

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

In the Matter of the Administrative Penalty
Order Issued to Power-O-Peat, Inc.,
Gilbert, Minnesota

FINDINGS OF FACT,
CONCLUSIONS, RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Phyllis A. Reha, Administrative Law Judge, on March 10, 1995, at the Minnesota Pollution Control Agency (MPCA), 520 Lafayette Road, St. Paul, Minnesota. Pursuant to Minn.Stat. §116.072, subd. 6, the hearing was conducted under the Revenue Recapture Act hearing rules found at Minn. Rule Part. 1400.8510-1400.8612 (1993).

Appearing on behalf of the Minnesota Pollution Control Agency was Richard P. Cool, Assistant Attorney General, NCL Tower, Suite 900, 445 Minnesota Street, St. Paul, MN, 55101. Appearing on behalf of Power-O-Peat, Inc. was Terry Leoni, shareholder of Power-O-Peat and family owner of the property on which the Power-O-Peat Central Lakes area peat mining operation is conducted in Gilbert, Minnesota. Two members of the public testified at the hearing as non-party "interested persons": Stuart Behling, 4712 Anderson Road, Duluth, Minnesota, and Kenneth D. Anderson, 615 Elk Street, Duluth, Minnesota.

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. This final decision may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendation 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 when making a final decision. Parties should contact Charles W. Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Power-O-Peat, Inc. committed the violations alleged in the Administrative Penalty Order issued in the matter.

2. Whether the \$2,500 nonforgivable penalty assessed against Power-O-Peat, Inc. is reasonable under all of the circumstances.

FINDINGS OF FACT

1. Some time in the mid-1950's , Power-O-Peat, Inc. began a peat mining operation at the Central Lakes site in St. Louis County, MN.

2. Most peat mining in Minnesota, including the mining operation at Power-O-Peat's Central Lakes site, is conducted for horticultural purposes. The extraction of peat from a mine involves the removal of water from the mine area. To accomplish this, mining operations typically undertake the following steps: (1) clear vegetation from the desired mining site; (2) construct ditches to drain the water from the mine area; (3) break-up the surface of the mine area to allow the peat to dry; (4) collect, and perhaps process (crush, screen) the peat; and (5) ship the peat in bulk or bags.

3. Water quality concerns associated with such peat mining operations include the problems of turbidity, suspended solids, and emission of various dissolved acids.

4. Power-O-Peat, Inc. is regulated under the state's implementation of the Federal National Pollutant Discharge Elimination System (NPDES) permit program. In 1987, the MPCA issued an NPDES/State Disposal System (SDS) permit to Power-O-Peat, Inc. This permit superseded an earlier NPDES permit issued to Power-O-Peat, Inc. on October 22, 1985. The 1987 permit, number MN 0056529, authorizes Power-O-Peat, Inc. to "discharge from the Central Lakes Mining Area, St. Louis County, Minnesota, to a receiving water named an unnamed tributary creek to Murphy Lake, in accordance with effluent limitations, monitoring requirements and other conditions ... " Exhibit 5.

5. Water from the Power-O-Peat Central Lakes mine site flows from various man-made ditches into a natural ditch; the ditch becomes a creek. This creek is referred to as the "unnamed tributary creek to Murphy Lake". The creek flows generally northwesterly into Murphy Lake. The main collection ditch through the Power-O-Peat Central Lakes site is approximately ten feet wide and five feet deep; it drains ground water and surface runoff through a culvert point designated in the NPDES permit as "outfall 010."

6. A point identified in the NPDES permit as "Station 701" denotes the water entry point at the Power-O-Peat Central Lakes site. Background water quality data is gathered at this point.

7. Murphy Lake and the unnamed creek flowing from the Power-O-Peat Central Lakes site into Murphy lake are “protected waters” of the State of Minnesota.

8. Part I.B.1 of the Power-O-Peat NPDES permit requires the Company to monitor site discharges at Outfall 010 at a specified frequency for total suspended solids, turbidity, total phosphorus, aluminum, pH and flow.

9. Part I.B.2. of the Power-O-Peat NPDES permit requires the Company to monitor site inflow at Station 701 at a specified frequency for turbidity, aluminum, and pH.

10. Part I.E.3. of the Power-O-Peat NPDES permit requires the Company to summarize each month on a designated Discharge Monitoring Report form all monitoring results, and to submit this report to the MPCA each month.

11. NPDES permits such as that at issue here are not automatically terminated or made unnecessary when active peat mining operations end, because discharges from peat mining operations do not necessarily end when active mining operations cease. So long as mine ditches remain open, discharges might continue. NPDES permits in Minnesota are only terminated when the MPCA receives evidence that certain arrangements with mine operators for the deactivation/closure of a mine have been completed, and after further monitoring.

