

3-2200-8710-2

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

In the Matter of the  
Administrative Penalty Order  
Issued to Sustane Corporation,  
1103 Main Street West,  
P.O. Box 19, Cannon Falls,  
Minnesota 55009

FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on April 18, 1994, at the Minnesota Pollution Control Agency (MPCA), First Floor Conference Room, 520 Lafayette Road, St. Paul, Minnesota. The record closed upon the submission of the last reply brief on May 10, 1994.

Richard P. Cool, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199, appeared on behalf of the Minnesota Pollution Control Agency. George O. Ludcke, Esq., Best & Flanagan, 4000 First Bank Place, 601 Second Avenue South, Minneapolis, Minnesota 55402-4331, appeared on behalf of Sustane Corporation.

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 which 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 ten 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 Commissioner Charles W. Williams, Minnesota Pollution Control Agency, Solid Waste Section, 520 Lafayette Road, St. Paul, Minnesota 55155-3898, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF THE ISSUES

1. Whether the discharge of wastewater on April 23, 1992, from cropland to an adjacent wetland constitutes a violation of Minn. Rules pt. 7070.0210 based upon a preponderance of the evidence, and if not, whether violation No. 1 should be dismissed.

2. Whether the discharge of wastewater on April 23, 1992, violated the terms of the Stipulation entered on August 27, 1991, based upon a preponderance of the evidence, and if not, whether violations Nos. 2 and 3 should be dismissed.

3. Whether the discharge of wastewater on April 23, 1992, violated MPCA Rules pt. 7001.1030, subp. 1, based upon a preponderance of the evidence, and if not, whether violation No. 4 should be dismissed.

4. Whether on September 5, 1992, wastewater from Sustane Corporation's runoff basin discharged into the intermittent stream in violation of the MPCA Interim Permit Number MPCA-I 1146(A), based upon a preponderance of the evidence, and if not, whether violation No. 5 should be dismissed.

5. Whether Sustane Corporation's failure to obtain an erosion monitoring survey in June of 1993 constitutes a violation of the Interim Permit Number MPCA - I -1146 (A), based upon a preponderance of the evidence, and if not, whether violation No. 6 should be dismissed.

6. Whether the \$4,560 nonforgivable penalty assessed against Sustane Corporation is reasonable under all the circumstances.

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

#### FINDINGS OF FACT

1. Sustane Corporation owns and operates a poultry manure storage and composting facility (hereinafter also referred to as the "Facility") located in Section 4 of Holden Township in Goodhue County, Minnesota. Craig Holden is the primary shareholder of Sustane Corporation and is the President. The Facility includes a composting pad approximately 6.9 acres in area, runoff diversion structures and a runoff collection and storage basin. Turkey manure and litter (bedding) are stored in windrows at the site and processed through composting to produce domestic fertilizer. The fertilizer is applied at other locations. Exhibits 8 and 9, pages 1-2.

2. Precipitation at the Facility, primarily from rainfall and snowmelt, comes in contact with the poultry manure being stored and composted. As a result of the precipitation, runoff which contains animal manure and manure related pollutants occurs at the Facility. The runoff is conveyed to the facility's runoff basin. Exhibit 9, page 2

3. The composting operation at the Facility began in 1981 without a permit. Exhibit 9.

4. The Feedlot Program staff from the MPCA first became aware of the Composting Facility on March 22, 1989, when a citizen complaint was received regarding runoff from the Facility to an intermittent stream south of the site. Exhibit 8, page 3.

5. In response to the citizen complaint, MPCA Staff inspected the Facility and discovered a potential pollution hazard from runoff due to the proximity of the stream to composting windrows. The compost windrows contain manure in various stages of composting. The concern of the MPCA Staff was that runoff from the windrows or composting area may carry pollutants to ground or surface waters. Exhibit 8, pages 3-4.

