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January 4, 2011

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U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, DC 20005

Re: In re Service Oil, Inc., Respondent
Docket No. CWA-08-2005-0010
EAB Appeal No. _____

Att'n: Ms. Eurika Durr, Clerk of the Board

Dear Ms. Durr:

Please find enclosed in connection with Respondent's appeal in the above matter the original and five (5) copies of each of the following:

1. Notice of Appeal; and
2. Appeal Brief.

A Certificate of Service is attached to each of the above documents.

Please be advised that the name, address, telephone number, and fax number of the individual who is authorized to receive service relating to the above-referenced proceeding are:

Michael D. Nelson
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Thank you.

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U.S. Environmental Protection Agency
January 4, 2011
Page 2

Sincerely yours,

OHNSTAD TWICHELL, P.C.

A handwritten signature in black ink, consisting of a series of fluid, connected loops and a long horizontal stroke extending to the right.

Michael D. Nelson

MDN:klt

Encs.

cc w/encs.: Honorable Susan L. Biro
Ms. Tina Artemis, Regional Hearing Clerk
Ms. Wendy I. Silver

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

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ENVIR. APPEALS BOARD

In Re:

Service Oil, Inc.,

Respondent.

Docket No. CWA-08-2005-0010

EAB Appeal No. _____

NOTICE OF APPEAL

Service Oil, Inc., Respondent, hereby appeals from the Initial Decision Upon Remand of Chief Administrative Law Judge Susan L. Biro, issued December 7, 2010, imposing a civil penalty of \$32,287 for violations of the Clean Water Act.

A copy of the 12/7/10 Initial Decision Upon Remand is annexed hereto as Attachment "1."

Dated: January 4, 2011.



Michael D. Nelson
ND ID #03457

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In Re: Service Oil, Inc., Respondent
Docket No. CWA-08-2005-0010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **Notice of Appeal** was served by me, by First Class Mail, this 4th day of January, 2011, upon the following:

Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8
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1595 Wynkoop Street
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

SERVICE OIL, INC.,

Respondent.

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Docket No. CWA-08-2005-0010

INITIAL DECISION UPON REMAND

I. Procedural History

This action was initiated on February 22, 2005, by the United States Environmental Protection Agency, Region 8 ("Complainant" or "EPA") filing an Administrative Complaint against Respondent Service Oil, Inc. ("Respondent" or "Service Oil") under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Complaint, as subsequently amended, alleged two violations of the CWA arising out of Respondent's construction of a \$10 million, 15-20 acre truck stop, the Stamart Travel Center, in Fargo, North Dakota, adjacent to public storm water sewer inlets leading to the Red River of the North. Count 1 alleged that prior to commencing construction in April/May 2002, Respondent failed to obtain a permit under Section 308 of the CWA, 33 U.S.C. § 1318, and its implementing regulation, 40 C.F.R. § 122.21, or alternatively, discharged pollutants without a permit under CWA Sections 301 and 402(p), 33 U.S.C. §§ 1311, 1342(p). Count 2 alleged that Respondent failed to conduct 65 of the 80 site inspections and/or maintain records thereof, as required by parts 3.B.1.a and 3.C of the CWA permit it obtained on November 25, 2002, seven months after construction began. EPA sought a combined, single penalty of \$40,000 for these violations.

By Accelerated Decision, on March 7, 2006, Respondent was found liable on Count 2 for its failure to conduct 65 inspections required under its permit. *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 6 (ALJ, Mar. 7, 2006) (Order on Complainant's Motion for Accelerated Decision on Liability and Penalties). A hearing was held on April 25-27, 2006, in Moorhead, Minnesota on the remaining issues of Respondent's liability on Count 1 and the appropriate penalty. On August 3, 2007, the undersigned issued an Initial Decision finding Respondent liable on Count 1 based upon its failure to timely acquire a permit for its construction activities in violation of CWA Section 308 (33 U.S.C. § 1318), and its implementing regulation, 40 C.F.R. § 122.21. *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2007 EPA ALJ LEXIS 21, at *62 (ALJ, Aug. 3, 2007). "[A]lternatively and/or additionally," the Initial Decision found Respondent liable on Count 1 on the basis that a preponderance of the evidence proved that, from May to September 2002, in absence of a permit,

Respondent had discharged pollutants from its site, specifically 49 tons of sediment in storm water, most or all of which reached the Red River, a navigable water of the United States, in violation of CWA Section 301 (33 U.S.C. § 1311). *Id.* at 2007 EPA ALJ LEXIS 21, at *139-40. For the two violations found, the Initial Decision imposed upon Respondent an aggregate civil penalty of \$35,640. *Id.*, 2007 EPA ALJ LEXIS 21, at *202.

