

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

In the Matter of the Administrative Penalty Order
Issued to Thomas Stonich

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson on May 3, 2010, conducted a hearing in this matter at the Offices of the Minnesota Pollution Control Agency, 525 Lake Avenue, Suite 400, Duluth, Minnesota 55802. The OAH hearing record closed when the hearing ended on May 3, 2010.

Anne E. Cohen, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency Staff ("MPCA"). Thomas Stonich ("Petitioner") appeared on his own behalf and without counsel.

STATEMENT OF ISSUES

1. Did the Petitioner violate Minn. R. 7090.0030 and 7090.2010 by engaging in construction activity without first obtaining a National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") Construction Stormwater ("CSW") Permit ("CSW Permit")?
2. Did the Petitioner violate Minn. R. 7090.2040, by beginning or continuing construction activity without first completing and submitting the Stormwater Pollution Prevention Plan ("SWPPP") required by CSW Permit rules?
3. Did the Petitioner violate the requirements of the NPDES/SDS Construction Storm Water General Permit ("General Permit"), by failing to stabilize all exposed soil areas as soon as possible, but in no case later than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased?
4. Did the Petitioner also violate the requirements of the General Permit, by failing to implement sediment control practices on all down gradient perimeters before any up gradient land disturbing activities began?
5. Did the Petitioner violate the provisions of Minn. R. 7090.2010, subp. 3, by failing to implement Best Management Practices ("BMPs") to prevent sediment and construction debris from being introduced into wetlands and other waters of the state?

4. If the Petitioner did violate one or more of the above rules, were the violations serious, requiring imposition of a non-forgivable penalty, and was the assessed penalty reasonable and appropriate?

The Petitioner admits that the violations set forth in the Notice and Order for Expedited Hearing Under Revenue Recapture Rules (“Notice of Hearing”) occurred, but argues that the amount of the administrative penalty imposed by the Administrative Penalty Order (“APO”) is unreasonable under the circumstances.

The ALJ concludes that the Petitioner violated Minn. R. 7090.0030, 7090.2010, and 7090.2040, and that the MPCA therefore properly issued the APO dated June 30, 2010, to the Petitioner. However, the ALJ concludes that the nonforgivable monetary penalty of \$4,380.00 that was assessed by the MPCA was unreasonable because it failed to adequately consider the extent of Petitioner’s lack of willfulness. The ALJ therefore recommends that the monetary penalty be reduced to \$3,380.00.

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

FINDINGS OF FACT

Unpermitted Activities and Construction Work

1. At all times relevant to this proceeding, the Petitioner was the owner of certain real property in the NW/SW Section 16, T60, R21, French Township, St. Louis County, Minnesota (“Subject Property”). The property is also known as 12722 Strizich Road, Side Lake, Minnesota 55781.¹

2. A cartway (“Gravel Road”) runs through the Petitioner’s property that provides access to his home. Before the construction activities at issue in this proceeding began, a portion of the Gravel Road was located on hilly terrain with a steep 20% grade, which made it difficult for emergency and other vehicles to gain access to the Petitioner’s home. It is possible for storm water falling on that portion of the Gravel Road to drain into an adjacent, unnamed pond. The portion of the Gravel Road with the steep grade was also located about one-quarter mile from Pickeral Lake. That lake is too far away for storm water drainage from the Gravel Road to reach the lake.

3. Before the Petitioner’s construction activities began, the Gravel Road had an impervious surface and was not subject to soil erosion and deposition of sediment.² However, the soil underlying the Gravel Road was a sugar sand soil, with particles that are subject to erosion.³

4. For several years prior to 2009, the Petitioner had attempted unsuccessfully to secure the agreement of French Township to maintain the Gravel

¹ Exhibit (“Ex.”) 1; testimony (“test.”) of Thomas Stonich.

² Test. of T. Stonich and Paul Ojanen.

³ Test. of P. Ojanen.

