

**Missouri Clean Water Commission
Capitol Plaza Hotel and Convention Center
415 West McCarty Street
Jefferson City, Missouri**

July 8, 2015

Frank Staton Administrative Hearing Commission Appeal No. 15-0191 CWC

Issue: This agenda item requests a decision from the Missouri Clean Water Commission regarding Administrative Hearing Commission appeal No. 15-0191 CWC. This appeal is related to the Missouri Department of Natural Resources Water Protection Program notice and order to abate violations and pay administrative penalties No. 2014-WPCB-1324 issued to Mr. Frank Staton on January 23, 2015.

Background: All pertinent background information is listed in the attached Missouri Administrative Hearing Commission recommended decision document.

Staff Recommendation: The Department recommends the Commission hear from the attorneys of the parties and make a decision within the statutory deadline of 180 days of the appeal.

Attachment:

- Administrative Hearing Commission's Recommended Decision

Before the
Administrative Hearing Commission
State of Missouri



FRANK W. STATON,)	
)	
Petitioner,)	
)	
vs.)	No. 15-0191 CWC
)	
MISSOURI DEPARTMENT OF NATURAL)	
RESOURCES,)	
)	
Respondent.)	

RECOMMENDED DECISION

The Administrative Hearing Commission (“AHC”) recommends that the Missouri Clean Water Commission (“CWC”) uphold the administrative penalty order issued to Frank Staton as assessed because he violated the Missouri Clean Water Law (“MCWL”).

Procedure

On February 4, 2015, Staton filed a complaint appealing a notice and order to abate violations and pay administrative penalties (“APO”) issued by the Missouri Department of Natural Resources (“DNR”). DNR filed an answer on March 5, 2015. On April 24, 2015, we held a hearing. Assistant Attorney General Thais Folta represented DNR. Stephen Wyse, with the Wyse Law Firm, represented Staton. The matter became ready for our decision on May 20, 2015, the date the last written argument was due.

Findings of Fact

1. Staton has an itinerant junk dealers' license and is licensed to work from the City of Brookfield, Missouri ("the City"). He owns a business called White Trash Recycling that he opened in August of 2012.

2. Staton has a contract with Advantage Metals Recycling ("Advantage") under which he brings Advantage scrap metal and is paid for it.

Violation of Law

3. On November 6, 2013, DNR received an Environmental Concerns and Investigations Form ("Concern Form"), a form filled out when someone calls in a complaint. The complaint against Staton was made by Jamie Stallo, Code Enforcement Officer with the City of Brookfield, and listed the concern as: releasing Freon to the atmosphere and not draining oil from vehicles. The complaint was assigned to David See, an Environmental Specialist Level Two with DNR.

4. Six days later, DNR received another Concern Form from an anonymous caller alleging that Staton was draining vehicles into the ground near a creek.

5. On November 26, 2013, See conducted an unannounced, routine field inspection of Staton's property. See was accompanied by the code enforcement officer for the City and a law enforcement official.

6. During the inspection, See observed: (1) a hydraulic crane arm being serviced, releasing an oily substance down the side of the crane and onto the ground; (2) several other sections of oil-stained ground; and (3) large, uncovered areas containing metal waiting to be processed for recycling.

7. See did not take soil samples or samples of the potential contaminant. Staton told See that he had processed eight to ten cars per day in 2012.

8. See prepared an inspection report that included discussion of the inspection, a compliance determination, a list of unsatisfactory features, required action Staton needed to take, and further recommendations.

9. On December 20, 2013, DNR's Northeast Regional Office Director, Irene Crawford, sent a Letter of Warning with a copy of See's report to Staton. The Letter of Warning identified violations of (1) operating a water contaminant source without a permit and (2) placing water contaminants in a location where they are reasonably certain to cause water pollution. DNR requested information from Staton and required him to submit an enclosed permit application. The Letter of Warning did not assess a civil penalty.