Respondent appealed the Initial Decision to the Environmental Appeals Board (“EAB”), which upheld the Initial Decision by a Final Decision and Order issued July 23, 2008. *In re Service Oil, Inc.*, CWA Appeal No. 07-02, 14 E.A.D. ___, 2008 EPA App. LEXIS 35 (EAB, July 23, 2008).

Respondent then appealed the EAB’s Final Decision and Order to the United States Court of Appeals for the Eighth Circuit. On December 28, 2009, the Eighth Circuit issued its opinion vacating the civil penalty and remanding the case to the Agency for redetermination of the penalty consistent therewith. *Service Oil, Inc. v. U.S. Environmental Protection Agency*, 590 F.3d 545, 551 (8th Cir. 2009). Eventually, the case was remanded back to the undersigned by the EAB “to conduct further proceedings as necessary to amend the liability findings and redetermine the penalty amount.” *In re Service Oil, Inc.*, CWA Appeal No. 07-02, 2010 EPA App. LEXIS 30 (EAB, July 27, 2010).

On August 3, 2010, the undersigned issued a Briefing Order offering each party the opportunity to state its position as to the need for “further proceedings,” and the recalculation of the penalty. On September 16, 2010, both parties submitted their post-remand briefs. *See*, Complainant’s Brief Regarding Recalculation of the Penalty Consistent with the Decision of the Eighth Circuit (“Complainant’s Brief”) and Respondent’s Post-Remand Brief to the Administrative Law Judge (“Respondent’s Brief”).¹

II. The Eighth Circuit’s Opinion

The opinion of the Eighth Circuit in *Service Oil* begins by observing that the 1972 Amendments to the CWA directed EPA to “adopt effluent limits for the discharge of various pollutants” and decreed that “‘it is illegal for anyone to discharge pollutants into the Nation’s waters except pursuant to a permit’ that incorporates those effluent limits.” *Service Oil*, 590 F.3d at 546. In 1987, Congress “expanded this regime by directing EPA to require permits for storm

¹ As to further proceedings, EPA stated in its Brief that it “believes that all relevant facts necessary for a redetermination of liability and penalty in this matter are already in the record and, therefore, further proceedings are not needed.” Complainant’s Brief at 1. Respondent took a different position in its Brief, arguing that the Tribunal is not permitted to conduct further proceedings upon remand, other than redetermine the penalty amount consistent with the Eighth Circuit’s opinion. Respondent’s Brief at 6. Other than permitting the submission of the post-remand briefs, this Tribunal conducted no further proceedings, agreeing with the parties as to the lack of a need therefor.

water discharges associated with industrial activity.” *Id.* citing 33 U.S.C. § 1342(p)(2)-(4). “Industrial activity” includes “[c]onstruction activity . . . except operations that result in the disturbance of less than five acres of total land area.” *Id.* at 547 (quoting 40 C.F.R. § 122.26(b)(14)(x)). “EPA’s regulations provide that one intending to discharge ‘storm water associated with industrial activity’ must apply for an individual NPDES [National Pollutant Discharge Elimination System] permit or for coverage under a ‘promulgated storm water general permit’” “at least ninety days before the start of construction, or when required by an applicable general permit.” *Id.* at 547 (quoting and citing 40 C.F.R. §§ 122.21(c)(1), 122.26(c)). “In this administrative enforcement proceeding, EPA imposed a substantial monetary penalty on Service Oil, Inc., the owner of a construction site that did not timely obtain a storm water discharge permit. EPA based the amount of the penalty not on unlawful discharges, but on *Service Oil’s failure to comply with the agency’s permit application regulations*,” and such, the Appellate Court held, is an “expansion of EPA’s remedial power *not authorized by the governing statutes*.” *Id.* at 546 (italics added).

