

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Paul S.
Dougherty, III, for Metal Coating
Company of Minneapolis and
MCM Industries, Incorporated.

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on January 25, 1991. An additional day of hearing was held on February 1, 1991.

Appearing on behalf of the Minnesota Pollution Control Agency staff was Special Assistant Attorney General Joseph G. Maternowski, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155. Appearing on behalf of Paul S. Dougherty, III, Metal Coating Company of Minneapolis and MCM Industries, Incorporated was Thomas D. Jensen, of the firm of Lommen, Nelson, Cole Stageberg, P.A., 1800 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402.

The record in this matter closed on February 15, 1991, upon receipt of post-hearing final submissions from the parties.

This Report is a recommendation, not a final decision. The Commissioner 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. 116.072, subd. 6(e), 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. Within those five days, parties may comment to the Commissioner on the recommendations, and the Commissioner must consider the comments in making his final decision. Parties should contact Joseph Maternowski to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether the conditions observed by MPCA staff during February and June 1990 inspections constitute violations of State rules and statutes.
2. Whether the proposed monetary penalty is reasonable; and
3. Whether Paul S. Dougherty, III, can be held personally liable for the

penalty specified in the Administrative Penalty Order.

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

FINDINGS OF FACT

Background of the Company and Paul Dougherty

1. MCM Industries, Inc. is a corporation organized under the laws of Delaware. Its predecessor business operations go back to the 1930s, when they were started by Paul S. Dougherty, Sr., the grandfather of Paul S. Dougherty,

III. The corporation operated businesses in California, Illinois and Minnesota, but in recent years, its only operation has been in Minneapolis. Staff Ex. 35 and Dougherty testimony.

2. MCM Industries, Inc. was qualified to do business in Minnesota under the name MCM Industries, Inc., and as of June 8, 1990, it was still in good standing with the Minnesota Secretary of State's office. Defendant's Ex. 7.

3. The Minnesota operations were referred to variously as Metal Coating Company of Minneapolis, MCM, and MCM Industries. At all times relevant to this proceeding, the Minnesota operations were carried out by an unincorporated entity, which was a division of MCM Industries, Inc., the Delaware corporation. For the remainder of this Report, this will be referred to as "MCM".

4. Paul S. Dougherty, Jr., was the president and majority owner of the Delaware corporation from the early 1960s until his death in 1982. Upon his death, Paul S. Dougherty, III, became the president and majority (51%) owner of the corporation. The remaining 49% of the stock is owned by his two sisters.

5. Paul S. Dougherty, III, was born in 1957. He was thus 25 years old when he assumed control of the business and he is 34 years old at the current time.

6. In 1961, MCM purchased the property located at 3170 Fifth Street Southeast in Minneapolis. The property contained a single-story, wood and metal frame building. From 1961 onward, MCM operated a hot dip galvanizing facility at that location. At the peak of its Minnesota operations, MCM employed approximately 20 people there.

7. Briefly stated, hot dip galvanizing is a process that applies zinc to carbon steel. Zinc protects the steel from rusting. Hot dip galvanizing involves a number of steps. The steel is first dipped into a "pickling tank" in order to clean it off. The solution in MCM's pickling tank consisted of

sulfuric acid, which is heated to a temperature of approximately 200 degrees Fahrenheit. After dipping in this hot acid, the steel is taken to a quenching tank, where the acid is rinsed off. Then, depending on the degree of cleanliness achieved, it might go back into another pickling tank and then be rinsed again in a quenching tank or, if it is clean enough after the first pickling operation, it might go into a flux tank. The flux solution aids in the bonding process between zinc and steel. After it has gone into the flux solution, the steel is dipped into the zinc tank where it is coated with zinc. It is then removed from the zinc tank, and allowed to dry. Dougherty testimony.

8. By the late 1980s, the building housing MCM's operation had become "decrepit". City inspectors had expressed concern about workers' safety, equipment breakdowns were causing production interruptions, and changing business plans all resulted in a decision to build a new building on the site.

In the summer and fall of 1988, a new building was designed and then constructed. The cost was \$1.2 million. The new facility was completed in January of 1989. After it went into operation, it quickly became apparent that there was a serious ventilation problem in the pickling room. The pickling solution was maintained at a temperature of near 200 degrees Fahrenheit, but the pickling room was unheated, so the ambient temperature in the pickling room was quite cold in the winter months. This temperature difference resulted in very large amounts of acidic mist in the pickling room, which the ventilation system could not handle properly. This mist not only was a serious visibility hazard, but also it froze on the walls and floor, and condensation dripped from the walls and ceilings. During the winter months of January, February and March of 1989, the sometimes dense mist created serious problems. An employee slipped on the icy floor, and OSHA was called out and inspected the facility. Inspections resulted in Orders being issued against the firm. One of the Orders was that the floor be mopped or "squeegeed" as often as was necessary to remove the liquid and prevent ice buildup. This was done daily, using Squeegees, with the liquid being placed back in the pickling tanks. Dougherty testimony.

