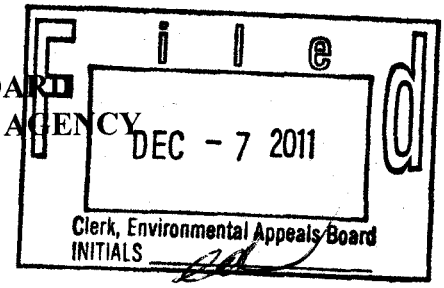
BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	
Service Oil, Inc.	)	CWA Appeal No. 11-01
Docket No. CWA-08-2005-0010	)	

FINAL DECISION AND ORDER

I. *STATEMENT OF THE CASE*

Service Oil, Inc. appeals from an Initial Decision Upon Remand issued December 7, 2010, by Chief Administrative Law Judge Susan L. Biro ("ALJ"). In that decision, the ALJ recalculated the administrative penalty to be assessed against Service Oil for storm water-related violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, at a truck stop construction site in Fargo, North Dakota. In a previous Initial Decision issued August 3, 2007, the ALJ assessed a penalty of $35,640 against Service Oil for these violations, which the Environmental Appeals Board ("Board") affirmed on appeal on July 23, 2008. On further appeal, however, the United States Court of Appeals for the Eighth Circuit vacated and remanded the penalty, instructing that it be recalculated in accordance with section 309(g)(3) of the CWA and that court's opinion, issued December 28, 2009.

On remand, the ALJ computed a penalty of $32,287, a reduction of $3,353 from the original penalty of $35,640. Service Oil now contends that the ALJ violated the law-of-the-case doctrine and the mandate rule in her reassessment of the appropriate penalty. The company asks that the Initial Decision Upon Remand be set aside and the penalty redetermined as $6,457. For

the reasons set forth below, the Board vacates the ALJ's Initial Decision Upon Remand and assesses a penalty of $14,529.24.

II. *ISSUE ON APPEAL*

The Board must decide whether, on remand, the ALJ complied with the Eighth Circuit's mandate when she recalculated the penalty against Service Oil.

III. *SUMMARY OF DECISION*

The Board holds that the ALJ's recalculation of penalty on remand was inconsistent with the Eighth Circuit's invalidation of that portion of Count 1 alleging a violation for Service Oil's failure to timely apply for a storm water permit and the Eighth Circuit's further determination that the majority of the Board's previously assessed penalty was attributable to that now-invalidated violation. The Board therefore assesses a revised penalty of $14,529.24.

IV. *JURISDICTION AND STANDARD OF REVIEW*

In this second round of administrative appellate review, the Board, as before, has jurisdiction under the Consolidated Rules of Practice, 40 C.F.R. part 22, and reviews the 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" an administrative law judge's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n 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"); *In re Smith Farm Enters., LLC*, CWA Appeal No. 08-02, slip op. at 75-94 (EAB Mar. 16,

2011), 15 E.A.D. ___ (applying de novo review standard to administrative law judge's Decision Upon Remand), *appeal docketed*, No. 11-1355 (4th Cir. Apr. 8, 2011).

When conducting de novo reviews of penalty determinations, the Board typically defers to the administrative law judge's penalty calculations, provided the judge reasonably considered each of the statutory penalty factors. *In re Vico Constr. Corp.*, 12 E.A.D. 298, 333-45 (EAB 2005); *In re Britton Constr. Co.*, 8 E.A.D. 261, 279-93 (EAB 1999). Even though review as a whole is fresh, the Board "generally will not substitute its judgment for that of [an administrative law judge] absent a showing that the [judge] committed clear error or an abuse of discretion in assessing a penalty." *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390 (EAB 2004); *see In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 724-34 (EAB 2002) (finding clear error in administrative law judge's penalty analysis and determining appropriate penalty).

V. *FACTUAL AND PROCEDURAL HISTORY*[1]

A. *Project Overview*

In April 2002, Service Oil, Inc. began constructing a new truck stop, called the "Stamart Travel Center," on a large parcel of land off Interstate Highway 29 in Fargo, North Dakota. At the outset, construction included clearing, grading, and excavation operations, which prepared the land for later installation of car and truck fuel stations, paved parking lots, and a restaurant. Construction did not include, until approximately eight months into the project, installation of storm water runoff controls (e.g., silt fences, sediment traps, drain inlet/outlet protections, vehicle

[1] The facts and procedural history of this case are extensively detailed in the ALJ's prior decisions and summarized in the Board's and Eighth Circuit's opinions. Only the sparest background necessary to understand this iteration of the case is therefore set forth here. Readers seeking further information are referred to the prior decisions, all of which are publicly available.

track-out pads) or implementation of storm water management practices (e.g., use of designated parking areas, concrete truck washing procedures, street sweeping). Accordingly, over that initial construction period, Service Oil allowed storm water to carry upwards of forty-nine tons of sediment from the land disturbances in the work area through storm drains and surface runoff to the Red River of the North, a navigable waterbody regulated under the CWA.

