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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In re :

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SERVICE OIL, INC., : Appeal No. 07-02

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1201 Constitution Avenue, NW.

Washington, D.C.

Thursday, June 5, 2008

The HEARING in this matter began at  
approximately 11:04 a.m. pursuant to notice.

BEFORE:

JUDGE KATHIE A. STEIN

JUDGE CHARLES SHEEHAN

JUDGE ANNA L. WOLGAST

## APPEARANCES:

On behalf of Environmental Protection Agency:

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On behalf of Service Oli, Inc.:

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## ALSO PRESENT:

EURIKA DURR  
Board of Environmental Appeals

GARY JONES  
Office of Enforcement & Compliance Assurance  
ELYANA SUTIN  
Region 8 Office of the Regional Council

PAUL BANGSER  
Office of General Counsel

\* \* \* \* \*

1 PROCEEDINGS

2 MS. DURR: The Environmental  
3 Appeals Board of the United States  
4 Environmental Protection Agency is now in  
5 session for oral argument. In re: Service  
6 Oil Inc. Docket Number CWA-08-2005-0010.  
7 CWA Appeal No. 07-02. The Honorable Judges  
8 Anna Wolgast, Charles Sheehan, and Kathie  
9 Stein presiding. Please turn off all cell  
10 phones and no recording devices are allowed.  
11 Please be seated.

12 JUDGE SHEEHAN: Good morning. We  
13 are hearing oral argument this morning in the  
14 matter of Service Oil Inc. In appeal from an  
15 initial decision by Judge Biro, who found  
16 Service Oil liable for two counts under the  
17 Clean Water Act, totaling the civil penalty  
18 of \$35,640.

19 On appeal certain aspects of  
20 liability and penalty are challenged. In our  
21 order of April 30th the Board instructed the  
22 parties to focus primarily on the 308 Clean

1 Water Act issue. And while we hold to that  
2 undoubtedly questions they will stray in to  
3 penalty issues as well. So we expect to be  
4 asking questions about penalties in addition  
5 to 308 issues.

6 On the order of proceeding, we will  
7 follow the order set forth in the April 30th  
8 and May 7th scheduling orders. Service Oil  
9 is allocated 30 minutes. It may reserve 5  
10 minutes at the beginning for rebuttal and the  
11 Region is also allotted 30 minutes. Service  
12 Oil will go first.

13 About questions during oral  
14 argument, inferences are not to be drawn from  
15 any particular line of questions that may be  
16 asked. Devil's advocacy is alive and well.  
17 And now I will ask counsel to state their  
18 names for the record, whom they represent,  
19 and we will go from there. Mr. Shockley.

20 MR. SHOCKLEY: John T. Shockley,  
21 here on behalf of Service Oil.

22 JUDGE SHEEHAN: And for the Agency?

1 MR. RYAN: Mark Ryan.

2 JUDGE SHEEHAN: Okay. So Mr.  
3 Shockley, you may proceed with your argument  
4 and tell us at the offset if you wish to  
5 reserve 5 minutes for rebuttal.

6 MR. SHOCKLEY: Thank you, Your  
7 Honor, I do wish to reserve 5 minutes for  
8 rebuttal. May it please the Court, my name  
9 is John Shockley, and I am here on behalf of  
10 Service Oil. The factual background of this  
11 case is unique to this area.

12 Service Oil is a company that is  
13 involved in retailing diesel and gas in this  
14 region. It has been doing this for years.  
15 It has developed significant business  
16 relationships in the community. The cited  
17 issue is commonly referred to in -- below, as  
18 the "staymark" site.

19 The staymark site is located in  
20 Fargo, North Dakota which is in the center of  
21 the Red River Valley. Prior to starting  
22 construction on this site it was ag land.

1 The construction on this site started in  
2 approximately 2002.

3 In the fall of 2002, inspectors  
4 from the North Dakota Department of Health,  
5 along with the Environmental Protection  
6 Agency appeared at the site. They asked  
7 permission to enter the site, and they were  
8 granted that. And I would note that Service  
9 Oil did not refuse permission to enter the  
10 property. This inspection --

11 JUDGE SHEEHAN: Mr. Shockley.

12 MR. SHOCKLEY: Yes.

13 JUDGE SHEEHAN: Mr. Shockley, can  
14 we jump to the 308 issues please. I think we  
15 have a pretty clear sense of the factual  
16 background. Thank you. Your central  
17 argument, it seems to us is that 308, in your  
18 word, is ambiguous, and that for the Agency  
19 to insist on a permit, obtaining a permit  
20 under 308 authority it must issue an  
21 individualized request or order to do so.  
22 What's your authority for that statement, if

1 it's so unambiguous?

2 MR. SHOCKLEY: I would actually  
3 like to -- thank you, Your Honor. I would  
4 like to clarify that slightly our -- Service  
5 Oil's position is that three -- you cannot  
6 have a 308 violation absent a specific  
7 request for information. I believe below the  
8 argument was made that Service Oil was viable  
9 under 308 in addition to other sections  
10 because it did not submit a -- or request a  
11 permit.

12 In essence, the liability was found  
13 on the failure to apply for a permit under  
14 308. It is our position that 308, the plain  
15 language of 308 requires an individualized  
16 request for information.

17 If you read section 308,  
18 specifically (a), it puts a duty upon the  
19 administrator to require an owner or operator  
20 of any point source to establish and maintain  
21 such records, such reports, install, use,  
22 maintain such monitoring equipment or methods

1 or such methods at such locations at such  
2 intervals, and such a manner as administrator  
3 shall prescribe and provide other information  
4 as he shall require.

5 JUDGE SHEEHAN: Then why --

6 MR. SHOCKLEY: I believe that --

7 JUDGE SHEEHAN: Why does that  
8 request from the administrator have to be  
9 individual, person by person, one by one?  
10 Why can the administrator under general  
11 regulatory authority issue broad regulations  
12 that require just that, but not target  
13 individual people?

14 MR. SHOCKLEY: Well, this is a --

15 JUDGE SHEEHAN: After all, let me  
16 point out, 308(a) talks about the  
17 administrator having the authority to carry  
18 out the objective of the act; more  
19 specifically to carry out the objective of  
20 the NPDES program in (a)(4) to issue  
21 requirements in (a)(3) -- requirements and a  
22 lot like regulations. So why is it so



1 unambiguous that it has to be a particular  
2 targeted request before a 308 authority is  
3 valid?

4 MR. SHOCKLEY: Well, specifically  
5 section 308 does not indicate any reference  
6 to permit requirements, and I believe that  
7 the EPA has taken the position that --

8 JUDGE SHEEHAN: -- 308 does  
9 reference --

10 MR. SHOCKLEY: -- for our --

11 JUDGE SHEEHAN: Excuse me. 308  
12 does mention target permit requirements  
13 referring to 1342, the 402 section of the act  
14 that is the NPDES permit program in sub part  
15 (a)(4). So why do you say it doesn't have  
16 anything to do with the permitting program,  
17 when on its face it seems to do just that?

18 MR. SHOCKLEY: Well, the Service  
19 Oil's position is quite simple in that  
20 section (a) requires the administrator to  
21 issue a request requiring information. A  
22 generalized request to submit a permit is

1 much different than a specific request for  
2 information. And -- to this case --

3 JUDGE SHEEHAN: Are you saying that  
4 the Agency has no authority to issue  
5 regulations under 308 general rules of broad  
6 applicability, it has to go one by one. Is  
7 that your position?