9. After the mist problem reappeared in the fall and early winter of 1989, MCM hired consulting engineers to design a new ventilation system. A design was prepared which would cost approximately \$150,000, including engineering costs. MCM decided to go ahead with the system, and closed down the facility on approximately April 1, 1990. It was the intent of the company to be closed for only one week, at which time it would reopen. However, construction and an installation of the new ventilation system took longer and cost more than expected, the contractors walked off the job, and after six weeks, the facility had still not reopened. MCM's lenders were unwilling to extend it any more money, and foreclosures, lawsuits and seizures of assets began, The company never resumed operations, the last production having taken place in March of 1990. By February of 1991, most of the MCM assets were in the process of being sold by a liquidator, and it appeared highly unlikely that the company would ever resume operations Dougherty testimony.

Background of Early Inspections and knowledge of-Rules

10. Due to the nature of the chemicals used in the steel galvanizing

business, MCM has been under the scrutiny of several state and local regulatory agencies, including the MPCA, the State Department of Labor and Industry's OSHA Division, the Hennepin County Department of Environment and Energy, the Metropolitan Waste Control Commission, and the City of Minneapolis. The company has been inspected and in contact with these various agencies on numerous occasions, as is the case with similar businesses in the metal coating industry. The company's "record" of compliance does not contain any notable incidents prior to the 1990 inspections and the Administrative Penalty Order at issue here. However, there have been some prior contacts which placed the company on notice with regard to certain of the rules which are at issue in this proceeding. Those will be set forth below.

11. On January 4, 1989, the Agency and Hennepin County conducted a joint inspection of MCM. Violations noted during that inspection included a failure to label containers of hazardous waste with the words "hazardous waste" clearly labeled or marked and visible for inspection. Ex. 10.

12. On March 14, 1989, a Hennepin County employee visited the company, and noted mist from the pickling tanks condensing on the ceiling and walls, and then dripping onto the floor. In a March 16 letter to the company, he speculated that drag out from parts removed from the pickling tank dripping on the floor might also be occurring, and urged that if that were the case, preventative modifications must be made to the production processes. The letter notes that liquid on the floor is pushed out the door with Squeegees, but suggests that the MCPA may want to comment on that practice. A copy of the letter was sent to the MCPA. Ex. 12.

13. On February 13, 1990, the facility was inspected by the Agency and Hennepin County. The company was in operation at the time of the inspection (which began at approximately 9:30 a.m.) and approximately 20 employees were at work. The inspectors noted that the pickling tanks were uncovered, and that vapor was rising from the pickling tanks due to the temperature difference between the pickling liquid and the ambient air. The floor of the pickling room was pockmarked with half-inch deep holes, particularly near the pickling tanks. The inspectors believed that the holes were caused by corrosion from pickling acid. The inspectors also noted that liquid was pooled on the pickling room floor for almost the entire length of the pickling room, except for the area near the flux tank. There were two doors. During the time that the inspectors were in the pickling room, employees walked through the pooled liquid as they were entering and exiting the pickling room from the outdoors, and a forklift truck drove through the pooled liquid and then out the door. In addition to this liquid leaving the pickling room on the shoes of the employees and the tracks of the vehicles moving into and out of the room, mud and snow was being tracked into the pickling room from the outdoors. The inspectors asked the company employee who was with them, Darrell Weigold, what caused the liquid to be on the floor, and Weigold responded that it was due to condensation from the pickling tank vapor, but that it was cleaned up daily and put back into the pickling tanks at the end of the day. Weigold indicated that in the past, it had been pushed out of the door, but that now it was being put back in the pickling tanks.

14. One of the Agency inspectors conducted field tests of the pooled liquid's pH. The tests of the liquid on the floor revealed that it was of a very low pH, between zero and one. These field tests were conducted with pH litmus paper having an accuracy of plus or minus one-half of a pH unit. Ex.

and 45.

15. After the inspection was over, the inspectors drove around parts of the facility by car, and noted that the foundation had baseline corrosion along the north and west walls. The building (which had been built in late 1988 and occupied in early 1989) consists of a concrete slab with metal siding. Photographs taken in June of 1990 (but which accurately depict the condition of the building in February of 1990 as well) vividly show that along the north and west sides of the building, the junction between the siding and the concrete (which junction is approximately nine inches above the ground surface level) has been corroded. In some places, the corrosion has eaten all the way through

the metal siding, whereas in others it has not. This condition is shown in photographs. Exhibit 7A-7G. The same set of photographs also depicts the pockmarked floor on the inside of the building in Exhibit 7L through 7U. Of particular interest is Exhibit 7R, which shows the extent of the pooling. Again, although the pictures were taken in June, they accurately depict the condition of the floor in February as well.

16. Immediately adjacent to the pickling room was the paint area. When the company was considering constructing its new building back in 1988, it envisioned expanding the scope of its operations from simple galvanizing to add a painting and sandblasting operation. These were included in plans for the new building. However, the painting and sandblasting business never got off the ground, and MCM did, at most, \$500 worth of painting for others. MCM did paint some of its own doors and racks in the new facility. During the February 1990 inspection, there was a five-gallon can of waste paint found on the paint booth. Its contents had not been analyzed, and the can was unlabeled. This was pointed out to Darrell Weigold, an MCM employee, during the inspection, and Weigold got a piece of chalk and wrote the words "Hazardous Waste/Waste Paint" on the can.