Analyzing the case, the Eighth Circuit begins by recognizing that “EPA and state permitting authorities obviously need detailed data from a new point source applicant in order to fashion and issue an appropriate permit before discharges commence” and that “EPA’s regulations governing permit applications serve this purpose.” *Service Oil*, 590 F.3d at 549, 550. The Eighth Circuit finds, however, that such “[r]egulations governing the timing and content of permit applications are clearly within the broad rule-making authority delegated [to EPA] by 33 U.S.C. § 1361(a) [CWA § 501(a)],”² and *not* within its rule-making authority provided by 33 U.S.C. § 1318(a) (CWA § 308(a)),³ as found below. *Id.* (italics added). As reason therefor, the

² Section 501(a) provides in full as follows:

(a) Authority of Administrator to prescribe regulations. The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act [33 U.S.C. §§ 1251 *et seq.*].

33 U.S.C. § 1361(a).

³ Section 308(a) provides in pertinent part that:

Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to state permit programs), 405, and 504 of this Act [33 U.S.C. §§ 1315, 1321, 1342, 1344, 1345, 1364]--

(continued...)

court observes that Section 308(a)'s "record-keeping requirements are expressly limited to 'the owner or operator of any point source'" and reckons that "[b]efore any discharge, there is no point source."⁴ *Id.* at 550. Thus, "the plain meaning" of Section 308 "is controlling and resolves the issue," indicating that Section 308 could not authorize a regulation against an entity merely "proposing a new discharge." *Id.*

The Court then goes on to state that the CWA "contains other provisions confirming that the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants" until a permit issues. *Service Oil*, 590 F.2d at 550 - 551. In support thereof, the Court cites the language of 33 U.S.C. § 1342(p)(3)(A), providing that permits for storm water discharges "shall meet all the applicable provisions of this section and section 1311," and the language of 33 U.S.C. § 1311, which prohibits discharges "[e]xcept in compliance with various CWA sections," absent from which is Section 1318, the Eighth Circuit remarks. *Id.* Additionally, the appellate court buttresses its conclusion with quotations taken from *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), addressing EPA's regulations governing concentrated animal feeding operations. *Id.* at 551. In that case, the Second Circuit held that "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit" and "the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges - not potential discharges, and certainly not point sources themselves." *Id.* quoting *Waterkeeper*, 399 F.3d at 505 (emphasis in original) and citing as "in accord," *NRDC v. EPA*, 822 F.2d 104, 128 n.24 (D.C. Cir. 1987) ("The Act does not prohibit construction of a new source without a permit The Act only prohibits new sources from discharging pollutants without a permit").

In response to the EAB's concern that preventing the Agency from assessing a penalty for untimely permit applications will result in the agency either "guess[ing] the identities of potential new point sources, or allow[ing] unpermitted discharges to ensue," the Eighth Circuit suggests that:

Prudent builders know that permits do not issue overnight and that storm water

³(...continued)

(A) the Administrator shall require *the owner or operator of any point source* to (i) establish and maintain such records, (ii) make such reports, . . . and (v) provide such other information as he may reasonably require;

33 U.S.C. § 1318(a) (italics added).

⁴ The Eighth Circuit's opinion also states at an earlier point that "[w]hen construction began, the site became a 'point source,'" citing as authority therefor the CWA's definition of a "point source" ("any . . . discrete conveyance . . . from which pollutants are or *may be* discharged"). *Service Oil*, 590 F.3d at 547 citing 33 U.S.C. § 1362(14) (emphasis added).

discharges can happen any time after the start of construction makes the site a point source. They will apply and obtain permits before starting construction to avoid penalties for unlawful discharge that may prove to be severe. That is the regulatory regime Congress crafted. By contrast, under the EAB's interpretation of § 1318(a), a person about to commence construction could apply to EPA for a storm water discharge permit less than the ninety days "before the date on which construction is to commence" prescribed in 40 C.F.R. § 122.21(c)(1); obtain the permit before construction commences and any discharge occurs; and still face a costly administrative enforcement proceeding and potential monetary penalties for failing to comply with the regulation. The statute is to the contrary.

Service Oil, 590 F.2d at 551.

