OAH 65-2200-37427

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Notice of Sanctions Issued to Jerry Loxtercamp and Jerry's Pumping, LLC	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

This matter came before Administrative Law Judge Ann O'Reilly for a contested case hearing on May 25, 2021. Due to the COVID19 pandemic, the hearing was conducted via Microsoft Teams videoconference.

Oliver J. Larson, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (MPCA). Zachary Burmeister, Rinke Noonan, appeared on behalf of Appellants Jerry Loxtercamp and Jerry's Pumping, LLC (Appellants).

The parties submitted post-hearing briefs and the record closed on June 15, 2021.[1]

STATEMENT OF THE ISSUES

1. Did Appellants violate Minn. Stat. § 115.061(a) (2020), Minn. R. 7050.0210, subps. 2, 13, and Minn. R. 7020.2225, subps. 1, 7 (2019)?

2. If so, is the $8,500 unforgivable civil penalty imposed in the Administrative Penalty Order reasonable?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that a preponderance of the evidence establishes that Appellants violated Minn. Stat. § 115.061(a), Minn. R. 7050.0210, subps. 2, 13, and Minn. R. 7020.2225, subps. 1, 7, when they applied liquid manure to fields in a manner that resulted in a discharge of pollution to waters of the state. However, the Administrative Law Judge finds that an unforgivable penalty of $8,500 is unreasonable under the factors set forth in Minn. Stat. § 116.072, subd. 2. Accordingly, the Judge respectfully recommends that the Commissioner **AFFIRM** the Administrative Penalty Order but **AMEND** the civil penalty to **$5,850**, an amount consistent with the gravity of Appellants' violations and the MPCA's penalty matrix.

[1] The parties jointly requested and stipulated to a 30-day period in which to provide closing briefs, thereby waiving the 10-day requirement in Minn. Stat. §116.072, subd. 6(b) (2020).

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Jerry Loxtercamp is the owner of Jerry's Pumping, LLC (Jerry's Pumping), a commercial animal waste technician (CAWT) regulated by the Minnesota Department of Agriculture (Department).[2] Jerry's Pumping is in the business of applying liquid animal waste (liquid manure) to crops and agricultural land.[3]

2. On October 22, 2018, Charlie Vogel made a complaint to Nicollet County about excess animal waste accumulating on the agricultural property surrounding his residence at 39315 460th Street, St. Peter, MN.[4] Mr. Vogel's property is located across a road from Northern Plains Dairy (Northern Plains), a large dairy farm and feedlot, where animal waste is collected and stored.[5]

3. Mr. Vogel leases the cropland surrounding his residence to a local farmer who grows crops on the land.[6] The farmer entered into an agreement with Northern Plains to obtain manure from Northern Plain's feedlot, which would then be applied to the farmer's fields as fertilizer.[7] To spread the manure in a liquid form, Northern Plains hired Jerry's Pumping.[8]

4. Manure created in a feedlot is maintained in a "lagoon" or large manure storage area.[9] Manure, rainwater, milk wastewater, animal urine, runoff, and other waste liquids and solids collect and are stored in the pit for later use as fertilizer.[10] The manure and liquid waste products are combined together to become a spreadable slurry, which is then applied, in liquid form, to crops.[11] The liquid manure mixture is pumped through drag line hoses from the feedlot to the surrounding crop land.[12] A flow meter is connected to a pump regulating the drag hoses to ensure a specific amount of

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[2] Exhibit (Ex.) 3 at 2; Testimony (Test.) of Jerry Loxtercamp.
[3] Test. of J. Loxtercamp.
[4] Test. of Andrew Hornick; Test. of David Malakowsky; Ex. 3 at 2.
[5] Test. of D. Malakowsky; Ex. 3 at 2-3. It is unclear in the record whether the feedlot where the manure was produced was owned or operated by Northern Plains Dairy, LLC or Davis Family Dairies, LLC. The Case Development Form (Ex. 3) identifies Northern Plains Dairy, LLC. Mr. Malakowsky's testimony referred to Davis Family Dairies. According to Minnesota Secretary of State filings, Northern Plains Dairy and Davis Family Dairies have the same registered manager and address. *See* *https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=e82a76d1-eff1-e511-8167-00155d01c56d* *and* https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=ac1b5b81-a1d4-e011-a886-001ec94ffe7f.
[6] Test. of D. Malakowsky.
[7] Test. of D. Malakowsky; Ex. 3 at 2-3.
[8] Test. of D. Malakowsky; Ex. 3 at 2-3. It is unclear in the record whether Jerry's Pumping purchased the manure or whether the farmer purchased the manure. In any event, it is undisputed that Jerry's Pumping was hired to apply the manure to the farmer's crops. Test. of J. Loxtercamp.
[9] Test. of D. Malakowsky.
[10] *Id.*
[11] *Id.*
[12] *Id.*

