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August 30, 2007

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ENVTL. APPEALS BOARD

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, DC 20005

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

Att'n: Ms. Eurika Durr, Clerk of the Board

Dear Ms. Durr:

Please find enclosed in connection with Respondent's appeal in the above matter the original and five (5) copies of each of the following:

1. Notice of Appeal;

2. Appeal Brief; and

3. Request for Oral Argument.

A Certificate of Service is attached to each of the above documents.

Please be advised that the name, address, telephone number, and fax number of the individual who is authorized to receive service relating to the above-referenced proceeding are:

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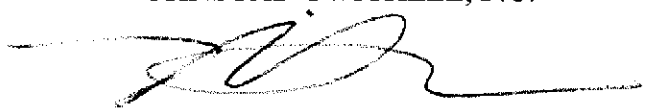
Thank you.

Sincerely yours,

OHNSTAD TWICHELL, P.C.



Michael D. Nelson

MDN:klt
Encs.
cc w/encs.: Honorable Susan L. Biro
Ms. Tina Artemis, Regional Hearing Clerk
Ms. Wendy I. Silver, Esq.
Mr. Mark A. Ryan, Esq.

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

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

NOTICE OF APPEAL

Service Oil, Inc., Respondent, hereby appeals from the Initial Decision of Chief Administrative Law Judge Susan L. Biro, issued August 3, 2007, imposing a civil penalty of $35,640 pursuant to Section 309(g) of the Clean Water Act (CWA) (33 U.S.C. § 1319(g)), for violations of Section 301 of the CWA (33 U.S.C. § 1311), Section 402 of the CWA (33 U.S.C. § 1342) and 40 C.F.R. § 122.26, Section 308 of the CWA (33 U.S.C. § 1318) and implementing regulation 40 C.F.R. § 122.21.

Dated: August 30, 2007.

Michael D. Nelson
ND ID #03457
John T. Shockley
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In Re: Service Oil, Inc., Respondent
Docket No. CWA-08-2005-0010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was served by me, by First Class Mail, this 30th day of August, 2007, upon the following:

Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
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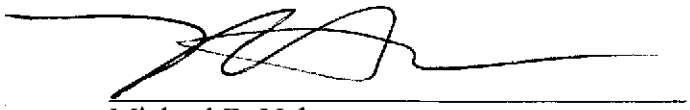

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F:\USERS\LIT\SERVICE OIL, INC\APPEAL\NOTICE OF APPEAL.WPD

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In Re:	EAB Appeal No. _____
Service Oil, Inc.,	
Respondent.	
Docket No. CWA-08-2005-0010	

APPEAL BRIEF

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I. INTRODUCTION

Service Oil, Inc. ("Service Oil"), appeals from the Initial Decision of the administrative law judge,[1] imposing a civil penalty of $35,640 for 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 the discharge of a pollutant without a permit in violation of CWA Section 301 (33 U.S.C. § 1311). The administrative law judge ruled by accelerated decision issued on March 7, 2006, that Service Oil had violated the conditions of its permit, and by Initial Decision issued on August 3, 2007,[2] ruled that Service Oil had violated Section 308 of the CWA (33 U.S.C. § 1318) and implementing regulation 40 C.F.R. § 122.21, and was guilty of discharging a pollutant without a permit in violation of CWA Section 301 (33 U.S.C. § 1311).

The administrative law judge erred in her ruling by making an erroneous legal determination and an erroneous penalty assessment.

II. ISSUES PRESENTED FOR REVIEW

A. Is the issuance of an individualized request or order by the administrator pursuant to Section 308 (33 U.S.C. § 1318) a precondition to a finding of liability for a violation of Section 308?

B. Did the administrative law judge fail to properly account (in her penalty determination) for the lack of industry sophistication in the State of North Dakota, when the EPA and the North Dakota State Health Department had just recently begun enforcing the CWA and the requirement of obtaining a storm water discharge permit for general construction activities was generally not known?

---

[1]The Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. Environmental Protection Agency.

[2]In the Matter of Service Oil, Inc., Docket No. CWA-08-2005-0010, Final Decision, Judge Susan L. Biro (August 3, 2007) (herein referred to as "Initial Decision").

C. Did the administrative law judge fail to give sufficient weight (in her deterrence determination) to the fact that it is now impossible in Fargo, North Dakota, to obtain a building permit without first obtaining the proper CWA storm water discharge permit, by virtue of the fact that the City of Fargo is now in Phase II of its own mandated compliance with the CWA?

D. Did the administrative law judge fail to give sufficient weight in her penalty calculation to the fact that only one of the thirteen sites inspected had a valid storm water discharge permit?

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History.

On February 22, 2005, complainant initiated the instant case by sending Service Oil a penalty complaint and notice of opportunity for hearing.[3] The complaint contained two counts. Count 1 alleged that Service Oil 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. Count 2 of the complaint alleged that after Service Oil obtained an NPDES permit it failed to conduct storm water inspections at the required frequency and/or to maintain inspection records on site in violation of parts 3.B.1.A. and 3.C. of the permit. The complaint proposed a penalty of $80,000.[4]

Service Oil filed an answer to the allegations on April 18, 2005. Subsequently, the parties filed their prehearing exchanges. On November 9, 2005, the administrative law judge denied Service Oil's motion to dismiss. On January 24, 2006, the administrative law judge issued an order on respondent's motion to dismiss and motion for additional discovery. Additionally the administrative

---

[3]The inspection which forms the basis for the instant case was performed in October of 2002, nearly two and a half years before the complaint was issued.

[4]On April 6, 2006, just prior to the administrative hearing below, complainant filed a "Notice of Reduced Penalty" indicating that it was reducing the total penalty it sought to $40,000. Also of interest, the EPA, according to a 8/21/07 local newspaper article, indicated that it had only sought a $40,000 penalty when in actuality it had initially sought an $80,000 penalty. See Attachment 1.

law judge issued an order on a motion in limine, motions to supplement and amend the prehearing exchanges, and a motion to compel discovery dated March 17, 2006, and an order on a motion to strike addendum, and a motion for reconsideration.

On March 7, 2007, the administrative law judge granted complainant's motion for an accelerated decision as to respondent's liability under Count 2, but denied complainant's motion for accelerated decision as to respondent's liability under Count 1, and as to the matter of establishing an appropriate penalty.

Unfortunately (for respondent), when the administrative law judge denied complainant's motion for accelerated decision on liability as to Count 1, it *sua sponte* stated:

> It may be that some provision listed in Section 309(g) of the CWA, other than Section 301, may provide a statutory basis for an administrative enforcement action for the failure to apply for a storm water permit as required by 40 C.F.R. § 122.26(c). Complainant, however, has not cited any such provision. Accordingly, it is concluded that under the complaint as written, complainant must establish that a discharge occurred during the relevant period.

In the Matter of Service Oil, Inc., Docket #CWA-08-2005-0010, Order on Complainant's Motion for Accelerated Decision on Liability and Penalties, Slip. Op. p. 9 (March 7, 2006). Subsequently, and based upon the administrative law judge's order allowing it, the complainant was given permission to file an amended complaint to include Section 308 of the CWA (33 U.S.C. § 1318) as an additional ground for liability on Count 1.[5]

---

[5]Interestingly, when complainant moved to amend its complaint to assert that respondent violated Section 308 of the CWA when it failed to obtain a storm water permit, in support of its motion complainant cited to (and quoted from) what it referred to as an "EPA guidance" titled "2000 Storm Water Enforcement Strategy Update," apparently crafted by one Eric V. Schaeffer, Director, Office of Regulatory Enforcement, to Regional Water Management Directors, Enforcement Division Directors, and Regional Counsels," dated January 18, 2000. The substance of this "Strategy Update" was Mr. Schaeffer's legal theory ("strategy") that a violation of Section 308 would automatically occur when a person failed to submit a storm water permit application, because by drafting 40 C.F.R. § 122.21, the Administrator had "requested" information by requiring a permit application.

An administrative hearing was held on this matter from April 25 through April 27, 2006, in Moorhead, Minnesota. Complainant filed its initial post-hearing brief on October 2, 2006. Respondent then filed its post-hearing brief on November 14, 2006. Complainant filed its reply brief on January 12, 2007. The administrative law judge issued her Initial Decision on August 3, 2007, finding respondent liable under Count 1 of the amended complaint and determining that for the violations of the CWA found in both Count 1 and Count 2, respondent Service Oil must pay an aggregate civil penalty of $35,640.

B. Factual Background.

The City of Fargo is located in the State of North Dakota. The population of the entire State of North Dakota is 635,867. See http://quickfacts.census.gov/gfd/states/38000.html. The 2006 population is less than it was in 2000.[6] The state geography is predominantly agricultural, non-urban land.