12. Part D of the Power-O-Peat NPDES permit addresses the subject of site “deactivation.” It notes that “the Commissioner may require the Permittee to submit a Pollution Control Deactivation [sic] Plan for approval ... The plan shall provide for the implementation, including continued maintenance if necessary, of best management practices and best available technology and shall assure compliance with all applicable laws and Agency regulations which apply to air quality, water quality, and the disposal of hazardous substances.” Exhibit 5.

13. The Power-O-Peat NPDES permit states that “this permit and the authorization to discharge shall expire at midnight, November 30, 1992. The Permittee is not authorized to discharge after the ... date of expiration. In order to receive authorization to discharge beyond the ... date of expiration, the Permittee shall submit such information and forms as are required by the Agency no later than 180 days prior to the above date of expiration pursuant to Minnesota Rules Part 7001.0050.” Exhibit 5.

14. On May 2, 1986, the MPCA issued a Notice of Violation to Todd Leno [sic], Power-O-Peat President, for noncompliance conditions under the then active NPDES permit for the Company’s Central Lakes site. The Notice of Violation alleged that “since the issuance of the permit, the Company has failed to submit the required discharge monitoring reports.” Exhibit 6.

15. On August 26, 1987, the MPCA sent to Todd Leoni a copy of the written results of a compliance inspection performed at the Power-O-Peat Central Lakes peat mining site on July 21, 1987. MPCA representative Bruce L. Johnson, Industrial

Enforcement Unit, Regulatory Compliance Section, Division of Water Quality, performed the inspection. Mr. Johnson's report noted permit violations for failure of the Permittee to provide flow volumes on Discharge Monitoring Reports submitted to the MPCA, and for failing to sample for various potentially toxic metals.

16. MPCA representative Roger Nelson spoke by phone with Terry Leoni on February 12, 1992. Mr. Leoni explained during this conversation that Power-O-Peat was no longer an active company, and was not then mining at the Central Lakes site. Mr. Nelson told Mr. Leoni that no Discharge Monitoring Reports had been received for the Central Lakes site. Mr. Leoni confirmed that no monitoring had been done at the site. Mr. Leoni expressed his desire to keep the site's NPDES permit active to enable a later sale of the mining operation. Mr. Nelson explained that the NPDES permit was due to expire on November 30, 1992, and that to renew the permit, all permit requirements would have to be brought up-to-date.

17. In a letter dated February 19, 1992, the MPCA notified Power-O-Peat, Inc. that its NPDES permit would expire on November 30, 1992. The letter explained that "in order to continue the permitted activity beyond the expiration date of the permit, you must submit a completed application for permit reissuance at least 180 days before the expiration of the existing permit." Exhibit 9. The MPCA included a permit application with this letter.

18. On July 31, 1992, the MPCA sent to Terry Leoni, Power-O-Peat, Inc., a copy of a Compliance Monitoring Survey which recorded the results of a site inspection performed by MPCA representative Jeff Stollenwerk at the Central Lakes site on July 30, 1992. Based on the results of that inspection, the Power-O-Peat facility was found to be in noncompliance with the terms and conditions of its then active NPDES permit. Among other findings summarized in the Inspection Report, Mr. Stollenwerk noted that no self-monitoring had been performed at the site.

19. Power-O-Peat, Inc. submitted no NPDES permit reissuance application or permit fees prior to November 30, 1992, so on that date its Permit #MN 0056529 lapsed.

20. On May 4, 1993, MPCA representative Pete Sandberg phoned Terry Leoni, Power-O-Peat, Inc. to discuss, among other things, the company's non-payment of NPDES permit fees. During the conversation, Mr. Leoni expressed his desire to retain an NPDES permit so that mining could resume in the future at the Central Lakes site.

21. On July 14, 1994, MPCA representative Pete Sandberg visited the Power-O-Peat Central Lakes site in response to an anonymous complaint that discharge from the mine was adversely affecting Murphy Lake. During the visit, Mr. Sandberg confirmed with Power-O-Peat, Inc. representatives that the company had not performed water quality monitoring at the site for at least four years. Power-O-Peat, Inc. representatives also noted during this visit that they wanted to resume peat mining operations in the northern area of the Central Lakes site.