Based upon the foregoing, the Eighth Circuit concludes that "Congress in §1319(g)(1) [CWA §309] granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory provisions related to the *core prohibition* against discharging without a permit [§§ 1311, 1312, 1316-1318, 1328, 1345], or contrary to the terms of a permit," and so holds that "[t]he agency may not impose those penalties for violations of *other* Clean Water Act regulatory requirements," such as those arising from regulations issued under §1361(a), "though it may be authorized to take other enforcement action by other subsections of § 1319."⁵ *Id.* (italics added). Declaring that "[t]he decision of the EAB 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.' As a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A), this was a statutorily impermissible factor. Accordingly, we grant the petition for review, vacate the order assessing a civil penalty of \$ 35,640, and remand to the agency for redetermination of the amount of the penalty in accordance with § 1319(g)(3) and this opinion." *Service Oil*, 590 F.2d at 551.

III. The Original Penalty Calculation

As noted both in the Initial Decision and Eighth Circuit's opinion, CWA Section 309(g)

⁵ Finding the regulation at issue (40 C.F.R. § 122.21) authorized by the CWA, albeit under a statutory section different from that found below, the Eighth Circuit characterized the issue presented in *Service Oil* as one of "remedial power, not regulation validity," and did not invalidate, in whole or in part, the regulation regarding the timing of permit applications. 590 F.3d at 550. Nevertheless, it is not precisely clear what "other enforcement action" under § 309 the Court thought EPA "may be authorized" to take for the regulation's violation as subsections (a)(3) and (d) thereof providing for compliance orders and civil penalty actions, and subsection (d) authorizing criminal actions, all use essentially the same language as subsection (g), authorizing EPA to institute actions only for "violation[s] of sections 1311, 1312, 1316, 1317, 1318, 1328, or 1345," and/or permit violations. *See*, 33 U.S.C. § 1319(a)(3), (d), (c). Such a result may be contrary to the principle of *uba jus ibi remedium*.

(33 U.S.C. § 1319(g)) authorizes EPA to assess civil administrative penalties for violations of CWA Sections 301, 302, 306-308, 318, 405, or a condition in a permit issued under Section 402 (33 U.S.C. §§ 1311, 1312, 1316-1318, 1328, 1345, and 1342). *Service Oil*, 2007 EPA ALJ LEXIS 21, *140; *Service Oil*, 590 F.3d at 547. Under Section 309(g) as amended, administrative penalties imposed for such violations cannot exceed \$11,000 for each day the violation continued, and the total penalty cannot exceed \$137,500. 33 U.S.C. § 1319(g)(2)(B). In determining the appropriate penalty to be assessed within those monetary limits, Section 309(g)(3) of the CWA provides that the “nature, circumstances, extent, and gravity” of the violations must be taken into account as well as the violator's ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require. 33 U.S.C. § 1319(g)(3).⁶ As further observed in the Initial Decision, the Supreme Court has indicated that highly discretionary calculations are necessary in assessing penalties under the CWA and federal courts often use the “bottom up” method in such calculations, which starts with the economic benefit of noncompliance, and then adjusts that figure upward to reflect the other statutory factors. *Service Oil*, 2007 EPA ALJ LEXIS 21, at *142-44 citing *inter alia*, *Tull v. United States*, 481 U.S. 412, 427 (1987), *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff’d*, 150 F.3d 259 (3d Cir. 1998).

The \$35,640 aggregate civil penalty imposed upon Respondent in the Initial Decision for its two counts of violation found was calculated as follows: (1) the uncontested figure of \$2,700 was accepted as the economic benefit Respondent obtained from the violations; (2) the economic benefit was multiplied by 10 to account for the nature, circumstances, and extent of the violations; (3) the resulting amount (\$27,000) was increased by 10% for the gravity of the violations; and that sum (\$29,700) was then increased further by another 20% in order to reflect Respondent’s culpability for the violations. *Service Oil*, 2007 EPA ALJ LEXIS 21, at *149-202.

IV. The Parties’ Positions

In its Brief, Complainant takes the position that the decision of the Eighth Circuit only requires that the penalty imposed upon Respondent in this case be adjusted downward by \$1,954, that is, from the original sum of \$35,640 to \$33,686. Complainant’s (“C’s”) Brief at 4-5. As explanation therefor, Complainant notes that the penalty calculation in the Initial Decision utilized as its base amount \$2,700 - the aggregate sum Complainant calculated as the economic benefit Respondent obtained from its noncompliance. *Id.* at 2-3. Such sum consisted of a total of \$940 in the economic benefit derived from delayed costs and \$1,760 in avoided costs. *Id.* at 2. The \$940 in economic benefit from delayed costs, EPA advises, represented the sum of the full cost of preparing the Notice of Intent (“NOP”) (\$126.50) as well as the Storm Water Pollution Prevention Plan (“SWPPP”) (\$772.25), and implementing the Best Management Practices (“BMPs”) (\$22,632.25), *i.e.* a total of \$23,531, multiplied by “a 5 percent gain for .8 years”

⁶ As observed in the Initial Decision, the Agency has not issued any civil penalty guidelines for CWA penalty calculations. *Service Oil*, 2007 EPA ALJ LEXIS 21, at * 142.

