analysis and reduced runoff volume concomitantly for the percentage of ponding area in each subdrainage area. Tr. Vol. III at 72.

Next, Ms. Doty testified, she computed whether the sediment in the storm water so discharged from the site would reach the Red River of the North. Tr. Vol. I at 173. She did this by comparing the expected velocity of the water after each storm event as it proceeded through each section of storm water system, starting with the inlets on 35<sup>th</sup> Street North adjacent to the site all the way to the Red River, to the velocity of 0.33 feet per second which she stated is the requisite speed necessary to keep silt and clay in suspension, *i.e.* prevent it from settling out. Tr. Vol. I at 173-74. In her calculations, Ms. Doty concluded that the velocity of the water through the initial pipe system starting on 35<sup>th</sup> Street would be one to two feet per second and the velocity in the succeeding concrete lined channel (upstream from the pumps in Lift Station no.7) would be from 0.6 to 1.6 feet per second. *Id.* Further, she determined that the volume for each of the ten storm events was sufficient to trip the three pumps in the Lift Station so that water would be pumped out of the station and into the receiving ditch at 25,000 gallons per minute and discharged at a velocity of 1.1 feet per second down to Red River. Tr. Vol. I at 173-74. See also, C's Ex. 38 (data on pumps in Lift Station). Based upon this, she concluded that, at those velocities, the sediment discharged in the storm water from site would be kept in suspension until it reached the Red River.<sup>30</sup> Tr. Vol. I at 174, 176-78. Ms. Doty buttressed her conclusion by opining that it takes silt

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<sup>30</sup> In regard to the Lift Station in particular, Ms. Doty opined that sediment in water discharged from the site would not settle out and collect in the Lift Station because only 11,000 gallons of water are required to trip all three pumps in the station and the lowest volume of water discharged from the site was 40,000 gallons, so in each instance the water discharged would have tripped the pumps upon entering the system preventing it from pending therein long enough for

(continued...)

approximately a day to settle out in still water and even longer in turbulent water and she calculated that it would take only eight hours for the water with sediment discharged from the site to move through City's storm water system and enter the Red River.<sup>31</sup> Tr. Vol. I at 175. Further, she alleged that she used conservative figures for various assumptions when performing her calculations. Tr. Vol. I at 156, 158, 179, Tr. Vol. III at 78.

On cross examination and/or rebuttal, Ms. Doty acknowledged that she was not present onsite before or during construction or the inspection, that she never examined the drain during the relevant time, and thus she had no personal knowledge of the site or drain conditions in 2002. Tr. Vol. I at 206-07, 216, 219; Tr. Vol. III at 79, 90. Ms. Doty further admitted that she did not use survey data procured onsite (*i.e.* elevation measurements taken on the ground) in her calculations and that she was unaware of accuracy rate range for the LiDAR data set by the company who collected it for the City.<sup>32</sup> Tr. Vol. I at 191-92. She agreed that there could be a 6 inch difference in actual site elevations from those indicated by the LiDAR data, but suggested that the probability of such a variation was low because the studies she was aware of suggested that the data obtained from LiDAR performed on flat land with no vegetation, like Respondent's site, was accurate to within a few inches. Tr. Vol. I at 188-89, 209. On the other hand, Ms. Doty also stated that the "slope" of the land is important in soil detachment calculations under MUSLE and RUSLE and the flatter the land, *i.e.* less slope it has, the less probability there is of detachment occurring. Tr. Vol. I at 195-96.

Additionally, Ms. Doty acknowledged that her topography map evidences that 35<sup>th</sup> Street is not flat, that it undulates in elevation by a foot, even over a short distance, and further that the height of the curb on 35<sup>th</sup> Street is not specifically shown thereon. Tr. Vol. I at 190; Tr. Vol. III at 83-87, 94. Ms. Doty admitted that if 35<sup>th</sup> Street was (uniformly) one foot higher in elevation than the site, discharge of water from the site onto the road "would be difficult, if not impossible." Tr. Vol. I at 190-91. However, she stated that it was not, in that the map reflects the existence of curb breaks between the site and the street, and photographs of the taken site during construction (C's

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<sup>30</sup>(...continued)

the sediment to settle out. Tr. Vol. I at 204-05.

<sup>31</sup> In calculating the time it would take for the stormwater to travel from the site to the Red River, Ms. Doty said she used the channel geometry data for Cass County Drain 10 provided by Mr. Bittner of the City of Fargo in performing the "Mannings Equation," which has an 'N' factor that takes into account the roughness of the channel. Tr. Vol. I at 205-07. In this case the natural channel has value of 0.35 which can account for vegetation within it. Tr. Vol. I at 206.

<sup>32</sup> Ms. Doty agreed that ground survey elevation data could be more accurate than LiDAR data if it was obtained using the best instrumentation available, such as a Trimble unit with a base station, and if the data is of greater density, *i.e.* instead of obtaining one data point every eight feet, a two foot spacing is used, but she indicated that it was not common to do so. Tr. Vol. I at 209-10.

Exs. 1(P) and 1(R)) evidence driveways situated at low points on the site leading to the street. Tr. Vol. I at 190, Tr. Vol. III at 70-71, 82-83, 87, 92-95.

Moreover, Ms. Doty conceded that while photographs taken of the construction site evidence changes thereon during the relevant period (May - October 2002), for the purposes of her calculations, she assumed that soil conditions on site as shown in May 2002 did not change. Tr. Vol. I at 192-95, 203. She claimed, however, that her assumption in this regard was not incorrect because site photos taken in April through November 2002 of the three subdrainage areas (R's Ex. 9) reflect that no depressions, large piles of debris, or other changes at all occurred thereon from May 2002 until August 2002, when fill dirt was brought in for the parking area and piled in the southern portion of site which crosses Area 1 and goes to the west of Area 3. Tr. Vol. I at 222-23, Tr. Vol. III at 72-73. Ms. Doty said such fill dirt was coarse sandy silty material, which is placed over the natural clay soil before asphalt or concrete laid in order to compensate for the expansive quality of clay and avoid differential settlement and heaving. Tr. Vol. I at 212-13; Tr. Vol. III at 74. She asserted that the placement of such dirt in the area to west of Area 3 would not change the results of her analysis because that area is a bowl and she did not consider it in her calculations. Tr. Vol. I at 214. However, she admitted that the fill dirt placed within Area 1 in August would affect the amount of sediment discharged as a result of three of the storm events she considered, specifically those which occurred in August and September 2002. Tr. Vol. I at 215. She opined that the placement of such dirt would reduce the soil erodibility value from 0.28 to 0.1 and thereby reduce the amount of sediment expected to be discharged from such events by 15-20%. Tr. Vol. I at 214-15; Tr. Vol. III at 74. Nevertheless, Ms. Doty did not think this change was "significant," opining that even assuming conservatively that no runoff at all occurred in that area during those three storm events, the total amount of sediment runoff from site during the relevant period would only drop from 50 to 49 tons. Tr. Vol. III at 74.

Finally, as to her opinion regarding the discharged sediment reaching the Red River, Ms. Doty conceded at hearing that she never performed any tests on Cass County Drain No. 10 in 2002 and assumed in her analysis that the drain had a regular consistent shape its entire length, not taking into account any obstructions such as would result from mast wasting, which may have existed therein. Tr. Vol. I at 207-08, 219. However, she stated that occurrences of "mast wasting," the slumping or moving of intact blocks of soil material down the slope into the drain, would not alter her opinion because her analysis was based on "wash load" sediment entrained in storm water moving with the water velocity through the drain. Tr. Vol. III at 76-77.

#### B. Testimony of Respondent's Experts

In support of its position, Respondent proffered at hearing the expert testimony of two witnesses, Nordan J. Lunde and John Wirres.

##### 1. Nordan J. Lunde

Mr. Lunde's prior relevant experience included 33 years of working with governmental



entities on water management systems and issues of soil and soil classification, wetland hydrology, identification and restoration, drainage system design, best management practices, water flow and overflow, sediment, elevation, topography, and water retention, including the design of retention and sedimentation ponds. Tr. Vol. III at 8-15, 43; R's Ex. 16. Based upon his experience, Mr. Lunde was qualified, without objection, as an expert in the "elevation, drainage, flow of water, retention and soil issues on the Stamart site between April and October 2002." Tr. Vol. III at 18.

As the basis for his opinion testimony, Respondent presented Mr. Lunde at hearing with the following hypothetical, in regard to Stamart site shown on Respondent's Exhibit 27, asking him to assume the following:

[T]he general elevation for the Stamart site was 896 feet above sea level and that there are pockets, as indicated on Exhibit Respondent 27, that are 897; in other words, a foot higher. And I want you to assume that for the most part the elevation of the street immediate to the east of that site, which is 35<sup>th</sup> Street, is higher than the Stamart site.

\* \* \*

I want you to further assume that in terms of street elevation, this street had a curb that was a six inch curb. . . . [and] that the first work of any substance at this site was the removal of topsoil at a depth between six and 12 or up to 18 inches . . . .

\* \* \*

I am going to ask you to assume that a depression was caused when the topsoil was removed at a depth of six to 12 or up to 18 inches. . . . that when vehicles either entered the site from 35<sup>th</sup> street or exited the site onto 35<sup>th</sup> street, they had to drive up an incline out of the Stamart site. . . .that after the topsoil was removed, a contractor came in and installed onsite storm sewers and a storm sewer system and that when that work was completed, the tops of the manholes and the drop-inlets extended above the surface of that depression 12 to 15 inches. . . . [and] that covers were placed on top of each of the drain inlets and manholes on site.

\* \* \*

And finally, Mr. Lunde, I am going to ask you to assume that for the time period at issue, which has been referred to as the non-permitted time period, the rainfall on this Stamart site is as depicted in Exhibit Complainant 34.

Tr. Vol. III at 19-21.

Based upon this hypothetical, Mr. Lunde opined that "the water that would possibly have fallen on that Stamart site during that period would be retained within that depressional area," suggesting, contrary to Ms. Doty's opinion, that there would be no discharge of storm water from the site. Tr. Vol. III at 23.

In support of his opinion, Mr. Lunde stated he had examined aerial photos of the site taken in June 2002 (R's Ex. 12) which evidenced that, with the exception of a grassy boulevard strip or

berm running between the site and 35<sup>th</sup> Street and other edge areas with undisturbed vegetation, most of the site had been stripped of topsoil, creating a depression thereon. Tr. Vol. III at 25-26, 48-49. Further, at certain points within this broad depressional area, storm sewers had been installed, creating "15 to 18 depressional areas where water could pond." Tr. Vol. III at 25, 28, 45; R's Ex. 12.

Mr. Lunde explained that the depressional areas on site, whether designed originally as "sedimentation ponds" or not, performed as such -- water would flow into these depressional areas and as it stood still therein, the sediments would precipitate out. Tr. Vol. III at 28-29. He stated that sediment ponds are an established method of filtering soil and organic particles out of storm water before discharge in order to avoid the sediments in the water impacting water quality. Tr. Vol. III at 10-13. Although he admitted he was not an expert in regulatory compliance in regard to storm water, Mr. Lunde testified that based upon data on EPA's website, he believed that a depression on a construction site was an appropriate method of containing storm water and controlling sediment. Tr. Vol. III at 23-24, 43. Mr. Lunde even went so far as to suggest that Respondent's storm water retention control methodology "should be used in different construction booklets." Tr. Vol. III at 29.

Mr. Lunde did agree with Ms. Doty on one point, that the site has "the Fargo and Ryan soils," with a water erodibility factor of 0.28, on a scale of 0.06 to 0.69 on the USDA NRC erosion index. Tr. Vol. III at 30-31, 45-46. However, he characterized such erodibility factor as "low," not moderate. Tr. Vol. III at 31. Further, he opined that from such soil, even on farmland "abused extensively," one would expect to see no more than one ton of erosion per acre per year. Tr. Vol. III at 30-31, 45-46.

Upon further examination, Mr. Lunde acknowledged that in responding to the hypothetical, he had assumed that the removal of the topsoil and subsoil from the site created "one large depression," but opined if that were not the case, and if some points on site were not depressed, it would change his opinion very little because of the six inch curbing around the site and the berm, *i.e.*, the strip of City property between the site and the roadway (as shown in C's Ex. 1(P)). Tr. Vol. III at 33-34, 45. On the other hand, he noted that his opinion would change significantly if the assumption in the hypothetical regarding the street being a foot above the property were to change. Tr. Vol. III at 33. Specifically, he stated that if the street was at the same level as the post-excavated site, then there would be storm water runoff onto the street, and he accepted that certain photographs (C's Ex. 1(P), 1(Q)) taken during the October 24, 2002 inspection evidence that some parts of the site were at the same height as the top of the curbing and/or not excavated to a level one foot below the curb. Tr. Vol. III at 35, 37-38. Mr. Lunde asserted, however, that regardless of whether the elevation of 35<sup>th</sup> Street was higher or lower than the site post-excavation, due to the existence of the berm, to enter the site from 35<sup>th</sup> street or exit to the street from the site, you would have to drive up an incline. Tr. Vol. III at 49.

Additionally, Mr. Lunde admitted that in reaching his conclusions he had relied only upon pre-grading elevation data shown in a Moore Engineering drawing dated January 20, 1998 (R's Ex.

27), and had not considered any post-grading elevations, nor the topographical and other data contained in Ms. Doty's report.<sup>33</sup> Tr. Vol. III at 39-40. He also admitted that he had never measured the size of the depressional areas he identified in reaching his conclusion, but relied only upon photographs of the site (R's Ex. 12) and that it was possible that the individual depressional areas he had identified as being onsite would not necessarily capture all the water falling on the site at any one time. Tr. Vol. III at 42-43, 45. He acknowledged that certain photographs did appear to show soil gathered around the site exit onto 35<sup>th</sup> Street. Tr. Vol. III at 52-53.

Furthermore, while he stated that he had been on site before and after the construction occurred, Mr. Lunde admitted that he had not been on site during construction. Tr. Vol. III at 36, 40, 42. Thus, he did not have any personal knowledge as to whether the storm drains on site were capped tight at all times and further agreed that dirt could enter the drains if the caps were not kept firmly in place and if dirt was pushed over the top, since the drains were on risers above ground level. Tr. Vol. III at 41-42.

## 2. John Wirres

Respondent's second expert witness at hearing was John Wirres. Since 1997, Mr. Wirres has worked as a civil engineer in Moore Engineering's water resources division and in such capacity has been involved in a number of projects concerning Cass County Drain No. 10. Tr. Vol. II at 188-89. Based upon his education and experience, Mr. Wirres was qualified without objection as an expert in field of hydrology and engineering aspects of Cass County Drain No. 10. Tr. Vol. II at 192; R's Ex. 23.

