IN RE SERVICE OIL, INC.

CWA Appeal No. 07-02

FINAL DECISION AND ORDER

Decided July 23, 2008

Syllabus

Respondent, Service Oil, Inc., challenges an Initial Decision issued by Administrative Law Judge, Susan L. Biro (the "ALJ"), finding Respondent liable for two counts of alleged violations of the Clean Water Act ("CWA" or "Act"). Region 8 of the U.S. Environmental Protection Agency (the "Region" or "Complainant") filed the two-count complaint and amended complaint, alleging: (1) that Respondent violated sections 308, 301(a) and 402(p) of the CWA, and their implementing regulations, 40 C.F.R. §§ 122.21, 122.26, by failing to apply for, and obtain, on or before the date it commenced construction activities at its Stamart site located in Fargo, North Dakota, a North Dakota Pollutant Discharge Elimination System ("NDPDES") permit authorizing storm water discharges from the site (Count 1); and (2) that after Respondent obtained the required NDPDES permit, it failed to conduct storm water inspections at the requisite frequency and/or to record or maintain inspection records on-site, in violation of the permit (Count 2).

The ALJ found Respondent liable on both counts and imposed a total civil penalty of $35,640. Respondent challenges certain aspects of the Initial Decision on appeal. Specifically, Respondent challenges the Count 1 liability determination pertaining to CWA section 308(a) and 40 C.F.R. section 122.21 arguing, *inter alia*, that the failure to apply for a permit cannot be deemed a violation of section 308 because a "precondition" of section 308 liability is an "individualized" request or order by EPA. In addition, Respondent questions the final penalty amount by challenging particular components of the penalty (i.e., culpability determination, "deterrence," and circumstances of the violations), and arguing that the penalty in this case should reflect only the uncontested economic benefit of its noncompliance (i.e., $2,700).

Held: The Environmental Appeals Board ("Board") affirms the Initial Decision in its entirety and upholds the total assessed penalty. The Board's holdings with respect to Respondent's main arguments are summarized below:

A. Challenges to Liability Determination

1. Section 308(a) Liability: The Board rejects Respondent's argument that CWA section 308 requires an "individualized" request or order by the Administrator as a precondition to finding a violation under section 308. Section 308(a) authorizes the Administrator to require information from point source owners or operators to carry out

the objectives of the Act. On its face, section 308 contains no threshold that such information be preceded by a particular, targeted request or order from the Agency, either identifying the regulated entity or spelling out the information sought. While individualized Agency requests or orders to produce particular records, reports or sampling results are common uses of section 308(a) authority, nothing in this section precludes an equally common Agency practice: rulemaking of general applicability, as the Agency undertook in section 122.21. With section 308(a)(3) explicitly contemplating implementing regulations and section 308(a)(4) giving particular emphasis to "carrying out" the NPDES permit program, Respondent's view finds no support. This conclusion is reinforced by the harm to water permit program implementation and enforcement that would occur were Respondent's arguments to prevail. In sum, nothing in the statute supports Respondent's view that an "individualized" Agency request or order is required by section 308.

2. Section 122.21 Liability: The Board rejects Respondent's attempt to challenge the validity of 40 C.F.R. § 122.21(c). The CWA (i.e., §§ 509(b)(1)(E), 509(b)(2)) and an implementing regulation (i.e., 40 C.F.R. § 22.38(c)) preclude Respondent from challenging section 122.21(c) in this enforcement proceeding.

B. Challenges to Penalty Assessment

1. Culpability: The Board rejects Respondent's argument that the ALJ should not have increased the penalty because Respondent was "unsophisticated," relying on others to fulfill its construction storm water obligations and part of an industry culture in the area of Fargo, North Dakota, allegedly unfamiliar with construction storm water requirements. The record refutes the portrayal of Respondent as an innocent, non-culpable site owner and of Fargo as a regulatory backwater. It shows, rather, that Respondent retained authority over its regulatory affairs (not ceding them to others) and that information about its regulatory responsibilities flowed to it from multiple channels, to which Respondent should have been alert. Thus, measured against the clear error standard, Respondent's culpability arguments fail to undermine the soundness of the ALJ's culpability determination.

2. Deterrence: Noting at the outset that deterrence is not a penalty factor, the Board rejects Respondent's argument that the ALJ should have given more weight to the fact that "general" deterrence is unnecessary in this case because recent City of Fargo ("City") rules condition issuance of building permits on an applicant first obtaining any required storm water permit. First, deterrence is not merely local, as Respondent suggests. Penalties reach be-

yond the particular claim or place; they have a nation wide character. Second, as any local ordinance, this City rule may be revoked at any moment. Finally, even if a permanent regulation, the City rule would only address Count 1 violations (obtaining a permit). Failure to comply with the permit and conduct necessary inspections (i.e., Count 2) is not covered under the City rule.

3. Circumstances of the Violations: The Board rejects Respondent's argument that the ALJ failed to properly consider the "circumstances of the violation." Respondent tries under this rubric to advance its earlier no-culpability "unsophistication" arguments by pressing City of Fargo and North Dakota-wide "unfamiliarity" with CWA regulatory requirements, an argument the Board has rejected. Moreover, when placed in the proper statutory framework, the circumstances of the violations in this case (i.e., over half a year of unpermitted activity and sixty-five of eighty required inspections not conducted) yield a conclusion amply supported by the ALJ's analysis.

Before Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Sheehan:

I. *BACKGROUND*

A. *Nature of Case*

This is an appeal of an Initial Decision issued by Administrative Law Judge, Susan L. Biro ("ALJ"), finding Respondent, Service Oil, Inc., liable for two counts of alleged violations to the Clean Water Act ("CWA" or "Act"), codified at 33 U.S.C. §§ 1251-1387. The complaint and amended complaint, filed by Region 8 of the U.S. Environmental Protection Agency ("Region" or "Complainant"), alleged in Count 1 that Respondent violated sections 308, 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1318, 1311(a), 1342(p), and their implementing regulations at 40 C.F.R. §§ 122.21, 122.26, by failing to apply for, and obtain, on or before the date it commenced construction activities related to its Stamart Travel Center located in Fargo, North Dakota, a North Dakota Pollutant Discharge Elimination System ("NDPDES") permit authorizing storm water discharges from the construction site. *See* Penalty Complaint ¶¶ 39-40; Amended Penalty Complaint ¶¶ 40-41; *In re Service Oil, Inc*., Docket No. CWA-08-2005-0010, at 1-3 (ALJ Aug. 3, 2007) ("Initial Decision"). Count 2 of the complaint alleged that after Respondent obtained an NDPDES permit for the site, Respondent failed to conduct storm water inspections at the requisite frequency and/or to record or maintain inspection records on-site, in violation of the permit. *See* Penalty Complaint ¶¶ 41-42; Amended Penalty Complaint ¶¶ 42-43; Initial Decision at 1-3.

The ALJ ruled in favor of Complainant and found Respondent liable on both counts. The ALJ imposed a total civil penalty of $35,640 for the two counts. Dissatisfied with the Initial Decision, Respondent filed an appeal with the Environmental Appeals Board ("Board") challenging certain aspects of the Initial Decision.

