

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

In the Matter of the Administrative  
Penalty Order Issued to Thein Well  
Company, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Chief Administrative Law Judge Raymond R. Krause on February 5, 2009, at the Offices of the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul., Minnesota 55155. The OAH hearing record closed on that date.

Leah M.P. Hedman, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (MPCA or Agency). Mark Thein, owner of Thein Well Company, Inc. (Thein or Respondent), appeared on its behalf.

**STATEMENT OF ISSUES**

1. Did Thein Well Company, Inc., discharge industrial waste into a water of the state and thereby violate Minn. R. 7053.0205, subp. 2?
2. Did Thein Well Company, Inc., discharge industrial waste into a water of the state and thereby violate Minn. R. 7050.0210, subp. 13?
3. Did Thein Well Company, Inc., fail to notify the MPCA that it discharged a pollutant into the water of the state and thereby violate Minn. Stat. § 115.061(a)?
4. If Thein Well Company violated Minn. R. 7053.0205, subp. 2, Minn. R. 7050.0210, subp. 13, or Minn. Stat. § 115.061(a), were the violations serious, requiring imposition of a non-forgivable penalty, and was the assessed penalty reasonable or appropriate?

The ALJ concludes that Thein violated Minn. R. 7053.0205, subp. 2, Minn. R. 7050.0210, subp. 13, and Minn. Stat. § 115.061(a), that the violations were properly determined to be serious, and that the assessed non-forgivable penalty was reasonable under the circumstances.

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

## FINDINGS OF FACT

### The Drill Site

1. In June and July 2008, Thein drilled a well at Akkerman Manufacturing near Brownsdale, Minnesota. The well is located on the north side of the Akkerman site. North of the site a narrow grass field runs the length of the rural Akkerman development, and a cornfield is north of the grassy area. A ditch or drainage route runs through the cornfield. The ditch runs under County Highway 2 and eventually empties into Roberts Creek.<sup>1</sup>

2. Water from the Akkerman site drains to the northwest and then west into the drainage route next to the corn field. Once water enters the drainage route, it travels approximately 1,000 feet through high grass to reach the ditch that runs along a gravel driveway. From there, it travels another 2,500 feet through high grass to reach Roberts Creek.<sup>2</sup>

3. The Thein drilling site on the Akkerman property is located approximately 3,077 feet from Roberts Creek. There is a one or two percent slope from the site to the Creek and the elevation falls 35 feet.<sup>3</sup>

4. The soil at the Akkerman site consists of clay and loam over fractured limestone bedrock. That type of soil requires a drilling foam to break the limestone and bring the cuttings to the surface to free the drill bit.<sup>4</sup> The process required vast amounts of water to facilitate the boring. Thein estimated that the active drilling process required approximately 500 gallons of water per minute, or 240,000 gallons of water in eight hours.<sup>5</sup>

### The Complaints and Violations

5. On July 1, 2008, William Buckley, Mower County Environmental Health Specialist, received a complaint from a resident in Brownsdale, Minnesota. The complainant stated that Thein was drilling at the Akkerman Manufacturing site and that water from the drilling site was being discharged into a nearby drainage ditch and Roberts Creek. The complainant stated that the discharge was causing discolored water and foam in the creek.<sup>6</sup>

6. Buckley drove to the complainant's property. He observed foaming, discoloration and turbidity in the ditch running under County Highway 2, which eventually drains into Roberts Creek. He also observed some rock bits (drill cuttings)

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<sup>1</sup> Testimony of Mark Thein; Ex. 4.

<sup>2</sup> Ex. 13.

<sup>3</sup> Exs. 2-3; Test. of William Buckley.

<sup>4</sup> Test. of W. Buckley.

<sup>5</sup> Test. of M. Thein; Ex. 22.