8 MR. SHOCKLEY: That is not the  
9 Service Oil's position. Service Oil's  
10 position is that while the EPA can issue  
11 regulations, the issue is not whether or not  
12 they can issue regulations, but how those  
13 regulations can be enforced under 308 --

14 JUDGE SHEEHAN: Can I -- let me ask  
15 if I can. Let's go back -- your construction  
16 began in, I believe April of 2002, let's  
17 flashback to March of 2002. Service Oil and  
18 its office is planning to clear the 15 or 20  
19 acres at this site the next month. Under  
20 your reading, it seems like you would be  
21 saying that EPA needs to guess at the fact  
22 that you are -- and your office is planning

1 this construction, and come knock on your  
2 door and ask you to submit a permit  
3 application. Is that right?

4 MR. SHOCKLEY: Respectfully, Your  
5 Honor, I don't believe that's our position.  
6 Our position is that if you are going to find  
7 a violation pursuant to section 308, you have  
8 to have the individualized request. Always  
9 keep in mind --

10 JUDGE SHEEHAN: Well, that's what I  
11 am asking. Does EPA have to knock on your  
12 door and make an individual request for you  
13 to obtain a permit before you begin  
14 construction in April. It seems like the  
15 logical implication of your argument.

16 MR. SHOCKLEY: It would have --  
17 well, respectfully, Your Honor, the position  
18 is that the individualized request is a  
19 prerequisite to finding liability pursuant to  
20 308. The permit requirements are to submit a  
21 permit. If you are going to find a violation  
22 pursuant to 308, you need to have that

1 individualized request prior to the finding  
2 of liability. And that's a simple --

3 JUDGE SHEEHAN: How do you square  
4 your argument with Ludlum, used by EPA in its  
5 brief? It seems to recognize the authority  
6 of the administrator to issue these kinds of  
7 regulations under section 308 without  
8 questioning that authority.

9 MR. SHOCKLEY: Well, I would square  
10 that argument with the case of in our Legal  
11 Environmental Assistance Foundation where the  
12 Court recognized the distinction between  
13 challenging the issuance of a rule compared  
14 to the substance of the rule. And what we  
15 are really talking about here is how it's  
16 been substantively enforced. Not how it is  
17 being -- not how it was enacted but whether  
18 and how the EPA is going to enforce section  
19 308.

20 JUDGE STEIN: Can I ask a few  
21 questions here. The section 1221 -- or  
22 122.21 of the regulations, were promulgated

1 under the authority of 308. Having been so  
2 promulgated, why is not this -- your client's  
3 conduct a violation of section 122.21  
4 promulgated under the authority of 308 and  
5 therefore a violation of the act?

6           It seems to me that under your  
7 interpretation, then section, I guess, it is  
8 121.21 would really have no meaning. Then  
9 what would be the meaning of regulations  
10 promulgated under the authority of 308, which  
11 require your client to apply for a permit,  
12 and then when you get into a actual  
13 enforcement of that you can't really enforce  
14 the underlying regulations, but you would  
15 have to basically submit an individualized  
16 request. Is that your client's position?

17           MR. SHOCKLEY: Let me make -- thank  
18 you, Your Honor, let me make clear. My  
19 client's position is that any regulation  
20 that's adopted by the EPA must square with  
21 section 308 which requires before a finding  
22 of liability that individual --

1           JUDGE STEIN: But your client had  
2 an opportunity to challenge these  
3 regulations. And having not so challenged  
4 them, how is it that you can attack the  
5 underlying regulations in this form?

6           MR. SHOCKLEY: As I -- thank you,  
7 Your Honor. As I mentioned before we are not  
8 challenging the ability of the EPA to adopt  
9 regulations, we are challenging the  
10 substantive enforcement of those regulations  
11 pursuant to section --

12           JUDGE STEIN: But isn't that  
13 precisely what the statute precludes? I mean  
14 it seems to me that the whole purpose of the  
15 bar on raising this issue in an enforcement  
16 proceeding was to prevent precisely the kind  
17 of collateral attack that you seem to be  
18 asserting here.

19           MR. SHOCKLEY: Respectfully, Your  
20 Honor, I disagree. We specifically, in the  
21 case that I referenced before, the Court  
22 recognized and distinguished substantive

1 challenges to a regulation compared with a  
2 challenge to the authority of the Agency to  
3 make a regulation. And --

4 JUDGE STEIN: But looking at it --  
5 at a slightly different way. Do you dispute  
6 that the Agency has an ability to interpret  
7 the terms of section 308 of the act?

8 MR. SHOCKLEY: We do not dispute  
9 that an Agency has the authority to interpret  
10 section 308, but that that interpretation  
11 must be consistent with the plain and  
12 unambiguous language of section 308. And the  
13 --

14 JUDGE SHEEHAN: But you've really  
15 pointed us to nothing unambiguous, expect  
16 for, I guess, and this word's in your brief  
17 too, the administrator shall require the  
18 owner or operator to make reports. Why does  
19 making reports somehow gobble up the entirety  
20 of 308 and require that every act under 308  
21 be so individualized and targeted when there  
22 is otherwise very broad language in 308?

1 MR. SHOCKLEY: That is an excellent  
2 question, Your Honor. Specifically the  
3 reading of 308 puts a burden upon the  
4 administrator to make an individualized  
5 request, and a subsequent burden upon the  
6 individual to respond to that. If you look  
7 in sub section (b) of the section, it talks  
8 about any records, reports, or information,  
9 and doesn't make reference to permits.  
10 Essentially what --

11 JUDGE SHEEHAN: Is Jones Falls the  
12 only case you rely on for your argument here,  
13 the only non-legislative history or statutory  
14 construction argument, is it Jones Falls, is  
15 that what it comes down to?

16 MR. SHOCKLEY: That is what we are  
17 basing our argument on. I cannot at this  
18 point say that is the only case that we are  
19 relying upon, but as of the brief in time  
20 that was the case that we are relying  
21 specifically upon for the -- our argument and  
22 position that you must make this



1 individualized request prior to finding my  
2 ability under 308.

3 JUDGE SHEEHAN: And did Jones Falls  
4 not precede three decades of Agency  
5 regulations that went exactly the opposite  
6 way, non-individualized requests were  
7 sufficient.

8 MR. SHOCKLEY: That is correct,  
9 Your Honor, that it did precede that time  
10 period of regulations, but keep in mind that  
11 it is still good case law, and while the  
12 regulations may have changed then Agency's  
13 interpretation must still be consistent with  
14 the unambiguous -- the text of section 308,  
15 and that the simple text of 308 doesn't  
16 reference permits.

17 It makes the administrator have  
18 burden to make a specific request for  
19 information. And in fact that was done in  
20 this case. The section 308 letter was sent  
21 to Service Oil, which Service Oil responded  
22 to. The effect of this case, the policy

1 effect, is to create penalty that allows or  
2 create a liability that allows stacking for  
3 the EPA to increase the penalty assessment  
4 for a party. And --

5 JUDGE SHEEHAN: Turning to the  
6 penalty issue for a moment, if we may, the  
7 two themes that seem to recur throughout your  
8 brief on the penalty issue seems to be you  
9 were in an unsophisticated part of the  
10 country not aware of these regulations, and  
11 that you had ceded all control for your  
12 permitting obligations to other parties.