B. *Statutory and Regulatory Background*

The CWA makes it unlawful for any person to discharge from any "point source"[1] into the waters of the United States any "pollutant,"[2]including rock, sand, and dirt, except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA or an authorized state, pursuant to section 402, 33 U.S.C. § 1342. *See* CWA §§ 101(a)(1), 301, 33 U.S.C. §§ 1251(a)(1), 1311. The CWA's NPDES permit program requires permits for, among other things, storm water discharges associated with industrial activity, including construction activity.[3] *See* CWA § 402(a), (p), 33 U.S.C. § 1342(a), (p); *see also* 40 C.F.R. § 122.26. Construction activities include clearing, grading, and excavation resulting in the disturbance of five or more acres of total land area. 40 C.F.R. § 122.26(b)(14)(x).

The NPDES permit program requires facilities proposing storm water discharges from construction activities to apply for an individual permit or seek coverage under a general permit prior to the date on which the construction is to commence. 40 C.F.R. § 122.21(c) (requiring facilities described in § 122.26(b)(14)(x) to submit application at least 90 days before commencing construction); *id*. § 122.26(c) (generally requiring storm water dischargers to apply for individual permits or seek coverage under general permits); *id*. § 122.21(a) (generally requiring dischargers and potential dischargers of pollutants to apply for a permit).

The State of North Dakota has had an EPA-approved NPDES permit program since 1975, which was modified in 1990 to include issuance of general NPDES permits. *See* CWA § 402(b), 33 U.S.C. § 1342(b) (authorizing EPA to approve state programs); State of North Dakota Program: Approval of Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 28,663 (July 8, 1975);

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[1] The CWA defines the term "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure * * * from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

[2] The CWA defines the term "pollutant" broadly, and specifically identifies, among other things, "rock, sand, [and] cellar dirt * * * discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6).

[3] NPDES regulations define "storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

Approval of the North Dakota's NPDES General Permit Program, 55 Fed. Reg. 5660 (Feb. 16, 1990). Most storm water discharges from large construction activities in the State of North Dakota are authorized under a general storm water permit. *See* Initial Decision at 9 (citing Complainant's Pre-hearing Exchange Exhibit 25 and Respondent's Pre-hearing Exchange Exhibit 15).

The North Dakota general permit requires the operator of the construction activity to submit a Notice of Intent ("NOI") to obtain coverage for storm water discharges, and a Storm Water Pollution Prevention ("SWPP") plan "30 days prior to the start of construction." *See* Authorization to Discharge under the North Dakota Pollutant Discharge Elimination System Permit No. NDR03-0000 at 2 ("ND General Permit"); Respondent's Pre-hearing Exchange Exhibit 15. The objective of the SWPP plan is to "identify potential sources of pollution which may reasonably be expected to affect the quality of storm water discharges associated with construction activity; and to describe Best Management Practices (BMPs) which will be used to reduce the pollutants in the storm water discharges associated with construction activity." ND General Permit at 5. The general permit notes that permit noncompliance constitutes a violation of the CWA and is grounds for enforcement. *Id*. at 10.

With respect to enforcing CWA violations, the CWA authorizes EPA to bring an enforcement action against any person in violation of, *inter alia*, sections 301 and 308, or who has violated a condition or limitation that implements any of such sections in a permit issued under section 402 by EPA or by a state with an EPA-approved NPDES permit program. CWA § 309(g)(1)(A), 33 U.S.C § 1319(g)(1)(A).

C. *Factual Background and Initial Decision*

The case at hand involves Respondent's clearing, grading, excavation and disturbance at its fifteen to twenty acre Stamart site.[4] *See* Initial Decision at 4, 23. Prior to commencing construction, Respondent did not apply for an individual permit or seek coverage under the North Dakota general permit.[5] Respondent began construction in or about April 2002 and submitted its NOI for coverage under the North Dakota general permit in November 2002. *Id*. at 4, 5. Part III of the general permit required that site inspections be conducted every seven calender days and within twenty-four hours after any storm event of greater than 0.5 inches of rain per 24-hour period, that inspection results be summarized and recorded on a Site Inspection Record, and that the Site Inspection Records be maintained

[4] The facts of this case are set forth in more detail in the Initial Decision. *See* Initial Decision at 3-6. Here we only discuss the facts pertaining to issues on appeal.

[5] In its answer to the complaint, Respondent admitted failing to obtain a permit prior to commencing construction. *See* Answer and Request for Hearing ¶¶ 39-40 (filed Apr. 18, 2005).

on-site. ND General Permit at 9, 10. Respondent conducted these inspections at far less than the required frequency, missing "65 out of 80 times." *See* Initial Decision at 57.[6]

On February 22, 2005, Complainant filed an administrative complaint alleging that Respondent: (1) violated sections 301(a) and 402(p) of the CWA and implementing regulation 40 C.F.R. § 122.26, by failing to obtain an NPDES permit on or before the date of commencement of construction activities at its facility, *see* Penalty Complaint ¶¶ 39-40; and (2) failed to conduct storm water inspections at the frequency required by its NDPDES permit and/or failed to record and/or maintain Site Inspection Records on-site. *Id*. at ¶¶ 41-42. On November 23, 2005, Complainant filed a Motion for Accelerated Decision on Liability and Penalties ("Complainant's Motion"). On March 7, 2006, the ALJ issued an order on Complainant's Motion finding in favor of Complainant as to Count 2, and denying the motion as to Count 1 and the issues of penalties. *See In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, at 5-11 (ALJ Mar. 7, 2006) (Order on Complainant's Motion for Accelerated Decision) (denying accelerated decision as to Count 1, explaining that the occurrence of a discharge is an element of liability under section 301 and a factual issue in dispute); *see also* Initial Decision at 11-12. Complainant then filed an amended complaint adding CWA § 308 and 40 C.F.R. § 122.21 as a basis of liability for Count 1. *See* Amended Penalty Complaint ¶ 41.

On August 3, 2007, the ALJ issued the Initial Decision, the subject of this appeal, ruling on the remaining issues in this enforcement action. With respect to Count 1, the ALJ found Respondent liable for the alleged violations on two separate grounds: (1) section 308 of the CWA[7]and 40 C.F.R. section 122.21,[8] for failure to apply for a permit prior to commencing construction activities, *see* Initial Decision at 24; and (2) section 301 of the CWA,[9] for failure to obtain a permit "for construction activities in which Respondent discharged a pollutant into waters of the United States," *id*. at 51. *See id*. at 12-51. The ALJ reasoned:

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[6] In its answer to the complaint, Respondent admitted failing to conduct inspections at the required frequency. *See* Answer and Request for Hearing ¶¶ 41-42 (filed Apr. 18, 2005).

[7] Section 308 authorizes the Administrator to, among other things, require owners or operators of point sources to provide any information the Administrator deems reasonable to carry out the objectives of the CWA. *See* CWA § 308, 33 U.S.C. § 1318.

[8] Section 122.21 requires persons proposing to discharge pollutants to apply for a permit. 40 C.F.R. § 122.21(a). In reviewing the regulatory history of section 122.21, the ALJ found that this provision was promulgated under the whole of the CWA, and concluded that it was a requirement under section 308. Initial Decision at 18 (citing 55 Fed. Reg. 47,990, 48,062-63 (Nov. 16, 1990)).

[9] Section 301, as noted earlier, prohibits the discharge of pollutants into waters of the United States without a permit. *See* CWA § 301, 33 U.S.C. § 1311; *see also* CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

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

Id. at 24. The ALJ added:

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

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

Id. at 51.

