BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
	)	**Appeal No. CWA 07-02**
SERVICE OIL, INC.,	)	
	)	
Respondent/Appellant.	)	**COMPLAINANT'S RESPONSE BRIEF**
	)	

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INTRODUCTION

The Chief Administrative Law Judge ("ALJ") issued her Initial Decision in this matter on August 3, 2007. On Count I, the ALJ found Service Oil, Inc. ("Appellant") liable for failing to obtain a permit in violation of section 308 of the CWA, 33 U.S.C. § 1318, and its implementing regulations 40 C.F.R. § 122.21 and for discharging a pollutant without a permit in violation of section 301 of the CWA, 33 U.S.C. § 1311. On Count II, the ALJ found Appellant liable for failing to conduct storm water inspections and/or failing to record or maintain on-site inspection records in violation of its National Pollutant Discharge Elimination System ("NPDES") permit. The ALJ imposed a civil administrative penalty of $35,640 on the Appellant.

Appellant appeals the finding of liability under section 308 and its implementing regulations and the magnitude of the penalty assessed.

QUESTIONS PRESENTED BY APPELLANT

I. Did the ALJ properly conclude that Appellant is liable on Count I of the Amended Complaint?

II. Did the ALJ fully consider the culpability factors in this case?

III. Did the ALJ properly consider the general deterrence effect of the penalty in this case?

IV. Did the ALJ fully consider the circumstances of the violations when calculating the initial adjusted penalty?

PROCEDURAL AND FACTUAL BACKGROUND

I. Procedural Background

On February 22, 2005, Complainant filed an administrative complaint against Appellant alleging two counts: Count I – failure to obtain a NPDES storm water permit prior to construction activities at its Stamart facility, in violation of sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and 40 C.F.R. § 122.26, and Count II – failure to

comply with its permits, after receiving permit coverage, by not conducting the requisite self-inspections or recording and/or maintaining records of self-inspections. Appellant filed its Answer and Request for Hearing on April 18, 2005. Various Pre-hearing Exchanges and Motions were filed during the subsequent months.[1] On March 13, 2006, Complainant moved to amend its complaint to add section 308 of the CWA, 33 U.S.C. § 1318, as an additional, alternative ground for liability for Count I. The ALJ granted this motion on April 10, 2006. An evidentiary hearing was held in Moorhead, Minnesota, from April 25 through 27, 2006. After an exchange of post-hearing briefs, the ALJ issued her Initial Decision on August 3, 2007.

Appellant timely filed its Notice of Appeal and Appeal Brief on August 31, 2007. Complainant filed a Motion for Extension on September 14, 2007, seeking an extension for submittal of its Response Brief. The Environmental Appeals Board ("EAB") issued its Order Granting the Motion for Extension until October 26, 2007, on September 17, 2007.

II. Factual Background

Appellant is a North Dakota corporation. JNT Ex.1, ¶11. Appellant owns and/or was engaged in construction activities at a facility known as Stamart Travel Center ("Stamart facility"), which is located at 3500 12th Avenue, North Fargo, North Dakota. JNT Ex.1, ¶14. Appellant began construction activities at the Stamart facility, disturbing over five acres during April of 2002. JNT Ex.1, ¶¶15 & 23.

On October 24, 2002, authorized Environmental Protection Agency ("EPA" or "Agency") employees entered the Appellant's facility and, with the consent of Appellant, inspected the facility for compliance with the CWA and the regulations. JNT Ex.1, ¶24. During the inspection, EPA officials observed that a great deal of sediment had come from Appellant's

[1] Complainant's exhibits will be referred to as CX__. Appellant's exhibits will be referred to as RX__. The First Joint Set of Stipulated Facts, Exhibits, and Testimony will be referred to as JNT Ex.1,__. The Second Joint Set of Stipulated Facts, Exhibits and Testimony will be referred to as JNT Ex. 2,__.

Stamart facility construction site and that sediment had been tracked onto 35th Street from the site. Tr. Vol. I, 42:1-17, JNT Ex.1, CX1 and CX1(o) & 1(p). At the time of the inspection, Appellant had neither applied for nor received a NPDES permit authorizing storm water discharges from its facility. JNT Ex.1, ¶25.

Shortly after the EPA inspection, Appellant submitted a Notice of Intent ("NOI") to the State. In a letter from the North Dakota Department of Health ("NDDH") dated November 15, 2002, Appellant received coverage under the North Dakota Storm Water General permit #NDR03-0571 from NDDH.

EPA provided a copy of its inspection report to Appellant on July 14, 2003.

Sixteen months after Appellant received coverage under North Dakota's general storm water permit, Moore Engineering, Inc., one of Appellant's consultants, stated in an engagement letter dated March 22, 2004 that, "[a]t a minimum, [inspections of existing storm water best management devices] will be once every two weeks and after every 0.5" rainfall amount in a 24 hour period." JNT Ex.1, RX11. However, the North Dakota general storm water permit for construction activity requires that inspections be performed at least once every seven (7) calendar days and within twenty-four (24) hours after any storm event of greater than 0.50 inches of rain per 24-hour period for construction activity with land disturbance of equal to or greater than 5 acres. JNT Ex.1, ¶30 & CX6. Appellant failed to conduct inspections at the frequency required by the North Dakota general storm water permit for construction activity. JNT Ex.1, ¶¶31 & 37.

The North Dakota general storm water permit for construction activity requires that inspection results be summarized and recorded on a Site Inspection Record ("SIR"), and kept on site. JNT Ex.1, ¶32 & CX6. Appellant failed to record and/or maintain on-site SIRs for weekly

inspections as required by the North Dakota general storm water permit for construction activity. JNT Ex.1, ¶33.