6. On June 27, 1989, MPCA Staff contacted Craig Holden, the owner and operator of Sustane Corporation to inform him of the concern regarding runoff from the composting site. Staff informed him that he was required to correct any existing pollution problems and obtain an Agency permit. Exhibit 8 page

7. In response to the environmental concerns raised by MPCA Staff, Sustane Corporation conducted site excavation in July of 1989, and constructed a composting pad and runoff collection basin. Sustane Corporation did not attempt to obtain prior review or approval of their construction plans from MPCA. Exhibit 8, page 4.

8. On August 8, 1989, MPCA Staff contacted Sustane Corporation and specifically requested an application for a feedlot permit for the Facility. On August 25, 1989, Sustane Corporation submitted an application for a permit for the Facility. The application included an as-built design for the Facility. Exhibit 8, page 4.

9. On August 25, 1989, Sustane Corporation submitted their initial permit application for the Facility. The as-built design for the Facility was rejected. Exhibit 8.

10. The design was rejected in part due to concerns that the runoff basin construction created a potential pollution hazard. Exhibit 8.

11. Sustane Corporation designed the runoff basin to collect runoff, and then slowly discharge the runoff through a standpipe to a grassed area adjacent to the intermittent stream bordering the site. Exhibit 8.

12. Upon discovery of the pad and runoff basin construction, MPCA again inspected the facility and informed Sustane that this method was not acceptable due to the short distance to the stream and the strength of the waste. Exhibit 8, page 4.

13. MPCA informed Sustane Corporation that the discharge would require a National Pollutant Discharge Elimination System (NPDES) permit from the Agency and that the discharge would not likely meet limits without further treatment. Exhibit 8, page 5.

14. On March 23, 1990, Sustane Corporation submitted revised plans for review to the MPCA. Said plans were rejected, again due to concerns over the runoff basin construction. Exhibit 8, page 5.

15. Subsequently, on about April 19, 1990, Sustane plugged the runoff basin outlet to the vegetated filter/buffer grass strip. Exhibit 9, page 3.

16. The runoff collected is presently applied to cropland. Due to limited basin storage capacity, frequent land application of the runoff is required. Exhibit 8, page 5.

17. On April 16, 1990, MPCA received a petition for an Environmental Assessment Worksheet (EAW) for this facility from local citizens. On May 14, 1990, that request was granted. Exhibit 8, page 6.

18. On May 8, 1990, MPCA Staff inspected the runoff basin and discovered that limestone was exposed due to erosion of the north sidewall of the runoff collection basin. The exposed limestone has the potential of acting as a conduit for runoff to move from the basin to ground water, creating a potential pollution hazard. Exhibit 8, page 5.

19. By letter dated May 30, 1990, MPCA requested that Sustane submit written plans detailing the corrective or protective measures that will be implemented to eliminate any potential pollution hazards at the Facility. Exhibit 9, page 4.

20. On October 23, 1990, MPCA received revised plans and specifications from Sustane Corporation designed by the Soil Conservation Service. Those plans were rejected by the MPCA by letter dated March 20, 1991, based upon concerns with runoff collection and the storage basin design. Specifically the clay liner design was not adequate. Exhibit 8, page 5.

21. On June 25, 1991, at a MPCA board meeting, Staff made several proposals regarding the Facility. The Staff proposed issuance of an Administrative Order to (1) regulate the ongoing operations at the Facility (2) establish a schedule for submittals needed to complete the EAW and permitting process. Sustane's permit application was held in abeyance until the EAW process was completed. The Board expressed some concerns and encouraged agency Staff and Sustane Corporation to enter into a stipulation agreement to specifically address concerns raised by the Board. Exhibit 8, page 3.

22. On July 23, 1991, a proposed stipulation was presented to the Board. The proposed stipulation was tabled, in part due to concerns raised by the Warsaw/Holden Townships Citizen's Group who requested that the Facility be shut down immediately. Exhibit 8, page 2.

23. On August 27, 1991, a revised stipulation Agreement between the MPCA and Sustane Corporation was presented to the Board. The Stipulation was effective from August 27, 1991 through May 28, 1992, the date the MPCA Interim Permit became effective. Exhibit 8.