17. As part of the February 1990 inspection, the company's hazardous waste contingency plan was reviewed. The plan which was given to the inspectors was a 1985 plan which made no mention of a paint booth. The plan also listed a Dick Miller as an emergency coordinator. Dick Miller was no longer employed by the company by 1990.

18. As part of a February 1989 letter enumerating matters discovered in a January 1989 inspection, the company was informed that:

Contingency plan. Plans to expand operations by adding painting operations will necessitate the need for fire concerns to be addressed in the contingency plan

(Ex. 15.)

19. Following the February 1990 inspection, the Agency inspectors spoke with Dougherty and Weigold separately. The inspectors went over their concerns with Dougherty, spending most of the time talking about the liquid on the floor of the pickling room. Dougherty was informed that the solution was considered a corrosive hazardous waste due to its very low pH, and that it had to be cleaned up and addressed. He was also told about the five-gallon paint can and the outdated contingency plan. Dougherty explained that the liquid on the floor was due to condensation of vapors from pickling tanks, that OSHA was requiring that it be cleaned up daily (which the company was doing), and that

the company was installing a new ventilation system, including demisters and tank covers, as a long-term solution to the problem.

20. Following the February inspection, Agency personnel determined that it would be appropriate to wait until the new ventilation system was installed, and then reinspect to see if it had cured the problem of the liquid on the floor. The Agency determined to take no action at that time, and no violation letters or other formal communications were given to Dougherty or the company.

21. In early April, the Agency received a complaint regarding working conditions in the pickling room, including the existence of strong acid fumes and sulfuric acid on the floor. The Agency investigated and determined that the facility was not back in operation. During May and June, the Agency made several checks to see if the company had gone back into operation, but it had not. Finally, in late June, the Agency determined to reinspect.

22. On June 28, Agency inspectors made an unannounced visit to the facility. The facility was not in operation, and there were only a handful of people present.

23. The June 28 inspection revealed few changes from what the inspectors had seen in February, except that the facility was not operating in June. Another major change was that there were now three large holes (each approximately three feet square) in the roof above the pickling area. These were the result of removal of the old ventilating system when the new one was installed. Otherwise, little had changed since February. There was still liquid on the floor of the pickling area. Samples were taken for laboratory analysis, and field tests were also performed with pH strips. The field tests showed pHs in the range of one to three. The five-gallon paint can was still in the painting area of the facility, but no chalk marks were visible, and no other label had been affixed to it. Its contents had not been analyzed. The inspectors asked to see the current contingency plan and were shown the same 1985 plan as before, with no changes made to it.

24. The inspectors took photographs of both the interior and exterior of the building. As noted earlier, these photographs do document extensive pockmarking of the cement floor in the pickling room, as well as structural damage to the baseline of the building.

25. At the end of the June inspection, the inspectors met with Dougherty, and briefly reviewed their observations with him.

26. The subsequent laboratory analysis showed that the pH of the floor samples taken from the pickling room floor was 2.9, 3.4, 2.8 and 1.8. Ex. 18. These are generally higher than the readings found in February. However, it is likely that rain from the holes in the roof diluted the acid on the floor between April and June.

Post-Inspection Activities

27. After receiving the pH figures from the laboratory, the Agency did, on July 13, send a letter to Paul Dougherty at MCM's Minneapolis address. The letter indicated that four violations had been observed at the February and

after the facility had failed to reopen in April, all employees were terminated. Some management employees, including Dougherty, were not paid for the last two weeks that they had worked. In June, a number of the employees complained to Dougherty, and he agreed to meet with them to see what could be done about paying them for the last two weeks. It was agreed that they would meet at the plant on June 28. It was mere happenstance that that was the same day that the inspectors chose to come.

June inspections, and asked MCM to review the Agency's findings for accuracy. The letter indicated that if the findings were incorrect, MCM should respond in writing by July 27 and explain why they should be changed. The letter further indicated that the Agency would consider MCM's response in determining whether any enforcement action would be appropriate. The letter was sent by certified mail, and was received by Paul Dougherty on July 17. Ex. 19.

The letter cites four separate violations. Two related to the hazardous waste (the corrosive acid) on the floor of the pickling room, one related to the failure to label the paint can, and the last one related to the failure to update the contingency plan.

28. Unbeknownst to the Agency, Dougherty picked up the letter on his way out of town to look for work. He had been unemployed (and without a salary) since April or May, and had been spending his time looking for a new job. Dougherty did not respond to the letter until August 24, and then only by a telephone call asking for more time to respond. Ex. 25.

29 On August 2, 1990, having heard nothing from Dougherty or MCM, Bruce Hall calculated the penalty which he believed to be appropriate given the violations cited in the July 13 letter.

30. Hall calculated a total penalty of \$10,000, which is the maximum possible under the Administrative Penalty Order statute. The penalty was calculated pursuant to an 11-page document entitled "Administrative Penalty Memorandum: Penalty Calculation: Directions", and the calculations are set forth on a nine-page document entitled "Penalty Calculation Worksheet: Administrative Penalty -- Hazardous Waste" which are in the record as Ex. 21 and 22, respectively. The directions have not been adopted as rules, and thus are not enforceable as such.

31 The Agency concluded that MCM had previous documented hazardous waste violations, and calculated the penalty as if MCM were a previous violator.