The North Dakota Department of Health was the agency responsible for implementing the storm water regulations under the CWA, in the State of North Dakota, at all times relevant in this case.

The property which is the subject of the instant case is better known as the Stamart site and is located in Fargo, North Dakota. See generally respondent's Exhibits 22, 28, 29 and 30. The City of Fargo is bordered on the east by the Red River of the North, which flows north through the Red River Valley and into Canada. Tr. vol. 3, at p. 97, l. 2-16. The Red River is a relatively young river plagued with oxbows and subject to eroding. Tr. vol. 3, at p. 99, l. 21 through p. 100, l. 16. The City of Fargo is surrounded by extreme expanses of agricultural land which also drain into the Red River.

Service Oil is in the business of retailing gasoline and diesel. Tr. vol. 2, at p. 10, l. 8-12. Service Oil is not in the construction business. Service Oil is a family owned business that was

[6]The 2000 population was 642,200. See http://quickfacts.census.gov/gfd/states/38000.html.

originally started as a sole proprietorship after World War II. Tr. vol. 2, at p. 50, l. 2-20. It eventually became a corporate entity and has grown to include a total of 12 retail gasoline and diesel sites. Tr. vol. 2, at p. 50, l. 24 through p. 51, l. 4. These sites vary in size with the Stamart site being the largest. Tr. vol. 2, at p. 51, l. 14 through p. 52, l. 17.

Because Service Oil is in the gasoline and diesel retail business (and not in the construction business), it sought out construction experts to assist it in designing and supervising the construction of the Stamart site. Tr. vol. 2, at p. 10, l. 8 through p. 13, l. 19. Service Oil relied upon these individuals and trusted them to help it navigate through the construction process.

Construction was begun at the Stamart site in the spring of 2002, and continued through the summer and fall of 2002. In October of 2002 (October 22-25, to be precise), storm water compliance inspections (under the Clean Water Act) at thirteen (13) separate construction sites in the Fargo/West Fargo area were conducted by three person teams. Respondent's Exhibit 1; tr. vol. 2, at p. 235, l. 23 through p. 236, l. 11. Each team of inspectors consisted of one inspector from the North Dakota Department of Health and two inspectors from the EPA's Region 8 office in Denver, Colorado. Tr. vol. 2, at p. 235, l. 1-12. Service Oil was one of 13 sites inspected. The North Dakota Department of Health inspector who inspected the Stamart site was Abby Krebsbach, and Lee Hanley and Patti Ochoa were the two inspectors from the EPA's Region 8 office. Id. Respondent's Exhibit 1. On October 24, 2002, the Stamart site was inspected. Respondent's Exhibit 1. The North Dakota Department of Health transcribed inspector Abby Krebsbach's inspection notes from the visit to the Stamart site, as well as inspection notes of visits to the twelve other sites. Respondent's Exhibit 1, tr. vol. 2., at p. 236, l. 12-25. Inspection comments regarding the Stamart site read as follows:

> "Not sure exactly where storm water inlets drain to. Viewed concrete wash activities being performed in areas away from storm sewer inlets. Noticed most storm sewer inlets on property were being protected with metal plates and marked with orange cones. I do not think a penalty is necessary."

Tr. vol. 2, at p. 237, l. 1-15; Respondent's Exhibit 1 at p. 1.

After being notified via telephone on October 24, 2002, by EPA inspector Lee Hanley of the inspection of the Stamart site, and of the requirement for a storm water permit, Dirk Lenthe (the president of Service Oil) immediately contacted the people respondent had hired to oversee the project and told them they needed "to do what needs to be done to get it taken care of." Tr. vol. 2, at p. 18, l. 8 through p. 19, l. 10. On October 28, 2002 (4 days after the October 24, 2002 inspection, including a weekend), Brock Storrusten of Moore Engineering prepared, and Mr. Lenthe signed, a notice of intent to obtain coverage under the NPDES. Complainant's Exhibit 3 at p. 2; tr. vol. 2, at p. 19, l. 11 through p. 20, l. 6. On November 3, 2002, Brock Storrusten of Moore Engineering sent a notice of intent to the North Dakota Department of Health. Complainant's Exhibit at p. 1. By letter dated November 15, 2002, Mr. Storrusten was notified by the North Dakota Department of Health that storm water coverage had been extended to the Stamart site, and that his permit application had been assigned a permit number. Complainant's Exhibit 4; tr. vol. 2, at p. 22, l. 19 through p. 24, l. 4. This letter from the North Dakota Department of Health reflects a "cc" going to Dirk Lenthe, president of respondent. The permit itself--which consists of some 16 pages of very detailed instructions and requirements as to exactly what was required of a permittee (Respondent's Exhibit 15)--was never sent by the North Dakota Health Department to either Brock Storrusten of Moore Engineering, Inc., or to respondent, or to anyone else.[7] Respondent, through Brock Storrusten of Moore Engineering, and Steve Whaley, project manager, subsequently sought to mitigate potential discharge through the implementation of best management practices and onsite inspections. Tr. vol. 2, at p. 82, l. 1 through p. 84, l. 4; and p. 119, l. 19 through p. 125, l. 7. See also, Complainant's Exhibit 10 (which is the entirety of respondent's Section 308 response to the

[7]In the Initial Decision at p. 61, the administrative law judge notes that in complainant's post-hearing brief, "Complainant does not dispute the truth of the fact that no permit was sent, but argues that it is insignificant."

EPA which was submitted to the EPA on behalf of respondent by Brock Storrusten of Moore Engineering), and specifically the inspection logs at pages 29 and 45 thereof.

IV. ARGUMENT

A. Summary of the Argument.

The administrative law judge erred in determining that the issuance of an individualized request or order by the administrator under Section 308 is not a precondition to finding liability for a violation under Section 308. The administrative law judge also erred by not considering the fact that the level of sophistication in the local construction industry was so low with respect to storm water permits that Service Oil's actions were reasonable and consistent with the vast majority of laymen and construction people in North Dakota in the year 2002.

The administrative law judge also erred by not giving sufficient weight to the fact that the City of Fargo will no longer issue building permits for large construction sites without the applicant having previously obtained all necessary CWA storm water permits and thus her ruling that "deterrence" should be a factor in the penalty determination should be reversed.

The administrative law judge also erred by failing to give sufficient weight to the fact that only one of the thirteen sites inspected when the Stamart site was inspected had a storm water permit in place, and this site, the Lowe's site, involved a national corporation familiar with storm water permit requirements. This fact goes directly to the circumstances and elements of the penalty calculation criteria and should have received much more weight.

B. Burden of Proof and Standard of Review.

Pursuant to the consolidated rules of practice, "the Complainant has the burden 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 preponderance of the evidence. 40 C.F.R. § 22.24(b). Thus, complainant has the burden of proving

both claims set forth in its amended complaint and in "demonstrating the appropriateness of the proposed penalty by a preponderance of the evidence." In the matter of C. W. Smith, Mr. O'Grady Smith, Smith's Lake Corporation, Docket No. CWA-04-2001-1501 Slip. op. at p. 50, initial decision, (July 15, 2004). Finally, the determination of a civil penalty must be "based on the evidence in the record and in accordance with any penalty criteria set forth in the act." 40 C.F.R. § 22.27(b); see also In the matter of C. W. Smith, Smith's Lake Corporation, at 50.

The Environmental Appeals Board (EAB) reviews both the factual and legal conclusions of the administrative law judge *de novo*. See 40 C.F.R. § 22.30(f) (the EAB has authority to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"). In re Billy Yee, 20 E.A.D. 1, 10 (May 29, 2001). The EAB may apply a deferential standard of review to findings of fact where the credibility of witnesses is an issue. Id.; In re J. P. Phillip Adams, Docket No. CWA-10-2004-0156 CW Appeal 06-06, Slip op. at p. 10.

C. The issuance of an individualized request or order by the administrator under Section 308 is a precondition to a finding of liability under Section 308.

The plain and unambiguous language of Section 308 (33 U.S.C. § 1318) requires an individualized request or order by the administrator as a precondition to finding a violation under Section 308. Section 308(a) provides in pertinent part:

> 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, ... standard of performance under this chapter; (2) determining whether any person is in violation of any such ... limitation, prohibition or ... standards of performance; (3) any requirement established under this section; or (4) carry out Sections 305, 311, 402, 404, 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 modern equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such

> methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require.

33 U.S.C. § 1318 (emphasis added). The text of the statute is clear and unambiguous in that an individualized request or order must be made by the administrator as a precondition to an allegation of a violation pursuant to Section 308.

The entire statutory scheme sets forth reporting requirements and record keeping requirements evidencing a congressional intent that Section 308 is a record keeping requirement.

In her opinion, the administrative law judge acknowledges that:

> 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).