Road leading to his home as a township road. However, sometime prior to September 2009, French Township informed the Petitioner that it might agree to maintain the Gravel Road as a township road if he were to remove the top 20 feet of part of the Gravel Road that was located on the hill with the 20% grade. Based on that representation, the Petitioner developed plans to remove the top of that portion of the Gravel Road and to level that road by using the excavated soil to fill the adjacent lower portion of the grade (“the Project” or “Site”).⁴

5. Thereafter, the Petitioner purchased the earth removing equipment necessary to construct the Project, and some time prior to September 15, 2009, he began construction activities to level a portion of the Gravel Road’s road bed, as he had planned.⁵ Those construction activities resulted in land disturbance of more than one acre.⁶

6. Under federal and Minnesota law,⁷ a CSW permit is required for construction activities that result in land disturbance of equal to or greater than one acre or less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.⁸ The MPCA is the responsible authority for issuing and enforcing those permit requirements in Minnesota.⁹

7. Before the Petitioner began work on the Project, he was unaware that the construction activities that he planned required a CSW permit.¹⁰ He therefore did not apply for and obtain a CSW permit before beginning his construction activities and disturbing the land.¹¹

8. Paul Ojanen is the Resource Conservationist for the North Saint Louis Soil and Water Conservation District (“NSLSWCD”) and has served in that capacity for three years. Before becoming employed with the NSLSWCD, Mr. Ojanen was employed in several different positions with the Minnesota Department of Natural Resources (“DNR”). He has a Bachelor of Science degree in geography and a Master of Science degree in natural resource science and management.¹²

9. On September 15, 2009, Mr. Ojanen received a complaint that the Petitioner was engaged in road construction activities in the course of altering an existing Gravel Road across his property, and that the Petitioner’s construction activities were disturbing land 500 feet from a pond.¹³ A copy of that complaint was also sent to James Dexter, a Pollution control Specialist in the MPCA’s Stormwater Management

⁴ Test. of T. Stonich.

⁵ *Id.*

⁶ Test. of P. Ojanen; Ex. 9.

⁷ 40 C.F.R. §122.26(a)(1) and (9)(i)(B); Minn. Stat. § 115.07; Minn. R. 7090.0010 *et seq.*

⁸ Minn. R. 7090.2010, subp. 1(A); Minn. R. 7090.0080, subp. 4 (2007).

⁹ Minn. R. 7090.0020.

¹⁰ Test. of T. Stonich.

¹¹ *Id.*

¹² Test. of P. Ojanen.

¹³ Ex. 1.

Unit.¹⁴ On September 16 and 17, 2009, Mr. Ojanen made site inspections of the Site.¹⁵ While on the Site, Mr. Ojanen encountered the Petitioner, notified him of the permit and SWPPP requirements, and advised him to consult the MPCA website for further information about the permitting process.¹⁶

10. After consulting the MPCA website about the CSW permit program and SWPPP requirements, the Petitioner emailed Mr. Ojanen on September 17, 2009, indicating that he had begun drafting a permit application. The Petitioner also stated that he had obtained hay bales for temporary erosion control, and that he would be purchasing material for a silt fence. Finally, the Petitioner requested a further on-site meeting with Mr. Ojanen to obtain further advice about CSW Permit program requirements.¹⁷

11. On September 25, 2009, Mr. Ojanen again met with the Petitioner at the Site. At that time, Mr. Ojanen did not observe any disturbance of wetlands, and he advised the Petitioner to avoid disturbing any wetlands or other waters. Mr. Ojanen also expressed concern about erosion because of the steep grades along the road and the sandy soil. At that time, the Petitioner had installed some silt fencing and was planning on installing more; he also indicated that he would be hiring a contractor with a straw mulcher. However, Mr. Ojanen believed that those grades at the Site could only be properly stabilized by natural vegetation.¹⁸

12. After the September 25, 2009, meeting with Mr. Ojanen, the Petitioner purchased additional silt fencing and continued installing it around disturbed land areas on the Site. However, before he could finish installing the silt fencing, circumstances required him to discontinue work on the Project in order to provide care for his elderly parents, both of whom became ill and partially disabled by serious medical conditions. Among other things, the Petitioner did not finish installing all of the silt fencing.¹⁹

13. On October 30, 2009, Mr. Dexter conducted a site inspection of the Project. While at the Site, Mr. Dexter took photographs of the land disturbances that he saw.²⁰ He also used a laser range finder to prepare a scaled map of areas of disturbed land. That scaled map indicated that approximately 1.9 acres of land had been disturbed by the Petitioner's construction activities.²¹ Mr. Dexter later transferred the coordinates he had taken of the disturbed areas onto an earlier aerial photograph of the Petitioner's property and its general vicinity.²² During his October 30th site visit, Mr.