32. The penalty calculation breaks down into two parts. First, there is the determination of a base penalty, and secondly, there are adjustments made to that base penalty. The adjustments are a relatively small part of the total penalty. In this case, for example, the base penalty was determined to be \$7,500, while the adjustments were \$2,500.

33. The \$7,500 base penalty was determined from a matrix which sets forth penalty amounts based upon two factors: (1) The willfulness of the violations,

and (2) the gravity of the violations. The directions set forth criteria to be considered when determining willfulness and gravity.

Other Chronological Events

34. There was no contact with the company after the inspection of June 28, until August 24. After calculating the penalty on August 2, Hall sent a letter to MCM on August 16. This letter (Ex.) recited the fact that the company had not responded to the July 13 communication, that the company's telephone had been disconnected, and that the Agency had recently determined that two other violations occurred at the facility. The first of these

violations, which was a violation of the duty to notify and avoid water pollution, related to the liquid pooled on the floor. The second was a violation of a requirement that waste be evaluated, relating to the waste paint material in the five-gallon bucket. This August 16 letter closed with a request that the company respond immediately. Ex. 20.

35. On August 24, 1990, Hall received a telephone call from Dougherty. Dougherty told Hall that he had just gotten a chance to look at the July 13 letter, and that he wanted more time to respond. Dougherty stated that he needed to contact other MCM employees in order to prepared his response, but that he was going out of town until the first week in September. Hall told Dougherty that he had already had enough time to get information to the Agency and that an enforcement action was forthcoming, including monetary penalties. It was agreed that Dougherty would draft a response to the July 13 letter before the enforcement action was issued. Ex. 25.

36. On September 14, 1990, the Agency sent an Administrative Penalty Order to the Company at its Minneapolis address. The Penalty Order alleges six violations and assesses a \$10,000 nonforgiveable penalty. There is no indication that this Order was ever picked up by any person.

37. On September 19, Hall called Dougherty at his home to inform him that the APO had been sent. Dougherty indicated that he thought that a letter of explanation had been sent to the MPCA, but Hall responded that he was not aware of any such letter. Dougherty then contacted his attorney, who faxed a portion of a submittal to Hall. It was received by Hall on September 17.

38. The company's response is contained in a letter dated September 12, 1990. The letter responds to each of the allegations set forth in the Agency's July 13 letter. It notes that MCM suspended its operations as of May 1, and has not been operating at all since then. The Company's letter encloses a copy of a September 1989 hazardous waste manual prepared for MCM by Pace Laboratories, as well as a September 1989 Employee Right-To-Know program. The former document continues to list Dick Miller as an alternate emergency coordinator, but lists Paul Dougherty as the primary emergency coordinator. Ex. 28 at p. 3 and 15.

39. On September 19, Hall and Dougherty talked again by telephone. Dougherty told Hall that he had been "fired" or "laid off" by the company's creditors, that the plant was shut down, and that he no longer has any interest or employment with MCM. Dougherty told Hall that he had no responsibility for any penalties or hazardous waste management by the company, but that he would try to find out who was responsible for the property. Dougherty indicated that

the acidic pickling solution was still in the tanks and on the floor of the plant. Ex. 29.

40. On October 3, the Agency sent a letter to Mr. Thomas Dougherty, an attorney with the Lommen, Nelson law firm. The letter indicates that after a review of the company's September 17 submittal to the Agency, the Agency had determined not to retract any of the violations or penalties cited in the September 14 Administrative Penalty Order. The Agency indicated its concern that a large volume of pickling solution remained in the tanks and on the floor of the facility. It enclosed a copy of the Order, and urged that the violations be corrected and the Order be responded to by October 17. Ex. 30.

41. On October 22, 1990, Hall contacted Thomas Jensen, an attorney with the Lommen, Nelson law firm. Jensen informed Hall that it appeared that MCM Industries would be willing to accept the Administrative Penalty Order if they were given more time to comply. Ex. 31. On November 12, Jensen wrote to Hall, indicating that MCM was no longer operating, but that it would like more time to seek correction of the pickling solution in the tanks. Ex. 32.

42. On December 5, 1990, a new Administrative Penalty Order was issued. The Order was directed to Paul S. Dougherty, III at his Minneapolis home address, as well as to MCM Industries, Incorporated at its Dover, Delaware registered office. The cover letter indicates that the company had failed to accept the September 14 Order, and thus the Agency was serving the Delaware corporation, as well as Dougherty individually. The APO itself lists six violations, and a number of correction action steps required to be completed by January 2, 1991. It also assesses a \$10,000 nonforgiveable penalty.

43. On December 26, 1990, Hall contacted Thomas Jensen, who informed Hall that MCM and Dougherty would be requesting an administrative hearing to appeal the APO. Hall inquired about the status of the pickling solution in the tanks, and was told that no action had been taken to remove or dispose of the waste.

44. By letter dated December 21, Jensen filed a request for an administrative hearing on behalf of MCM and Paul Dougherty. This was received on December 27.

45. On January 3, 1991, the Agency issued its Notice of and Order for Hearing in the matter, setting the hearing for January 25.

46. The hearing lasted for two days, January 25 and February 1. The parties agreed to waive the limitation of Minn. Stat. c 116.0, subd. 7, regarding the submission of written argument. The record closed on February 15, upon receipt of memoranda from both parties.