(covering the period from January 2002, three months before construction started, until November 2002, the month the permit was obtained), resulting in an accrued economic benefit from the *delayed payment* of such expenses of approximately \$940.00. *Id.* The remaining portion of the \$2,700 figure, *i.e.* \$1,760, EPA states is simply the economic benefit associated with avoided costs resulting from Respondent's failure to "conduct, maintain and record" the inspections as required. *Id.*

In light of the Eighth Circuit's decision, on remand, EPA suggests modifying the original penalty calculation by deducting from the economic benefit portion of the penalty the *full* cost of preparing the NOI (\$126.50) and SWPPP (\$772.25), a total of \$898.75, but not the remainder of the *delayed costs* pertaining to Respondent's post construction failure to timely implement the BMPs or the avoided costs of the missed inspections "following the start of construction." C's Brief at 3-4. Subtracting \$898.75 from the initially calculated total delayed costs of \$23,531, reduces the delayed costs to approximately \$22,633. *Id.* at 4. Again, multiplying this sum by a 5% gain, but for a reduced .7 years (subtracting the month prior to the start of construction), in light of the Eighth's Circuit's opinion invalidating imposition of a penalty for failure to apply for a permit prior to construction, results in a figure of \$792.15 as the economic benefit derived from delayed costs. *Id.* Adding such amount to the \$1,760 in avoided costs results in a revised economic benefit amount of \$2,552. *Id.*

Then, following the methodology used by this Tribunal in the original penalty calculation, Complainant calculates its proposed revised penalty by multiplying the economic benefit of \$2,552 by 10, to account for the nature, circumstances and extent of the violation, increasing it another 10% for the gravity of the violation, plus an additional 20% in recognition of Respondent's culpability for the violations, resulting in a final recalculated total penalty, according to EPA, of \$33,686. C's Brief at 5.

Respondent takes a different approach in its proposal as to how the penalty should be modified in light of the Eighth Circuit's decision. As it did at hearing, Respondent accepts and starts its calculations with the original economic benefit amount of \$2,700 proposed by EPA at hearing. Respondent's ("R's") Brief at 6. However, Respondent proposes that upon remand, this figure should only be doubled to \$5,400, rather than multiplied by 10 to account for the nature, circumstances and extent of the violations. Then, consistent with the Tribunal's initial penalty calculations, the product of this equation should be increased by 10% to account for the gravity of the violations, and 20% to account for culpability, for a final proposed penalty of \$7,128. R's Brief at 6.

As rationale for merely doubling the economic benefit rather than multiplying by 10 to account for the nature, circumstances and extent of the violation, Respondent suggests that the Eighth's Circuit opinion requires "a deletion from the vacated penalty of the entire amount previously assessed against Service Oil, for Service Oil's 'complete failure to apply for and obtain a NPDES permit prior to starting construction.'" R's Brief at 6, (quoting *Service Oil*, 590 F.3d at 548-551) (emphasis in original). It notes that the Eighth Circuit found that Service Oil was assessed a "ten-fold increase in the base economic benefit penalty *because of* Service Oil's

‘complete failure to apply for its storm water permit prior to starting construction.’” *Id.* at 7 (emphasis added). Acknowledging, however, that the Tribunal did include in its nature, circumstances and extent discussion Respondent’s failure to conduct inspections required by the permit once it was issued, a “type of violation [which] is more technical in nature” it claims, it concedes a doubling of the economic benefit would be appropriate. *Id.*

V. Discussion

A. The Economic Benefit Calculation

The Eighth Circuit’s opinion in *Service Oil* holds that an administrative penalty under CWA § 309(g) (33 U.S.C. § 1319(g)) may only be assessed by EPA for “violations of specific statutory provisions related to the [Act’s] *core prohibition against discharging without a permit*, or contrary to the terms of a permit.” *Service Oil*, 590 F.3d at 550 (italics added). Therefore, the Eighth Circuit found EPA could not assess an administrative penalty against Respondent merely for violating 40 C.F.R. § 122.26(c) - a regulation requiring a permit application prior to the start of construction, even where discharge occurred. *Id.* at 551 (“a violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A)”). The Eighth Circuit’s opinion overturns the penalty imposed by this Tribunal to the extent such penalty was based upon a violation of 40 C.F.R. § 122.26(c) and/or CWA Section 308.