24. On October 14, 1991, MPCA rejected Sustane's request to remove sediment from the bottom of the runoff collection basin. The request was rejected due to the insignificant gain in volume; less than 10% of the total volume of the basin. The small increase in volume was not deemed sufficient to pose a risk damage to the basin bottom and sidewalls from excavation. Exhibit 28.

25. MPCA staff placed on the agenda of the MPCA Board meeting held on March 24, 1992, approval of proposed findings of fact to authorize the issuance of a negative declaration, which would mean no necessity for an environmental

impact statement (EIS), for the Sustane compost facility redesign project. to concerns of citizens, more information was requested by the Board from Sustane.

26. At the April 27, 1992 Board meeting, Staff again requested that the MPCA Board approve said proposed findings and order. The Board vote was deadlocked.

27. At the May 26, 1992 Board meeting, the Board voted to accept Staff recommendation to authorize the issuance of a negative declaration regarding the need for an EIS. Said Order was signed by the Commissioner on May 27, 1992. Exhibit 12.

28. The second Water Quality Division Stipulation Agreement was signed by the President of Sustane Corporation and the Commissioner of the MPCA, and was effective on May 28, 1992. Exhibit 9.

29. On April 23, 1992, the Facility was diverting runoff water by using travelling irrigation gun to divert the runoff to cropland. The gun became mired in saturated soils, resulting in repeated application of wastewater to the cropland. Sustane Corporation contacted the MPCA to report the runoff.

30. In response to the report, Mr. Randy Ellingboe, an engineer with the water quality division of MPCA, personally observed the wastewater discharge. Mr. Ellingboe observed that wastewater runoff from the subject site ran downhill approximately 50 to 100 feet to a wetland bordering the cornfield. Within 40 feet of the wetland showed evidence that runoff was ponded at the surface. See Exhibit 23.

31. Mr. Ellingboe observed that the discharge substantially affected the wetland as evidenced by the brown colored wetland areas where the discharge travelled in contrast with the clean and colorless waters not affected by the discharge. He estimated the area and volume of the discharge, by the area covered by the brown plume. Mr. Ellingboe also observed that the wastewater discharge was the same brown color as the wastewater in the runoff basin in the Facility.

32. Mr. Ellingboe did not collect any samples of the runoff water nor did he return the following day to inspect the seasonal wetland. He did discuss the matter with Mr. Holden, President of Sustane Corporation, and with Dr. Warren Springer, Consultant to Sustane Corporation, that a potential violation of the Stipulation Agreement had occurred. Exhibit 23.

33. Prior samples of the wastewater had been taken on May 23, 1990, April 5, 1991, and March 16, 1992. The most recent sample had the lowest level of ammonia concentration, 53 mg/l. MPCA permits typically allow surface water discharges with ammonia limitations in the range of 1-10mg./l. Similarly, the water samples showed high concentrations of suspended solids, and phosphorus. See Exhibits 20, 21, and 24.

34. On September 5, 1992, and as a result of an estimated 2 to 2 1/2 inches of rainfall within one hour, the basin wastewater exceeded the capacity of the runoff basin resulting in an overflow. Sustane does not contest that an overflow occurred which travelled to the drainageway south of the Facility.

35. At issue at the hearing was whether or not the overflow reached the intermittent stream to the south of the site. Mr. Ellingboe described the drainageway as a swale. He described a swale as an area of saturated soils where during runoff and precipitation events, the water will collect. He indicated that the intermittent stream flows through the swale area and drains that vicinity.

36. The overflow travelled over mowed grass to the mowed/unmowed grass boundary. The intermittent stream was 50 to 75 feet beyond that boundary. un-mowed grass was reed canary grass, the vegetation typical of drainageway vegetation. Mr. Ellingboe indicated that the drainageway soils were a wetland type soil that is saturated on a frequent basis. Based upon its limited water holding capacity, Mr. Ellingboe believed that the soils would be unable to absorb the heavy rainfall, resulting in runoff. Mr. Ellingboe also indicated that while the un-mowed grass acted as a solid filter, it was not a barrier to the wastewater flow itself. The wastewater overflow was of a volume sufficient to move the woodchips, which were spread along the un-mowed/mowed boundary, above the residential lawn.