13 As far as the cessation or the  
14 ceding argument goes, the ALJ was pretty  
15 clear -- lots of fact-finding in her decision  
16 there that there was no signed agreement  
17 between Service Oil and any general  
18 contractor. In fact, you were twice asked to  
19 identify a general contractor with whom you  
20 had a signed agreement and could produce  
21 none.

22 That Mr. Lenthe, the president of

1 Service Oil directly hired the contractor so  
2 he acted as his own general contractor.  
3 Service Oil identified itself as the  
4 applicant and the NOI for the permit  
5 coverage, and then was this signatory for  
6 terminating the permit coverage.

7 And a lot of text in your brief is  
8 made of your hiring the Whaley and Moore  
9 Firms to navigate the permitting regime, but  
10 as the ALJ found there was no written  
11 contract with Whaley doing that and the  
12 contract with Moore was silent on that point.

13 In fact Moore offered in its  
14 proposal to you to undertake those permitting  
15 responsibilities and Service Oil refused. So  
16 it sounds from the findings below anyhow is  
17 if far from giving control to someone else  
18 you kept that control in your hands. Can you  
19 address that?

20 MR. SHOCKLEY: Yes, Your Honor,  
21 that is an excellent question. With respect  
22 to the penalty, keep in mind this is a

1 business that has been operating in the Red  
2 River Valley for many, many years with  
3 significant relationships to the construction  
4 and engineering. And it is after all a rural  
5 area in which people still, even in large  
6 contracts like this enter into oral  
7 agreements.

8           With respect to the permitting  
9 requirements, if you would have spoken to the  
10 majority of people in the construction  
11 industry in Fargo in 2002, and referenced a  
12 storm water permit, I believe they would have  
13 probably given you a blank look. Our -- is  
14 simply --

15           JUDGE SHEEHAN: Is there any record  
16 evidence of that blank look?

17           MR. SHOCKLEY: No, Your Honor. I  
18 am just speculating. With respect to there's  
19 just not a lot of knowledge at that time  
20 regarding permits, and my client is not in  
21 the business of construction or engineering,  
22 and pursuant to his previous arrangements

1     relied upon those contractors and engineering  
2     firms to help him through this process.

3             JUDGE SHEEHAN:  But your client --

4             MR. SHOCKLEY:  If they would have

5     --

6             JUDGE SHEEHAN:  You client, as the  
7     proceedings below indicate, runs a \$140 -- a  
8     \$140 million a year business at least in '05,  
9     300 employees, 12 sites across two states.  
10    The staymark site sounded large, 15 to 20  
11    acres, a restaurant, a parking lot, retail  
12    pumps, and so on.  It doesn't sound like a  
13    very unsophisticated person in the regulatory  
14    world.

15            MR. SHOCKLEY:  Well, I think that  
16    is also an excellent question, but I think  
17    you can distinguish between the regulatory  
18    world of gas and diesel retailing compared to  
19    the regulatory world of construction.  My  
20    client is not in the business of  
21    construction, and had to rely upon  
22    individuals to help him through that

1 construction process. In reference --

2 JUDGE SHEEHAN: Well, then why  
3 didn't he hire people to undertake the  
4 regulatory requirements instead of seemingly  
5 refusing to do so and holding that power in  
6 his hands. It sounded like -- sounds like  
7 almost ahead in the same sort of attitude, I  
8 want to keep all the chits in my own pocket;  
9 I am not going to give them to somebody else.  
10 And then now you are claiming, well, no one  
11 else was involved, or no one else was helping  
12 out, so it was someone else's fault. Just  
13 doesn't add up.

14 MR. SHOCKLEY: Well, my client  
15 relied upon these individuals to help him out  
16 through the relationships that he'd had in  
17 the past.

18 JUDGE SHEEHAN: Were they signed  
19 contracts?

20 MR. SHOCKLEY: -- and specifically

21 --

22 JUDGE SHEEHAN: Were they signed

1 contracts or was it all just buddy system or  
2 oral handshakes that sort of thing.

3 MR. SHOCKLEY: It's common practice  
4 in the area that you will have handshakes and  
5 conversations regarding construction projects  
6 -- the contractor --

7 JUDGE STEIN: Is there any evidence  
8 in the record that this is the practice in  
9 the community? Can you point me to where --

10 MR. SHOCKLEY: I believe there --

11 JUDGE STEIN: -- can you point to  
12 where in the record there is evidence that  
13 the mode of dealing in this community is  
14 through oral contracts rather than written  
15 contracts?

16 MR. SHOCKLEY: I believe there was  
17 a testimony from the owner of Service Oil  
18 regarding that to a certain extent. There  
19 were no specific fact witnesses called  
20 regarding the construction industry in  
21 Fargo-Moorhead at the time.

22 JUDGE SHEEHAN: So what --

1 JUDGE STEIN: And there were oral  
2 contracts or as to other matters?

3 MR. SHOCKLEY: I believe the  
4 president of Service Oil testified that he  
5 had oral agreements with the contractor, and  
6 also with Service Oil.

7 JUDGE SHEEHAN: And what  
8 responsibilities do you think Service Oil has  
9 to figure out what the regs require and  
10 comply with them instead of being ignorant of  
11 them, and in the dark? What should a company  
12 like Service Oil do to make sure it is  
13 fulfilling its responsibilities?

14 MR. SHOCKLEY: Well, I think, in  
15 2002, Service Oil acted appropriately given  
16 the area in that he sought out construction  
17 contractors and engineering professionals in  
18 the business to advise him. Quite simply, he  
19 was unaware of any type of regulatory regime  
20 requiring storm water permits. He just  
21 didn't have any way to recognize that he  
22 needed this, and he sought out these



1 individuals to tell him what permits were  
2 needed, what permits were not, and even  
3 though he may not have had written  
4 agreements, it was his common business  
5 practice to engage in this --

6 JUDGE SHEEHAN: Why then, when the  
7 Moore contracting came to Service Oil, and  
8 said, "We will help you obtain permits,"  
9 those are the words in the ALJ's decision  
10 below, and evidently Service Oil's said,  
11 "Thank you very much, no."

12 So it seems like from that finding  
13 alone Service Oil was on notice there was a  
14 permitting world out there they needed to  
15 deal with. So why didn't it then deal with  
16 that world.

17 MR. SHOCKLEY: I believe that it  
18 was an understanding that that was related to  
19 building permits. I am not a 100 percent  
20 sure on that I'd have to check the record.  
21 I'd be happy to submit a memorandum on that  
22 issue to the Board, if the Board so desire.

1                   JUDGE SHEEHAN: Turning to your  
2 deterrence argument. Your point is that  
3 because the city of Fargo at some point came  
4 up with a regulation of building permit  
5 regulation that would not allow the issuance  
6 of a building permit, unless there was proof  
7 of construction storm water coverage first.