¹⁴ Ex. 5.

¹⁵ Test. of P. Ojanen.

¹⁶ *Id.*; Ex. 2.

¹⁷ Ex. 3.

¹⁸ Test. of P. Ojanen; Ex. 6.

¹⁹ Test. of T. Stonich.

²⁰ Test. of James Dexter; Ex. 8.

²¹ Test. of J. Dexter; Exs. 9 and 10.

²² Ex. 13.

Dexter did not see evidence that sediment or eroded soil had been introduced into the adjacent pond or surrounding wetland.²³

14. Thereafter, by letter dated November 12, 2009, Mr. Dexter advised the Petitioner of the October 30, 2009, site visit. He further advised the Petitioner that his construction activities had taken place without a CSW Permit and therefore violated Minn. R. 7090.2010. Mr. Dexter also noted several violations of General Permit requirements.²⁴

15. In a telephone conversation on November 15, 2009, Mr. Dexter advised the Petitioner that because the Petitioner was no longer actively working the construction site, the disturbed areas needed to be stabilized with vegetation.²⁵

16. On November 24, 2009, Mr. Dexter conducted a second site inspection of the Petitioner's Project. While on the Site, Mr. Dexter again took photographs of the land disturbances that he saw.²⁶ He saw that there were still approximately 1.9 acres of disturbed land, and that no further construction activities had occurred since his October 30, 2009, inspection.²⁷ Mr. Dexter noted there were no perimeter controls down slope from the areas of disturbed soils that drained down toward the adjacent pond, and that there were no inlet protection measures. However, Mr. Dexter did not see evidence that sediment or eroded soil had been introduced into the adjacent pond or surrounding wetlands.²⁸

17. Thereafter, in late November 2009, it appeared to the Petitioner that his parents' medical conditions had stabilized. He then finished installing silt fencing and placed rock and gravel beds at the inlets of the Project's 12-inch culverts. The Petitioner did not stabilize disturbed lands with vegetation before the winter season began.²⁹

18. By letter dated November 30, 2009, Mr. Dexter advised the Petitioner of the November 25, 2009, site visit. He again advised the Petitioner that the construction activities had been taking place without a CSW Permit and therefore in violation of Minn. R. 7090.2010. Mr. Dexter also indicated that there continued to be violations of several requirements of the General Permit.³⁰

19. In late December 2009 and early January 2010, the medical conditions of the Petitioners' parents again required his attention, and he took no action to obtain a CSW permit or to prepare a SWPPP until early February 2010.³¹

²³ Test. of J. Dexter and T. Stonich.

²⁴ Ex. 10.

²⁵ Test. of J. Dexter.

²⁶ Test. of James Dexter; Ex. 11.

²⁷ Ex. 12.

²⁸ Test. of J. Dexter and T. Stonich.

²⁹ Ex. 15; test. of T. Stonich.

³⁰ Ex. 10.

³¹ *Id.*; Exs. 22.

20. On January 6, 2010, the MPCA sent an alleged violation letter to the Petitioner, citing the following alleged violations of law:

- a. Violating Minn. R. 7090.0030 and 7090.2010 by engaging in construction activity without first obtaining a CSW Permit;
- b. Violating Minn. R. 7090.2040, by failing to complete and submit a SWPPP;
- c. Violating the requirements of the General Permit by failing to stabilize all exposed soil areas as soon as possible, but in no case later than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased;
- d. Violating the requirements of the General Permit, by failing to implement sediment control practices on all down gradient perimeters before any up gradient land disturbing activities began; and
- e. Violating the requirements of the General Permit, by failing to protect storm drain inlets by appropriate Best Management Practices (BMPs) during construction until all sources with potential for discharging into the inlet have been stabilized.

The alleged violation letter also listed the following corrective actions that would be considered in determining the seriousness of the violations:

1. Within 10 days after receipt of this letter, the Regulated Party shall apply for a CSW Permit and develop an SWPPP, in accordance with Part III.A. of the General Permit before the application is submitted.
2. Within 10 days after receipt of this letter, the Regulated Party shall submit to the MPCA a copy of the SWPPP that is developed for the site.
3. Within 10 days after receipt of this letter, the Regulated Party shall stabilize all soils in accordance with CSW Permit requirements.
4. Within 10 days after receipt of this letter, the Regulated Party shall install perimeter sediment control measures down gradient of disturbed soils on that portion of the site that drains to the pond north of the site.