Mr. Wirres opined that in Drain 10 north of Lift Station No. 7, the downward grade or slope of the channel is typically 2 feet per mile or 0.04%. Tr. Vol. II at 193, 195, 199. Roughly north of 52<sup>nd</sup> Avenue North, which is about 1 mile north of the Airport, the grade steepens to 0.06%. Tr. Vol. II at 199; R's Ex. 31. Mr. Wirres explained that over time, sediment, side sloughing, silt, and weeds build up in the bottom of the drain, reducing the slope and slowing flow. Tr. Vol. II at 194-96, 206. The major source of sediment buildup in Drain 10 in the channel area upstream from the Lift Station is primarily sand and gravel coming off of the roads and dirt off of lawns, he stated. Tr. Vol. II at 210. Further downstream of Lift Station No. 7, the sediment comes from the fields close to the channel. Tr. Vol. II at 210. So, to keep it functional, the whole drain is cleaned out every 20 years. Tr. Vol. II at 217; Vol. I at 116. This last occurred, Mr. Wirres stated, in 1980s or 1990s. Tr. Vol. II at 224. More frequently, limited portions of the drain are

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<sup>33</sup> Mr. Lunde did say that in reaching his opinion, he had reviewed both the daily and monthly rainfall data considered by Ms. Doty, agreeing with her that brief storm events cause greater runoff than slow soaking rain. Tr. Vol. III at 32. However, he admitted he was not familiar with the RUSLE and/or MUSLE empirical models she used to determine soil loss from runoff and, that while he was familiar with NRCS T-55 model, he did not employ it in his analysis in this case. Tr. Vol. III at 47.

cleaned to remove "high spots" (visibly recognizable mounds of dirt in the channel), where sediment has built up. Tr. Vol. II at 202, 224. The last time this occurred, Mr. Wirres recalled, was after certain flood events in 2000 and 2001. Tr. Vol. II at 202, 224-25. At that time, Fargo and West Fargo experienced a significant rainfall of up to eight inches, pushing the sewer system over capacity, and it incurred damage from sediment deposits, mounds of sediment, side erosion and sloughing. Tr. Vol. II at 203-05. In addition, the City made some repairs to the drain in 2002. Tr. Vol. II at 201, 227. Further, Mr. Wirres opined that because the water in the channel is generally moving slowly, sediments tend not to travel very far once they are picked up by the channel and drop out. Tr. Vol. II at 205, 210-11. He suggested that dirt from an erosion area would go only maybe a few thousand feet in the channel. Tr. Vol. II at 210-11.

Additionally, Mr. Wirres testified that the speed of the water in the drain depends upon the water depth. Tr. Vol. II at 199. At a one foot depth, the water travels through the drain at one foot per second. Tr. Vol. II at 199-200. At such rate, assuming the channel is "in a sort of pristine condition," he opined, it would take about 7 ½ hours from water to travel from the Lift Station to the River. Tr. Vol. II at 200. He is aware, however, that the drain is not in pristine condition but has some weeds and sediment in the bottom that slows down water during low flow. Tr. Vol. II at 214-16. Nevertheless, Mr. Wirres suggested that based upon his knowledge of the actual conditions of the drain, this time estimate would not be "grossly in error but maybe slightly optimistic in some portions," noting that if "there hasn't been a significant rainfall event for a while," just very mild traces of rain, Drain 10 has "[m]aybe a foot or two" of water in it. Tr. Vol. II at 203, 206, 212-13. He also noted that the water height at the end of the drain can affect velocity of water and that on occasion the River runs high, causing water to pond at the channel outlet, and back up into and slow the drain velocity. Tr. Vol. II at 208, 222- 223. Mr. Wirres indicated that he could not say if the River was high or low on any particular days from April to November 2002; however, he was aware that spring floods in the area occur generally in March to April. Tr. Vol. II at 223. He also added that the River will "lag the rain," meaning that if it rains today, the River will run high a few days after a rain event because it takes time for the water to get though the channel to the river. Tr. Vol. II at 225. He opined that if 50 tons of sediment were deposited in one spot in the drain, it would start backing up the water, but he was not aware of this having happened in May to September 2002. Tr. Vol. II at 226.

On cross examination, Mr. Wirres acknowledged that the velocity of the water in the drain increases with the amount of rain, and that the capacity of the water for carrying sediment increases with the velocity of the water. Tr. Vol. II at 211, 213. He noted that the velocity of the water would increase significantly if there was a 3 inch rain event in three hours. Tr. Vol. II at 213. At an 8 foot depth, he opined that the velocity of the water would be 3 feet per second, relying on calculations which apply the Chezny Mannings Equation governing open channel flow. Tr. Vol. II at 213-14; R's Ex. 26. Further, he agreed that the type of sediment affects the fallout rate; for example, gravel would fall out faster than clay. Tr. Vol. II at 211-12. Therefore, he agreed that to accurately determine how many feet of drain length it would take for sediment to fall out, one would need to know the water velocity and sediment type, and he acknowledged that he had not read Ms. Doty's report containing such data and relevant calculations. Tr. Vol. II at 211-12.

### C. Other Relevant Testimony

#### Leonila Hanley

Ms. Hanley testified that she is a Public Health Officer, detailed to EPA as an environmental engineer with the NPDES Program, and that she has lead 50 storm water inspections and participated in some 70 others. Tr. Vol. I at 28-33. She led the inspection of the Stamart facility on October 24, 2002 and created the report thereon dated July 14, 2003 (C's Ex. 1). Tr. Vol. I at 37.

As to the Stamart inspection, Ms. Hanley recalled at hearing that -

We observed a great deal of sediment coming from the site. We did see some storm drains that . . . had caked over mud or sediment on the top of the grate and there was sediment in the drain when you looked down, and these were the ones that were on the street level. We saw the disturbed area coming over the curb on the street side. There was significant vehicle track-out, that is the vehicles that were going in and out were carrying a lot of the dirt and sediment onto - to offsite. We observed a couple of trucks, concrete truck washing activities, and we also observed no storm drain protection and a significant amount of construction materials and debris that were being spread on the paved area and very close to the storm drains.

Tr. Vol. I at 42. *See also*, Tr. Vol. I at 39 (chose site for inspection because on driving by noticed a "significant amount of sediment coming from the site. . ."); Tr. Vol. I at 63 ("saw a great deal of sediment in and around the storm drains. . ."); Tr. Vol. I at 46-48, 50 (observed tracking of vehicles from disturbed/staging area onto paved area and a significant amount of sediment loading around storm drain); Tr. Vol. I at 54-55 (observed trucks parked on disturbed area; sediment loading in street); Tr. Vol. I at 55-56 (C's Ex. 1(R) shows "sediment being taken off the property by all the activities from the vehicles going in and out;" observed sediment covering paved entrance area prior to the street, near storm drain on property).

Ms. Hanley specifically testified that at the time of her inspection some of the storm drains on-site were not sealed, and that she observed "gaps at the very bottom between the cover and the very base of the storm drain." Tr. Vol. I at 49; C's Ex. 1(C). As to an above ground drain, she noted that "the metal plate that was covering or supposed to be covering the opening had been pushed away from the top of the storm drain and there was dirt around it. Tr. Vol. I at 49; Ex. C's 1(E). She also found a storm drain with caking on it and "sediment inside." Tr. Vol. I at 54; C's Ex. 1(P). She noted generally that there was sediment loading close to storm drains. Tr. Vol. I at 53; C's Exs. 1(L)-(N)

Additionally, upon inspection, Ms. Hanley noted the absence of best management practices or controls on site to prevent sediment and other pollutants being tracked offsite where they could enter the open storm drains on 35<sup>th</sup> Street. Tr. Vol. I at 41. In particular, she observed that in

regard to the two entrances to the property on 35<sup>th</sup> Street, “no BMPs [had been] implemented [such as a track out pad] to keep the sediment from going over the curb into the street” and she observed the disturbed area going over the curb and that “sediment . . . has accumulated in the street.” Tr. Vol. I at 53-54; C’s Ex. 1(P). At hearing, Ms. Hanley said, in her opinion “vehicles were contributing very significantly to the sediment loading. They were constantly driving up and over. There was no control over the amount of vehicles. Instead of maybe designating a parking space where people can just simply park their cars and walk to do their work. I mean there were cars everywhere. And so they were just tracking - - they were driving over the masonry materials. They were driving over the dirt. They were driving over everything.” Tr. Vol. I at 97. *See also*, Tr. Vol. I at 84 (She saw “tire tracks of the dirt going over the curb and onto the street” and over the approach area. Dirt could come from vehicles coming in and out and the runoff from the disturbed area onto the street). Ms. Hanley stated that she did not observe any detention ponds in or near the facility. Tr. Vol. I at 58.

On cross examination, Ms. Hanley acknowledged that during her inspection she did not observe any water on the site or the street, and thus never personally observed any storm water with sediment flowing offsite. Tr. Vol. I at 57, 71. However, she claimed that she observed the effect of such offsite flow, specifically sediment tracking, despite the fact that there had been only a trace of rain the day before the inspection and none in the three days preceding that. Tr. Vol. I at 71, 77; R’s Ex. 20. Moreover, Ms. Hanley acknowledged that she did not test any water during her inspection, did not follow the storm drains from the site to the Red River, nor inspect the Lift Station. Tr. Vol. I at 68, 70. She also admitted that during her inspection she did not ask specifically about street sweeping or brooming activities and did not know what, if any, “brooming policy” was in effect for the site or what might have occurred in this regard after she left the site. Tr. Vol. I at 80-81, 85. However, Ms. Hanley did claim that Mr. Whaley had advised the inspectors that what they were observing onsite that day was the site as it normally operated on a daily basis and that further that he admitted that there were no BMPs in place.<sup>34</sup> Tr. Vol. I at 80-81, 85.

#### Abbie Krebsbach

Abbie Krebsbach testified at the hearing that she had accompanied Ms. Hanley during her October 24, 2002 inspection of the Stamart site. Tr. Vol II at 233-35. At the time of the inspection she had been working for the State Department of Health for just about seven months and, by the time of hearing, she no longer worked for the State. Tr. Vol. II at 246, 256. Ms. Krebsbach testified and her notes reflect that during the inspection she was “not sure exactly where storm water inlets drain to;” “[v]iewed concrete wash activities . . . away from storm sewer inlets;” “[n]oticed most storm sewer inlets on property were being protected with metal plates and marked with orange cones;” and observed “[s]ome sediment tracking into street [and] evidence of small

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<sup>34</sup> While Ms. Hanley indicated in her testimony and inspection report that she met on site with Steve Whaley, the construction manager, he denied that to be the case. C’s Ex. 1; Tr. Vol. I at 67-68; Tr. Vol. II at 80.

amount of sediment in storm inlets.” R’s Exs. 1, 2; Tr. Vol. II at 241, 254. Ms. Krebsbach stated that based upon the inspection, she thought the amount of pollutants being discharged from the site was “minimal” compared to other sites inspected, and that no penalty was necessary, but she admitted that at the time she made this determination she was unaware that EPA had estimated that 50 tons of sediment had been discharged from the site. Tr. Vol. II at 262-63.

#### Steven Dirk Lenthe

Service Oil’s CEO Steven Dirk Lenthe testified briefly at hearing regarding the construction process. Tr. Vol. II at 5. He indicated that he had been onsite a total of about 80 to 90 days during construction, supervising the installation of the petroleum equipment and tanks. Tr. Vol. II at 40. Before the site was developed, Mr. Lenthe said, there was a swale on the property where the building now exists.<sup>35</sup> Tr. Vol. II at 10. He confirmed that an initial step in the construction process involved installing onsite storm drains which connected into the City sewer system. Tr. Vol. II at 61-62, 74. He stated that the onsite drains were initially above ground or grade because the “black dirt” had been removed from the area around them, that they were capped on top so nothing could enter into them, and remained that way “virtually until they blacktopped [the site]” and “we came to a finished grade.” Tr. Vol. II at 62-63. Mr. Lenthe, however, explained that the inspection had been conducted at the end of the construction process, that is, within two to three weeks of the blacktop and concrete work being finished, and admitted that “by then obviously we opened them up so we could have onsite [drainage], even though we didn’t really get any precipitation that would actually run into them until the following spring.” Tr. Vol. II at 63. Thus, his testimony supports Ms. Hanley’s observation that at least some of the onsite drains were open at the time of the inspection.

#### Steven Whaley

Steven Whaley, a construction manager, testified that his role in the Stamart construction site was to coordinate with the “general contractor,” Olaf Anderson, and the four or five prime contractors, and generally “make sure the thing happened.” Tr. Vol. II at 65, 68-70. As such, he stated that he was onsite almost every day during construction.<sup>36</sup> Tr. Vol. II at 74-75. He noted that soil tests were conducted and provided to the sitework contractor who determined that the topsoil *i.e.*, the black dirt or Red River Valley farmland, had to be removed from the area of the site that was going to be hard-surfaced for truck traffic in order to get down to the clay underneath

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<sup>35</sup> A “swale” is defined as “a low-lying stretch of land:...an elongated depression in land that is at least seasonally wet or marshy,...and is normally without flowing water.” Webster’s Third New International Dictionary 2305 (2002).

<sup>36</sup> Although he stated he was onsite almost every day, Mr. Whaley asserted at hearing that, contrary to the indication in the inspection report (C’s Ex. 1), he was not the site representative with whom the inspectors met on the day of the inspection, and he claimed that he first heard of the inspection from Mr. Lenthe. Tr. Vol. II at 80-81.

which was a more stable surface capable of sustaining substantial truck weight. Tr. Vol. II at 72. As a result, Mr. Whaley estimated that the site was generally stripped of about 12 to 15 inches of topsoil, acknowledging that the amount of soil removed varied in places, and that he "can't be certain" of the exact amount. Tr. Vol. II at 72-73. He stated, however, that among the areas left unstripped was the berm running adjacent to the curb on 35<sup>th</sup> Street close to 12<sup>th</sup> Avenue North, other areas around the perimeter of the site, and certain areas of landscaping. Tr. Vol. II at 72-73, 126. Once the essentially middle area of the site was stripped of topsoil it became "depressed below the surrounding areas," Mr. Whaley indicated. Tr. Vol. II at 73, 111. As a result, he stated, vehicles traveled downhill when they entered from the street onto the site and up a slope when leaving. Tr. Vol. II at 74.

After the stripping was completed, the in-ground storm sewer system was installed onsite, Mr. Whaley explained. Tr. Vol. II at 74. Kindred Plumbing, the contractor which installed the inlets and connecting pipes, compacted and backfilled the land around the excavated areas and leveled it off to the best of its ability. Tr. Vol. II at 76. However, Mr. Whaley recalled, the areas directly around the manholes or drop-inlets catch basins on the system "were not backfilled to the top elevation" by the contractor, but left depressed, *i.e.* at a lower grade than the surrounding clay area. Tr. Vol. II at 75, 77. As a result, those inlets stuck up 12 to 15 inches above the surrounding ground. Tr. Vol. II at 75. Moreover, metal covers were installed on them. Tr. Vol. II at 76. Mr. Whaley testified that thereafter, when a "good rain, not just a trace" occurred, the "rain would run into the depressed lower areas and accumulate around the inlets." Tr. Vol. II at 77, 111. He remembered that there were times when, due to rain, it was too wet to work within the depression. *Id.* However, he could not recall ever observing water rising to the top of the manhole covers or inlets, entering the storm drains, or running offsite during a rain storm. Tr. Vol. II at 78, 112.

After the topsoil was removed down to clay, the land was "scarified" or disked and re-compacted to get a good stable base. Tr. Vol. II at 78. Fabric was then placed on top of the clay, a subbase of eight to ten inches of Class V (very high compaction) gravel was placed over the fabric and compacted in July 2002, and finally the asphalt or concrete pavement poured on top. Tr. Vol. II at 78, 109-10. Mr. Whaley testified that there was some delay in the pavement installation and eventually he was able to get the contractor, Border States Paving, Inc., to agree to begin work on October 10th and end by November 1, 2002. Tr. Vol. II at 103. The timing of this installation was of some concern to him because, as exhibited by a photograph of the site taken in early October 2002 (R's Ex. 12), at that point only small portions of the paving under canopies and some of the building sidewalks had been completed, but the paving around the islands and building had not yet been done, and it was getting too late in the year, *i.e.* potentially too cold, to pour concrete. Tr. Vol. II at 100-02, 104. To finish the project, topsoil for the landscaping berms around the perimeter of the property was brought back in during the first week of November 2002. Tr. Vol. II at 107, 109.

Mr. Whaley acknowledged at hearing that as shown by photographs taken during the inspection (C's Ex. 1(O), (P), (Q)), at that point the grade of the site was not one foot below that of the road but perhaps six inches. Tr. Vol. II at 115-16. Further, he commented that even after the



paving was completed, the site nevertheless generally remained depressed, explaining that “[n]ow days the whole site when it is designed is to be below the surface of the existing roadways. It is called internal collection. . . . because the agencies do not want storm water running back onto the streets, I guess. . . . [the grade] would be somewhat close but might still be less than [pre-construction levels].” Tr. Vol. II at 110.

