

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty
Order Issued to Alan Odenthal

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter initially came on for hearing before Administrative Law Judge Barbara L. Neilson on September 9, 2010, at 9:30 a.m. at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. Respondent Alan Odenthal did not appear at the September 9, 2010, hearing. Because of potential issues with the Respondent's receipt of notice of the hearing, the hearing was rescheduled for November 3, 2010.

The Respondent also failed to appear for the November 3, 2010, hearing. On November 4, 2010, the Minnesota Pollution Control Agency filed a motion requesting that the Respondent be found in default. The OAH record remained open until November 24, 2010, for receipt of a response from the Respondent. No response was received.

Lawrence W. Pry, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (MPCA).

Alan Odenthal (Respondent) did not appear in person or through counsel.

STATEMENT OF ISSUES

There are two issues presented in this case:

(1) whether the MPCA properly concluded that the Respondent violated 40 C.F.R. §§ 503.15, 503.16, 503.17, and 503.33; Minn. R. 7080.0130, 7080.0170, 7080.0175, 7083.0720, 7083.0730, 7083.0760, and 7080.2450; Sibley County Ordinance 300.14.3; and Nicollet County Ordinance 730.1, 730.2, and 730.4; and

(2) if so, whether the \$9,625 penalty assessed by the MPCA is reasonable.

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

FINDINGS OF FACT

1. On December 15, 2009, the MPCA issued an Administrative Penalty Order to the Respondent, Alan Odenthal. The Administrative Penalty Order documented violations identified by MPCA staff on August 24, 2008, based on an inspection at the Michael Foods/Crystal Farms installation, a review of the Respondent's land application documents, and other materials supplied to the MPCA.¹

2. The Respondent subsequently requested an expedited hearing concerning this matter.²

3. On August 17, 2010, the MPCA sent by first-class mail a copy of the Notice and Order for Expedited Hearing under Revenue Recapture Rules (Notice and Order for Hearing) to the Respondent at 28583 State Highway 22, Gaylord, MN 55334.³

4. On September 2, 2010, the MPCA re-sent the Notice and Order for Hearing with attached Exhibit A (the Administrative Penalty Order and accompanying cover letter) to the Respondent.

5. The Notice and Order for Hearing scheduled the hearing to take place on September 9, 2010, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

6. The Respondent did not appear at the September 9, 2010, hearing. He did not contact the Administrative Law Judge before the hearing to seek a continuance or request any other relief.

7. By letter dated September 17, 2010, the MPCA requested that the Respondent be found in default based on his failure to appear at the September 9, 2010, hearing. The MPCA indicated in its letter that it had discovered that the Notice and Order for Hearing mistakenly had been sent to the wrong street address on State Highway 22, but argued that the Respondent had received adequate notice and a default determination remained appropriate.

8. On September 22, 2010, the Administrative Law Judge sent a letter to Respondent at the correct address that had been supplied by the MPCA (29563 State Highway 22). In the letter, the Judge informed the Respondent that he had working ten days to contest MPCA's request for a default judgment.⁴

¹ See Letter to Respondent from MPCA (Dec. 15, 2009) attached to Notice of and Order for Expedited Hearing, Ex. A.

² Notice of and Order for Expedited Hearing at 12-13.

³ See copy of envelope attached to Letter from MPCA to ALJ (Sept. 22, 2010). It appears that the Certificate of Service relating to this mailing incorrectly indicated that the information was sent to 29583 State Highway 22.

⁴ Letter from ALJ to Respondent (Sept. 22, 2010).

Respondent never responded to the letter or contacted the Office of Administrative Hearings or the MPCA.

9. By letter received September 28, 2010, the MPCA informed the Administrative Law Judge that the Order and Notice for Hearing dated August 17, 2010, had been returned to the Attorney General's Office marked "unclaimed."⁵

10. On October 4, 2010, the Administrative Law Judge denied the MPCA's request for default judgment due to several potential issues with service of the original Notice and Order for Hearing. The Administrative Law Judge directed the MPCA to obtain a new hearing date from the OAH Docket Coordinator and serve an amended Notice and Order for Hearing on the Respondent at his correct address.

11. On October 12, 2010, the MPCA sent a second Notice and Order for Hearing to Respondent by first-class mail at 29563 State Highway 22, Gaylord, MN 55334 (Respondent's correct address).⁶

12. The second Notice and Order for Hearing stated that the hearing would take place on November 3, 2010, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

13. The Notice and Order for Hearing specifically notified the Respondent that failure to appear at the hearing may result in a finding that Respondent is in default, that the MPCA's allegations contained in the Notice and Order for Hearing may be accepted as true, and that the MPCA's proposed action may be upheld.⁷

14. The Respondent did not appear for the hearing, nor did Respondent contact the Administrative Law Judge prior to the hearing to seek a continuance or request any other relief.