With respect to Count 2, the ALJ found Respondent liable for failing to conduct storm water inspections and for failing to record or maintain on-site inspection records in violation of its NDPDES permit. *Id*. at 12 (citing ALJ's Order on Complainant's Motion for Accelerated Decision). On August 31, 2008, Respondent filed a timely appeal challenging the portion of the liability determination relative to Count 1 and certain parts of the penalty analysis. Respondent also moved for oral argument because "the factual issues in this case are of such complexity that oral argument would materially assist in a resolution" and the "legal issues raised in this case are complex and involve the interpretation and application of Section 308 of the Clean Water Act." Request for Oral Argument (filed Aug. 31, 2007). The Board granted this request, and argument was held on June 5, 2008. *See In re Service Oil, Inc.*, CWA Appeal No.07-02 (EAB Apr. 30, 2008)

(Order Scheduling Oral Argument); *see also* EAB Oral Argument Transcript (June 5, 2008) ("EAB Tr.").

D. *Standard of Board Review*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule."). Nonetheless, the Board has stated on numerous occasions that it will generally give deference to a presiding officer's findings of fact based upon the credibility of witnesses because the presiding officer has the opportunity to observe witnesses and evaluate their credibility. *See, e.g.*, *In re Adams*, 13 E.A.D. 310, 318 (EAB 2007); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005) ("This approach recognizes that the ALJ is able to observe first hand a witness's demeanor during testimony and is therefore in the best position to evaluate his or her credibility"); *In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000).

With these considerations as background, we now proceed to analyze the issues on appeal.

II. *DISCUSSION*

A. *Challenges to Liability Determination*

1. *Respondent's Position*

Respondent only challenges the Count 1 liability determination pertaining to CWA section 308(a) and its "implementing regulation," 40 C.F.R. § 122.21.[10] Respondent's Appeal Brief at 8-9. While Respondent does not deny having failed to apply for and obtain a permit prior to commencing construction, it argues that "[t]he plain and unambiguous language of [s]ection 308 * * * requires an individualized request or order by the [A]dministrator as a precondition to finding a violation under [s]ection 308." *Id.* at 8. Here, no such request or order issued from EPA.

In support of its position, Respondent relies on *Committee for the Consideration of Jones Falls Sewage System v. Train*, 375 F. Supp. 1148, 1152

[10] Respondent does not contest section 301 liability. *See* Respondent's Appeal Brief at 8-13.

(D. Md. 1974), *aff'd on other grounds*, 539 F.2d 1006 (4th Cir. 1976). *See id*. at 10-11. The court there stated that "a discharger cannot be in violation of * * * section [308] or an order issued under this section unless such an order has in fact been issued." *Jones Falls*, 375 F. Supp at 1152. Respondent adds that "the Agency's regulation [referring to 40 C.F.R. § 122.21] does not constitute a request pursuant to section 308" and conflicts with the CWA. *Id*. at 11; *see also id*. at 12-13. Respondent summarizes its argument as follows: "The failure to apply for a permit cannot and should not be deemed a violation of [s]ection 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." *Id*. at 13.

2. *ALJ's Analysis*

The ALJ began her analysis with the general origins of CWA authority to promulgate implementing regulations, noting that: "Section 501(a) [of the CWA,] (33 U.S.C. § 1361(a)) provides the Administrator with the broad general authority 'to prescribe such regulations as are necessary to carry out his functions under this chapter.'" Initial Decision at 16. Thus, she found, it is not necessary that particular sections, such as 308, explicitly refer to later regulations. *Id*. This underlying breadth of section 501(a) of the Act and the importance of NPDES regulations to the CWA's permit program led the ALJ to conclude that nothing in the language of section 308 suggests that the Administrator's authority to "carry out the objective of the CWA" cannot be implemented through regulations, and that there is no basis for "restricting the Administrator's authority granted to him under CWA [s]ection 308 to imposing 'requirements' on a case-by-case basis rather than by broad regulations." *Id.* at 16, 17.

Quite the contrary, section 308(a)'s inclusion of "any requirement *established* under this section" suggests that Congress did anticipate broad-scale implementing regulations. *Id*. at 16. The ALJ concluded:

I find, contrary to Respondent's position, that the issuance of an individualized request or order by the Administrator under Section 308 is *not* a precondition to finding a violation under [s]ection 308, and that violations of validly promulgated regulations requiring the making of records or reports, monitoring, sampling effluent, or providing information, falling within the ambit of the authority granted to the Administrator by [s]ection 308, can be a basis for a penalty action under CWA [s]ection 309(g).

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

Id. at 19 (internal citations omitted).

The ALJ relied on *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164 (3d Cir. 2004), and *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1109 (W.D. Wis. 2001), as support for her conclusion that the Administrator may promulgate regulations pursuant to section 308 and that those regulations may be enforceable without a specific request or order. Initial Decision at 18-19. As to Respondent's reliance on *Jones Falls*, the ALJ observed that, at the time the district court decided the case, "the Administrator had not issued any regulations which could be considered as 'requirements' under [s]ection 308." *Id*. at 18.

3. *Complainant's Position*

Complainant argues that the Board should not address Respondent's challenges to liability since Respondent does not challenge the ALJ's section 301 alternative finding of liability. *See* Complainant's Response Brief at 6. More specifically, Complainant claims that "regardless of the outcome of [Respondent's] appeal pertaining to liability under section 308 of the CWA, [Respondent's] liability for Count [1] of the Amended Complaint will stand," and that "because the ALJ's penalty assessment does not differentiate between the violations constituting the two sources of liability for Count [1], the outcome of [Respondent's] section 308 appeal is irrelevant to the final penalty assessment." *Id*. Complainant further argues that the Board should dismiss Respondent's appeal because section 509(b)(2) of the CWA[11] and 40 C.F.R. section 22.38(c)[12] render it an impermissi-

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[11] Section 509(b) provides in pertinent part:

> (1) Review of the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title * * * may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such * * * approval [or] promulgation * * * or after such date only if such application is based solely on grounds which arose after such 120th day.
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> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

CWA § 509(b), 33 U.S.C. § 1369(b).

[12] Section 22.38(c) provides as follows:

> Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), shall not
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> Continued

ble challenge to section 308's implementing regulation. *Id*. at 5, 7-10. Moreover, under section 509(b)(1), it is untimely.[13] *Id.* In any event, Complainant adds, Respondent has not identified "extremely compelling" circumstances which would overcome the otherwise preclusive effects of section 509(b) and warrant Board review of those regulations. *Id*. at 5, 9. Finally, Complainant urges that "[i]f the [Board] does reach the merits of [Respondent's] apparent challenge to 40 C.F.R. § 122.21, it should find that this provision is authorized under several provisions of the CWA, including section 308, which grants broad information gathering authority to the Administrator, and that EPA has properly exercised that authority through regulations that carry out the NPDES program." *Id*.

4. *Section 308(a) Liability Determination*

At the outset, we note that Complainant would have us decline, as "irrelevant" an examination of section 308 liability, reasoning that the ALJ penalty assessment "does not differentiate between section 308 and 301 liability." *Id*. at 6. We find, however, that while the ALJ's penalty analysis refers generally to "Count 1," *see* Initial Decision at 56, a closer delving shows that the failure to apply for a permit prior to commencing construction – and thus section 308 liability – threads through her analysis. *See id.* ("'the nature, extent and circumstances of the violation' is the complete failure to apply for and obtain a[n] NPDES permit prior to starting construction"); *id*. at 63 ("[t]he question here, * * * in terms of determining the appropriate amount of penalty * * * is the extent of Respondent's culpability for not applying for the permit"). Because section 308 liability, no less than section 301 liability, is an inseparable part of the penalty determination, and Complainant acknowledged as much at oral argument, *see* EAB Tr. at 45, we proceed to review it.

a. *Agency Request or Order as "Precondition"*

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

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(continued)

> be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

40 C.F.R. § 22.38(c).

[13] Complainant argues that review of section 122.21 could previously have been obtained under section 509(b)(1) of the CWA because "the most recent regulatory amendment to the permit application requirement in 40 C.F.R. § 122.21(c)(1) relied on the CWA in its entirety, and the accompanying Federal Register preamble specifically cited both sections 301 and 308 of the CWA, 33 U.S.C. §§ 1311 and 1318." Complainant's Response Brief at 7.