fertilizer is applied to the fields at an even rate.[13] Jerry's Pumping equipment "injects" the liquid fertilizer into the fields, but where the soil is hard or compacted, the liquid manure cannot penetrate the ground and must be plowed into the soil to prevent pooling and runoff.[14]

5. The property at issue in this case, owned by Mr. Vogel, includes approximately 114 acres of cropland located in St. Peter (Subject Property).[15] The Subject Property is equipped with a drain tile system.[16] The drain tile system is comprised of plastic drain tile, buried underground, through which excess water can collect, drain, and flow away from the fields.[17] Four-inch diameter intake pipes, protruding from the ground in the fields, collect the excess water and liquids from the fields, pass it through the drain tile system under the ground, and into an intermittent stream at the south end of the Subject Property.[18] The intermittent stream, in turn, flows into Seven Mile Creek, a designated trout stream listed by the Minnesota Department of Natural Resources (DNR).[19]

6. A CAWT who applies liquid manure is expected to know where drain tile intakes and nearby freshwater bodies are located, so that liquid fertilizer does not flow into the intakes or into the waters of the state.[20] Similarly, CAWTs are expected to ensure that the amount of liquid fertilizer applied to a field is not excessive so that the soil does not get waterlogged.[21] If the fields are oversaturated with liquid fertilizer, the soil cannot absorb the fertilizer fast enough to prevent pooling and it can result in standing manure or, worse yet, in runoff that flows into nearby water bodies.[22]

Investigation of Complaint

7. Because the MPCA is charged with investigating potential waste discharges into waters, Mr. Vogel's complaint about excess liquid manure was referred to the MPCA office in Mankato for investigation on October 23, 2018.[23] MPCA Environmental Specialist David Malakowsky was assigned to investigate the complaint that day.[24]

8. At approximately 11:30 a.m., Mr. Malakowsky and his colleague, Sara Isebrand, arrived at the Subject Property.[25] Near the driveway of the property,

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[13] *Id.*
[14] Test. of J. Loxtercamp; Test. of A. Hornick; Test. of D. Malakowsky.
[15] Test. of D. Malakowsky; Exs. 5, 10.
[16] Test. of D. Malakowsky.
[17] *Id.*
[18] *Id.*
[19] *Id.*; Ex. 3 at 3.
[20] Test. of D. Malakowsky.
[21] *Id.*
[22] *Id.* "Hydraulic loading" is the term used to measure the volume of wastewater applied to a surface during a period of time. *See* https://www.wateronline.com/doc/math-solutions-hydraulic-loading-calculations-0001#:~:text=Hydraulic%20loading%20is%20defined%20in,(gpd%2Fft2).
[23] Test. of D. Malakowsky; Ex. 3.
[24] Test. of D. Malakowsky.
[25] *Id.*

Mr. Malakowsky observed an open drain tile intake pipe (Intake #1) with a large amount of liquid pooled around it.[26] He also noticed large standing pools of liquid manure throughout the fields.[27] Intake #1 borders on the northeast side of the Subject Property, near the driveway to the residence, and is approximately 75 feet from 460th Street.[28] An aerial photograph of the property, with the locations of the intake pipes identified, is set forth below:[29]

9. The investigators spotted a worker[30] of Jerry's Pumping who was applying the liquid fertilizer to the fields.[31] The worker was taking apart the dragline hoses and had just finished spraying the fields.[32] The MPCA investigators asked the worker to stop applying any more manure to the property and to notify the MPCA duty officer of the discharge.[33] This worker did not call in any notification to the MPCA duty officer.[34]