B. *The ALJ's Findings of Liability*

Region 8 of the United States Environmental Protection Agency ("EPA" or "Agency") subsequently brought an administrative enforcement action against Service Oil, alleging two counts of violation of the CWA at the Stamart site. In the proceedings that followed, the ALJ granted accelerated decision as to liability for the second count (Count 2), which alleged failure to conduct weekly storm water inspections and maintain site inspection records at the truck stop. The ALJ denied accelerated decision as to liability for the first count (Count 1) and instead presided over a three-day administrative hearing on the allegations in that count. The ALJ eventually found Service Oil liable under Count 1 on two independent bases:

(1) *Failure to apply for a CWA permit* prior to commencing construction, in violation of CWA section 308, 33 U.S.C. § 1318, and implementing regulations at 40 C.F.R. § 122.21; and

(2) *Failure to obtain a CWA permit* for construction activities in which pollutants were discharged into waters of the United States (namely, the Red River of the North), in violation of CWA section 301, 33 U.S.C. § 1311.

Init. Dec. at 24, 50-51.

C. *The ALJ's Initial Penalty Calculus*

In determining the original penalty, the ALJ assessed an administrative penalty of $35,640 for the Counts 1 and 2 violations combined. *Id.* at 72. In deriving that figure, the ALJ referenced section 309(g)(3) of the CWA, which provides:

> In determining the amount of any [administrative] penalty * * *, [EPA] * * * shall take into account the 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); *see* Init. Dec. at 51. The ALJ looked to these statutory penalty factors and also to the federal courts, which employ several standardized methods when applying CWA section 309(d) civil penalty criteria in specific cases. *See* Init. Dec. at 51-52; *In re Service Oil, Inc.*, CWA Appeal No. 07-02, slip op. at 22-23 (EAB July 23, 2008), 14 E.A.D. ___, *vacated & remanded*, 590 F.3d 545 (8th Cir. 2009). The ALJ chose to follow the federal courts' "bottom-up method," which first quantifies the violator's economic benefit of noncompliance and then adjusts that figure to reflect the other statutory factors.[2] Init. Dec. at 52-53.

Accordingly, the ALJ began by assessing Service Oil's economic benefit. She valued the company's "delayed costs" of compliance at $940, which represented the monies Service Oil saved by temporarily postponing submission of a CWA permit application, preparation of a

---

[2] EPA has not issued a civil penalty policy specifically to guide application of CWA §§ 309(d) or 309(g) statutory factors to civil or administrative CWA violations, respectively. The two penalty provisions have many similarities, however (*compare* CWA § 309(d), 33 U.S.C. § 1319(d) *with* CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3)), rendering use of quantification methods akin to those developed for federal court litigation appropriate in the administrative context.

storm water pollution prevention plan, and installation and maintenance of storm water controls on site. *Id.* at 53. The ALJ also valued Service Oil's "avoided costs" of compliance at $1,760, which represented the monies saved by forgoing dozens of storm water inspections that should have been conducted during the construction phase. *See id.* at 53-54 & nn.47-49. Together, these figures totaled $2,700 as the economic benefit to Service Oil of all three CWA violations. *Id.*

The ALJ then applied a tenfold upward adjustment to the base penalty, to reflect the "nature, circumstances, and extent" of Service Oil's violations. *Id.* at 56-57. For Count 1, the ALJ described the "nature, circumstances, and extent" as Service Oil's "complete failure to apply for and obtain a [storm water] permit prior to starting construction in April 2002 and continuing until November 2002, a period of approximately seven months, as required by the CWA and its implementing regulations." *Id.* at 56. The ALJ explained further, stating:

> Contrary to [Service Oil's] assertion, I do not view this as a mere violation of a technical regulation. * * * Rather, the nature, extent, and circumstances of the violation in Count 1 is a substantive violation of the stormwater permit program that goes to the very heart of the CWA and its intent to limit or eliminate pollutant discharges into navigable waters by planning and putting into place *before construction begins* measures to prevent and/or minimize discharges occurring. * * * Failing to apply for such a permit by itself created a risk of illegal discharge, if not assurance thereof, in that it meant no serious thought was given to the need for [best management practices] to prevent the possibility of pollutants discharging from the site in stormwater prior to construction beginning, and no adequate monitoring of discharges occurred during the critical period when the land was being disturbed by clearing, grading, and excavating activities and such discharge was most likely to occur.