<sup>6</sup> Testimony of W. Buckley.

which could have been carried by the discharge from the drilling site to the drainage ditch.<sup>7</sup>

7. The level of foam he observed in the ditch culvert can occur naturally from decaying leaves and other causes, but it is also consistent with drilling activity.<sup>8</sup>

8. Buckley then drove to the Akkerman site, where he saw two Thein employees and a drill rig. The employees were getting ready to leave the site for the day and Buckley observed no active drilling while he was on site. He observed a foam substance on the ground at the site that he recognized to be drilling foam.<sup>9</sup>

9. The Thein employees told Buckley that they had been air drilling at the Akkerman site, which is a drilling process in which water and a drilling foam are forced into the ground to break the soils and bedrock and carry the soil and rock pieces (drill cuttings) back to the surface. The drill cuttings were approximately a quarter-inch in diameter. The Thein employees told Buckley they were using a drilling foam called Quik-Foam.<sup>10</sup>

10. Quick-Foam is a common drilling foam that it is approved for use in potable well drilling.<sup>11</sup>

11. Buckley observed no Best Management Practices (BMPs), such as hay bales or shallow ditches used to divert the discharge, in place at the Akkerman site.<sup>12</sup>

12. Buckley then drove to the site of the alleged discharge on Roberts Creek. He observed cloudy water and active minnows near the surface. He could not discern whether the minnows were active because of natural causes, or because of a disturbance in the Creek.<sup>13</sup>

13. On the afternoon of July 2, 2008, Nancy Christensen, who lives near the Akkerman site, observed that the water in the drainage ditch along County Highway 2 was orange and foamy. She took photographs of the ditch.<sup>14</sup> She took one photograph of the location where the ditch drains into Roberts Creek.<sup>15</sup> She then telephoned Buckley to report the discoloration and foam, and she provided him the photographs she had taken.<sup>16</sup>

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<sup>7</sup> Test. of W. Buckley; see *also* Exs. 2-4 (maps) and Ex. 5.

<sup>8</sup> Test. of W. Buckley.

<sup>9</sup> Test. of W. Buckley.

<sup>10</sup> Test. of W. Buckley; Ex. 13.

<sup>11</sup> Ex. 16; Test. of W. Buckley.

<sup>12</sup> Test. of W. Buckley.

<sup>13</sup> Test. of W. Buckley.

<sup>14</sup> Exs. 5-10.

<sup>15</sup> Ex. 11.

<sup>16</sup> Test. of W. Buckley; Test. of Nancy Christensen.

14. Buckley drove to the Akkerman site at approximately 4:00 p.m. on July 2, 2008, but he observed no drilling activity and there were no Thein employees present on the site. He observed no water or foam discharge on the site that day.<sup>17</sup>

15. Buckley then drove to Roberts Creek. He observed cloudy water in the creek and minnows near the surface. The water appeared slightly less cloudy than on July 1, 2008. The minnows were not uncommonly active at the surface.<sup>18</sup>

16. Buckley did not meet either citizen complainant. He took no photographs of the drilling site, the ditch or Roberts Creek.<sup>19</sup>

17. On July 7, 2008, Buckley referred the citizen complaints to Ryan Swafford at the MPCA regional office in Mankato, Minnesota.<sup>20</sup>

18. From 1991-2003, Buckley was a certified well inspector. He has never observed an air drilling site where all the drilling water could be contained.<sup>21</sup>

19. The photograph depicting Roberts Creek shows no disturbance or foam in the water.<sup>22</sup>

20. Roberts Creek usually has a strong flow. The ditch does not normally have a heavy flow.<sup>23</sup> In fact, the ditch only intermittently carries water. Pictures taken near the end of July 2008 reveal that the ditch that runs from the Akkerman site to Roberts Creek is completely dry.<sup>24</sup>

21. Mark Thein admitted that he realized that the drilling water discharge from the Akkerman site would eventually reach Roberts Creek because water flows downhill, but did not realize that the water would be discolored.<sup>25</sup>

22. There was no evidence that the discharge from the Akkerman site reached the Cedar River from Roberts Creek.

### **Thein's Previous Violations**

23. In April 2002, the MPCA issued Thein an Administrative Penalty Order (APO) for violations that occurred at a well-drilling site near Rochester, Minnesota. The 2002 APO included four violations of the following rules and statutes: Minn. R. 7050.0210, subp. 3 (Inadequate Treatment); Minn. R. 7050.0210, subp. 2 (Nuisance Conditions Prohibited); Minn. R. 7050.0210, subp. 13 (Pollution Prohibited); and Minn.