22. In a letter dated August 3, 1994, the MPCA notified Power-O-Peat, Inc. that its Central Lakes peat mining site was found to be in non-compliance with Minnesota Statutes and requirements of NPDES permit No. MN 0056529. The letter noted a total of five violations: two monitoring violations (various monitoring had not been performed since 1990), one reporting violation (no Discharge Monitoring Reports had been submitted to the MPCA since 1990), one violation for failing to pay an accumulated total of \$3,690 in annual permit fees, and one violation for continuing to discharge after the expiration of its NPDES permit on November 30, 1992 (and failing to submit an application to renew the expired permit).

23. In 1994 Power-O-Peat, Inc. submitted an application to the U.S. Army Corps of Engineers for a permit to excavate 120 acres for peat mining operations at its Central Lakes site. In the associated Public Notice published on December 21, 1994, Power-O-Peat claimed to hold a current NPDES water discharge permit (No. MN 0056529) for the site.

24. Minn. Stat. §116.072, subd. 2, gives the Commissioner authority to authorize penalties up to \$10,000 for all violations identified during an inspection or compliance review. In determining the amount of a penalty the Commissioner may consider:

- (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, if the commissioner specifically identifies the additional factors in the commissioner's order.

25. The MPCA has developed a thorough evaluation process for determining the amount of a fine to be assessed in administrative penalty situations. This process is described in the MPCA's Penalty Calculation Worksheet. Exhibit 18. The process is based upon the statutory factors noted in Finding 24.

26. In the fall of 1994, MPCA staff convened to determine whether Power-O-Peat's NPDES permit violations merited an Administrative Penalty Order, and if so, in what amount. In its determination of an appropriate APO penalty amount, the MPCA first assessed the gravity of the sampling and reporting violations to develop a "base" penalty. Using the Violations Matrix found in the Penalty Calculation Worksheet, the MPCA determined that the "Deviation From Compliance" was "Serious," because the NPDES program relies almost exclusively on self-monitoring to determine permittee

compliance. The MPCA recognized that there had been little or no mining activity at the Power-O-Peat Central Lakes site during the permit period, and so found the “Potential For Harm” to the environment to be “Minor.” This resulted in an allowable base penalty range of \$500 to \$2,000. The MPCA settled on a base penalty of \$1,000 “because the permittee was notified numerous times about the need to sample and report, yet did not comply.” Exhibit 19.

27. The MPCA then considered possible adjustments to the base penalty based on factors of culpability, permittee history, and economic benefit. The MPCA made no adjustments to the base penalty based on culpability or permittee history. It did, however, assess an additional \$1,500 to the base penalty to account for economic benefit. “Had the company performed all of the monitoring required by the permit, they would have incurred analytical costs of \$2,988 annually (based on a [Minnesota Department of Health] price list). No monitoring has been performed for at least 4 years, a cost saving of about \$12,000. However, had MPCA pursued enforcement more aggressively, the situation might have been resolved in much less time. We propose a penalty based on six months of non-sampling, which comes to \$1,500.” Exhibit 19.

28. As the last step in its penalty formulation, the MPCA determined the “forgivability” of the adjusted base penalty amount. The MPCA found the adjusted base penalty total of \$2,500 to be non-forgivable, explaining that the violation was very serious and that Power-O-Peat had failed to respond to repeated MPCA notifications of permit non-compliance.

29. The MPCA issued its Administrative Penalty Order to Power-O-Peat, Inc. on December 12, 1994. The APO delineates three Category A violations:

(1) NPDES Permit No. MN 0056529, part I.B.1, requires that monitoring for Total Suspended Solids, Turbidity, Total Phosphorus, Aluminum and pH shall be conducted on the discharge from this facility identified as outfall 010. No monitoring has been performed since 1990.

(2) NPDES Permit No. MN 0056529, part I.B.2, requires that monitoring for Turbidity, Aluminum and pH shall be conducted on the influent to the facility at monitoring point 701. No monitoring has been performed since 1990.

(3) NPDES Permit No. MN 0056529, part I.E.3, requires that the results of the monitoring be summarized on a discharge monitoring report and submitted to the MPCA on a monthly basis. No discharge monitoring reports have been submitted since 1990. Jurisdictional Exhibit C.

30. The APO notified Power-O-Peat that it had the right to contest the Order: “Within 30 days of receipt of this Order ... you may file a written notice of contest with

the Commissioner. An expedited hearing by the Office of Administrative Hearings pursuant to Minn. Stat. ch.14 will then be scheduled.” Jurisdictional Exhibit C.

31. Power-O-Peat, Inc. filed a request for an administrative hearing to review the Administrative Penalty Order. The Company’s request, dated January 10, 1995, is attached as Exhibit B to the Amended Notice Of And Order For Hearing. Power-O-Peat’s primary response to the allegations in the APO was that no discharge had occurred at its Central Lakes site because “Power-O-Peat has been out of business since 1988.” Jurisdictional Exhibit C.