10. Staton did not respond to the Letter of Warning.

11. On February 14, 2014, Crawford issued a letter giving Staton until March 7, 2014 to provide the requested information and submit the application for a permit.

12. Staton did not respond to this letter.

13. On April 3, 2014, See attempted to conduct an unannounced re-inspection of Staton's property. See was accompanied by the code enforcement officer for the City and a law enforcement official. Staton denied them access to his property. See offered to work with Staton to resolve the situation. See took photographs of Staton's property from public rights-of-way. There was a wooden privacy fence on the property that had not been there at the time of the first inspection.

14. See took pictures of a flatbed truck with various assorted scrap metals and other materials that could be seen over the privacy fence. See concluded that Staton's operations were still ongoing.

15. See prepared an inspection report, which again included discussion of the inspection, a compliance determination, a list of unsatisfactory features, required action, and recommendations.

16. On April 23, 2014, Crawford issued a Notice of Violation with a copy of See's report. Staton was required to submit an application for a permit by May 14, 2014.

17. From at least November 26, 2013 until February 2015, Staton operated an auto and metal salvaging operation in the course of which he placed water contaminants in a location where it was reasonably certain to cause pollution discharged to an unnamed tributary to Yellow Creek, a water of the state of Missouri. He did not have a permit to do so.

Amount of Assessment

18. DNR attempted through conference, conciliation, and persuasion to resolve the violations of the MCWL. The parties failed to reach a resolution.

19. DNR calculated a penalty for only one of the two violations – the operation of an auto and metal salvaging operation without having an operating permit to do so.

20. DNR's Enforcement Officer Corinne Rosania decided whether to issue a penalty and the amount of the penalty. She considered the violations, inspection history, and the communication history with Staton. She made a recommendation to her supervisor.

21. Rosania used a Penalty Matrix Worksheet ("the Worksheet") to determine the amount of Staton's penalty.¹ There are two prongs to the penalty matrix – potential for harm and extent of the deviation.

¹ The Worksheet is based on the procedures for assessment of an administrative penalty that are set forth in 10 CSR 20-3.010. Tr. at 86-87.

22. The Worksheet produces a calculation based on points (generally 0 to 30 points possible in a category). Points are given to such things as industrial facilities' output, wastewater flows, and storm water flows.

23. Staton was given the lowest possible score (5 points) in several categories because no contamination had been observed, but contamination was reasonably certain.

24. Staton was given the lowest score of 10 points under the category of "Organizational capability and sophistication."²

25. Staton was given 25 points under the category "Facility in noncompliance more than 67% of time during a period of at least three (3) consecutive months."³

26. Staton was given a low score of 10 points under the category "Violations continued after responsible party had been clearly informed, on at least three (3) separate occasions, of the noncompliance and the need to correct it."⁴

27. Staton was given 10 points under the category "Discharge without a required Storm water Permit."⁵

28. Staton's final score was 55 points. The potential for harm score was 10 – in the minor category. The extent of deviation score was 55- in the moderate category.

29. Rosania determined the amount of the penalty under a "gravity-based penalty assessment matrix."⁶

² Respondent's ex. B at 5.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 6.

⁶ Respondent's exhibit B at 7.

Gravity-Based Penalty Assessment Matrix

Potential Harm	Deviation Level		
	Major	Moderate	Minor
Major	\$9,250 (\$8,501 to \$10,000)	\$8,000 (\$7,501 to \$8,500)	\$7,000 (\$6,501 to \$7,500)
Moderate	\$6,000 (\$5,501 to \$6,500)	\$5,000 (\$4,501 to \$5,500)	\$4,000 (\$3,501 to \$4,500)
Minor	\$3,000 (\$2,501 to \$3,500)	\$2,000 (\$1,501 to \$2,500)	\$750 (\$0 to \$1,500)

30. Based on this score, the penalty amount, according to the base penalty assessment matrix, was \$2,000.

31. In determining the administrative penalty, one of the considerations is any economic benefit that was gained by the party's violations – in Staton's case, the failure to get the permit. Rosania then calculated the economic benefit by determining the delayed or avoided costs that Staton had gained by avoiding getting the permit. Rosania added \$300 to the penalty amount (\$150 per year for a permit times two years of activity without a permit).