> in the development of any * * * limitation, prohibition, or * * * standard of performance under this chapter; (2) determining whether any person is in violation of any such * * * limitation, prohibition or * * * or standard of performance; (3) any requirement established under this section; or (4) carrying out section[] * * * 1342 [CWA § 402], of this title -
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> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods * * * , (iv) sample such effluents * * * , and (v) provide such other information as he may reasonably require * * * .

CWA § 308(a), 33 U.S.C. § 1318(a).

The CWA does not explicitly address whether 308(a) liability requires, as a "precondition," that the Agency have made an "individualized request or order," nor has any court squarely analyzed the question. Yet the answer nonetheless is a straightforward exercise in statutory interpretation, fully supported by the congressional intent driving the CWA. Moreover, significant adverse programmatic repercussions would result were Respondent's theory to prevail.

Section 308(a) authorizes the Administrator to require information from point source owners or operators to "carry out the objectives of [the Act]," such as records, reports, sampling results, and "such other information as he may reasonably require." CWA § 308(a)(A)(i)-(ii), (iv)-(v), 33 U.S.C. § 1318(a)(A)(i)-(ii), (iv)-(v). On its face, subsection (v) ("such other information as he may reasonably require") contains no threshold that "such other" information be preceded by a particular, targeted request or order from the Agency, either identifying the regulated entity or spelling out the information sought.[14] To the contrary, with section 308(a)(3) explicitly contemplating implementing regulations,[15] and section 308(a)(4) giving particular emphasis to "carrying out" the NPDES permit pro-

[14] Respondent characterizes section 308 as "essentially a record keeping statute," *see* Respondent's Brief at 10, the unsupported implication appearing to be that records are only subject to release if the Agency specifically requires or orders them.

[15] That regulations would flow from section 308(a) is consonant with the entire Clean Water Act scheme. *See* CWA § 501(a), 33 U.S.C. § 1361(a) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions * * * .").

gram,[16] Respondent's narrow reading of section 308 finds no support. Nothing on the face of the statute compels us to adopt Respondent's unduly constrained view that an "individualized" Agency request or order is somehow imbedded in section 308. As the court affirmatively recognized in *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 119 (D.C. Cir. 1987), the Act's information gathering authority has inherent breadth: "the statute's sweep is sufficient to justify broad information disclosure requirements * * * ." *Id.*

The clearest analytical clue Respondent offers for construing section 308 to require any "individualized" request or order appears to be the words it underscores in quoting section 308(a)(A) and (A)(ii): "the Administrator shall require [the owner or operator to] make such reports * * * ." Respondent's Appeal Brief at 8. But while "individualized" Agency requests or orders to produce particular records, reports or sampling results are certainly common uses of section 308(a) authority, nothing in the quoted or other language of this section precludes – or certainly "unambiguously" precludes – an equally common Agency practice: rulemaking of general applicability, as the Agency undertook in section 122.21.

Moreover, while Respondent gives dispositive importance to *Jones Falls*, which found no liability for failure to provide information when no Agency "order" had first issued, 375 F. Supp. at 1152, *Jones Falls* was cast in a far different light by later rulemakings. It pre-dated three decades of NPDES regulations requiring applications for permits, culminating in 1990 with the section 122.21(c) requirement at issue (i.e., submittal of permit application prior to commencing construction activities) promulgated under the whole of the CWA, and the 1999 amendments to section 122.21(c) promulgated under section 308 authority. *See supra* note 16.

The practical reality of water permit program implementation and enforcement, and the consequences of the constricted information gathering scheme advocated by Respondent, reinforce the congressional design that the Agency be armed with information gathering flexibility. Were EPA, instead of sensibly availing itself of a broad, national permit application rule such as section 122.21, forced to track down, one-by-one, unnumbered thousands of actual and potential point source dischargers and make "individualized" permit demands, Respondent's

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[16] *See, e.g.*, 40 C.F.R. § 122.21(c) (amended in 1999 pursuant to, *inter alia*, section 308); National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,797 (Dec. 8, 1999) (expanding existing NPDES storm water regulations codified at 40 C.F.R. pt. 122, noting: "EPA promulgates today's storm water regulation pursuant to the specific mandate of Clean Water Act section 402(p)(6), as well as sections 301, 308 * * * ."). As early as 1990, the Agency had cited the entirety of the CWA for its Part 122 authority. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,062 (Nov. 16, 1990).

Appeal Brief at 9, its information gathering tool, a central pillar of the Clean Water Act, would erode.[17] In the case of Respondent before April 2002, when it began its construction activity, and other potential dischargers, the Agency would be handcuffed, made to either guess their identities, or stand helplessly by as unpermitted discharges ensued. A wholly impractical and resource-squandering permit program of this sort would be antithetical to one promoting "reasonably" required information. CWA § 308 (a)(A)(v), 33 U.S.C.§ 1318(a)(A)(v).[18]

Rather than countenance a fragmented permit program, "it is entirely appropriate * * * to issue regulations informing the public about the standards and procedures the agency intends to apply" to simplify the administrative task. *Indus. Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1366 (7th Cir. 1983). The court in *Allegheny Ludlum* tacitly recognized the reality of administering an efficient CWA regulatory program. With respect to NPDES-regulated facilities submitting amended discharge monitoring reports (required by regulation under section 308(a) authority, similar to the section 122.21 permit application requirement here), the *Allegheny Ludlum* court nowhere predicated such reporting and liability on the Agency's first formally asking for the information.[19] *Allegheny Ludlum*, 366 F.3d at 175.

Thus, we find that section 308(a) does not require a "precondition" that the Agency issue a specific request or order, and that this interpretation furthers the objectives of the statute. Therefore, we affirm section 308(a) liability.

b. *Section 122.21 Liability*

Intertwined through Respondent's section 308 "precondition" argument is an indirect challenge to its implementing regulation, 40 C.F.R. § 122.21(c). While never expressly referring to it, Respondent criticizes EPA for its "attempt to regulate away * * * the unambiguous language in a statute * * * [as] not within the province of an agency." Respondent's Appeal Brief at 11. Thus, the pre-section

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[17] At the genesis of the Act, Congress recognized the vital role of requiring information, data, and reports as "[a] necessary adjunct to the establishment of effective water pollution requirements and the enforcement of such requirements." S. Rep. No. 92-414, at 62 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3728.

[18] As the ALJ noted, *see* Initial Decision at 16-17, this interpretation is consistent with the longstanding principle that remedial legislation, like the CWA, should be given liberal construction to effectuate its statutory purpose. *See, e.g., Scott v. City of Hammond, Ind.*, 741 F.2d 992, 998 (7th Cir. 1984)("CWA should be liberally construed"); *see also Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 782 (8th Cir. 1991) ("[R]emedial legislation should be given liberal construction to effectuate its statutory purpose").