Id.

For Count 2, the ALJ identified the "nature, circumstances, and extent" as Service Oil's "failure to an overwhelming extent, that is, 65 out of 80 times, to conduct the inspections

required to determine if the [best management practices] it put into place were effectively controlling stormwater discharge after it obtained its permit." *Id.* The ALJ noted:

> While this type of violation is more technical in nature, it too undermines the very intent and purpose of the CWA in that [the] inspection requirement is clearly designed to assure that the anti-pollutant discharge measures required by the CWA and permits issued thereunder are actually effectively and continuously implemented and maintained. Without such monitoring, the whole permit issuance process becomes ineffectual.

Id. at 56-57. The ALJ concluded her analysis of the three violations' "nature, circumstances, and extent" by deeming it "appropriate" to multiply the "rather nominal" economic benefit figure by ten, which yielded an "initial adjusted penalty" of $27,000. *Id.* at 57.

The ALJ moved next to the "gravity" of the violations. In that discussion, the ALJ explicitly considered the status of the Red River of the North as a "Class 1" stream from which the City of Fargo draws its drinking water and into which Service Oil discharged approximately forty-nine tons of sediment. *Id.* at 57-58. The ALJ found that the administrative record lacked direct evidence of actual harms caused by Service Oil's violations to water quality, aquatic organisms, or human uses of the Red River. *Id.* at 58. Nonetheless, the ALJ deemed the available evidence sufficient to establish that Service Oil's activities had, as a general matter, "caused the Red River to become more impaired." *Id.* Consequently, the ALJ adjusted the penalty upward by another 10% to reflect the gravity of the violations. *Id.* at 57-58.

The ALJ concluded with analyses of the remaining penalty factors set forth in CWA section 309(g)(3) (i.e., ability to pay; history of violations; culpability; other factors as justice may require). *See id.* at 58-72. The ALJ adjusted the penalty upward by another 20% to reflect

Service Oil's culpability, *id.* at 60-67, and made no adjustments for the other factors, for a total penalty of $35,640. *Id.* at 72.

D. *Appeals to the Board and to the Eighth Circuit*

Service Oil appealed the ALJ's initial penalty decision to the Board, which affirmed the decision in its entirety. *Service Oil*, slip op. at 34, 14 E.A.D. at ___. Service Oil then appealed the Board's decision to the Eighth Circuit, which held that the Board could not, consistent with the statute, assess civil penalties for a party's failure to apply for a storm water discharge permit.[3] *Service Oil, Inc. v. EPA*, 590 F.3d 545, 550-51 (8th Cir. 2009). The Eighth Circuit consequently vacated the Board's penalty order and remanded the case to the Agency, instructing that the penalty amount be redetermined in accordance with the statutory penalty factors at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and the court's opinion. *Id.* at 551.

The Eighth Circuit issued a formal mandate to the Agency pursuant to Federal Rule of Appellate Procedure 41(a). *Service Oil, Inc. v. EPA*, Mandate Order (8th Cir. Apr. 22, 2010). The Board then remanded the case to the ALJ, directing her to "render a new initial decision that is consistent with the Eighth Circuit's decision." Board Remand Order at 2 (July 27, 2010). The ALJ duly rendered that new decision on December 7, 2010.

---

[3] In so doing, the Eighth Circuit decided a legal issue that was not squarely raised before, or specifically decided by, the Board; namely, whether a failure to submit a timely permit application constitutes a violation of CWA § 308. The Board analyzed a different legal question; namely, whether CWA § 308 requires EPA to issue an "individualized" request or order (such as a requirement that a particular person file a permit application) as a precondition to finding a violation under CWA § 308. The Board held that it does not, and thus affirmed the ALJ's finding of liability on CWA § 308 grounds.