32. The number of cars Staton processed per year was not used in determining the amount of the penalty.

33. On January 23, 2015, DNR issued a Notice and Order to Abate Violations and Pay Administrative Penalties. The penalty assessed was \$2,300.

34. Staton did not provide DNR any documentation that payment of a penalty would preclude him from correcting the violations or carrying out important remedial measures, so the penalty was not reduced.

Conclusions of Law

We have jurisdiction to hear a petition appealing a decision of DNR.⁷ We exercise the authority to conduct a hearing and recommend a decision to the CWC.⁸ DNR has the burden of proof.⁹ We must judge the credibility of witnesses, as well as the weight and value of the evidence.¹⁰ We have the discretion to believe all, part, or none of the testimony of any witness.¹¹

Under § 644.079.1,¹² the director of DNR may issue an order assessing an administrative penalty upon a determination that a provision of Chapter 644 or a regulation promulgated thereunder has been violated. An administrative penalty may not be imposed until the director “has sought to resolve the violations through conference, conciliation and persuasion [CC&P] and shall not be imposed for minor violations[.]”

Section 644.051.2¹³ makes it unlawful for any person “to operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of section 644.006 to 644.141 unless such person]holds a Missouri State Operating Permit from the CWC.]” Section 644.056.1¹⁴ obligates DNR to investigate alleged violations of the MCWL, and to order abatement if no permit has been issued.

⁷Section 621.250. Statutory references, unless otherwise noted, are to RSMo Cum. Supp. 2013.

⁸*Id.*

⁹Section 640.012.

¹⁰*Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App., W.D., 2014).

¹¹*Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App., W.D., 2001).

¹²RSMo 2000.

¹³RSMo Supp. 2014.

¹⁴RSMo 2000.

Regulation 10 CSR 20-6.200 regulates storm water discharges in the state of Missouri. Regulation 10 CSR 20-6.200(2)(C)1 provides that “Dischargers of storm water associated with industrial activity shall apply for an individual permit or seek coverage under a promulgated storm water general permit.” Regulation 10 CSR 20-6.200(2) defines “storm water discharge associated with industrial activity” as follows:

(2)The discharge from any conveyance which is used for collecting and conveying storm water which is not under a permit issued under 10 CSR 20-6.010 and which is directly related to the manufacturing, processing, or raw materials storage areas at an industrial plant.

(B) Industries subject to this requirement include:

3. Facilities which meet the following definitions are considered to be included in this subsection:

C. Facilities involved in the recycling of materials including metal scrap yards, battery reclaimers, salvage yards, and automobile junk yards

Regulation 10 CSR 20-6.200 specifically states that metal scrap yards, salvage yards, and automobile junkyards are included as storm water discharges associated with industrial activities. Such facilities are storm water point sources for purposes of the permitting requirements of 10 CSR 20-6.010. Therefore, metal scrap yards, salvage yards, and automobile junkyards are subject to permitting requirements. Staton had scrap metal and automobiles in his salvage yard. Both are a potential source of pollution to surface and groundwater because they were not under cover. Under Missouri regulations, auto salvage facilities such as Staton’s facility are required

to apply for and obtain a general storm water permit. Regulation 10 CSR 20-6.200(2). Staton did not have a permit.

See testified why oil leaking and on the ground was a cause for concern:

Q: In your training and experience, what is the concern about oil leaking from the equipment onto the ground in an operation such as Mr. Staton's?

A: Minor amounts of oil from the typical usage of the vehicle is not really an exceptional concern; however, for an operation like this, especially if you do observe staining happening in the process, we'd recommend to the property owners that that contaminated or oil-stained ground be cleaned up and properly disposed of at a landfill that will accept that material.

