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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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In re :
 :
SERVICE OIL, INC., : Appeal No. 07-02
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1201 Constitution Avenue, NW.
Washington, D.C.

Thursday, June 5, 2008

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

BEFORE:

- JUDGE KATHIE A. STEIN
- JUDGE CHARLES SHEEHAN
- JUDGE ANNA L. WOLGAST

2	<p>1 APPEARANCES:</p> <p>2 On behalf of Environmental Protection Agency:</p> <p>3</p> <p>4 MARK RYAN, ESQUIRE</p> <p>5 Office of Regional Counsel</p> <p>6 United States Environmental Protection Agency</p> <p>7 Region 10, Idaho Operations Office</p> <p>8 1435 N. Orchard Street</p> <p>9 Boise, Idaho 83706</p> <p>10 (208) 378-5768</p> <p>11</p> <p>12 On behalf of Service Oil, Inc.:</p> <p>13 JOHN T. SHOCKLEY, ESQUIRE</p> <p>14 Ohnstad Twichell, P.C.</p> <p>15 901 13th Avenue East, 2nd Floor</p> <p>16 P.O. Box 458</p> <p>17 West Fargo, North Dakota 58078-0458</p> <p>18 (701) 282-3249</p> <p>19</p> <p>20 ALSO PRESENT:</p> <p>21 EURIKA DURR</p> <p>22 Board of Environmental Appeals</p> <p>GARY JONESI</p> <p>Office of Enforcement & Compliance Assurance</p> <p>ELYANA SUTIN</p> <p>Region 8 Office of the Regional Council</p> <p>PAUL BANGSER</p> <p>Office of General Counsel</p> <p>* * * * *</p>	4
3	<p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Environmental</p> <p>3 Appeals Board of the United States</p> <p>4 Environmental Protection Agency is now in</p> <p>5 session for oral argument. In re: Service</p> <p>6 Oil Inc. Docket Number CWA-08-2005-0010.</p> <p>7 CWA Appeal No. 07-02. The Honorable Judges</p> <p>8 Anna Wolgast, Charles Sheehan, and Kathie</p> <p>9 Stein presiding. Please turn off all cell</p> <p>10 phones and no recording devices are allowed.</p> <p>11 Please be seated.</p> <p>12 JUDGE SHEEHAN: Good morning. We</p> <p>13 are hearing oral argument this morning in the</p> <p>14 matter of Service Oil Inc. In appeal from an</p> <p>15 initial decision by Judge Biro, who found</p> <p>16 Service Oil liable for two counts under the</p> <p>17 Clean Water Act, totaling the civil penalty</p> <p>18 of \$35,640.</p> <p>19 On appeal certain aspects of</p> <p>20 liability and penalty are challenged. In our</p> <p>21 order of April 30th the Board instructed the</p> <p>22 parties to focus primarily on the 308 Clean</p>	5
	<p>1 Water Act issue. And while we hold to that</p> <p>2 undoubtedly questions they will stray in to</p> <p>3 penalty issues as well. So we expect to be</p> <p>4 asking questions about penalties in addition</p> <p>5 to 308 issues.</p> <p>6 On the order of proceeding, we will</p> <p>7 follow the order set forth in the April 30th</p> <p>8 and May 7th scheduling orders. Service Oil</p> <p>9 is allocated 30 minutes. It may reserve 5</p> <p>10 minutes at the beginning for rebuttal and the</p> <p>11 Region is also allotted 30 minutes. Service</p> <p>12 Oil will go first.</p> <p>13 About questions during oral</p> <p>14 argument, inferences are not to be drawn from</p> <p>15 any particular line of questions that may be</p> <p>16 asked. Devil's advocacy is alive and well.</p> <p>17 And now I will ask counsel to state their</p> <p>18 names for the record, whom they represent,</p> <p>19 and we will go from there. Mr. Shockley.</p> <p>20 MR. SHOCKLEY: John T. Shockley,</p> <p>21 here on behalf of Service Oil.</p> <p>22 JUDGE SHEEHAN: And for the Agency?</p>	

6	<p>1 The construction on this site started in 2 approximately 2002.</p> <p>3 In the fall of 2002, inspectors 4 from the North Dakota Department of Health, 5 along with the Environmental Protection 6 Agency appeared at the site. They asked 7 permission to enter the site, and they were 8 granted that. And I would note that Service 9 Oil did not refuse permission to enter the 10 property. This inspection --</p> <p>11 JUDGE SHEEHAN: Mr. Shockley. 12 MR. SHOCKLEY: Yes. 13 JUDGE SHEEHAN: Mr. Shockley, can 14 we jump to the 308 issues please. I think we 15 have a pretty clear sense of the factual 16 background. Thank you. Your central 17 argument, it seems to us is that 308, in your 18 word, is ambiguous, and that for the Agency 19 to insist on a permit, obtaining a permit 20 under 308 authority it must issue an 21 individualized request or order to do so. 22 What's your authority for that statement, if</p>	8	<p>1 or such methods at such locations at such 2 intervals, and such a manner as administrator 3 shall prescribe and provide other information 4 as he shall require.</p> <p>5 JUDGE SHEEHAN: Then why -- 6 MR. SHOCKLEY: I believe that -- 7 JUDGE SHEEHAN: Why does that 8 request from the administrator have to be 9 individual, person by person, one by one? 10 Why can the administrator under general 11 regulatory authority issue broad regulations 12 that require just that, but not target 13 individual people? 14 MR. SHOCKLEY: Well, this is a -- 15 JUDGE SHEEHAN: After all, let me 16 point out, 308(a) talks about the 17 administrator having the authority to carry 18 out the objective of the act; more 19 specifically to carry out the objective of 20 the NPDES program in (a)(4) to issue 21 requirements in (a)(3) -- requirements and a 22 lot like regulations. So why is it so</p>
7	<p>1 it's so unambiguous?</p> <p>2 MR. SHOCKLEY: I would actually 3 like to -- thank you, Your Honor. I would 4 like to clarify that slightly our -- Service 5 Oil's position is that three -- you cannot 6 have a 308 violation absent a specific 7 request for information. I believe below the 8 argument was made that Service Oil was viable 9 under 308 in addition to other sections 10 because it did not submit a -- or request a 11 permit.</p> <p>12 In essence, the liability was found 13 on the failure to apply for a permit under 14 308. It is our position that 308, the plain 15 language of 308 requires an individualized 16 request for information.</p> <p>17 If you read section 308, 18 specifically (a), it puts a duty upon the 19 administrator to require an owner or operator 20 of any point source to establish and maintain 21 such records, such reports, install, use, 22 maintain such monitoring equipment or methods</p>	9	<p>1 unambiguous that it has to be a particular 2 targeted request before a 308 authority is 3 valid?</p> <p>4 MR. SHOCKLEY: Well, specifically 5 section 308 does not indicate any reference 6 to permit requirements, and I believe that 7 the EPA has taken the position that -- 8 JUDGE SHEEHAN: -- 308 does 9 reference -- 10 MR. SHOCKLEY: -- for our -- 11 JUDGE SHEEHAN: Excuse me. 308 12 does mention target permit requirements 13 referring to 1342, the 402 section of the act 14 that is the NPDES permit program in sub part 15 (a)(4). So why do you say it doesn't have 16 anything to do with the permitting program, 17 when on its face it seems to do just that? 18 MR. SHOCKLEY: Well, the Service 19 Oil's position is quite simple in that 20 section (a) requires the administrator to 21 issue a request requiring information. A 22 generalized request to submit a permit is</p>