Activities of Paul S.-Dougherty III

47. At all times relevant hereto, Dougherty was President of the corporation and the majority owner of the stock. He was the highest level fulltime employee of the company.

48. Dougherty had a variety of duties. He spent much of his time attempting to raise money and increase sales, particularly in the last months of the company's operations. This often took him away from the building. Dougherty did not spend much time in the pickling room area. There would be weeks when he did not go into it at all. However, he was well aware of the mist problem and the presence of liquids on the floor resulting (in part) from that mist.

49. Dougherty is identified as the primary facility emergency coordinator in a 1985 manual for hazardous waste management (Defendant's Ex. 1) as well as in the 1989 manual (part of Ex. 28). In the Employee Right-To-Know written program (dated September 1989), he is charged with reviewing the company's container labeling system and updating it as required, as well as being responsible for the employee training and information programs. He is also charged with relations with outside contractors and their employees vis-a-vis hazardous chemicals. Ex. 28.

50. Dougherty was present during parts of both of the inspections at issue herein, and was personally informed of the inspectors' findings on both occasions. All correspondence of record regarding inspections (both Hennepin County and MPCA) was directed to him.

51. As president and principal shareholder, Dougherty had the ability to prevent and control the conditions which are alleged to be violations. There was no one with any greater authority than he.

ALLEGED VIOLATIONS AND PERTINENT STATUTORY AND RULE EXCERPTS

The final Administrative Penalty Order, dated December 5, 1990, lists six violations. Each of those violations will be set forth below, along with the relevant statutory and rule excerpts identified in the Order.

1. The Agency alleges: The company has not had its waste paint-related materials sampled, and analyzed in an appropriate laboratory to determine if the waste is hazardous.

Minn. Rules pt. 7045.0214, subps. 1 and 2, provide in relevant part as follows:

Subp. 1. Any person who produces a waste..... must evaluate the waste to determine if it is hazardous. Material is determined to be a waste in accordance with the conditions specified under the definition of other waste material in part 7405.0020. . . .

Subp. 2. The person evaluating the waste must determine if the waste meets any of the following criteria for hazardous waste:

A. The waste is listed

B. The waste exhibits any of the characteristics of hazardous waste in part 7045.0131 by either:

(1) testing the waste according to the methods set forth..... ; or

(2) applying knowledge of the hazard characteristics of the waste in light of the materials with the processes used.

2. The Agency alleges: The company has failed to report to the MPCA that hazardous waste had spilled, leaked, or otherwise escaped from its sulfuric acid containing tanks. The company also failed to properly recover this waste acid once it had escaped from the tanks.

Minn. Rules pt. 7405.0275, subps. 2 and 3, provide, in pertinent part,
as
follows:

Subp. 2. Any person in control of a hazardous waste that spills, leaks, or otherwise escapes from a container, tank, or other containment system . . . shall immediately notify the agency if the hazardous waste may cause pollution of the air, land resources or waters of the state. The person shall use the agency's 24-hour telephone number

Subp. 3. Any person who generates a hazardous waste that spills, leaks, or otherwise escapes from a containers tank, or other containment system . . . shall recover the hazardous waste as rapidly and as thoroughly as possible and shall immediately take other action as may be reasonably possible to protect human life and health and minimize or abate pollution of the water, air, or land resources of the state.

3. The agency alleges: The company failed to label its container of waste paint-related material located in the paint booth area with the words "hazardous waste", as well as the identity of the waste.

Minn. Rules pt. 7045.0292, subp. 1, item C, provides, in pertinent part, as follows:

Subp. 1. A generator may accumulate hazardous waste on-site without a permit or without having interim status if:

C. tanks and containers are clearly labeled with the waste accumulation start date; alternatively, containers are so labeled while a clearly designated and legible log of tank transactions which includes accumulation start dates is maintained; all of these dates must be available for inspection.

In mid-March of 1990, the above-quoted language became effective. Prior to that date, the cited rule required each container to be marked with the accumulation start date (or a log be kept) and, in addition, the rule required that the words "hazardous waste" are clearly labeled or marked and visible for inspection on each container. After mid-March of 1990, that latter requirement was moved to item I of the same subpart. Item I now requires that the words "hazardous waste" and a description clearly identifying the contents be placed on each container. This matter is more fully discussed in the memorandum.

4. The Agency alleges: The company has not maintained and operated its facility so as to minimize the possibility of an unplanned sudden or nonsudden release to the air, land or water of hazardous waste or hazardous waste constituents which could threaten human health or the environment. This was

exhibited by the pooling of hazardous sulfuric acid waste acid on the floor of the work area in sulfuric acid containing tanks. This sulfuric acid waste was uncontained, accompanying employees and visitors were walking in it. Company equipment was also moving through the material. It was also apparent that this acidic hazardous waste had escaped from the building housing these tanks.