On cross examination, Mr. Whaley admitted that vehicles left the site “an awful lot,” but he said he never saw vehicles track mud offsite and while it was “not one of [his] major concerns,” “[i]t would be something that I would have had to have noticed at that time.” Tr. Vol II at 112-13. He further claimed that the paving contractor, at a particular time, was obliged to broom or clean up the dirt residue on the street. Tr. Vol. II at 125. He also acknowledged, however, that he was not aware of the storm water program until the inspection, so prior to that time he would not have necessarily looked for storm water permit violations or recognized them. Tr. Vol. II at 114. In addition, he admitted that no BMPs to minimize stormwater runoff were in place prior to the inspection being conducted on October 24, 2002, and that BMPs were only installed thereafter, in late fall of 2002, “after almost all of the pavement and curbing and everything was completed.” Tr. Vol. II at 122-24.

#### Brock Storrusten

Mr. Storrusten, a civil engineer employed by Moore Engineering for the past 13 years, testified that he designed the plans and specifications for the construction of the Stmart site in 2002, and at that time he was unaware of the Federal storm water regulations. Tr. Vol. II at 129-31, 161-62; R’s Ex. 38. Moore Engineering previously had been involved in the City’s construction of 35<sup>th</sup> Street North adjacent to the construction site and installation of the utilities in that area. Tr. Vol. II at 131. In connection therewith, in 1997, about five years before the Stmart site was developed, Moore had drawn a map (R’s Ex. 27) entitled the “General Layout, Great Northern Fifth Addition, Fargo, North Dakota.” Tr. Vol. II at 135. The map included elevation data on the Stmart site and 35<sup>th</sup> Street. Tr. Vol. II at 135-36; R’s Ex. 27. The elevation data probably came from survey “shots” done on site, in 50 foot increments, Mr. Storrusten said, but he did not know the particular equipment used to acquire them.<sup>37</sup> Tr. Vol. II at 136-37, 158-60.

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<sup>37</sup> In determining elevations, Mr. Storrusten explained, Moore generally uses the 1929 datum for its maps and that the plans he designed for the site was based upon survey data utilizing the 1929 datum. Tr. Vol. II at 139-40, 157. *See also*, n. 24 above. The only Moore design plans for the site in the record, however, appear to be an “Erosion Measures” plan dated March 21, 2002 and an undated Site Map, neither of which contain elevations and thus do not reference any datum. C’s Ex. 10, p. 28, 60. However, this General Layout map (R’s Ex. 27) initially created by Moore on May 22, 1997 with a “Record Drawing” date of dated January 20, 1998, done for the City of Fargo in connection with the its installation of the street four years before the Stmart construction, explicitly indicates that its benchmark was taken from “*Fargo Datum*,” which is the 1988 Datum. R’s Ex. 27. Moreover, Mr. Storrusten indicated that he was

(continued...)

Mr. Storrusten testified that the elevations shown on the 1997 map for the Stamat site were for the most part lower than those of 35<sup>th</sup> Street. Tr. Vol. II at 135-36. Based upon his experiences with other projects, Mr. Storrusten stated that “generally the grade at the property line is usually a foot above the flow line elevation that the street is installed at. So in many instances the ground on the outside of the street ends up to be higher than the existing ground.” Tr. Vol. II at 138. But he admitted that he was not involved in the design of 35<sup>th</sup> Street so he could not testify as to its design. Tr. Vol. II at 138. Further, he stated that there can be slight elevation changes between contour lines as shown on a map, which will not be reflected thereon. Tr. Vol. II at 160.

With regard to the activities on Stamat site in 2002, Mr. Storrusten stated that Kelly Larson was the project manager from Moore who was onsite once a week or more, and Mr. Storrusten was only there a total of about 15 to 20 times.<sup>38</sup> Tr. Vol. II at 150-51, 182-83. Although he was not at the site frequently prior to construction, Mr. Storrusten confirmed that the first step in the process involved stripping off the topsoil to a depth of “between probably six and 12 inches, could go as deep as 18, but generally they would try to minimize that, so six to 12.” Tr. Vol. II at 140, 168-70. He stated that stripping left a depressional area of lower grade than the edges around the perimeter. Tr. Vol. II at 141. Generally in this kind of situation, he suggested, when it rained, the depressed “area would be left standing with water” and during a few times he was on-site, he saw standing water “[w]here they had excavated and worked . . . away from the building, of course, but throughout the lot area” including around the drop-inlets. Tr. Vol. II at 141, 185. He clarified that “[t]he site was not inundated,” “[t]here would be pockets of water here and there,” but confirmed Mr. Whaley’s testimony that the amount of standing water caused project delays. Tr. Vol. II at 185-86.

Mr. Storrusten said that although the City of Fargo itself does not have a “mud ordinance,” prohibiting dirt from going onto the streets, similar to that in West Fargo, he believed that the contractor tried to comply just the same. Tr. Vol. II at 150. However, he never personally witnessed any brooming on-site. Tr. Vol. II at 186.

On cross examination, Mr. Storrusten said he is familiar with the LiDAR technique for obtaining elevation data, he uses it for preliminary work, and that the accuracy of it is considered in the industry to be plus or minus one foot. Tr. Vol. II at 155. He further agreed that, generally,

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<sup>37</sup>(...continued)

not involved in the design shown on it, although he did think that the information shown thereon “more than likely was probably taken off a survey we [Moore] did of the whole platted area.” Tr. Vol. II at 159. This means the elevations on this map (R’s Ex. 27) relied upon by Mr. Lunde and that on Ms. Doty’s map (C’s Ex. 42, 42A, 45A) may, in fact, have the same absolute fixed elevation reference-points based on the 1988 Datum, and none of the testimony submitted at hearing regarding the one-foot difference between the 1929 and 1988 datum may be relevant. See, n. 24 above.

<sup>38</sup> Neither party called Mr. Larson as a witness in this proceeding.

elevations taken at closer survey intervals are more accurate, testimony suggesting that the LiDAR data taken at 8 foot intervals would be more accurate than the elevation data reflected on Moore's map taken at 50 foot intervals. Tr. Vol. II at 160. He also acknowledged that the aerial photograph with imposed LiDAR elevations (C's Ex. 45A) relied on by Ms. Doty in her analysis reflects the site elevations as of May 2002, after the foot of topsoil was removed, give or take a foot. Tr. Vol. II at 156-57, 174-75. He suggested, however, that the photograph does not reflect elevations for the street or curb. Tr. Vol. II at 175.

Further, Mr. Storrusten admitted that after the site was stripped, and before the storm drains were installed on site, water could drain from the property into the inlets on 35<sup>th</sup> Street which discharge ultimately to the Red River. Tr. Vol. II at 168-70. Moreover, even after the installation of the on-site drains, he stated that "it is possible" for storm water to be discharged from the site, even without a "Hurricane Katrina like event." Tr. Vol. II at 170, 175-76.

Finally, Mr. Storrusten conceded that he did not know when BMPs were installed or removed from the site. Tr. Vol. II at 172-73. He explained that when he responded to EPA's Section 308 Request in regarding to BMP installation as "unknown," he did so based upon his personal lack of knowledge. Tr. Vol. II at 172; C's Exs. 9, 10.

#### D. Pollutants Discharged Offsite in Storm Water

There does not appear to be any argument that pre-construction, in its undisturbed state, at least some amount of storm water, although perhaps with most sediment therein filtered out by the natural vegetation, would have run off of the undeveloped site and into the storm drains on 35<sup>th</sup> Street. See, C's 25, p. 7 (noting that grass works as a sediment control measure), Tr. Vol. I at 285-286 (testimony of Mr. Urdiales that runoff erosion rate from construction sites is almost 20 times more than from vegetative pastures); Tr. Vol. II at 195-96, 214-15 (testimony of Mr. Wirres that weeds slow the water flow). Mr. Lenthe's testimony and Moore's General Layout map, dated January 20, 1998, show that there was a swale diagonally transversing the property where the building is now located, passing over 35<sup>th</sup> Street, and intersecting city storm drains installed thereon. Tr. Vol. II at 9-10; R's Ex. 27. Respondent's argument that a discharge of sediment-carrying stormwater did not occur after construction began, although admittedly no BMPs were in place, comes down to essentially two points: (1) the storm drains installed on-site were elevated and covered; and (2) the site was depressed in elevation so all storm water falling on the property stayed thereon and did not flow into the street and city storm drains. R's Brief at 14-16.

The evidence of record simply does not support the accuracy of the first assertion regarding the onsite storm drains being elevated and covered, at least in regard to the day of the October 2002 inspection. Ms. Hanley testified at hearing that on the day of the inspection, she observed and photographed a number of storm drains on-site which were either not above ground and/or did not appear closed off against stormwater entry. Tr. Vol. I at 42, 48-51, 53-54; C's Exs. 1(C), 1(E), 1(F), 1(G), 1(M), 1(N). Ms. Krebsbach also noted that "most," but implicitly not "all," of the storm drains onsite were protected by metal covers, and noted "[e]vidence of small amount of

sediment in storm inlets.” R’s Ex. 1, 2; Tr. Vol. II at 237, 241.

Among such drains was that exhibited in the photographs marked as C’s Exs. 1(C) and 1(F). Those photographs display a storm drain, approximately six to 12 inches *below* the level of the surrounding paved area, which evidences an accumulation of dirt. Ms. Hanley observed not only “sediment loading around the storm drain,” but also “gaps at the very bottom between the cover and the very base of the storm drain,” leading her to believe the drain was not sealed. Tr. Vol. I at 48-49; C’s Ex. 1(C). She noted further that this drain was close to the staging area where masonry materials and debris were situated and a paved area where she observed sediment loading from vehicles tracking dirt from the disturbed area. Tr. Vol. I at 46-48, 50-51. Similarly, Ms. Hanley testified to observing another below-ground level storm drain on the eastern side of the property with both “sediment loading that is in that caved area” around the drain and “cracks around the base of the cover.” Tr. Vol. I at 53. Photographs she took of this drain (C’s Exs. 1(M) and 1(N)) evidence vehicle tracks in dirt running on either side of the drain. Moreover, it must be remembered that Moore’s erosion plans for the site called for the areas around these drains to be paved to an elevation such that storm water falling in the surrounding area would flow *towards* the drains. C’s Ex. 3, p. 3. At the time of the inspection, many areas of the site were still unfinished with large areas of disturbed dirt not yet paved over. *See*, R’s Ex. 9 (photographs of site taken in October 2002).

Ms. Hanley also testified as to above-ground drains which she photographed, and which did not appear sealed against storm water or were surrounded by sediment. Tr. Vol. I at 49, 51; C’s Exs. 1(E) and 1(G). As to one of them, Ms. Hanley noted “the metal plate that was covering or supposed to be covering the opening had been pushed away from the top of the storm drain and there was dirt around it. And there was a lot of construction activity around that area, so we were concerned about all the debris that would be kicked up and enter the storm drain.” Tr. Vol. I at 49; C’s Ex. 1(E). The photograph shows dirt piled right up against the drain on all sides, rising to within a few inches of the top, as well as a sprinkling of dirt on top of the drain. C’s Ex. 1(E). Another above-ground drain also had blackish dirt piled on one side to the top or almost to the top of the drain. Tr. Vol. I at 51; C’s Ex. 1(G).

Furthermore, Ms. Hanley testified that during her inspection, she observed “concrete truck washing” activities on-site “with a lot of debris that is being washed off the trucks,” near a storm drain at the southwest part of the site, and based on Moore’s site map, dated March 27, 2002, showing drainage flowing toward that drain, had “a very high potential of flowing to the storm drains.” Tr. Vol. I at 51-52, 63; C’s Ex. 1(H), 1(I), 1(J), 1(K), 15, 43 p. 3. “Concrete washing” means literally washing off the inside and outside of a concrete mixing truck after use, which is common practice to avoid the excess concrete hardening therein or thereon. Tr. Vol. I at 93-94. As indicated above, concrete is a pollutant. Ms. Hanley did not specifically testify as to whether she observed that the storm drain she was referring to in this regard was sealed or not. However, as noted above, Mr. Lenthe admitted that at the time of the inspection the storm drains were opened

for drainage, as it was a few weeks before the blacktop and concrete work on-site was completed.<sup>39</sup> Tr. Vol. II at 63. Such testimony corroborates Ms. Hanley's testimony that the concrete wash water and other sediment on-site did flow into open drains on-site.

In addition to the evidence of sediment and concrete being discharged into open on-site drains, the evidence indicated that dirt and sediment was tracked off-site by vehicles onto 35<sup>th</sup> Street North where it could be carried easily by storm water into the open city storm drains located thereon. Mr. Bittner testified, and various exhibits corroborate, that there were inlets to the City storm water sewer system "all along 35<sup>th</sup> Street south of 12<sup>th</sup> Avenue" including directly adjacent to the site. Tr. Vol. I at 104; C's Exs. 1(P), 14, 15. Many witnesses testified, and the photographs in the record reflect, that the site was largely stripped of groundcover, leaving it a vast area of dark disturbed dirt. *See e.g.*, Tr. Vol. II at 72-73; R's Ex. 9; C's Ex. 1(D), 1(E), 1(G), 1(O)-1(R), 1(T). Mr. Whaley admitted that vehicles left the site "an awful lot" and that there were no BMPs in place until after the inspection to prevent vehicle tracking. Tr. Vol. II at 112-13, 122-24. *See also*, Tr. Vol. I at 53-54 (Ms. Hanley noting how "there are no BMPs implemented to keep the sediment from going over the curb into the street"); Jt. Ex. 1, Stip. 28 (Respondent had no BMPs such as track-out pads as of the inspection date). Various photographs show numerous vehicles on the site and tire tracks in the dirt all over the site. *See e.g.*, R's Ex. 9, photographs dated June 2002. The testimony of Ms. Hanley and Ms. Krebsbach as well as numerous photographs in the record bear witness to tire tracks of dirt going from the site onto the Street and dirt on 35<sup>th</sup> Street adjacent to the site, including in an area directly around an open city storm drain abutting the site. Tr. Vol. I at 84; Tr. Vol. II at 241, 254; C's Exs. 1(O), 1(P), 1(Q), 1(R); R's Exs. 1, 2, 9, 12. This city drain inlet (shown in C's Ex. 1(P)) was particularly susceptible to receiving sediment and dirt tracked off of the site because it is positioned directly in front of, and flush with the base of, a driveway apron, or "approach" as they are locally called, which leads vehicles off the disturbed site to the street.<sup>40</sup> *See*, C's Ex. 1(P). Photographs of these driveway aprons show disturbed dirt with impressions of tire tracks, indicating that vehicles with tires covered in dirt directly exited the site on or near the apron areas. C's Exs. 1(O), 1(P), 1(R). One of the driveway aprons photographed during the

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<sup>39</sup> I do not find Mr. Lenthe's testimony to the effect that the on-site storm drains were opened by the date of the inspection contradicted by that of Steven Whaley, who generally suggested that the on-site storm drains were installed with metal covers, but did not testify specifically that such covers remained on the drains at all times or were on the drains at the time of the inspection. *See*, Tr. Vol. II at 76. In addition, it is noted that when confronted by the allegations in EPA's inspection report of truck operators discharging "concrete wash directly into storm drains" and "[t]he storm drains at the construction site were unprotected and had sediment build-up" which had to be removed from the drainage lines (C's Ex. 1), Respondent did not deny this to be the case, but rather apologized for not having a permit, and noted that it had since installed BMPs to prevent sedimentation loading off site, and that it "would not condone" concrete washing into storm drains. C's Ex. 2.