10	<p>1 much different than a specific request for 2 information. And -- to this case -- 3 JUDGE SHEEHAN: Are you saying that 4 the Agency has no authority to issue 5 regulations under 308 general rules of broad 6 applicability, it has to go one by one. Is 7 that your position? 8 MR. SHOCKLEY: That is not the 9 Service Oil's position. Service Oil's 10 position is that while the EPA can issue 11 regulations, the issue is not whether or not 12 they can issue regulations, but how those 13 regulations can be enforced under 308 -- 14 JUDGE SHEEHAN: Can I -- let me ask 15 if I can. Let's go back -- your construction 16 began in, I believe April of 2002, let's 17 flashback to March of 2002. Service Oil and 18 its office is planning to clear the 15 or 20 19 acres at this site the next month. Under 20 your reading, it seems like you would be 21 saying that EPA needs to guess at the fact 22 that you are -- and your office is planning</p>	12	<p>1 individualized request prior to the finding 2 of liability. And that's a simple -- 3 JUDGE SHEEHAN: How do you square 4 your argument with Ludlum, used by EPA in its 5 brief? It seems to recognize the authority 6 of the administrator to issue these kinds of 7 regulations under section 308 without 8 questioning that authority. 9 MR. SHOCKLEY: Well, I would square 10 that argument with the case of in our Legal 11 Environmental Assistance Foundation where the 12 Court recognized the distinction between 13 challenging the issuance of a rule compared 14 to the substance of the rule. And what we 15 are really talking about here is how it's 16 been substantively enforced. Not how it is 17 being -- not how it was enacted but whether 18 and how the EPA is going to enforce section 19 308. 20 JUDGE STEIN: Can I ask a few 21 questions here. The section 1221 -- or 22 122.21 of the regulations, were promulgated</p>
11	<p>1 this construction, and come knock on your 2 door and ask you to submit a permit 3 application. Is that right? 4 MR. SHOCKLEY: Respectfully, Your 5 Honor, I don't believe that's our position. 6 Our position is that if you are going to find 7 a violation pursuant to section 308, you have 8 to have the individualized request. Always 9 keep in mind -- 10 JUDGE SHEEHAN: Well, that's what I 11 am asking. Does EPA have to knock on your 12 door and make an individual request for you 13 to obtain a permit before you begin 14 construction in April. It seems like the 15 logical implication of your argument. 16 MR. SHOCKLEY: It would have -- 17 well, respectfully, Your Honor, the position 18 is that the individualized request is a 19 prerequisite to finding liability pursuant to 20 308. The permit requirements are to submit a 21 permit. If you are going to find a violation 22 pursuant to 308, you need to have that</p>	13	<p>1 under the authority of 308. Having been so 2 promulgated, why is not this -- your client's 3 conduct a violation of section 122.21 4 promulgated under the authority of 308 and 5 therefore a violation of the act? 6 It seems to me that under your 7 interpretation, then section, I guess, it is 8 121.21 would really have no meaning. Then 9 what would be the meaning of regulations 10 promulgated under the authority of 308, which 11 require your client to apply for a permit, 12 and then when you get into a actual 13 enforcement of that you can't really enforce 14 the underlying regulations, but you would 15 have to basically submit an individualized 16 request. Is that your client's position? 17 MR. SHOCKLEY: Let me make -- thank 18 you, Your Honor, let me make clear. My 19 client's position is that any regulation 20 that's adopted by the EPA must square with 21 section 308 which requires before a finding 22 of liability that individual --</p>

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1 JUDGE STEIN: But your client had
2 an opportunity to challenge these
3 regulations. And having not so challenged
4 them, how is it that you can attack the
5 underlying regulations in this form?
6 MR. SHOCKLEY: As I -- thank you,
7 Your Honor. As I mentioned before we are not
8 challenging the ability of the EPA to adopt
9 regulations, we are challenging the
10 substantive enforcement of those regulations
11 pursuant to section --
12 JUDGE STEIN: But isn't that
13 precisely what the statute precludes? I mean
14 it seems to me that the whole purpose of the
15 bar on raising this issue in an enforcement
16 proceeding was to prevent precisely the kind
17 of collateral attack that you seem to be
18 asserting here.
19 MR. SHOCKLEY: Respectfully, Your
20 Honor, I disagree. We specifically, in the
21 case that I referenced before, the Court
22 recognized and distinguished substantive

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1 challenges to a regulation compared with a
2 challenge to the authority of the Agency to
3 make a regulation. And --
4 JUDGE STEIN: But looking at it --
5 at a slightly different way. Do you dispute
6 that the Agency has an ability to interpret
7 the terms of section 308 of the act?
8 MR. SHOCKLEY: We do not dispute
9 that an Agency has the authority to interpret
10 section 308, but that that interpretation
11 must be consistent with the plain and
12 unambiguous language of section 308. And the
13 --
14 JUDGE SHEEHAN: But you've really
15 pointed us to nothing unambiguous, expect
16 for, I guess, and this word's in your brief
17 too, the administrator shall require the
18 owner or operator to make reports. Why does
19 making reports somehow gobble up the entirety
20 of 308 and require that every act under 308
21 be so individualized and targeted when there
22 is otherwise very broad language in 308?