8                   First of all, where is that  
9 requirement that you seem to think is  
10 embedded in the Clean Water Act embedded in  
11 the Clean Water Act that this ordinance is  
12 required by the act? And number two, even if  
13 it were required, and even if it were some  
14 sort of local deterrence, not general  
15 deterrence, but local deterrence, why then  
16 isn't a company getting this sort of  
17 construction permit for you to then than  
18 disregard the permit.

19                   It sounds like they only need to  
20 show that they have the permit coverage, but  
21 the building ordinance doesn't at all require  
22 that compliance with that permit occur.

1 MR. SHOCKLEY: Thank you, Your  
2 Honor, I'd like to clarify that it is not our  
3 position that the Clean Water Act requires a  
4 local jurisdiction to enact such an  
5 ordinance. Our position is that it could not  
6 -- this type of violation could no longer  
7 happen in the Fargo-Moorhead area because the  
8 contractors now have to obtain a storm water  
9 permit when they --

10 JUDGE SHEEHAN: But obtaining the  
11 permit isn't the same thing, however  
12 wonderful, it's not the same thing as  
13 complying with the permit. You could go to  
14 the building people and present the copy of  
15 your construction permit, get your building  
16 permit, and then proceed to the next state of  
17 violate the terms of the permit. Why does  
18 having the permit, "condition" as you call it  
19 some how cover compliance in the future?

20 MR. SHOCKLEY: I think it goes to  
21 knowledge, Your Honor, quite simply,  
22 construction industry now knows that they

1 have to obtain these permits without that  
2 ordinance being in place. Unless they --

3 JUDGE SHEEHAN: Does the building  
4 permit get ganged if there is non compliance  
5 with the underlying construction permit?  
6 Does the city check to see that the permit is  
7 being abided by, or just issue its building  
8 permit and that's the last you hear from the  
9 city?

10 MR. SHOCKLEY: I do not know about  
11 the specific practices of the city of Fargo,  
12 and I don't believe there was any testimony  
13 regarding the specific practices regarding  
14 inspections of the city of Fargo and below,  
15 so I would be unable to answer that question.

16 JUDGE SHEEHAN: When you went  
17 through the permit application process in the  
18 fall of '02, in I think November of '02 you  
19 having been alerted to the need for the  
20 permit, obtained permit coverage, is that  
21 right?

22 MR. SHOCKLEY: That is correct,

1 Your Honor.

2 JUDGE SHEEHAN: Okay. Then why you  
3 make much in your brief of the fact that you  
4 never saw the permit. You got the coverage,  
5 but you never saw it, weren't you curious?  
6 You had a permit, you knew the permit must  
7 require some obligation from you. Why didn't  
8 you call somebody, check a website make  
9 inquiries to find out what the permit  
10 required?

11 MR. SHOCKLEY: Well, there was a --  
12 there is testimony in the record below  
13 indicating there was a struggle with the  
14 contractor to find out what was required of  
15 the permit. There is actually e-mails  
16 regarding how we actually receive the permit.

17 And I believe it really goes to the  
18 knowledge of the construction industry at  
19 that time, they thought this was much like a  
20 building permit and that you received the  
21 building permit and it has instructions on  
22 it, and you post it on a building. I think

1 that really shows the knowledge of the  
2 construction industry and they thought this  
3 was a permit much like a building permit  
4 rather than a comprehensive set of  
5 regulations.

6 JUDGE SHEEHAN: But it sounds like  
7 from what you just said, if you had a  
8 building permit, you would see nailed to the  
9 wall what the requirements were. Why didn't  
10 you seek to find out what the storm water  
11 permit, nailed to the wall, would require?

12 MR. SHOCKLEY: I think there was --  
13 there is testimony and e-mails and exhibits  
14 below indicating there was this struggle by  
15 my client and his agents to find out what  
16 exactly was required under that permit.  
17 There was no intent not to follow the permit  
18 once they obtained it. They were trying to  
19 find out what the permit required of them.  
20 What they could and could not do and they  
21 were just simply unaware -- and they started  
22 to follow it --

1 JUDGE STEIN: Did they ask the  
2 permitting authority for a copy?

3 MR. SHOCKLEY: I believe they did,  
4 I believe that's also in the record if it had  
5 been asked for by, if they received a permit  
6 from the North Dakota Department of Health  
7 and if so where could they post it?

8 JUDGE STEIN: I am not asking if  
9 they received it. But if your allegation is  
10 they didn't and your client couldn't get it  
11 from the contractor, why didn't your client  
12 just call up the person that issued it and  
13 ask for a copy?

14 MR. SHOCKLEY: I believe my client  
15 specifically was relying upon the contractor  
16 and the engineer to obtain that type of  
17 information, and --

18 JUDGE SHEEHAN: I am looking at the  
19 November 15th letter from the North Dakota  
20 Department of Health that is addressed to one  
21 of your contractors. But it's CC-ing Mr.  
22 Lenthe, the president of Service Oil and it

1 says, "Here's the website where at least you  
2 can get the forms to fill out the  
3 application." And it references coverage  
4 under the storm water permit and even then it  
5 gives a permit number. Why couldn't you just  
6 call Ms. Abbie, whatever her name is, and  
7 ask for the permit?

8 MR. SHOCKLEY: I specifically, Your  
9 Honor, I believe that the reason why is that  
10 there was an unfamiliarity with the  
11 permitting process, and what was required  
12 under the permit. My client --

13 JUDGE SHEEHAN: But you had her  
14 name and her phone number on this letter.  
15 The person sending the letter was obviously  
16 someone you could pick up the phone and call  
17 her. Number is right at the bottom of the  
18 letter; it doesn't seem like it takes a lot  
19 of effort for anybody much less somebody as  
20 seemingly sophisticated as the president of  
21 Service Oil to figure out a phone number.

22 MR. SHOCKLEY: Well, Your Honor, I



1 believe that my client relied specifically  
2 upon his contractors, and if he were to  
3 receive the letter like that he would have  
4 told his contractors to take care of the  
5 issue, simply because he is not in the  
6 construction industry and was relying upon  
7 these individuals to help them navigate  
8 through the process.

9 JUDGE WOLGAST: I wanted to clarify  
10 one point, Judge Biro here cited to legal  
11 theories for liability one of which was  
12 section 308, and I wanted to clarify that you  
13 are not challenging her alternate theory of  
14 liability.

15 MR. SHOCKLEY: This is -- Your  
16 Honor, that is in our brief that is correct.  
17 We did not challenge the alternative theory  
18 of liability; we are challenging theory of  
19 liability under sections 308. And there is a  
20 -- I would imagine there is a certain desire  
21 for this Board to simply ignore our appeal  
22 because -- we are only challenging one ground

1 of liability.

2 But I would direct you to page 56  
3 of the initial decision in which as part of  
4 the penalty calculation, Judge Biro indicated  
5 that she was considering the complete failure  
6 to apply and obtain an ND -- NPDES permit  
7 prior to starting.

8 And section 308 would certainly --  
9 violation of section 308 would certainly  
10 contribute to an increase in the penalty  
11 calculation, and therefore that is why we are  
12 challenging the grounds of liability under  
13 section 308. And I also believe that there  
14 is a -- there is substantial unfairness to  
15 how this section 308 violation came to the  
16 court.