E. *The ALJ's Penalty Calculus on Remand*

In her Initial Decision Upon Remand, the ALJ slightly altered the delayed costs portion of the economic benefit figure (reducing it from $940 to $686 to reflect a slightly shorter period of violation), but she left the avoided costs portion, as well as the gravity and culpability percentage increases, unchanged. Init. Dec. Upon Remand at 9, 12. With respect to the nature, circumstances, and extent factors analyses, the ALJ reinstituted the tenfold increase to the base penalty. *Id.* at 10. The ALJ explained:

> The "*nature*" of the paramount violation established in Count 1 was not the regulatory violation, but [Service Oil's] violation of what the Eighth Circuit properly recognized as the "core prohibition" of the CWA, that is[, s]ection 301's prohibition on discharging pollutants without a permit. * * * The "*circumstances*" thereof, as extensively detailed in the Initial Decision, arose from [Service Oil's] construction of its 12th truckstop on a 15+ acre site in Fargo, North Dakota, at a cost of approximately 10 million dollars beginning in April/May 2002. * * * [P]rior to obtaining [a storm water] permit, [Service Oil] never installed on site the 'best management practices' required to prevent, minimize, or control sediment in storm water flowing off the construction site and into [Fargo's] storm water system leading to the Red River of the North. * * *
>
> In terms of the "*extent*" of the violation set forth in Count 1, as indicated in the Initial Decision, in October 2002, inspectors at the site observed evidence of sediment runoff, "significant vehicle track out," as well as concrete washing activities. * * * Expert testimony * * * established that 49 tons of sediment flowed off [Service Oil's] site into [Fargo's] municipal storm sewer system, and ultimately into the Red River of the North, during the seven-month period that [Service Oil] had no permit. * * * The Red River is a source of drinking water for Fargo city residents and the addition of pollutants thereto increases the City's cost of treatment as well as the risk of exposing residents to contaminants through water consumption, bathing, or recreation. * * *
>
> As to the "*nature, circumstances, and extent*" of the violation set forth at Count 2, [Service Oil] conceded [that it] * * * failed to conduct 65 out of 80 (4/5ths or 81%) of required site inspections. Consequently, it was impossible for [Service Oil] or anyone else to know if the [best management practices] were properly installed and maintained as necessary to prevent pollutants in storm water running off the site during the balance of the construction period.

Id. at 10-11 (emphasis added; citations omitted). The ALJ concluded that, "even taking into account the holding of the Eighth Circuit's opinion that no penalty is authorized for [Service Oil's] failure to apply for a permit prior to construction/discharge, the aforementioned 'nature, extent, and circumstances' of the two remaining violations * * * indicates that at least a tenfold increase in the economic benefit of the penalty is still fully warranted." *Id.* at 12. Applying the tenfold penalty increase to the economic benefit factor, and the 10% and 20% adjustments, the ALJ reached a total penalty on remand of $32,287. *Id.*

F. *The Present Appeal*

Service Oil timely appealed the ALJ's Initial Decision Upon Remand to this Board. The Board now vacates the ALJ's decision and assesses a new penalty.

VI. *ANALYSIS*

A. *Service Oil's Arguments on Appeal*

Service Oil casts this appeal as one governed by the law-of-the-case doctrine and its corollary, the mandate rule. Service Oil cites the Eighth Circuit's ruling that a failure to apply for a storm water permit prior to construction in the time prescribed by EPA's permit regulations does *not* violate CWA section 308, 33 U.S.C. § 1318, and therefore *cannot* be a basis for a civil monetary penalty under CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1). Appeal Br. at 2, 7-8 (citing *Service Oil*, 590 F.3d at 546, 548-49, 551). Service Oil then highlights the Eighth Circuit's associated finding that the Board's prior decision impermissibly based the monetary penalty "primarily" on this very factor. *Id.* at 2-3 (quoting *Service Oil*, 590 F.3d at 549, 551). Service Oil argues that the Eighth Circuit established the law of the case when it found the Board

had specifically – and unlawfully – upheld a tenfold increase made in the base penalty "because of Service Oil's 'complete failure to apply'" for a storm water discharge permit. *See id.* at 10 n.2 (quoting 590 F.3d at 548-49).

Service Oil contends further that all other penalty calculations made by the ALJ in her Initial Decision and affirmed by the Board on appeal likewise constitute the law of the case. These penalty elements were not challenged by the parties on further appeal to the Eighth Circuit or ruled upon in any way (explicitly or implicitly) by that court. *Id.* at 8-9. Thus, to ensure uniformity of decisions, protect the settled expectations of the parties, and promote judicial economy, Service Oil argues, those penalty calculations should not be altered in further proceedings. *See id.* at 9 (citing *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995)). The only thing Service Oil believes the ALJ had authority to do on remand – and indeed was mandated to do – was to extract from the penalty all sums attributable to the section 308 failure-to-apply violation. *See id.* at 7-10. That included, primarily, wholesale deletion of "the entirety of [the] tenfold increase in the economic benefit penalty." *Id.* at 10 n.2. Because the ALJ did not do this, Service Oil charges error. *Id.* at 10.