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1 MR. SHOCKLEY: That is an excellent
2 question, Your Honor. Specifically the
3 reading of 308 puts a burden upon the
4 administrator to make an individualized
5 request, and a subsequent burden upon the
6 individual to respond to that. If you look
7 in sub section (b) of the section, it talks
8 about any records, reports, or information,
9 and doesn't make reference to permits.
10 Essentially what --
11 JUDGE SHEEHAN: Is Jones Falls the
12 only case you rely on for your argument here,
13 the only non-legislative history or statutory
14 construction argument, is it Jones Falls, is
15 that what it comes down to?
16 MR. SHOCKLEY: That is what we are
17 basing our argument on. I cannot at this
18 point say that is the only case that we are
19 relying upon, but as of the brief in time
20 that was the case that we are relying
21 specifically upon for the -- our argument and
22 position that you must make this

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1 individualized request prior to finding my
2 ability under 308.
3 JUDGE SHEEHAN: And did Jones Falls
4 not precede three decades of Agency
5 regulations that went exactly the opposite
6 way, non-individualized requests were
7 sufficient.
8 MR. SHOCKLEY: That is correct,
9 Your Honor, that it did precede that time
10 period of regulations, but keep in mind that
11 it is still good case law, and while the
12 regulations may have changed then Agency's
13 interpretation must still be consistent with
14 the unambiguous -- the text of section 308,
15 and that the simple text of 308 doesn't
16 reference permits.
17 It makes the administrator have
18 burden to make a specific request for
19 information. And in fact that was done in
20 this case. The section 308 letter was sent
21 to Service Oil, which Service Oil responded
22 to. The effect of this case, the policy

18	<p>1 effect, is to create penalty that allows or 2 create a liability that allows stacking for 3 the EPA to increase the penalty assessment 4 for a party. And --</p> <p>5 JUDGE SHEEHAN: Turning to the 6 penalty issue for a moment, if we may, the 7 two themes that seem to recur throughout your 8 brief on the penalty issue seems to be you 9 were in an unsophisticated part of the 10 country not aware of these regulations, and 11 that you had ceded all control for your 12 permitting obligations to other parties.</p> <p>13 As far as the cessation or the 14 ceding argument goes, the ALJ was pretty 15 clear -- lots of fact-finding in her decision 16 there that there was no signed agreement 17 between Service Oil and any general 18 contractor. In fact, you were twice asked to 19 identify a general contractor with whom you 20 had a signed agreement and could produce 21 none.</p> <p>22 That Mr. Lenthe, the president of</p>	20	<p>1 business that has been operating in the Red 2 River Valley for many, many years with 3 significant relationships to the construction 4 and engineering. And it is after all a rural 5 area in which people still, even in large 6 contracts like this enter into oral 7 agreements.</p> <p>8 With respect to the permitting 9 requirements, if you would have spoken to the 10 majority of people in the construction 11 industry in Fargo in 2002, and referenced a 12 storm water permit, I believe they would have 13 probably given you a blank look. Our -- is 14 simply --</p> <p>15 JUDGE SHEEHAN: Is there any record 16 evidence of that blank look?</p> <p>17 MR. SHOCKLEY: No, Your Honor. I 18 am just speculating. With respect to there's 19 just not a lot of knowledge at that time 20 regarding permits, and my client is not in 21 the business of construction or engineering, 22 and pursuant to his previous arrangements</p>
19	<p>1 Service Oil directly hired the contractor so 2 he acted as his own general contractor. 3 Service Oil identified itself as the 4 applicant and the NOI for the permit 5 coverage, and then was this signatory for 6 terminating the permit coverage.</p> <p>7 And a lot of text in your brief is 8 made of your hiring the Whaley and Moore 9 Firms to navigate the permitting regime, but 10 as the ALJ found there was no written 11 contract with Whaley doing that and the 12 contract with Moore was silent on that point.</p> <p>13 In fact Moore offered in its 14 proposal to you to undertake those permitting 15 responsibilities and Service Oil refused. So 16 it sounds from the findings below anyhow is 17 if far from giving control to someone else 18 you kept that control in your hands. Can you 19 address that?</p> <p>20 MR. SHOCKLEY: Yes, Your Honor, 21 that is an excellent question. With respect 22 to the penalty, keep in mind this is a</p>	21	<p>1 relied upon those contractors and engineering 2 firms to help him through this process.</p> <p>3 JUDGE SHEEHAN: But your client --</p> <p>4 MR. SHOCKLEY: If they would have 5 --</p> <p>6 JUDGE SHEEHAN: You client, as the 7 proceedings below indicate, runs a \$140 -- a 8 \$140 million a year business at least in '05, 9 300 employees, 12 sites across two states. 10 The staymark site sounded large, 15 to 20 11 acres, a restaurant, a parking lot, retail 12 pumps, and so on. It doesn't sound like a 13 very unsophisticated person in the regulatory 14 world.</p> <p>15 MR. SHOCKLEY: Well, I think that 16 is also an excellent question, but I think 17 you can distinguish between the regulatory 18 world of gas and diesel retailing compared to 19 the regulatory world of construction. My 20 client is not in the business of 21 construction, and had to rely upon 22 individuals to help him through that</p>

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1 construction process. In reference --
2 JUDGE SHEEHAN: Well, then why
3 didn't he hire people to undertake the
4 regulatory requirements instead of seemingly
5 refusing to do so and holding that power in
6 his hands. It sounded like -- sounds like
7 almost ahead in the same sort of attitude, I
8 want to keep all the chits in my own pocket;
9 I am not going to give them to somebody else.
10 And then now you are claiming, well, no one
11 else was involved, or no one else was helping
12 out, so it was someone else's fault. Just
13 doesn't add up.
14 MR. SHOCKLEY: Well, my client
15 relied upon these individuals to help him out
16 through the relationships that he'd had in
17 the past.
18 JUDGE SHEEHAN: Were they signed
19 contracts?
20 MR. SHOCKLEY: -- and specifically
21 --
22 JUDGE SHEEHAN: Were they signed

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1 contracts or was it all just buddy system or
2 oral handshakes that sort of thing.
3 MR. SHOCKLEY: It's common practice
4 in the area that you will have handshakes and
5 conversations regarding construction projects
6 -- the contractor --
7 JUDGE STEIN: Is there any evidence
8 in the record that this is the practice in
9 the community? Can you point me to where --
10 MR. SHOCKLEY: I believe there --
11 JUDGE STEIN: -- can you point to
12 where in the record there is evidence that
13 the mode of dealing in this community is
14 through oral contracts rather than written
15 contracts?
16 MR. SHOCKLEY: I believe there was
17 a testimony from the owner of Service Oil
18 regarding that to a certain extent. There
19 were no specific fact witnesses called
20 regarding the construction industry in
21 Fargo-Moorhead at the time.
22 JUDGE SHEEHAN: So what --