Initial Decision at p. 14. After acknowledging that Section 308 is essentially a statute which addresses the gathering and maintaining of records by the administrator, the administrative law judge then engaged in a liberal and unsupportable interpretation of the text of Section 308 to breathe a different meaning into the plain and unambiguous language of Section 308. The administrative law judge determined that "a fair interpretation" of Section 308 includes "an implied corollary obligation" which imposed an obligation upon Service Oil to provide information to the administrator **absent a request or order for information from the administrator**. Initial Decision at p. 14.

Such a reading of Section 308 is contrary to the basic rule set forth by the United States Supreme Court which guides agency action. In determining the question of whether an agency's interpretation of a statute is correct, a tribunal begins with the plain language of the statute. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002). If the statute's language has a clear and unambiguous

meaning with regard to the dispute, the tribunal's analysis must end with the language of the statute. Id. "The Court, as well as the agency, must give effect to the unambiguous expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-43 (1984). The plain and unambiguous language of Section 308 (33 U.S.C. § 1318) clearly contemplates that a violation of 308 occurs where a respondent does not comply with a request for information from the administrator, not simply the failure to apply for a permit. This distinction is clear because the failure to comply with a request requires that the administrator first make the request, whereas the failure to apply for a permit does not require the administrator to first make a request that a storm water permit be applied for. This interpretation is consistent with the overall language of Section 308, which indicates that Section 308 is essentially a record keeping statute. This aspect of the statute was acknowledged by the administrative law judge in this case, and then dismissed by the same administrative law judge.

The interpretation argued by respondent is supported by case law which is precisely on point, in which this exact "theory" complainant sought to advance in this case (and which the administrative law judge in the instant case adopted) was rejected:

> The weakness in this argument is that the defendant 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 modern devices, sample effluence, 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 an order has in fact been issued.

Committee for the Consideration of Jones Fall Sewage System v. Train, 375 F. Supp. 1148, 1152 (D.M.D. 1974).

The administrative law judge attempted to distinguish this case by arguing that the decision in Jones Fall Sewage System was issued in 1974, before the EPA promulgated any regulations. Initial Decision at p. 18. The administrative law judge apparently concluded that an agency has the

authority to change case law and legislative intent by simply adopting regulations. Such a position is contrary to the fundamental core concepts of separation of power formulated in the United States Constitution. Quite simply, an agency can not be allowed to play legislator, prosecutor and judge all in the same breath. The Jones Fall Sewage case law is still as relevant and on point today as it was in 1974. The attempt to regulate away a case--or the unambiguous language in a statute--is not within the province of an agency. The agency's regulation does not constitute a request pursuant to Section 308, and the administrative law judge should not be allowed to breathe a different meaning into the statute to allow for such an interpretation.

The administrative law judge in the instant case cited to United States v. Livola, 605 F. Supp. 96 (N.D. Ohio 1985), to support her interpretation of Section 308. Initial Decision at p. 19. However, in Livola an EPA employee had sent certified letters to Livola requesting information. Id. at 98. The EPA even sent a second letter request for information which was also rebuffed. Id. The court noted that the provisions involved in the statutory scheme governing hazardous waste were substantially similar to Section 308. Id. The court also noted that the requests for information were rebuffed and the EPA's remedies were governed under another statutory section (42 U.S.C. § 6928), which authorized the issuance of an order for compliance or the institution of a civil action. Id. The court noted that the EPA **need not** issue a compliance order or administrative subpoena prior to seeking civil penalties. Id. at 100. Simply, these remedies did not have to be sought after the EPA had made a request for information which was rebuffed prior to commencing a civil action. Id.

The administrative law judge attempted to find support for the EPA's Section 308 position in this case in United States v. Allegheny Ludlum Corp., 366 F. 3d 164 (3d Cir. 2004). However, that case involved a defendant who had already been issued a permit. Id. at 1109. The Court's discussion did not involve an alleged violation of Section 308 absent a request, as is the situation in

the instant case. Id. Nor did United States v. Murphy Oil USA, Inc., 143 F. Supp. 2d 154 (W.D. Wis. 2001), involve an alleged violation of Section 308 absent a request for information from the administrator--it involved a defendant who had already been issued a permit. The administrative law judge's reliance upon these cases which are clearly not on point or contrary to Jones Fall Sewage was clear error. The EPA and the administrative law judge simply cannot escape the plain and unambiguous language of Section 308, which requires a request by the EPA as a precondition to finding liability under Section 308. Jones Fall Sewage System v. Train is still valid case law, and it means the same today as when the opinion was issued in 1974.

In United States v. Marte, 356 F. 3d 1336 (11th Cir. 2004), the Court was faced with an analogous situation in a case where in illegal alien asserted that a regulation (8 C.F.R. § 212.2) impacted his exposure to criminal liability under a statute (8 U.S.C. § 1326) for attempted illegal reentry into the United States following deportation.

> Marte's first contention ... is that his conviction violates due process because 8 C.F.R. § 212.2 either authorized his conduct or is unconstitutionally vague. Specifically, Marte asserts that § 212.2 is an implementing regulation, and the district court erred in applying § 1326 without looking to the regulation.
>
> When a regulation implements a statute, the regulation must be construed in light of the statute, *see Hodgson v. Behrens Drug Co.*, 475 F. 2d 1041, 1047 (5th Cir. 1973), but where a regulation conflicts with a statute, the statute controls, *see, Legal Environmental Assistance Found., Inc. v. U.S. EPA*, 118 F. 3d 1467, 1473 (11th Cir. 1997).
>
> * * *
>
> The question then, is whether the regulation affects the meaning and application of § 1326 in this case.

Id. at 1340-41 (footnote omitted). The Court's ruling in Marte was in the negative--the regulation **did not** impact or affect the meaning and application of the statute. Id. at 1341-42. "As we have already noted, where a regulation conflicts with a statute the regulation yields, not the statute." Id. at 1342.

The Eleventh Circuit's earlier 1997 ruling which was cited in Marte is especially informative as to analyzing the administrative law judge's Section 308 ruling in the instant case. That 1997 Eleventh Circuit case involved EPA as a party-respondent, and in ruling against EPA that Court held:

As the Supreme Court has admonished:

> "The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Legal Environmental Assistance Foundation, Inc. v. U.S. EPA, 118 F. 3d 1467, 1473 (11th Cir. 1997) (citations omitted).

In this case, after the October 2002 inspection occurred complainant actually did make a request for information from Service Oil, pursuant to Section 308. The complainant stated in doing so that "Section 308 of the Clean Water Act, 33 U.S.C. § 1318 gives the EPA authority to request information of this nature." Complainant's Exhibit 9 at p. 2. Complainant's Exhibit 9 was the only request for information made by complainant. Respondent subsequently responded to this information request. Complainant's Exhibit 10. The Section 308 claim upon which liability was found in this case in the administrative law judge's Initial Decision had nothing to do with this Section 308 request, or respondent's response to it.

The failure to apply for a permit cannot and should not be deemed a violation of Section 308, because the complainant does not (and did not) make a request or an individualized order to submit an application for a CWA storm water permit. Had EPA actually requested respondent prior to construction to obtain an NPDES permit, respondent could have obtained the proper permit and the instant case would not have occurred.

D. The administrative law judge failed to properly account for the level of sophistication in the local business and construction industry as to CWA matters.

The administrative law judge failed to properly account for the methods and means under which business contracts and construction is undertaken in North Dakota. This factor has a direct and substantial effect upon Service Oil's culpability and shows that Service Oil has no culpability in the instant case. Had the instant case been brought in federal court, respondents would have had the opportunity to present the case to a judge or jury who would have been familiar with business, contracts, and the construction industry in North Dakota. This familiarity was lost in the administrative hearing process in this case because the administrative law judge could not comprehend the lack of involvement of lawyers in a multi-million dollar contract. Nor did the administrative law judge adequately comprehend the lack of knowledge about storm water permit requirements in the construction industry, and the lack of general understanding that dirt (sediment) could in fact become a pollutant.

The administrative law judge acknowledged in her Initial Decision 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," and that "it is common knowledge, that most site (or home) owners lack necessary knowledge, skills and experience, and routinely enter into agreements without outside licensed professionals." Initial Decision at p. 63. However, the administrative law judge then appears to call into doubt Service Oil's non-culpability by noting that it was a $10 million project, and that respondent did not have a lawyer involved in it. However, in North Dakota such multi-million dollar contracts are not necessarily reviewed by attorneys. Further, as indicated in the testimony of the president of Service Oil (Dirk Lenthe), he did not see the need to retain attorneys as he had been dealing with the same construction people for years.

In the instant case, respondent hired Whaley Construction to manage the project and Moore Engineering, Inc., to design and supervise the civil portion of the project. Respondent is not in the business of construction, nor has he ever been in the business of construction, and thus it relied upon these professional firms to navigate the project through the technical process of acquiring necessary permits and complying with those permits. Respondent took reasonable and appropriate steps to insure that it was meeting permit requirements and did not have any direct control over the events constituting a violation.