STANDARD OF REVIEW

In enforcement proceedings under 40 C.F.R. Part 22, the EAB must "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions." 40 C.F.R. § 22.30(f). The EAB has interpreted this to mean that it "reviews an [ALJ's] factual findings and legal conclusions *de novo*." *In re Vico Constr. Corp. and Amelia Venture Properties, L.L.C.*, 12 E.A.D. 298 (EAB 2005). However, because the ALJ has been able to view witnesses' testimony and assess their credibility, the EAB typically defers to an ALJ's factual findings when those findings are based on witness testimony. *E.g.*, *In re Ocean States Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). The EAB reviews penalty determinations *de novo*, but "generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty." *In re Phoenix Constr. Servs., Inc.* 11 E.A.D. 379, 390 (EAB 2004).

SUMMARY OF THE ARGUMENT

Appellant appeals the ALJ's finding of liability on Count I under section 308 and its implementing regulations, as well as the magnitude of the ALJ's final penalty assessment. The EAB should uphold the ALJ's finding of liability and the ALJ's penalty assessment for the reasons outlined below.

The ALJ found the Appellant liable on Count I under both section 301, 33 U.S.C. § 1311, and section 308, 33 U.S.C. § 1318, of the CWA. Appellant appeals only the finding of liability

under section 308. Because there are alternate grounds for liability on Count I, the EAB should decline to review Appellant's arguments.

Further, the EAB should dismiss the Appellant's appeal because it constitutes a challenge to section 308's implementing regulations 40 C.F.R. § 122.21 within the context of an enforcement action, which is barred by 40 C.F.R. § 22.38(c). Additionally, under section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), because Appellant did not timely challenge the promulgation of 40 C.F.R. § 122.21 and because Appellant has not identified "extremely compelling" circumstances warranting the EAB's review of those regulations, the EAB should decline to review Appellant's challenge.

If the EAB does reach the merits of Appellant's apparent challenge to 40 C.F.R. § 122.21, it should find that this provision is authorized under several provisions of the CWA, including section 308, which grants broad information gathering authority to the Administrator, and that EPA has properly exercised that authority through regulations that carry out the NPDES program.

Appellant appeals the magnitude of the ALJ's penalty assessment and challenges the ALJ's consideration of its culpability, the general deterrence effect of the final penalty, and the circumstances of the violations. The ALJ fully considered all the culpability factors raised in this case, including the level of sophistication in the construction industry, Init. Dec. at 65-66; how much control the violator had over the events constituting a violation, Init. Dec. at 64-65; the foreseeability of the events constituting a violation, Init. Dec. at 66-67; and whether the violator in fact knew of the legal requirement which was violated, Init. Dec. at 67; and thus did not commit clear error or abuse her discretion when she included a culpability component in her penalty assessment. The ALJ properly considered the role of general deterrence in penalty

calculations and the need for general deterrence in this case, Init. Dec. at 72-72, and did not commit clear error or abuse her discretion when she refused to adjust the penalty downward. The ALJ fully considered the actual circumstance of the Appellant's violations separate from the Appellant's culpability factors, Init. Dec. at 54-57, and did not commit clear error or abuse her discretion in adjusting the Appellant's economic benefit upward by a factor of 10.

ARGUMENT

I. The ALJ properly concluded that Appellant is liable on Count I of the Amended Complaint.

A. The EAB should not address Appellant's liability under section 308 and its implementing regulations 40 C.F.R. § 122.21, given that Appellant does not challenge the ALJ's alternative finding of liability based on section 301 of the CWA, 33 U.S.C. § 1311.

Appellant appeals the ALJ's decision holding Appellant liable on Count I of the Amended Complaint for violating section 308 and its implementing regulations 40 C.F.R. § 122.21, by failing to submit a timely permit application. Appellant has declined to challenge the portion of the ALJ's decision correctly holding Appellant "alternatively...liable on Count I of the Amended Complaint on the basis that it violated 33 U.S.C. § 1311" by discharging pollutants into navigable waters without a permit. Init. Dec. at 51. Thus, regardless of the outcome of Appellant's appeal pertaining to liability under section 308 of the CWA, Appellant's liability for Count I of the Amended Complaint will stand. Moreover, because the ALJ's penalty assessment does not differentiate between the violations constituting the two sources of liability for Count I, the outcome of Appellant's section 308 appeal is irrelevant to the final penalty assessment. As a result, the EAB need not address Appellant's liability under section 308 and its implementing regulations 40 C.F.R. § 122.21.

B. The EAB cannot entertain Appellant's challenge to the validity of section 308's implementing regulations 40 C.F.R. § 122.21 because of the preclusive provisions in section 509(b) of the CWA, 33 U.S.C. § 1369(b), and 40 C.F.R. § 22.38(c).

Appellant has not specifically articulated a challenge to the validity of the regulations at 40 C.F.R. § 122.21, nor has it challenged the ALJ's finding that Appellant violated section 122.21 by not applying for a NPDES permit in a timely manner prior to commencing construction. Init. Dec. at 24. Instead, it argues against finding a violation of section 308 of the CWA. However, this enforcement action was also based on a violation of the regulatory requirement in 40 C.F.R. § 122.21 that owners and operators must apply for a permit. Therefore, the Board may dismiss this appeal on the basis that Appellant has not appealed the ALJ's finding that it violated 40 C.F.R. § 122.21. Alternatively, to the extent that Appellant's claim is read as a challenge to 40 C.F.R. § 122.21 itself, there are several reasons why that challenge cannot be heard by the EAB.