[19] Respondent argues that *Allegheny Ludlum* has no bearing on its circumstances because the defendant there was issued a permit. Respondent's Appellate Brief at 11-12. This distinction, however, misses the central point: the court's recognition that section 308 functions through broad rules.

122.21 case, *Jones Falls*, is, in Respondent's view, "valid case law," and reliance on the post-section 122.21 case, *Allegheny Ludlum*, "clear error." *Id*. at 12.

To this challenge, the Clean Water Act erects two procedural bars, one of timing, the other of forum. First, section 509(b)(1), 33 U.S.C. § 1369(b)(1), allows 120 days to seek review of any "effluent * * * or other limitation under section 1311 [CWA § 301] * * * ."[20] Second, if review of such Agency action "could have been obtained" under section 509(b)(1), section 509(b)(2), 33 U.S.C. § 1369(b)(2), precludes judicial review of that action in any civil or criminal enforcement proceeding. Agency regulations tighten the point with respect to administrative litigation: if section 509(b)(1) review of Agency action could have been obtained, it "shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g)." 40 C.F.R. § 22.38(c). The amended penalty complaint here was filed under section 309(g) authority.

With respect to timing, in first promulgating the amendments to section 122.21(c) relevant to the case at hand, the Agency cited the entirety of the CWA as the basis for its authority. 55 Fed. Reg. at 48,062.[21] Thus, any judicial challenge to this "effluent * * * or other limitation under section 1311"[22] should have been brought within 120 days of November 16, 1990, not now.[23] The one possible seam in this procedural wall is section 509(b)'s preclusion of judicial, not administrative, review. The Board, however, has found this distinction of no practical avail. Rather, "the effect of this statutory provision is to make it unnecessary for an administrative agency to entertain as a matter of right a party's challenge to a rule subject to this statutory provision * * * . Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency

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[20] Such review lies in the appropriate Federal Circuit Court of Appeals. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). The only exception to 120 day review ("grounds which arose after such 120th day," *id*.) is not asserted by Respondent.

[21] Later amendments in 1999 to section 122.21 specifically cite sections 301 and 308 as authority. 64 Fed. Reg. at 68,797. The Agency subsequently identified the foundation of Part 122's permit regulations as the entirety of the Clean Water Act. Revised Compliance Dates Under the National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 72 Fed. Reg. 40,245, 40,250 (July 24, 2007) ("The authority citation for part 122 continues to read as follows: Authority: The Clean Water Act, 33 U.S.C. [§] 1251 *et seq*.").

[22] Several courts have held that broad, policy-oriented rules, like 40 C.F.R. Parts 122-125 are "effluent * * * or other limitations." *See Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982), *cert. denied sub nom. Chem. Mfrs. Ass'n v. EPA*, 459 U.S. 897 (1982); *In re USGen New Eng., Inc.*, 11 E.A.D. 525, 551-52 (EAB 2004).

[23] Complainant states that the date of the later section 122.21(c) amendments (Dec. 8, 1999) started the clock on judicial review. *See supra* note 13; Complainant's Response Brief at 7-8. However, the part of section 122.21(c) at issue here was promulgated in November 1990 and was reviewable no later than early 1991. *See supra* note 16 (citing 55 Fed. Reg. 47,990).

is entitled to close the book on the rule insofar as its validity is concerned." *In re USGen New Eng., Inc.*, 11 E.A.D. 525, 556-57 (EAB 2004) (quoting *In re Echevarria*, 5 E.A.D. 626, 634-635 (EAB 1994)).

From this timing bar it is but a short leap to the next – Respondent's use of this administrative enforcement action to challenge section 122.21. Again, Congress in section 509(b)(2), and the Agency in promulgating 40 C.F.R. § 22.38(c), shut the door on utilizing this CWA enforcement action appeal as a vehicle to challenge section 122.21.

B. *Challenges to Penalty Assessment*

Respondent challenges that portion of the $35,640 penalty attributable to Count 1's section 301 and 308 violations.[24] Before we examine Respondent's particular arguments, we first lay out the principles that guide our review of an administrative law judge's penalty determination.

1. *Board's Review of an ALJ Penalty Determination, and Applicable Penalty Criteria*

The rules governing this proceeding, 40 C.F.R. Part 22, make a presiding officer responsible for assessing a penalty based on the evidence in the record and the penalty criteria set forth in the relevant statute. 40 C.F.R. § 22.27(b). For proposed penalties under section 309 of the CWA, the criteria are:

> [T]he nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). These calculations are, moreover, "highly discretionary," *see Tull v. United States*, 481 U.S. 412, 427 (1987), with "no precise [CWA] formula" to compute them. *In re Pepperell Assocs.*, 9 E.A.D. 83, 107 (EAB 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001). However, the presiding officer must "explain in detail in the initial decision how the penalty to be

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[24] *See* Respondent's Appeal Brief at 1 ("Service Oil, Inc. * * * appeals from the Initial Decision of the administrative law judge, imposing a civil penalty of $35,640 for violation of Section 308 of the Clean Water Act * * * and the discharge of a pollutant without a permit in violation of CWA Section 301 * * * ."). Although not framed as part of its appeal, Respondent also weaves in penalty challenges attributable to Count 2's permit violations. *See, e.g., id.* at 15 ("Respondent did not even know of the inspection requirements that were violated because it never received a copy of the permit * * * .") . We address these arguments as well.

assessed corresponds to any penalty criteria set forth in the Act," 40 C.F.R. § 22.27(b), and if the officer wishes to deviate from the penalty recommended by the Complainant, she or he "shall set forth in the initial decision the specific reasons for the increase or decrease." *Id*.

While presiding officers must also consider any civil penalty guidelines issued by EPA under the statute,[25] the Agency has developed no penalty policy specific to the CWA. *In re City of Marshall*, 10 E.A.D. 173, 189 n.28 (EAB 2001). However, in assessing penalties under the CWA, the Agency often relies for guidance on EPA's two general penalty policies: (1) the Policy on Civil Penalties: EPA General Enforcement Policy #GM-21 (Feb. 16, 1984) [hereinafter "EPA General Enforcement Policy #GM-21"]; and (2) A Framework for Statute-Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22 (Feb. 16, 1984) [hereinafter "EPA General Enforcement Policy #GM-22"]. *Id*.

In this case, the ALJ did not apply the methodology these documents recommend for calculating penalties (i.e., determine a deterrence amount based on the economic benefit of noncompliance and the gravity of the penalty, then adjust that amount based on violator-specific and other unique factors). Rather, the ALJ applied the "bottom-up" method, one of the methods used by federal courts in calculating penalties, which starts with the economic benefit of noncompliance, then adjusts that amount upward to reflect the remaining statutory factors. *See* Initial Decision at 51-53 (citing *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998)).

The Board will generally defer to the presiding officer's penalty assessment, provided that the presiding officer considered each of the statutory penalty factors and reasonably explained any deviations from the penalty proposed by the Complainant. *See In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999) (citing *In re Predex Corp*., 7 E.A.D. 591, 597 (EAB 1998)) (the "Board generally will not substitute its judgment for that of a presiding officer absent a showing that the officer committed an abuse of discretion or clear error in assessing the penalty"); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999) ("[w]e see no obvious errors in the Presiding Officer's penalty assessment and, therefore, we see no reason to change his penalty assessment"), *appeal dismissed*, 237 F.3d 681 (D.C. Cir. 2001).

