OAH 5-2200-37298

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Order for Adminstrative Penalties, issued to Nikate Storage Owners' Association d/b/a Nikate Storage, LLC	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION AND RECOMMENDATION FOR FINAL DISPOSITION**

This matter came before Administrative Law Judge Jim Mortenson on the Pollution Control Agency's (Agency) Notice of Motion and Motion for Summary Disposition (Motion). The Motion was served and filed on June 23, 2021. Nikate Storage, LLC (Respondent) did not respond to the Motion. The Motion record closed on July 13, 2021.

J. Qortney McLeod, Assistant Attorney General, represents the Agency. Todd Christenson is the registered agent for Respondent.

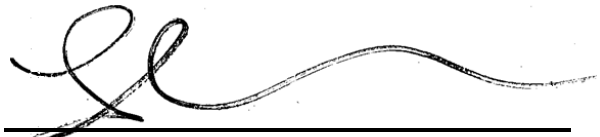
Based upon the administrative record and for the reasons explained in the accompanying memorandum,

IT IS HEREBY RECOMMENDED,

1. The Commissioner **GRANT** the Agency's Motion for Summary Disposition; and,

2. **AFFIRM** the Administrative Penalty Order (APO) issued by the Agency on November 4, 2020.

Dated: July 27, 2021



JIM MORTENSON
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the MPCA (Commissioner) will make the final decision after reviewing the record and may adopt, reject or modify this Report. Under Minn. Stat. § 116.072, subd. 6(e) (2020), the Commissioner's decision shall not be made until five days after receipt of this Report. The person to whom the Order is issued may, within those five days, comment to the Commissioner on the Recommendation. The final order may be appealed in the manner provided in Minn. Stat. § 14.63 to 14.69 (2020).

MEMORANDUM

I. Introduction

This case concerns Respondent's failure to obtain a storm water discharge permit prior to construction activities and whether the civil penalties for that – and other related violations of law – were properly determined by the Agency. The Agency moves for summary disposition because, it argues, there is no genuine dispute of material fact that Respondent violated the regulations cited in the APO issued November 4, 2020. In addition, the Agency argues it carefully considered the legal requirements for the determination of civil penalties under applicable law and that its determination that Respondent must pay $3,637.50 is justified.

Respondent disagrees with the penalty and appealed the APO because it complied with all of the Agency's instructions. It also argued that it was not notified that the penalty was coming after having worked with the Agency to rectify identified problems. Finally, Respondent argued that there was no damage caused by any of its violations.[1]

II. Uncontested Facts

The Agency is the state regulatory body responsible for administering and enforcing laws to limit pollution of the state's waters.[2] As part of its duties, the legislature required that the Agency establish reasonable pollution standards for the state's waters in relation to public use of those waters.[3] The legislature further empowered the Agency to investigate the extent, character, and effect of water pollution and:

> [A]dopt, issue, reissue, modify, deny, revoke, enter into or enforce reasonable orders, permits, variances, standards, rules, schedules of compliance, and stipulation agreements

[1] Respondent informed the Judge of its position during the May 21, 2021, prehearing conference. Respondent did not take the opportunity to respond to the Motion and elaborate its arguments.
[2] Minn. Stat. § 115.03, subd. 1 (2020).
[3] *Id.*

under conditions prescribed by the Agency in order to prevent, control, or abate water pollution.[4]

The Agency established the storm water permit program in order to regulate the discharge of storm water from construction and industrial activities and to abate water pollution associated with storm water discharges from those sources.[5] One way the Agency protects the state's waters is by requiring a national pollutant discharge elimination system/state disposal system (NPDES/SDS) general stormwater permit (permit) for construction activities.[6] As defined by rule, construction activity means activities for the purpose of construction - including clearing, grading, and excavating - that result in land disturbance of one acre or more.[7]

Unless a site is covered by an existing permit, owners and operators proposing activities that require a construction storm water permit must complete a permit application before conducting construction activity.[8] Owners and operators that fail to submit a permit application are still required to comply with the storm water discharge design requirements, construction activity requirements, and permit requirements.[9]