First, a regulation for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), cannot be challenged in a later action, administrative or judicial, to enforce that regulation. CWA section 509(b)(2), 33 U.S.C. § 1369(b)(2); 40 C.F.R. § 22.38(c) (providing that "[a]ction of the Administrator for which review could have been obtained under 509(b)(1) of the CWA…shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g)"). The regulations at issue, 40 C.F.R. § 122.21, are regulations for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C § 1369(b)(1). The most recent regulatory amendment to the permit application requirement in 40 C.F.R. § 122.21(c)(1) relied on the CWA in its entirety, and the accompanying Federal Register preamble specifically cited both sections 301 and 308 of the CWA, 33 U.S.C. §§ 1311 and 1318. *E.g.*, National Pollutant Discharge Elimination System –

Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. at 68797 (December 8, 1999) ("EPA promulgates today's storm water regulation pursuant to the specific mandate of Clean Water Act section 402(p)(6), as well as sections 301, 308, 402, and 501.").[2] As a result, 40 C.F.R. § 122.21 includes both sections 301 and 308 of the CWA as a source of authority, and is thus governed by section 509(b)(1)(E) of the CWA. 40 C.F.R. § 122.21 therefore qualifies as an "effluent limitation or other limitation under [CWA] Section 301." *See* 509(b)(1)(E), 33 U.C.S. § 1369(b)(1)(E).[3] Accordingly, the EAB must dismiss this appeal because 40 C.F.R. § 122.21 cannot be challenged in a later administrative proceeding, such as this one, to enforce a regulation.

A second reason why this appeal should be rejected is that, even if Appellant were not invalidly attempting to challenge this regulation in an enforcement proceeding, the time provided to otherwise challenge this regulation in a judicial proceeding (120 days from promulgation) has expired. As stated above, 40 C.F.R. § 122.21 is subject to the provisions of CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1). Section 509(b)(1) provides that parties seeking judicial

[2] More recently, the Agency stated in the Authority section that Part 122, the portion of the rule covering NPDES permit regulations, is based on the CWA in its entirety. Revised Compliance Dates Under the National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 72 Fed. Reg. at 40,250 (July 24, 2007) ("The authority citation for part 122 continues to read as follows: Authority: The Clean Water Act, 33 U.S.C. 1251 et seq.").

[3] *See also In re USGen New England, Inc., Brayton Point Station*, 11 E.A.D. 525, 551 (EAB 2004) (noting that "[s]everal courts have held that various part 122 through 125 regulations do constitute 'effluent limitation[s] or other limitation[s]' within the meaning of section 509(b)(1)(E)"); *Natural Resources Defense Council, Inc. v. E.P.A.*, 673 F.2d 400, 405 (D.C. Cir. 1982), *cert. denied* 459 U.S. 879 (1982) (concluding that "the broad, policy-oriented rules" in 40 C.F.R. pts. 122-125, which "set out procedures for obtaining permits that comply with § 301," are "effluent limitations or other limitations"); *Virginia Electric and Power Company v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (holding that regulations on cooling water intake structures were "other limitations" for purposes of CWA § 509(b)(1)(E), because they impose a limitation on point sources by requiring that "certain information be considered in determining best available technology for intake structures"); *Cf. American Iron and Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997) (per curiam) (where court of appeals had jurisdiction under Section 509(b)(1) to review parts of a guidance document that were based on statutory provisions listed in Section 509(b)(1), the court of appeals also had ancillary jurisdiction to review other parts of the guidance that were not based on statutory provisions listed in 509(b)(1)). Here, because review of 40 C.F.R. 122.21 would already be in the court of appeals given that it is based in part on CWA 301, the court of appeals would also have jurisdiction even on the specific question of Section 308 authority for section 122.21 despite the fact that Section 308 is not specifically listed in Section 509(b)(1).

review of Agency actions listed in that section must do so within 120 days after "the date of such determination, approval, promulgation, issuance or denial." As explained above, the regulations promulgated by EPA at 40 C.F.R. § 122.21 do fall within the actions listed under section 509(b)(1).

Recognizing section 509(b)(1)'s preclusion of review, the EAB has ruled that it will review agency rules only under very narrow circumstances. *See Brayton Point Station*, 11 E.A.D. at 555. In that opinion, the EAB analyzed its authority to review regulations that are based on statutory provisions that are listed in section 509(b)(1). Quoting from *In re Echevarria*, 5 E.A.D. 626, 634-635 (EAB 1994), the EAB stated:

> While it is true* * *that the [Act] makes direct reference to preclusion of judicial review, not administrative review, the effect of this statutory provision is to make it unnecessary for an administrative agency to entertain as a matter of right a party's challenge to a rule subject to this statutory provision...Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned.

11 E.A.D. at 556-57. The EAB went on to observe, "Based upon these considerations, the Board has concluded that there is 'an especially strong presumption' against entertaining a challenge to the validity of regulation subject to a preclusive judicial review provision." *Id.* at 557 (emphasis added). The EAB identified only a narrow exception to the presumption, stating that it will review a challenge to regulations if there are "extremely compelling" circumstances warranting such review. *Id.* As examples of such circumstances, the EAB noted that it had granted review in a case where "the EAB regulatory decision ha[d] been effectively invalidated by a court but ha[d] yet to be formally repealed by the Agency." *Id.* (citing *Echevarria*, 5 E.A.D. at 634-635). No such circumstances exist here.

Appellant challenges 40 C.F.R. § 122.21, a regulation that has been in place since 1972, and which has included a storm water component since 1990. Section 509(b)(1) of the CWA

would preclude review of this issue in federal district and circuit courts because the challenge is not timely, which, under the presumption outlined above, "militates particularly strongly against [the EAB] reviewing the issue here." *Brayton Point Station*, 11 E.A.D. at 559. Moreover, the Appellant has not demonstrated that there are "extremely compelling" circumstances which might warrant review regardless of the presumption. The situation cited by the EAB in *Echevarria*, certainly does not apply here; the challenged regulations have not been invalidated by any court. As a result, the EAB should decline to review the Appellant's challenge to 40 C.F.R. § 122.21 in this enforcement proceeding.