32. Terry Leoni noted in his written response to the APO that he intended to reopen the Central Lakes peat mining site in the spring of 1995. He stated that he wanted to “comply with all state and federal laws. Compliance to the laws is very important to me.” Jurisdictional Exhibit C.

33. On February 3, 1995, the MPCA issued a Notice of and Order for Hearing setting March 8, 1995 as the date for the expedited hearing. Due to a scheduling conflict, the hearing date was changed to March 10, 1995. On February 14, 1995, an Amended Notice of and Order for Hearing was issued notifying all parties of the change .

34. Prior to the administrative hearing, the MPCA and Power-O-Peat, Inc. agreed to the following stipulations of fact:

- (1) NPDES Permit No. MN 0056529, part I.B.1., requires that monitoring for Total Suspended Solids, Turbidity, Total Phosphorus, Aluminum, pH and flow shall be conducted on the discharge from the Power-O-Peat, Inc. facility at outfall 010. Part I.B.1. identifies the measurement frequency for the above-identified parameters.
- (2) Power-O-Peat, Inc. has not conducted any of the monitoring requirements in NPDES Permit No. MN 0056529, part I.B.1., since at least January 1, 1990.
- (3) NPDES Permit No. MN 0056529, part I.B.2., requires that monitoring for Turbidity, Aluminum, and pH shall be conducted at monitoring station 701 of the Power-O-Peat, Inc., facility. Part I.B.2. identifies the measurement frequency for the above-identified parameters.
- (4) Power-O-Peat, Inc. has not conducted any of the monitoring requirements in NPDES Permit No. MN 0056529, in part I.B.2., since at least January 1, 1990.”
- (5) NPDES permit No. MN 0056529, part I.E.3., requires that all monitoring results must be summarized on a monthly basis on a designated discharge monitoring report form and that the discharge monitoring reports must be submitted to the Minnesota Pollution Control Agency on a monthly basis.

(6) Power-O-Peat, Inc. has not submitted any discharge monitoring reports required by NPDES Poermit No. MN 0056529, part I.E.3., since at least January 1, 1990. Jurisdictional Exhibit A.

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 Pollution Control Agency have jurisdiction in this case pursuant to Minn.Stat. §14.57-14.62 and Minn. Stat. §116.072.

2. All relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is properly before the Administrative Law Judge.

3. Any Finding of Fact more properly termed a Conclusion of Law is hereby adopted as such.

4. As the agency proposing the civil penalty, the Minnesota Pollution Control Agency has the burden of proving by a preponderance of the evidence that Power-O-Peat, Inc. has violated the terms of its NPDES/SDS permit.

5. The MPCA established with a preponderance of evidence that Power-O-Peat, Inc. violated its NPDES/SDS permit by failing to perform necessary monitoring and reporting.

6. The \$2,500 nonforgivable penalty assessed to Power-O-Peat, Inc. in the Administrative Penalty Order of December 12, 1994, is 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 the penalty is found to be unreasonable.

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

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RECOMMENDATION

IT IS RECOMMENDED that the nonforgivable penalty of \$2,500 contained in the December 12, 1994, Administrative Penalty Order issued to Power-O-Peat, Inc. be AFFIRMED.

Dated this 31st day of March, 1995.

PHYLLIS A. REHA
ADMINISTRATIVE LAW JUDGE

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.

Reported: Tape Recorded (4 cassettes).

MEMORANDUM

Minn.Stat. §116.072 provides that the Administrative Law Judge may not alter the amount of the Agency fine unless it is deemed "unreasonable," considering the six factors listed in the statute: (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 if the commissioner specifically identifies the additional factors in the commissioner's order. Power-O-Peat, Inc.'s primary challenge to the reasonableness of the MPCA penalty was that no penalty was warranted because no active mining operations had occurred on the permitted site since 1988. As was clearly established by the MPCA, however, the terms of an NPDES permit must and do apply whether or not the permittee is conducting an active business at the permitted site. The threat of harm to protected waters of Minnesota caused by peat mining operations such as Power-O-Peat's Central Lakes site remain until such site is fully deactivated and reclaimed. Permit obligations therefore end only when such site is formally deemed deactivated and the permit is terminated by the permitting authority. No such deactivation or termination occurred here. By Power-O-Peat's own admission, it did not fulfill its permit obligations of monitoring and reporting during the effective term of its NPDES permit. The MPCA's measured response to Power-O-Peat, Inc.'s persistent non-compliance in this regard is anything but unreasonable.

PAR