15. On November 4, 2010, the MPCA requested that the Respondent be found to be in default based on his failure to appear at the November 3, 2010, hearing.

16. By letter dated November 5, 2010, the Administrative Law Judge sent a letter to Respondent at 29563 State Highway 22 enclosing a copy of the MPCA's default motion and informing him that he had ten working days from receipt of the letter to contest MPCA's request that he be found to be in default.⁸ As of the date of this Report, the Respondent has not submitted any response or contacted the Administrative Law Judge or the Office of Administrative Hearings.

⁵ MPCA letter to ALJ (Sept. 22, 2010).

⁶ Affidavit of Service by U.S. Mail (Oct. 12, 2010).

⁷ Notice and Order for Hearing at 13.

⁸ Letter from ALJ to Respondent (Sept. 22, 2010).

17. Because Respondent failed to appear for the hearing, failed to provide any reason for that failure, and failed to contest the MPCA's request that he be found to be in default, the Respondent is deemed to be in default.

18. Pursuant to Minn. R. 1400.8560, the allegations contained in the Notice and Order for Hearing are taken as true and incorporated by reference into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50 and 116.072, subd. 6.

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. Under Minn. R. 1400.8560, a default occurs when a party fails to appear without the prior consent of the judge. If the agency appears at a hearing but the party against whom the agency intends to take action does not, the allegations in the Notice and Order for Hearing shall be taken as true and deemed proved without further evidence.

5. The Respondent is in default as a result of his failure to appear at the November 3, 2010, hearing.

6. The Respondent failed to keep maintenance records, receipts of lime purchases, pH samples, temperature readings or holding times, and thereby failed to dispose of septage, in violation of 40 C.F.R. part 503, and Minn. R. 7080.2450, subp. 6.⁹

7. The Respondent failed to include results of pH sampling, temperature readings, and holding times on sampling sheets, failed to keep records relating to testing and liming, and failed to show that he met compliance monitoring requirements, in violation of 40 C.F.R. §§ 503.15 and 503.33.

⁹ The MPCA also alleged that Respondent violated Minn. R. 7080.0175, subp. 6. However, that rule was repealed in early 2008, (see 32 State Reg. 1347 (January 28, 2008)), and the Agency has not demonstrated that the violations occurred while that rule was in effect or that the current rules impose the same requirements.

8. The Respondent failed to keep records to demonstrate that he properly monitored each container of domestic septage applied to the land, in violation of 40 C.F.R. § 503.16.

9. Respondent failed to maintain required documentation related to the land application of domestic septage, in violation of 40 C.F.R. § 503.17.

10. Respondent failed to verify that pathogen and vector attraction reduction were met, and failed to report the actual number of acres that received septage and the maximum amount of septage that could be applied to each acre, in violation of 40 C.F.R. part 503 and Minn. R. 7083.0720 and 7083.0730.

11. Respondent failed to comply with Nicollet County ordinances requiring that an “as-built” be supplied within 30 days after installation; installed a mound system without the required amount of top and cover soil; did not have the final cover around the sewage tanks crowned or properly sloped; failed to comply with Sibley County Zoning requirements pertaining to the installation of subsurface sewage treatment systems; failed to meet the requirements for proper notification or submittal of required reports and certification statements; and hindered or otherwise interfered with the inspection of one of his installations, in violation of Nicollet County Ordinance 750, Sibley County Zoning Ordinance, Article 300, Section 300, and Minn. R. 7083.0720 and 7083.0760.

12. Respondent failed to install the subsurface sewage treatment system as required, failed to submit required documents, and interfered with the inspection process, in violation of Sibley County Zoning Ordinance, Article 300, Section 300, and Nicollet County Ordinances 730.1, 730.2, and 730.4 by.¹⁰

13. The MPCA properly considered the statutory factors in Minn. Stat. § 116.072, subd. 2, in assessing an administrative penalty in the amount of \$9,625. There has been no showing that the amount of the penalty is unreasonable.

¹⁰ The MPCA also alleged that Respondent violated Minn. R. 7080.0130 and 7080.0170. However, those rules were repealed in early 2008 (see 32 State Reg. 1347 (January 28, 2008)), and the Agency has not demonstrated that the violations occurred while those rules were in effect or that the current rules impose the same requirements.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner AFFIRM the Administrative Penalty Order issued to Alan Odenthal.

Dated: December 3, 2010.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Default.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the MPCA will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 116.072, subd. 6(e), 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.