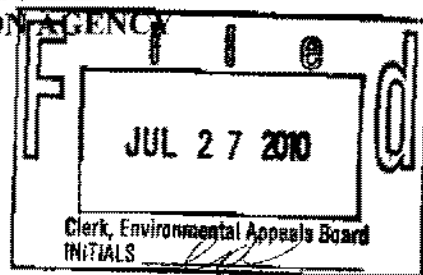


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: Service Oil, Inc.

)
) CWA Appeal No. 07-02
)

Docket No. CWA-08-2005-0010

)
)
)

REMAND ORDER

On July 23, 2008, the Environmental Appeals Board (the "Board"), issued a Final Decision and Order in the above-captioned case upholding an Initial Decision issued by Administrative Law Judge Susan L. Biro (the "ALJ") which found Respondent, Service Oil, Inc., liable for two counts of violations of the Clean Water Act ("CWA") and assessed a total civil penalty of \$35,640. More specifically, the Board upheld the ALJ's determinations: (1) that Service Oil violated section 308 of the CWA and 40 C.F.R. section 122.21 by failing to apply for a permit prior to commencing construction activities, and section 301 of the CWA, by failing to obtain a permit for construction activities in which Respondent discharged a pollutant into waters of the United States (Count 1); and (2) that Service Oil failed to conduct storm water inspections and failed to record or maintain on-site inspection records in violation of its NDPDES permit (Count 2). *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, at 12, 24, 51 (ALJ Aug. 3, 2007) (Initial Decision); *In re Service Oil, Inc.*, CWA Appeal No. 07-02, slip op. at 34 (EAB July 23, 2008), 14 E.A.D. ___ (affirming ALJ's decision in its entirety).

On August 13, 2008, Service Oil filed a Petition for Review of the Board's Final Decision and Order with the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") asserting that the Agency erred as a matter of law in holding Service Oil liable under Section 308 of the CWA. On December 28, 2009, the Eighth Circuit issued its judgment granting Service Oil's Petition, vacating the Board's Order and remanding the matter to the Agency. *See Service Oil, Inc. v. U.S. EPA*, 590 F.3d 545 (8th Cir. 2009). Specifically, the Eighth Circuit held that the failure to submit a timely permit application in accordance with 40 C.F.R. §§ 122.21(c)(1) and 122.26(c) "cannot be a violation of § 1318(a) [, section 308(a)] because the statute's record-keeping requirements are expressly limited to 'the owner or operator of any point source,' and [b]efore any discharge, there is no point source." *Id.* at 550. The court also concluded that "EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application." *Id.* at 550-51. Noting that the penalty the Agency assessed was "primarily [based] on Service Oil's 'complete failure to apply for its storm water permit prior to starting construction,'" the Eighth Circuit remanded the matter to the Agency for penalty recalculation. *Id.* at 551. The formal Mandate associated with the Eighth Circuit's decision was issued on April 22, 2010, and filed with the Clerk of the Board on July 13, 2010.

In light of the Eighth Circuit's opinion, and because the penalty the ALJ originally assessed was based in part on Service Oil's failure to submit a timely permit application, *see* Initial Decision at 56-57, it is appropriate to remand this matter to the ALJ to render a new initial decision that is consistent with the Eighth Circuit's decision. Accordingly, the Board hereby remands the above-captioned matter to the ALJ to conduct further proceedings as necessary to amend the liability findings and redetermine the penalty amount. The ALJ's new initial decision

shall have the effect described in 40 C.F.R. § 22.27. Either party may appeal from the new initial decision as prescribed in 40 C.F.R. § 22.30.

So ordered.¹

ENVIRONMENTAL APPEALS BOARD

Dated: *July 27, 2010*

By: *Charles J. Sheehan*
Charles J. Sheehan
Environmental Appeals Judge

¹ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Charles Sheehan, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of Service Oil, Inc., CWA Appeal No. 07-02, were sent to the following persons in the manner indicated:

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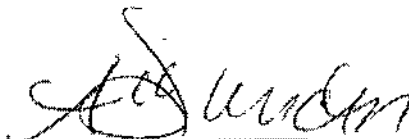
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Dated: JUL 28 2010



Annette Duncan
Secretary