17 The EPA brought a motion for  
18 accelerated decision on counts 1 and 2. On  
19 count 2, I believe Judge Biro found  
20 accelerated -- found for the EPA and left  
21 count 1 open to be tried at a hearing and the  
22 reason was we brought to the Court's

1 attention that the EPA was still required to  
2 prove the factual basis for finding of  
3 violation that a discharge did occur.

4 In her opinion, she noted that  
5 there may be some other type of violation  
6 under one of several sections, and it was  
7 from that point that the EPA then amended its  
8 complaints to include this section 308  
9 violation.

10 And it was substantially unfair and  
11 at that point in time to amend the complaint,  
12 we then -- it was then tried which we  
13 preserved our objections regarding the  
14 section 308 complaint, and Service Oil was  
15 found liable under the initial decision with  
16 respect to the 308 claim.

17 And that's why we're challenging it  
18 because that contributes to the penalty  
19 calculation in this case, and also it was  
20 unfairly -- in our -- my client's position,  
21 it was unfairly raised and prejudicial to my  
22 client prior to the start of the trial.

1                   JUDGE STEIN:  And what was the  
2  nature of the prejudice to have an alternate  
3  theory of liability that you didn't apply for  
4  a permit?  What was the prejudice?

5                   MR. SHOCKLEY:  I --

6                   JUDGE STEIN:  Was that detailed  
7  below?

8                   MR. SHOCKLEY:  I think, Your Honor  
9  -- I believe that was detailed below in the  
10 briefs that were submitted to the court that  
11 it was a late time-period to submit the  
12 alternative grounds for liability.

13                   It was on the eve of trial and  
14 therefore we had an additional ground to  
15 prepare for.  It should be recalled that the  
16 EPA had nearly 2 years since the time it  
17 brought the complaint, to the time that it  
18 amended the complaint to this alternative  
19 grounds of liability.

20                   JUDGE STEIN:  But the ALJ granted  
21 the motion and you had the opportunity both  
22 during the trial and during briefing to argue

1     why section 308 liability was inappropriate,  
2     so what was the nature of the prejudice?

3                 MR. SHOCKLEY:  It -- thank you,  
4     Your --

5                 JUDGE STEIN:  I mean it seems to me  
6     it's really more of a legal challenge than  
7     necessarily a factual issue.

8                 MR. SHOCKLEY:  Well, thank you,  
9     Your Honor.  The nature of the prejudice was  
10    reflected below in that it was a late  
11    amendment to the complaint prior to the CERTA  
12    trial.  You are correct, Your Honor, in that  
13    it was argued at the hearing and it was also  
14    argued in post- hearing briefs and it is also  
15    argued before this tribunal.

16                And therefore it is a legal issue  
17    at this point but it was prejudicial at the  
18    time that the amendment was allowed.

19                JUDGE SHEEHAN:  Okay, thank you,  
20    Mr. Shockley.

21                MR. SHOCKLEY:  Thank you.

22                JUDGE SHEEHAN:  Mr. Ryan.

1 MR. RYAN: Thank you, Your Honor.  
2 Before I proceed, I'd like to take just a  
3 second to introduce my co-counsel at the  
4 table, I have Mr. Gary Jones from the Office  
5 of Enforcement and Compliance Assurance with  
6 me. I have Ms. Elyana Sutin, who is my  
7 co-counsel at hearing from Service Oil case  
8 from Region 8, and I have Mr. Paul Bengser  
9 from the office of General Counsel.

10 I will first answer the question  
11 posed by the Board in its order scheduling  
12 hearing. I will then briefly summarize my  
13 case and then proceed into the details.  
14 Excuse me -- the question posed by the Board  
15 is whether an individualized request is a  
16 precondition to liability under section 308  
17 of the Clean Water Act, and the answer to  
18 that is no.

19 There are four reasons why the  
20 administrative law judge's decision should be  
21 affirmed in this case. One, review of the  
22 claims brought -- excuse me, alleged in count

1 1 of the complaint that the violation of  
2 122.21 and 122.26 of 40 CFR, is precluded in  
3 this case because Respondent is challenging a  
4 regulation in the context of an enforcement  
5 action.

6 Two, Section 308 of the Clean Water  
7 Act grants the administrative broad authority  
8 to collect information both through  
9 individualized requests and through  
10 regulation.

11 Three, the EPA issued such a  
12 regulation here, 122.21A, the 122.26, which  
13 is a valid exercise of the administrator's  
14 authority under the Act, and four, the  
15 administrative law judge's assessment of the  
16 facts of the case in applying the section  
17 309(g) penalty factors, in assessing her  
18 penalty was appropriate -- inappropriate  
19 exercise of her discretion.

20 Let me address you to these points  
21 in detail. First, this 308 claim should not  
22 be before the Board today. These clearly

1 challenging the regulation, 122.21, if you  
2 look at count 1 of the complaint -- of the  
3 amended complaint, we are not alleging  
4 primarily a violation of 308, we are alleging  
5 primarily a violation of the duty to apply  
6 which is in section 122.21.

7 JUDGE SHEEHAN: Well, isn't it  
8 really both? That's -- I think what you're  
9 saying is accurate, but certainly there is a  
10 lot of rhetoric about the problem with the 08  
11 being interpreted in this way.

12 MR. RYAN: That's correct, Your  
13 Honor, but if you look at section 309, the  
14 case was brought under section 309. 309  
15 states that only violations of 308, 301, and  
16 other enumerated sections can be a basis for  
17 309 violation.

18 You get to the 308 violation which  
19 is a enumerated in 309 through the violation  
20 of the regulation. But for a 122.21, we  
21 would not have a count 1 violation. There is  
22 no general requirement out there in the ethos



1 for someone to apply for a permit. Only  
2 through regulation or through an order is  
3 someone required to do, take that affirmative  
4 act.

5 In this case, 122.21 is the basis  
6 for our count 1. What -- in 308 only  
7 derivatively. So what --

8 JUDGE SHEEHAN: Well, the 122.21 is  
9 derived from 308 --

10 MR. RYAN: That's right.

11 JUDGE SHEEHAN: -- and if 308 is  
12 the soil and 122.21 is the tree and the soil  
13 is defective, or the soil can not give birth  
14 to this kind of a tree under their legal  
15 argument, it seems like it is an attack on  
16 using 308 authority in this way, as well as  
17 using the regs in this way.

18 MR. RYAN: It is Your Honor, but if  
19 you look at section 509(b)(2) of the Act in  
20 section 40 CFR 2238(c), it expressly -- the  
21 Congress expressly forbid this kind of  
22 collateral attack on regulations in the

1 context of an enforcement action.

2 Congress spoke directly to this  
3 point. He is -- he is 20 years late  
4 challenging the regulation.

5 JUDGE STEIN: The checks to 509, if  
6 I recall it specifically preclude judicial  
7 review. How do you address that particular  
8 language in light of this Board's precedents  
9 on that issue?

10 MR. RYAN: This Board addressed  
11 that very issue in Bradenpoint, in which it  
12 said that sections -- parts 122 through 125  
13 are essentially akin to judicial review or --  
14 excuse me -- would -- excuse me -- that the  
15 board would, under extraordinary  
16 circumstances, review regulations and I  
17 believe that in the Bradenpoint case, you  
18 cited to the issue where prior regulation had  
19 been invalidated.