10. The MPCA investigators next spoke with the complainant, Mr. Vogel, who directed the investigators to drain tile Intake #2 on the south end of the property.[35]

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Exs. 5, 101.
[30] While the record evidences that the person who the MPCA investigators spoke to was providing services for Jerry's Pumping, it is unclear whether this individual was an employee of Jerry's Pumping or an employee of another pumping operation that was being used by Jerry's Pumping to complete the job. Test. of D. Malakowsky; Test. of J. Loxtercamp; Test. of A. Hornick.
[31] Test. of D. Malakowsky.
[32] *Id.*
[33] *Id.*; Ex. 3 at 3.
[34] Test. of D. Malakowsky; Test. of A. Hornick.
[35] Test. of D. Malakowsky.

Mr. Malakowsky observed another large area of standing liquid manure on the fields, which was flowing over the field service road and pooling around Intake #2.[36] Mr. Malakowsky noted the strong smell of manure in the area due to the standing pools of sewage.[37]

11. Mr. Vogel explained that he had taken pictures of the area the day before (October 22, 2018), which showed a large pooling of liquid manure around Intake #2.[38] Mr. Vogel provided the pictures he had taken on October 22, 2018, to the MPCA investigators.[39] These pictures depict a drag hose and large amounts of standing brown water/liquid manure in the fields and areas immediately surrounding Intake #2.[40]

12. After speaking with Mr. Vogel, the MPCA investigators met with Andrew Hornick, an employee of Jerry's Pumping, and a representative from Northern Plains Dairy about cleaning up the site to prevent the liquid manure from discharging into waters of the state.[41]

13. Mr. Hornick explained that the liquid manure was being applied at a rate of 24,000 gallons per acre, but the field soils were tightly compacted and wet due to recent rain.[42] As a result, the liquid manure was not soaking into the fields during application.[43] Mr. Malakowsky noted that the drain tile intakes were not covered to prevent the liquid manure from entering the drain tile system.[44] In addition, the grassy area by the intermittent stream was filled and overflowing with liquid manure and runoff.[45]

14. At hearing, Mr. Hornick admitted that he was notified by Mr. Vogel late in the afternoon of October 22, 2018, that the liquid manure and runoff was entering into Intake #2.[46] To help absorb the liquid and prevent the spread of the pooling manure, he placed some "separated solids" (e.g., animal bedding) around that area.[47] Because Jerry's Pumping did not have the proper equipment to till the manure into the compacted soil, Mr. Hornick did not attempt to incorporate the manure into the fields at that time.[48]

15. After speaking with the MPCA investigators, Mr. Hornick and the Northern Plains Dairy representative agreed to plow up the fields to help the ground absorb more

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[36] *Id*.; Ex. 3 at 3.
[37] Test. of D. Malakowsky.
[38] Test. of D. Malakowsky; Ex. 6 at 33-41.
[39] Test. of D. Malakowsky; Ex. 6 at 33-41.
[40] Ex. 6 at 33-41.
[41] Test. of D. Malakowsky; Ex. 3 at 3.
[42] Ex. 3 at 3. Jerry Loxtercamp testified that, while the application rate was supposed to be 24,000 gallons per acre, the actual applied flow rate was 22,700 gallons per acre due to the wetness and compaction of the soil. Test. of J. Loxtercamp.
[43] Ex. 3 at 3.
[44] Test. of D. Malakowsky.
[45] Test. of A. Hornick.
[46] *Id.*
[47] *Id.*
[48] *Id.*

of the liquid runoff and incorporate the liquid manure.[49] Mr. Hornick also agreed to place more piles of separated solids and straw around the pooling liquid.[50] Because the MPCA was present on the property and aware of the situation due to Mr. Vogel's complaint, neither Mr. Hornick, Mr. Loxtercamp, nor anyone from Jerry's Pumping contacted the MPCA to report a discharge.[51]

16. The MPCA investigators and Mr. Vogel proceeded down the fields to the drain tile outlet, which drains into an intermittent stream – a water of the state.[52] There, Mr. Malakowsky observed another large pool of liquid manure along the stream bed.[53]

17. At the head of the intermittent stream, where Intake #2 discharges into the stream through a culvert, the investigators observed brown-colored scum/foam floating on the water and the strong smell of manure, indicating that the Subject Property's drain tile system was discharging the liquid manure into the intermittent stream.[54] The investigators instructed Mr. Hornick and the dairy representative to include this area in their cleanup efforts.[55]