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<sup>17</sup> Test. of W. Buckley.

<sup>18</sup> Test. of W. Buckley.

<sup>19</sup> Test. of W. Buckley.

<sup>20</sup> Test. of Ryan Swafford.

<sup>21</sup> Test. of W. Buckley.

<sup>22</sup> Ex. 22.

<sup>23</sup> Test. of N Christensen.

<sup>24</sup> Ex. 13.

<sup>25</sup> Test. of M. Thein; Ex. 22.

Stat. § 115.061 (Duty to Notify and Avoid Water Pollution). Thein was assessed a forgivable penalty of \$4,500, which became non-forgivable after Thein failed to take the corrective action outlined in the APO.<sup>26</sup>

### **Alleged Violation Letter and Thein's Response**

24. On July 7, 2008, Ryan Swafford, MPCA Pollution Control Specialist, learned of the complaints regarding the drilling on the Akkerman site. Swafford spoke with Buckley and issued an Alleged Violation Letter (AVL) to Thein on July 25, 2008. The AVL stated that the MPCA received a complaint on July 7, 2008, regarding discharge from the Thein drilling site on the Akkerman property. The AVL alleged that Thein discharged sediment-contaminated wastewater to waters of the state and that this wastewater caused nuisance conditions in Roberts Creek, including excessive suspended solids, material discoloration, nuisance foaming, and the temporary degradation of the aquatic habitat from turbidity, in violation of Minn. R. 7050.0210, subp. 3 (Inadequate Treatment); Minn. R. 7050.0210, subp. 2 (Nuisance Conditions Prohibited); and Minn. R. 7050.0210, subp. 13 (Pollution Prohibited). The AVL also alleged that Thein failed to immediately notify the MPCA that a discharge of potential pollution-causing material had occurred, in violation of Minn. Stat. § 115.061 (Duty to Notify and Avoid Water Pollution). The only date identified in the AVL was July 7, 2008. The AVL did not inform Thein that the citizen complaints and site investigations occurred on July 1, 2008, and July 2, 2008.<sup>27</sup>

25. Thein responded to the AVL by letter dated July 30, 2008. Thein denied that it discharged any solids into Roberts Creek. Thein stated that it had attempted to air drill the well at the Akkerman site on June 24, 2008, June 30, 2008, and July 2, 2008.<sup>28</sup>

### **Case Forum Discussion and APO**

26. The MPCA uses a forum process in cases that may involve a non-forgivable penalty. Swafford prepared a Case Development Form and an Administrative Penalty Order Penalty Calculation Worksheet to facilitate a forum discussion in which the MPCA staff would determine what violations occurred and assess the appropriate penalty.<sup>29</sup>

27. In determining the appropriate penalty, the forum consulted the APO Penalty Calculation Guidance policy, which 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 Guidance policy and Worksheet use a matrix to determine whether the potential for harm to natural resources was

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<sup>26</sup> Ex. 17.

<sup>27</sup> Ex. 12.

<sup>28</sup> Ex. 13.