In summary, if Appellant's appeal is read as a challenge to section 40 C.F.R. § 122.21, Appellant is barred from raising this challenge in an enforcement proceeding, Appellant did not timely challenge the promulgation of 40 C.F.R. § 122.21, and Appellant has not identified "extremely compelling" circumstances warranting the EAB's review of those regulations. The EAB should therefore decline to review Appellant's apparent challenge to 40 C.F.R. § 122.21.

C. The Administrator properly exercised his authority under various provision of the CWA in implementing the permit application regulations at 40 C.F.R. § 122.21.

Even if the EAB were to reach the issue of the validity of the permit application requirements in 40 C.F.R. § 122.21 (which it should not, as explained above), there is clear support in the CWA for finding that these regulatory requirements are a valid exercise of the Administrator's authorities under the Act. Several provisions of the Act plainly provide authority for this regulatory provision. These provisions include section 501(a), which gives the Administrator authority to "prescribe such regulations as are necessary to carry out his functions under this chapter," 33 U.S.C. § 1361(a), which functions include implementing the prohibition

on discharging without a permit in section 301(a), 33 U.S.C. § 1311(a), and implementing the permit program itself through section 402 of the Act, 33 U.S.C. § 1342.

Additional authority is provided in section 308 of the Act, 33 U.S.C. § 1318, and it is the authority of section 308 to support a permit application requirement in the regulations that is specifically challenged by Appellants. Appellant asserts that the plain language of section 308 indicates that it is a record-keeping statutory provision, that section 308 cannot be violated until EPA issues an individualized request or order, and that 40 C.F.R. § 122.21 "does not constitute a request pursuant to section 308." Brief for Appellant at 9. Appellant's argument must fail because section 308 grants broad information gathering authority to the EPA Administrator, which he has properly exercised through general regulations to carry out the NPDES program.

Section 308 provides for the collection, storage and reporting of information as it relates to achieving the goals of the CWA. It states in part:

> (a) Maintenance; monitoring equipment; entry; access to information
>
> *Whenever required to carry out the objective of this chapter, 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 chapter; (2) *determining whether any person is in violation of any* such effluent limitation, or other *limitation, prohibition* or effluent standard, pretreatment standards, or standard of performance; (3) any requirement established under this section; *or (4) carrying out sections* [305, 311, *402*, 404, 405 and 504] –
>
> > (A) *the Administrator shall require the owner or operator of any point source to* (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods…(iv) sample such effluents…, and (v) *provide such other information as he may reasonably require…*

33 U.S.C. § 1318(a) (italics added). Appellant asserts that this language creates nothing more than a record-keeping regime and that it requires the Administrator to "request" information. Brief for Appellant at 9. A close reading of section 308 proves otherwise. The portion of section 308 cited above is divided into two sections that serve separate and related functions. Subsection

(a) establishes the conditions of use of the section 308 authority, and paragraph (a)(A) defines the scope of the application of section 308 authority once one of those conditions has been met. Read together, these two provisions establish an information gathering regime that is vital to the success of the CWA.

The primary condition for the use of EPA's section 308 authority is that it be employed "whenever necessary to carry out the objectives of [the CWA]." *Id.* Subsection (a) provides a non-exhaustive list of these objectives, including determining if any person is in violation of any limitation or prohibition outlined in the Act, carrying out requirements established pursuant to section 308, and carrying out the permitting requirements of section 402, 33 U.S.C. § 1342. An additional objective listed in section 101 of the CWA, 33 U.S.C. § 1251, the Congressional declaration of goals and policy, is maintaining "the chemical, physical, and biological integrity of the Nation's waters." The permitting requirements in 40 C.F.R. § 122.21 are designed to carry out these various objectives of the CWA.

The Administrator's section 308 authority is enumerated in paragraph (a)(A) by a list of requirements that may be imposed on owners and operators of point sources. These requirements include establishing records, making reports, conducting monitoring, sampling effluents and, most broadly, providing other information the Administrator "may reasonably require." This language reaches far beyond the mere establishment of record-keeping requirements. Instead, it authorizes the Administrator to engage in information collection and reporting that will provide the data and information needed to effectuate the goals of the CWA as outlined in sections 101 and 308(a). This broad information gathering aspect of the section 308 authority has been recognized by the EAB and by the federal courts. *See, e.g., In the Matter of Simpson Paper Co., Louisiana-Pacific Corp.*, 3 E.A.D. 541, 549 (CJO 1991) (holding that section 308(a) is an

information gathering tool that applies to any owner or operator of a point source); *Mobil Oil Corp. v. U.S. EPA*, 716 F.2d 1187, 1190 (7th Cir. 1983).

Appellant asserts that "an individualized request or order must be made by the [A]dministrator as a precondition to...a violation pursuant to section 308." Brief for Appellant at 9. By arguing that these are the sole options EPA has to effectuate its section 308 authority, Appellant is essentially arguing that the Administrator lacks the authority to issue regulations pursuant to section 308. Appellant does not explain, however, the source of this limitation on the Administrator's section 308 authority and, more importantly, Appellant ignores section 501(a) of the CWA which provides the Administrator with broad general authority "to prescribe such regulations as are necessary to carry out his functions under [the CWA]." 33 U.S.C. § 1361(a). Clearly, one of the Administrator's functions under the CWA is requiring owners and operators of point sources to provide information to the Agency for the purposes, for example, of ensuring their compliance with the Act. Thus, while CWA section 308 itself does not expressly refer to the Administrator carrying out this information gathering activity through regulation, section 501(a) does expressly provide this authority.