<sup>40</sup> C's Ex. 1(P) also exhibits in the upper right corner of the photograph a slightly elevated "beehive" casting type of open manhole cover, surrounded by dirt embossed with tire tracks.

inspection appears covered in dirt which spills out into 35<sup>th</sup> Street, and has concrete waste on or near it, and is situated right near a storm drain on 35<sup>th</sup> Street at the intersection of 12<sup>th</sup> Avenue.<sup>41</sup> Tr. Vol. I at 55-56; C's Ex. 1(R), 43, 44. Photographs of the site from June through October 2, 2002 show that prior to the driveway aprons being paved, there were two or three dirt driveways exiting the site along 35<sup>th</sup> Street, with dark material that appears to be dirt spilling over into 35<sup>th</sup> Street, so that vehicles exiting the site tracked dirt directly from the site onto 35<sup>th</sup> Street from June through early October 2002 without any paved driveway apron. R's Ex. 9.

While there was some general testimony from Respondent's witnesses at the hearing concerning the paving contractor being responsible for "brooming" the dirt off the street (Tr. Vol. II at 125, 150), no witness specifically testified to personally observing such activity on the day of the inspection or any other day.<sup>42</sup> See e.g., Tr. Vol. II at 125, 186. Moreover, Mr. Whaley testified that the paving contractor began the bulk of his work only late in the construction process in or about October 2002 (Tr. Vol. II at 100-02, 104), suggesting that such contractor may not have been consistently on-site prior thereto to perform brooming. Furthermore, Ms. Hanley observed with regard to the drain on 35<sup>th</sup> Street (shown in photograph C's Ex. 1(P)) "caking on the drain itself and sediment inside." Tr. Vol. I at 54. The evidence in the record that there was no significant rain on the days preceding the inspection (Tr. Vol. I at 77; C's Exs. 13, 34; R's Ex. 20) and that the sediment had not been cleared from the street on the day of the inspection, suggests that if brooming was being done, it was not being done consistently or effectively. Other evidence also belies the claim of sufficient vehicle tracking control through brooming, including the monthly photographs of the site taken starting in June 2002 which consistently display dirt on 35<sup>th</sup> Street adjacent to site egress areas. See, R's Ex. 9. It should also be noted that the BMPs Respondent proposed to put into place after the inspection to control vehicle track-out were much more extensive than mere brooming and included using "loaders and/or skid steers to clean roadways at interim points throughout the day as necessary then at end of each day" and "vacuum sweepers," suggesting that brooming daily would not have been sufficient. C's Ex. 3.

The monthly photographs taken of the site during construction and various other exhibits also negate the accuracy of Respondent's second claim regarding the whole site being sufficiently

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<sup>41</sup> Based upon the photographs, I give little weight to Mr. Whaley's testimony to the effect that he never saw vehicles track mud off site (Tr. Vol. II at 112-13), particularly considering his testimony that vehicle tracking was not one of his major concerns during construction, and his lack of awareness of the storm water program requirements prior to the inspection. *Id.*; Tr. Vol. II at 114.

<sup>42</sup> Moore's draft contract for the construction does require at paragraph 14 that "Immediately upon the completion of the work on each site or block the contractor shall at his own cost and expense, clean up, and remove all refuse materials of every kind resulting from the work . . ." R's Ex. 38. It is unclear whether this provision was in the final contract and whether it would include brooming by the paving contractor as the offsite tracking of sediment was not necessarily the result of said contractor's work.

curbed and depressed after the initial site stripping and grading so as to prevent storm water runoff. It does appear true from the maps and photographs proffered at hearing that, prior to construction, there was apparently a continuous curb along the edge of the site on 35<sup>th</sup> Street. R's Exs. 9, 27. However, the site, a truckstop, was designed to have five driveway aprons (approaches), each 45 feet or 60 feet wide, separated by oval decorative landscaping berms, allowing trucks smooth egress and ingress between 35<sup>th</sup> Street and the site. Tr. Vol. I at 81-82; R's Ex. 9, 29 (Stamart Travel Center Utility Plan, dated August 15, 2002 (revised)). Moreover, Moore's Erosion Plan for the site evidences that it planned for water from the site to flow towards and through at least some of five driveway openings onto 35<sup>th</sup> Street, where the existing storm water inlets were located directly adjacent thereto. See, C's Ex. 15 (Stamart Travel Center Erosion Measures, revised Mar. 27, 2002, modified to show Street Stormwater Drains on 35<sup>th</sup> Street); C's Ex. 10, p. 60. To accomplish this outcome, obviously at some point, the existing curb had to be broken and removed and the ground around those driveway areas graded and prepared so that when they were eventually covered with cement there would be a smooth downward-sloping path from the site to the street. In fact, consistent therewith, Moore's Specifications Book for the site construction calls for the "removal of curb and gutter" in the amount of "495 L.F. (linear feet)." R's Ex. 38 (the fourth item in the list of construction activities after "topsoil stripping," "unclassified excavation," and "embankment.")<sup>43</sup>

It is not clear from the record exactly when this curb removal and grading occurred. The NOI submitted by Moore to the State indicated that lot construction began on May 20, 2002 and ended November 2002. C's Ex. 3. Aerial photographs of the site taken as early as June 2002 reflects at least one such area where the curb has either been removed or has been so covered by dirt tracked off the site by vehicles that the curb is obscured. R's Exs. 9, 12. Along the edge of the site along 35<sup>th</sup> Street, where Respondent alleges there is a berm, there are significant areas where there is no vegetation. R's Exs. 9, 12. August 2002 photographs suggest that the curb and berm has been removed from three dirt driveway areas. *Id.* Photographs of the site taken in September and October 2002 indicate the absence of a curb along most of the edge of the site abutting 35<sup>th</sup> Street. R's Ex. 12. The photographs from the October 2002 inspection specifically evidence that by that point, not only had the berm and curb around the new driveway areas been removed and presumably the areas graded and prepared in anticipation of driveway installation, but that cement for the driveway aprons had already been poured in at least two locations. C's Exs. 1(P), 1(R), R's Ex. 12.

Moreover, the grading of the site for such driveways having occurred earlier in the construction process, which several witnesses testified involved stripping and grading of the site overall, would easily explain why the topographical map created by Ms. Doty using LiDAR data from May 2002 evidences both generally "high[] elevations are around the periphery of the property" and four low points (within three designated areas) where water could run offsite onto 35<sup>th</sup> Street. See, Tr. Vol. I at 148-149; Tr. Vol. III at 82, 83, 93-95; C's Ex. 45A, 42; R's Ex. 27

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<sup>43</sup> "Embankment" is the placement of earth, gravel, or other material to support a roadway. Webster's Third New International Dictionary 738 (2002).

(Moore's 1997 "General Layout" map showing relatively flat elevations on the site in 1997). A comparison of the four discharge locations placed by Ms. Doty on an aerial map of the site (C's Ex. 45A), with Moore's erosion plan for the site (C's Ex. 15), suggests the low drainage areas are situated approximately where at least two of the driveway aprons are to be located. *See also*, Tr. Vol. III at 95 (Doty testimony that driveway shown in C's Ex. 1(P) is identified on C's Ex. 45A by an arrow marked with an "(A)" evidencing a low point where water would flow off-site). Further, Ms. Doty testified that the elevation data on her topographical map evidences breaks in the curb. Tr. Vol. III at 82-83; C's Ex. 45A. Thus the record suggests that, perhaps as early as May 2002, the land where the driveways were to be placed had been graded such that water would be directed to flow offsite towards 35<sup>th</sup> Street, and later, some part or parts of the curb had been removed.

In sum, the various photographs of the site taken over time evidence that when the areas were cleared and graded for the driveways and/or the curb broken, and for some period thereafter until the paving contractor completed its work in October and November 2002, the site mainly consisted of a large disturbed lot, easily allowing for storm water in the path of the driveways to pick up and transport soil off-site. *See*, R's Ex. 9. In addition, the photographs taken as early as June 2002 do not reflect that a wide undisturbed grassy berm was maintained all along 35<sup>th</sup> Street. *Id.*

Because the evidence suggests that the site was not continuously separated from 35<sup>th</sup> Street by a curb and berm during the relevant period, the assumptions in hypothetical presented to Respondent's expert Mr. Lunde are not reflective of the actual conditions during construction. Therefore, his opinions derived from such hypothetical are unworthy of substantial weight. On one hand, I accept that, due to stripping and grading, a large portion of the inner site may have been depressed in comparison to the street, that the perimeter of the property was generally left undisturbed, and that the areas directly around the on-site storm inlets may have operated as small retention ponds. However, I find Mr. Lunde's conclusion, that *all* the storm water which fell on the site during the relevant period would definitively have flowed to and been retained therein, not consistent with the record as a whole, particularly the photographs and LiDAR data suggesting that there were four elevation areas on site as of May 2002 from which storm water could flow into 35<sup>th</sup> Street. Additionally, I find the reliability of Mr. Lunde's opinion decreased by the fact that he did not consider the elevation data regarding the site as it existed in May 2002, after it was stripped and graded, but rather considered only the elevation data from 1998 (R's Ex. 27), and that he undertook no calculations to determine to a mathematical certainty whether the soils in the areas of depression he saw on R's Ex. 12 could, in fact, retain the quantity of storm water which actually fell upon the site. Tr. Vol. III at 39-40, 42-43, 45; R's Ex. 16.

On other hand, I find Ms. Doty's testimony worthy of far greater weight for a variety of reasons. First, her testimony relies in large measure upon on the results of LiDAR data acquired by a neutral third party, the City of Fargo, during the construction process. While there was some testimony regarding the accuracy of such data, that it could be off from actual elevations by as much as a foot, in this case the actual elevations of the site are irrelevant. It is only the relative elevations that matter, *i.e.* that some points are comparatively lower than others such that water



would flow from the site to the street. Moreover, the results of such data appear consistent with the overall design plan for the site in that the topographical map Ms. Doty created based upon such data shows low points where water would drain offsite to 35<sup>th</sup> Street approximately where the driveway aprons were to be placed. Further, Ms. Doty's opinion is supported by detailed mathematical calculations using empirical models relied upon professionals in the relevant field, regarding the effect of precipitation on transporting certain soil types, *etc.* Finally, her calculations responsibly accounted and/or discounted for those areas on site which were depressed and which would serve as water retention areas.

Based upon the foregoing, it is found that pollutants in the form of dirt, sediment and concrete, did flow off-site during construction.

#### E. Pollutants Discharged Into The Red River

It is uncontested that the City of Fargo's municipal storm water sewer system ultimately leads by "gravity flow" to the Red River. *Jt. Ex. 1, Stip. 19.* However, Respondent claims that even assuming it discharged pollutants into the City system, such pollutants did not reach the Red River but rather settled out beforehand because of various impediments in the system. R's Brief at 26-29. In support of this claim, Respondent cites Mr. Bittner's testimony to the effect that the City annually cleans sediment out of Drain 10 and the Lift Station and Mr. Wirres' testimony to the effect that sediment tends not to travel far in the Drain, due to the nominal declining elevation, resulting in slow water velocity, and the weeds and uneven surface in the five mile rural portion thereof. R's Brief at 26-27, citing *Tr. Vol. I at 111-112, 114-15, Tr. Vol. II at 195, 205, 210.* Respondent characterizes Ms. Doty's opinion, that the 49 tons of sediment she calculated as being discharged from the site reached the Red River, as "so incredible it borders on the preposterous." R's Brief at 27. Specifically, Service Oil challenges Ms. Doty's opinion that the sediment discharged would pass through the sump in the Lift Station because its pumps would create turbulence keeping it suspended, and suggests that if her opinion was true, there would be no need for the sump to ever be cleaned out. R's Brief at 28-29 citing *Tr. Vol. I at 114-115, 178.*

There is no question that based upon the testimony of Mr. Wirres and Mr. Bittner *some* of the sediment which enters the City of Fargo's storm water sewer system settles out in the Drain and/or Lift Station and is thus never discharged into the Red River. *Tr. Vol. I at 114-15; Tr. Vol. II at 194-96, 206.* However, Respondent's argument is premised upon the proposition that *all* of the sediment which enters the Drain settles out along the way, an assumption simply unsupported by the record. Mr. Wirres testified that the capacity of the water in the drain to transport sediment increases with the velocity of the water and the velocity of the water increases with the amount of rain. *Tr. Vol. II at 211, 213.* When, due to little or no recent precipitation, there is just a "trickle of water flowing through that channel," as Mr. Bittner indicated is the case on "most" days of the year, sediments in the water would not travel far, and would fall out, as Mr. Wirres indicated. *Tr. Vol. I at 112; Tr. Vol. II at 205, 210-11.* This nominal water volume and velocity, however, is not always the case, as the City experiences periodic flood events and large rainfall events involving significant water volume and velocity which would carry sediments in the water and Drain down

toward the River. Tr. Vol. II at 202-05, 213, 223-25. Further, the evidence of record shows that during the period relevant here, from April through October 2002, the Fargo area incurred a total of 22.44 inches of precipitation, which was 5.4 inches more than normal and over 90% of its total rain for the whole year. C's Exs. 12, 34. Based upon that, Ms. Doty calculated that the volume of runoff from the Starnart site, *alone*, on the 10 days examined, produced over 2,652,000 gallons of water flow, ranging over the ten days examined from a low of 64,420 gallons to a high of 763,376 gallons with varying peak flow rates, from a low of 0.26 to a high of 14.92 cfs (cubic feet per second). Tr. Vol. I at 169-70; C's Ex. 42A. Such flow from the Starnart site, of course, would be added to that of many other sites simultaneously discharging storm water into the Drain, increasing the volume of water and its velocity and thus its ability to transport sediment. Ms. Doty calculated the velocity of the water discharged from the site alone as it proceeded through each step in the Drain and determined that the sediment discharged in the storm water from the site would be kept in suspension until it reached the Red River. Tr. Vol. I at 174, 176-78. Respondent cannot overcome this careful scientific analysis merely by proffering broad generalizations and unsupported and illogical presumptions.

As to the issue raised by Respondent with regard to the Lift Station sump and the rural, earthen portion of the drain, Ms. Doty testified without contradiction that it takes approximately a day in still, standing water for silt to fall out, and that such time increases with the level of water turbulence. Tr. Vol. I at 175. Both Ms. Doty and Mr. Wirres estimated that it would take the storm water discharged from the Starnart site approximately 7½ to 8 hours to go through the Drain and into the Red River, thus leaving insufficient time for the sediment to fall out. Tr. Vol. I at 175; Tr. Vol. II at 200. Further, Ms. Doty carefully calculated that sediment in water discharged from the site would not settle out in the Lift Station because only 11,000 gallons of water are required to trip the pumps therein and the lowest volume of water discharged from the site alone was 40,000 gallons. Tr. Vol. I at 204-05. Mr. Bittner testified, moreover, that when the water reaches a certain level the Lift Station itself is bypassed and the water simply "gravity flows" through culverts underneath the railroad tracks. Tr. Vol. I at 112-13. Thus, the natural turbulence in the discharged water as well as whatever additional turbulence was added thereto by the action in the pumps would have prevented the sediment from settling out in the Lift Station sump or rural portion of the Drain.