Finally, the MPCA requested the Petitioner to submit a letter explaining why he did not obtain a CSW Permit after being told by Mr. Ojanen and the MPCA to do so.³²

21. On February 11, 2010, the Petitioner talked with Mr. Dexter by telephone and asked him what kind of training would be necessary in order to comply with the terms of a CSW Permit. Mr. Dexter informed the Petitioner that the University of

³² Ex. 14.

Minnesota Extension Service's Installer Training would be adequate for the scope of the work that the Petitioner would be performing.³³

22. By email message dated March 1, 2010, the Petitioner responded to the MPCA's alleged violation letter. He explained that shortly after September 25, 2010, when he had begun installing some silt fencing at the Project, it had been necessary for him to halt construction and further action on obtaining a CSW Permit in order to attend to the medical needs of his aged parents through January 2010. Thereafter, he had taken the following corrective actions:

- a. He had submitted NPDES Permit application ID No. 57600449 and had paid the required fee;
- b. He had completed a SWPPP and was submitting a copy of the template for review by the MPCA;
- c. He had installed silt fence on down gradients and had placed gravel beds at the inlets of the 12-inch culverts he had installed; and
- d. He had registered for an Erosion Control for Construction Installer course.

23. By letter dated March 2, 2010, the MPCA acknowledged the Petitioner's submission of a completed CSW Permit application for the Project. The MPCA also advised the Petitioner that he was required to comply with the terms of his permit regarding prevention of erosion and sediment control by employing the procedures established in his SWPPP. The agency further advised him that that he was required to upgrade his SWPPP and erosion prevention and sediment control BMPs as site and weather conditions dictate throughout the entire term of the Project.³⁴

24. On April 21, 2010, Mr. Dexter performed a desk review of the Petitioner's SWPPP Template, noted several deficiencies, and "red-lined" the deficiencies on the template. Thereafter, he provided the Petitioner with a copy of the "red-lined" template and requested the Petitioner to submit a plan to correct the deficiencies. The Petitioner has never submitted a plan to the MPCA for correcting the deficiencies in his SWPPP.³⁵

Subsequent Enforcement Actions

25. On May 6, 2010, the MCPA prepared a case development form to determine whether or not enforcement actions against the Petitioner under the SWPDA were warranted.³⁶

26. As part of the case development process, the MPCA convened an enforcement forum ("Enforcement Forum") that met on August 22, 2007, to determine

³³ Ex. 22.

³⁴ Ex. 16.

³⁵ Test. of J. Dexter; Exs. 18 and 20.

³⁶ Test of J. Dexter; Ex. 22.

whether the MPCA should proceed with an enforcement action and the type of enforcement action to be considered. After considering the evidence of potential violations by the Petitioner of applicable MPCA rules and the similarity of those potential violations to other enforcement cases, the enforcement forum recommended that the MPCA issue an APO to the Petitioner.

27. At the same time, the MPCA prepared an Administrative Penalty Order (APO) Penalty Calculation Worksheet to be used in determining the 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.³⁷ 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”):

		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				

28. 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.³⁸

29. The Enforcement Forum considered the information presented in the Case Development Form and the APO worksheet and determined that the Petitioner’s violations of applicable rule were serious, stating:

The failure to apply for and receive the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Construction Stormwater (CSW) Permit (Permit) and failure to prepare a Stormwater Pollution Prevention Plan (SWPPP) **are considered serious violations.**

³⁷ Tr. pp. 210-214; Ex. N.

³⁸ Ex. 23.

The Permit is the primary compliance tool of the CSW program and is intended to minimize harm to water resources from construction sites both during and after construction. The Permit requirements and the SWPPP are also intended to ensure that operators are familiar with the site and with the risks related to stormwater run-off from the site. Failure to obtain the Permit and prepare a SWPPP increases the likelihood that impacts to the environment will result from construction activities. In addition, the failure to prepare erosion and sediment control BMPs on the site increases the likelihood that sediment which has eroded from the site will impact nearby surface waters, including a pond. For all of the above reasons, the violations are serious.³⁹

30. The Enforcement Forum also found that the Potential for Harm factor for Violation Group #1 should be rated as Moderate because:

To obtain the permit, site operators must certify that they understand and accept the conditions of the permit, which are intended to minimize harm to the environment from construction activities. The permit requires site operators to develop a Stormwater Pollution Prevention Plan (SWPPP) for the project prior to commencing construction activities. Preparation of the SWPPP requires familiarity with the site and with risks posed by stormwater runoff from the site, both during and after construction. The SWPPP addresses site-specific details essential to protecting water resources from impacts related to construction activities. Failure to obtain the permit reduces the likelihood that site operators will anticipate and avoid harm to water resources from construction activities. This increases the potential that harm will occur. Though failure to obtain the Permit and prepare the SWPPP increases the potential for harm to water resources, this failure does not necessarily result in actual environmental harm.⁴⁰

31. The Enforcement Forum found that the Deviation from Compliance for Violation Group #1 was Major because:

State rule requires that the permit be obtained for any activities disturbing land equal to or greater than one acre in area. Failure to obtain the permit violates state rule. A prerequisite for obtaining permit coverage is the preparation of the SWPPP that addresses site-specific stormwater controls. The failure to obtain a permit and prepare a SWPPP is likely to result in a high level of deviation from compliance with the permit requirements at a construction site. The permit application is the only notice that the MPCA received regarding the proposed project. Failure to apply for a permit may preclude the MPCA from conducting regulatory functions (e.g., site inspections and review of the SWPPP) that ensure compliance with the permit at the construction site. The failure to obtain a

³⁹ *Id.*

⁴⁰ *Id.*

permit and prepare a SWPPP is considered a major deviation from compliance.⁴¹

32. The Enforcement Forum determined the base penalty for Violation Group #1 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, stating:

This places the penalty in the range of \$2,000 -\$5,000. There is no reason to deviate from the middle of that range.⁴²

33. The Enforcement Forum determined that the Potential for Harm for Violation Group #2 was minor because:

The SWPPP violations cited are paperwork violations and do not in and of themselves create any increased potential for harm. Onsite soils are a clean sand and rapidly infiltrate runoff. The drainage classification of native soils is "somewhat excessively drained". Down-gradient of the disturbed areas there is an existing woodland buffer in excess of 100' that would capture any potential sediment that was discharged from the Site before the sediment reached the pond. There were no impacts to surface waters. Because of these factors, **the Potential for Harm from the Group #2 violations is considered Minor.**⁴³

34. However, the Enforcement Forum determined that the Deviation from Compliance was Major because:

The failure to include all of the requirements in a SWPPP could lead to an inaccurate evaluation of the Site and a false sense of compliance with Permit requirements. Even though land disturbing activities began in 2009, or before, no effort was made to stabilize disturbed solids for the duration of the activity. No perimeter sediment control BMP(s) were installed between disturbed solids and a down-gradient pond north of the disturbed soils. The deviation from compliance was aggravated by the Regulated Party's failure to correct all of the identified non-compliant items in a timely manner after being notified of the non-compliance in late November, 2009. Because of these factors, **the Deviation from Compliance from the Group #2 violations are (sic) considered Major.**⁴⁴

35. The Enforcement Forum determined the base penalty for Violation Group #2 using the range for minor potential for harm and major deviation from compliance (\$500 to \$2,000). The forum therefore set the total base penalty at \$500, stating:

⁴¹ *Id.*
⁴² *Id.*
⁴³ *Id.*
⁴⁴ *Id.*

The bottom of the box was selected due to the small size of the site and small number of violations of each count (i.e. two acres left unstabilized, approximately 150' of undisturbed vegetated upland buffer between the limit of disturbance and the pond, only one culvert left unprotected []).⁴⁵

36. The Enforcement 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 an enhancement of \$380.00 was appropriate because the Petitioner had gained economically in that amount by not having to pay for the amount of hay or straw that would have been necessary to stabilize disturbed soils. No enhancement or mitigation was given for willfulness or culpability, history of past violations, or "other factors as justice may require."⁴⁶

37. Based on the component penalty calculations, the forum determined that the appropriate penalty was \$4,380.00, and that the penalty would be non-forgivable because the violations were serious.⁴⁷