Respondent broke ground on construction activities on a site in the city of La Prairie on August 14, 2019.[10] Land disturbance at the construction site covered 1.63 acres.[11] This site included areas with exposed soils and an un-stabilized topsoil stockpile located in the southwest corner of the site.[12] Due to the size and characteristics of Respondent's construction site, it was required to apply for a stormwater permit through MPCA.[13]

In November of 2019, the Agency received complaints regarding Respondent's construction activities and related storm water drainage. The Agency checked the construction stormwater permitting database and verified that Respondent did not have a permit for the site. Upon further examination, the Agency found additional violations, including but not limited to, inadequate sediment controls, lack of stormwater pollution prevention plan, lack of soil stabilization, and a lack of site inspections.[14]

On December 6, 2019, the Agency notified Respondent that it lacked the appropriate permit and a stormwater pollution prevention plan. The Agency also requested training certificates for required employee trainings. Respondent subsequently applied for a construction stormwater permit in January 2020.[15]

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[4] *Id.*
[5] *See* Minn. R. 7090.0010 (2019).
[6] Minn. R. 7090.2010 (2019).
[7] Minn. R. 7090.0080, subp. 4 (2019).
[8] Minn. R. 7090.2010, subp. 2.
[9] *Id.*, at subp. 3.
[10] McFee Declaration (Decl.) at 1 (June 23, 2021).
[11] *Id.*
[12] Exhibit (Ex.) A at 3, APO (May 27, 2020).
[13] McFee Decl. at 1.
[14] *Id.* at 2.
[15] *Id.*

Agency staff subsequently held a meeting to determine whether to assess an administrative penalty to Respondent, necessary corrective actions would, and the civil penalty.[16] During this meeting, Agency staff discussed Respondent's violations' potential for harm, deviance from compliance, level of willfulness, history of past violations, and any economic benefits gained.[17]

On May 27, 2020, the Agency issued an APO to Respondent for violations of Minn. R. ch. 7090 (2019).[18] The APO addressed approximately nine violations including, conducting construction activities without a permit.[19] The APO included eight corrective actions Respondent had to complete within 30 days.[20] The Agency assessed a penalty of $8,115 for the violations after considering a variety of factors, including: whether the violations were willful, whether the Regulated Party gained economic benefit, whether there is a history of past violations, the number of violations, and the gravity of the violations.[21]

On June 4, 2020, Respondent requested an appeal of the APO.[22] As a result, the parties agreed to meet for a "pre-appeal meeting" to discuss the penalty and next steps forward.[23] On June 29, 2020, the parties met to discuss the facts of the enforcement action and the penalty and corrective actions imposed.[24] At the meeting, Respondent presented the Agency with new information regarding the allegations of the APO, including, but not limited to, a new date by which a stormwater pollution prevention plan had been created.[25] As a result, on November 4, 2020, the Agency rescinded the APO and reissued a new APO at a lower penalty amount of $4,425 of which $788 was forgivable if all corrective action was completed within 30 days.[26]

When determining the new penalty amount, the Agency re-considered each of the factors used in determining the previous penalty.[27] The Agency used a tool called a Case Development Form to assist in the analysis of the penalty factors.[28] The Agency first considered whether the violations caused risk to humans, animals, air, water, land, or other natural resources in evaluating the potential for harm of Respondent's conduct.[29] The Agency also considered the area's size and sensitivity, receptors, pollutant type, amount of pollutant, overall resource value, actual impact, and impact to the regulatory

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[16] *Id.*
[17] *Id.*
[18] Ex. A.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] McFee Decl. at 3.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 3-4; Ex. B, APO (Nov. 4, 2020).
[27] McFee Decl. at 4.
[28] *Id.*; Ex. C, Case Development Form (Mar. 18, 2020). This form was updated following Respondent's appeal on June 4, 2020, to include notes about the appeal, the meeting, the Agency's intent to rescind the first APO and issue a new one, and revised penalty numbers.
[29] *Id.*

program when evaluating the potential for harm.[30] The Agency found the potential for harm to be moderate when taking into account the lack of permit coverage, lack of stormwater pollution prevention plan for a duration, failure to conduct inspections, and natural characteristics of the construction site.[31]