However, the claim that Respondent violated 40 C.F.R. § 122.26(c) was only one of two bases of liability jointly plead in Count 1 of the Complaint. The other basis of liability was the claim that Respondent violated CWA § 301 (33 U.S.C. § 1311(a)) by discharging pollutants without a permit, *i.e.*, a violation of the Act’s “core prohibition.” In regard thereto, as the Eighth Circuit observed, “[a]fter a lengthy review of conflicting expert testimony, the ALJ further found that “dirt, sediment and concrete, did flow off-site during construction” and “would have reached the Red River. Therefore, [the Eighth Circuit held] *Service Oil* also violated § 1311(a) by discharging pollutants without a permit.” *Id.* at 548. This finding of liability and the imposition of an administrative penalty in regard thereto under CWA § 309(g) remains unaffected by the Eighth Circuit’s opinion. Similarly, the finding that Respondent was liable on Count 2 for violating the terms of its CWA permit and EPA’s authority to impose a penalty in regard thereto is not affected by the Eighth Circuit’s opinion.

Originally, in calculating the appropriate penalty, the Initial Decision took into account all three basis of liability set forth in the Complaint and determined a single consolidated penalty on the two counts. Upon remand, the penalty must be redetermined solely in light of Respondent’s liability on Count 1 for discharging pollutants without a permit and on Count 2 for violating the terms of its permit.

The Initial Decision utilized the “bottom up” methodology to calculate the original penalty in this case. Neither party has raised any objections thereto. In fact, both utilized the same methodology in the calculations included in their post-remand briefs. Therefore, such

methodology will be employed again in determining the penalty upon remand.

Under the "bottom-up" methodology, the base figure used to calculate a CWA penalty is "economic benefit," the assessment of which "deters violations by removing an incentive to violate the law [and] helps create a level playing field by ensuring that violators do not obtain an economic advantage over their competitors." *Service Oil*, 2007 EPA ALJ LEXIS 21, at *146. "[C]ase law has established that [Complainant] need not demonstrate the exact amount of economic benefit, since a tribunal is only required to make a 'reasonable approximation' thereof when calculating a CWA penalty." *Id.*

In this case, Complainant initially calculated the economic benefit Respondent received as a result of its CWA violations as \$2,700. Respondent did not challenge this figure and this Tribunal used it in the penalty calculations in the Initial Decision. *Id.*, 2007 EPA ALJ LEXIS 21, at *146-150. In its brief submitted upon remand, EPA proposes that, in recalculating the penalty, the Tribunal remove from the economic benefit figure the whole portion attributable to Respondent's failure to timely file its NOI and put its SWPPP in place. C's Brief at 3-4. However, EPA fails to cite any specific language of the Eighth Circuit's decision which would direct such a wholesale deletion, and the facts of this case suggests such is unwarranted. The evidence adduced at hearing established that Respondent's discharges from the site in the absence of both a permit and a SWPPP began in May 2002, and continued on for seven months until November of 2002, when Respondent obtained its permit. As a result thereof, Respondent benefitted from its violation of discharging without a permit, by delaying the expenditure of the cost of obtaining the permit and SWPPP for seven months (as well as the BMPs), albeit not the whole time period (9.6 months or 0.8 of a year) used in EPA's original economic benefit calculation. On remand, Respondent has not raised any issue regarding the appropriateness and use of the full \$2,700 economic benefit figure. Therefore, it seems appropriate to revise the original economic benefit calculation to remove the time before the illegal discharges began to occur. Such revision results in a new aggregate economic benefit amount of \$ 2,446, which was calculated as follows:

- The Economic Benefit from Delayed Costs: Cost of preparing the NOI (\$126.50) plus the cost of preparing the SWPPP (\$772.25), plus the cost of implementing the BMPs (\$22,632.25) total \$23,531, multiplied by a 5 percent gain for 7/12 of a year (or 58.3%) = \$686.
- The Economic Benefit of Avoided Costs: Cost of 23 missed (one-hour) weekly site inspections over the seven month period prior to the time the permit was obtained, plus the 65 inspections Respondent did not perform after it obtained its permit, at the rate of \$20 per hour = \$1,760.⁷

⁷ The evidence adduced in this proceeding indicated that Respondent conducted no inspections in the seven months after construction began, and then failed to conduct 65 of the
(continued...)