<sup>29</sup> Test. of R. Swafford; Ex. 15; Ex. 21.

minor, moderate or major, and whether the deviation from compliance was minor, moderate, or major.<sup>30</sup>

28. The Guidance policy and Worksheet permit the base penalty to be adjusted (enhanced or mitigated) for willfulness of culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require.<sup>31</sup>

29. The MPCA held a forum discussion on September 18, 2008. The forum considered the information presented in the Case Development Form and determined that three violations had occurred and that those violations were serious. The forum reasoned that:

[The violations were serious] because they resulted in nuisance conditions to waters of the state. The regulated party failed to minimize, recover or abate the discharges to waters of the state and exacerbated negatively the already impaired water. Immediate notification of the State Duty Officer and the MPCA by a discharger is critical as it gives the MPCA the ability to respond to a discharge in a timely manner.<sup>32</sup>

30. The MPCA determined that the violations were repeat based on the previous APO issued to Thein in 2002.<sup>33</sup>

31. The MPCA determined that the Potential for Harm factor was Major and that the Deviation from Compliance factor was Moderate. The MPCA reasoned that:

The potential for harm was realized and is **Major** because: 1) there was a direct discharge of sediment, drilling mud and chemically contaminated wastewater (industrial waste) to waters of the state; 2) silt-laden water is very high in TSS [Total Suspended Solids], and exacerbates negatively to this impaired water; and 3) Roberts Creek/Cedar River are impaired for Turbidity; turbidity/TSS is imperative to this violation.

The deviation from compliance is considered **Major** (sic) because: 1) The regulated party failed to notify the MPCA, nor did they make an attempt to minimize, abate or prevent pollution to waters of the state. The immediate notification to the MPCA allows the MPCA to adequately respond to discharges and make appropriate evaluations to determine what actions should be taken to prevent further impact to the environment and recovery of waste materials. It is also critical that the RP [Regulated Party] rapidly recover discharged material and take actions to minimize pollution in order

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<sup>30</sup> Exs. 20-21; Test. of K. Moon.

<sup>31</sup> Ex. 20-21.

<sup>32</sup> Exs. 15, 21; Test. of R. Swafford.

<sup>33</sup> Ex. 21; Test. of R. Swafford; Test. of Ken Moon.

to minimize the environmental impact from the discharge to the receiving waters of the state.<sup>34</sup>

32. The MPCA determined the base penalty range for a major potential for harm and a moderate deviation from compliance was \$3,500 to \$8,000. The MPCA set the base penalty amount at \$7,500. The MPCA matrix for calculating the base penalty is shown below:<sup>35</sup>

		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		

33. The forum addressed the enhancement or mitigation of the base penalty by considering the factors of willfulness/culpability, history of past violations, other factors such as justice may require, and economic benefit. The forum determined that a 20 percent enhancement was appropriate because of Their's prior violations in 2002. The penalty was not enhanced or mitigated pursuant to any other factor.<sup>36</sup>

34. The forum determined that the penalty was non-forgivable because the violations were serious.<sup>37</sup>

35. On December 29, 2008, the MPCA issued an APO to Their. The APO found three violations: 1) Minn. R. 7053.0205, subp. 2 (Nuisance Conditions Prohibited);<sup>38</sup> Minn. R. 7050.0210, subp. 13 (Pollution Prohibited) and Minn. Stat. § 115.061 (Duty to Notify and Avoid Water Pollution). Under Minn. Stat. § 116.072, the MPCA required Their to pay a \$9,000 non-forgivable penalty, provide a detailed description of steps it would take to ensure that waste from its well drilling activities do not enter waters of the state at future drilling sites, and submit a plan that would ensure that the agency will be contacted in the event of a discharge.<sup>39</sup>

<sup>34</sup> Ex. 21.

<sup>35</sup> Ex. 21; Test. of K. Moon.

<sup>36</sup> Ex. 21; Test. of K. Moon.

<sup>37</sup> Ex. 21; Test. of K. Moon.

<sup>38</sup> This violation was previously found at Minn. R. 7050.0210, subp. 2. It was renumbered after the AVL letter was issued. Test. of R. Swafford.

<sup>39</sup> Ex. 18.