The alleged violations were not reasonably foreseeable by respondent because respondent is not in the construction business and this was the first storm water enforcement action of this kind in the Fargo-West Fargo area. The construction industry in the Fargo-West Fargo area was unfamiliar with the permitting requirements, and the North Dakota Department of Health procedures were such that it did not even provide a copy of the NPDES permit to permittees such as respondent. The local construction industry was almost completely unaware of the need to obtain a storm water permit and the steps needed in order to comply with NPDES permit requirements. Further, the City of Fargo did not require the issuance of storm water permits for projects the size of the Stamart facility project until March of 2006. Tr. vol. 1 at p. 119, l. 13 through p. 126, l. 14; Respondent's Exhibit 21.

Respondent did not even know of the inspection requirements that were violated because it never received a copy of the permit after storm water permit coverage was confirmed by a letter from the North Dakota Department of Health. Complainant took great pains to argue that respondent could/should have obtained the NPDES permit "at any time." This argument is nothing more than 20/20 hindsight. How was respondent to know it should have contacted the North Dakota Department of Health to ask them to send the NPDES permit out? It never came, and respondent did not know it should have come. This is because the local construction and business industry was

unfamiliar with these permit requirements. Furthermore, it is entirely reasonable that the local construction and business industry (as well as the general public) would not generally perceive that dirt or sediment could constitute a pollutant. Generally, when an average person considers the term pollutant, that person immediately thinks of hazardous waste or some type of chemical discharge. Sediment or dirt generally would not be commonly known as a pollutant.

Further, after being informed of the requirement to obtain a permit, respondent made a diligent effort to obtain a permit and to implement required inspections. Even much later, due to its lack of familiarity with the required inspection process, respondent was under the mistaken belief (courtesy of Moore Engineering, Inc., the civil engineer in the project) that it only needed to conduct inspections it later learned (from its defense lawyer in the instant suit) are required for small construction sites. Thus, the administrative law judge failed to properly consider the lack of sophistication in the local construction and business industry. This factor clearly affects the culpability of respondent and mitigates against any penalty being assessed against respondent at all, because to assess a penalty against a party who unwarily violated a permit requirement (due to lack of knowledge on the part of professionals in the construction industry, hired by respondent to navigate the respondent through the process), is tantamount to assessing a penalty against an innocent party. The administrative law judge erred in increasing the penalty by twenty percent based upon the culpability of respondent. There should have been no increase in the amount of the penalty based upon the respondent's culpability, because the lack of sophistication in the local construction and business industry demonstrates a complete lack of culpability on respondent's part.

E. The administrative law judge should have given more weight to the fact that general deterrence is unnecessary in the instant case, because the City of Fargo now requires--pursuant to CWA mandates to the City of Fargo--that projects obtain CWA storm water permits prior to being issued a construction building permit.

The administrative law judge should have made a downward adjustment in the amount of the penalty assessed in the instant case on the basis that deterrence is **not** a factor in this case, because in 2006 the City of Fargo instituted a permit system tying storm water permits to building permits, as part of the City of Fargo's own compliance with the CWA's Phase II requirements. In determining that this factor (deterrence) did not justify a downward adjustment in the penalty amount, the administrative law judge erred.

Pursuant to 33 U.S.C. § 1319(a)(3) the final factor that the tribunal must take into account is "other matters as justice may require." Under this factor the administrative law judge should have considered the fact that the City of Fargo now has a building permit system tying storm water permits to building permits. Initial Decision at p. 72. During the course of the hearing, Mark Bittner, city engineer for the City of Fargo, testified that as of March 2006 it would be impossible for a person/entity to get a building permit from the City of Fargo for a project like the Stamart facility, without first getting a storm water permit under the CWA. Mr. Bittner told the tribunal that a party must first obtain a storm water permit before the city can issue a building permit:

Q [by respondent's counsel]:	Mr. Bittner, tell me how this process works under this new ordinance.
A:	We actually have a couple of different ways, depending upon what type of construction and what size of the construction site it is. For any construction site larger than five acres, it is still a requirement that the state issue a permit. When a permittee wants to come in and get a building permit from the City of Fargo, they show the state erosion control permit to us and we issue a similar permit and then they go over to the building official and he is granted the building permit. For sites that are smaller than five acres, the state is not involved. City permits those.

> They need to show us--if it is a commercial site, commercial/industrial site, they need to supply to us their storm water pollution prevention plan. If it is a residential, single residential small tract site, we have a set of guidelines that they need to certify they follow those guidelines, so that's the process.

Tr. vol. 1 at p. 124, l. 23 through p. 125, l. 22. Thus it is now not possible for a building permit to be issued before a construction site obtains a CWA storm water permit.

The administrative law judge noted with respect to the deterrence issue as follows:

> "With regard to deterrence being generally unnecessary because the City of Fargo in 2005 instituted a permit system tying water permits to building permits as evidenced by respondent's Exhibit 15, while this may be true at the moment, such a tie in may not continue indefinitely and certainly may not exist in each and every other jurisdiction across the country. Thus the imposition of a monetary penalty will serve as a deterrence in discouraging potential violators of the law nationwide."

Initial Decision at p. 72. The administrative law judge's conclusions are erroneous because the City of Fargo's new storm water permit requirements are themselves imposed by (and are a result of) the CWA. As Mr. Bittner testified, Fargo's new storm water permit requirements were mandated by Phase II of Fargo's own CWA requirements:

Q [by respondent's counsel]:	Mr. Bittner, last week when I visited with you in your office did I show you a copy of what is marked as Exhibit No.--Respondent's Exhibit No. 21, a Fargo Forum article?[8]
A:	You did.
Q:	It is a fairly short article. Could I have you read it to yourself, if you would?
A:	Okay.
Q:	Before I ask specific questions about that article, you and I had a short conversation about the Clean Water Act and Phase I and Phase II, how that has impacted what you folks do in the City of Fargo. Can you explain in just a couple minutes how that works, the Phase I, Phase II?

[8]A copy of this newspaper article, Respondent's Exhibit 21, is annexed to this Appeal Brief as Attachment 2.

A: Recently in the last -- I think it was within the last three years, the City of Fargo has become under the regulations of Phase II of the storm water regulations issued by EPA. Under that the city had to adopt certain criteria for developing Best Management Practices for improving runoff quality. And one of those areas that needed to be addressed was construction site erosion protection, and so as part -- prior to that Phase I regulations, which I believe were adopted in the early '90s, they impacted all cities greater than a quarter million, whereas Phase II brought on populations of metropolitan areas greater than 100,000. So Phase II regulations brought in the City of Fargo, Moorhead, West Fargo and adjacent urbanized areas. As I mentioned, one of those areas was construction runoff and erosion control. How we would have got involved in the Phase I regulations required all construction sites, I believe the limited factor was five acres, all them had to be permitted through the State. After Phase II, the regulations changed so any construction site greater than one acre had to be permitted, and that became a City responsible, or local MS4 responsibility, to do that permitting. So essentially and still anything that -- any construction site greater than five acres is still a requirement of the State to do the permitting.

Q: So that newspaper article, which -- what is the date on that, by the way?

A: November 19th, 2005.

Q: Is the Forum the local paper for the Fargo-Moorhead community?

A: That's correct.

Q: In fact, it is the official newspaper for the City of Fargo, is it not?

A: That's correct.

Q: Now, briefly describe the subject of that article. What is going on here?

* * *

Q: What is it about? What is the article about?

A: It speaks to a proposed increase in building permit fees and the -- Basically the Home Builders Association is concerned about that increase in those fees plus the additional fees that would be coming associated with the storm water permitting requirements that we were required to adopt by March 1 of this year.

Q: And are you quoted in that article?

A: That's correct.

Q: And explaining the need for it? It is required by the EPA and it has got to happen, it has to happen?

A: Yes. We had been working on that for about three years.

* * *

Q: Did I hear you say that if it is greater than 15 acres they still have to get a permit from Bismarck and disclose that permit to you?

A: Larger than five acres their permit is from the State Health Department.

Q: Do you know if the Stamart project was greater than five acres?

A: I believe it is, yes.

Q: So am I correct that had this ordinance been in place back in 2002, no building permit would have been issued for the Stamart project without first having the storm water permit?

A: According to our current regulation, that's correct.

Tr. vol. 1 at p. 119, l. 20 through p. 122, l. 5; p. 123, l. 21 through p. 124, and p. 125, l. 23 through p. 126, l. 13. It is not "happenstance" that a tie-in now exists in the City of Fargo, mandating that a CWA storm water permit be obtained as a precondition to getting a building permit. "Such a tie in" will obviously continue so long as the CWA is on the books as the law of the land, and we know that the CWA applies nation-wide--it is, in fact, applied "in each and every other jurisdiction across the country." The City of Fargo does not have the option of doing away with their new tie-in ordinance at any time in the future. The same CWA which requires a construction project to have

a CWA storm water permit also mandates that the City of Fargo cannot issue a building permit for a construction project until and unless the construction project first gets a CWA storm water permit. It is that simple.