B. Nature, Circumstances and Extent

As indicated above, for its part, Respondent suggests that the revision in the initial penalty calculation required by the Eighth Circuit's opinion is the elimination of the ten-fold increase of the economic benefit in consideration of the "nature, circumstances and extent" of the violations. In support thereof, Respondent relies on language in the Eighth Circuit's opinion, which attributes the ten-fold increase to Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction." R's Brief at 6 (quoting *Service Oil*, 590 F.3d at 548-51, quoting in turn the Initial Decision, *Service Oil*, EPA ALJ LEXIS 21, at *155). While that language is, in fact, a direct quote from the Initial Decision, as Respondent is well aware, it does not correctly represent either the Tribunal's penalty analysis nor the facts of the case relating to the "nature, extent, and circumstances" of the violations.⁸

The "nature" of the paramount violation established in Count 1 was not the regulatory violation, but Respondent's violation of what the Eighth Circuit properly recognized as the "core prohibition" of the CWA, that is Section 301's prohibition on discharging pollutants without a permit. *Service Oil*, 2007 EPA ALJ LEXIS 21, at *63-140. The "circumstances" thereof, as

⁷(...continued)

required inspections *after* it obtained its permit. Thus, the record suggests that had Respondent not violated the law, it would have incurred the additional cost of conducting at least a total of 103 one-hour inspections, *i.e.*, 28 weekly inspections over the first seven month period, plus 10 additional inspections after rain events which occurred during that period (involving greater than 0.5 inches of precipitation in 24 hours), as well as the 65 post-permit inspections. *See, Service Oil*, 2007 EPA ALJ 21 at *131-140. As such, at the rate of \$20 per hour, the total avoided costs would be \$2,060. However, as noted by Complainant in its Brief, at hearing, its witness Mr. Urdiales testified that the avoided cost of the missed inspections totaled \$1,940 (*i.e.*, 97 inspections) and Complainant only requested avoided costs in this proceeding in the amount of \$1,760 (88 inspections). C's Brief at 2 citing Tr. Vol. I at 257. As such, this Tribunal deems it appropriate upon remand to limit the economic benefit for avoided costs to the lower \$1,760 figure requested by Complainant.

⁸ Respondent also overstates the Eighth Circuit's holding when it refers in its Brief to "this Tribunal's now-vacated findings at pp. 56-57 of its 8/3/07 Initial Decision." R's Brief at 6. The Eighth Circuit's ruling does not invalidate any of the factual findings made in the Initial Decision upon which the penalty was based. Rather, the Eighth Circuit's opinion merely operates to remove from the reach of EPA's administrative penalty authority those violations of the CWA and its regulations that fall under Section 308, 33 U.S.C. § 1318, and occur before a particular site became a "point source" under the Act. The opinion, by its own terms, does not affect penalties based on violations occurring after Respondent's site became a "point source" and discharged pollutants therefrom. *See Service Oil*, 590 F.3d at 547 ("When construction began, the site became a 'point source.'")

extensively detailed in the Initial Decision, arose from Respondent'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. *Id.* at *7-10. Although it hired a variety of prime contractors to facilitate individual aspects of the construction, Respondent acted as its own general contractor on the project, retaining final control over and responsibility for all aspects thereof. *Id.*, 2007 EPA ALJ LEXIS 21, at *9-10, 167-188. Respondent did not obtain a permit under the CWA until November 2002, some seven months after construction began. More importantly, prior to obtaining such permit, Respondent 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 the City's storm water system leading to the Red River of the North. *Id.*, 2007 EPA ALJ LEXIS 21, at *10-12. Furthermore, during that seven month period, from April through November 2002, when it was unprotected by BMPs, the site received 22.59 inches of precipitation, which was 91% of the area's total annual precipitation. *Id.*, 2007 EPA ALJ 21, at *150.