20 But that the -- it would  
21 nevertheless generally abide by the NRDC and  
22 other -- and its progeny cases saying that

1 you know, regulations would not be  
2 collaterally attacked in the enforcement  
3 action.

4 And if one looks at the -- if one  
5 looks at 2238(c) of regulations, it  
6 specifically states, actually the  
7 administrative for which review could have  
8 been attained under section 509(b)(1) shall  
9 not be subject to review in an administrative  
10 proceeding. So our regulations speak  
11 directly to that point.

12 JUDGE SHEEHAN: Turning to the  
13 penalty issue for a moment, it seems like --  
14 it seems as if you argue that the penalty  
15 analysis and finding here was based entirely  
16 on 301, so there's really no need to stray  
17 into 308 country, is that right?

18 It doesn't differentiate the  
19 penalty analysis, doesn't differentiate  
20 between 301 and 308, and therefore no need to  
21 touch 308, because it's all under the 301  
22 mantel, is that correct?

1 MR. RYAN: Not entirely correct,  
2 Your Honor.

3 JUDGE SHEEHAN: Well, you used the  
4 word differentiate in your brief as if it's  
5 all one big model and we don't need to get to  
6 308 because it's all 301. But even the sites  
7 that Mr. Shockley gave is page 56 --

8 MR. RYAN: Right.

9 JUDGE SHEEHAN: -- of the ALJ's  
10 finding, page 63 and other places where it's  
11 clearly -- her analysis would be the  
12 culpability or nature of circumstances in  
13 extent or premised on failure to obtain the  
14 permit, which gets back to 308.21 ground --

15 MR. RYAN: That's correct, Your  
16 Honor.

17 JUDGE SHEEHAN: So why do you say  
18 there is no basis for looking at the failure  
19 to obtain a permit?

20 MR. RYAN: Well, if he is -- well,  
21 if Your Honor looks at the -- excuse me -- if  
22 Your Honor looks at the number of violations,

1 and that same reference on page 56, the  
2 presiding officer referenced I believe 7  
3 months of violation which would pencil out to  
4 approximately 210 days of violations.

5           Doing the quick math, \$11,000 per  
6 day times 210, you're -- one reaches  
7 statutory maximum penalty very quickly.  
8 Proposed penalty in this case was \$40,000  
9 which was substantially below that. If it --  
10 the presiding officer clearly conflated the  
11 two 301 and 308 in that one -- in that  
12 sentence of page 56 --

13           JUDGE SHEEHAN: But you agree that  
14 there are 308 pieces, to use that word and --

15           MR. RYAN: Yes, I would agree with  
16 that, Your Honor, yes, there are a series of  
17 308 piece. However if you look at the  
18 references to the discharges without a permit  
19 for approximately 7 months, that's 210 days  
20 of violations. Given de novo review, the  
21 Board certainly can review this decision and  
22 find that there is sufficient number of

1 violations to section 301, discharging  
2 without a permit to substantiate the penalty  
3 of this -- well -- and well below the  
4 statutory maximum.

5 JUDGE STEIN: Apart from your  
6 argument that it's unnecessary, is the agency  
7 objecting to the Board's review under 308, or  
8 you're just arguing that it's unnecessary for  
9 us to reach that issue?

10 MR. RYAN: I believe it's  
11 unnecessary. Well, no, I believe that we are  
12 objecting, Your Honor, under section 509(b),  
13 one that this -- the Board should not be  
14 reviewing the section -- the validity --

15 JUDGE STEIN: No, I'm not asking  
16 whether you're looking -- I'm not asking you  
17 whether or not we're looking at the  
18 underlying regulation, I'm asking whether the  
19 Agency is objecting to the Board's  
20 consideration of a challenge to the 308  
21 finding of liability? And by virtue of the  
22 fact that you brought a case under 308, the

1 ALJ has issued a decision under 308, why is  
2 it that this Board can't consider that  
3 challenge?

4 MR. RYAN: 40-CFR 2238(c), Your  
5 Honor.

6 JUDGE STEIN: So in other words,  
7 your argument is that for any regulation that  
8 the agency has issued that we can't consider  
9 a respondent's appeal by virtue of a  
10 provision like 509?

11 That all arguments that a party  
12 might have as to have that regulation is  
13 applied under the circumstances as precluded  
14 by 509? I mean, that strikes me as, you  
15 know, quite frankly, breathtaking.

16 MR. RYAN: Well, 1 -- 2238(c) which  
17 is the regulation at issue here and regarding  
18 review of collateral attacks to regulations  
19 clearly forbids the Board that challenge. I  
20 mean, the Board certainly can consider it,  
21 but it can't be a -- the Board cannot reverse  
22 a validly promulgated regulation --

1                   JUDGE STEIN: No one's asking --  
2   that's not the question that I'm asking you.  
3   I'm asking you a very different question.

4                   The question that I'm asking you is  
5   given that you've told us that it's  
6   unnecessary to reach the 308 question, if we  
7   were to disagree with you and conclude that  
8   in -- we believe that it is necessary to  
9   reach the 308 claim, are you objecting to our  
10  doing that and it seems to me you're saying  
11  yes. Is that correct?

12                  MR. RYAN: Yes, that is correct,  
13  Your Honor. We should not be reviewing the  
14  308 claim in this form.

15                  JUDGE SHEEHAN: Even the penalty  
16  aspect as opposed to the liability aspect?

17                  MR. RYAN: Well, the penalty  
18  aspect, of course, the judge relied in part  
19  on 308 for her violation but in terms of the  
20  Respondent's challenge to whether we can  
21  bring a 308 claim -- that he's missed the  
22  boat on that one.



1           JUDGE STEIN: Well, I think --  
2 quite frankly I think the Agency is missing  
3 the boat on this one. If you know, you're  
4 saying that we can't review this issue of  
5 liability then why is it that the Agency is  
6 bringing a claim under 308?

7           I mean, I think the breadth that  
8 you're trying to sweep under this 509, it  
9 goes well beyond what it is that we have  
10 historically precluded under you know, under  
11 509.

12           MR. RYAN: Well, Your Honor, if --

13           JUDGE STEIN: The Appellant has a  
14 right to appeal.

15           MR. RYAN: Of course the Appellant  
16 has a right to appeal, I agree with that and  
17 the Appellant also has the right to appeal  
18 any factual findings that might underlie a  
19 violation. That's not the case here. He's  
20 not challenging whether he applied for a  
21 permit, he's not challenging whether he's  
22 submitted the proper applications.

1           What he is challenging is EPA's to  
2 promulgate a regulation 122.21(a). That's  
3 his challenge and that challenge could be  
4 heard.

5           JUDGE STEIN: Right. As part of  
6 our consideration to this challenge to 308  
7 liability, we would of course look at the  
8 issue of whether that challenge is precluded  
9 but I think that's a -- that's step two. To  
10 me that's not step one, I mean, I think you  
11 first have to get to the question of whether  
12 or not you look at 308 at all. The Agency  
13 has argued we shouldn't reach it, we may or  
14 may not agree with it.

15           If we disagree with the agency,  
16 then we will go ahead and look at 308;  
17 whether we then now get to your step two I  
18 think is really a separate question from the  
19 question that I was attempting to ask.

