

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Lori Louise
Krosch Janet

**FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell on October 21, 2008, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The record closed on October 27, 2008, with the receipt of Exhibits 33 through 48.

Ann E. Cohen, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency (the "Agency"). Lori Janet and Steve Janet (collectively, the "Janets") appeared on their own behalf, without legal counsel.

STATEMENT OF ISSUES

1. Did the Janets collect and store solid waste in violation of Minn. Stat. § 116.081 and Minn. R. 7050.0030 and 7050.3050 (2007)?
2. If so, was the violation serious, requiring imposition of a non-forgivable penalty, and was the assessed penalty reasonable or appropriate?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Janets live with their five children in rural Olmsted county on an 80-acre property that is adjacent to 132nd Avenue SE.¹ The property contains two pole barns near 132nd Avenue, a home deeper into the property at the end of a gravel road, and other smaller outbuildings.² Also on the property is construction equipment, including a front-end loader and a dump truck.³

¹ Exhibit 15, testimony of Steve Janet and Corey Boeck, Agency Pollution Control Specialist.

² Exs. 2, 20, 24, test. of S. Janet, C. Boeck and Brent Svenby, Rochester-Olmsted Senior Planner.

³ Id., Exs. 6, 20, 36.

2. The Janets have a cow and also raise pigs.⁴ During the time periods in question in this matter, ten pigs were observed by Agency personnel.⁵ However, at any time the sows may each give birth to 10-12 babies.⁶ The Janets have a permit to feed donuts to the pigs and have had a feedlot permit in the past, although they do not have one at the present.⁷

3. For a period of two years between 2006 and 2008, Mr. Janet accepted waste sheetrock from ten (10) contractors from the Rochester, Minnesota, area.⁸ The waste sheetrock was crushed and used as animal bedding and also crushed and utilized as a liming agent.⁹ The crushed sheetrock was mixed with pig manure and spread as fertilizer on farm fields on the Janet property.¹⁰

4. Prior to April 19, 2007, the Janets had a shed on their property that contained a broken television, an old toilet, tires and other household discards.¹¹ The shed and its contents burned, and the debris from that fire was not removed.¹²

5. On April 19, 2007, the Agency received a complaint from a Filmore County, Minnesota, official about burning of hazardous waste and sheetrock on the Janet property. Agency staff contacted Olmsted County zoning officials with regard to the complaint.¹³

6. On April 20, 2007, an Olmsted County zoning officer and a Rochester/Olmsted planner visited the Janet property. During that visit, they observed and took photographs of multiple piles of solid waste debris, including:

- a. construction debris consisting of wood, primarily plywood; and
- b. multiple large piles of sheetrock, partially crushed and uncrushed.¹⁴

7. During the April 20, 2007, visit the Zoning Officer spoke with Mr. Janet and told him that the collected solid waste was a violation of county ordinance and that he would be receiving a written violation notice.¹⁵

8. On April 24, 2007, Olmsted County issued a Notice of Violation (“NOV”) to Steve and Lori Janet.¹⁶ The NOV cited the violation of and contained a copy of

⁴ Ex. 6, test. of S. Janet.

⁵ Test. of C. Boeck.

⁶ Test. of S. Janet.

⁷ *Id.*, test. of C. Boeck.

⁸ *Id.*, Ex. 15.

⁹ *Id.*

¹⁰ Ex. 11 at 2.

¹¹ Test. of S. Janet, Ex. 23.

¹² *Id.*

¹³ Test. of C. Boeck, B. Svenby, Ex. 15.

¹⁴ Ex. 24, test. of B. Svenby.

¹⁵ *Id.*

¹⁶ Test. of B. Svenby, Ex. 3.

Section 5.02, Subs. 4, and Section 6.08, Subs. 2, of the Olmsted County Solid Waste Ordinance #10.¹⁷ The NOV stated:

You are hereby requested to discontinue this violation within 30 calendar days upon receipt of this NOTICE OF VIOLATION, and to remove the existing solid waste from the property and dispose of it at the County waste-to-energy plant or landfill.¹⁸ The sheetrock and other debris was not removed.¹⁹

9. On June 4, 2007, the Olmsted County zoning officer and the Rochester/Olmsted planner re-visited the Janet property. During that visit, they observed and photographed the same multiple piles of solid waste debris.²⁰