37 The topographic plans show a continuous sloping terrain to the centerline of the watercourse. Exhibits 14 and 15. Based on the sloping terrain, the saturated soils, the heavy rainfall, and the absence of a barrier, the Judge finds that the wastewaters continued travelling downhill through the drainageway into the intermittent stream.

38. In March 1993, MPCA approved Sustane's Composting Pad Erosion and Damage Monitoring Plan that had been submitted in January, 1993. Exhibit 33. Said plan required compost pad surveys to be completed by Sustane Corporation twice annually, in June and November, when the ground is dry and not frozen. Subsequently, a written report was to be filed with the MPCA and Sustane Corporation. Exhibit 33

39. The biannual compost pad surveys, which were to be conducted with a baseline and multiple points in each drive between windrows, was recommended to establish the rate of erosion of the pad. After three surveys had been completed, and if no significant erosion was noted, then the frequency was to be reduced to once per year. Exhibit 41.

40. Sustane Corporation failed to obtain a compost pad survey in June 1993. On September 24, 1993, the President of Sustane Corporation wrote to Mr. Ellingboe, informing him that due to inclement weather and contractor scheduling he was unable to obtain a compost pad survey. Exhibit 35. However, Mr. Hooper from Sustane Corporation indicated that equipment drove on the compost pad in June of 1993.

41. On October 28, 1993, David R. Nelson, the Supervisor of the Water Quality Division of MPCA, sent Sustane Corporation a letter stating that it was not reasonable for the corporation to have not obtained a survey of the compost pad by September 24, 1993. Their failure to provide a survey resulted in making it difficult, if not impossible, to assess the effects of 1993 precipitation on the pad surface. Exhibit 36.

42. The proposed violations and penalty amount was sent to Sustane Corporation on January 12, 1994, with an opportunity to respond within 10 days. Exhibit 30.

43. On January 17, 1994, Sustane responded to the MPCA alleged violation and offered an explanation of the listed events. Exhibit 31. Based upon the response from Sustane Corporation, MPCA eliminated the penalty for failure to submit lab results from the 9/18/92 sampling of the wastewater. Exhibit 47.

44. On February 16, 1994, the Water Quality Division of MPCA signed an administrative penalty order pursuant to Minn. Stat. § 116.072 (1992) for Sustane Corporation's alleged violations of the water quality laws of the State of Minnesota. The Order was mailed to Sustane Corporation on March 2, 1994. The Commissioner determined that the penalty amount of \$4,560 was unforgivable due to the serious nature of the violations. The Order contained a provision regarding appeal. Exhibit 3.

45. On March 21, 1994, Sustane Corporation timely filed a request for hearing by serving notice by letter to the MPCA that it intended to contest the penalty order. Exhibit 2. Sustane Corporation asserts that the nonforgivable characterization of the penalty is unreasonable based upon the specific circumstances of each runoff event and the nonserious nature of the survey delay.

46. The Agency has developed a thorough evaluation process for determining the amount of a fine to be assessed in Administrative penalty situations. This process is based upon statutory factors set forth in Minn. Stat. § 116.072 subd. 2. The application of the statutory factors to the facts of this case is described in Exhibit 48.

47. The penalty order and the fines are based upon three separate events. The first event was the runoff of wastewater from irrigation to wetlands (Violations Nos. 1-4). The Agency asserts that the runoff or discharge of wastewater onto wetlands, which are "waters of the state", created a nuisance condition. In addition, the discharge of wastewater violated Paragraph B. subd. 1 of the Stipulated agreement entered into by Sustane Corporation and MPCA which was effective from August 27, 1991, through May 28, 1992. Exhibit 8. Finally the Agency asserts that the discharge of wastewater violated Minn. Rules pt. 7001.1030, subp. 1, which requires that a person obtain a NPDES permit from the Agency prior to discharging a pollutant from a point source into the "waters of the state". The Penalty imposed for this event is in the amount of \$500.

48. The \$500 penalty for Violations Nos. 1-4 is reasonable in this case based upon a gravity factor for potential harm and deviation from compliance. An actual discharge occurred which affected a wetland.