Furthermore, as to Respondent's claim that weeds and grass in the rural portion of the Drain was such that it would cause the water to slow so significantly that sediment would fall out, it is noted that besides cleaning the Drain out every August, Mr. Wirres testified that the City cleaned out and repaired the Drain to remove high spots in 2000 and 2001 after certain storm events, and made other repairs to the Drain in 2002. Tr. Vol. II at 224-25, 227. In addition, he stated that the County has adopted a system to check the Drain's condition only every two years and does a thorough clean-out every 20 years, suggesting that it takes a very long time for weeds and sediment to build up to a level where the flow of water in the Drain would be significantly impeded such that all the sediment contained therein would fall out. Tr. Vol. II at 216, 227. Recent photographs of the Drain, taken in winter, which Mr. Wirres suggested basically reflected its condition in 2002, show no obvious extensive overgrowth of weeds or sediment piles within the

Drain. R's Ex. 32; Tr. Vol. II at 200-201. *See also*, C's Ex. 36. Thus, while at the time of the various discharges the Drain may not have been in "pristine" condition, there is no evidence that it was so overgrown with weeds and grass as to significantly affect the anticipated water velocities as calculated by Mr. Wirres (R's Ex. 26) and relied upon by Ms. Doty in her analysis. Tr. Vol. II at 195-96, 201, 214-15 (testimony of Mr. Wirres that weeds and sediment slow down the flow of water during "low-flow" periods).

Finally, as to the matter of the velocity of the water in the drain slowing due to ponding when the River runs high, Mr. Wirres indicated at hearing that Spring floods in the area occur in March to April and "after that the river tends to be lower." Tr. Vol. II at 223. The period of time considered by Ms. Doty in her analysis was May to September. C's Ex. 42A. Thus, during the relevant time the river would have been comparatively low such that the water in the drain would not have backed up and ponded, slowing down its velocity.

In sum, in reliance upon Ms. Doty's opinion supported by her analysis as well as the other evidence of record in this case, I find by a preponderance of the evidence that at least some, if not most or all, of the sediment discharged from the Stamart site certainly would have reached the Red River eventually.

Therefore, Respondent is alternatively and/or additionally found liable on Count 1 of the Amended Complaint on the basis that it violated 33 U.S.C. § 1311, by failing to obtain a permit for construction activities in which Respondent discharged a pollutant into waters of the United States.

### **PENALTY CRITERIA**

The assessment of civil administrative penalties for violations of the Clean Water Act is authorized by Section 309(g) of the Act, 33 U.S.C. § 1319(g). Under that section, as modified by 40 C.F.R. § 19.4 (Table 1) pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (note), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 (note), administrative penalties for Class II violations<sup>44</sup> occurring between January 30, 1997 and March 15, 2004, such as those primarily alleged in this case, cannot exceed

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<sup>44</sup> Class I maximum penalties are capped at \$27,500 (as compared to the maximum of \$137,500 for Class II penalty actions) and proceedings for assessment thereof under CWA Section 309(g)(2)(A) are *not* conducted in accordance with Section 554 or 556 of the Administrative Procedure Act (5 U.S.C. §§ 554, 556), but are conducted in conformance with Subpart I of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (40 C.F.R. §§ 22.50-52). *See*, 33 U.S.C. 1319(g)(2)(A).

\$11,000 for each day the violation continues, and the total penalty cannot exceed \$137,500.<sup>45</sup> 33 U.S.C. § 1319(g)(2)(B). Section 309(g)(3) of the CWA further provides that in determining the amount of any penalty, the nature, circumstances, extent, and gravity of the violations must be taken into account. 33 U.S.C. § 1319(g)(3). In addition, consideration must also be given to the violator's ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require. *Id.*

The Agency has not issued any civil penalty guidelines to provide a methodology for CWA penalty calculations, so the penalty must be determined by some method on the basis of the evidence of record and the list of penalty criteria set forth in Section 309(g) the CWA. 40 C.F.R. § 22.27(b); *Larry Richner*, 10 E.A.D. 617, 633 (EAB 2002). The Supreme Court has indicated that highly discretionary calculations are necessary in assessing penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 427 (1987). Federal courts calculating penalties under the penalty criteria of Section 309(d) of the CWA generally use one of two methods. One method, known as the "bottom up" method, starts with the economic benefit of noncompliance, and then that amount is adjusted upward to reflect the other statutory factors. *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998) (calculating "wrongful profits" - earnings the defendant made by not cutting back production volume to come into compliance, multiplied by two for deterrent effect). Other courts apply the "top down" method, starting with the statutory maximum and reducing that amount for any statutory factors in mitigation of the penalty. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990). Some Administrative Law Judges have calculated penalties under Section 309(g) of the CWA following the framework of EPA's general civil penalty policies, known as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties), 41 Env't Rep. (BNA) 2991, dated February 16, 1984. *See e.g., Urban Drainage and Flood Control District*, EPA Docket No. CWA-VIII-94-20, 1998 EPA ALJ LEXIS 42 (ALJ, June 24, 1998); *Industrial Chemicals Corp.*, EPA Docket No. CWA-02-99-3402, 2000 EPA ALJ LEXIS 58 (ALJ, June 16, 2000). These policies provide that a preliminary deterrence figure should first be calculated, based upon the economic benefit of noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors. The Federal courts as well as the Environmental Appeals Board have emphasized the importance of the economic benefit factor, even where the exact or full amount cannot be calculated, and have provided that a partial amount or reasonable approximation is sufficient to include in a penalty assessment. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *B.J. Carney*, 7 E.A.D. 171, 207-08 (EAB 1997), *on remand*, EPA Docket No. CWA-1090-09-13-

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<sup>45</sup> Arguably, to some extent the violations in Count II which occurred after March 15, 2004 and before the Respondent Permit terminated in June 2004, would fall under the succeeding applicable higher maximum penalty limit of \$157,500. *See*, 40 C.F.R. § 19.4 (Table 1). However, since the Complainant has not requested the maximum penalty in this case, such distinction is of no significance here.

309(g), 1998 EPA ALJ LEXIS 112 (ALJ, January 5, 1998), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999).

For the two counts of violation in this case, Complainant has proposed the undifferentiated single penalty amount of \$40,000. C's Brief at 27. Moreover, while Complainant provides in its Brief a discussion of the various statutory factors and relevant facts involved in calculating the CWA penalty in this case, it does not advocate a particular penalty calculation methodology nor does it explain how it exactly calculated the final proposed penalty figure of \$40,000 for the two violations.<sup>46</sup> C's Brief at 27-43. Respondent, on the other hand, has proposed a penalty of \$2,702.19, representing the exact dollar amount of economic benefit Complainant alleges Respondent received as a result of its two violations. R's Brief at 1, 33. Further, it argues that the "bottom up" penalty calculation methodology is the one most appropriate to this case, and that no additional penalty beyond the base amount for economic benefit is warranted under the remaining statutory factors. R's Brief at 32-34. In that Complainant proposes that far less than the statutory maximum penalty be imposed and provides no details as to the methodology it used to calculate the proposed penalty, and there appears to be no dispute between the parties as to the economic benefit amount, considering the circumstances of this case as discussed below, the "bottom-up" method will be used to determine the penalty here.

#### 1. Economic benefit

As noted by Complainant in its Brief, the purpose of assessing a penalty that reflects a violator's economic benefit is two-fold. C's Brief at 41 citing *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 218 (EAB 1997) and *Public Interest Research Group v. Powell Duffyn Terminals*, 913 F.2d 64, 80 (3<sup>rd</sup> Cir. 1990). First, it deters violations by removing an incentive to violate the law. *Id.* Second, it helps create a level playing field by ensuring that violators do not obtain an economic advantage over their competitors. *Id.*, citing *United States v. Ludlum Steel Corp.*, 187 F. Supp. 2d 426, 437 (W.D. Pa. 2002). Further, as Complainant also points out, case law has established that it need not demonstrate the exact amount of economic benefit, since a tribunal is only required to make a "reasonable approximation" thereof when calculating a CWA penalty. C's Brief at 42

At hearing, Complainant's witness Aaron Urdiales, an EPA environmental scientist tasked as the oversight coordinator for the State of North Dakota's CWA NPDES Program, testified that he calculated the economic benefit Respondent enjoyed as a result of the two violations at issue. Tr. Vol. I at 226-27, 257. In doing so, he stated that he relied upon information drawn from various sources, including the inspection report (C's Ex. 1), EPA's CWA Section 308 request (C's

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<sup>46</sup> Complainant submitted no penalty calculation worksheet at hearing and, as Respondent notes in its Brief at page 39, when this Tribunal inquired at hearing about the Agency producing a witness regarding the calculation of the proposed penalty, it indicated that "[t]here is no calculation to be done," referring, presumably, to the fact that the Agency has not issued any penalty calculation guidelines for CWA actions. Tr. Vol. I at 293.

Ex. 9), Respondent's response thereto (C's Ex. 10), Respondent's NOI (C's Ex. 3), weather reports (C's Ex. 34), EPA regulations regarding estimated costs of BMPs per acre (C's Ex. 21), and EPA Economic Analysis of the Final Phase II Storm Water Rule (C's Ex. 22). Tr. Vol. I at 258-66. Taking into account both "delayed" costs and "avoided" costs, Mr. Urdialis opined at hearing that the total economic benefit Respondent received as a result of the violations amounted to approximately \$2,700.<sup>47</sup> Tr. Vol. I at 257. Specifically, Mr. Urdiales explained this aggregate figure stating that he calculated that Respondent had benefitted to the extent of \$940 from "delayed" costs involving late filing of the NOI, preparing the SWPPP, and installing and maintaining the required BMPs on site by 0.8 years (approximately 9.6 months or 292 days). Tr. Vol. I at 258-64. He also determined that Respondent benefitted to the extent of \$1,940 from "avoided" costs involving the 97 required storm water inspections at \$20 each which were not conducted either before the NPDES Permit was obtained or thereafter, until the Notice of Termination was filed.<sup>48</sup> Tr. Vol. I at 265-266.

In its Post-Hearing Brief, Respondent states that it "does not dispute that this sum represents the economic benefit that Respondent derived from its noncompliance." R's Brief at 33. Therefore, it is found that, as a result of the two violations on which it was found liable in this case, Respondent benefitted economically by delayed and/or avoided costs it was legally obligated to incur to the extent of \$2,700.<sup>49</sup>

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<sup>47</sup> From the testimony and documentary evidence proffered at hearing alone, it is difficult to reproduce Mr. Urdiales' mathematical calculations so as to reach his final figure of approximately \$2,700 in that the amounts he provided for delayed (\$940) and avoided costs (\$1,940) total \$2,880. However, Complainant's Brief at 43 suggests that the \$1,940 figure represents "avoided costs before taxes," and thus, a lesser sum would presumably reflect the after tax value and perhaps this accounts for the lesser sum proffered by Mr. Urdialis.

<sup>48</sup> Although not completely clear from the testimony at hearing, it appears that this 0.8 year period in regard to delayed costs in filing the permit covers the time period from January or February of 2002 when the permit was required to be filed under the regulations (*i.e.* 90 days before commencing construction in April 2002) to November 2002, when the application was filed. It is also unclear why Mr. Urdiales calculated avoided costs from inspections which theoretically should have been conducted *before* the permit was obtained, in that Complainant limited the liability it sought in Count 2 to Respondent's failure to conduct inspections *after* receiving its permit. However, Respondent has not raised this issue and the monetary value of the difference in the calculations would be fairly nominal.

<sup>49</sup> In its Post-Hearing Brief, Complainant implies that Respondent's actual economic benefit from avoided costs may have actually totaled \$23,000 on the basis that testimony adduced at hearing did not prove that Respondent actually installed the required BMPs on site and/or maintained them after it obtained its Permit. C's Brief at 42, n. 30. However, Complainant does not request in its Brief that this Tribunal make a finding of economic benefit beyond \$2,700 and  
(continued...)

## 2. Nature, Circumstances, and Extent of the Violations

In its Initial Brief, Complainant characterizes the nature, circumstances and extent of the two violations in this case as "significant." C's Brief at 31. In regard to the violation at issue in Count 1, it points out that Respondent started construction of its Stamart facility in April 2002 without a NDPDES permit and, as a result, no SWPPP and BMPs were in place then or during the next eight months of active construction, citing to the testimony of Inspector Hanley in regard to the absence of a permit and the importance of and need for an appropriate SWPPP and BMPs at a construction site, particularly concrete wash procedures, vehicle track out pads, and inlet protection. C's Brief at 30-31 (citing Tr. Vol. I at 42-43, 59-61). The Agency further points to evidence in the record showing that from April through November 2002 the site received 22.59 inches of precipitation, which was 91% of the total annual precipitation, and asserts that if BMPs had been in place at the time they would have minimized the pollutants entering the storm system after these rain events. *Id.* However, Complainant acknowledges in its Brief (at 30) that Respondent provided some evidence that it used BMPs for the 19 months after it obtained the permit until it was terminated (citing, Tr. Vol. II at 172-173, 181-184, 250; C's Ex. 10, pp. 29-41, 450).

Further, in regard to Count 2, EPA asserts that Respondent did not even comply with its NDPDES permit once it was obtained in November 2002 in that it failed to conduct 65 out of 80 self-inspections required thereunder, noting that, as a result, it is impossible to determine if BMPs were installed and replaced as needed, or if they were working or not working to prevent sediment discharge. C's Brief at 30. EPA also points out that Respondent replied "unknown" to a Section 308 inquiry as to whether BMPs were employed on site during construction, and cites to a lack of evidence in the record to show what control methods were being implemented to reduce and minimize stormwater runoff. *Id.* at 31. Moreover, Complainant states that the few inspections Respondent did conduct after obtaining its permit did not comply with the terms and conditions of its permit, and further cites to the fact that Respondent did not enter into a contract with Moore for the insufficient self-inspections until March 2004. *Id.* citing Tr. Vol. II at 120-121. The Agency suggests that "the lack of knowledge by both the Respondent and its consultants of the storm water regulations and the terms of the permit together with the lack of BMPs at the site lend credence to the conclusion that significant amounts of sediment entered the storm drains during precipitation events." *Id.* at 30-31. Complainant suggests that each day Respondent failed to conduct self-inspections or record or maintain self-inspection records once a permit was obtained constitutes an additional day of violation, and that CWA Section 309(g)(2)(B) speaks in terms of penalties per day of violation, rather than penalties per violation. C's Brief at 28, citing *Chesapeake Bay Foundation v. Gwaltney*, 791 F.2d 304, 314 (4<sup>th</sup> Cir. 1986).

Addressing the violation in Count 1, Respondent argues in response that the record demonstrates that "the violation is in the nature of a failure to obtain a permit, and not of an actual

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<sup>49</sup>(...continued)

so no such finding is made herein. *Id.* at 43.

or potential harm to the environment,” in that the evidence demonstrates there was no actual or potential environmental harm caused by the violations.<sup>50</sup> R’s Brief at 35. It states that the initial construction created a depressed area, bowl or pool such that a “catastrophic precipitation event” would have to occur for pollutants in storm water to actually run off or flow from the site and that no such event occurred. *Id.* Further, Respondent notes that there were no tests conducted and no evidence presented showing that its construction activities caused any sedimentary buildup obstructing the Red River, fish kills or vegetative destruction. *Id.* Rather, its expert witness, Mr. Lunde, testified that the 49 tons of sediment Respondent allegedly discharged was “basically a drop in the bucket.” *Id.* (citing Tr. Vol. III at 98). As to EPA’s witness, Mr. Urdialis, Respondent notes that he was not qualified as an expert in environmental harm and implies that his testimony in regard thereto should be given little weight. *Id.* at 35-36.

With regard to the circumstances of the violation, Respondent states that it “neither intentionally nor willfully violated the permitting requirements,” noting that 12 out of 13 of the construction sites other than Respondent’s inspected by EPA and the State also had no CWA permit; that it “hired experienced construction firms to take care of all permitting requirements;” and that it promptly responded to the inspectors’ notice that a permit was required. R’s Brief at 36. Further, Respondent argues the violation was “regulatory in nature only” therefore warrants only a minimal penalty since Complainant cannot prove sediment actually flowed off-site. R’s Brief at 36-37.