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1 JUDGE STEIN: And there were oral
2 contracts or as to other matters?
3 MR. SHOCKLEY: I believe the
4 president of Service Oil testified that he
5 had oral agreements with the contractor, and
6 also with Service Oil.
7 JUDGE SHEEHAN: And what
8 responsibilities do you think Service Oil has
9 to figure out what the regs require and
10 comply with them instead of being ignorant of
11 them, and in the dark? What should a company
12 like Service Oil do to make sure it is
13 fulfilling its responsibilities?
14 MR. SHOCKLEY: Well, I think, in
15 2002, Service Oil acted appropriately given
16 the area in that he sought out construction
17 contractors and engineering professionals in
18 the business to advise him. Quite simply, he
19 was unaware of any type of regulatory regime
20 requiring storm water permits. He just
21 didn't have any way to recognize that he
22 needed this, and he sought out these

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1 individuals to tell him what permits were
2 needed, what permits were not, and even
3 though he may not have had written
4 agreements, it was his common business
5 practice to engage in this --
6 JUDGE SHEEHAN: Why then, when the
7 Moore contracting came to Service Oil, and
8 said, "We will help you obtain permits,"
9 those are the words in the ALJ's decision
10 below, and evidently Service Oil's said,
11 "Thank you very much, no."
12 So it seems like from that finding
13 alone Service Oil was on notice there was a
14 permitting world out there they needed to
15 deal with. So why didn't it then deal with
16 that world.
17 MR. SHOCKLEY: I believe that it
18 was an understanding that that was related to
19 building permits. I am not a 100 percent
20 sure on that I'd have to check the record.
21 I'd be happy to submit a memorandum on that
22 issue to the Board, if the Board so desire.

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1 JUDGE SHEEHAN: Turning to your
2 deterrence argument. Your point is that
3 because the city of Fargo at some point came
4 up with a regulation of building permit
5 regulation that would not allow the issuance
6 of a building permit, unless there was proof
7 of construction storm water coverage first.
8 First of all, where is that
9 requirement that you seem to think is
10 embedded in the Clean Water Act embedded in
11 the Clean Water Act that this ordinance is
12 required by the act? And number two, even if
13 it were required, and even if it were some
14 sort of local deterrence, not general
15 deterrence, but local deterrence, why then
16 isn't a company getting this sort of
17 construction permit for you to then than
18 disregard the permit.
19 It sounds like they only need to
20 show that they have the permit coverage, but
21 the building ordinance doesn't at all require
22 that compliance with that permit occur.

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1 MR. SHOCKLEY: Thank you, Your
2 Honor, I'd like to clarify that it is not our
3 position that the Clean Water Act requires a
4 local jurisdiction to enact such an
5 ordinance. Our position is that it could not
6 -- this type of violation could no longer
7 happen in the Fargo-Moorhead area because the
8 contractors now have to obtain a storm water
9 permit when they --
10 JUDGE SHEEHAN: But obtaining the
11 permit isn't the same thing, however
12 wonderful, it's not the same thing as
13 complying with the permit. You could go to
14 the building people and present the copy of
15 your construction permit, get your building
16 permit, and then proceed to the next state of
17 violate the terms of the permit. Why does
18 having the permit, "condition" as you call it
19 some how cover compliance in the future?
20 MR. SHOCKLEY: I think it goes to
21 knowledge, Your Honor, quite simply,
22 construction industry now knows that they

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1 have to obtain these permits without that
2 ordinance being in place. Unless they --
3 JUDGE SHEEHAN: Does the building
4 permit get ganged if there is non compliance
5 with the underlying construction permit?
6 Does the city check to see that the permit is
7 being abided by, or just issue its building
8 permit and that's the last you hear from the
9 city?
10 MR. SHOCKLEY: I do not know about
11 the specific practices of the city of Fargo,
12 and I don't believe there was any testimony
13 regarding the specific practices regarding
14 inspections of the city of Fargo and below,
15 so I would be unable to answer that question.
16 JUDGE SHEEHAN: When you went
17 through the permit application process in the
18 fall of '02, in I think November of '02 you
19 having been alerted to the need for the
20 permit, obtained permit coverage, is that
21 right?
22 MR. SHOCKLEY: That is correct,

29

1 Your Honor.
2 JUDGE SHEEHAN: Okay. Then why you
3 make much in your brief of the fact that you
4 never saw the permit. You got the coverage,
5 but you never saw it, weren't you curious?
6 You had a permit, you knew the permit must
7 require some obligation from you. Why didn't
8 you call somebody, check a website make
9 inquiries to find out what the permit
10 required?
11 MR. SHOCKLEY: Well, there was a --
12 there is testimony in the record below
13 indicating there was a struggle with the
14 contractor to find out what was required of
15 the permit. There is actually e-mails
16 regarding how we actually receive the permit.
17 And I believe it really goes to the
18 knowledge of the construction industry at
19 that time, they thought this was much like a
20 building permit and that you received the
21 building permit and it has instructions on
22 it, and you post it on a building. I think

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1 that really shows the knowledge of the
2 construction industry and they thought this
3 was a permit much like a building permit
4 rather than a comprehensive set of
5 regulations.
6 JUDGE SHEEHAN: But it sounds like
7 from what you just said, if you had a
8 building permit, you would see nailed to the
9 wall what the requirements were. Why didn't
10 you seek to find out what the storm water
11 permit, nailed to the wall, would require?
12 MR. SHOCKLEY: I think there was --
13 there is testimony and e-mails and exhibits
14 below indicating there was this struggle by
15 my client and his agents to find out what
16 exactly was required under that permit.
17 There was no intent not to follow the permit
18 once they obtained it. They were trying to
19 find out what the permit required of them.
20 What they could and could not do and they
21 were just simply unaware -- and they started
22 to follow it --

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1 JUDGE STEIN: Did they ask the
2 permitting authority for a copy?
3 MR. SHOCKLEY: I believe they did,
4 I believe that's also in the record if it had
5 been asked for by, if they received a permit
6 from the North Dakota Department of Health
7 and if so where could they post it?
8 JUDGE STEIN: I am not asking if
9 they received it. But if your allegation is
10 they didn't and your client couldn't get it
11 from the contractor, why didn't your client
12 just call up the person that issued it and
13 ask for a copy?
14 MR. SHOCKLEY: I believe my client
15 specifically was relying upon the contractor
16 and the engineer to obtain that type of
17 information, and --
18 JUDGE SHEEHAN: I am looking at the
19 November 15th letter from the North Dakota
20 Department of Health that is addressed to one
21 of your contractors. But it's CC-ing Mr.
22 Lenthe, the president of Service Oil and it