F. The administrative law judge failed to properly consider the circumstances of the violation in that only one of the thirteen sites inspected at the time that the Stamart site was inspected had a CWA storm water discharge permit.

The administrative law judge improperly multiplied the amount of economic benefit in the instant case by a factor of 10 to come up with her "initial adjusted penalty," based upon the nature, circumstances and extent of the violation. Initial Decision at p. 57. The circumstances of the violation show an industry that was almost totally unfamiliar with the requirement to obtain a storm water discharge permit. This unfamiliarity is evidenced by the fact that only one of the thirteen sites inspected when the Service Oil site was inspected had a storm water permit.[9]

The fact that 12 of the 13 construction sites EPA inspected in the Fargo-West Fargo area in October of 2002 **did not have a storm water permit** is the most important evidence in the record as to the circumstances of the violation. The only construction site that had a storm water permit was the site of a new Lowe's Home Improvement store, a nation-wide home improvement retailer that builds stores every year across the country--it stands to reason that Lowe's is/was going to be aware of CWA storm water permit requirements, because it deals with CWA permit issues every day at sites across the United States **outside of North Dakota**. If the Lowe's inspection is pulled out of the EPA's inspection list (because of Lowe's sophistication in CWA storm water permit issues, due to its nation-wide building program), it would mean that **every one of the remaining 12 construction sites, without exception, had no storm water permit and did no storm water inspections**. That would be 100%.

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[9]See Respondent's Exhibit 2, copy annexed to this Appeal Brief as Attachment 3.

The reason the "12 of 13 sites" evidence is critical in this case is that it does not entail any issue of credibility of witnesses, as to which the trier of fact (the administrative law judge) may be called upon to resolve conflicts in the testimony of witnesses. It is evidence that cannot be disputed, and it demonstrates conclusively just what the circumstances of the violation were in October of 2002, when EPA inspected respondent's site. In laymen's language, there was virtually no industry sophistication in North Dakota, at all, in terms of CWA storm water permitting.

In addressing the "12 of 13 sites" issue in the Initial Decision, the administrative law judge stated as follows:

> 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[10] 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.

Initial Decision at p. 56 (footnote added).

> It [complainant] 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.

Initial Decision at p. 61 (bracketed language added).

> 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;

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[10]Actually, only 13 sites were inspected by EPA in October of 2002, including Respondent's site. Respondent's site was one of the 12 sites that had no CWA storm water permit.

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.

Initial Decision at p. 62.

> Further, it [respondent] 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 considering tying such permits to common building permits until 2005. *Id.*[11]

Initial Decision at p. 63 (footnote added).

> 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.

Initial Decision at p. 63.

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[11]The administrative law judge misread respondent's argument--at no time did respondent make the argument attributed to it by the administrative law judge in the above quote. The administrative law judge's *Id.* reference is to Respondent's Post-Hearing Brief at p. 40. What respondent argued there was:

> Respondent was never provided with a copy of the permit by the governmental body that supposedly issued it, and thus was not in a position to conduct the required inspections because it was unaware of those requirements.
>
> The construction industry in the Fargo-West Fargo area was likewise unfamiliar with the permitting requirements, and the North Dakota Health Department's procedures were such that it did not even provide a copy of the NPDES permit to permittees such as Respondent. Thus, the local construction industry was unaware of the need to obtain storm water permits and steps needed in order to comply with NPDES permit requirements. Further, the City of Fargo did not address the issue of storm water permits for projects the size of the Stamart facility until March of 2006. Tr. Vol. I at p. 119, l. 13 through p. 126, l. 14; Respondent's Exhibit 21.

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.

Initial Decision at p. 66.

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.

Initial Decision at p. 67.

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.... Therefore on this basis, and because I believe the construction professionals it hired should have known and advised it with regard thereto, I find Respondents' 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.

Initial Decision at p. 67.

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.

Initial Decision at p. 68.

... [A]s 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.... He [Gary Bracht, manager of the North Dakota Health Department NPDES program] 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.... 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.

Initial Decision at p. 71.

The respondent in this case, Service Oil, is one step removed from the industry the CWA is targeted at--the construction industry. The fact that 12 of the 13 sites EPA inspected in the Fargo-West Fargo area in October of 2002 did not have CWA storm water permits is conclusive evidence of the absence of CWA sophistication **in the Fargo-West Fargo construction industry**, let alone in the local population as a whole (which would include respondent, who is not in the construction business).

In addition, respondent had hired experienced construction firms to take care of all of the permitting requirements prior to the construction project being undertaken. When respondent was called by EPA inspector Lee Hanley on October 24, 2002, and informed of the need for a storm water permit, respondent immediately called the project manager and project engineer--"do what needs to be done to get it taken care of." Tr. vol. 2, p. 18, l. 11 through p. 19, l. 10. Thus, the circumstances of the violation show that respondent neither intentionally nor willfully violated the permitting requirements.

Further, Steve Whaley (respondent's construction manager) testified that the first action on the site was the removal of soil before the construction began. The effect of the removal of the soil from the site was the creation of a bowl (depressed area) in which rainwater collected. Steve Whaley testified that the storm sewer for the Stamart site was installed by Kindred Plumbing after the site's topsoil was stripped. After storm sewer inlets were installed at the facility, metal caps were attached to the top of each of the drop inlets, and the drop inlets stuck up out of the ground 10 to 15 inches, which had the result that no storm water flowed into the drop inlet. Expert witness Nord Lunde concluded that the effect of this action was to create a sediment basin which would prevent the flow of storm water off site. The circumstances of the violation show an effort by respondent's construction experts to conduct the construction operation in a good and prudent manner and to

make a reasonable effort to insure that dirt and other materials did not escape from the site. The circumstances also indicate a construction industry unfamiliar with storm water permitting requirements. The administrative law judge's Initial Decision would seem to require respondent to have knowledge above and beyond that of the average construction professional in the local construction industry. Ultimately, the violation in this case was regulatory in nature and thus the penalty should only reflect the economic benefit.

V. ALTERNATIVE FINDINGS OF FACT

A. Nature, Circumstances, and Extent of the Violations.[12]

As to Count 1, it is undisputed that during the October 2002 inspection of the Stamart site and twelve other sites in Fargo and West Fargo, North Dakota, only one site, the Lowe's site, had a valid NPDES permit. R's Ex. 2. Further, Mr. Lenthe testified that he had no knowledge of NPDES permit requirements prior to receiving a telephone call from the EPA. Tr. Vol II, p. 18, l. 17 through 20. Based upon these facts and the collective testimony of Brock Storrusten, Steve Whaley, and Dirk Lenthe, I find that respondent neither intentionally nor willfully violated the permitting requirements.

Service Oil hired experienced construction and engineering firms to take care of all permitting requirements. Tr. Vol. II. at p. 10 l. 8 through p. 13 l. 19. In light of the fact that only one of the thirteen sites inspected in October, 2002 had a NPDES permit, and that one site involved a national company, it is reasonable to conclude that the Fargo and West Fargo business and construction community was for virtually all purposes unfamiliar with CWA permit requirements. Further, in observing the testimony of the North Dakota Department of Health officials, I believe that even the department that was charged with administering the NPDES permit in North Dakota was

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[12]The administrative law judge's Finding of Fact numbered and titled "**2. Nature, Circumstances, and Extent of the Violations**" appears at p. 55 of the Initial Decision.

largely unfamiliar with many of the NPDES program requirements. Based upon the foregoing it was entirely reasonable for Service Oil to not be aware of the NPDES permit requirements.

Finally, and of greater concern to this tribunal, is the lack of evidence presented at the hearing with respect to environmental damage or potential for environmental damage. Even complainant's own witness, Aaron Urdialis, who was not qualified as an expert witness, was unable to give a definitive opinion with respect to the potential amount of environmental harm . Tr. Vol. I. p. 277. (During the hearing, this tribunal indicated that it would not give any special weight to Mr. Urdialis' opinions. Id.) In light of the fact that the "pollutant" at issue in this case is sediment, and the fact that complainant could not produce an opinion concerning the potential environmental harm from this pollutant, I conclude that it would be difficult for the average business or construction person in North Dakota in 2002 to believe that it was necessary to obtain a storm water discharge permit for an activity that had previously been performed--always--without the requirement to obtain a storm water permit. It is entirely reasonable in light of the circumstances of the case that the business and construction community viewed sediment from construction sites as a non-pollutant, common occurrence, in light of the fact the Fargo-West Fargo community is surrounded by largely undeveloped farm land which commonly discharges sediment in drains and ditches which are connected to the Red River. See Tr. Vol II. p. 210.