As to the extent of the violation, Respondent characterizes it as “minimal” because there is no conclusive evidence that stormwater, much less sediment, was tracked off-site and/or discharged into the Red River, and characterizes Ms. Doty’s testimony in this regard as “speculation,” fundamentally flawed and unreliable. R’s Brief at 37. It notes that any storm water discharged from the site would have gone into Drain 10, which “effectively acts as a filter,” preventing sediments from flowing into navigable water. *Id.* In reply to these arguments, Complainant states that a discharge did occur. C’s Reply Brief at 3-5.

Upon consideration of all the foregoing, I find as to Count I, the “nature, extent and circumstances of the violation” is the complete failure to apply for and obtain a NPDES permit prior to starting construction in April 2002 and continuing until November 2002, a period of approximately seven months, as required by the CWA and its implementing regulations. Contrary to Respondent’s assertion, I do not view this as a mere violation of a technical regulation. A mere technical violation would be, for example, applying for a permit less than the full number of days required prior to starting construction, not completing some insignificant part of the application process prior to beginning construction, or even perhaps not applying for a permit *where evidence shows that all the substantive requirements of a permit were nevertheless actually put into place.* The facts here reflect none of those circumstances nor anything comparable. Rather, the nature,

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<sup>50</sup> Respondent’s arguments in regard to the “nature, circumstances and extent of the violation” do not seem to specifically or separately address the inspection violation in Count II. R’s Brief at 35-37.



extent, and circumstances of the violation in Count 1 is a substantive violation of the stormwater permit program that goes to the very heart of the CWA and its intent to limit or eliminate pollutant discharges into navigable waters by planning and putting into place *before construction begins* measures to prevent and/or minimize discharges occurring. *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985) ("The permit process is the cornerstone of the . . . scheme for cleaning up the nation's waters."). Failing to apply for such a permit by itself created a risk of illegal discharge, if not assurance thereof, in that it meant no serious thought was given to the need for BMPs to prevent the possibility of pollutants discharging from the site in stormwater prior to construction beginning, and no adequate monitoring of discharges occurred during the critical period when the land was being disturbed by clearing, grading and excavating activities and such discharge was most likely to occur. *See, Kelly v. U.S. EPA*, 203 F.3d 519, 522-523 (7th Cir. 2000) (noting that the claim that non-permitted actions caused no environmental harm "miss[es] the larger point" of the CWA, which is to require that federal approval be obtained *beforehand* to prevent or minimize aquatic damage); *J. Philip Adams*, CWA Appeal No. 06-06, slip op. at 4, 2007 EPA App. LEXIS 24 (EAB Jun. 29, 2007) (CWA's protection of waters depends on voluntary compliance with the permit process prior to violation being discovered by inspectors in the field); 40 C.F.R. § 122.26(b)(14)(x)("[c]onstruction activity including clearing, grading and excavation" is covered industrial activity under the CWA).

As to Count 2, the nature, extent, and circumstances of the violation is the Respondent's failure to a overwhelming extent, that is, 65 out of 80 times, to conduct the inspections required to determine if the BMPs it put into place were effectively controlling stormwater discharge after it obtained its permit. While this type of violation is more technical in nature, it too undermines the very intent and purpose of the CWA in that inspection requirement is clearly designed to assure that the anti-pollutant discharge measures required by the CWA and permits issued thereunder are actually effectively and continuously implemented and maintained. Without such monitoring, the whole permit issuance process become ineffectual. Moreover, I find unpersuasive Respondent's attempts to downplay the significance of this violation based upon the fact that there is little evidence in the record regarding its BMPs not being in place and effective, in that I note the lack of such evidence is a direct result of its failure to perform the required inspections.

Therefore, based upon the nature, extent, and circumstances of the violations it is appropriate to multiply the rather nominal economic benefit in this case of \$2,700 by 10, creating at this point an initial adjusted penalty of \$27,000.

### **3. Gravity of the Violations**

With regard to gravity, Complainant alleges in its Brief, citing numerous cases in support, that a substantial penalty can be assessed even in the absence of proof of actual environmental harm, and moreover, that the evidence in this case shows that Respondent discharged approximately 49 tons of sediment from its site which "posed a great risk to the environment." C's Brief at 32-33. Citing the testimony of Mr. Urdiales, EPA argues that construction activities alter the natural landscape, increasing runoff and erosion, which in turn results in additional sediment

being transported to receiving waters, and thus plays a major role in impairment of surface water. *Id.* at 33. Such impairments include increased turbidity, causing fish to suffocate or suffer bodily injury, and smothering benthic macro organisms, increased difficulty in filtering water, and increased erosion. *Id.* at 34 citing Tr. Vol. I at 267-269, 285-86; C's Exs. 32, 33. Further, EPA notes that Mr. Urdiales testified that the Red River of the North is a source of drinking water for the City of Fargo, designated to achieve the highest state water quality standard as a "Class 1 stream" under North Dakota's Standards of Water Quality, and during the years at issue here, 2002-2004, was listed as impaired for turbidity. *Id.* citing Tr. Vol. I at 269-73, 275-77, 279, 287; C's Exs. 24, p.8, 30-33.

EPA further argues that it has been held that the failure to obtain a permit harms its regulatory program, and that such harm may lead to a risk of environmental harm, citing *Phoenix Constr. Serv., Inc.*, 11 E.A.D. 379, 396-400 (EAB 2004). C's Brief at 33. It also notes that discharge of pollutants without a permit "goes to the very heart of, and thus significantly harms, the statutory CWA program" quoting this Tribunal's prior decision in *C.W. Smith*, EPA Docket No. CWA-04-2001-1501, 2004 EPA ALJ LEXIS 128, \*146 (ALJ, July 15, 2004). C's Brief at 29.

On the other hand, Respondent states that the permit application "violation is in the form of harm to the regulatory process only and thus it must be considered a minor violation." R's Brief at 38. It reiterates its arguments regarding the violation not causing any actual or potential harm to the environment, the "drop in the bucket" testimony of Mr. Lunde, the unreliability of Ms. Doty's testimony, and the lack of testing. *Id.* In regard to Count 2, the failure to conduct inspections violation, it alleges that this too is a "minor" "technical" violation, "not willful[ly]" done, noting its representatives did conduct inspections at the site "albeit not at the required frequency," which it attributes to governmental agencies failing to provide it with a copy of the permit until this case was instituted. *Id.* at 38. Further, it characterizes this violation as singular, "not significant because there was no actual or potential harm," and "short" in duration. *Id.*

While it is true that there is no evidence that Respondent's violations caused any actual harm to the Red River or the fish or plants in it, that does not by itself mean that the violations have little or no gravity or significance. Evidence of record indicates that "[p]ollution from urban and agricultural land that is transported by precipitation and runoff . . . is the leading source of impairment" of waterbodies. C's Ex. 30. Further, "[w]ater pollution threatens public health both directly through the consumption of contaminated food or drinking water, and indirectly through skin exposure to contaminants present in recreational or bathing waters." *Id.* See also, C's Ex. 22 (cost/benefit analysis of Phase II stormwater regulations). Mr. Bittner, who works for the City of Fargo on its storm water system, indicated that storm water runoff is a "big issue" for the City. Tr. Vol. I at 126. He explained that the Red River is a source of drinking water for the City residents. Tr. Vol. I at 127. The City relies upon the BMPs, which were absent in this case, to "prevent pollution from happening initially so you don't have to treat [stormwater]" and that there is no filtering process before storm water is released into the River. Tr. Vol. I at 126-28. The City incurs the expense of operating a treatment plant to create safe potable water from the water drawn from the River. Tr. Vol. I at 127.

As a Class I stream, the Red River's defining characteristic is as a water "capable of supporting growth of salmonid fishes and associated aquatic biota" and as such was required to meet the State's highest water quality standards, that is, to have the lowest level of pollutants. C's Ex. 24, p.8 (North Dakota Water Quality Standards Rules §§ 33-16-02.1-01 *et seq.* (eff. June 1, 2001)). Nevertheless, since the 1990s, EPA has identified that portion of the River in the Fargo/Moorhead area as being impaired by turbidity,<sup>51</sup> affecting its aquatic consumption, aquatic life, and recreation. C's Exs. 32, 33. Turbidity, as Mr. Urdialis testified, is caused at least in part by sediment laden stormwater runoff. Tr. Vol. I at 268. Thus, while the impact of the sediment laden runoff from the site during construction may have been "[b]asically a drop in the bucket," as Mr. Lunde described it (Tr. Vol. III at 98), each extra drop works towards filling the bucket, until it eventually overflows. In this case, it means Respondent, albeit however slightly, caused the Red River to become more impaired. Therefore, a 10 percent increase in the penalty now calculated of \$27,000 or \$2,700 is warranted in recognition of the gravity of the violation, for a total interim penalty of \$29,700.

#### 4. Ability to Pay

Despite being given an opportunity to do so, Respondent chose not to raise at hearing an "inability to pay" defense.<sup>52</sup> In addition, the record contains sufficient evidence, including data regarding the size of Respondent's business (12 sites/300 employees) and testimony as to its gross revenues last year totaling over \$140 million dollars, to find that Respondent has the ability to pay up to the full proposed penalty of \$40,000. Tr. Vol. II at 51-53. Therefore, the penalty will not be adjusted downward in this case based upon this potential mitigation factor.

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<sup>51</sup> "Turbidity" is a measure of a water's clarity resulting from the suspension of materials such as soil particles (clay, silt, and sand), algae, plankton, microbes, and other substances therein. Webster's Third New International Dictionary 2464 (2002).

<sup>52</sup> Early on in this case, Respondent had suggested that paying the proposed penalty would require it to borrow money. However, it never provided any documentation in support thereof despite the requests made by this Tribunal in its Prehearing Order and by Complainant in a letter sent to Respondent in regard thereto. As a result, Complainant filed a Motion to Compel Additional Discovery for the Statutory Factor Ability to Pay, including therein, in the alternative, a Motion to Preclude Respondent from Offering Any Evidence of its Inability to Pay at Hearing. In response to the Motion, Respondent explicitly represented that it would not raise "ability to pay" as an issue at the hearing, would not argue that the penalty should be eliminated or reduced on the basis of this factor, and would not offer evidence on that factor. Based upon this representation, this Tribunal denied Complainant's Motion as moot. *See, Order on Motions in Limine, Motions to Supplement and Amend Prehearing Exchange, and Motion to Compel Discovery*, 2006 EPA ALJ LEXIS 9 (ALJ, March 17, 2006).

## 5. History of Violations

Complainant acknowledges in its Brief that Respondent has no prior history of violations, so as a potentially *aggravating* factor, Respondent's history is not relevant to the appropriate penalty to be imposed in this case.<sup>53</sup> C's Brief at 29.

Respondent, however, suggests in its Brief that its lack of prior violations be considered as a *mitigating* factor, having a downward impact on the proposed penalty, and supporting its position that imposition of a penalty limited to the economic benefit of the violations is appropriate. R's Brief at 39. Respondent, however, cited no case in support of its position in this regard.

It is a well established legal axiom that it is the duty of every citizen to comply with the law. See e.g., *Stout v. Commissioner*, T.C. Memo 1959-16 (U.S. Tax Court Memos 1959) ("there is a duty upon individuals to comply with the law and they may not shirk their duty and avoid the legal consequences of a failure to comply by merely throwing the burden upon an accounting firm" and claiming that they did not file because that firm did not prepare the proper form for them to file); *Olshausen v. Commissioner*, T.C. Memo 1958-85 (U.S. Tax Court Memos 1958) (a person must use "reasonable diligence in ascertaining his duty to comply with the law. Any reasonable and prudent person would not rely upon an impression, but would consult the current law. Neither indifference nor reliance upon rumor constitute reasonable cause"). See generally, Promise, Benefit, and Need: Ties That Bind Us to the Law, 18 Ga. L. Rev. 727, 769 (Summer 1984) ("These duties [toward fellow citizens], based on reciprocal relations of benefit and need, constitute the main underpinning of our responsibility to comply with the law and with other rules that govern our lives."). There are no special circumstances in this case for mitigating the penalty merely based upon the fact that Respondent, who was unaware of the CWA permit requirements prior to this action, had not previously been found in violation of the Clean Water Act.

## 6. Culpability

Complainant in its Brief argues that Respondent has a high degree of culpability for the violations because it was the owner of the site, citing *United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5<sup>th</sup> Cir. 1981). C's Brief at 35. It notes that Mr. Lenthe took direct responsibility for actions on the site and he was identified as the person in charge to inspectors and the Agency in the Respondent's Section 308 Response. *Id.* at 36 citing Tr. Vol. II at 43, 47; C's Ex. 10. Further, after the inspection, Mr. Lenthe was the person who dealt with inspectors and state authorities on the CWA permit issue and signed the notices of intent and termination. *Id.* Additionally, the Agency points out that the SWPP provides that the owner is

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<sup>53</sup> Mr. Lenthe did admit at hearing that on August 13, 2003 an EPA inspector "accused" Service Oil of pumping gasoline contaminated water into a storm drain at its facility located on 13<sup>th</sup> Avenue Southwest in Fargo. Tr. Vol. II at 42-43. However, he denied the accuracy of this accusation, no further evidence regarding this event was submitted into the record, and so it is not being considered here. Tr. Vol. II at 43.

responsible for checking BMPs to ensure they are working correctly after rain/snow events. *Id.*

Moreover, Complainant argues that Respondent's high culpability is not diminished by the involvement of other professionals in the construction process, in that as owner of the site, it would still be ultimately legally responsible for the failings of those professionals, citing *Waterkist, Inc.*, EPA Docket No. CWA-10-2003-0007, 2004 EPA ALJ LEXIS 2 (ALJ, Jan. 28, 2004)(Order on Motions). Moreover, EPA suggests that the facts of this case do not suggest that any of those other professionals assumed responsibility for regulatory compliance such as to warrant a reduction in Respondent's culpability. C's Brief at 37-38. In this regard, Complainant notes that while Steve Whaley was the construction manager on the project, Respondent never entered into any written contract with him or his company and there is no evidence that he was delegated the responsibility for compliance with the storm water regulations. C's Brief at 37 citing Tr. Vol. II at 12, 47, 56-57. Moreover, Mr. Whaley testified that he never heard of storm water permits prior to the events in this case and thought it was the responsibility of each contractor to obtain permits for the work it did. C's Brief at 37 (citing Tr. Vol. II at 85, 95). With regard to Moore Engineering, Complainant acknowledges that Respondent did have a written contract with Moore, but notes that the contract explicitly enumerated the services it would provide in regard to the construction, and that there was no obligation to obtain permits unless an additional sum was paid. C's Brief at 37 (citing Tr. Vol. II at 55; R's Ex. 38). It notes that there is no evidence that Respondent paid the additional sums to Moore for obtaining permits and Mr. Storrusten indicated at hearing that he did not consider Moore responsible for complying with stormwater regulations. C's Brief at 37 citing Tr. Vol. II at 162-63. As to Respondent's culpability under Count 2 for the inspections, Complainant notes that Respondent did not enter into a written contract with Moore providing for such inspections until March 31, 2004, some 16 months after the EPA site inspection, and just shortly before the permit was terminated. C's Brief at 38.

Additionally, EPA states that the retail fuel industry, of which Service Oil is part, is highly regulated and as such it argues that Respondent was sufficiently sophisticated to acquire the necessary information to comply with the stormwater regulations. C's Brief at 38. It notes that such regulations have been in existence since November 1990, 12 years prior to the construction at issue here, that the State had been issuing storm water permits since 1993 and 1994, including in the Fargo area, and that the State regulators engaged in outreach educational efforts prior to construction beginning. C's Brief at 40 (citing Tr. Vol. I at 33; Tr. Vol. II at 259-261; and Tr. Vol. III at 59-63).