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1 says, "Here's the website where at least you
2 can get the forms to fill out the
3 application." And it references coverage
4 under the storm water permit and even then it
5 gives a permit number. Why couldn't you just
6 call Ms. Abbie, whatever her name is, and
7 ask for the permit?
8 MR. SHOCKLEY: I specifically, Your
9 Honor, I believe that the reason why is that
10 there was an unfamiliarity with the
11 permitting process, and what was required
12 under the permit. My client --
13 JUDGE SHEEHAN: But you had her
14 name and her phone number on this letter.
15 The person sending the letter was obviously
16 someone you could pick up the phone and call
17 her. Number is right at the bottom of the
18 letter; it doesn't seem like it takes a lot
19 of effort for anybody much less somebody as
20 seemingly sophisticated as the president of
21 Service Oil to figure out a phone number.
22 MR. SHOCKLEY: Well, Your Honor, I

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1 believe that my client relied specifically
2 upon his contractors, and if he were to
3 receive the letter like that he would have
4 told his contractors to take care of the
5 issue, simply because he is not in the
6 construction industry and was relying upon
7 these individuals to help them navigate
8 through the process.
9 JUDGE WOLGAST: I wanted to clarify
10 one point, Judge Biro here cited to legal
11 theories for liability one of which was
12 section 308, and I wanted to clarify that you
13 are not challenging her alternate theory of
14 liability.
15 MR. SHOCKLEY: This is -- Your
16 Honor, that is in our brief that is correct.
17 We did not challenge the alternative theory
18 of liability; we are challenging theory of
19 liability under sections 308. And there is a
20 -- I would imagine there is a certain desire
21 for this Board to simply ignore our appeal
22 because -- we are only challenging one ground

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1 of liability.

2 But I would direct you to page 56

3 of the initial decision in which as part of

4 the penalty calculation, Judge Biro indicated

5 that she was considering the complete failure

6 to apply and obtain an ND -- NPDES permit

7 prior to starting.

8 And section 308 would certainly --

9 violation of section 308 would certainly

10 contribute to an increase in the penalty

11 calculation, and therefore that is why we are

12 challenging the grounds of liability under

13 section 308. And I also believe that there

14 is a -- there is substantial unfairness to

15 how this section 308 violation came to the

16 court.

17 The EPA brought a motion for

18 accelerated decision on counts 1 and 2. On

19 count 2, I believe Judge Biro found

20 accelerated -- found for the EPA and left

21 count 1 open to be tried at a hearing and the

22 reason was we brought to the Court's

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1 attention that the EPA was still required to

2 prove the factual basis for finding of

3 violation that a discharge did occur.

4 In her opinion, she noted that

5 there may be some other type of violation

6 under one of several sections, and it was

7 from that point that the EPA then amended its

8 complaints to include this section 308

9 violation.

10 And it was substantially unfair and

11 at that point in time to amend the complaint,

12 we then -- it was then tried which we

13 preserved our objections regarding the

14 section 308 complaint, and Service Oil was

15 found liable under the initial decision with

16 respect to the 308 claim.

17 And that's why we're challenging it

18 because that contributes to the penalty

19 calculation in this case, and also it was

20 unfairly -- in our -- my client's position,

21 it was unfairly raised and prejudicial to my

22 client prior to the start of the trial.

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1 JUDGE STEIN: And what was the

2 nature of the prejudice to have an alternate

3 theory of liability that you didn't apply for

4 a permit? What was the prejudice?

5 MR. SHOCKLEY: I --

6 JUDGE STEIN: Was that detailed

7 below?

8 MR. SHOCKLEY: I think, Your Honor

9 -- I believe that was detailed below in the

10 briefs that were submitted to the court that

11 it was a late time-period to submit the

12 alternative grounds for liability.

13 It was on the eve of trial and

14 therefore we had an additional ground to

15 prepare for. It should be recalled that the

16 EPA had nearly 2 years since the time it

17 brought the complaint, to the time that it

18 amended the complaint to this alternative

19 grounds of liability.

20 JUDGE STEIN: But the ALJ granted

21 the motion and you had the opportunity both

22 during the trial and during briefing to argue

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1 why section 308 liability was inappropriate,

2 so what was the nature of the prejudice?

3 MR. SHOCKLEY: It -- thank you,

4 Your --

5 JUDGE STEIN: I mean it seems to me

6 it's really more of a legal challenge than

7 necessarily a factual issue.

8 MR. SHOCKLEY: Well, thank you,

9 Your Honor. The nature of the prejudice was

10 reflected below in that it was a late

11 amendment to the complaint prior to the CERTA

12 trial. You are correct, Your Honor, in that

13 it was argued at the hearing and it was also

14 argued in post-hearing briefs and it is also

15 argued before this tribunal.

16 And therefore it is a legal issue

17 at this point but it was prejudicial at the

18 time that the amendment was allowed.

19 JUDGE SHEEHAN: Okay, thank you,

20 Mr. Shockley.

21 MR. SHOCKLEY: Thank you.

22 JUDGE SHEEHAN: Mr. Ryan.

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1 MR. RYAN: Thank you, Your Honor.
2 Before I proceed, I'd like to take just a
3 second to introduce my co-counsel at the
4 table, I have Mr. Gary Jonesi from the Office
5 of Enforcement and Compliance Assurance with
6 me. I have Ms. Elyana Sutin, who is my
7 co-counsel at hearing from Service Oil case
8 from Region 8, and I have Mr. Paul Bengser
9 from the office of General Counsel.
10 I will first answer the question
11 posed by the Board in its order scheduling
12 hearing. I will then briefly summarize my
13 case and then proceed into the details.
14 Excuse me -- the question posed by the Board
15 is whether an individualized request is a
16 precondition to liability under section 308
17 of the Clean Water Act, and the answer to
18 that is no.
19 There are four reasons why the
20 administrative law judge's decision should be
21 affirmed in this case. One, review of the
22 claims brought -- excuse me, alleged in count

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1 1 of the complaint that the violation of
2 122.21 and 122.26 of 40 CFR, is precluded in
3 this case because Respondent is challenging a
4 regulation in the context of an enforcement
5 action.
6 Two, Section 308 of the Clean Water
7 Act grants the administrative broad authority
8 to collect information both through
9 individualized requests and through
10 regulation.
11 Three, the EPA issued such a
12 regulation here, 122.21A, the 122.26, which
13 is a valid exercise of the administrator's
14 authority under the Act, and four, the
15 administrative law judge's assessment of the
16 facts of the case in applying the section
17 309(g) penalty factors, in assessing her
18 penalty was appropriate -- inappropriate
19 exercise of her discretion.
20 Let me address you to these points
21 in detail. First, this 308 claim should not
22 be before the Board today. These clearly