36. On January 7, 2009, Thein appealed the APO and requested an expedited hearing pursuant to Minn. Stat. § 116.072, subd. 6.<sup>40</sup>

37. On January 30, 2009, the MPCA issued a Notice of and Order for Hearing regarding this matter.<sup>41</sup>

38. At the hearing, Mark Thein stated that he received adequate notice of the hearing.<sup>42</sup>

39. 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 Minnesota 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 improper. Pursuant to Minn. Stat. § 116.072, subd. 6(a), if the Respondent requests an expedited hearing, the Commissioner of MPCA must notify Respondent of the time and place of the hearing at least 20 days before the hearing. The Notice of and Order for Hearing in this matter was issued on January 30, 2009 – five days before the hearing.<sup>43</sup>

3. Although the Notice of and Order for Hearing was untimely, Respondent stated that he had adequate notice of the hearing. Accordingly, Respondent has waived any argument that the APO should be dismissed because of the Commissioner's untimely Notice.

4. The Department has satisfied all other all relevant substantive and procedural requirements of law and rule, and this matter is properly before the Administrative Law Judge.

5. The MPCA has the burden to establish by a preponderance of the evidence that Thein 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

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<sup>40</sup> Notice of and Order for Hearing.

<sup>41</sup> Notice of and Order for Hearing.

<sup>42</sup> Test. of M. Thein.

<sup>43</sup> Notice of and Order for Hearing.

penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).<sup>44</sup>

6. The MPCA proved by a preponderance of the evidence that Thein discharged sediment and chemically-contaminated wastewater to waters of the state (Roberts Creek) and that this discharge caused nuisance conditions of excessive suspended solids, material discoloration and turbidity in violation of Minn. R. 7053.0205, subp. 2.

7. The MPCA proved by a preponderance of the evidence that Thein discharged sediment and chemically-contaminated wastewater to waters of the state (Roberts Creek) and that this discharge caused pollution of excessive suspended solids in violation of Minn. R. 7050.0210, subp. 13.

8. The MPCA proved by a preponderance of the evidence that Thein failed to notify the MPCA that a discharge of sediment-contaminated wastewater to waters of the state had occurred and that Thein also failed to rapidly recover discharged material and take actions to minimize and abate the pollution, in violation of Minn. Stat. § 115.061.

9. 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 MPCA provided adequate notice of violations under this provision.

10. The Commissioner has the authority to assess penalties of up to \$10,000 for violations of MPCA 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.

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<sup>44</sup> Minn. Stat. § 116.072, subd. 6(c).

11. Their's prior violations, for which it was issued an APO in 2002, are relevant to the current APO.

12. 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 MPCA has shown that the present violations were serious, and therefore a non-forgivable penalty is appropriate.

13. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum, the \$9,000 penalty assessed by the MPCA against Their is reasonable and supported by the record in this matter.

14. 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.

15. 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 violations and penalty set out in the Administrative Penalty Order issued on December 29, 2008, to Their Well Company, Inc.

Dated: March 5, 2009.

s/Raymond R. Krause  
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RAYMOND R. KRAUSE  
Chief Administrative Law Judge

Reported: Digitally Recorded; Not Transcribed.

**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 Paul Eger, 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**

On December 29, 2008, Thein was issued an APO for discharging sediment and chemically-contaminated wastewater to Roberts Creek, a water of the state, and for failing to take immediate remedial action to minimize the pollution and nuisance conditions. The discharge arose from Thein's well-drilling activities on the Akkerman Manufacturing site near Brownsdale, Minnesota. Two citizen complainants notified Mower County officials that discharge was entering Roberts Creek and causing turbidity, discoloration and foaming. Thein admits that it drilled at the Akkerman site on June 30, 2008, and July 2, 2008, and that it had used a drill foam and approximately 500 gallons of water per minute during the drilling process. Thein further admits that it realized the discharge water would eventually reach Roberts Creek, approximately 3,100 feet away from the well site, because water "flows downhill."