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[25] ALJs are not compelled to use penalty policies in calculating penalties, but if an ALJ chooses not to apply an applicable penalty policy, he or she must explain the reasons for departing from it. *See In re CDT Landfill Corp*., 11 E.A.D. 88, 117-18 (EAB 2003); *In re Capozzi*, 11 E.A.D. 10, 31 (EAB 2003).

2. *ALJ's Penalty Analysis*

Using the "bottom up" method, the ALJ began her analysis with the economic benefit of non-compliance, and determined that Respondent did benefit economically in delayed costs (late filing of the NOI) and avoided costs (scores of inspections not conducted) by a total of $2,700. Initial Decision at 54. The ALJ then considered the "nature, circumstances and extent" of the violations, deeming it "appropriate to multiply the rather nominal economic benefit of $2,700 by [a factor of] 10" (for an "initial adjusted" penalty of a $27,000), primarily due to Respondent's "complete failure" to apply for and obtain an NPDES permit for some eight months after starting construction and failure to conduct sixty-five of eighty required inspections. *Id*. at 56. The ALJ then considered the gravity of the violation, noting the high waterbody impairment threat from the kind of urban runoff at issue here, with attendant public health consequences, concluding that "Respondent, albeit however slightly, had certainly caused the Red River to become more impaired." *Id.* at 59. Accordingly, she increased the $27,000 figure by 10%, yielding a "total interim" penalty of $29,700. *Id*.

Having considered these violation-specific factors, the ALJ continued with the violator-specific factors: Respondent's ability to pay, its history of violations and degree of culpability. *Id*. at 59-68. With respect to ability to pay, the ALJ concluded that Respondent had the ability to pay the total proposed penalty, and declined to adjust the "total interim" penalty downward. *Id.* at 59. Similarly, the ALJ declined to adjust the "total interim" penalty downward for Respondent's lack of prior violations. *Id*. at 60 ("There are no special circumstances in this case for mitigating the penalty merely based upon the fact that Respondent, who was unaware of the CWA permit requirements prior to this action, had not previously been found in violation of the Clean Water Act."). Analysis of the culpability factor took a far more detailed turn.

With numerous references to the hearing testimony, and against the culpability criteria analyzed in *In re Phoenix Construction Services, Inc*., 11 E.A.D. 379 (EAB 2004) (e.g., violator's control of events, industry sophistication, etc.),[26] the ALJ spotlighted Respondent's central claim – that Respondent ceded to others its obligations to obtain a permit and conduct required inspections. This the ALJ found to have a "certain initial attractive appeal." Initial Decision at 63. Respondent was not an "experienced construction professional," *id*., and harbored "reasonable, albeit erroneous" confidence in its engineering and other firms to alert it to regulatory obligations. *Id*. at 66. But deeper consideration showed a record devoid of any signed agreement ever formally delegating a general contractor to carry forward Respondent's CWA obligations. *Id*. at 64-65. Rather, the record un-

[26] The *Phoenix Constr*. culpability criteria reflect Agency policy guidance. *See* EPA General Enforcement Policy #GM-22, at 18.

derscored that Respondent acted as its own general contractor, *id.*, its engagement with its CWA responsibilities, particularly for a $10 million project, was desultory,[27] and its fulfillment of required inspections was far from adequate. *See id*. at 67-68. Thus, on balance, the ALJ adjusted the penalty upward "only" 20% ($5,940), bringing it to $35,640. *Id.* at 68.

The penalty analysis concluded with the "other factors as justice may require" criterion. The ALJ turned away a host of claims, including that Respondent was targeted for selective federal enforcement, the "accidental" character of its violations due to ignorance of permit requirements, and environmental "good deeds." *Id*. at 68-72. She concluded that Respondent was not "singled out" for prosecution, *id*. at 69-70, was part of a regulated community in a City receiving considerable communication about permit requirements from State officials, *id*. at 70-71, and acted less from environmental than profit motives when it installed a pollution-reducing device. *Id*. at 72. Finding no downward adjustment warranted under the "other factors as justice may require" criterion, *id.* at 72, the ALJ set the final penalty at $35,640.

3. *Respondent's Challenges*

In Respondent's view, the penalty in this case should reflect only the economic benefit of its noncompliance: $2,700. Respondent's Appeal Brief at 30-31, 33. It thus challenges selective components of the penalty: (1) culpability – the ALJ "failed to properly account for the level of sophistication in the local business and construction industry," *id*. at 14-16; (2) deterrence – the ALJ "should have given more weight to the fact that general deterrence is unnecessary in the instant case," *id*. at 17-21; and (3) the circumstances of the violations – the ALJ "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." *Id*. at 21-26.

a. *Culpability Determination: Lack of Sophistication*

Respondent believes itself an "innocent party." *Id*. at 16. The ALJ "erred in increasing the [total interim] penalty by twenty percent [$5,940]" and "[t]here should have been no increase in the amount of the penalty based upon * * * [R]espondent's culpability because the lack of sophistication in the local construction and business industry demonstrate a complete lack of culpability on [R]espondent's part." *Id*.

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[27] For example, warning signals in the form of references in a proposed contract between Respondent and a general contractor to CWA requirements were ignored, *see* Initial Decision at 65 n.57, and a project of this scale and expense did not spur Respondent to seek any legal advice about its regulatory obligations, *id*. at 67.

Respondent's professed unsophistication takes many forms: (1) it is not in the business of construction, *id*. at 15; (2) it hired an engineering firm to manage the project, and therefore, took reasonable steps to ensure that it was meeting permitting requirements and had no control over events constituting the violations, *id*.; (3) the construction industry in the Fargo area was not familiar with storm water permit requirements, *id*.; (4) the construction industry in North Dakota is such that attorneys are not necessarily involved in multi-million dollar contracts, *id*. at 14; (5) North Dakota Department of Health procedures did not ensure that the permittee was provided a copy of the NPDES permit, and thus, Respondent was not aware of the inspection requirements that it violated, *id*. at 15; and (6) "sediment or dirt generally would not be commonly known as a pollutant." *Id*. at 16.[28]

At the outset, as culpability is a matter of "degree," CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3), we note that the degree of culpability found by the ALJ, a 20% upward adjustment of $5,940, is within the range allowed by Agency guidance.[29] Moreover, Respondent's persistent claim of regulatory innocence and ignorance must be set against the bright light of case law highly disfavoring such pleas as supporting a penalty reduction.

i. *Reliance on "Construction" Firms to Manage Construction Storm Water Permit Obligations*

The picture, as found by the ALJ, is somewhat mixed. On one hand, Respondent is not a construction professional. *See* Initial Decision at 63. On the other, it can hardly "cast itself in the role of an innocent non-culpable site owner." *Id*. at 64. Running a $140 million per year, three hundred person enterprise in the business of retailing fuel stops in two states, *id.* at 3, it cannot simply turn its back on satisfying CWA obligations. If it attempted to employ a firm qualified to assume these obligations, it certainly failed. Respondent's claim that it "relied upon * * * professional firms to navigate the project," *see* Respondent's Appeal Brief at 15, has no basis in the record. The ALJ's exhaustive review of the evidence, including two specific queries to Respondent on this score, shows not a single signed agreement delegating these duties. *See* Initial Decision at 64-66. Respondent never hired a "'general contractor' in name or in fact to whom it broadly delegated responsibility for operating the construction project as a whole, including any and all legal compliance responsibilities it had in regard to the project." *Id*. at 65.

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[28] We organize our analysis along the two main themes running through Respondent's appeal brief.