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1 challenging the regulation, 122.21, if you
2 look at count 1 of the complaint -- of the
3 amended complaint, we are not alleging
4 primarily a violation of 308, we are alleging
5 primarily a violation of the duty to apply
6 which is in section 122.21.
7 JUDGE SHEEHAN: Well, isn't it
8 really both? That's -- I think what you're
9 saying is accurate, but certainly there is a
10 lot of rhetoric about the problem with the 08
11 being interpreted in this way.
12 MR. RYAN: That's correct, Your
13 Honor, but if you look at section 309, the
14 case was brought under section 309. 309
15 states that only violations of 308, 301, and
16 other enumerated sections can be a basis for
17 309 violation.
18 You get to the 308 violation which
19 is a enumerated in 309 through the violation
20 of the regulation. But for a 122.21, we
21 would not have a count 1 violation. There is
22 no general requirement out there in the ethos

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1 for someone to apply for a permit. Only
2 through regulation or through an order is
3 someone required to do, take that affirmative
4 act.
5 In this case, 122.21 is the basis
6 for our count 1. What -- in 308 only
7 derivatively. So what --
8 JUDGE SHEEHAN: Well, the 122.21 is
9 derived from 308 --
10 MR. RYAN: That's right.
11 JUDGE SHEEHAN: -- and if 308 is
12 the soil and 122.21 is the tree and the soil
13 is defective, or the soil can not give birth
14 to this kind of a tree under their legal
15 argument, it seems like it is an attack on
16 using 308 authority in this way, as well as
17 using the regs in this way.
18 MR. RYAN: It is Your Honor, but if
19 you look at section 509(b)(2) of the Act in
20 section 40 CFR 2238(c), it expressly -- the
21 Congress expressly forbid this kind of
22 collateral attack on regulations in the

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1 context of an enforcement action.
2 Congress spoke directly to this
3 point. He is -- he is 20 years late
4 challenging the regulation.
5 JUDGE STEIN: The checks to 509, if
6 I recall it specifically preclude judicial
7 review. How do you address that particular
8 language in light of this Board's precedents
9 on that issue?
10 MR. RYAN: This Board addressed
11 that very issue in Bradenpoint, in which it
12 said that sections -- parts 122 through 125
13 are essentially akin to judicial review or --
14 excuse me -- would -- excuse me -- that the
15 board would, under extraordinary
16 circumstances, review regulations and I
17 believe that in the Bradenpoint case, you
18 cited to the issue where prior regulation had
19 been invalidated.
20 But that the -- it would
21 nevertheless generally abide by the NRDC and
22 other -- and its progeny cases saying that

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1 you know, regulations would not be
2 collaterally attacked in the enforcement
3 action.
4 And if one looks at the -- if one
5 looks at 2238(c) of regulations, it
6 specifically states, actually the
7 administrative for which review could have
8 been attained under section 509(b)(1) shall
9 not be subject to review in an administrative
10 proceeding. So our regulations speak
11 directly to that point.
12 JUDGE SHEEHAN: Turning to the
13 penalty issue for a moment, it seems like --
14 it seems as if you argue that the penalty
15 analysis and finding here was based entirely
16 on 301, so there's really no need to stray
17 into 308 country, is that right?
18 It doesn't differentiate the
19 penalty analysis, doesn't differentiate
20 between 301 and 308, and therefore no need to
21 touch 308, because it's all under the 301
22 mantel, is that correct?

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1 MR. RYAN: Not entirely correct,
2 Your Honor.
3 JUDGE SHEEHAN: Well, you used the
4 word differentiate in your brief as if it's
5 all one big model and we don't need to get to
6 308 because it's all 301. But even the sites
7 that Mr. Shockley gave is page 56 --
8 MR. RYAN: Right.
9 JUDGE SHEEHAN: -- of the ALJ's
10 finding, page 63 and other places where it's
11 clearly -- her analysis would be the
12 culpability or nature of circumstances in
13 extent or premised on failure to obtain the
14 permit, which gets back to 308.21 ground --
15 MR. RYAN: That's correct, Your
16 Honor.
17 JUDGE SHEEHAN: So why do you say
18 there is no basis for looking at the failure
19 to obtain a permit?
20 MR. RYAN: Well, if he is -- well,
21 if Your Honor looks at the -- excuse me -- if
22 Your Honor looks at the number of violations,

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1 and that same reference on page 56, the
2 presiding officer referenced I believe 7
3 months of violation which would pencil out to
4 approximately 210 days of violations.
5 Doing the quick math, \$11,000 per
6 day times 210, you're -- one reaches
7 statutory maximum penalty very quickly.
8 Proposed penalty in this case was \$40,000
9 which was substantially below that. If it --
10 the presiding officer clearly conflated the
11 two 301 and 308 in that one -- in that
12 sentence of page 56 --
13 JUDGE SHEEHAN: But you agree that
14 there are 308 pieces, to use that word and --
15 MR. RYAN: Yes, I would agree with
16 that, Your Honor, yes, there are a series of
17 308 piece. However if you look at the
18 references to the discharges without a permit
19 for approximately 7 months, that's 210 days
20 of violations. Given de novo review, the
21 Board certainly can review this decision and
22 find that there is sufficient number of

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1 violations to section 301, discharging
2 without a permit to substantiate the penalty
3 of this -- well -- and well below the
4 statutory maximum.
5 JUDGE STEIN: Apart from your
6 argument that it's unnecessary, is the agency
7 objecting to the Board's review under 308, or
8 you're just arguing that it's unnecessary for
9 us to reach that issue?
10 MR. RYAN: I believe it's
11 unnecessary. Well, no, I believe that we are
12 objecting, Your Honor, under section 509(b),
13 one that this -- the Board should not be
14 reviewing the section -- the validity --
15 JUDGE STEIN: No, I'm not asking
16 whether you're looking -- I'm not asking you
17 whether or not we're looking at the
18 underlying regulation, I'm asking whether the
19 Agency is objecting to the Board's
20 consideration of a challenge to the 308
21 finding of liability? And by virtue of the
22 fact that you brought a case under 308, the