38. On June 30, 2010, the MPCA issued an APO to the Petitioner. The APO was based on a violation of Minn. R. 7090.2010, subp. 1, pertaining to CSW Permit requirements and a violation of Minn. R. 7090.0210, subp. 3, pertaining to compliance requirements for unpermitted construction activities. It was also based on the following violations of requirements set forth in the General Permit: (1) failing to stabilize all exposed soil areas as soon as possible, (2) failing to implement sediment control practices on all down gradient perimeters before any up gradient land disturbing activities began; and (3) failing to implement BMPs to prevent sediment and construction debris from being introduced into waters of the state. Pursuant to Minn. Stat. § 116.072, the MPCA required the Petitioner to pay a \$4,380.00 non-forgivable penalty.⁴⁸

Procedural Findings

39. The Petitioner requested review of the APO by an administrative law judge pursuant to Minn. Stat. § 116.072, subd. 6(a).⁴⁹

40. On June 9, 2008, the Commissioner of the MPCA ("Commissioner") issued the Notice and Order for Hearing, and this contested case proceeding ensued.

41. The Notice of Hearing scheduled the hearing in this matter for January 26, 2011. For good cause, the ALJ subsequently rescheduled the hearing for May 3, 2010, at the Offices of the Minnesota Pollution Control Agency, 525 Lake Avenue, Suite 400, Duluth, Minnesota 55802.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ex.24.

⁴⁹ Ex. 25

42. At the hearing, the MPCA introduced Exhibits 1 through 25 into the hearing record; it subsequently withdrew Exhibits 7 and 21. The Petitioner introduced Exhibits A and B into the hearing record.⁵⁰

Other Findings

43. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

44. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

45. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

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 MPCA have jurisdiction of this proceeding pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

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

3. The MPCA has the burden to establish by a preponderance of the evidence that the Petitioner violated applicable laws or rules, and that issuance of the APO was warranted. If the MPCA establishes the alleged violations, the ALJ 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).⁵¹

4. The Petitioner admitted that he committed the violations of law that were alleged in the APO.⁵²

5. The MPCA therefore proved by a preponderance of the evidence that:

a. The Petitioner engaged in construction activities, within the meaning of Minn. R. 7090.0800, subp. 4, on the Subject Property;

⁵⁰ Exs. F and Q.

⁵¹ Minn. Stat. § 116.072, subd. 6(c).

⁵² Test. of t. Stonich.

b. The Petitioner violated Minn. R. 7090.0030 and 7090.2010 by engaging in construction activity without first obtaining a Permit;

c. The Petitioner violated Minn. R. 7090.2040, by beginning or continuing construction activity without first completing and submitting a Stormwater Pollution Prevention Plan (“SWPPP”), as required by a Permit; and

d. The Petitioner violated the requirements of the General Permit by: (1) failing to stabilize all exposed soil areas as soon as possible, (2) failing to implement sediment control practices on all down gradient perimeters before any up gradient land disturbing activities began; and (3) failing to implement BMPs to prevent sediment and construction debris from being introduced into waters of the state.

6. 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

7. Minn. Stat. § 116.072, subd. 5(b), provides that for a serious violation, the Commissioner may issue an order with a penalty that will not be forgiven after the corrective action is taken. The MPCA has shown that the present violations were serious, and that a non-forgivable penalty is therefore appropriate.

8. An administrative law judge may recommend a change in the amount of the proposed penalty if the administrative law judge determines that, based on the factors in Minn. Stat. § 116.072, subd. 6(c), the amount of the penalty is unreasonable.⁵³

9. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum that follows, the ALJ determines that the \$4,830.00 penalty assessed by the MPCA insufficiently reflects the extent of the Petitioner’s lack of willfulness. The \$4,830.00 penalty is therefore, to that extent, unreasonable.

⁵³ Minn. Stat. § 116.072, subd. 6.

10. 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.

11. These Conclusions are reached for the reasons discussed in the Memorandum that follows, which is hereby incorporated into these Conclusions.

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

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner AFFIRM the violations set forth in the Administrative Penalty Order issued to Thomas Stonich on June 30, 2010, but REDUCE the administrative penalty imposed by that Administrative Penalty Order to \$3,380.00.