Q: Why do we care if oil is going into the ground such as you saw in the [sic] November of 2013?

A: Sure. That water is basically not attracted to oil, and so any storm water, rain, snow melts, anything of that nature will easily pick up oil off the ground and carry it -- give it significant flow into the nearest tributary.^[15]

Staton argues that he was allowing someone else to service the crane and that it was a temporary situation. But, as noted above, See observed other patches of oil-stained ground. See admitted that he did not see a contaminant from Staton's property flow directly into a river or stream. But, under the law, DNR can find a violation:

1. It is unlawful for any person:

(1) To cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state^[16]

¹⁵ Tr. at 29-30.

¹⁶ Section 644.051.1(1), RSMo Supp. 2014 (emphasis added.)

See's testimony above convinces us of the likelihood of contamination even if he did not actually see it. He described the oil on the ground and associated with the machinery and testified as to the likelihood of rain, snow, or other water carrying that oil to the tributary.

Staton was required to have a permit, and continuing to operate his business without one was a violation of the CWL.

Exemption

Staton claimed at the hearing that he and his business are exempt from the storm water permit requirements. Regulation 10 CSR 20-6.200(1)(B)3 does provide for an exemption for "de minimis discharges as defined by the department in general permits or by the Clean Water Commission[.]" DNR has defined "de minimis" in 10 CSR 20-6.200(1)(C)5:

A water contaminant source, point source, or wastewater treatment facility that is determined by the department to pose a negligible potential impact to waters of the state. . . .

DNR requires permits for auto salvagers who process more than 50 cars per year. Despite telling See he processed eight to ten cars a day, Staton testified at the hearing that he did not process more than 50 cars in a year. But DNR offered evidence that regardless of the number of cars processed by Staton in a year, he was still required to have a storm water permit.

See testified:

For the activities that I observed being conducted on the property, there were no particular exceptions available. Basically, there's no de minimis or minimum of recycled metals for a salvage operation. Now, if he was operating an automotive salvage, 50 cars or less processed in a year, that would fall de minimis, but as far as bulk tonnage of metal that's processed, there's no de minimus amount.[¹⁷]

¹⁷ Tr. at 27.

See observed an amount of metal salvage material on the property at the time of the inspection that would qualify for a permit. The only exception to that rule is if the facility is under cover,¹⁸ which Staton's is not. Staton does not fall within an exemption to the permit requirements.

Amount of Penalty

Conference, conciliation and persuasion failed to resolve Mr. Staton's violations and, as a result, an administrative penalty was calculated. DNR argues that the penalty was appropriately calculated to be \$2,300.

Regulation 10 CSR 20-3.010 sets forth the guidelines for determining the amount of a penalty:

(3) Determination of Penalties. The amount of an administrative penalty will involve the application of a gravity-based assessment under subsection (3)(A) and may involve additional factors for multiple violations, (3)(B), multi-day violations, (3)(C) and economic benefit resulting from noncompliance under subsection (3)(D). The resulting administrative penalty may be further adjusted as specified under (3)(E).

(A) Gravity-Based Assessment. The gravity-based assessment is determined by evaluating the potential for harm posed by the violation and the extent to which the violation deviates from the requirements of the Missouri Clean Water Law.

1. Potential for harm. The potential for harm posed by a violation is based on the risk to human health, safety or the environment or to the purposes of implementing the Missouri Clean Water Law and associated rules or permits.

A. The assessment of the potential for harm resulting from a violation will be based on the risk of adverse effects upon humans or the environment from exposure to water contaminants as a result of a violator's noncompliance. The potential for harm will be expressed as a point total and evaluated by adding together the points assessed for criteria contained in the following categories.

[Categories described in Findings of Fact]

¹⁸ Tr. at 91.