Minn. Rules pt. 7045.0292, subp. 1, item H (which references Minn. Rules 7045.0566, subp. 2) provides, in relevant part, as follows:

Subp. 1. A generator may accumulate hazardous waste on-site without a permit or without having interim status if:

H. the requirements of parts 7045.0558 and 7045.0566 to 7045.0576 are fulfilled regarding personnel training, preparedness, prevention, and contingency planning;

Minn. Rules pt. 7045.0566, subp. 2 provides, in relevant part, as follows:

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or nonsudden release to air, land, or water of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

5. The Agency alleges: The company failed to amend its contingency plan to address the change in operation of the facility by addition of a paint booth, and the subsequent hazardous waste produced by this operation. In addition, the company failed to immediately update its list of emergency coordinators to reflect current company personnel.

Minn. Rules pt. 7045.0572, subp. 6, items C and D, provide, in relevant part, as follows:

Subp. 6. The contingency plan must be reviewed, and immediately amended if necessary, whenever:

C. The facility changes in its design, construction, operation, maintenance, or other circumstances in a way that materially increases the potential for fires, explosions, or the release of hazardous waste or hazardous waste constituents, or changes the response necessary in an emergency:

D. The list of emergency coordinators changes.

6. The Agency alleges: The company failed to contain and recover hazardous waste sulfuric acid which had been released from its containment tanks. This uncontained hazardous waste acid then corroded through the building construction materials and was released to the environment.

Minn. Stat. 115.061 provides, in pertinent part, as follows:

It is the duty of every person to notify the agency immediately of the discharge, accidental or otherwise, of any substance or material under its control which, if not recovered, may cause pollution of waters of the state, and the responsible person shall recover as rapidly and as thoroughly as possible such substance or material and take immediately such other action as may be reasonably possible to minimize or abate pollution of waters of the state caused thereby.

7. Other pertinent statutes and rules. Minn. Rules pt. 7405.0020, subp. 66, defines "person" to mean:

any human being, any municipality or other governmental or political subdivision or other public agency, any public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, or any other legal entity, but does not include the pollution control agency.

Minn. Stat. 116.06, subd. 9, defines "land pollution" to mean:

. . . the presence in or on the land of any waste in such quantity, of such nature and duration, and under such conditions as would affect injuriously any waters of the state, create air contaminants or cause air pollution.

Based upon the foregoing 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 herein and authority to take the action proposed pursuant to Minn. Stat. 116.072, subds. 1 and 6 (1990), and Minn. Stat. 14.50 (1990).

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of law and rule have been fulfilled. The matter is, therefore, properly before the Administrative Law Judge.

3. The Agency has the burden of establishing the fact of the violations alleged by a preponderance of the evidence. Minn. Rule pt. 1400.8608 (1989).

4. 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 penalty proposed is determined to be unreasonable. Minn. Stat. 116.07, subd 6(c) (1990).

5. At the time of the inspections in February and June of 1990, MCM was a generator of hazardous waste.

6. The company has the legal responsibility to comply with all properly promulgated administrative rules of the Agency.

7. As a consequence of Findings 16 and 23, supra, the Agency has established a violation of Minn. Rules pt. 7045.0214, subps. 1 and 2 by failing to evaluate the waste paint-related materials.

8. As a consequence of Findings 13-15 and 23, Supra, the company has violated Minn. Rule pt. 7045.0275, subps. 2 and 3 by failing to notify the Agency of the escape of the sulfuric acid from the pickling tanks and its corrosion through the sides of the building and deposit (albeit minimal) upon the land. Failure to correct this problem constitutes failure to minimize or abate pollution.

9. As a consequence of Findings 16 and 23, supra, the company has violated Minn. Rule pt. 7045.0292, subp. 1, item C, by failing to label the five gallon can of waste paint-related materials according to the rule.

10. As a consequence of Findings 13-15 and 23, supra, the company has violated Minn. Rule pt. 7045.0566, subp. 2, by failing to maintain and operate its facility so as to minimize releases to the land of hazardous waste or hazardous waste constituents.

11. As a consequence of Findings 17 and 23, supra, the company has violated Minn. Rule pt. 7045.0572, subp. 6, items C and D, by failing to update its contingency plan in light of changed conditions and changes in personnel.

12. As a consequence of Findings 13-15 and 23, supra, the company has violated Minn. Stat. 115.061, relating to water pollution. \$el, Memorandum.

13. The Agency's calculation of the gravity of these violations as "serious" is unreasonable, and the \$10,000 fine is unreasonable.

14. As a consequence of the foregoing Conclusion, the administrative penalty must be recalculated. Assessing the gravity of the violations as "moderate" would be reasonable. A base penalty of \$3,500 would be reasonable. The adjustments to the base penalty have been justified as reasonable. Memorandum.

15. The Administrative Law Judge lacks both the subject matter jurisdiction and the personal jurisdiction over various lending entities to determine who is responsible for the corrective actions required by the Administrative Penalty Order. Norwest Equipment Leasing, Inc. and State Bank of Young America were not parties to this proceeding.

16. MCM Industries, Incorporated and Paul S. Dougherty, III are both

liable for the administrative penalty. The corporation owned and operated the facility during the time that the violations occurred, and Paul S. Dougherty, III personally participated (as discussed more fully in the Memorandum) and was a responsible corporate officer.

Based on the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner recalculate the administrative penalty in a manner consistent with this Report, and then proceed to collect that amount from MCM Industries, Inc. and Paul S. Dougherty, III.

Dated this 18th day of March, 1991.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded.