10. On June 5, 2007, Olmsted County issued a second NOV to Steve and Lori Janet.²¹ The NOV again cited the violation of and contained a copy of Section 5.02, Subs. 4, and Section 6.08, Subs. 2, of the Olmsted County Solid Waste Ordinance #10.²² The June 5, 2008, NOV also contained a copy of the first NOV letter.²³

11. Both NOVs were sent out stamped with return service if not delivered. Neither was returned.²⁴

12. The sheetrock and other debris were not removed as of August 6, 2007.²⁵

13. The sheetrock and other debris were not removed as of August 31, 2007.²⁶

14. On April 28, 2008, the Agency received another complaint from a Filmore County official that nothing had been removed from the Janet property since the initial complaint in April 2007.²⁷

15. On May 1, 2008, Agency staff inspected the Janet property. During the visit Agency staff observed an area of 50' by 60' of crushed sheetrock off the edge of the driveway, in a ravine. In the ravine, along with the sheetrock, were approximately two cubic yards of burnt MSW, one hot water heater, one broken television, one refrigerator, and a toilet. In addition, Agency staff observed another pile of sheetrock

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ex. 25.

²⁰ *Id.*, test. of B. Svenby.

²¹ Test. of B. Svenby, Ex. 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Ex. 26.

²⁶ Ex. 27.

²⁷ Test. of C. Boeck, Ex. 15.

approximately 30' by 20' by 4' tall. Agency contact information was left at the Janet home, as no one appeared to be home.²⁸

16. On May 12, 2008, the Agency sent an Alleged Violation Letter (AVL) to the Janets. The AVL cited a violation of Minn. R. 7001, 7035 and Minn. Stat. ch. 116. In addition to these notices, the AVL required that the Janets immediately:

- a. cease all burning of solid waste; and
- b. cease allowing disposal of any additional solid waste at the site or any other unpermitted solid waste facility.²⁹

17. In addition, the AVL requested the following information within 10 days:

- a. a description of the type of waste at the Site and where it was generated;
- b. provide the names, contacts and phone numbers of all the haulers that the Regulated Party has provided or is currently providing disposal service;
- c. the amount of waste accepted at the Site on a monthly basis;
- d. how long the Site has been used for disposal and storage of solid waste;
- e. how long the Regulated Party has been operating at the Property; and a copy of a current burning permit; and
- f. provide all permits (township, county, state) that have been obtained for the operation of a solid waste storage/disposal facility.³⁰

18. On May 14, 2008, Agency staff re-inspected the Site and left contact information at the front door and mailbox of the Janet residence. The Agency staff observed that approximately two to three new sheetrock loads (approximately five cubic yards) of sheetrock waste had been dumped at the pile adjacent to 132nd Avenue.³¹

19. On May 15, 2008, Mr. Janet contacted Agency staff and stated that the sheetrock is generated from 10 building contractors in the Rochester, Minnesota, area. He declined to identify the contractors. He stated that he has been hauling the sheetrock for two years to his Site and is providing the disposal service free of charge to the contractors because he is using the waste sheetrock for animal bedding, fill for his

²⁸ *Id.*, Exs. 6, 28.

²⁹ Ex. 7, test. of C. Boeck.

³⁰ *Id.*

³¹ *Id.*, Ex. 9.

road, and that he blends it with manure for land application as fertilizer. Mr. Janet also stated that the sheetrock stabilizes the driveway and keeps it dry.³²

20. The Janets secured two dumpsters from Alli RollOff, Inc. (“RollOff”) for proper depositing and removal of the sheetrock.³³ One was retrieved, empty, by RollOff because the front-end loader Mr. Janet was using to remove the sheetrock became stuck in a large mudhole and was unusable.³⁴ The Janets were billed for the retrieved and empty dumpster.³⁵

21. On or about May 12, 2008, the Rochester planner observed that the piles of plywood were gone and that sheetrock piles were being reduced.³⁶ Agency staff recognized that it was apparent that progress was being made in reducing and removing the sheetrock piles, but that work was stopped because of the unusable loader.³⁷

22. During the one and one-half month period the loader was unusable, progress in removing the sheetrock stopped.³⁸

23. On May 21, 2008, Agency staff again contacted Mr. Janet and again advised him of the requirements of the AVL. Mr. Janet stated that he was working on a response to the AVL. Agency staff also learned that day that Mr. Janet had requested an application by e-mail for a Case Specific Beneficial Use Determination (CSBUD), for using the sheetrock waste for animal bedding and as a liming agent.³⁹ However, the Agency received neither a written response to the AVL or an application for a CSBUD.⁴⁰