When assessing whether Respondent deviated from compliance, the Agency considered the number of laws, rules, or permit conditions that the conduct violated, the degree to which the conduct failed to conform to the applicable laws or permit conditions, whether the laws violated were basic to compliance, and the duration of the conduct.[32] The Agency found Respondent's deviation from compliance to still be "major" when considering the duration of time construction activities were performed without permit coverage, stormwater pollution prevention plan or proper inspections.[33] The Agency further found the lack of compliance to be major when considering the lack of sediment controls on site.[34]

Considering all the evidence, including that which was newly acquired, the Agency did not add on any additional penalty for willfulness or history of past violations. It did, however, reduce the forgivable portion of the penalty by 25 percent.[35] The Agency also found Respondent gained an economic benefit of $1,275 for the cost of inspections that were not performed.[36] As a result, the Agency added that amount to the penalty.[37] The total revised penalty is $4,425, of which $788 must be forgiven because all of the corrective action is complete, leaving a penalty due of $3,637.[38]

III. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.[39] The Office of Administrative Hearings generally follows the summary judgment standards developed in judicial courts in considering motions for summary disposition.[40] A motion for summary disposition may be granted when no genuine issue of material fact exists.[41] A genuine issue is one that is not a sham or frivolous, and a fact is material if resolving it will affect the result or outcome of the case.[42]

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[30] *Id.*
[31] *Id.* at 5.
[32] *Id.* at 4-5.
[33] *Id.* at 5.
[34] *Id.* at 6.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] McFee Decl. at 7; Ex. C at 12.
[39] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[40] *See* Minn. R. 1400.6600 (2019); Minn. R. Civ. P. 56.
[41] *In re Gillette Children's Specialty Healthcare*, 883 N.W.2d 778, 785 (Minn. 2016).
[42] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare,* 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985).

The moving party must initially show the absence of a genuine issue of material fact.[43] To successfully resist a motion for summary disposition, the responding party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[44] Facts at issue must be established by substantial evidence, and the parties may not rest upon general averments or denials.[45] Evidence offered to support or defeat summary judgment must be such evidence as would be admissible at trial,[46] though the evidence presented need not be in a form that would be admissible.[47] "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial."[48]

When considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the nonmoving party, and doubts and factual inferences must be resolved against the moving party.[49] The trial court's function is not to decide the facts at issue, but to determine whether a genuine dispute of material fact exists.[50]

IV. Analysis

Respondent failed to apply for a permit prior to commencing construction activity on its property and did not comply with stormwater discharge requirements, construction activity requirements, and permit requirements once construction began. Since being notified of its errors, however, Respondent corrected its mistakes. It now contests the reasonableness of the remaining penalty amount after the initial reduction of the penalty.

The Commissioner may issue an order requiring violations of the Water Pollution Control Act (Act)[51] to be corrected and may also assess monetary penalties.[52] Penalties for violations found during an inspection or other compliance review may not exceed $20,000.[53] A penalty must be forgiven if the commissioner determines that the violation was corrected or appropriate steps were taken toward correcting the violation.[54] If, however, the violation was serious, the penalty need not be forgiven.[55]

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[43] Minn. R. Civ. P. 56.01; *Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005).
[44] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).
[45] *Id.* at 70-71.
[46] *Hopkins v. Empire Fire & Marine Ins., Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).
[47] *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).
[48] *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).
[49] *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).
[50] *See id.* at 664 (citing *DLH*, 566 N.W.2d at 70).
[51] Minn. Stat. ch. 115 (2020).
[52] Minn. Stat. § 116.072, subd. 1 (2020).
[53] *Id.* at subd. 2 (2020).
[54] *Id.* at subd. 5(a) (2020).
[55] *Id.* at subd. 5(b) (2020).