The language of section 308 is entirely consistent with the collection of information through regulation. For example, section 308 authority is expressly available to "assist[] in the development of any effluent limitation, or other limitation, prohibition, or effluent standard", 33 U.S.C. § 1318(a)(1), and otherwise to carry out the NPDES program under section 402, 33 U.S.C. § 1318(a)(4). These activities require broad scale information collection that is often best effectuated through generally applicable regulations. It would be wholly impracticable for the Agency to have to issue individual requests for every piece of information it may need to develop effluent limitations, permits, and regulations, and it would not be reasonable to believe

that Congress intended such a result in section 308. As noted by the ALJ: "[t]he cornerstone of the CWA's pollution control scheme is the...[NPDES] permit program, and the comprehensive NPDES regulations are pivotal to the implementation of the CWA's permit scheme." Init. Dec. at 17 (citing *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 108, 111, 119 (D.C. Cir. 1987) (citations omitted)).

Given the importance of the NPDES program in achieving the goals of the CWA, the ALJ reasonably noted that, "[w]here administrative powers are granted for the purpose of effectuating broad regulatory programs which are deemed essential to the public welfare, interpretive attention may concentrate on the remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the program to be realized." Init. Dec. at 16 (citing 3 Sutherland Statutory Construction § 65:3 (6th Ed. 2000)). In light of this principle, there is no basis for Appellant's claim that section 308 should be read to restrict the Administrator's authority to imposing requirements on a case-by-case basis rather than by broad regulation, especially with regard to owners an operators of point sources applying for coverage under a general NPDES permit prior to discharge.

Courts have recognized and approved EPA's use of regulations under section 308 to gather information necessary to carry out the NPDES program. For example, in *NRDC v. U.S. EPA*, 822 F.3d at 119, the D.C. Circuit upheld Agency-promulgated regulations that required NPDES permit applicants to provide a list of toxic pollutants that the facility used or manufactured, finding EPA "could reasonably determine that it could not regulate as effectively as Congress intended without [the] information." The court recognized the broad authority granted by section 308, noting that "the statute's sweep is sufficient to justify broad information

disclosure requirements relating to the Administrator's duties, as long as the disclosure demands which he imposes are "reasonable.'" *Id.*

The Third Circuit has also acknowledged the valid use of the Administrator's section 308 authority through regulation rather than an individual order. *See U.S. v. Allegheny Ludlum Corp.*, 366 F.3d 164 (3rd Cir. 2004). In that case, the defendant appealed a finding of liability for discharges in excess of its permit limitations revealed in Discharge Monitoring Reports ("DMRs") it had submitted to the Agency. Defendant argued that it should not be liable for discharge violations because, due to a laboratory error, the DMRs had overstated the actual levels of discharged effluents. At the outset, the court recognized that the DMRs were required by a regulation promulgated pursuant to the EPA's section 308 authority. 366 F.3d at 175. The court held that "the failure to correct an inaccurate DMR is an independent violation of the CWA and regulations thereunder" even when there was no actual discharge involved. *Id.* The broad language of section 308 and prior case law make clear that the Administrator's section 308 authority is broad enough to be exercised through a variety of mechanisms, including general regulations.

In suggesting that the Administrator lacks the authority to issue regulations pursuant to section 308, Appellant attempts to rely on only one case authority, *Committee for the Consideration of Jones Falls Sewage System v. Train*, 375 F.Supp. 1148 (D. Md. 1974). However, *Jones Falls* is neither controlling nor instructive. The Appellant cites to the following sentence as controlling, "Obviously a discharger cannot be in violation of [section 308] or an order under this section unless an order has in fact been issued." *Jones Falls*, 375 F.Supp. at 1152. *Jones Falls* was a sanitary sewer permit case brought pursuant to the first round of NPDES permitting regulations promulgated in 1972 and 1973. 37 Fed. Reg. 28,391 (Dec. 22,

1972) (regulations for state-issued permits) and 38 Fed. Reg. 13,528 (May 12, 1973) (regulations for EPA-issued permits). At that time, EPA had not issued any regulations which could be considered to be "requirements" under section 308. As noted by the ALJ, under such circumstances, the *Jones Falls* court looked to whether a specific order directed to an owner or operator had been issued. Init. Dec. at 17-18. The court simply did not address the issue of whether EPA might be able to carry out its section 308 authorities at a later time through regulations.

In summary, the ALJ correctly determined that Appellant is liable for Count I of the Amended Complaint. Because the ALJ found Appellant liable for Count I under section 301 of the CWA, 33 U.S.C. § 1311, a finding that the Appellant does not challenge, the outcome of this appeal will not affect Appellant's liability, and the EAB should decline to consider this appeal. To the extent that Appellant's claim is read as a challenge to the regulations at 40 C.F.R. § 122.21, it is prohibited in an action, such as this one, to enforce the regulation. Moreover, because the time (120 days from promulgation) provided to challenge this regulation judicially has expired, review should be denied by the EAB, since "extremely compelling circumstances" do not exist to warrant consideration by the EAB. If the EAB does reach the merits of Appellant's apparent challenge to 40 C.F.R. § 122.21, it should find that this provision is authorized under several provisions of the Clean Water Act, including section 308, which grants broad information gathering authority to the Administrator, and that EPA has properly exercised that authority through regulations that carry out the NPDES program. As a result, the EAB should dismiss this appeal.

II. The ALJ fully considered the culpability factors in this case.

In addition to appealing the ALJ's liability determination, Appellant also appeals the magnitude of the penalty assessed by the ALJ. Appellant challenges the ALJ's consideration of its culpability, the general deterrence effect of the final penalty, and the circumstances of the violations. Each of these issues is addressed in a separate section below.