Testing of Stream and Creek

18. The investigators decided to take water samples of the intermittent stream, as well as Seven Mile Creek, to determine whether the liquid manure had discharged into waters of the state.[56]

19. Because the MPCA investigators believed some of the liquid manure had discharged into the intermittent stream and, thus, potentially reached the trout stream, the MPCA notified the DNR of potential fish kill associated with the suspected discharge.[57]

20. The MPCA investigators collected six water samples from the intermittent stream, starting at the head of the stream (where the drain tile system discharges into the stream) and continuing at equal distances along the stream.[58] The investigators also took one water sample from Seven Mile Creek, approximately 50 feet upstream from where the intermittent stream discharges into Seven Mile Creek.[59] A total of seven water samples were sent to a lab for testing.[60]

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[49] Test. of D. Malakowsky; Ex. 3 at 3.
[50] Test. of D. Malakowsky; Ex. 3 at 3.
[51] Test. of A. Hornick; Test. of J. Loxtercamp; Test. of D. Malakowsky.
[52] Ex. 3 at 3.
[53] Test. of D. Malakowsky; Ex. 3 at 3; Ex. 6.
[54] Test. of D. Malakowsky; Ex. 3 at 3.
[55] Ex. 3 at 3.
[56] Test. of D. Malakowsky; Ex. 3 at 3-4.
[57] Ex. 3 at 3-4.
[58] Test. of D. Malakowsky; Ex. 3 at 3-4; Ex. 8.
[59] Test. of D. Malakowsky; Ex. 3 at 3-4; Ex. 8.
[60] Test. of D. Malakowsky; Ex. 3 at 3-4; Ex. 8.

21. Test results confirmed high levels of *Escherichia coli* (*E. coli*) and nitrates in the first three water samples closest to the discharge point, where the drain tile system (culvert) flows into the intermittent stream.[61] The levels of *E. coli* and nitrates grew small as water flowed further downstream from the discharge point.[62] The presence of *E. coli* and nitrates in the Seven Mile Creek sample evidences that the discharge of liquid manure reached the trout stream via the intermittent stream.[63]

22. The test results were as follows:[64]

Sample #	***E. coli* level**	**Total Nitrogen**
#1 (at culvert/head of Intermittent Stream)	1467 MPN[65]/100 ml	21.7 mg/L
#2 (50 yds from culvert of Int. Stream)	1782 MPN/100 ml	22.0 mg/L
#3 (75 yds from culvert of Int. Stream)	1500 MPN/100 ml	21.5 mg/L
#4 (mid-Intermittent Stream)	N/A[66]	3.6 mg/L
#5 (lower mid-Intermittent Stream)	269.0 MPN/100 ml	3.1 mg/L
#6 (bottom of Intermittent Stream)	183.0 MPN/100 ml	2.8 mg/L
#7 (Seven Mile Creek upstream)	74.0 MPN/100 ml	12.8 mg/L

23. According to the MPCA, these tests confirmed that manure applied to the subject property entered the drain tile system, discharged into the intermittent stream, and ultimately flowed into Seven Mile Creek, where lower levels of *E. coli* and nitrogen were detected.[67] High levels of *E. coli* and nitrogen are associated with animal waste (manure.)[68]

24. Appellants do not challenge the test results or the fact that liquid manure from the October 22 and 23, 2018, applications discharged into the intermittent stream and Seven Mile Creek.[69]

Remediation

25. MPCA investigators returned to the subject property on October 25, 2018, to observe and document the cleanup efforts.[70] The investigators noted that all pools of discharged liquid manure were covered with separated solids or straw to absorb the liquid and that the fields were “chisel plowed” to incorporate the liquid manure into the soils (thereby removing the standing liquids).[71] Appellants had to rent equipment to plow the fields because the soil was so compacted and Appellants did not own the proper equipment to incorporate the manure into the soil.[72] In any event, the conditions causing