24. Agency staff prepared an Administrative Penalty Order (APO) Penalty Calculation Worksheet to be used in determining an appropriate penalty amount. The Penalty Calculation Worksheet incorporates the factors to be considered under Minn. Stat. § 116.072 and provides guidance for determining the appropriate penalty amount. In calculating the base penalty, the Worksheet uses a matrix to determine whether the potential for harm to humans, animals, air, water, land, or other natural resources was minor, moderate or severe (set out on the vertical axis of the matrix, labeled “Potential for Harm”), and whether the deviation from compliance was minor, moderate, or severe (on the horizontal axis of the matrix, labeled “Deviation from Compliance”):

³² Ex. 15, test. of C. Boeck and S. Janet.

³³ Test. of S. Janet, Exs. 23, 30, 32.

³⁴ Ex. 20, test. of S. Janet and C. Boeck.

³⁵ Ex. 32.

³⁶ Test. of B. Svenby.

³⁷ Test. of C. Boeck.

³⁸ Test. of S. Janet, Ex. 23.

³⁹ Test. of C. Boeck, Ex. 15.

⁴⁰ *Id.*

		Deviation from Compliance		
		Minor	Moderate	Major
Potential For Harm	Major	\$5,000 to \$2,000	\$8,000 to \$3,500	\$10,000 to \$5,000
	Moderate	\$2,000 to \$500	\$3,500 to \$1,000	\$5,000 to \$2,000
	Minor	\$500 to \$0	\$1,000 to \$200	\$2,000 to \$500
		Base Penalty Range		

25. The worksheet permits the base penalty to be adjusted (enhanced or mitigated) for willfulness or culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require.⁴¹

26. The Agency uses a forum process in cases that may involve a non-forgivable penalty. The forum considered the information presented in the Case Development Form and the APO worksheet, and after determining that two violations had occurred, determined that those violations were serious, stating:

Failure to obtain a permit is considered serious because without a permit the MPCA staff cannot ensure that the establishment, construction, operation, and closure of the solid waste facility will comply with standards and rules that will best protect human health and the environment. In this case, the Regulated Party was collecting waste from 10 contractors [and] has been disposing of the material at an unpermitted facility for two years. The Regulated Party also disposed of solid waste by burning at the Site, creating a risk to human health and the environment by releasing pollutants into the air and land. The disposal area is located approximately 300 feet uphill from Mill Creek, a DNR designated trout stream. These are serious violations.⁴²

27. The forum determined that these were not repeat violations.⁴³

28. The forum also determined that the Potential for Harm factor should be rated as Moderate because:

Potential for harm is considered moderate because solid waste has been mismanaged for approximately two years at the Site, and over the years a

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

large amount of waste may have been burned. The ash has been left at the Site. Because the large concentration of new sheetrock waste and the close proximity to Mill Creek, a DNR designated trout stream, it is reasonable to conclude that pollutants such as hydrogen sulfide, Boron, pH had a higher probability of affecting the creek. The amount of new construction waste is also relatively large and some of the debris observed during the inspection was burnt MSW. Tires, appliances and CRTs are prohibited from land disposal. Burning and burying poses a danger to both public health and the environment. The uncontrolled burning of waste puts pollutants directly into the air and burying ash can cause contaminated groundwater. The Regulated Party was also failed to obtain a Case Specific Beneficial Use Determinations (CSBUD), prior to using the sheetrock waste for animal bedding and as a liming agent. If a CSBUD were granted, at a minimum, the waste would be required to be stored in accordance with 7035.2855, which it was not.⁴⁴

29. The forum determined that the Deviation from Compliance was Major because:

The deviation from compliance is considered major because of the amount of new construction waste accepted by the Regulated Party, the burnt solid waste, and the prohibited items identified in the sheetrock. The deviation from compliance is not considered minor because the Regulated Party failed to obtain a permit from state or county authorities and because the site was not managed in accordance with MPCA rules. The Regulated Party stated that all MPCA permits had been obtained to collect sheetrock and operate his feedlot. The MPCA has never issued the Regulated Party a permit.⁴⁵

30. The forum, to mitigate the effect of the APO, lumped the violations together to consider them as a single violation.⁴⁶

31. The forum determined the base penalty for the violation using the range for moderate potential for harm and major deviation from compliance (\$2,000 to \$5,000). The forum set the total base penalty at \$3,500 without additional explanation.⁴⁷

32. The forum addressed the enhancement or mitigation of the base penalty by considering the factors of willfulness/culpability, history of past violations, other factors as justice may require, and economic benefit. The forum determined that a 50% enhancement was appropriate due to the Janets' willful unresponsiveness to Olmsted County in 2007, and because they continued to accept sheet rock waste at the Site. In addition, the forum stated:

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Test. of C. Boeck.