As to Count 2, the circumstances of the violation do indicate respondent's failure to conduct inspections at the required frequency to determined if the BMPs it put into place were controlling storm water discharge after it obtained its permit. This type of violation is merely technical in nature; respondent did obtain a permit and it did install BMPs. Its unfamiliarity with the inspection requirements is reasonable considering the lack of sophistication in the business and construction community in Fargo, North Dakota, and especially given the fact that the North Dakota Health Department did not ever send the actual 16-page permit to respondent, which would have specified

very clearly to respondent just what its inspection obligations were. Based upon these circumstances, the violation is more technical in nature and the economic benefit should not be increased at all based upon the circumstances of the violation.

B. Culpability.[13]

It is undisputed that respondent is not an experienced construction professional and that it did hire a variety of construction professionals in connection with the Stamart project. It is common knowledge that most site owners lack the necessary knowledge, skills and experience, and routinely enter into agreements with professionals to assist in that process.

Further, in the instant case it appears that the North Dakota Department of Health, the agency in charge of enforcing the storm water discharge permit requirements, was largely unfamiliar with the requirements and this unfamiliarity spilled into the business and construction community in the entire State of North Dakota and specifically in Fargo. It should be noted with respect to the background of this case that in October of 2002, the EPA was responding 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. Tr. vol. 1 at pp. 38-39, 88, 89. It was the EPA that instituted these inspections based upon the low level of permit applications. The logical inference to be drawn from the low number of applications is that the construction and business industry in Fargo and West Fargo, North Dakota, was largely unfamiliar with storm water discharge permit requirements. It is also noted that during the hearing held in this matter, Mark Bittner, Fargo city engineer, testified that in the year 2002 the City of Fargo did not have a building permit tie-in. Tr. Vol 1. p. 124 through 126. Thus, it is with this background that this tribunal begins its analysis of Service Oil's culpability.

[13]The administrative law judge's Finding of Fact numbered and titled "**6. Culpability**" appears at p. 60 of the Initial Decision.

Both respondent and EPA cite 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 violations;

b. The foreseeability of events constituting violations;

c. Whether the violator took reasonable precautions 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.

In the instant case, respondent is a non-construction professional and was unaware of its specific obligations under the CWA prior to beginning construction of the Stamart site and was under the reasonable, albeit erroneous, impression that the professionals it hired to guide it through the construction process would obtain any and all necessary permits. Tr. vol. 2 at pp. 46, 49. While at first blush such an assumption might appear unreasonable, Service Oil had a long standing 25-year business relationship with both Moore Engineering and Whaley Construction. Tr. vol. 2 at pp. 51-52, 54. Steve Whaley was hired to be the project manager and knew and testified that the respondent was relying upon him to supervise the project day to day and generally, "make sure the thing happened." Tr. vol. 2 at pp. 12, 40, 47, 65, 68-70, and 152. The president of respondent, Dirk Lenthe, was under the impression that Mr. Whaley was responsible for any and all permits on prior projects that he had worked on with Service Oil over the years. Tr. vol. 2 at p. 60. Moore Engineering had previously been hired by respondent to design plans and specifications for other projects and also was hired for this project to handle and create the plans and specifications and to

handle the bid process for the Stamart site. Tr. vol. 2 at p. 131; R's Exhibit 36. Although Moore Engineering is a large professional engineering firm in the Fargo area and has handled a number of construction projects including storm water projects prior to taking on the Stamart project, its employees were largely unaware of the requirement to obtain a storm water discharge permit from the North Dakota Department of Health. In this regard, the background and circumstances of the business and construction industry in North Dakota sheds light upon this mistaken assumption.

Further, given that the City of Fargo had not yet begun its CWA-mandated process of tying in storm water permits to the issuance of building permits, it was entirely reasonable for respondent to be unaware of the requirement to obtain a storm water discharge permit prior to beginning construction. Service Oil did not have any attorneys on staff and did not consult with any attorneys in connection with this project. Tr. vol. 2 at pp. 57-60. This circumstance, while at first blush in an urban area may appear to be unreasonable, is entirely consistent with the standard business and construction practices in the State of North Dakota. Finally, Service Oil's actions are entirely consistent with respondent's prior business relationships with both of the professional firms involved (Whaley and Moore).

Based upon the consideration of all of the foregoing, no increase in the penalty is warranted in recognition of the respondent's lack of culpability for the violations.

C. Other Factors as Justice may Require.[14]

A penalty above the economic benefit of the violations of $2,700 is unnecessary. One of the purposes of a civil penalty is to create deterrence to other potential violators. In the instant case, the City of Fargo (by virtue of CWA mandates) now requires that anyone applying for a permit must obtain a valid storm water discharge permit prior to obtaining a building permit from the City of

[14]The administrative law judge's Finding of Fact titled "**Other factors as justice may require**" appears at p. 68 of the Initial Decision, and was misnumbered as "6," the same number as the administrative law judge's Finding of Fact "**6. Culpability**."

Fargo. Effectively, the City of Fargo has picked up where EPA and the North Dakota Health Department have failed. The City of Fargo has taken the regulatory approach that agencies are in place to assist industry in complying with regulations, not to "sit idly by in the weeds" and wait for a violation. By doing this, the City of Fargo is helping to promote compliance with the Clean Water Act and to protect the environment. Because of the City of Fargo's CWA-mandated actions, violations of the nature of the instant case, i.e., regulatory violations, should not ever happen again in Fargo, North Dakota. Thus, no increase in the penalty above and beyond economic benefit is justified. Quite simply, deterrence is not a factor that should play a part in the penalty assessed against respondent.

VI. ALTERNATIVE CONCLUSIONS OF LAW

A. Elements of Liability Under Section 308.[15]

The unambiguous text of Section 308 of the Clean Water Act clearly requires that the administrator issue an order or make a request before finding liability pursuant to Section 308 (33 U.S.C. § 1318). The plain language of Section 308 simply does not impose a general statutory duty upon owners and operators of point sources, but rather imposes a duty only upon the administrator that he or she shall require such persons to establish and maintain records. Absent a request or order pursuant to Section 308, and a subsequent refusal by the individual to whom the request was made, there cannot be a finding of liability pursuant to Section 308.

While Complainant advances a more broad and liberal interpretation of Section 308, the language of Section 308 simply does not support such an interpretation. The case of the Committee for the Consideration of the Jones Fall Sewage System v. Train, 375 F. Supp. 1148, 1152 (D. Md. 1974), is directly on point. The EPA must issue a request or an order prior to a finding of liability

[15]The administrative law judge's Conclusion of Law titled and designated "A. Elements of Liability Under Section 308" appears at p. 12 of the Initial Decision.

pursuant to Section 308. This interpretation is clearly consistent with Section 308 and is consistent with my role as administrative law judge to insure that the EPA does not exceed the statutory authority granted to it by Congress. If Congress had intended Section 308 to include different language, it would have inserted different language in Section 308. It did not do so.

Further, 40 C.F.R. § 122.21 cannot be a basis for finding a violation for failing to obtain a permit prior to commencing construction. The EPA cannot simply draft language in a regulation that is in contravention of the plain and unambiguous language of the statute. The statutes drafted by Congress guide the EPA in its enforcement of the such statutes. The EPA as an agency has no authority to go beyond the substantive law prescribed by Congress. To do so would invade a coordinate branch's authority and challenges the very core principles of separation of power enshrined in the Constitution, which require us to adhere to Congress's intent and to the plain and unambiguous language of the statute. The Court in United States v. Marte, 356 F.3d. 1336, (11th Cir. 2004) stated:

> When a regulation implements a statute, the regulation must be construed in light of the statute, but where a regulation conflicts with a statute, the statute controls.

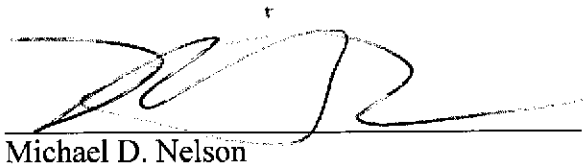
Id. At 1341. In the instant case, the language of Section 308 is clear in that an order or request must be made by the administrator prior to a finding of liability under section 308. The argument that 40 C.F.R. § 122.21 expands upon the language of Section 308 is not consistent with the rule that 40 C.F.R. § 122.21 must be construed in light of Section 308. In harmonizing the statute and the regulation, it is clear that a request or order for information must first be made as a precondition to liability under Section 308. The interpretation of 40 C.F.R. § 122.21 advanced by complainant conflicts with Section 308 and therefore, the plain and unambiguous language of Section 308 controls. Should Congress desire to amend Section 308, it has the authority to do such. However, the EPA does not. It is elementary that an agency's power to adopt regulations is circumscribed by

the enabling statute. As such, I conclude that the issuance of an individualized request or order by the administrator under Section 308 is a precondition to a finding of a violation under Section 308.