As to Respondent's assertion that its culpability for the violation in Count 2 is diminished by the fact that it was not provided with a copy of the permit and so was unaware of its exact inspection obligations, Complainant does not dispute the truth of the fact that no permit was sent, but argues that it is insignificant. C's Brief at 38-40. In support of this position, EPA notes that the permit was accessible on the State's website, Mr. Lenthe testified that if he had received the permit, he would have passed it onto Mr. Whaley anyway, and Respondent's contractors testified that they accessed several websites within days of inspection regarding stormwater regulations. C's Brief at 38-39 (citing Tr. Vol. II at 46, 85, 244-45, 250-251, 261, 244; C's Ex. 10). Further,

Complainant notes that neither Mr. Whaley nor Mr. Moore testified that they ever asked for a copy of the permit. C's Brief at 39 (citing Tr. Vol II at 117, 165-66).

On the other hand, Respondent characterizes itself as having "no culpability in the instant case," because of the involvement of other construction professionals, and that assessing a penalty under such circumstances "is tantamount to assessing a penalty against an innocent party." R's Brief at 41. Both Respondent and EPA cite to the following factors in *Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 418 (EAB 2004), to be considered when determining culpability:

- a. How much control the violator had over the events constituting a violation;
- b. The foreseeability of events constituting violations;
- c. Whether the violator took reasonable precaution against the events constituting the violation;
- d. Whether the violator knew or should have known of the hazard;
- e. The level of sophistication within the industry in dealing with compliance issues;
- f. Whether the violator in fact knew of the legal requirement which was violated; and
- g. The good faith and diligence of the violator in redressing the violations and fixing the problems.

R's Brief at 39-40; C's Brief at 35-36.

As to these factors, Respondent states as to the application violation in Count 1, that it "did not have any direct control over the events constituting a violation," noting that it is not in the construction business, and so hired and relied upon professionals to navigate through the technical process of acquiring the necessary permits. R's Brief at 40. It notes that for the same reason, the violations were not foreseeable because it is not in the construction business and this was the first enforcement action of its kind in the Fargo area. *Id.* As to the inspection violations in Count 2, Respondent states that it was never provided with the permit by the State and thus was "not in a position to conduct the required inspections because it was unaware of those requirements."<sup>54</sup> *Id.*

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<sup>54</sup> Both Mr. Lenthe and Mr. Storrusten stated that they were personally unaware of the specific inspection requirements even when they entered into a written contract for Moore to complete the inspections in March 2004, some 17 months after the EPA compliance inspection. Tr. Vol. II at 32-33, 173-74; R's Ex. 37. However, it is noted that the record shows that the General Permit was publically accessible on the State website at the time, that Moore Engineering had been previously sent mass mailings on the CWA by the State and attended relevant State sponsored water conferences, and most importantly, that the Inspection Report sent directly to Respondent by EPA on July 14, 2003 (C's Ex. 1), and responded to by Mr. Lenthe on July 24, 2003 (C's Ex. 2), explicitly advised Respondent of the inspection requirements stating that "[t]he North Dakota General Storm Water Permit requires...to conduct site inspections at

(continued...)

Further, it argues that the construction industry in the Fargo area was generally unaware of storm water permit application requirements and steps involved in complying therewith because the City did not consider tying such permits to common building permits until 2005. *Id.* (citing Tr. Vol. I at 119-126; R's Ex. 21).

Moreover, Respondent points out that it "made a diligent effort to obtain a permit and to implement the required inspections once it became aware of the CWA requirements. R's Brief at 41. It attempts to deflect any culpability for performing fewer inspections than required after it obtained the permit, noting that it hired Moore to provide the required site inspections and neither it nor Moore realized that the inspections were not being carried out at the requisite rate for this size site until after this case was filed. *Id.*

As noted by the Complainant in its Brief, the primary purpose of imposing a civil penalty is to "punish *culpable* individuals and deter future violations, not just to extract compensation or restore the status quo." C's Brief at 27 quoting *Kelly v. EPA*, 203 F.3d 519, 523 (7<sup>th</sup> Cir. 2000)(italics added). There is no question that Respondent, as the owner of the site, would be ultimately legally liable for the discharge of pollutants from the site. The CWA is a strict liability statute; neither negligence nor knowledge is a prerequisite to the imposition of administrative penalties under it. *Kelly*, 203 F.3d at 522; *United States v. Winchester Mun. Util.*, 944 F.2d 301, 304 & n.1 (6th Cir. 1991); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979). Civil liability under the statute can be "predicated on either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permit." *United States v. Board of Trustees*, 531 F. Supp. 267, 274 (S. D. Fla. 1981). As the owner, Respondent legally maintained final responsibility for or control over the work which occurred in the absence of a permit and the results thereof.

The question here, however, in terms of determining the appropriate amount of penalty to be imposed, is the extent of Respondent's culpability for not applying for the permit or conducting the necessary inspections. In that it is undisputed that Respondent is not an experienced construction professional and that it did hire a variety of construction professionals in connection with this project, its claim of no culpability has a certain initial attractive appeal. However, upon full consideration of the matter, the evidence simply does not support totally exculpating Respondent of all culpability for the violations found.

It is common knowledge, that most site (or home) owners, lacking the necessary knowledge, skills and experience, routinely enter into agreements with outside licensed professionals, usually "general contractors," to lawfully carry out construction projects on their

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<sup>54</sup>(...continued)

least once every 7 calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain. . . ." C's Ex. 1; Tr. Vol. II at 250-251; Tr. Vol. III at 61-63.

behalf.<sup>55</sup> Under such arrangements, the “general contractor” is delegated by the site owner with complete responsibility for the “day to day supervision” and/or “control of [construction] activities” as well as complying with any and all applicable laws and regulations, most of which the site owners are probably unfamiliar. Consistent with such standard arrangements, under the Federal Regulations and the North Dakota General Storm Water Permit, it is the legal responsibility of the general contractor as the “operator” of the construction activity to apply for NOI and conducting the necessary inspections as permittee. *See*, 40 C.F.R. § 122.21(b) (“When a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit.”); 55 Fed. Reg. 47990 (noting that “the operator will *generally* be responsible for submitting the permit application” and that EPA considers the term “operator” to include a “general contractor” who is generally involved in site planning from initial stages, familiar enough with the site to prepare the CWA permit application, and is often onsite coordinating the operation among its staff and subcontractors so it can ensure compliance with permit requirements); C’s Ex. 25.<sup>56</sup> Concomitantly, in the event regulatory compliance did not occur, it would be the “operator” or general contractor who would bear the brunt of most, if not all, of the culpability for the non-compliance. A innocent site owner under such circumstances could certainly present a compelling argument for a total lack of culpability.

Although Respondent has not explicitly claimed as a defense to liability in this case that while it was the “owner,” the site was operated by another, and as such it had no legal responsibility for applying for a permit under the applicable Federal regulation (40 C.F.R. § 122.21(b)) or the State General Permit), in terms of the penalty, it does attempt to cast itself in the role of an innocent non-culpable site owner. However, the facts of this case simply do not match up with those standard circumstances. While at various points, Olaf Anderson & Sons is referred to as the “general contractor” on the project, there is no signed “general contractor” agreement

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<sup>55</sup> The term “general contractor” “is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works or services on a large scale.” General contractors are responsible for the entire job, as compared to sub-contractors who are responsible for only a portion of a construction job. Black’s Law Dictionary 295 (5<sup>th</sup> ed. 1979). “Subcontractors” enter into contracts with the general contractor or another subcontractor who is *already obligated* for the performance of the same work. *Id.* at 1277.

<sup>56</sup> The North Dakota General Permit provides that “[t]he *operator* of the construction activity shall submit a Notice of Intent . . . to obtain coverage for stormwater discharges . . . 30 days prior to the start of construction. An operator is the company, individual, or organization who has day to day supervision and control of activities occurring at the construction site. This can be the owner, developer, the general contractor or, in some circumstances, the agent of one of these parties.” C’s Ex. 25 (italics added). Further, it provides “[t]he permittee shall inspect the construction site to ensure that stormwater controls identified in the SWPP are effective and properly maintained.” *Id.*



between Respondent and Olaf Anderson, or anyone else for that matter, in the record.<sup>57</sup> In addition, despite being requested to do so at least twice, Respondent never identified Olaf Anderson or any one else as the "operator" or "general contractor" on the project. See, C's Ex. 1 (EPA Inspection Report indicating that general contractor for the site is "unknown" and that EPA "requests" Service Oil to provide the name of the general contractor); C's Ex. 2 (Lenthe's response to Ex. 1 omitting any identification of a "general contractor"); C's Ex. 9 RFI (Question 2) asking for identification of "any other entity which you believe may be responsible for storm water requirements under the [NDPDES General Permit]" and basis for that belief); C's Ex. 10 (Moore's response on Service Oil's behalf to RFI indicating that Service Oil is the owner of the project and only that Moore was "retained to fill out some of the paperwork to apply for the storm water permit and later to inspect the site and relay information to Service Oil." In addition, Service Oil identified itself on the NOI submitted as the "Applicant" and indicated that "owner/contractor" would be responsible for site inspections and maintenance of BMPs. C's Exs. 3, 5. Furthermore, Mr. Lenthe testified at hearing that only "the building was done by Anderson" and that Service Oil also *directly hired* a variety of other major or prime contractors and subcontractors to work on the project, including performing the site preparation work, thereby essentially acting as its own general contractor on the project. Tr. Vol. II at 10-11, 39-40, 69-70, 80, 94. Thus, it does not appear that Respondent ever hired a "general contractor" in name or in fact to whom it broadly delegated responsibility for operating the construction project as a whole, including any and all legal compliance responsibilities it had in regard to the project.

Second, while Respondent claims that Moore and Whaley were the "professional firms *it relied upon to navigate the project* through the technical process of acquiring necessary permits,"

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<sup>57</sup> The record does contain what appears to be a proposed contract between Respondent and a "yet to be named" general contractor, drafted by Moore. R's Ex. 38. It is noted that the draft contract, under "Special Provisions," Section 2.14 "Construction & Environmental Disturbance Requirements," provides that -

The minimum requirements are set forth by the North Dakota State Health [D]epartment and Consolidated Laboratories. They insure that minimal environmental degradation occurs as a result of construction or related work which has the potential to affect the waters of the State of North Dakota. All activities will be designed and implemented to restrict the losses or disturbances of soil, vegetative cover, and pollutants (chemical, physical, or biological) from site.

R's Ex. 38. While this provision is not crystal clear, and was apparently not drafted with CWA compliance in mind, it at least implies that the general contractor would be perhaps obligated to comply with State CWA permit requirements on behalf of Respondent and could equitably exculpate Respondent in whole or in part from liability in the event no permit was applied for and/or the requisite inspections not done. Tr. Vol. II at 162. However, there is no evidence that this provision was ever in any agreement executed by Respondent with anyone.

the record does not clearly evidence that those entities, hired to perform only discrete portions of the project, in any way, shape or form, were ever clearly delegated such responsibility by Respondent, voluntarily assumed such responsibility, or were even aware of Respondent's reliance on them in this regard such as to shift culpability for noncompliance to them. R's Brief at 40 (*italics added*). There is no written contract at all between Service Oil and Whaley setting forth the latter's obligations as to the project and absent from Respondent's contract with Moore, which specifically enumerates the tasks which are assigned to it, is "obtaining permits." Tr. Vol. II at 12; R's Ex. 36. In fact, as Complainant points out, Moore's contract proposal offered the Respondent the option of having Moore take responsibility for obtaining permits for an additional fee, an option Respondent chose *not* to exercise. R's Ex. 36; Tr. Vol. II at 55-57. Moreover, at no point has either Respondent, Whaley or Moore ever claimed to have even discussed permits specifically or regulatory generally in regard to the project. To the contrary, at hearing, all parties denied knowledge of the permit requirement prior to the EPA inspection and both Steven Whaley and Brock Storrusten explicitly denied having been given any responsibility in regard to obtaining permits for the project or otherwise complying with the CWA's requirements in regard to the site prior to EPA's inspection. Tr. Vol. II at 85, 95, 162-63. Thus, it does not appear that Respondent ever effectively delegated its responsibility for permit compliance to anyone such that it could totally exculpate itself from responsibility.

Nevertheless, I do believe that Respondent, a non-construction professional, was unaware of its specific obligations under the CWA prior to construction and was under the reasonable, albeit erroneous, impression a layman might have that Whaley and Moore would be familiar with whatever regulatory requirements applied and, more importantly, would, unprompted, advise it with regard thereto. Tr. Vol. II at 46, 49. Service Oil had longstanding (25 year) business relationships with both of these professional entities. Tr. Vol. II at 51-52, 54. Steven Whaley, hired to be the project manager, knew Respondent was relying upon him to supervise the project day to day and generally "make sure the thing happened." Tr. Vol. II at 12, 40, 47, 65, 68-70, 152. Mr. Lenthe implied in his testimony that Mr. Whaley had been responsible for permits on prior projects. Tr. Vol. II at 60. Moore was hired to design the plans and specifications for the project and handled the bid invitation process for Service Oil. Tr. Vol. II at 131; R's Ex. 36. The record evidences that Moore is for the Fargo area a large professional engineering firm, the engineer for the City of West Fargo and other smaller communities, who has had handled "quite a few" construction projects, including storm water projects, prior to undertaking the Starnart project. Tr. Vol. II at 176-77; Tr. Vol. III at 61, 63. That such experienced construction professionals would claim in this action that when construction began on the project in 2002 they were unfamiliar with the CWA permitting requirements and so did not advise their client, Respondent, in regard thereto, is difficult to swallow. Tr. Vol. II at 133, 142, 177. In this regard it is noted that the relevant regulations had been in effect for at least 10 years before construction began, the State had been engaged in fairly aggressive outreach activities to the industry for years prior to construction, and at least some others in the industry in the Fargo area were apparently aware of the law and complying with the regulations by obtaining permits. Tr. Vol. III at 60, 62-63. Moreover, Mr. Storrusten's employer, Moore Engineering, the testimony indicated, was the recipient of State directed mailings on the CWA regulations and attended State sponsored conferences on water pollution. Tr. Vol. III

at 62-63. In addition, it is reasonable to expect that professional organizations would have been advising and training those involved in the construction industry regarding the CWA permit requirements since the first regulations were issued. Thus, even if Mr. Storrusten was not personally aware of the CWA permit requirements as they applied to this project, his supervisor at Moore, Nick Gludt, with 20 years of experience, should have been aware of the requirements. Tr. Vol. II at 179-81.

On the other hand, this was a 10 million dollar construction project which Respondent chose to handle in a very informal manner and, as such, it cannot persuasively claim that it honestly believed that it had adequately planned for every contingency or event which might arise. Mr. Lenthe testified that he never bothered to read the draft specification book and contract for the project prepared by Moore because if he had "it would have put [him] to sleep." Tr. Vol. II at 60-61. He did not follow up on the reference to permits in the single page Moore contract proposal because he just assumed they were "talking about . . . the standard permits we get from the City for construction." Tr. Vol. II at 56; R's Ex. 36. Service Oil had no attorneys on its staff and did not consult any in connection with this project. Tr. Vol. II at 57, 60. Respondent did not think it important even to put into place written agreements with the contractors upon whose proper performance it most heavily relied, such as Steve Whaley. Tr. Vol. II at 12, 59. However, the record does clearly evidence that when advised of the need for a permit, Respondent did diligently and in good faith make all the necessary arrangements to attempt to promptly come into compliance in regard thereto. C's Ex. 3. Therefore on this basis, and because I believe the construction professionals it hired should have known and advised it with regard thereto, I find Respondent's culpability for failing to apply for a permit somewhat reduced.