⁴⁷ *Id.*, Ex. 16.

The Regulated party stated that he is in the business with working with government agencies and was aware that permits are required for certain activities, including waste sheetrock for land application or for animal bedding. The Regulated Party stated that the required permits were obtained, which was not true.⁴⁸

33. The forum determined that the penalty would be non-forgivable because the violations were serious, stating:

The violations are serious and although the Regulated Party has not had history directly with the MPCA, the Regulated Party has been unresponsive to Olmsted County, the violations are considered nonforgivable.⁴⁹

34. On June 28, 2008, Mrs. Janet had a conversation with Mr. Boeck regarding their efforts to complete the cleanup and the problem with the stuck loader.⁵⁰

35. No later than July 8, 2008, the Janets had removed the sheetrock and all other solid waste from their property and graded the areas where it had been located, and posted a No Dumping sign on their property.⁵¹

36. On July 16, 2008, the Agency issued an APO to the Janets.⁵² The APO found violations of Minn. Stat. § 116.081, Minn. R. 7001.0030, 7001.3050, and 7035.0080. Under Minn. Stat. § 116.072, the Agency required the Janets to:

- a. pay a \$5,250.00 non-forgivable penalty;
- b. conduct no further solid waste collection, storage or disposal activities;
- c. identify the haulers and generators of the sheetrock;
- d. submit documentation that all solid waste has been disposed of at a permitted solid waste facility; and
- e. submit documentation that the site has been posted "no dumping."⁵³

37. The Janets partially completed the corrective action specified in the APO in a timely manner by:

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Test. of C. Boeck.

⁵¹ *Id.*, Exs. 23, 30-48.

⁵² Ex. 22.

⁵³ *Id.*

- a. conducting no further solid waste collection, storage or disposal activities; and
- b. submitting, at the hearing, documentation that all solid waste has been disposed of at a permitted solid waste facility; and
- c. submitting, at the hearing, documentation that the site has been posted "no dumping."⁵⁴

38. On August 15, 2008, the Janets appealed the APO and requested an expedited hearing before an Administrative Law Judge.⁵⁵

39. On September 4, 2008, the Agency issued a Notice of and Order for Hearing regarding this matter.

40. Any Conclusion of Law more appropriately considered a Finding of Fact is hereby adopted as such.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of and Order for Hearing in this matter was proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is properly before the Administrative Law Judge.

3. Minnesota law⁵⁶ authorizes the Agency's Commissioner to issue administrative penalty orders to persons who collect and store solid waste without a required permit.

4. Minn. Stat. § 116.072, subd. 6, grants persons to whom the Commissioner has issued administrative penalty orders the right to an expedited administrative hearing to review whether or not the order has been issued in conformity with Minnesota law.

5. The rules that govern expedited administrative hearings for review of an administrative penalty order provide that the party proposing that an action

⁵⁴ Exs. 30, 31, 32

⁵⁵ Ex. 14.

⁵⁶ Minn. Stat. § 116.072 (1) (2006).

be taken has the burden of supporting the proposed action by a preponderance of the evidence.⁵⁷

6. The Minnesota Pollution Control Agency has the burden to establish by a preponderance of the evidence that the Janets violated applicable laws or rules and that issuance of the Administrative Penalty Order was warranted. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the Administrative Penalty Order unless the amount of the proposed penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).⁵⁸

7. The Agency proved by a preponderance of the evidence that the Janets violated Minn. Stat. § 116.081, and Minn. R. 7050.0030 and 7050.3050 (2007) by accepting, storing, and utilizing solid waste without the necessary Agency permits.

8. Under Minn. Stat. § 116.072, subd. 3, an Administrative Penalty Order must include “a concise statement of the facts alleged to constitute a violation” and “a reference to the section of the statute, rule, ordinance, variance, order, stipulation agreement, or term or condition of a permit or license that has been violated.” The Agency provided adequate notice of violations under this provision.