The Act does not define what is a "serious" violation of the regulatory standards.[56] However, the failure to take immediate action to correct a violation "belies any characterization of the…violation as 'serious'."[57]

The Department's case development form for the construction stormwater program provides that the gravity of the violation(s) are used to determine the base penalty.[58] In turn, the gravity of a violation "is determined by the potential for harm and the deviation from compliance."[59] According to the case development form instructions:

> When assessing the ***potential for harm,*** consideration should be given to the risk of harm caused by the violation or violations to humans, animals, air, water, land, or other natural resources of the state. Facts to consider include the affected area's size and sensitivity, receptors, pollutant type, amount of pollutant, overall resource value, actual impact, and impact to the regulatory program. Because many rules and regulations are preventive in nature, the focus is on potential for harm and not on actual harm.[60]

Further,

> When assessing the ***deviation from compliance***, consideration should be given to number of laws, rules or permit conditions that the conduct violated, the degree to which the conduct failed to conform to the applicable laws or permit conditions, whether the laws violated were basic to compliance and the duration of the conduct.[61]

This administrative framework is similar, but not identical, to the framework in place when the Court of Appeals examined the Agency's determination of penalties in *Arrowhead Concrete Works*. In *Arrowhead*, the Court found that the Department's consideration of whether a violation was "serious" was a direct extension of the analysis of the potential for harm and deviation from compliance.[62] In looking at both factors, the reviewer was instructed to determine whether the potential for harm or deviance from compliance was "minor, moderate, or serious."[63]

But the Agency's instructions are different today. It is only the base penalty that is determined using the potential for harm and deviation from compliance factors.[64] In addition, staff are instructed to use summary assessment words which include: "low,

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[56] *BFI Waste Systems v.* Bishop, 927 N.W.2d 314, 321 (Minn. Ct. App. 2019); *See* Minn. Stat. § 116.072 (2020).
[57] *Arrowhead Concrete Works, Inc. v. Williams*, 550 N.W.2d 883, 887 (Minn. Ct. App. 1996).
[58] Ex. C at 9.
[59] *Id.*; *Arrowhead,* 550 N.W.2d at 886.
[60] *Id.*
[61] *Id.*
[62] *Arrowhead,* 550 N.W.2d at 886.
[63] *Id.*
[64] Ex. C. at 9.

high, minor, medium, major, significant, etc." in describing the gravity of the violation.[65] The term "serious" is not included. Rather, the assessor is prompted to check a box concerning whether each violation is serious.[66]

When determining a penalty, the Commissioner may consider:

1. the willfulness of the violation;
2. the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
3. the history of past violations;
4. the number of violations;
5. the economic benefit gained by the person by allowing or committing the violation; and
6. other factors as justice may require, if the commissioner . . . specifically identifies the additional factors in the commissioner's . . . order.[67]

When reviewing an APO, the trial court must determine whether the preponderance of the evidence shows that the violations cited in the APO occurred and whether the violations warrant the penalty assessed.[68] If the violation for which the Agency cited the Respondent is not the violation upon which the penalty is assessed, summary disposition is not proper.[69]

In this case, the uncontested facts demonstrate that the nine violations occurred. Further, the facts demonstrate the penalties were carefully assessed for two groups of violations for which penalties imposed. The CDF included a thorough recitation of facts and considerations made by the Agency in reaching the penalty determination. The Agency considered and documented all six of the factors set forth in Minn. Stat. § 116.072, subd. 5(b). Agency staff determined all of the violations were serious. Yet, a portion of the penalty was made forgivable, which is within the Commissioner's discretion.[70] The Agency even reduced the base penalty because Respondent "does not frequently engage in construction activity."[71]

While the failure to take immediate action raises a concern that the violations cited were not "serious," Respondent has neither articulated nor presented any facts to demonstrate that the Agency's rationale is in erroneous or that a smaller penalty is appropriate.

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[65] *Id.*
[66] *Id.* at 10.
[67] Minn. Stat. § 116.072, subd. 5(b).
[68] *BFI Waste Systems*, 927 N.W.2d at, 321 (Minn. Ct. App. 2019); Arrowhead, 550 N.W.2d at 888, *citing* Minn. Stat. § 116.072 (1994).
[69] *Id.* at 887.
[70] Minn. Stat. § 116.072, subd. 5(b).
[71] Ex. C at 13.

V. Conclusion

Because the Agency has shown there is no genuine dispute of material facts, and because it has shown the assessed penalty was carefully considered in accordance with legal requirements, and because Respondent has not made or articulated any reason to doubt the Agency's findings and determination, summary disposition is appropriate. The Judge respectfully recommends the Commissioner **AFFIRM** the APO issued by the Agency on November 4, 2020.

J. R. M.