[29] Agency guidance allows far higher culpability adjustments than imposed here: up to 30% in "unusual circumstances," and above 30% for "extraordinary circumstances." *See* EPA General Enforcement Policy #GM-22, at 18-19.

To the contrary, two key individuals with other firms upon whom Respondent repeatedly indicated it relied for permit advice pointedly denied having been given such responsibility by Respondent. *Id*. at 66 (citing ALJ Hearing Transcript ("Tr.") Vol. II at 85, 95, 162-63).[30] It was Respondent, not a contractor, identifying itself as "Applicant" on the Notice of Intent, *id*. at 65, submitting the Notice of Termination, *id.* at 6, and "essentially acting as its own general contractor on the project." *Id.* at 65. Thus, Respondent certainly handled this $10 million project "in a very informal manner," *id*. at 67,[31] and much of the fault it attempts to foist on others is more fairly laid at its own doorstep.[32]

ii. *Unfamiliarity With Construction Storm Water Permit Obligations in Fargo, North Dakota*

The thrust of Respondent's argument is that geographical circumstances, and other characteristics endemic to North Dakota, somehow placed Respondent beyond the regulatory perimeter.[33] Certain facts are telling.

First is the history of construction storm water program implementation bearing on Respondent's activities. When Respondent commenced its project, twelve years of national construction storm water regulations already lay behind.[34] The State of North Dakota itself undertook "fairly aggressive" compliance assistance permitting outreach in Fargo in the years immediately prior to Respondent's violations, including a conference of 3,400 attendees. Initial Decision at 70-71. Mass mailings on permit requirements were sent by the State. *Id*. (citing Tr. Vol. III at 62-63). The State's NPDES program manager testified that the City of Fargo engineer attended a Water Supply Pollution Control Conference, that "others were

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[30] Their roles consisted, rather, of handling "discrete portions" of the project. Initial Decision at 66.

[31] As Respondent acknowledged, attorneys are "not necessarily" involved in multi-million dollar North Dakota construction projects, and for this project, Respondent's President "did not see the need to retain attorneys." Respondent's Appeal Brief at 14.

[32] We note that, recognizing it was not a construction professional, Initial Decision at 63, the ALJ did allow Respondent some accommodation on the penalty. Although the "professional firms [Respondent] *relied upon* to *navigate the project* through the technical process of acquiring necessary permits" were never "clearly delegated such responsibility, voluntarily assumed such responsibility, or were even aware of Respondent's reliance on them," *id*. at 65-66, Respondent's culpability was somewhat diminished because, *inter alia*, "the construction professionals it hired should have known and advised it" of such responsibilities. *Id*. at 67.

[33] Although not styled as such, we treat this as addressing the "[knowledge] of the legal requirement" culpability factor. *See* EPA General Enforcement Policy #GM-22, at 18.

[34] To credit Respondent's skepticism that anyone could "perceive" sediment or dirt as a pollutant, *see* Respondent's Brief at 16, would be to ignore a provision of law in force since 1972. CWA § 502(6), 33 U.S.C. § 1362(6).

aware of and complying with the law," and that "a couple of hundred [storm water permits]" were issued in the State each year – including in the Fargo area. *Id*. (citing Tr. Vol. III at 54-63).

Second, whatever the general history of construction storm water enforcement in Fargo, Respondent, by its own account, "hired Whaley Construction to manage the project and Moore Engineering, Inc., to design and supervise the * * * project." Respondent's Appeal Brief at 15. Moore actually received State mailings on CWA regulations and attended State-sponsored seminars on water pollution. Initial Decision at 66. That such Respondent-hired construction professionals were somehow unaware of construction storm water requirements, and did not so advise their clients was, the ALJ deemed, "difficult to swallow." *Id*. at 66.

Third, Respondent's portrait of a business operating in a regulatory vacuum even after it began construction is belied by its string of direct contacts with regulatory authorities. EPA inspected the site in October 2002, *id*. at 4, "immediately" thereafter personally speaking to the President of Respondent about its obligation to obtain a storm water permit, *id*. at 5, and Respondent soon submitted its general permit application to the State Department of Health. On November 8 and 15, 2002, first by telephone, then by letter, the Department of Health advised Respondent's contact person that certain information was missing from the application. *Id*. Respondent's submission of additional material ten days later completes a not insubstantial dialogue with Federal and State regulators. We can assume that general permit coverage commenced shortly thereafter.[35]

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[35] Whether permitting authorities need notify general permit applicants of permit coverage is at their discretion. 40 C.F.R. § 122.28(b)(2)(vi) ("[t]he Director may notify a discharger * * * that it is covered by a general permit * * * ."). Under the North Dakota program, permit coverage is presumed if, after ten days of receipt of the application by the North Dakota Department of Health, the applicant receives no denial or request for additional information. ND General Permit pt. I.D.1; Respondent's Pre-hearing Exchange Exhibit 15. In this case, with Respondent submitting a second round of information on November 25, 2002, *see* Complainant's Pre-hearing Exchange Exhibit 10, and no subsequent evidence of permit denial or additional information sought by the State, coverage would have begun in early December 2002.

Awareness of the particular terms of general permit coverage, though, is another matter. While the State's November 15, 2002 letter to Respondent referenced the State website, it did so only to tell Respondent where to obtain necessary forms. Contrary to the ALJ's and Complainant's implication that Respondent was told by this letter of the general permit's availability on the State website, i.e., Initial Decision at 67 and Complainant's Response Brief at 22, neither this letter, any later State communication nor any other part of the record before us actually identified the website as containing the general permit. (At oral argument, Complainant agreed that the State's November 15, 2002 letter did not apprise Respondent that the permit was available on the website. EAB Tr. at 55.).

While Respondent's efforts to procure and read its permit were certainly feeble (i.e., making no attempt to contact State permitting authorities with whom Respondent and its contractor were corresponding, Initial Decision at 67; apparently not troubling itself to consult the identified State "envi-
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Thus, whether in the period preceding or succeeding construction, the record firmly counters Respondent's broad claims of ignorance.[36] Indeed, in no CWA case have such claims prevailed before the Board, *see In re Cutler*, 11 E.A.D. 622, 653-654 (EAB 2004); *In re Advanced Elecs., Inc.*, 10 E.A.D. 384, 402 (EAB 2002); *Pepperell Assocs.*, 9 E.A.D. at 109-110, nor should they here.[37] These cases, in fact, spotlight allegations of ignorance that parallel those made by Respondent. For a facility having "an ongoing relationship with [a regulating agency]," the Board observed "the company's incomplete efforts to become better versed in environmental regulation affecting the facility" and declined to reduce the penalty. *Pepperell Assocs.*, 9 E.A.D. at 109-110. On a record replete with reasons why a land excavator "knew or should have known" the reach of CWA jurisdiction, the Board turned away claims of ignorance. *Cutler*, 11 E.A.D. at 653-654.

In sum, the record refutes the portrayal of Respondent as blind to its responsibilities through no fault of its own, and of Fargo as a regulatory backwater. Respondent retained authority over its regulatory affairs, and did not cede them to others. Information about its regulatory obligations flowed to it from multiple channels, to which Respondent should have been alert. Measured against the "clear error" standard, Respondent's culpability arguments fail to undermine the soundness of the ALJ's decision. We uphold the 20% upward adjustment of $5,940.

b. *Deterrence*

Respondent seeks a downward penalty adjustment under the "other matters as justice may require" criterion, arguing that deterrence is not a factor here.[38] Respondent's Appellate Brief at 17. It observes that the City of Fargo now no longer issues building permits for large construction sites without the applicant having previously obtained all necessary CWA storm water permits. Since City

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(continued)
ron/wq/storm" website, Complainant's Pre-hearing Exchange Exhibit 4; unable to prevail in a "struggle" with its own contractors to determine permit conditions, EAB Tr. at 30), there could be circumstances under which a permittee's culpability – under the knowledge of the legal requirement factor – might lessen if permitting authorities failed to make permit obligations reasonably available.