Appellant presents its first issue as an appeal of the ALJ's consideration of the sophistication of the construction industry in Fargo as it relates to compliance with the CWA. A close reading of the Appellant's argument, however, indicates that the Appellant is actually appealing the ALJ's finding of relative culpability for Appellant's failure to get a permit and failure to comply with a permit once it was obtained. Though not articulated as such, the Appellant bases its argument against a finding of culpability on the first, second, fifth and sixth factors outlined in *Phoenix Constr. Servs.* 11 E.A.D. at 418.[4] In that case, the EAB explained that "the culpability statutory factor generally measures the level of the violator's fault . . . and frequently includes consideration of a host of factors to assess the violator's willfulness and/or negligence." *Id.* For the sake of clarity, this section of the brief will address these factors and Appellant's related arguments separately and in the order raised by the Appellant.

The Appellant asserts that it lacks any culpability, that the ALJ incorrectly assessed its culpability, and that the ALJ incorrectly increased the initial penalty amount by 20% or $5,940. Brief for Appellant at 16. The Appellant fails to prove that the ALJ's consideration of the

[4] The full list of factors, which comes from the Agency's general penalty policy guidance, includes:

1) how much control the violator had over the events constituting the violation;
2) the foreseeability of the events constituting the violation;
3) whether the violator took reasonable precautions against the events constituting the violation;
4) whether the violator knew or should have known of the hazards associated with the conduct;
5) the level of sophistication within the industry in dealing with compliance issues; and
6) whether the violator in fact knew of the legal requirement which was violated.

EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, at 18 (Feb. 16, 1984).

culpability factors was clearly erroneous or an abuse of discretion, and the ALJ's Initial Decision should be upheld.

A. The ALJ accounted for the level of sophistication in the construction industry.

Appellant asserts that the ALJ failed to account properly for the lack of sophistication in the Fargo business and construction community. As evidence of the lack of sophistication in Fargo, Appellant points out that it did not use lawyers when contracting for construction services at the site of the violations, and asserts that this is not uncommon in North Dakota. While EPA's General Enforcement Policy does not limit consideration of sophistication within an industry to local representatives of that industry, the ALJ appeared to accept Appellant's assertion and cited its relative lack of sophistication as one reason she found "[Appellant's] culpability for failure to apply for a permit somewhat reduced." Init. Dec. at 66. Thus, rather than using the Appellant's lack of sophistication "to call into doubt Service Oil's non-culpability," Brief for Appellant at 14, the ALJ accounted for Appellant's level of sophistication in dealing with CWA compliance and reduced her assessment of the Appellant's culpability. While the ALJ's conclusion ignores the fact that the construction industry, as a whole, is experienced in regulatory compliance and has been subject to some version of storm water permitting for 17 years, it is not clear error or an abuse of discretion.

B. The ALJ accounted for how much control the violator had over the events constituting a violation.

Appellant asserts that because it relied on a professional firm to "navigate the project through the technical process of acquiring necessary permits" it "did not have control over the events constituting a violation" in this case. Brief for Appellant at 15. In support of this assertion, Appellant cites the fact that it hired Moore Engineering to design and supervise the project and Whaley Construction to manage the project. As the ALJ properly concluded, these

relationships are not sufficient to prove "that [Appellant] ever effectively delegated its responsibility for permit compliance to anyone such that it could totally exculpate itself from responsibility." Init. Dec. at 65.

The ALJ's conclusion is supported by the case record, which shows that, while Appellant may have hired individuals and firms for particular aspects of the construction project, Appellant maintained full control of the site and the project for the duration of construction. For example, at trial, Appellant's owner, Steven Dirk Lenthe, testified that he took direct responsibility for all actions at his site. Tr. Vol. II, 43:20-23. Lee Hanley, the EPA Inspector, testified that during the October 24, 2002 EPA inspection, Mr. Lenthe was the individual identified by the site representatives as the person in charge and the person to whom she was to speak with on any questions regarding the site. Tr. Vol. I, 39:19-40:15. As further evidence that Appellant maintained control of the site, in its first response to the section 308 letter request for information, Mr. Lenthe certified that "Service Oil, Inc. is the owner of the project. Mr. Lenthe is the responsible official within Service Oil for this construction project." Tr. Vol. II, 47:5-12. Likewise, Mr. Lenthe is the person who signed the Notice of Intent to Obtain Coverage under the NPDES General Permit for Storm Water Discharges Associated with Construction Activity (NOI), Init. Dec. at 5, 60; CX3; who signed a fax answering two questions posed by the North Dakota Department of Health (NDDH), RX6; and who signed the Notice of Termination to Cancel Coverage under the NPDES General Permit for Storm Water Discharges Associated with Construction Activity, Init. Dec. at 60, CX8. Significantly, when provided with an early opportunity to relinquish control over the events constituting the violation by exercising the option in Moore Engineering's control proposal of having Moore take responsibility for obtaining permits, Appellant declined to do so. RX36; Tr. Vol. II, 55-57. It was not until sixteen

months after Appellant received coverage under North Dakota's general storm water permit, and three months prior to terminating its permit, that Appellant contracted with Moore Engineering to perform the inspections required by the permit. Tr. Vol. II.173:3-25; CX10 at p.45; RX11, RX36, RX37, and RX38. These are all indicators that Appellant was the owner and operator of the construction site and had ultimate control over the permit application process and the permit compliance process. Given these facts, the ALJ accounted for the Appellant's control over the events constituting a violation and concluded that Appellant was not relieved of culpability.

C. The ALJ accounted for the foreseeability of the events constituting a violation.

Appellant asserts that its failure to obtain a storm water permit was not foreseeable because the Appellant is not in the construction business, because no prior storm water enforcement had occurred in the Fargo area, and because the Fargo construction industry was unfamiliar with storm water permitting requirements. Brief for Appellant at 15.