49. The second event which triggered a penalty occurred on September 1, 1992. Wastewater overflowed from the runoff basin into the intermittent stream, which was a violation of Special Condition No. 4. of Sustane Corporation's Interim Permit Number MPCA-I 1146(A), dated May 28, 1992. Exhibit 13. The Agency issued a \$1500 penalty for this event.

50. The penalty amount was set based upon the gravity factor for potential harm and deviation from compliance. Exhibit 48. The Agency

characterized violation No. 5 as serious because an actual discharge occurred. Said penalty is reasonable in this case based upon the actual discharge of wastewater into the intermittent stream.

52. The third event, which triggered violation No. 6, was Sustane's failure to conduct the pad erosion survey in June of 1993. The gravity component of this violation was \$2,000. As set forth in Finding No. 28, the purpose of the survey was to establish a baseline to measure the erosion, if any, of the runoff basin from 1993 precipitation. As set forth in Finding No. 29, no evidence was presented to establish that the land was not dry enough to enable the survey to take place.

53. The failure to obtain the survey resulted in lost data concerning the basin which is crucial to protecting surface and ground water from receiving wastewater discharge containing pollutants from the animal manure. An additional \$560 was added to the penalty for the cost savings component as Sustane was able to save the cost of one of the biannual surveys. The estimated cost for the survey, which would take approximately 8 hours for a crew at a rate of \$70 per hour, was \$560. Said penalty is reasonable in this case based upon the gravity and cost savings components.

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

#### CONCLUSIONS

1. The Minnesota Pollution Control Agency and the Office of Administrative Hearings have jurisdiction in this matter pursuant to Minn. Stat. § § 14.50 and 116.072, subd. 6 (1990). The Minnesota Pollution Control Agency gave proper notice of the hearing and has fulfilled all relevant substantive requirements of law and rule.

2. As the agency proposing the civil penalty, the Minnesota Pollution Control Agency has the burden of proving by a preponderance of the evidence that a water quality violation has occurred and that Sustane Corporation caused the violation.

3. The Minnesota Pollution Control Agency has proved by a preponderance of the evidence that a water quality violation has occurred by Sustane's discharge of wastewater on April 23, 1992, from cropland to an adjacent wetland. Said event constitutes a violation of Minn. Rules pt. 7070.0210, as alleged in the administrative penalty order. In addition, the discharge violated the terms of the Stipulated Agreement dated August 27, 1991.

4. The Minnesota Pollution Control Agency has proved by a preponderance of the evidence that a water quality violation occurred on September 5, 1992, when wastewater from the Sustane runoff basin discharged into an intermittent stream, in violation of MPCA Interim Permit Number MPCA-I 1146(A).

5. The Minnesota Pollution Control Agency has proved by a preponderance of the evidence that Sustane was not prevented from obtaining a timely erosion monitoring survey in June of 1993 due to weather conditions. Sustane's failure to obtain a timely survey violated the terms of the MPCA Interim Permit Number MPCA-I 1146(A).

6. The \$4,560 nonforgivable fine was not unreasonable within the meaning of Minn. Stat. § 116.072, subd. 6(c). That statute prohibits an Administrative

Law Judge from recommending a change in the amount of a proposed penalty unless he finds that the amount of the penalty is unreasonable.

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

RECOMMENDATION

It is respectfully recommended that the Commissioner of the Minnesota Pollution Control Agency affirm the \$4,560 nonforgivable penalty assessed against Sustane Corporation.

Dated June 9th, 1994.

s/Allen E. Giles

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ALLEN E. GILES

Administrative Law Judge

NOTICE

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

Reported: Tape Recorded.

MEMORANDUM

Sustane Corporation appealed the Minnesota Pollution Control Agency's administrative penalty order based upon a dispute over whether some of the violations had occurred, whether the violations caused actual or potential environmental harm, and whether the violations were serious enough to merit unforgivable penalty.