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. *Id.* 2007 EPA ALJ LEXIS 21, at *11-12. Expert testimony credited by the Tribunal established that 49 tons of sediment flowed off Respondent's site into the City's municipal storm sewer system, and ultimately into the Red River of the North, during the seven month period that Respondent had no permit. *Id.*, 2007 EPA ALJ LEXIS 21, at *60-133. 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. *Id.*, 2007 EPA ALJ LEXIS 21, at *161-62. Further, the Red River has been classified as a "Class I stream," requiring it to meet the highest water quality standards and has since the 1990s been identified as impaired by turbidity affecting its aquatic life. *Id.*, 2007 EPA ALJ LEXIS 21, at *162. Expert testimony at hearing advised that turbidity is caused, at least in part, by sediment runoff. *Id.* Further, as the Initial Decision noted, it was the finding that stormwater runoff containing toxic and conventional pollutants was causing serious deterioration in 30% of rivers and streams that specifically prompted Congress in 1987 to extend the CWA's permit requirements to attempt to prevent unpermitted construction activities such as those engaged in by the Respondent in this case. *Id.*, 2007 EPA ALJ LEXIS 21, at *18-19.

As to the "nature, circumstances and extent" of the violation set forth in Count 2, Respondent conceded at all points in this proceeding that after it obtained a CWA permit in November 2002, it did not fully comply with the terms thereof. Specifically, Respondent failed to conduct 65 out of 80 (4/5ths or 81%) of required site inspections. Consequently, it was impossible for Respondent or anyone else to know if the BMPs were properly installed and maintained as necessary to prevent pollutants in stormwater running off the site during the balance of the construction period. *Id.* at *157-58.

Thus, even taking into account the holding of the Eighth Circuit's opinion that no penalty is authorized for Respondent's failure to apply for a permit prior to construction/discharge, the

aforementioned "nature, extent, and circumstances" of the two remaining violations, upon which Respondent has been found liable and for which a penalty may be imposed, indicates that at least a tenfold increase in the economic benefit of the penalty is still fully warranted.

As neither party has suggested that any other changes in the penalty as calculated in the Initial Decision are required by the Eighth Circuit's opinion, the remaining components thereof remain unchanged. Accordingly, for all these reasons, I find the proper recalculated penalty amount to be \$32,287, figured as follows: economic benefit of \$2,446, multiplied by 10 to account for the nature, circumstances, and extent of the violations, the resultant increased by 10% for the gravity of the violations, and that resultant increased further by 20% to reflect Respondent's culpability for the violations.

ORDER

1. Upon remand, Respondent Service Oil, Inc., is hereby assessed an aggregate civil penalty of \$32,287.
2. Respondent shall pay the full amount of this civil penalty within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.
3. Payment shall be made by submitting a certified or cashier's check in the amount of \$32,287, payable to "Treasurer, United States of America," and mailed to:

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

4. A transmittal letter identifying the subject case and EPA docket number, as well as Respondent's name and address, must accompany the check.
5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.
6. This Initial Decision Upon Remand resolves all outstanding issues and claims in this proceeding and, for purposes of appeal, shall be treated as an "initial decision" under 40 C.F.R. § 22.30(a).
7. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision Upon Remand shall become a final order forty-five (45) days after its service upon the parties and without further proceedings, unless (1) Respondent moves to set aside this Initial Decision Upon Remand; (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision Upon Remand is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision Upon Remand, pursuant to 40 C.F.R. § 22.30(b).



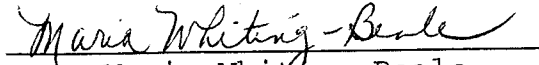
Susan L. Biro
Chief Administrative Law Judge

Dated: December 7, 2010
Washington, D.C.

In the Service Oil, Inc., Respondent
Docket No. CWA-08-2005-0010

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision Upon Remand**, dated December 7, 2010, was sent this day in the following manner to the addressees listed below.


Maria Whiting-Beale
Staff Assistant

Dated: December 7, 2010

Original and One Copy by Pouch Mail to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA
MC8RC
1595 Wynkoop Street
Denver, CO 80202-1129

Copy By Pouch Mail To:

Wendy I. Silver, Esquire
Enforcement Attorney (8ENF)
U.S. EPA
1595 Wynkoop Street
Denver, CO 80202-1129

Copy By Certified Mail Return Receipt To:

Michael D. Nelson, Esquire
John T. Shockley
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