I also find Respondent's culpability for the inspection violation in Count 2 diminished by the circumstances of this case. It is clear that once the issue with regard to the CWA permit obligations came to light with the inspection in October 2002, Mr. Storrusten, as a courtesy to Respondent, undertook responsibility for designing the BMPs, including designating the requisite number of inspections. Tr. Vol. II at 181, 184. Under such circumstances it was fairly reasonable (although recent events might have suggested it a bit imprudent) for Respondent to initially rely upon Moore to properly determine what regulatory compliance was required, rather than to try to determine that for itself. That Moore, a professional engineering firm, initially failed to properly determine the required level of inspections is inexcusable, given that the permit was publically accessible on the State website and even if it were not, State officials were clearly available for consultation as to the compliance requirements. Tr. Vol. II at 250-251; Tr. Vol. III at 61; R's Ex. 11.<sup>58</sup> However, by July 2003, Respondent had in its possession EPA's inspection report specifying the requisite the level of inspections required for a site of its size - "at least once every 7 calender

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<sup>58</sup> The record suggests that Mr. Storrusten's supervisor, Mr. Gludt, was also unaware of the level of inspections required in that he apparently personally performed the initial site inspections after Respondent contracted with Moore to do so in March of 2004, and the record reflects that he did so only twice over a period of two months on March 31, 2004 and then on May 14, 2004, rather than every week as was required. C's Ex. 10, p. 29.

days.” C’s Ex. 1. At that point, and certainly by March 2004, when it received Moore’s proposal to conduct inspections “once every two weeks,” Respondent personally had notice of the actual inspection requirement and as such bore some responsibility to assure the proper requirements were being met. C’s Ex. 2; R’s Ex.10. That it failed at those points to assure it was fully complying with the law imposes on it at least some amount of culpability for the violation. Therefore, again, while Respondent’s culpability for the inspection violation is greatly reduced in light of the actions of others, it is not eliminated in total.

Based upon consideration of all the foregoing, only a 20 percent increase in the \$29,700 penalty, or \$5,940, is warranted in recognition of the Respondent’s relative culpability for the violations, for a total interim penalty of \$35,640.

#### **6. Other factors as justice may require**

Complainant asserts in its Brief that a downward adjustment under this heading is not routine and is used only when the evidence of good deeds is “clear and unequivocal” and the circumstances such that “a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.” C’s Brief at 43 (quoting *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 232, n. 82 (EAB 1997) and citing *Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995)). Complainant asserts that Respondent proffered no evidence at hearing that would fall within these terms. *Id.* at 43-44.

Respondent states that this penalty factor provides an “equitable safety net,” that is used “when the other adjustment factors provide the violator with an insufficient method of adjusting a penalty,” protecting violators from the injustice of an egregious penalty, also citing *Spang & Co.*, 6 E.A.D. 226, 249 (EAB 1995). R’s Brief at 41-42. It argues that Complainant’s proposed penalties, of \$80,00 initially and then \$40,000, are “draconian,” pulled “out of thin air,” and unsupported by any justification. R’s Brief at 42. It notes that Complainant chose not to submit into evidence its penalty justification exhibit, which Respondent asserts prevented it from properly preparing a defense and represents “unfair surprise.” R’s Brief at 42, 45. Moreover, contrary to Complainant’s claim, Respondent states that it did present evidence at the hearing on this factor; specifically it adduced evidence that North Dakota “did not know how to issue a permit,” that it never sent a copy of the permit to Respondent after it was applied for and after coverage was confirmed, and that a permit is really a “storm water discharge manual,” containing information essential to a permittee’s compliance detailing the requisites of compliance. *Id.* Citing *B.J. Carney*, Respondent suggests that these inactions on the part of the State represent a “conflicting regulatory approach,” with regard to Respondent’s noncompliance, supporting a downward adjustment in penalty. R’s Brief at 43. Further, Respondent notes that once the inspection occurred it promptly applied for a permit, instituted BMPs, and undertook inspections, albeit insufficient in number. *Id.*

Moreover, Respondent argues that it did a “good deed,” for which it deserves credit in this action and denying the same would be a “manifest injustice.” R’s Brief at 44. Citing Mr. Lenthe’s testimony, Respondent reminds the Tribunal that it installed on site during the construction a

device that separates oil from ground water and thus prevents oil from running into the storm water sewers. *Id.* citing Tr. Vol. II at 13-17. The device, not required by EPA, was installed at a cost of \$100,000, and “[b]y rights” should offset the whole penalty in this case, Respondent asserts, although it is only asking to have it offset the non-economic benefit portion of the proposed penalty in this case. R’s Brief at 44-45.

Finally, Service Oil claims deterrence should not be considered in the penalty imposed in this case, noting that its violations were “accidental,” not willful, noting that at the time the local construction industry (upon some members of which it relied to “navigate it through the permit process”) and the State were both unaware of the extent and requirements of the permit process. R’s Brief at 45-46. Respondent suggests that imposition of a large penalty in this case this case “would only suggest EPA has a selective enforcement policy and will decide to prosecute those projects/individuals that it chooses, based upon unknown factors and without input from state authorities that are the most familiar with those individuals . . . undermin[ing] the credibility of the CWA.” R’s Brief at 46. It also points out that its deterrence on its part is already assured by virtue of the fact that it is now “very familiar” with the permit requirements and the large legal fees it will incur from violations. *Id.* Moreover, general deterrence is also assured, it suggests, by virtue of the fact that beginning in March of 2006, the City will not issue a building permit without the applicant first obtaining a storm water permit, citing the testimony of Mr. Bittner. R’s Brief at 46-47 (citing Tr. Vol. I at 119-126 and R’s Ex. 21).

Upon consideration of all of Respondent’s arguments, it is determined that no downward adjustment is warranted in this case under the “other factors as justice may require” factor.

First, as to Respondent’s claim that Complainant failed to submit any document detailing its proposed penalty calculation and that such failure constituted “unfair surprise,” and prevented it from adequately defending against the penalty, it is noted that in response to the Order of this Tribunal dated January 24, 2006, finding the Agency’s prior submittal regarding penalty insufficient, the Agency did submit additional documentation regarding its initial proposed penalty. *See*, Complainant’s Response to Order on Additional Discovery Regarding Penalty Calculation filed February 9, 2006. In that Response, EPA provided copies of numerous documents it considered in calculating the penalty and a four page affidavit detailing the methodology used to calculate the economic benefit resulting from delayed and avoided costs. It noted that it has no binding policy as to penalty calculations in CWA matters, only guidance relating to settlement, and that such settlement guidance cannot be considered at hearing, citing *Bollman Hat Co.*, 8 E.A.D. 177 (EAB 1999). *Id.* Thus, Respondent was aware months prior to hearing of the maximum penalty which the Agency sought to have imposed upon it, the factors considered in calculating such amount, and the exact methodology used to determine the economic benefit portion thereof. Respondent has cited no authority suggesting that it was entitled to any more information than the Agency provided and thus its legal claim of “unfair surprise” as to the proposed penalty is without merit.

Second, as to selective enforcement, the EAB has noted that proving “unequal treatment

[alone] is not an available basis for challenging agency law enforcement proceedings' . . . [and while] [t]his principle classically arises in the context of selective enforcement (i.e., where one entity is prosecuted and others in similar circumstances are not), . . . it is equally applicable in the penalty context." *Chem Lab Products, Inc.*, FIFRA Appeal No. 02-01, 2002 EPA App. LEXIS 17, 50-53 (EAB, Oct. 31, 2002)(quoting *Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) (quoting Koch, 1 *Administrative Law and Practice* § 5.20, at 361 (1985)). To successfully raise a "selective enforcement" defense requires a showing not only of being "singled out," but also that the government has selected the respondent for enforcement action "invidiously or in bad faith, i.e., based upon such impermissible consideration as race, religion, or the desire to prevent the exercise of constitutional rights." *Newell Recycling Company, Inc.*, 8 E.A.D. 598, 635 (EAB 1999) (quoting *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997) (quoting *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990))). The burden of proof on the part of a proponent of "selective enforcement" is "rigorous," "demanding," "daunting," and "high." See, e.g., *B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998)("Respondent faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions."). Evidence in the record suggests that Respondent was not "singled out" for enforcement, in that EPA recommended an Administrative Penalty Order be issued in regard to 10 of the 11 other construction sites also found to be lacking permits during its October 2002 compliance effort. R's Ex. 2. Moreover, Respondent has not submitted any evidence that EPA selected it for prosecution "invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [its] constitutional rights." Thus, any claim in this regard is meritless.

Third, the mere fact that the State chose not to take action against Respondent, a successful local business and employer, for the violations, while EPA did, does not alone represent a "conflicting regulatory approach" of the type referred to in *B.J. Carney* as warranting a downward adjustment in penalty. In that case, as indicated in the portion of the decision cited in Respondent's Brief, the EPA deferred to the State ("Sandpoint [Idaho] ") on its regulatory interpretation and compliance efforts and delayed initiating action against the Respondent for over five years as a result. R's Brief at 43 (citing *B.J. Carney Industries*, EPA Docket No. CWA-1090-09-13-309(g), 1996 EPA ALJ LEXIS 6, 1996 WL 316507 part IV.F (ALJ, March 11, 1996). In this case, both the State and EPA agreed that Respondent was in violation as to the storm water permit requirements and as to what it needed to do to come into compliance, i.e. apply for a permit, install BMPs, inspect, etc. See, C's Ex. 1; R's Ex. 5. Thus, Respondent did not receive conflicting advice as to regulatory compliance from governmental entities. Further, the record suggests that the State's decision not to take further action against Respondent was made at a preliminary time when the State was unaware that Respondent not only failed to initially obtain a permit, but also failed to comply with the terms of its permit once obtained. Tr. Vol. III at 60-61.

Fourth, as to Respondent's argument that its lack of a permit violation was "accidental," not "willful," because of the limited knowledge of the construction industry as to the permit requirements, the evidence of record shows that the State engaged in fairly aggressive outreach

activities to the industry in 2001 and 2002 to inform the industry of the permit requirements, including holding a conference with 3,400 attendees and sending out mass mailings. Tr. Vol. III at 62-63. Mr. Bracht, manager of the State's NPDES program, testified specifically that Moore Engineering, Respondent's contractor and the engineer for the City of West Fargo and other small communities in the State, who does "quite a few" projects in the Fargo area, "received some of the mailings and they also come to our Water Supply Pollution Control Conference." Tr. Vol. III at 54, 63. He further noted that others were aware of and complying with the law in that the State was issuing "a couple of hundred [storm water permits] a year," including applications from the Fargo area. Tr. Vol. III at 60, 62. Such evidence belies a claim of "accidental" violation, at least in terms of Respondent's contractors, and severely undercuts Respondent's rationale for reducing the penalty on this basis. To the extent that Respondent "accidentally" committed the permit violation has already been taken into account under the factor of culpability.

Fifth, as to Respondent's attempt to shift the blame for the inspection violation to the State on the basis that the State never sent it a copy of the permit, it is noted that at the time, the permit was publically accessible on the State's website, and that both Respondent and Moore were in contact by mail and telephone with State officials and thus had easy access to information concerning the exact inspection requirements applicable to it. R's Ex. 10; Tr. Vol. II at 250-251; Tr. Vol. III at 61. Mr. Lenthe agreed during his testimony that it was important to read a permit once you are covered by it and that he expected "[his] people" to do that. Tr. Vol. II at 44-45. The evidence shows that neither he nor "his people" *i.e.* Moore, apparently did that and as a result, the violation occurred. It is submitted, however, that under such circumstances the blame for the error lies with Moore and Respondent, not the State.

Sixth, as to Respondent's "good deed," in *Spang*, cited by both parties, the EAB held that certain environmentally beneficial projects not required by law *could be* considered in penalty calculations "under the rubric of other factors as justice may require." *Spang*, 6 E.A.D. at 249, 1995 EPA App. LEXIS 33 \*46, 56 (EAB 1995). It noted that "[t]he justice factor, . . . vests the Agency with broad discretion to reduce the penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *Id.* at \*56. To obtain such reduction the Respondent had to show a "nexus between the nature of the violation and the environmental benefit to be derived from the project," and the steps taken and monies spent on a project. *Id.* at \*61. Further, the EAB reiterated, however, that "no project, however close the nexus, should be credited unless the penalty which would otherwise be assessed would work an injustice." *Id.* at \*62.

In *B.J. Carney*, also cited by the parties, the EAB held that the Respondent's alleged compliance costs did not warrant a downward adjustment in penalty under the "justice" factor. *B.J. Carney*, 7 E.A.D. 171, 1997 EPA App. LEXIS 7 \*143 (EAB 1997). In this regard it noted that the costs had already been taken into account in determining the gravity of the violation and that the Respondent had not met its burden of quantifying the costs, and therefore held that "[o]n this record, we are not persuaded that a failure to give any further downward adjustment would be an injustice, let alone a "manifest injustice." *Id.* at \*144.

It is noted that the relevant facts of this case and *Spang* differ significantly in that the Respondent in *Spang* claimed that the environmentally beneficial projects for which it sought credit were not "undertaken for purely business reasons," and Respondent has made no such claim here. *Spang*, 6 E.A.D. at 243. Rather, Mr. Lenthe admitted at hearing that his "two reasons" for installing the oil/water separator device were "I didn't want to hassle with the state over the issues of possible spills and going offsite with it and, secondly, it is a lot easier to maintain," appending the added claim that the device is environmentally beneficial only upon prompting by his counsel. Tr. Vol. II at 15-17. Thus, while the device may be environmentally beneficial, that additional effect was an unintended consequence of what was clearly a primarily business driven decision, and does not represent a primarily altruistic act on Respondent's part to do an environmentally "good deed."

In addition, there is simply no evidence in this case that failing to give Respondent a downward adjustment based upon its installation of an underground oil/water separator from the penalty of \$35,640 as it now stands would work a "manifest injustice." The Respondent is a very successful retailer of fuel. It built a 10 million dollar truckstop and failed to obtain the necessary CWA permit prior thereto and to conduct the requisite inspections thereafter. As a result, pollutants were discharged from its site over the course of many months. The penalty is not excessive in light of the violations themselves nor the circumstances related thereto. Therefore, no adjustment is made to the penalty in consideration of Respondent's "good deed."

Finally, as to the argument that a penalty is unnecessary to assure deterrence because Respondent is unlikely to commit further violations as it now knows of the CWA requirements and has, by incurring legal fees, been already penalized, it is noted that such an argument could be made by each and every respondent against whom a penalty is pending. As such, it holds no particular weight. With regard to deterrence being generally unnecessary because the City of Fargo in 2005 instituted a permit system tying storm water permits to building permits as evidenced by R's Ex. 15, while this may be true at the moment, such tie-in may not continue indefinitely and certainly may not exist in each and every other jurisdiction across the country. Thus, imposition of a monetary penalty, will serve as a deterrence discouraging potential violators of the law nationwide.

Based upon the foregoing, no downward adjustment is made to the penalty based upon consideration of "other factors as justice may require."

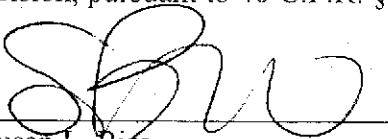


**ORDER**

1. Respondent is hereby found liable on Count 1 of the Amended Complaint.
2. For the two violations of the CWA found to have been committed, Respondent Service Oil, Inc., is hereby assessed an aggregate civil penalty of \$35,640.
3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency  
Region 8 Hearing Clerk  
P.O. Box 360859  
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondents' names and address(es), must accompany the check;
5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11;
6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).



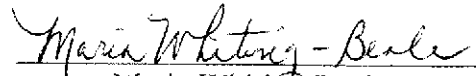
Susan L. Biro  
Chief Administrative Law Judge

Date: August 3, 2007  
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated August 3, 2007, was sent this day in the following manner to the addressees listed below.

  
Maria Whiting-Beale  
Legal Staff Assistant

Original And One Copy By Pouch Mail To:

Tina Artemis  
Regional Hearing Clerk  
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Copy By Certified Mail Return Receipt To:

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