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

There are a few matters that require additional explanation. These include the extent of pollution required to sustain a violation, the reasonableness of the penalty, and the personal liability of Paul Dougherty. Each will be dealt with below.

I.

There were three violations based upon the sulfuric acid on the floor of the pickling room. Each of the rules (or statute) cited for those three violations requires a showing that the conduct may either threaten human health or the environment, or constitute pollution of air, water or land resources. In other words, not every release of a hazardous waste triggers the operation of the statute or the rules. Instead, the release must be of such a nature as to pose a risk to human health or the environment. Comparing the facts of this case to that requirement causes difficulties in deciding whether or not there were violations.

The initial starting point for this analysis is a close reading of the rules, with particular emphasis on the word "may" when it is used in phrases such as "may cause pollution" or "may affect human health". The statute and rules do not require a showing of pollution or negative impact on human health before requirements are triggered. Instead, the statutory scheme is intended to be preventative. The requirements are activated when there may be a

negative impact on the environment or human health. In that way, it is entirely consistent with other environmental statutes which are triggered by the potential, rather than the actuality, for environmental damage. See, for example, Minn. Stat. 116D.04, subd. 2a ("where there is the potential for significant environmental effects . . .") and 116D.02, subd. 5 (defining conduct by a person which "violates, or is likely to violate, any environmental quality standard . . .").

If MCM had allowed the tank walls to deteriorate to the point where they ruptured and hundreds of gallons of acid spilled out the doorway onto the ground, there would be no question but that the various rules at issue here were violated. But if, at the other extreme, an employee took an eyedropper full of acid from the tank, walked outdoors, and dropped one drop onto the ground, there would be no question but that the various rules had not been violated. What happened in this case, however, was that the acid was allowed to collect on the floor to the point where it corroded through the metal siding and some amount dripped down the side of the foundation onto the gravel surface of the ground. The exact amount is unknown. We do not know the flow, nor do we know the duration. We do not know if we are talking about a pint, a quart, a gallon, ten gallons, one hundred gallons, or more. Moreover, the record does not contain any evidence regarding how much acid, at what strength, and over what ground area would be necessary to "affect injuriously any waters of the state" as that term is used in Minn. Stat. 116.06, subd. 9, or "alter the chemical integrity of waters of the state", as those terms are used in Minn. Stat. 115.01, subd. 5.

It is concluded that the language "may cause pollution" is ambiguous, and therefore reference to the canons of construction contained in Minn. Stat. 645.16 (4) and (5) is appropriate. That statute provides that legislative intent may be ascertained by considering the object to be obtained and other laws upon the same or similar subjects. In the case of Greater, Morrison Sanitary Landfill, 435 N.W.2d 92 (Minn. App. 1989), the Court of Appeals was faced with similar ambiguity. The court reasoned as follows:

The Minnesota Legislature has devoted an entire chapter to set forth the state's environmental policy.

State agencies are directed that "to the fullest extent practicable"

they shall interpret the policies, rules and public laws of the state in accordance with the broad environmental policy objectives of Chapter 116D. Minn. Stat. 116D.03, subd. 1 (1986). Because it is designed to further the state's strong environmental policy, the closure law is remedial in nature; therefore, it should be liberally construed to effectuate the legislative intent to protect the environment. (Citations omitted).

Applying that standard to this case, particularly in light of the preventative thrust of the hazardous waste statute and rules, results in the conclusion that the statute and rules were violated when the company allowed the acid to eat through the building and spill out onto the land. It is more likely than not that the quantity of acid released was relatively minor, but that is more appropriately considered when looking at the size of the fine imposed for the violations.

II.

The legislature has specified that an administrative Law judge is not to casually tinker with the amount of fines. Minn. Stat. 116.072, subd. 6 (c), provides, in pertinent part, as follows:

The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.

The reference to "the factors in subdivision 2" is to a list of factors, specified by the legislature, to be considered in determining the amount of a penalty. Those factors are:

- (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 violation;
- (4) The number of violation;
- (5) The economic benefit gained by the person by allowing or committing the violation; and
- (6) Other factors as justice may require if the commissioner specifically identifies the additional factors in the commissioner's order.

The statute goes on to provide that for a violation after an initial violation, the commissioner shall, in determining the amount of a penalty, consider the factors listed above as well as the following:

- (1) Similarity of the most previous violation and the violation to be penalized;
- (2) Time elapsed since the last violation;
- (3) Number of previous violations; and
- (4) Response of the person to the most previous violation identified.

Although there were technically six violations, as a practical matter there were three. The first dealt with the acid on the floor, the second dealt with the five-gallon paint can, and the third dealt with the contingency plan.

Reviewing the factors listed above when considering the violations charged and proven compels the result that a \$10,000 fine is excessive and unreasonable, but that some lesser fine would be reasonable. The agency's guidelines for computing fines place a great deal of weight on the two factors that go into the base penalty, which are willfulness and gravity. The agency assessed the gravity factor as "major", which is the most severe assessment available. The administrative law judge cannot find that that assessment is reasonable. It would be reasonable to label the violations as "minor" or, at most, "moderate". Therefore, the Administrative Law Judge has recommended

that the violations be treated as "moderate", but that the lowest base penalty for that category (\$3500) be used. The Agency has demonstrated the reasonableness of its assessment of willfulness, as the company and Dougherty essentially ignored the notices of violation which were delivered to them

orally at the close of the February inspection, but even that assessment must be tempered by the fact that no written follow-up letter was sent after the February inspection, contrary to what Dougherty had come to expect from past county inspections.