[61] Ex. 3 at 4; Ex. 8.
[62] Test. of D. Malakowsky; Ex. 3 at 4; Ex. 8.
[63] Test. of D. Malakowsky; Ex. 3 at 4; Ex. 8.
[64] Ex. 8.
[65] MPN is Most Probable Number.
[66] Sample #4 was not tested for *E. coli* due to a lack of testing supply. Test. of D. Malakowsky.
[67] *Id.*; Test. of D. Malakowsky.
[68] Test. of D. Malakowsky.
[69] *See* Appellant’s Closing Brief at 1.
[70] Ex. 3 at 4.
[71] *Id.*
[72] Test. of A. Hornick.

the discharge into the intermittent stream and Seven Mile Creek were corrected by October 25, 2018.[73]

26. The DNR later confirmed that there was no fish kill in the Seven Mile Creek resulting from the discharges occurring on October 22 and 23, 2018.[74]

Notice of Violations

27. On July 2, 2019, approximately eight months after the discharge, the MPCA sent Appellants an "Alleged Violations Letter" alleging various violations of Minnesota law and requesting additional information from Appellants.[75] Appellants responded on July 25, 2019, stating that their CAWT license had expired.[76] Appellants provided only some of the information requested by the MPCA.[77]

28. Nearly six months later, a forum of MPCA investigators met on February 11, 2020, to discuss whether Appellants committed violations of law and if sanctions should be imposed.[78] Eight MPCA employees, investigators, and specialists comprised the forum.[79] The forum determined that Appellants committed three violations of law: (1) violation of Minn. Stat. § 115.061(a) (failure to notify MPCA of a discharge); (2) violations of Minn. R. 7050.0210, subps. 2 and 13 (causing a nuisance condition and discharging pollution); and (3) violation of Minn. R. 7020.2225, subp. 1 (discharge of manure into waters of the state) and subp. 7 (application of manure within 300 feet of an open drain tile intake without incorporation within 24 hours).[80]

MPCA Penalty Determinations

29. The MPCA has developed a system for determining penalty amounts using both base penalties that may be fully or partially forgivable, as well as adjustments to increase or decrease the base penalty amount.[81]

30. For base penalty determinations, the MPCA uses a "penalty matrix" to guide its decision-making process.[82] The matrix evaluates: (1) the regulated party's "deviation from compliance"; and (2) the "potential for harm."[83] These two factors are

[73] Ex. 3 at 4.
[74] Ex. 9.
[75] Ex. 3 at 4.
[76] *Id.*
[77] *Id.*
[78] Ex. 3 at 9.
[79] *Id.*; Test. of D. Malakowsky.
[80] Ex. 3 at 5-6. While the Administrative Penalty Order lists three violations, the Case Development Form discusses the third violation (Minn. R. 7020.2225, subps. 1, 7) as two separate violations. *Compare* Exs. 1 and 3.
[81] Ex. 3 at 7-10.
[82] *Id.* at 7.
[83] *Id.*

then rated as "minor," "moderate," or "major," depending on the gravity of the violation(s).[84]

31. The penalty matrix is set forth below:

Penalty matrix:

		Deviation from Compliance		
		Minor	**Moderate**	**Major**
Potential for Harm	**Major**	$2,100 ↔ $3,600 ↔ $5,100	$3,600 ↔ $5,850 ↔ $8,100	$5,100 ↔ $7,600 ↔ $10,000
	Moderate	$600 ↔ $1,350 ↔ $2,100	$1,100 ↔ $2,350 ↔ $3,600	$2,100 ↔ $3,600 ↔ $5,100
	Minor	$100 ↔ $350 ↔ $600	$300 ↔ $700 ↔ $1,100	$600 ↔ $1,350 ↔ $2,100

32. When determining "deviation from compliance," the MPCA considers the number of laws, rules, or permit conditions violated, the degree to which the conduct failed to conform to the applicable laws or permit conditions, whether the laws violated were basic to compliance, and the duration of the conduct.[85]

33. When determining the potential for harm, the MPCA considers the risk of harm caused by the violation(s) to "humans, animals, air, water, land, and other natural resources of the state."[86] Facts that are considered include "the affected area's size and sensitivity, receptors, pollutant type, amount of pollutant, overall resource value, actual impact, and the impact to the regulatory program."[87] This analysis focuses on the potential for harm, not the actual harm imposed.[88]

