



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
SERVICE OIL, INC.,) Docket No. CWA-08-2005-0010
)
Respondent.)

BRIEFING ORDER

This matter was initiated on February 22, 2005 by the United States Environmental Protection Agency, Region 8 (“Complainant”), filing an Administrative Complaint under Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g). The Complaint, as amended on April 10, 2006, alleged that Respondent, Service Oil, Inc. (“Respondent”), violated Sections 301(a), 308, and 402(p) of the CWA (33 U.S.C. §§ 1311(a), 1318, and 1342(p)) and its implementing regulations (40 C.F.R. §§ 122.21 & 122.26). Complainant sought a total penalty of \$40,000 for (Count 1) failure to apply for, and obtain, a North Dakota Pollutant Discharge Elimination System permit authorizing discharges from Respondent’s Stamart site located in Fargo, North Dakota, and (Count 2) failure to conduct the necessary inspections and maintain inspection reports in conformity with the general permit once issued.

Following a hearing on the matter, this Tribunal issued an Initial Decision on August 3, 2007, finding Respondent liable on both Counts and assessing an overall penalty of \$35,640. *Service Oil, Inc.*, Docket No. CWA-08-2005-0010 (EPA ALJ Aug. 3, 2007). Thereafter, Respondent filed a timely appeal of the Initial Decision with the Environmental Appeals Board (“EAB”), arguing that the finding of liability on Count 1 was improper because EPA had not issued an individualized request or order and that the penalty should be reduced to \$2,700, which reflects only the undisputed economic benefit of noncompliance. The EAB affirmed the Initial Decision in its entirety, including the assessed penalty, in a Final Decision and Order dated July 23, 2008. *In re Service Oil, Inc.*, CWA Appeal No. 07-02, 2008 WL 2901869 (EAB July 23, 2008). On August 13, 2008, Respondent filed a Petition for Review of the EAB’s Final Decision and Order with the United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”).

On December 28, 2009, the Eighth Circuit issued a decision vacating the EAB’s Decision assessing \$35,640 and remanding the case to the agency for redetermination of the amount of penalty in accordance with the statute and the Circuit Court’s opinion. *Service Oil, Inc. v. U. S. Env’tl. Prot. Agency*, 590 F.3d 545 (8th Cir. 2009). On remand, the EAB issued a Remand Order returning the case to this Tribunal “to render a new initial decision that is consistent with the Eighth Circuit’s decision.” Remand Order at 2.

In its decision, the Eighth Circuit concluded that the penalty assessed against the Respondent “was based primarily on the failure to apply for a permit prior to starting construction, as required by the EPA regulations.” 590 F.3d at 549. The court went on to hold that this failure “was not a violation of § 1318, triggering liability for an administrative monetary penalty under § 1319(g)(1)” because § 1318 only applies to “the owner or operator of any point source.” *Id.* at 549-50. According to the reasoning of the Eighth Circuit, it was only “[w]hen construction began [that] the site became a ‘point source.’” *Id.* at 547. Consequently, those actions or omissions occurring before construction began cannot be considered when determining an appropriate civil penalty for violation of § 1318.

On remand, the EAB directed this Tribunal “to conduct further proceedings as necessary to amend the liability findings and redetermine the penalty amount.” Remand Order at 2. In connection therewith, each party is hereby given an opportunity to submit a Brief setting forth its position as to what further proceedings, if any, it suggests this Tribunal conduct prior to amending the findings made in the Initial Decision consistent with the Order of the Eighth Circuit, and outlining its position as to any and all relevant facts and law which should be considered and/or applied, in light of the Eighth Circuit’s decision, to a redetermination of liability and penalty in this matter.¹ Any party wishing to submit such Brief shall do so on or before **September 17, 2010**. All documents filed in this matter, if sent by mail, shall be addressed as follows:

The 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, D.C. 20460

Hand-delivered packages transported by Federal Express or any delivery service that x-rays its packages as part of its routine security procedures, may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005. Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259, or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number of this office is (202) 565-0044.

¹ This Tribunal’s office offers an Alternative Dispute Resolution Process. If both parties agree to opt into such process, and stay the filing of briefs for the duration thereof, they shall notify the undersigned’s office within 15 days of this Order.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

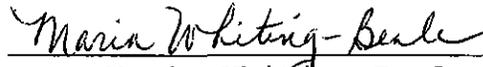
Susan L. Biro
Chief Administrative Law Judge

Dated: August 3, 2010
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Briefing Order**, dated August 3 2010, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: August 3, 2008

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