20           MR. RYAN: Well, if the question  
21 you were attempting to ask Your Honor, and  
22 forgive me if I'm missing it, was that

1 whether the 308 element of the judge's  
2 decision, the ALJ's decision should be  
3 reviewed, of course it should. All the  
4 elements of all of the ALJ's decisions should  
5 be reviewed. The question is can -- and what  
6 I was trying -- what I was answering was  
7 whether they can collaterally attack a  
8 122.21.

9 JUDGE STEIN: Right, now I  
10 understand your position on that.

11 MR. RYAN: Okay.

12 JUDGE STEIN: Okay, I think we're  
13 clear at this point.

14 MR. RYAN: Thank you, Your Honor.

15 JUDGE SHEEHAN: Another penalty  
16 question, Mr. Ryan, the record below  
17 indicates that EPA went to Fargo in the fall  
18 of '02 because there were a "low number" --  
19 that from the opinion below -- of permits  
20 being received.

21 And then you go out and at least  
22 according to the Respondent, 12 of the 13

1 sites inspected at the time were not  
2 compliant. So let's assume that this area  
3 was largely off the regulatory map, at least  
4 out of the -- away from the eyes of EPA for  
5 some period before this action.

6 If that's true, does that have any  
7 effect in your view on the penalty in terms  
8 of the failure of the agency if any, to do  
9 outreach or to keep an enforcement presence  
10 there that would alert people to the need to  
11 stay in compliance?

12 Is there any penalty break to be  
13 accorded if this is true to an area where  
14 there hadn't been much EPA presence in recent  
15 history?

16 MR. RYAN: No, and the reason why  
17 is because the there -- the presiding officer  
18 found in her initial decision that there was  
19 in fact outreach in the area, and there were  
20 in fact, I believe the number was 200 permits  
21 issued in North Dakota and in the Fargo area  
22 previous year by the state. And it's a

1 strict liability statute. Everyone is --

2 JUDGE SHEEHAN: Well, I'm not  
3 talking about liability, I'm talking about  
4 penalty. So is there any penalty  
5 consideration to be given in circumstances,  
6 along the lines I laid them out, not  
7 according to what the Judge Biro said --

8 MR. RYAN: Right.

9 JUDGE SHEEHAN: -- I'm just asking  
10 the question theoretically in some sense, if  
11 it is as Respondent says, does that affect  
12 the penalty?

13 MR. RYAN: Under this particular  
14 factor, no. I mean, when it comes to the  
15 issue of what was in the respondent's mind,  
16 what was his general culpability, she did  
17 give some credit to that, but in terms of  
18 what the local community knew because of  
19 perhaps a high rate of non-compliance then I  
20 would say no, we should not -- we do not give  
21 credit to that.

22 JUDGE WOLGAST: Another question as

1 to penalty. Am I correct here that Service  
2 Oil here received notice of the action on --  
3 the state's action on the permit via a letter  
4 but that letter didn't also contain the  
5 permit itself?

6 MR. RYAN: That's correct, Your  
7 Honor.

8 JUDGE WOLGAST: And why would that  
9 be? Why wouldn't the -- why here didn't the  
10 permitting agency make sure that the  
11 permittee received the permit and should that  
12 have been taken into account in assessing a  
13 penalty?

14 MR. RYAN: It was taken into  
15 account in assessing the penalty, but to  
16 answer your first question was -- why would  
17 -- why did the state not provide a copy of  
18 the permit, I don't believe the record  
19 reflects that.

20 It apparently was not a practice of  
21 the state to provide copies. The letter as  
22 Justice Sheehan stated clearly set forth the

1 website and the judge -- and the ALJ in the  
2 decision said in her opinion you could have  
3 gone to the website and downloaded the  
4 permit.

5 JUDGE SHEEHAN: Well, not exactly.  
6 The letter says that you can go to the  
7 website to obtain the forms to fill out -- to  
8 get permit coverage. It says nothing about  
9 the website containing the permit.

10 MR. RYAN: Well, I believe the  
11 record reflects that the website did have --  
12 in fact have the permit on it.

13 JUDGE SHEEHAN: But the letter  
14 didn't say that, is that correct?

15 MR. RYAN: That's correct, the  
16 letter didn't say that, but as Your Honor  
17 pointed out earlier they could have picked up  
18 the phone and made a phone call. They  
19 didn't. They made very few attempts to  
20 actually get the permit. They just started  
21 guessing as what they needed to do.

22 JUDGE SHEEHAN: Going back for a

1 moment to the general 308 issue here --

2 MR. RYAN: Yes.

3 JUDGE SHEEHAN: You added 308.21  
4 when you amended the compliant, it wasn't in  
5 the initial complaint?

6 MR. RYAN: That's correct.

7 JUDGE SHEEHAN: The Respondent  
8 references the Eric Schaffer memo of 2000, I  
9 believe, saying that 308 is good grounds to  
10 use in enforcement actions if no permit has  
11 been applied for. Is the use of 308 in these  
12 circumstances -- the use of 308 to enforce  
13 against somebody who has not obtained a  
14 permit common?

15 It doesn't seem to have been the  
16 first thought in Region 8's mind because it  
17 only appeared in the amended complaint, but  
18 is it a common practice to use this authority  
19 in these circumstances?

20 MR. RYAN: Yes, it is.

21 JUDGE SHEEHAN: In Region 8, or  
22 nationally, if you know?



1           MR. RYAN: I believe nationally. I  
2 mean, certainly in my region, Region 10, and  
3 I believe now in Region 8, I mean, national  
4 -- nationally it does as well, Your Honor.

5           JUDGE SHEEHAN: And I believe we  
6 might have -- I might have cut you off a bit  
7 earlier when you were beginning to discuss  
8 some of the outreach and compliance  
9 assistance that had to be done in this area.  
10 Can you go into that a bit more? What EPA  
11 had done in the Fargo area to spread the  
12 word?

13           MR. RYAN: I believe that the  
14 primary actions were taken by the state, not  
15 by EPA.

16           JUDGE SHEEHAN: Okay.

17           MR. RYAN: And the state witness  
18 who testified, testified that they had done  
19 numerous mailings to construction companies  
20 and engineering firms in the area, and that  
21 the fact that they had issued over --  
22 approximately 200 permits in the state and in

1 the Fargo area indicated it's certainly --  
2 people were aware of the need to get permits.

3 JUDGE WOLGAST: And is that part of  
4 the record?

5 MR. RYAN: And they also had  
6 information sessions, I believe, too.

7 JUDGE WOLGAST: And is that  
8 reflected in the record?

9 MR. RYAN: That would be in the  
10 record, Your Honor. I don't have the site  
11 unfortunately. I can provide it to you  
12 though.

13 JUDGE STEIN: Mr. Ryan, counsel for  
14 Service Oil pointed us to or argued that his  
15 client was prejudiced by virtue of the  
16 agencies having raised this 308 issue on the  
17 eve of the hearing. Could you respond to  
18 that?

19 MR. RYAN: There was -- no -- yes,  
20 I could, Your Honor. There was no prejudice.  
21 I mean, it was -- the facts that were at  
22 issue before the judge did not change as a

1 result of the adding the 308 claim.

2 The initial compliant, alleged  
3 failure to comply -- apply for permit simply  
4 alleged a different legal ground. Changing  
5 the legal grounds late in the game doesn't  
6 really change his ability to prepare for  
7 hearing and he was clearly aware of that  
8 claim at that hearing and prepared for it and  
9 put on this case.