B. *The Legal Doctrines*

The law-of-the-case doctrine is a long-established creature of common law jurisprudence, by which courts generally refuse to "reopen what has been decided."[4] *Messinger v. Anderson*,

---

[4] The United States Supreme Court has explained that "[u]nlike the more precise requirements of res judicata, law of the case is an amorphous concept." *Arizona v. California*, 460 U.S. 605, 619 (1983). It is "amorphous" at least in part because it applies in varying ways to a court's own prior rulings, collateral court rulings, and appellate court rulings. The "most elementary" application of the law-of-the-case doctrine involves lower courts' duty to comply (continued...)

225 U.S. 436, 444 (1912); *see Arizona v. California*, 460 U.S. 605, 619 (1983) ("a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive"); *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coops., Inc.*, 896 F. Supp. 912, 914 (E.D. Ark. 1995) (the "venerable" law-of-the-case doctrine is "a staple of our common law as old as the Republic"); *see also Great W. Tel. Co. v. Burnham*, 162 U.S. 339, 343-44 (1896); *Roberts v. Cooper*, 61 U.S. 467, 481 (1857). The doctrine is "based on the salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967); *accord Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976).

Under the doctrine, once a court decides an issue of fact or law, either explicitly or by necessary implication, that court's decision on the issue will be treated as binding – i.e., as the "law of the case" – in subsequent proceedings in the same case. *E.g.*, *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008); *Crowe v. Smith*, 261 F.3d 558, 562 (5th Cir. 2001); *DiSimone v. Browner*, 121 F.3d 1262, 1266-67 (9th Cir. 1997). In choosing, as a matter of prudent discretion, to adhere to decisions made in earlier proceedings, courts protect the settled expectations of parties, ensure uniformity of decisions, and promote judicial efficiency. *E.g.*, *UniGroup, Inc. v. Winokur*, 45 F.3d 1208, 1211 (8th Cir. 1995); *Key*, 925 F.2d at 1060; *Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986). Only a handful of extraordinary circumstances provide possible bases for revisiting prior rulings, including: (1) an intervening change in controlling law; (2) new

---

[4](...continued)
with the rulings of appellate courts. *Williams v. Comm'r of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993).

significant evidence; or (3) clear error in the prior disposition that works a manifest injustice. *See, e.g.*, *Hulsey v. Astrue*, 622 F.3d 917, 924-25 (8th Cir. 2010); *United Artists Theatre Cir., Inc. v. Township of Warrington*, 316 F.3d 392, 397 n.4 (3d Cir. 2003); *DiSimone*, 121 F.3d at 1266-67; *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312-13 (6th Cir. 1997); *Key*, 925 F.2d at 1060-63.

The rule-of-mandate doctrine (or mandate rule), similarly long-lived, is a more binding variant (or corollary, expression, subspecies, or close relation)[5] of the law-of-the-case doctrine. It comes into play when the law of the case is established by a superior court in an on-going case proceeding. The United States Supreme Court long ago explained the rule as follows:

> Whatever was before the [superior court], and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the [superior court's] mandate. Th[e inferior court] cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.

---

[5] According to the United States Court of Appeals for the Ninth Circuit:

> Courts have not been consistent in describing the mandate doctrine. We have said the doctrine is "similar to, but broader than, the law of the case doctrine." * * * By contrast, several of our sister circuits have described the rule of mandate doctrine as "nothing more than a specific application of the 'law of the case' doctrine." * * * There certainly is a difference between the two doctrines, and they are not identical. While both doctrines serve an interest in consistency, finality, and efficiency, the mandate rule also serves an interest in preserving the hierarchical structure of the court system.

United States v. Thrasher, 483 F.3d 977, 982 (9th Cir. 2007) (citations omitted).

Sibbald v. United States, 37 U.S. 488, 492 (1838); *accord In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Federated Rural Elec.*, 896 F. Supp. at 914.

An appellate court mandate is "completely controlling as to all matters within its compass," and on remand a trial court may rule only on issues "not expressly or impliedly disposed of on appeal." *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940). In so doing, however, a trial court is "without power to do anything [that] is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the appellate] court deciding the case." *Id.*; *accord Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002); *Crowe v. Smith*, 261 F.3d 558, 562 (5th Cir. 2001); *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858, 865 (8th Cir. 1980); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 541 (8th Cir. 1975); *R.C. Paull v. Archer-Daniels-Midland Co.*, 313 F.2d 612, 617-18 (8th Cir. 1963).