The first four violations set forth in the administrative penalty order relate to an event that occurred on April 23, 1992. On that date, as set out more fully in the Findings, wastewater from the composting Facility was being sprayed upon cropland to ensure that the runoff/collection basin did not overflow. The irrigating pump became stuck in mud, causing the wastewater to be discharged from the cropland to a wetland area. Sustane Corporation does not dispute that the discharge of wastewater into the wetland occurred. The dispute is over the characterization of the wetland as a surface water, and the assertion that the temporary discoloration of the wetland caused actual or potential environmental damage. Sustane Corporation asserts that the discharge was not serious enough to support an unforgivable penalty.

Referring to Violation Number 1, Sustane Corporation argues that a wetland is not "waters of the state". The State Water Pollution Control Act defines

"waters of the state" to include all marshes, watercourses, drainage systems and "all other bodies or accumulations of water, surface or underground." Minn. Stat. § 115.01 subd. 9 (1992). In this proceeding, the MPCA asserts that the wetland is a "surface water", and hence is "waters of the state". The Minnesota Pollution Control Agency defines "surface water" in a regulatory context to mean "any body or accumulation of water that is not an underground water". See Minn. Stat. § 115.01, subd. 2 (1992). Ground water is defined "water contained below the surface of the earth in the saturated

zone". See Minn. Stat. § 115.01, subd. 6. The Minnesota Pollution Control Agency has consistently included wetlands under their surface water classifications for purposes of regulating water quality standards. See Minn. Rules pts. 7050.0430 and 7050.0470 (1991).

The Issue Statement that supported the Stipulation entered into by the parties on August 27, 1991, specifically provided that areas near the wastewater land application sites that have been designated wetlands by the Soil Conservation Service are to be considered wetlands for purposes of the Stipulation Agreement. Further, the issue statement provided that irrigation setback requirements were to be in effect for said areas. Exhibit 8, page 1 of the Issue Statement.

Based upon the State statutes and rules, the MPCA's inclusion of wetlands as "surface waters", and the language in the Issue Statement, this Judge finds that wetlands are "waters of the state" and "surface waters" for purposes of this proceeding.

Minn. Rule part 7050.0210 sub. 2 prohibits the discharge of sewage, industrial waste, or other waste:

into any waters of the state so as to cause any nuisance conditions, such as the presence of significant amounts of floating solids, scum, visible oil film, excessive suspended solids, material discoloration,... or other harmful effects.

Animal manure fits under the term "other wastes". Based upon Mr. Ellingboe's observation that the wetland waters affected by the discharge were brown and discolored, the discharge of wastewater caused a nuisance condition. Accordingly, Sustane Corporation violated Minn. Rule 7050.0210, subp 2 (1991) as set forth in Violation Number 1 of the administrative penalty order.

The discharge of wastewater into the wetland was a violation of the terms of the parties' Stipulation Agreement dated August 27, 1991. Paragraph II.B. 1. provides that:

There shall be no discharge of manure, composted manure, manure-contaminated runoff, and runoff basin wastewater and sludges from the facility or any land application site used for runoff application to any surface waters, including the intermittent stream.

As set forth above, wetland is a surface water. Accordingly, Sustane Corporation violated Paragraph II.B. 1. of the Stipulated Agreement, as set forth in Violation Number 2 of the administrative penalty order.

Even if wetlands did not fit under the definition of "waters of the state", or "surface waters", Sustane Corporation still violated the terms of the Stipulated Agreement by the discharge of wastewater on April 22, 1992. Paragraph II.B.7. of said Agreement provides:

Land application of any wastewater or sludges from the runoff basin shall be restricted to either (a) the crop nutrient requirements for nitrogen for the cover crop of the land application site (i.e., agronomic rates) or (b) the hydraulic loading rate for the soils of the land application site, whichever condition is more restrictive.

In addition, Paragraph II.B.8. provides that the Facility's land application of any wastewater was to comply with the terms and conditions of the Land Application Management Plan. Said Plan had a condition that "wastewater shall not be applied during saturated soil conditions". Exhibit 18

The testimony supports a finding that the soil condition became saturated during the wastewater discharge. This finding is consistent with the irrigation pump's malfunction due to muddy conditions. The saturated condition of the soil supported a finding that the hydraulic loading rate for the soil had been exceeded. Accordingly, Sustane Corporation violated Paragraph II. 7 and 8 of the August 27, 1991, Stipulation Agreement, as set forth in Violation Number 3 of the administrative penalty order.