9. The Commissioner has the authority to assess penalties of up to \$10,000 for violations of Agency regulations. Pursuant to Minn. Stat. § 116.072, subd. 2(b), the Commissioner may consider the following factors in determining the amount of the penalty:

- (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

10. For a repeated or serious violation, the Commissioner may issue an order with a penalty that will not be forgiven after the corrective action is taken, in accordance with Minn. Stat. § 116.072, subd. 5(b). The Agency has shown that the present violation was serious, therefore a non-forgivable penalty is appropriate.

⁵⁷ Minn. R. 1400.8608 (2005).

⁵⁸ Minn. Stat. § 116.072, subd. 6(c).

11. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum, the \$5,250.00 penalty assessed by the Agency against Janets is reasonable.

12. Any Finding of Fact more properly termed a Conclusion is adopted as such. Any Conclusion more properly termed a Finding of Fact is adopted as such.

13. These Conclusions are reached for the reasons discussed in the following Memorandum, which is hereby incorporated into these Conclusions.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner AFFIRM the Administrative Penalty Order issued on July 16, 2008, to Steve Janet and Lori Janet.

Dated: November 24, 2008

s/M. Kevin Snell

M. Kevin Snell
Administrative Law Judge

Reported: Digitally Recorded; No transcript prepared.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Brad Moore, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, 651-296-6300, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

Mr. and Mrs. Janet do not dispute the violations of law and rules. However, they do dispute the size of the financial penalty. They argue that the financial penalty should be reduced because they received no payment from contractors for accepting the sheetrock, did not engage in the burning of hazardous materials as alleged, were making progress on the cleanup but were delayed for a month and a half because the front end loader was stuck in the mud and inoperable, and did eventually remove all solid waste as required in the APO.

The Administrative Law Judge ("ALJ") may only consider whether or not the APO was reasonable and appropriate at the time of its determination. That determination occurred on June 5, 2008, during the Agency forum meeting and discussions. At that time, the cleanup had not occurred and the property had not been posted. The names of the contractors providing the sheetrock were never disclosed. That part of the APO has not been complied with to date. Without such information, the property owners must bear the entire regulatory burden. The fact that the cleanup and posting of the property was completed by July 8, 2008, can have no bearing on the ALJ's determination of whether the APO was reasonable and appropriate. Although completion of the cleanup occurred before issuance of the APO, it occurred after the determination to issue it. There was no evidence in the record that the Agency knew the cleanup was complete before the APO was issued. Those facts are appropriate for the Commissioner to consider in making his final decision in this matter. The evidence in the record is clear that, as of the close of the record, the sheetrock had been entirely removed from the property and the property was posted with a "no dumping" sign.

Furthermore, the ALJ may not substitute his judgment for that of the Agency on a determination where reasonable minds could differ. The Agency established that its calculation of the base penalty was reasonable based on the gravity of the violation, including risk of harm to the trout stream and the prior willful noncompliance of the Janets. The Agency's determination of a moderate potential for harm was reasonable due to the proximity to the trout stream. Although Mr. Janet claimed that that tributary of Mill Creek was not a trout stream, the Agency's documentary evidence and testimony were persuasive.

Its determination of a major deviation from compliance is reasonable, particularly in light of the fact that nothing was done to clean up the sites for more than a year. It took the alleged violations letter and visits from Agency staff to motivate the Janets to commence efforts towards compliance. The base penalty determination of \$3,500.00 was in the mid range for a moderate potential for harm and a major deviation from compliance. In the penalty matrix, a \$3,500.00 base penalty would be justified even if the compliance deviation had been moderate rather than major.

Finally, a 50 percent upward departure for willfulness and culpability is not unreasonable under the circumstances. For more than a year, little effort to achieve compliance was made even though Olmsted County and the Agency had made it clear

through visits and letters that collection of waste had to stop and cleanup had to be completed.

Under these circumstances, the non-forgivable penalty of \$5,250.00 is not unreasonable or inappropriate. The Administrative Law Judge recommends that the Commissioner affirm the Administrative Penalty Order. However, the ALJ observes that the Janets have the opportunity to present argument to the Commissioner regarding the remedial measures accomplished subsequent to the determination and issuance of the APO.

M. K. S.