34. The MPCA also looks to whether the alleged violation(s) was/were "serious" or "repeated" in determining whether a monetary penalty should be forgivable or non-forgivable.[89]

35. The fines set forth in the penalty matrix comprise the base penalty that the MPCA imposes.[90] After the base penalty is selected, the MPCA applies "adjustments" based upon: (1) the willfulness of the violation(s); (2) the regulated party's violation history; (3) "other factors as just may require;" and (4) "economic benefit" to the regulated party.[91] Willfulness and history of past violations increase the base penalty by way of an added percentage of the base penalty or in a flat adjustment amount.[92] "Other factors as justice may require" may be used to make either an upward or downward

[84] *Id.*
[85] *Id.*
[86] Ex. 3 at 7.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 8.
[91] *Id.* at 8-9.
[92] *Id.*

adjustment from the base penalty.[93] "Economic benefit" is expressed in a specific adjustment amount, as opposed to a percentage of the base penalty.[94]

Forum Determination of Monetary Penalty

36. With respect to Appellants, the MPCA forum determined that Appellants committed three violations, which were all serious violations, but none were repeated violations.[95] The forum also found that Appellants' deviation from compliance and the potential for harm from the spill were both "major" in terms of gravity.[96] The forum reasoned:

> The potential for harm was major because when the Regulated Party failed to apply liquid manure according to Minn. R. 7020 requirements, over applying liquid manure and failing to incorporate the liquid manure that was applied next to an open tile intake within 24 hours, it caused an actual discharge of liquid manure and manure contaminated runoff to waters of the state. The Regulated Party failed to take immediate action to recover the discharge of liquid manure and manure contaminated runoff allowing it to flow into an open tile intake that flowed into an intermitted [sic] stream that flows into Seven Mile Creek of Nicollet County, a designated trout stream listed by the DNR.
>
> The deviation from compliance was major because the Regulated Party failed to apply liquid manure according to Minn. R. 7020 requirements, over applying liquid manure and failing to incorporate the liquid manure that was applied next to an open tile intake within 24 hours, causing the liquid manure to pool in three separate locations and to also discharge to a tile intake and then to waters of the state. The Regulated Party also failed to notify the State Duty Officer of the discharge of liquid manure and manure contaminated runoff and failed to take immediate action in stopping the discharge of liquid manure and manure contaminated runoff, only doing so when directed to do so by the MPCA staff.[97]

37. Using the MPCA's penalty matrix, the forum decided on a total base penalty of $8,500, which falls within the mid-range of the major deviation from compliance and major potential for harm category.[98] The forum applied no adjustments, finding that the violations were not willful, that Appellants had no history of past violations, that Appellants did not benefit economically from the violations, and that

[93] *Id.* at 9.
[94] *Id.*
[95] *Id.* at 7-8.
[96] *Id.*
[97] *Id.* at 8.
[98] *Id.* at 7-10.

there were no other factors requiring an upward or downward adjustment from the base penalty.[99]

Administrative Penalty Order and Appeal

38. On April 13, 2020, the MPCA issued an Administrative Penalty Order to Appellants, alleging three violations of law and rule and imposing a fine of $8,500.[100] The Order also required Appellants to make the following corrective actions:

- Obtain a CAWT license with the Minnesota Department of Agriculture;

- Develop an Emergency Response Plan (ERP) for the application of liquid or solid manure and submit a copy of the ERP to the MPCA for review within 30 days of the Order.[101]

39. Appellants timely responded to the Order on May 13, 2020, requesting a contested case hearing.[102]

40. While Appellants obtained a valid CAWT,[103] there was no evidence presented that Appellants developed an ERP and submitted it to the MPCA for review within 30 days of the Administrative Penalty Order. There was also no evidence presented that Appellants failed to develop an ERP or failed to submit it to the MPCA for review within the required 30 days. Therefore, it is unclear whether Appellants have complied with the corrective actions identified in the Administrative Penalty Order.

41. Appellants have no history of other MPCA violations.[104]

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of the Minnesota Pollution Control Agency (Commissioner) and the Administrative Law Judge have jurisdiction over this matter pursuant to Minn. Stat. §§ 116.072 and 14.57-.69 (2020).

2. Appellants received due, proper, and timely notice of the Administrative Penalty Order, as well as the right to a request review and appeal the Order.