VII. CONCLUSION

For all of the above reasons, respondent respectfully requests that the amount of the penalty be reduced to the amount of the economic benefit only, which is the amount of $2,700.

Dated: August 30, 2007.



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W. Fargo firm faces fine for EPA violation

By Teri Finneman
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A West Fargo-based business faces a $35,640 penalty for violating the federal Clean Water Act.

A judge ruled for the U.S. Environmental Protection Agency in a clean water enforcement case against Service Oil Inc., 1718 Main Ave. E., according to a news release received Monday.

Service Oil Inc. operates Stamart travel centers and convenience stores. The company has 10 locations in North Dakota and two in Minnesota.

The federal government's case against the gasoline and diesel fuel retailer stems from an EPA inspection in 2002.

EPA Chief Administrative Law Judge Susan Biro found that Service Oil failed to acquire an applicable discharge permit for construction activities and discharged pollutants without a permit.

Both were in violation of the federal Clean Water Act.

Biro has ordered the company to pay a civil penalty of $35,640. EPA attorneys sought a $40,000 penalty.

Service Oil has until Sept. 2 to appeal the penalty. When reached for comment late Monday, owner Dirk Lenthe asked to review the ruling first.

He did not immediately call back with comment or respond to a second interview request left on his work voice mail Monday evening.

Meanwhile, EPA officials praised the ruling.

"It is gratifying that Judge Biro upheld our complaint in the Service Oil case and validated the hard work of our inspectors and case team," David Janik, EPA Region 8 supervisory enforcement attorney, said in a statement.

Michael Risner, acting deputy assistant regional administrator for EPA's Denver headquarters, hopes the decision encourages other companies to comply with the law.

"In some cases, I think they really aren't aware of it (regulatory requirements), and in others, they simply ignore that," Risner said. "Without making a judgment one way or another in this specific case, that's generally what happens."

The court took almost a year to decide this case, Risner said.

Readers can reach Forum reporter Teri Finneman at (701) 241-5560

ATTACHMENT 1

ATTACHMENT 2

Builders question fee hike

Fargo proposes 10% increase for permits

By Mike Nowatzki
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Raising fees for residential building permits will make it harder to offer affordable housing in Fargo, local home builders warned this week.

The City Commission will consider a revised fee schedule Monday that would increase permit fees by 10 percent for new one- and two-family dwellings.

In a letter to the city Wednesday, officials from the Home Builders Association of Fargo-Moorhead called the proposed hikes "especially troubling" because the city plans to impose another building permit fee next year for storm water regulation and administration.

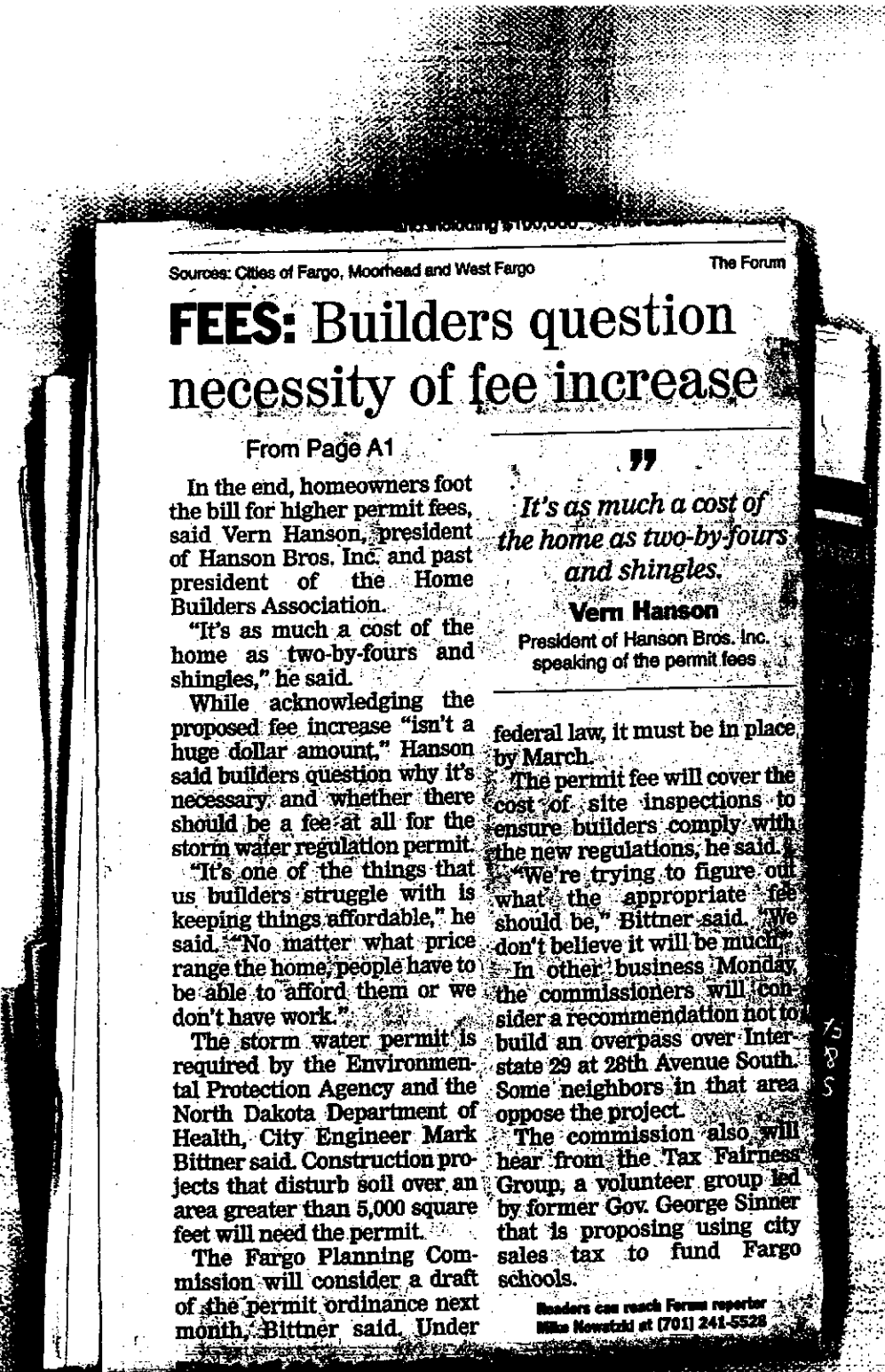
"Our members' ability to provide affordable housing in Fargo continues to be eroded by fee increases, material prices, code changes, added federal regulations and the like," stated the letter, signed by association President Dave Anderson and Executive Vice President Bryce Johnson.

However, inspection costs such as fuel, salaries, legal expenses and codebooks also have increased in recent years, said Ron Strand, Fargo inspections administrator.

Fargo last raised residential building permit fees in 2002.

Under the proposed changes, the fees would jump $45 for a $100,000 home, $64 for a $200,000 home and $84 for a $300,000 home.

FEES: Page A4



Sources: Cities of Fargo, Moorhead and West Fargo — The Forum

FEES: Builders question necessity of fee increase

From Page A1

In the end, homeowners foot the bill for higher permit fees, said Vern Hanson, president of Hanson Bros. Inc. and past president of the Home Builders Association.

"It's as much a cost of the home as two-by-fours and shingles," he said.

While acknowledging the proposed fee increase "isn't a huge dollar amount," Hanson said builders question why it's necessary and whether there should be a fee at all for the storm water regulation permit.

"It's one of the things that us builders struggle with is keeping things affordable," he said. "No matter what price range the home, people have to be able to afford them or we don't have work."

The storm water permit is required by the Environmental Protection Agency and the North Dakota Department of Health, City Engineer Mark Bittner said. Construction projects that disturb soil over an area greater than 5,000 square feet will need the permit.

The Fargo Planning Commission will consider a draft of the permit ordinance next month, Bittner said. Under federal law, it must be in place by March.

> *It's as much a cost of the home as two-by-fours and shingles.*
>
> **Vern Hanson**
> President of Hanson Bros. Inc. speaking of the permit fees

The permit fee will cover the cost of site inspections to ensure builders comply with the new regulations, he said.

"We're trying to figure out what the appropriate fee should be," Bittner said. "We don't believe it will be much."

In other business Monday, the commissioners will consider a recommendation not to build an overpass over Interstate 29 at 28th Avenue South. Some neighbors in that area oppose the project.

The commission also will hear from the Tax Fairness Group, a volunteer group led by former Gov. George Sinner that is proposing using city sales tax to fund Fargo schools.