The Administrative Law Judge has not calculated the revised penalty in absolute dollar amounts because he believes that is better left to the expertise of the agency. However, the calculation of the add-ons should be no more severe than was demonstrated in Exhibit 22.

III.

The final matter which bears additional explanation is the conclusion that Paul S. Dougherty, III, ought to be held personally liable for the amount of the penalty. There are three grounds for this conclusion: that it is allowed by the statute, Dougherty personally participated in the acts which led to the violation by virtue of his ignoring them, and that he is a responsible corporate officer. Each of these will be discussed below.

The statute authorizing administrative penalties, Minn. Stat. 116.072, makes no mention of any limitation on the type of entities who are subject to administrative penalty orders. Instead, it refers to "persons" throughout. Minn. Stat. 116.06 provides that except as otherwise expressly provided or indicated by the context, the term "person" means:

Any human being, . . . any public or private corporation, any partnership, firm. . . . any receiver, trustee, . . . or any other legal representative of any of the foregoing, or any other legal entity

It would be difficult to conceive of a more encompassing definition. Clearly, individuals and corporations both fall within it. The legislature has, on occasion, differentiated between individuals and organizations when specifying penalties for environmental actions. In Minn. Stat. 609 671, a person convicted of certain hazardous waste violations may be sentenced to pay a fine of not more than \$100,000, except that an organization may be sentenced to pay a fine of not more than \$1,000,000. If the legislature had intended to limit the application of the administrative penalties statute to entities, it could have done so. But there still remains the question of whether or not it is appropriate to assess an individual when there is an organization involved, as there is in this case. To answer that question, we must consider two of the common law bases for doing so.

The first common law theory under which individuals have been fined for corporate acts is the "personal participation" theory. In an early case, *State v. McBride*, 215 Minn. 123, 9 N.W.2d 416 (1943), the president and dominant person in a corporation was sentenced to jail after a corporate employee sold liquor illegally. The court stated the general rule to be as follows:

Although a director or other officer of a corporation is not ordinarily criminally liable for acts performed by other officers or agents of the corporation, he is criminally liable for his own acts, although done in his official capacity, if he participated in the unlawful act, either directly or as an aider, abettor, or accessory. . . . It is the official rule that an officer or agent of a corporation cannot avoid responsibility for his act on the ground

that it was done in his official capacity, nor can he assert that acts in corporate form are not his acts merely because they are carried on by him through the instrumentality of the corporation which he controls and dominates and which he has employed for that purpose.

9 N.W.2d 416, at 420. In that case, the corporate president was not even present at the time the liquor was sold, nor was there any direct evidence of his knowledge that it was being sold. Nevertheless, the court had no problem sustaining a "reasonable inference" that he had knowledge that illicit sales of liquor were being made. The facts regarding Paul Dougherty's knowledge of the conditions in the pickling room and the other violations cited go beyond the standard in McBride. After Dougherty was told of the violations in February, there is no need to rely on even "reasonable inferences" regarding his knowledge. Moreover, he was the primary emergency coordinator whose duties included overall hazardous waste management, and all notices of violations relevant to this proceeding, both written and oral, had been directed to him.

In the case of *Morgan v. Eaton's Dude Ranch*, 239 N.W.2d 761 (Minn. 1976), which was a civil tort action arising from a hayride accident, the court stated the rule as follows:

It is settled that a corporate officer is not liable for the torts of the corporation's employees unless he participated in, directed, or was negligent in failing to learn of and prevent the tort.

The cases [that] impose liability upon Eaton as an officer all involve officers who knowingly participated in, authorized, or negligently failed to prevent wrongful conduct.

The imposition of sanctions against corporate officers is particularly prevalent in the environmental area. In the case of *United State, v. Conservation Chemical Co.*, 628 F.Supp. 391 (W.D. Mo. 1985), the court surveyed a number of cases from around the country before concluding that personal liability was appropriate for a corporation's president who was responsible for the overall operation, who directed and controlled major repair and operations expenditures and who made decisions concerning environmental compliance. It was not necessary that he have actual "hands on" linkage with the specific facts that gave rise to the violations.

Another way of looking at the same problem is the "responsible corporate officer" doctrine. This doctrine imposes liability on the person who was in a position to prevent and correct the violations. *United States v. Dotterweich*, 320 U.S.277 (1943); *United States v. Park*, 421 U.S.658 (1974); *United States v. Johnson & Towers- Inc.*, 741 F.2d 1123 (3rd Cir. 1984); and *United States v. Hodges ex rel.*, 759 F.2d 557 (6th Cir. 1985). In our own Eighth Circuit, *United States v. Northeastern Pharmaceutical and Chemical, Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986) holds that it is not necessary to "pierce the

corporate veil" to impose personal liability on a corporate officer who had the ultimate authority to control the management of hazardous substances, because that person was in a position to prevent and correct the problems.

Paul Dougherty meets the tests of both of the common law doctrines described above.

A.W.K.