The law-of-the-case doctrine and the mandate rule are applicable to judicial review of administrative decisions. *Hulsey v. Astrue*, 622 F.3d 917, 924 (8th Cir. 2010); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003); *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998); *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 537-38 (8th Cir. 1998), *vacated & remanded on other grounds*, 525 U.S. 1133 (1999); *Brachtel v. Apfel*, 132 F.3d 417, 419-20 (8th Cir. 1997). They require an administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, if those issues are decided explicitly or by necessary implication. *Poppa v. Astrue*, 569 F.3d 1167, 1170-71 (10th Cir. 2009); *Atlantic City Elec.*, 329 F.3d at 858-59; *Wilder*, 153 F.3d at 803; *DiSimone*, 121 F.3d at 1266. Put another way, "[t]he basic doctrine that, until reversed, the dictates of a

Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction applies equally to the precedential rule of *stare decisis* and the policy rule respecting the law of the case." *Beverly Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984). "Administrative agencies[, which are bound by the law of the circuit in which a case arises,] are no more free to ignore this doctrine than are district courts." *Id.*; *accord Scott*, 289 F.3d at 267-68; *NLRB v. Goodless Bros. Elec. Co.*, 285 F.3d 102, 107-11 (1st Cir. 2002); *Bloom v. NRLB*, 153 F.3d 844, 850-51 (8th Cir. 1998), *vacated & remanded on other grounds sub nom. Office & Prof'l Emps. Int'l Union v. Bloom*, 525 U.S. 1133 (1999).

C. *Service Oil's Characterization of the ALJ's Task on Remand Is Overbroad*

With these legal principles in mind, the Board begins its analysis by examining the scope of the ALJ's task in the wake of the Eighth Circuit's remand. As noted above, Service Oil defines the ALJ's task on remand as follows: "Pursuant to the Eighth Circuit's mandate in *Service Oil, Inc.*, all the ALJ was permitted to do on remand was redetermine the amount of the penalty to be imposed against Service Oil, 'in accordance with 33 U.S.C. § 1319(g)(1)(A) and [the Eighth Circuit's] opinion.'" Appeal Br. at 7. Further, "[i]n terms of a 'redetermination of the amount of the penalty,' such 'redetermination' is limited to a deletion from the original penalty of the entire amount previously assessed against Service Oil * * * for Service Oil's 'complete failure to apply for and obtain a [storm water] permit prior to starting construction.'" *Id.*

This statement of the task on remand, and others like it in Service Oil's appeal brief and elsewhere in this record, mistakenly conflate the failure to *apply* for a permit with the failure to

obtain a permit authorizing a discharge. These two elements are distinct. They form the two separate bases for Count 1 liability, and the Eighth Circuit invalidated only the former (i.e., the section 308 failure-to-apply violation), leaving the latter (i.e., the section 301 failure-to-obtain-a-permit violation, also more typically known as a discharge-without-a-permit violation) wholly untouched. *See Service Oil*, 590 F.2d at 549-51. The ALJ's finding of Count 1 liability on that latter basis remains in place, as does her finding of Count 2 liability for failure to perform storm water inspections and maintain reports. No party appealed any aspect of these liability rulings in any previous iteration of this case, and neither the Eighth Circuit nor the Board explicitly or implicitly addressed them on its own initiative. *See generally id.* at 546-51; *Service Oil*, slip op. at 10-34, 14 E.A.D. at ___. Accordingly, as to those specific aspects of this litigation, the ALJ's rulings on these two liability bases, affirmed by the Board, comprise the law of the case. *See, e.g., In re SchoolCraft Constr. Co.*, 8 E.A.D. 476, 482 (EAB 1999) (Board ruling in prior stage of litigation established law of the case). The liability findings may not be reconsidered or altered in subsequent proceedings barring invocation of one of the various extraordinary exceptions mentioned in Part VI.B above, which no party has raised. *See In re Bethenergy*, 3 E.A.D. 802, 805-07 (CJO 1992) (reexamining, and ultimately affirming, previously decided legal issue on charge that it was plain error); *see also United States v. Bartsh*, 69 F.3d 864, 865-67 (8th Cir. 1995) (affirming trial court determination that it lacked discretion, under law of the case, to revisit penalty decision, despite defendant's claims of substantial new evidence and clear error resulting in manifest injustice).