Readers can reach Forum reporter Mike Nowatzki at (701) 241-5528

October 2002, Inspections and Follow-Up Information

Site	Description of Project	Date Inspected	Permitted (at time of insp)	EPA Report Sent	Response Received and Comments	Permit Obtained	Permit #	Dept Enf	Enf Date	Response to Enf	Sent Consent Agree	
Agassiz Crossing	Grading for city street and storm sewer - ultimately for commercial development in future	10/23/2002	No	7/14/2003	No	No - site not active (as of 8/04)	None	Warning letter	6/29/2004	NR		
Point West	Grading, streets, home/apartment building, landscaping for residential development	10/23/2002	No	7/14/2003	Yes - acceptable. Responded promptly.	3/20/2003	NDR03-0598 (Matrix Properties)	Warning letter	6/30/2004	NR - Did call		
Creekside	Grading, streets, home building, landscaping for residential development	10/23/2002	No	9/2/2003	Yes - responded late on 1/12/2004	1/12/2004	NDR03-0790	NOV	4/26/2004	5/5/2004	6/29/2004	
Service Oil Truck Plaza	Grading for Stamart Travel Center	10/24/2002	No	7/14/2003	Applied for permit promptly 11-5-2002. No official response sent.	11/15/2002	NDR03-00571	Warning letter	6/30/2004	7/12/2004		
Galleria	Grading and apartment building for residential development	10/24 - 10/25/2002	No	7/14/2003	No	No		Warning letter	6/29/2004	NR		
Foxtail Townhomes	Grading and townhome building for residential development	10/25/2002	No	7/14/2003	No	No		Warning letter	6/29/2004	NR - Did call anyway		
45th Street Marketplace	Grading for commercial development	10/25/2002	No	7/14/2003	Permit obtained for the remaining development at this site, but not for the IHOP - no response sent.	9/10/2003	NDR03-0746	NOV	4/26/2004	5/3/2004	6/29/2004	

ATTACHMENT 3

RESPONDENT'S EXHIBIT 2

October 2002, Inspections and Follow-Up Information

Site	Permit Violations	Additional Inspection Comments	EPA Recommends:	ND Recommends:	Reasoning	
Agassiz Crossing	Some sediment tracking into street - evidence of small amount of sediment in storm inlets. No permit needed yet because of ISTEA?	City owned project (storm sewer/curb & gutter so far - so no permit is needed (ISTEA). Some vegetative buffer was present around site. Storm water inlets drain to a county drainage ditch. Merit-care owns adjacent land to street and could possibly sell to Wal-mart.	Administrative Penalty Order	Nothing	ISTEA Issue. No building going on currently.	
Point West	No permit, no SWPP Plan. Some sediment tracking into street - evidence of small amount of sediment in storm inlets	Info sent to Dale Trochmann - 11/18/02. Some vegetative buffer was present around site. Storm water inlets drain to a county drainage ditch. Porta-potty located approx. 25 ft from storm inlet - very flat grade.	Administrative Penalty Order	Nothing	Appears lots had been sold off (numerous builders) Matrix responded with in 11/2002, and obtained permit in 3/2003	
Creekside	No permit, no SWPP Plan. Some sediment tracking into street - evidence of small amount of sediment in storm inlets	Called and left message 11/18/02. Some vegetative buffer was present around site. Storm water inlets drain to a county drainage ditch. Evidence of concrete washout in graded area - not in street. Nobody responded to my phone call.	Administrative Penalty Order	NOV+penaly	Reinspect before proceeding with penalties	
Service Oil Truck Plaza	No permit, No SWPP Plan. Some sediment tracking into street - evidence of small amount of sediment in storm inlets. Some raw materials were kept outside exposed to storm water - but kept away from storm inlets.	Not sure exactly where storm water inlets drain to. Viewed concrete wash activities being performed in areas away from storm sewer inlets. Noticed most storm sewer inlets on property were being protected with metal plates and marked with orange cones. I don't think penalty is necessary.	Administrative Penalty Order	Nothing	Quick response and compliance	
Galleria	Some sediment tracking into street - evidence of small amount of sediment in storm inlets. Difficult to determine if this project was a larger common plan of development or sale - no permit, no SWPPP??	A little vegetative buffer was present around site. Storm water inlets drain to a county drainage ditch.	Administrative Penalty Order	Warning Letter	Since report was sent out after they were completed with the site.	
Foxtail Townhomes	Some sediment tracking into street - evidence of small amount of sediment in storm inlets. Difficult to determine if this project was a larger common plan of development or sale - no permit, no SWPPP??	Some vegetative buffer was present around site. Storm water inlets drain to a county drainage ditch. Storm drain on site was protected. Concrete washout occurring on graded areas, not in street. Small oil spill evident by bobcat. Talked with Steve's partner Toomey? on phone 2/9/04 - site was stabilized by 9/03.	Administrative Penalty Order	Warning Letter	Since report was sent out after they were completed with the site - 9/2003.	
45th Street Marketplace	No permit, no SWPP Plan. Some sediment tracking into street - evidence of small amount of sediment in storm inlets	Called and left message 11/18/02. Some vegetative buffer was present around site. Not sure exactly where storm water inlets drain to. No one responded to me in 2002.	Administrative Penalty Order	NOV+penaly	Applied for rest of the site and IHOP was completed in May/June 2003.	

October 2002, Inspections and Follow-Up Information

Site	Permit Violations	Additional Inspection Comments	EPA Recommends:	ND Recommends:	Reasoning	
Elmwood Court Addition	No permit, no SWPP Plan	Site is being built on tilled farm field. Storm inlets & manholes covered with plywood or fabric until street grade done. Infrastucture contract with city and will be owned and operated by city. Appeared to me that the project falls under ISTEA. Did not appear to have temp cover for stockpiled material or on diking. Surface drainage was not discernable due to flatness and diking. Pond being	Administrative Penalty Order	Nothing	ISTEA Issue. No building going on at time of inspection.	Spoke to Mark Sundet from Paces Lodging on 9-1-03 about a permit for another property - he called in with questions. Sent them application package. Have a permit in system for Elmwood Court phase III ??- for street contractor - but not from developer. Nothing sent in from Paces for any project as of 1/12/2004.
Lowe's	Copy of permit not onsite, sediment collected on 13th ave., Sediment at storm drain near site entrance. They had a permit and SWPP Plan.	Dirt fill used to ramp curb on 13th A few inlets unprotected	Nothing	Nothing	Permitted	Dry pond built on N.side of building; overall site control was good; all req. records on-site. Storm sewer pipe at site is basically flat & will drain to pond or from pond to 13th ave depending on water elev in 13th ave main. Concrete raceway in pond bottom to facilitate sed recovery
Sundance Square Townhomes	No permit/SWPP plan, inspections not done, drains not protected, sediment build up present, no track pad	No permit. No inlet protection (sediment observed around basin @ Sundance Sq & Sundance Dr.), some tracking	Administrative Penalty Order	NOV + penalty		summer after EPA's report came out. Have since sent letters requiring Ryland Homes to get Small Construction Coverage for other home building sites. No response sent after 2 letters (1 being certifed mail).
Charleswood	No permit/SWPP plan, inspections not done, sediment build up present, drainage and other debris enters det. Pond, no track pad, port-a-potties not properly located	Development is in area that drains to runoff pond designed for settling and extreme event storage. While pond should capture sediments, BMPs would increase time before cleanout. Basically the pond is a more elaborate version of those used a coal mine. The pond is part of the city's longterm SW management plan. The pond was designed as multi pupose - settle pollutants for up to 25yr event, flood retention to 100yr event and	Administrative Penalty Order and potential Administrative Order (since still operating)	NOV + penalty	Responded 2 months late and dirt still in streets at the site.	Site still has sediment in some streets 11/03. SWPP Plan required homebuilders to get permits, but none have been sent in since issued permit in 10/03.
Marten's Way	No permit/SWPP plan, inspections not done, drains not protected, sediment build up present, no track pad	No permit / permit policy for development / builders No inlet protection (in particular 16th); some sediment tracking; no protection measures along 64th av (surface drain)	Administrative Penalty Order and potential Administrative Order (since still operating)	NOV + penalty	No response - recalcitrant.	Talked to Tyrone Leslie on phone this summer and gave him all the information he needed. Still haven't seen anything submitted.
Gille Auto	No permit, batteries not properly stored, oil stains by oil barrel storage area, oil soaked materials disposed of inappropriately, fluids exposed to sw outside	No permit or SWPP; Batteries piled uncovered; spilled oil in pickup box and various stained areas from spills (ex. near used oil barrels)	Notice of Violation	Notice of Violation	Still haven't sent SWPPP and permit application	

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Appeal Brief was served by me, by First Class Mail, this 30th day of August, 2007, upon the following:

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Chief Administrative Law Judge
Office of Administrative Law Judges
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