Violation Number 4 of the administrative penalty order states that Sustane Corporation violated Minn. Rule 7001.1030, subp 1 by discharging a pollutant into the "waters of the state" without obtaining a National Pollutant Discharge Elimination System permit from MPCA. Again, Sustane Corporation argues that the wetland is not a "water of the state". As set forth above, this Judge finds that the wetland is a "surface water", and hence is part of the "waters of the state". Sustane Corporation does not contest that they failed to obtain a NPDES permit. Accordingly, the evidence supports a finding that Violation Number 4 occurred.

The fifth violation relates to an incident that occurred on September 1, 1992. On that date, wastewater from the runoff basin overflowed and traveled to the drainageway south of the Facility. The issue in dispute was whether or not the wastewater reached the intermittent stream. Mr. Ellingboe testified that under the wet conditions, the drainageway soils were unable to absorb the heavy rainfall, resulting in runoff. Mr. Ellingboe believed that the wastewater reached the intermittent stream. Dr. Springer testified that he was unable to draw a conclusion as to whether the wastewater reached the intermittent stream. Based upon the testimony presented, this Judge finds that there is a preponderance of the evidence to support Violation Number 5.

The sixth violation relates to Sustane Corporation's failure to conduct a compost pad erosion survey in June of 1993. Sustane Corporation admits that the survey was not conducted until October of 1993. Sustane Corporation did not notify MPCA that they were unable to timely provide said survey until September of 1993. The testimony supports a finding that the pad was sufficiently dry to allow the survey to be conducted. The only other excuse provided for the failure to obtain a survey during the time period of June through September 1993, was the contractor's schedule. Based upon the testimony and evidence presented, Sustane Corporation failed to timely obtain a pad survey as required by the MPCA Interim Permit No. MPCA-I 1146(A).

The final issue raised by Sustane Corporation was the reasonableness of the \$4,560 nonforgivable penalty for the three incidents described above.

Administrative Law Judge is prohibited from adjusting the amount of a fine unless it is unreasonable, considering the factors listed in Minn. Stat. § 116.072 subd. 2. The two factors considered in this proceeding were the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; and the economic benefit gained by the person by allowing or committing the violation.

For violations Nos. 1, 2, and 4, the assessed penalty was \$500. The discharge of manure wastewater into a wetland producing brown discoloration constitutes a reasonable basis for establishing a \$500 base penalty based on the gravity factor. It is not necessary for the MPCA to provide evidence of actual damage to water in order to satisfy the gravity component of the statute. The discharge exposed the water to environmental damage, and hence that exposure supports the gravity component. See In re Palm Industries Inc. OAH File No. 2-2200-5080-2 (December 17, 1990).

For violation Number 5, the assessed penalty was \$1500, based upon the gravity component. As stated above, the discharge of wastewater into the intermittent stream created the potential for environmental harm. The potential harm of the discharge of the manure wastewater was recognized by the parties, as set forth in the no discharge provision of the Stipulated Agreement. Accordingly, the penalty is deemed reasonable.

For violation Number 6, \$2000 was assessed under the gravity component and \$560 was assessed under the economic savings component. Sustane corporation asserts that the failure to obtain a survey in June was insignificant. However, the parties were aware that the purpose of the survey was to obtain a baseline of the compost pad to enable the MPCA to measure erosion twice a year. The failure of obtaining a summer survey resulted in loss of a baseline survey to enable the MPCA to measure whether any erosion occurred between June and November of 1993. Given the concerns over the limestone in the basin, and the thickness of coversoils over the bedrock, the failure to provide the June survey data, the base penalty of \$2000 under the gravity factor is reasonable.

Sustane Corporation saved the costs of the survey by failing to provide a summer survey. The October survey took the place of the required November survey. Accordingly the economic savings component of \$560 is reasonable.

AEG