Moreover, to the extent that Service Oil suggests the entire tenfold penalty increase to the base penalty must be deleted because the Eighth Circuit established, as the law of the case, that

the Board assessed that increase *only* for the failure-to-apply violation, *see* Appeal Br. at 10 n.2, the company is again mistaken. Upon review of the entire decision, it becomes quite plain that the Eighth Circuit found that the Board (and ALJ) applied the tenfold increase "primarily" – i.e., *mostly*, but not *solely* – for the failure-to-apply violation. *See, e.g.*, *Service Oil*, 590 F.2d at 546 ("EPA imposed a substantial monetary penalty on Service Oil," basing that "substantial" amount "not on unlawful discharges[] but on Service Oil's failure to comply with the agency's permit application regulations"); *id.* at 549 ("[t]he amount of penalty assessed * * * was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations"); 551 ("[t]he decision of the [Board] based the amount of monetary penalty assessed primarily on Service Oil's 'complete failure to apply for its storm water permit prior to starting construction'").

Accordingly, contrary to Service Oil's position, the Board holds that, on remand, the ALJ's only task under the Eighth Circuit's mandate was to tease out from the penalty calculus the sums attributable solely to the now-invalidated section 308 failure-to-apply violation. This exercise required extraction not of the entire tenfold penalty increase but rather of a "primary" percentage thereof. It did not involve assessment of new, additional penalties for either of the remaining two bases of liability. Adding additional penalties for matters neither appealed to nor addressed by the Board or the Eighth Circuit would have been barred by the law of the case, which, as noted above, protects parties' settled expectations, conserves limited adjudicative resources, and promotes finality. *See, e.g.*, *Travelers Prop. Cas. Ins. Co. v. Nat'l Union Ins. Co.*, 621 F.3d 697, 712-13 (8th Cir. 2010) (where no party appealed apportionment of recoveries between insured and uninsured losses, and where apportionment ruling constituted a final order,

such apportionment is the established law of the case); *Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1440-41 (8th Cir. 1986) (where no party appealed earlier order directing improvements to rental housing, and where large expenditures were made in reliance on finality of that order, law of the case prevents reconsideration of issues explicitly and implicitly decided in that order).

D. *The ALJ's Imposition of a Tenfold Increase Attributable to the Nature, Circumstances, and Extent of the Two Remaining Violations Is Inconsistent with the Eighth Circuit's Decision*

The Board turns finally to the question whether the ALJ erred in recalculating the civil penalty on remand. The ALJ's task unquestionably was a difficult one, because the prior penalty analysis, affirmed by the Board, had not attributed specific sums to any of the three independent liability bases. Had that been the case, the Eighth Circuit might itself have chosen to vacate just that portion of the penalty assessed for the failure-to-apply violation, rather than the entire penalty. The various penalty elements, however, were indistinguishably intertwined, making disengagement difficult.

That said, the penalty recalculation was cabined by the ruling and findings of the Eighth Circuit. The Eighth Circuit ruled that Service Oil's failure to apply for a storm water permit prior to construction in the time prescribed by EPA's permit regulations did not, as a matter of law, violate CWA section 308, 33 U.S.C. § 1318, and therefore could not be a basis for a civil monetary penalty under CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1). *Service Oil*, 590 F.3d at 546, 551. Further, the Eighth Circuit expressly found that the Board's and the ALJ's prior decisions impermissibly based a majority of Service Oil's monetary penalty on the failure-to-apply violation. *Id.* at 546, 549, 551.

Whether the Board or ALJ agree with the Eighth Circuit's characterization of the prior decisions is irrelevant at this stage of the proceedings. The only question is whether the Eighth Circuit's factual finding on the penalty assessment basis is dicta or law of the case. The Board determines that this finding is not dicta, i.e., some passing commentary or speculation that can be ignored without consequence. *See, e.g.*, *Wilder v. Apfel*, 153 F.3d 799, 803-04 (7th Cir. 1998) (court's analysis of disability evidence is not "dicta" but rather "the essentials of our first decision, the grounds on which we reversed the denial of benefits" and as such is binding as law of the case); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 541 (8th Cir. 1975) (court's determination that a controversy over an on-land taconite tailings disposal site falls outside federal court jurisdiction is not "advisory" or "dictum" but rather a binding part of the court's opinion); *cf. In re Veldhuis*, 11 E.A.D. 194, 219-20 (EAB 2003) (ALJ discussion is dicta and thus not "adverse ruling" for which appellant may seek redress from Board), *appeal dismissed upon stip.*, No. 0374235 (9th Cir. Mar. 8, 2004). Instead, the Eighth Circuit's factual finding described the general contours of Service Oil's assessed penalty and, as such, formed an integral portion of the grounds on which the Eighth Circuit vacated and remanded the Board's penalty order. *See Vidimos, Inc. v. Wysong Laser Co.*, 179 F.3d 1063, 1064-66 (7th Cir.) (discussion of whether party could obtain consequential damages was not dicta but rather was essential to appellate court's prior decision to remand the case; as such it is binding as the law of the case), *cert. denied*, 528 U.S. 1061 (1999); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312-13 (6th Cir. 1997) (factual issues fully briefed and squarely decided are not dicta but rather are law of the case).