B. The matrix cell appropriate for a specific penalty assessment will be determined by identifying the appropriate category (for example, major, moderate, minor) for both the potential for harm and the extent of deviation. This results in the penalty being set at the midpoint of the range in the selected matrix cell.

D. Economic Benefit. Any economic benefits, including delayed and avoided costs that have accrued to the violator as a result of noncompliance, will be added to the penalty amount. Determination will be made by the department using an economic benefit formula that provides a reasonable estimate of the economic benefit of noncompliance. Economic benefit may be excluded from the administrative penalty if any one (1) of the following occur:

1. The economic benefit is an insignificant amount;
2. There are compelling public concerns that would not be served by taking a case through administrative appeal or circuit court litigation; or
3. It is unlikely that the department would be able to recover the economic benefit in litigation based on the particular case.

(E) Adjustments. The department may add to or subtract from the total amount of the penalty after consideration of the following adjustments:

1. Recalculation of penalty amount. After the issuance of an order by the director, if new information about a violation becomes available which indicates that the original penalty calculation may have been incorrect, the department may recalculate the penalty;
2. Good faith efforts to comply. The department may adjust a penalty amount downward if good faith efforts have been adequately documented by the violator. Good faith efforts include, but are not limited to, documentation that the violator has reported noncompliance or instituted measures to remedy the violation prior to detection by the department. However, good faith efforts to achieve compliance after agency detection are assumed and are not grounds for decreasing the penalty amount;
3. Culpability. In cases of heightened culpability, the penalty may be increased at the department's discretion, within the ranges of the matrix. Likewise, in cases where there is a demonstrable absence of culpability, the department may decrease the penalty. Lack of knowledge of the Missouri Clean Water Law and any associated rule and/or permit shall not be a basis of decreased culpability. The following criteria will be used to determine culpability:

A. How much control the violator had over the events constituting the violation;

B. The foreseeability of the events constituting the violation;

C. Whether the violator took reasonable precautions against the events constituting the violation;

D. Whether the violator knew or should have known of the hazards associated with the conduct; and

E. Whether the violator knew or should have known of the legal requirement which was violated. This criteria shall be used only to increase a penalty, not to decrease it;

4. History of noncompliance. Where there has been a history of noncompliance with the Missouri Clean Water Law or any associated rule or permit, to a degree deemed significant due to frequency, similarity or seriousness of past violations, and considering the violator's response to previous enforcement actions, the department may increase the administrative penalty. No downward adjustment is allowed because of this factor;

5. Ability to pay. When a violator has adequately documented that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out important remedial measures, the department may take one (1) of the following actions:

A. Waive any portion or all of the administrative penalty; or

B. Negotiate a delayed payment schedule, installment plan or replace upfront penalties with stipulated penalties; and

6. Other adjustment factors. This rule allows for other penalty adjustments based on fairness and equity not mentioned in this rule which may arise on a case-by-case basis.

We have set forth in our Findings of Fact how Rosania applied these considerations using the Worksheet. We find the penalties were lawfully calculated.

DNR argues Staton did not introduce any evidence of an inability to pay and therefore the penalty should not be reduced. We agree and do not reduce the payment under 10 CSR 10-6.230(6)(E)5.

The regulation allows for penalty adjustments based on "fairness and equity . . . which may arise on a case-by-case basis." Staton's arguments are mainly that he does not owe the

penalty at all, but some of his arguments – that he processes very few vehicles and attempts to clean up any spills as they occur – might be considered an equitable argument against the penalty or the amount thereof. Weighing against this is Staton’s failure to cooperate with DNR and the inconsistency of his statement to See and his testimony at the hearing as to the number of vehicles processed. We do not find Staton to be a credible witness.

We recommend that the CWC uphold the penalty as assessed by DNR.

Summary

The AHC recommends that the CWC uphold the administrative penalty order issued to Staton as assessed because he violated the MCWL.

SO RECOMMENDED on June 4, 2015.

NICOLE COLBERT-BOTCHWAY
Commissioner