As a preliminary matter, this argument must fail because the CWA is a strict liability statute. *See, e.g., In re City of Salisbury, MD*, 10 E.A.D. 263, 277 n. 19 (EAB 2002) ("the CWA is a strict liability statute"); *see also U.S. v. Earth Sciences, Inc.*, 559 F.2d 368, 379 (10th Cir. 1979). Thus, it is immaterial whether Appellant had actual knowledge of the storm water permitting requirements. Additionally, since Appellant failed to relinquish control of the project, it remained its responsibility to identify and meet the permitting requirements.

While she did not address the issue of foreseeability directly in her opinion, the ALJ concluded that the reasons cited by the Appellant justified reducing its culpability for failing to obtain a permit. Init. Dec. at 67. The ALJ's reasoning in this section is instructive. She notes that while Appellant may have some claim to ignorance of permitting requirements, it is difficult to believe that its professional engineering firm, Moore Engineering, which had extensive

experience in the construction field, including storm water projects, was totally unaware of the storm water permitting requirements. Init. Dec. at 66. This skepticism is well-founded given that the CWA's storm water rules had been in place since 1990 and given that the State of North Dakota had engaged in compliance assistance outreach in Fargo in the years prior to Appellant's violations. Tr. Vol. III, 60, 62-63. Thus, while Appellant may not have known about the storm water permit requirements, its engineering firm should have, and the need for a storm water permit was reasonably foreseeable. Given the level of control that Appellant maintained over the construction site and project, the ALJ concluded that Appellant was somewhat culpable for the failure to obtain a permit.

D. The ALJ accounted for whether the violator in fact knew of the legal requirement which was violated.

Finally, Appellant asserts that it is not culpable for the violations of the storm water permit it eventually obtained because it did not know of the inspection requirements in that permit. Appellant blames its ignorance of its permit requirements on the fact that the NDDH never included a copy of the permit in the letter confirming permit coverage and the fact that its contractor, Moore Engineering, misinformed it of the inspection frequency required by the permit. Brief for Appellant at 15. The ALJ concluded that, while Appellant's initial reliance on Moore Engineering reduces its culpability, Appellant remains somewhat culpable because it had the knowledge and ability to ascertain the permit requirements. Init. Dec. at 67.

A review of the events leading up to this case is useful in considering Appellant's culpability. Appellant began construction at the Stamart site in April 2002. JNT Ex.1, ¶¶ 15 & 23. The EPA conducted its inspection of the Appellant's construction site in October 2002 and, at that time, informed the Appellant of its duty to obtain a storm water permit. JNT Ex. 1, ¶24; Tr. Vol. I, 57:15 - 58:5. Appellant submitted an NOI to NDDH shortly thereafter. In November

2002, NDDH sent Appellant a letter confirming permit coverage which, as noted by Appellant, did not include a copy of North Dakota's general permit, but which contained a website where a copy of the general permit could have been obtained. JNT Ex. 1, ¶29 & CX4. In July 2003, the EPA inspector sent her inspection report to the Appellant. This report included a recitation of the permit's inspection requirements. In March 2004, Appellant contracted with Moore Engineering to perform the inspections required by the permit. At that time, Moore Engineering, erroneously informed Appellant as to the inspection frequencies required by Appellant's permit. As a result, Appellant continued to conduct permit inspections at an incorrect frequency.

From the timeline above, it is clear that Appellant was sufficiently aware of North Dakota's storm water permit requirements by November 2002 to submit a permit application. While the letter from NDDH did not include a copy of North Dakota's general permit, Appellant certainly knew that such a permit existed. Appellant asserts that it could not have known to ask NDDH for a copy of the permit and thus could not have known about the permit conditions. However, on February 8, 2003, Steve Whaley, one of Appellant's contractors, emailed Stamart representatives inquiring "Did we ever receive a permit for the storm discharge at 12th Ave.? If so, should we post it on site somewhere?" CX10. Appellant did nothing in response to Mr. Whaley's inquiry. However, even if Appellant did not know to ask NDDH for a copy of the permit and was relying on Moore Engineering to comply with the permit requirements, Appellant was specifically informed of the permit's inspection requirements in July 2003 when it received the EPA inspection report. At this point, Appellant should have known of the legal requirements it was violating and had been violating since the previous November. The ALJ accounted for these facts in determining whether the Appellant in fact knew of the legal requirement it had violated, and determined that it was somewhat culpable for those violations.

In summary, the ALJ fully considered all the culpability factors raised in this case, including the culpability reducing factors discussed above, and did not commit clear error or abuse her discretion when she included a $5,940 culpability component in her penalty assessment.

III. The ALJ properly considered the general deterrence effect of the penalty in this case.

The Appellant argues that considerations of general deterrence are unnecessary in this case because the City of Fargo has tied issuance of building permits to the State's storm water permit system. As a result, Appellant concludes that the ALJ erred in not lowering the penalty to account for this purported absence of a general deterrence effect. The ALJ rejected this argument in her initial decision.

The Appellant's argument is flawed for three reasons. First, the appellant grossly understates the universe of potential violators that would be deterred by the penalty in this case. Second, the Appellant overstates the deterrent effect of the City of Fargo's tie-in regulations. Third, the Appellant ignores the need for general deterrence for permit violations.

One of the goals of EPA's general penalty policy is to deter owners and operators from violating the law. According to this policy, "[a] penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence)." EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties*, at 3 (Feb. 16, 1984). Appellant argues that the Fargo tie-in regulations negate the general deterrence effect of this case because, under the tie-in regulations, building permits will not be issued until an applicant has obtained a storm water permit from the State. Though it does not state as much, the Appellant's implication is that no future owners or operators in Fargo will need to be deterred from engaging in construction without a storm water permit because it is

now impossible. Even if true, this argument incorrectly assumes that the general deterrence effect of this penalty is limited to City of Fargo. In fact, the general deterrence effect of this penalty is potentially as broad as the reach of the CWA's construction storm water requirements, that is to say, nationwide. Thus, general deterrence is still a consideration in this case.