Despite the fact that Thein admitted the actual discharge to Roberts Creek, it disputed the violations and the penalty for various reasons. First, Thein argued that its due process rights had been violated because the AVL it received in July 2008 alleged that the discharge into Roberts Creek occurred on July 7, 2008, when in fact the citizen complaints were received, and the alleged violations occurred, on July 1 and July 2. Thein argues because the date was misstated in the AVL, it could not mount a defense to the alleged violations. Although it is true that the AVL included the wrong date of discharge, the APO included the correct discharge date of July 1, 2008. The MPCA is statutorily obligated to provide "a concise statement of the facts alleged to constitute a violation" and "a reference to the section of the statute or rule" that has been violated in the APO. The MPCA complied with this requirement. While it is unfortunate that the AVL included the wrong violation date, the MPCA corrected its error in the APO and Thein was able to mount a defense against the violations and penalty. Thein was not denied its due process rights.

Second, Thein argued that the violation was unavoidable and that the suggested BMPs, such as a containing basin or silt pit, were unrealistic. Because of the vast amount of water that was required to drill the well at the Akkerman site – approximately 240,000 gallons of water in eight hours – Thein argues that no BMPs could be used to prevent the discharge into Roberts Creek. While Thein may be correct that the

suggested BMPs would have been inadequate, it does not excuse the violations. Their should have considered the suggested BMPs and amount of discharge before it started its drilling process. If it doubted the adequacy of the BMPs, it should have consulted with MPCA before it began drilling. The fact that the suggested BMPs were inadequate does not excuse the violation that occurred.

Third, Their argued that the damage to the stream was negligible because the MPCA never tested the discharge and because the drill foam it used at the Akkerman site has been approved by the Minnesota Department of Health for use in potable wells. The statutes and rules preclude the discharge of sediments and industrial waste into any waters of the state so as to cause any pollution or nuisance conditions. The evidence offered here was that discoloration, foaming and turbidity were visible in Roberts Creek, and that those conditions were attributable to Their's discharge of well-drilling water from the Akkerman site. There is no requirement that the MPCA measure the amount of suspended solids before or after a discharge into the water of the state. The evidence demonstrates violations of Minn. R. 7053.0205, subp. 2, Minn. R. 7050.0210, subp. 13, and Minn. Stat. § 115.061(a).

Finally, Their argued that the assessed penalty was excessive because Their did not realize that the water entering the stream was discolored; it did not gain economic benefit; it misunderstood the previous APO issued in 2002; and because the gravity of the violation was not serious. The ALJ finds that the MPCA established that its calculation of the base penalty was reasonable. The MPCA calculated the base penalty pursuant to the factors set forth in Minn. Stat. § 116.072. The MPCA determined the violations were serious because they resulted in nuisance conditions to a water of the state and because Their failed to mitigate the conditions and notify the Agency that the discharge had occurred. The MPCA determined the Potential for Harm was Major because there was a direct discharge of industrial waste into a water of the state; silt-laden water is high in total suspended solids; and because Roberts Creek and the Cedar River are impaired for turbidity. Although the evidence failed to demonstrate that Their discharged wastewater into the Cedar River, the discharge into Roberts Creek has been established. Therefore the MPCA did not err in determining the Potential for Harm was Major because of the turbidity classification of Roberts Creek. The MPCA determined the Deviation from Compliance was Moderate because Their failed to mitigate the nuisance conditions or notify the Agency that the discharge had occurred. The MPCA's base penalty calculation was reasonable. The resulting impact was serious and a nonforgivable penalty is appropriate.

Likewise, the MPCA reasonably enhanced the penalty because of Their's prior violations. Their violated the same rules and statute in 2002. Though Their may have misunderstood the corrective action outlined in the 2002 APO, it was not error for the MPCA to enhance the penalty based on those previous violations. The enhancement was reasonable and supported by the record.

**R. R. K.**