10 JUDGE WOLGAST: How --

11 MR. RYAN: -- prejudice.

12 JUDGE WOLGAST: -- how soon before  
13 the hearing was the amended complaint  
14 submitted?

15 MR. RYAN: It was I believe a month  
16 or two, wasn't it, yes.

17 JUDGE WOLGAST: It was a month or  
18 two?

19 MR. RYAN: I believe. I don't know  
20 off the top of my head, Your Honor.

21 JUDGE WOLGAST: And did Service Oil  
22 ask for extra time to respond to the 308

1 claim?

2 MR. RYAN: I don't believe they  
3 did, Your Honor.

4 JUDGE WOLGAST: Thank you.

5 JUDGE SHEEHAN: Okay, thank you,  
6 Mr. Ryan. Would you -- do you have more? I  
7 should ask.

8 MR. RYAN: No, Your Honor, I'm  
9 done. Thank you.

10 JUDGE SHEEHAN: Five minutes, Mr.  
11 Shockley.

12 MR. SHOCKLEY: Okay, thank you,  
13 Your Honor.

14 JUDGE SHEEHAN: If you wish to --

15 MR. SHOCKLEY: Thank you, Your  
16 Honor. I'd just like to clarify once again  
17 that this case is not about the authority of  
18 an agency to issue regulations. This is  
19 about the application of a regulation  
20 pursuant to a statute to a particular set of  
21 circumstances in finding a violation for the  
22 failure to provide -- apply for a permit

1 pursuant to section 308. This is not a  
2 collateral attack on their authority to issue  
3 a regulation, rather it is the application  
4 and its interpretation by the agency of how  
5 that should be applied in specific  
6 circumstances.

7 JUDGE STEIN: And let me interrupt  
8 -- excuse me, let me interrupt you there. So  
9 the agency has promulgated this regulation  
10 under the authority of 308.

11 Are you saying that they can  
12 promulgate the regulation and there can be a  
13 regulation that requires you to apply for a  
14 permit promulgated under 308 but then when  
15 the agency goes to enforce it, they can't  
16 enforce it under 308 -- under 309,  
17 referencing 308? I mean, I'm having  
18 difficulty understanding how it is they have  
19 the authority to promulgate the regulation,  
20 but then how is it that that regulation  
21 becomes enforceable if in each and every  
22 circumstance where they attempt to enforce

1 it, a company like yours can come in and say  
2 that they have no authority to enforce it?

3 MR. SHOCKLEY: Well, that is an  
4 excellent question, Your Honor, and I believe  
5 it's a distinction -- a careful distinction  
6 that must be made between the authority to  
7 undertake an act and the substance of the  
8 act. And what we're really talking about is  
9 the substance of their actions, whether or  
10 not the enforcement of 40 CFR section 120.21,  
11 which requires a permit -- a person to apply  
12 for a permit, can be found as a violation  
13 under 308. And 308 --

14 JUDGE STEIN: Well, if it can't be  
15 found as a violation under 308, under what  
16 authority would it be found as a violation?  
17 I mean, how would they enforce that  
18 provision?

19 MR. SHOCKLEY: Well -- well, I  
20 believe Your Honor that --

21 JUDGE STEIN: Aren't you  
22 essentially saying that there's sort of a

1 null set here? If they can't enforce it  
2 under 308, then how would they enforce that  
3 regulation?

4 MR. SHOCKLEY: Well, the remedy for  
5 the EPA would seem to be enforcing -- taking  
6 enforcement action against an individual who  
7 is discharging sediments or other pollution  
8 into waterways without a permit.

9 JUDGE STEIN: Well, that's a -- but  
10 that's a different provision. I mean, there  
11 is a regulation on the books that says  
12 there's an obligation to apply for the permit  
13 and that is a very important obligation and  
14 it's a broad applicability, potentially  
15 applicable to hundreds, thousands -- hundreds  
16 of thousands as potentially facilities across  
17 the country and it seems to me that under  
18 your argument that regulation -- if we were  
19 to accept your argument, how could the agency  
20 enforce that regulation? I mean, that can't  
21 be what Congress intended?

22 MR. SHOCKLEY: Well, respectfully,

1 Your Honor, I believe that section 308's  
2 purpose is a maintenance, monitoring  
3 equipment entry and access to information  
4 section giving the authority to the Agency to  
5 collect information --

6 JUDGE SHEEHAN: Why can't that  
7 information be in the form of a permit  
8 application? Why is a permit application  
9 somehow not information being sought by the  
10 Agency?

11 MR. SHOCKLEY: Well, I believe Your  
12 Honor that a close strict reading of section  
13 308 does not include any -- it references a  
14 collection of information and issuances of  
15 specified individualized requests for  
16 information.

17 JUDGE SHEEHAN: Even though the  
18 word "individualized" is nowhere to be found  
19 on the face -- unambiguously to use your word  
20 of 308, is that right? You say it's plain  
21 and it's unambiguous but you can't give us  
22 any word or words to back that up, it seems.



1 MR. SHOCKLEY: Well, Your Honor, it  
2 simply does not include the authority to go  
3 beyond making specific request to find a  
4 violation for 308.

5 It's a information gathering  
6 section and essentially our position is that  
7 122.21 is an application requirement, it's  
8 not a requirement that's specific for  
9 information.

10 It's just you must apply and it's  
11 for information gathering and record keeping  
12 only. In the event that they issue an  
13 individualized request, then a violation of  
14 308 can be found, if the facts so indicate a  
15 failure to respond to a section 308  
16 information request. And that's what was  
17 done in this case. They made a section 308  
18 information request, which subsequently was  
19 responded to.

20 By saying that it is a section 308  
21 violation not to apply for a permit, which is  
22 a generalized requirement buried in a

1 regulation you're essentially holding every  
2 individual who has no knowledge of the  
3 permitting requirements culpable under  
4 section 308 even though the administrator,  
5 even though it -- section 308 specifically  
6 references a duty advertent upon the  
7 administrator to require the owner or  
8 operator of any point source to establish.  
9 And it seems that the specific language of  
10 section 308 is pointed towards owner or  
11 operator referencing a specific reference to  
12 individualized requests.

13 JUDGE SHEEHAN: Okay, I think -- we  
14 thank you. I think we have it. Thank you  
15 all.

16 MR. SHOCKLEY: Thank you, Your  
17 Honor.

18 JUDGE SHEEHAN: We are adjourned.

19 SPEAKER: All rise.

20 (Whereupon, at 12:00 p.m., the  
21 HEARING was adjourned.)

22 \* \* \* \* \*

C E R T I F I C A T E

This is to certify that the foregoing  
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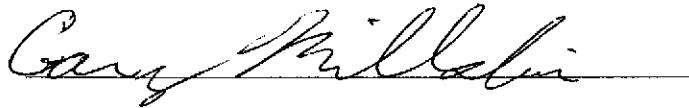
SERVICE OIL, INC.

BEFORE: ENVIRONMENTAL APPEALS BOARD

DATE: JUNE 5, 2008

PLACE: WASHINGTON, D.C.

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the aforementioned matter, as electronically  
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GARY MILLSTEIN