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1 ALJ has issued a decision under 308, why is
2 it that this Board can't consider that
3 challenge?
4 MR. RYAN: 40-CFR 2238(c), Your
5 Honor.
6 JUDGE STEIN: So in other words,
7 your argument is that for any regulation that
8 the agency has issued that we can't consider
9 a respondent's appeal by virtue of a
10 provision like 509?
11 That all arguments that a party
12 might have as to have that regulation is
13 applied under the circumstances as precluded
14 by 509? I mean, that strikes me as, you
15 know, quite frankly, breathtaking.
16 MR. RYAN: Well, I -- 2238(c) which
17 is the regulation at issue here and regarding
18 review of collateral attacks to regulations
19 clearly forbids the Board that challenge. I
20 mean, the Board certainly can consider it,
21 but it can't be a -- the Board cannot reverse
22 a validly promulgated regulation --

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1 JUDGE STEIN: No one's asking --
2 that's not the question that I'm asking you.
3 I'm asking you a very different question.
4 The question that I'm asking you is
5 given that you've told us that it's
6 unnecessary to reach the 308 question, if we
7 were to disagree with you and conclude that
8 in -- we believe that it is necessary to
9 reach the 308 claim, are you objecting to our
10 doing that and it seems to me you're saying
11 yes. Is that correct?
12 MR. RYAN: Yes, that is correct,
13 Your Honor. We should not be reviewing the
14 308 claim in this form.
15 JUDGE SHEEHAN: Even the penalty
16 aspect as opposed to the liability aspect?
17 MR. RYAN: Well, the penalty
18 aspect, of course, the judge relied in part
19 on 308 for her violation but in terms of the
20 Respondent's challenge to whether we can
21 bring a 308 claim -- that he's missed the
22 boat on that one.

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1 JUDGE STEIN: Well, I think --
2 quite frankly I think the Agency is missing
3 the boat on this one. If you know, you're
4 saying that we can't review this issue of
5 liability then why is it that the Agency is
6 bringing a claim under 308?
7 I mean, I think the breadth that
8 you're trying to sweep under this 509, it
9 goes well beyond what it is that we have
10 historically precluded under you know, under
11 509.
12 MR. RYAN: Well, Your Honor, if --
13 JUDGE STEIN: The Appellant has a
14 right to appeal.
15 MR. RYAN: Of course the Appellant
16 has a right to appeal, I agree with that and
17 the Appellant also has the right to appeal
18 any factual findings that might underlie a
19 violation. That's not the case here. He's
20 not challenging whether he applied for a
21 permit, he's not challenging whether he's
22 submitted the proper applications.

<p style="text-align: right;">50</p> <p>1 What he is challenging is EPA's to 2 promulgate a regulation 122.21(a). That's 3 his challenge and that challenge could be 4 heard. 5 JUDGE STEIN: Right. As part of 6 our consideration to this challenge to 308 7 liability, we would of course look at the 8 issue of whether that challenge is precluded 9 but I think that's a -- that's step two. To 10 me that's not step one, I mean, I think you 11 first have to get to the question of whether 12 or not you look at 308 at all. The Agency 13 has argued we shouldn't reach it, we may or 14 may not agree with it. 15 If we disagree with the agency, 16 then we will go ahead and look at 308; 17 whether we then now get to your step two I 18 think is really a separate question from the 19 question that I was attempting to ask. 20 MR. RYAN: Well, if the question 21 you were attempting to ask Your Honor, and 22 forgive me if I'm missing it, was that</p>	<p style="text-align: right;">52</p> <p>1 sites inspected at the time were not 2 compliant. So let's assume that this area 3 was largely off the regulatory map, at least 4 out of the -- away from the eyes of EPA for 5 some period before this action. 6 If that's true, does that have any 7 effect in your view on the penalty in terms 8 of the failure of the agency if any, to do 9 outreach or to keep an enforcement presence 10 there that would alert people to the need to 11 stay in compliance? 12 Is there any penalty break to be 13 accorded if this is true to an area where 14 there hadn't been much EPA presence in recent 15 history? 16 MR. RYAN: No, and the reason why 17 is because the there -- the presiding officer 18 found in her initial decision that there was 19 in fact outreach in the area, and there were 20 in fact, I believe the number was 200 permits 21 issued in North Dakota and in the Fargo area 22 previous year by the state. And it's a</p>
<p style="text-align: right;">51</p> <p>1 whether the 308 element of the judge's 2 decision, the ALJ's decision should be 3 reviewed, of course it should. All the 4 elements of all of the ALJ's decisions should 5 be reviewed. The question is can -- and what 6 I was trying -- what I was answering was 7 whether they can collaterally attack a 8 122.21. 9 JUDGE STEIN: Right, now I 10 understand your position on that. 11 MR. RYAN: Okay. 12 JUDGE STEIN: Okay, I think we're 13 clear at this point. 14 MR. RYAN: Thank you, Your Honor. 15 JUDGE SHEEHAN: Another penalty 16 question, Mr. Ryan, the record below 17 indicates that EPA went to Fargo in the fall 18 of '02 because there were a "low number" -- 19 that from the opinion below -- of permits 20 being received. 21 And then you go out and at least 22 according to the Respondent, 12 of the 13</p>	<p style="text-align: right;">53</p> <p>1 strict liability statute. Everyone is -- 2 JUDGE SHEEHAN: Well, I'm not 3 talking about liability, I'm talking about 4 penalty. So is there any penalty 5 consideration to be given in circumstances, 6 along the lines I laid them out, not 7 according to what the Judge Biro said -- 8 MR. RYAN: Right. 9 JUDGE SHEEHAN: -- I'm just asking 10 the question theoretically in some sense, if 11 it is as Respondent says, does that affect 12 the penalty? 13 MR. RYAN: Under this particular 14 factor, no. I mean, when it comes to the 15 issue of what was in the respondent's mind, 16 what was his general culpability, she did 17 give some credit to that, but in terms of 18 what the local community knew because of 19 perhaps a high rate of non-compliance then I 20 would say no, we should not -- we do not give 21 credit to that. 22 JUDGE WOLGAST: Another question as</p>