Even if the Appellant has correctly identified the universe of potential violators to be deterred (*i.e.*, future construction site owners and operators in Fargo), it overstates the deterrence effect of the City's regulations. In particular, Appellant overstates its duration, asserting that "The City of Fargo does not have the option of doing away with the new tie-in ordinance at any time in the future." Brief for Appellant at 20. This is incorrect. The City of Fargo storm water sewer system qualifies as a small municipal separate storm sewer system ("MS4") as defined in 40 C.F.R. § 122.26(b)(16). As a small MS4, the City was required to apply for coverage under a NPDES permit by March 10, 2003. 40 C.F.R. § 122.33(c)(1). As part of its permit, the City is required to develop and implement a program to reduce pollutants in storm water runoff to its MS4 and that program must include "an ordinance or other regulatory mechanism to require erosion and sediment controls." 40 C.F.R. § 122.34(a)(4)(ii)(A). Contrary to Appellant's assertion, Fargo is not required to tie the issuance of building permits to storm water permits, and it is free to choose a different regulatory mechanism altogether. Since the tie-in program is thus subject to change, its deterrence effect may not last in perpetuity, and general deterrence remains an issue within the universe of potential construction site owners and operators in the City of Fargo.

Finally, Appellant's argument ignores the fact that Fargo's permit tie-in ordinance provides deterrence only against the failure to obtain a permit. It plays no role in deterring non-compliance with permit conditions. Thus, the penalty in this case, which includes a penalty for

violation of permit conditions, has an additional deterrence effect which would remain despite the existence of the Fargo ordinance.

In summary, the ALJ properly considered the general deterrence effect of the penalty and did not commit clear error or abuse her discretion when she refused to adjust the penalty downward.

IV. The ALJ fully considered the circumstances of the violations when calculating the initial adjusted penalty.

The Appellant argues that the ALJ incorrectly considered the circumstances of the violation in her initial decision and erred in increasing the economic benefit by a factor of ten. The Appellant's argument is based on a misreading of section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and a misapplication of the factors contained therein. The ALJ fully considered the circumstances of the violation and did not commit clear error or abuse her discretion in her assessment of the penalty.

Section 309(g)(3) provides the following:

> In determining the amount of any penalty assessed under this subsection, the Administrator....shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require...

33 U.S.C. § 1319(g)(3). This language outlines the various factors the Agency should consider when determining administrative penalties. These factors are divided into two types: those related to the violation and those related to the violator. As a result, the Agency must consider the violation and the violator separately when determining a penalty.

Appellant conflates the two statutory considerations, arguing that the ALJ incorrectly increased the penalty because the instant violations occurred in a business environment where

the majority of the sites inspected in October 2002 lacked proper permits and that the Appellant and its contractors knew nothing of the permitting requirement. In other words, the Appellant purports to explain the circumstances of the violation, but does so by discussing factors that relate to its own culpability rather than the circumstances of the violation. Culpability factors do not belong in a discussion of the violations. In a penalty appeal arising under the Toxic Substances Control Act, 15 U.S.C. § 2615(a), the EAB had occasion to address this very issue. *In the Matter of: 3M Company (Minnesota Mining and Manuf.)*, 3 E.A.D. 816 (EAB 1992). In that case, the EAB held that factors relating to the violator do not belong in the violation phase of a penalty analysis. *Id.*, 3 E.A.D. at 824-25 (noting that an appellant's "compliance program and compliance history as well its intent at the time the violations occurred are factors that are more directly associated with the violator than the violations"). For this reason, the Appellant's argument is unavailing as it relates to the circumstances of the violation.

The ALJ's determination of the "initial adjusted penalty" reflects her review of the actual circumstance of the Appellant's violations. Init. Dec. at 54-57. As outlined in the factual history above, the Appellant failed to apply for a permit for seven months after beginning construction at its site and failed to implement permit conditions, including inspection frequency, for the life of the construction project. These failures undermined the intent of the CWA permitting program to prevent illegal discharges and increased the risk of such discharges. The EAB has said that "where Appellant has failed to obtain necessary permits...such failure caused harm to the regulatory program." *Phoenix Constr. Servs.*, 11 E.A.D. at 396. In that case, the EAB further held that "risk to a regulatory program by disregarding the monitoring, reporting, or permitting requirements of an environmental statute also often results in potential environmental harm." *Id.* at 397. Thus, the circumstances of the violations in the instant case involve harm to the

regulatory program, as well as potential environmental harm, which justify the "initial adjusted penalty."

In summary, the ALJ considered the circumstances of the violations, as opposed to the culpability of the Appellant, and did not commit clear error or abuse her discretion in adjusting the Appellant's economic benefit upward by a factor of ten.

CONCLUSION

The EAB should decline to review Appellant's appeal because there are alternate grounds for liability on Count I, because it constitutes a challenge to section 308's implementing regulations 40 C.F.R. § 122.21 within the context of an enforcement action, because it is not a timely challenge to the promulgation of 40 C.F.R. § 122.21 and because Appellant has not identified "extremely compelling" circumstances warranting the EAB's review of those regulations. If the EAB reaches the merits of Appellant's challenge to 40 C.F.R. § 122.21, it should affirm the ALJ's Initial Decision because this provision is authorized under several provisions of the Clean Water Act, including section 308, which grant broad information gathering authority to the Administrator, and EPA has properly exercised that authority through regulations that carry out the NPDES program.

The EAB should affirm the ALJ's penalty assessment because the ALJ fully considered Appellant's culpability, properly considered the general deterrence effect of the final penalty, fully considered the circumstances of Appellant's violations, and did not commit clear error or an abuse of discretion in imposing an administrative penalty of $35,640 on the Appellant.

Respectfully submitted,

10/26/2007
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CERTIFICATE OF SERVICE

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