[36] Respondent conceded as much at oral argument. When asked to identify record evidence of supposed construction storm water ignorance in the Fargo area, Respondent's counsel admitted this to be "just speculating." EAB Tr. at 20.

[37] Although the Agency gives the Board no specific CWA penalty policy to guide it, the general Agency policy categorically forbids such consideration: "lack of knowledge of the legal requirement * * * should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law." EPA's General Enforcement Policy #GM-22, at 18.

[38] Deterrence is the consequence of imposing a penalty, not a penalty factor under either the Clean Water Act or Agency policy. We nonetheless consider Respondent's claim.

rules themselves provide "deterrence" for failing to obtain a construction storm water permit, Respondent reasons, CWA enforcement deterrence is unnecessary. *Id.* at 7, 17-21.

At the outset, we note the extraordinary nature of any "other matters as justice may require" offset. This is to be sparingly wielded, coming into play only where application of the other adjustment factors has not resulted in a "fair and just" penalty. *Phoenix Constr.*, 11 E.A.D. at 414-15; *Pepperell Assocs.*, 9 E.A.D. at 113; *In re Steeltech, Ltd.*, 8 E.A.D. 577, 594-95 (EAB 1999), *aff'd*, 105 F. Supp. 2d 760 (W.D. Mich 2000), *aff'd*, 273 F.3d 652 (6th Cir. 2001); *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 215-16 (EAB 1999), *aff'd*, 112 F. Supp.2d 965 (C.D. Cal. 2000); *In re Spang & Co.*, 6 E.A.D. 226, 249-50 (EAB 1995). *See, e.g., In re Bollman Hat Co.*, 8 E.A.D. 177, 189-90 (EAB 1999) (applying this factor where complainant and administrative law judge misapplied penalty policy). Respondent makes two main arguments.

First is Respondent's premise that deterrence is merely local, in this case only dissuading the Fargo community from such violations. In so suggesting a limited deterrence reach of this case, however, Respondent misunderstands EPA's General Enforcement Policy #GM-21. One goal of the policy is "specific" deterrence – addressing the particular violator. *See* EPA's General Enforcement Policy #GM-21, at 3. The other, "general" deterrence, *id.*, extends the admonition against violating the law far more broadly – to the "general public," *id.* – and in this case, beyond the City of Fargo. *See Mun. Auth. of Union Twp.*, 929 F. Supp. at 806 ("The Clean Water Act's penalty provision is aimed at deterrence with respect to both the violator's future conduct (specific deterrence) and the *general population regulated by the Act* (general deterrence).") (emphasis added). While EPA enforces federal law against particular violators and violations, it does so with the wider objective of emphatically signaling to the entire regulated community the unacceptability of such behavior, not merely the particular city or locale of the violations. Penalties reach beyond the particular claim or place. They have a nation wide character.

Second is Respondent's assumption about the impact of the City rules. It may be true that the City of Fargo presently conditions obtaining a building permit on producing a CWA storm water permit. But, as the ALJ understood, this seeming shield to storm water noncompliance has holes. For one thing, as any local ordinance, it may be revoked at any moment. *See* Initial Decision at 72.[39] For another, even if a permanent regulation, it would only address Count 1 – obtaining a permit. Failure to thereafter comply with the permit and conduct necessary inspections is not, even by Respondent's characterization, under continuing

[39] At oral argument, Respondent conceded that the CWA does not require such a local ordinance. EAB Tr. at 27.

City of Fargo regulation. Thus, that part of Respondent's penalty attributable to failure to inspect (Count 2) is entirely unaffected by the ordinance.

We therefore affirm the ALJ decision not to adjust the penalty downward.

c. *Circumstances of the Violations*

Finally, Respondent tries by a different door to advance its earlier no-culpability "lack of sophistication" arguments. Again, it presses City of Fargo and even North Dakota-wide "unfamiliarity" with CWA regulatory requirements, this time wrapping itself in widespread storm water permit noncompliance on one hand, and asserting on the other its alacrity in seeking permit coverage and installing runoff controls once alerted by EPA to the obligation. Respondent's Appeal Brief at 21-26. Thus, it concludes, the ALJ erred in increasing the economic benefit by a factor of ten to account for the "nature, circumstances and extent of the violation." *Id*. at 21.

Complainant, however, rightly points to Respondent's misunderstanding of the statutory factors in CWA § 309(g)(3). Complainant's Response Brief at 25. As Complainant explains, section 309(g)(3) divides the various statutory factors the Agency must consider in assessing administrative penalties in two groups: those related to the violation and those related to the violator. *Id*. The factor argued by Respondent here – "circumstances of the violation" – even by its own phrasing, belongs to the first group. *See*, *e.g.*, *In re 3M Co.*, 3 E.A.D. 816, 825-26 (CJO 1992) (declining to consider inadvertent mistakes and good faith but erroneous assumptions as "circumstances" related to the violations because they relate to actions and intent of the violator). Yet, Respondent proceeds to argue, as if in the second group, by pressing its own exculpatory behavior and location. *Id*. at 26.

When placed in the proper statutory framework, however, the circumstances of the violation yield a conclusion amply supported by the ALJ's analysis. Chief among her findings was, for Count 1, a "complete failure" to apply for its storm water permit prior to starting construction,[40]and for Count 2, its "failure to an overwhelming extent" in conducting its required inspections. Initial Decision at 56-57. As to the former, and against Respondent's claim of mere technical violations, the record showed well over half a year of unpermitted activity, a "substantive" defect that "goes to the very heart of the CWA and its intent to limit or eliminate pollutant discharges * * * *before construction begins*." *Id*. at 57. As to

[40] Even if Respondent intended to argue a violator-specific factor (such as degree of culpability) in noting that twelve of thirteen contemporaneously inspected sites were found without permits, this does not advance Respondent's case. This claim is but a variant of the already-addressed "lack of sophistication" brush with which it painted the Fargo area, *see* discussion *supra* Part II.B.3.a, and we are not persuaded that it warrants a downward adjustment.

the latter, sixty-five of eighty required inspections were not conducted, leaving a consequent monitoring gap of the sort that renders "ineffectual" the whole permit process. *Id.*[41]

In sum, we find no clear error in the judgment of the ALJ, and affirm her upward adjustment of economic benefit by a factor of ten to account for the nature, circumstances and extent of the violations.

III. *CONCLUSION*

For all the foregoing reasons, we affirm the Initial Decision in its entirety and uphold the total penalty the ALJ assessed. Accordingly, Respondent shall pay the full amount of the civil penalty the ALJ assessed ($35,640) within thirty (30) days of receipt of this final order. Payment should be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the case name and the EPA docket number must accompany the check. 40 C.F.R. § 22.31(c).

So ordered.

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[41] Respondent claims its installation of storm water capturing devices as a redeeming, and penalty-lowering, "circumstance." Respondent's Appeal Brief at 25. We agree with the ALJ, however, that this was not a "primarily altruistic act," Initial Decision at 72, but rather, "an unintended consequence of what was a primarily business driven decision." *Id.*