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

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

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

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

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

1 moment to the general 308 issue here --

2 MR. RYAN: Yes.

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

6 MR. RYAN: That's correct.

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

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

20 MR. RYAN: Yes, it is.

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

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

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

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

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

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

22 JUDGE SHEEHAN: Going back for a

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

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

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

16 JUDGE SHEEHAN: Okay.

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

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1 the Fargo area indicated it's certainly --
2 people were aware of the need to get permits.
3 JUDGE WOLGAST: And is that part of
4 the record?
5 MR. RYAN: And they also had
6 information sessions, I believe, too.
7 JUDGE WOLGAST: And is that
8 reflected in the record?
9 MR. RYAN: That would be in the
10 record, Your Honor. I don't have the site
11 unfortunately. I can provide it to you
12 though.
13 JUDGE STEIN: Mr. Ryan, counsel for
14 Service Oil pointed us to or argued that his
15 client was prejudiced by virtue of the
16 agencies having raised this 308 issue on the
17 eve of the hearing. Could you respond to
18 that?
19 MR. RYAN: There was -- no -- yes,
20 I could, Your Honor. There was no prejudice.
21 I mean, it was -- the facts that were at
22 issue before the judge did not change as a

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1 result of the adding the 308 claim.
2 The initial compliant, alleged
3 failure to comply -- apply for permit simply
4 alleged a different legal ground. Changing
5 the legal grounds late in the game doesn't
6 really change his ability to prepare for
7 hearing and he was clearly aware of that
8 claim at that hearing and prepared for it and
9 put on this case.
10 JUDGE WOLGAST: How --
11 MR. RYAN: -- prejudice.
12 JUDGE WOLGAST: -- how soon before
13 the hearing was the amended complaint
14 submitted?
15 MR. RYAN: It was I believe a month
16 or two, wasn't it, yes.
17 JUDGE WOLGAST: It was a month or
18 two?
19 MR. RYAN: I believe. I don't know
20 off the top of my head, Your Honor.
21 JUDGE WOLGAST: And did Service Oil
22 ask for extra time to respond to the 308

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1 claim?
2 MR. RYAN: I don't believe they
3 did, Your Honor.
4 JUDGE WOLGAST: Thank you.
5 JUDGE SHEEHAN: Okay, thank you,
6 Mr. Ryan. Would you -- do you have more? I
7 should ask.
8 MR. RYAN: No, Your Honor, I'm
9 done. Thank you.
10 JUDGE SHEEHAN: Five minutes, Mr.
11 Shockley.
12 MR. SHOCKLEY: Okay, thank you,
13 Your Honor.
14 JUDGE SHEEHAN: If you wish to --
15 MR. SHOCKLEY: Thank you, Your
16 Honor. I'd just like to clarify once again
17 that this case is not about the authority of
18 an agency to issue regulations. This is
19 about the application of a regulation
20 pursuant to a statute to a particular set of
21 circumstances in finding a violation for the
22 failure to provide -- apply for a permit

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1 pursuant to section 308. This is not a
2 collateral attack on their authority to issue
3 a regulation, rather it is the application
4 and its interpretation by the agency of how
5 that should be applied in specific
6 circumstances.
7 JUDGE STEIN: And let me interrupt
8 -- excuse me, let me interrupt you there. So
9 the agency has promulgated this regulation
10 under the authority of 308.
11 Are you saying that they can
12 promulgate the regulation and there can be a
13 regulation that requires you to apply for a
14 permit promulgated under 308 but then when
15 the agency goes to enforce it, they can't
16 enforce it under 308 -- under 309,
17 referencing 308? I mean, I'm having
18 difficulty understanding how it is they have
19 the authority to promulgate the regulation,
20 but then how is it that that regulation
21 becomes enforceable if in each and every
22 circumstance where they attempt to enforce

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1 it, a company like yours can come in and say
2 that they have no authority to enforce it?
3 MR. SHOCKLEY: Well, that is an
4 excellent question, Your Honor, and I believe
5 it's a distinction -- a careful distinction
6 that must be made between the authority to
7 undertake an act and the substance of the
8 act. And what we're really talking about is
9 the substance of their actions, whether or
10 not the enforcement of 40 CFR section 120.21,
11 which requires a permit -- a person to apply
12 for a permit, can be found as a violation
13 under 308. And 308 --
14 JUDGE STEIN: Well, if it can't be
15 found as a violation under 308, under what
16 authority would it be found as a violation?
17 I mean, how would they enforce that
18 provision?
19 MR. SHOCKLEY: Well -- well, I
20 believe Your Honor that --
21 JUDGE STEIN: Aren't you
22 essentially saying that there's sort of a

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1 null set here? If they can't enforce it
2 under 308, then how would they enforce that
3 regulation?
4 MR. SHOCKLEY: Well, the remedy for
5 the EPA would seem to be enforcing -- taking
6 enforcement action against an individual who
7 is discharging sediments or other pollution
8 into waterways without a permit.
9 JUDGE STEIN: Well, that's a -- but
10 that's a different provision. I mean, there
11 is a regulation on the books that says
12 there's an obligation to apply for the permit
13 and that is a very important obligation and
14 it's a broad applicability, potentially
15 applicable to hundreds, thousands -- hundreds
16 of thousands as potentially facilities across
17 the country and it seems to me that under
18 your argument that regulation -- if we were
19 to accept your argument, how could the agency
20 enforce that regulation? I mean, that can't
21 be what Congress intended?
22 MR. SHOCKLEY: Well, respectfully,

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1 Your Honor, I believe that section 308's
2 purpose is a maintenance, monitoring
3 equipment entry and access to information
4 section giving the authority to the Agency to
5 collect information --
6 JUDGE SHEEHAN: Why can't that
7 information be in the form of a permit
8 application? Why is a permit application
9 somehow not information being sought by the
10 Agency?
11 MR. SHOCKLEY: Well, I believe Your
12 Honor that a close strict reading of section
13 308 does not include any -- it references a
14 collection of information and issuances of
15 specified individualized requests for
16 information.
17 JUDGE SHEEHAN: Even though the
18 word "individualized" is nowhere to be found
19 on the face -- unambiguously to use your word
20 of 308, is that right? You say it's plain
21 and it's unambiguous but you can't give us
22 any word or words to back that up, it seems.

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1 MR. SHOCKLEY: Well, Your Honor, it
2 simply does not include the authority to go
3 beyond making specific request to find a
4 violation for 308.
5 It's a information gathering
6 section and essentially our position is that
7 122.21 is an application requirement, it's
8 not a requirement that's specific for
9 information.
10 It's just you must apply and it's
11 for information gathering and record keeping
12 only. In the event that they issue an
13 individualized request, then a violation of
14 308 can be found, if the facts so indicate a
15 failure to respond to a section 308
16 information request. And that's what was
17 done in this case. They made a section 308
18 information request, which subsequently was
19 responded to.
20 By saying that it is a section 308
21 violation not to apply for a permit, which is
22 a generalized requirement buried in a

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

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

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

18 JUDGE SHEEHAN: We are adjourned.

19 SPEAKER: All rise.

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

22 * * * * *

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