Therefore, the Board determines that the ALJ on remand failed to apply the Eighth Circuit's factual finding in recalculating the civil penalty. Specifically, the Board determines that the ALJ's reinstitution of a tenfold increase to the economic benefit based on the nature, circumstances, and extent of the two remaining violations is inconsistent with the Eighth Circuit's decision because it does not give meaning to the court's holding that the penalty was "primarily" attributable to the invalidated section 308 failure-to-apply violation.

E. *New Penalty Calculation*

Having concluded that the remanded civil penalty must be recalculated, the Board has two options. The Board may determine an appropriate new penalty on its own, or it may remand this case to the ALJ once again for recalculation of the penalty. The Board determines in this instance that it is in the interest of administrative economy to recalculate the penalty applying the Eighth Circuit's direction.

The Board adopts the ALJ's recalculated economic benefit and therefore begins the penalty analysis with an economic benefit of $2,446. As explained in Part V.B above, Count 1 of the Complaint rested on both failing to apply for a permit and failing to obtain a permit prior to construction, resulting in the discharge of approximately forty-nine tons of sediment to the Red River of the North prior to Service Oil's receipt of its permit.

For the illegal discharge of forty-nine tons of sediment (Count 1), and for Service Oil's failure to comply with the permit's requirements, sixty-five out of eighty times, to conduct weekly storm water inspections and maintain site inspection records at the facility (Count 2), the Board assesses a 4.5-fold increase in the base penalty amount, rather than a tenfold increase.

This reduction is fully consistent with the Eighth Circuit's decision and results in an interim penalty calculation of $11,007 ($2,446 x 4.5). Next, the ALJ assessed penalties attributable to the gravity of the violation and the culpability of Service Oil. These calculations were based on a percentage increase of 10% for gravity and 20% for culpability to the recalculated penalty amount. Service Oil has not challenged these percentages on appeal, and in fact adopts them in its description of "[w]hat the [Board] must do in the instant appeal." Appeal Br. at 10; *see id.* at 10-11. Applying a 10% increase to the $11,007 interim penalty results in a sum of $12,107.70. Applying a 20% increase for culpability to the $12,107.70 interim penalty results in a recalculated penalty total of $14,529.24.[6]

VII. *CONCLUSION AND ORDER*

The Board hereby vacates the ALJ's Initial Decision Upon Remand and orders Service Oil to pay a total civil penalty of $14,529.24. Payment of the entire amount of the civil penalty must be made within thirty (30) days of service of this Final Decision and Order, by certified or cashier's check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000

A transmittal letter identifying the case name and the EPA docket number, plus Service Oil's complete name and address, must accompany payment. 40 C.F.R. § 22.31(c). Service Oil must serve copies of the check or other instrument of payment on the Regional Hearing Clerk

[6] The Board does not, by this calculation, endorse or reject the ALJ's use of a "bottom-up" method of penalty calculation, but rather uses the method here for the sake of consistency.

and on EPA Region 5. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.

ENVIRONMENTAL APPEALS BOARD[7]

Dated: December 7, 2011 By: Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

[7] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Final Decision and Order** in the matter of *Service Oil, Inc.*, CWA Appeal No. 11-01, were sent to the following persons in the manner indicated:

By First Class U.S. Mail, Return Receipt Requested:

Michael D. Nelson, Esq.
Ohnstad Twichell, P.C.
901 13th Avenue East
Post Office Box 458
West Fargo, North Dakota 58078-0458
telephone: (701) 282-3249
facsimile: (701) 282-0825

By EPA Pouch Mail:

Amanda J. Helwig, Esq.
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2243-A
Washington, D.C. 20460
telephone: (202) 564-3713
facsimile: (202) 564-0024

Date: DEC - 7 2011

Annette Duncan
Secretary