Dated: June 1, 2011.

s/Bruce H. Johnson

BRUCE H. JOHNSON

Administrative Law Judge

Reported: Digitally recorded; 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

When the Petitioner began work on his road modification project, he was unaware that what he planned to do required a CSW Permit from the MPCA.⁵⁴ He first became aware of that requirement on September 16, 2009, when Paul Ojanen was making a site inspection and told the Petitioner that both a permit and erosion control measures were required.⁵⁵ Thereafter, the Petitioner purchased some silt fencing and began installing it on the Site. About ten days later, the Petitioner again met with Mr. Ojanen at the Site. At that time, Mr. Ojanen indicated that silt fencing alone would probably be insufficient for erosion control measure, and that the Site could only be properly stabilized by natural vegetation.⁵⁶ In response, the Petitioner indicated that he was planning to install more silt fencing and to hire a contractor with a straw mulcher.⁵⁷ However, shortly thereafter, both of the Petitioner's parents elderly became partially disabled by serious medical conditions. That distracted the Petitioner, and he discontinued construction on the Project and installation of erosion control measures at the Site. He also did not follow through at that time with efforts to obtain a CSW Permit and to prepare an SWPPP for the Project.

The hiatus in the Petitioner's construction activities and efforts to control erosion and obtain a CSW Permit continued until mid-November 2009, when James Dexter of the MPCA staff made a telephone call to the Petitioner. Mr. Dexter advised the Petitioner that because the construction site was no longer being actively worked, the disturbed areas needed to be stabilized with vegetation.⁵⁸ There was no testimony at the hearing about the efficacy of attempting to stabilize the construction site with natural vegetation in mid-November. In any event, the Petitioner responded in late November 2009 by installing additional silt fencing and placing rock and gravel beds at the inlets of the Project's 12-inch culverts. The Petitioner, however, did not attempt to stabilize disturbed lands with vegetation before the winter season began.⁵⁹

The Petitioner's next communication from the MPCA was a letter dated November 30, 2009, advising him that the construction activities had been taking place without a CSW Permit and therefore in violation of law.⁶⁰ However, the evidence established that in late December 2009, the Petitioner again became distracted by the medical conditions of his parents,⁶¹ and he also took no further action to obtain a CSW Permit until after the MPCA issued an alleged violation letter to him on January 6, 2010. Thereafter, in early February 2010, the Petitioner made arrangements to obtain the training he would need to install adequate erosion and sediment control measures for his Project,⁶² and by March 2, 2010, he had obtained a CSW Permit and prepared an

⁵⁴ Finding 6.

⁵⁵ Finding 8.

⁵⁶ Finding 10.

⁵⁷ *Id.*

⁵⁸ Finding 14.

⁵⁹ Finding 16.

⁶⁰ Ex. 10.

⁶¹ Finding 17.

⁶² Finding 20.

SWPPP.⁶³ However, there continued to be unresolved issues between the Petitioner and the MPCA over the adequacy of his SWPPP and the necessity of actions to stabilize the slopes of his road bed with natural vegetation.⁶⁴ When it appeared that no progress was being made in resolving those issues, the MPCA issued an APO to the Petitioner on June 30, 2010.

The Petitioner was clearly extremely slow to respond to the MPCA's efforts to bring his Project into compliance with the law. But much of his slow response occurred because he was frequently distracted by the need to care for elderly parents who were in ill health. Thus, the Petitioner's noncompliance can be considered willful only in the sense that he chose to concentrate his efforts on resolving his parents' difficulties rather than on prompt compliance with his regulatory responsibilities. There is no evidence that his violations were willful in the sense that he has intended to evade his regulatory responsibilities and the requirements of the law. In short, although the Petitioner has been frustratingly slow to comply with the requirements of the CSW program and his violations were not completely inadvertent, the ALJ concludes that they also were not intentional.

The law permits an ALJ to recommend a reduction in the amount of a penalty assessed by the MPCA if the ALJ concludes that the penalty is unreasonable in light of the factor of willfulness.⁶⁵ The Commissioner, in turn, may consider that factor in determining the final amount of the penalty to be assessed.⁶⁶ The ALJ concludes that the penalty assessed upon the Petitioner was unreasonable because the MPCA staff gave insufficient consideration to the extent of the Petitioner's lack of willfulness. The ALJ therefore recommends that the administrative penalty be reduced from \$4,380.00 to \$3,380.00.

B. H. J.

⁶³ Findings 21 and 22.

⁶⁴ Findings 22 and 23.

⁶⁵ Minn. Stat. § 116.072, subds. 2(b) and 6(c).

⁶⁶ Minn. Stat. § 116.072, subds. 2(b).