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[99] *Id.*
[100] Ex. 1.
[101] Pursuant to the Administrative Penalty Order, the ERP must contain the procedures to be completed in the event of a discharge or spill. In addition, Appellant shall have in place a field application map identifying all sensitive features prior to manure application. The map will aid the Appellant in identifying any sensitive features during application. *See* Ex. 1.
[102] Ex. 2.
[103] *See* Ex. 1.
[104] Test. of J. Loxtercamp.

3. The MPCA has complied with all procedural requirements of rule and law.

4. Appellants timely requested review of the Administrative Penalty Order and a contested case hearing. Accordingly, this matter is properly before the Commissioner and Administrative Law Judge for decision.

5. The Commissioner may issue orders requiring violations be corrected and may administratively assess monetary penalties for violations of Minn. Stat. ch. 15, as well as rules adopted under that chapter, including Minn. R. ch. 7020 and 7050.[105]

6. To justify the issuance of the Administrative Penalty Order at issue in this case, the MPCA has the burden to establish by a preponderance of the evidence[106] that Appellants violated the laws and rules cited in the Order: Minn. Stat. § 115.061(a), Minn. R. 7050.0210, subps. 2, 13, .7020.2225, subps. 1, 7.

7. A "preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence.[107] "It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true."[108]

8. Minn. Stat. §115.061(a) (2020), provides that:

> . . . it is the duty of every person to notify the [MPCA] 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 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.

9. A "discharge" is defined as "the addition of a pollutant to waters of the state, including a release of animal manure, manure-contaminated runoff or process wastewater from an animal feedlot, a manure storage area, or an animal manure land application site by leaking, pumping, pouring, emitting, emptying, dumping, escaping, seeping, leaching, or any other means. . . ."[109]

10. "Pollutant" means "any sewage, industrial waste, or other wastes, as defined in this chapter, discharged into a disposal system or to waters of the state."[110] Liquid animal manure is a pollutant when discharged into waters of the state.[111]

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[105] Minn. Stat. §§ 115.03, 116.072, subd. 1 (2020).
[106] Minn. R. 1400.7300, subp. 5 (2019).
[107] 4 Minnesota Practice, CIV JIG 14.15 (2014).
[108] *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).
[109] Minn. R. 7020.0300, subp. 9c (2019); *see also* Minn. Stat. § 115.01, subd. 4 (2020).
[110] Minn. Stat. § 115.01, subd. 12 (2020.)
[111] Minn. Stat. § 115.01, subd. 17 (2020) (including animal waste in definition of "sewage"); Minn. R. 7020.0300, subp. 9c (including animal manure as a pollutant in the definition of "discharge").

11. "Waters of the state" include "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portions of the state."[112] The intermittent stream and Seven Mile Creek are waters of the state.

12. Appellants failed to timely notify the MPCA of the discharge of liquid manure first occurring on October 22, 2018, and failed to take action reasonably possible on October 22 and 23, 2018, to minimize or abate pollution of waters of the state. Accordingly, the MPCA has established that Appellants have violated Minn. Stat. § 115.061(a).

13. Minn. R. 7050.0210 prohibit the creation of nuisance conditions and the discharge of pollutants into the waters of the state. Subparts 2 and 13 of the rule state as follows:

> Subp. 2. **Nuisance conditions prohibited**. No sewage, industrial waste, or other wastes shall be discharged from either point or nonpoint sources[113] 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, obnoxious odors, gas ebullition, deleterious sludge deposits, undesirable slimes or fungus growths, aquatic habitat degradation, excessive growths of aquatic plants, or other offensive or harmful effects.
>
> Subp. 13. **Pollution prohibited**. No sewage, industrial waste, or other wastes shall be discharged from either a point or a nonpoint source into the waters of the state in such quantity or in such manner alone or in combination with other substances as to cause pollution as defined by law. . . .

14. The MPCA has established by a preponderance of the evidence that Appellants discharged liquid manure into waters of the state, causing pollution and a nuisance condition in violation of Minn. R. 7050.0210, subps. 2 and 13.

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[112] Minn. Stat. § 115.01, subd. 22; Minn. R. 7020.0300, subp. 26 (2019).

[113] "Point source" is defined in Minn. Stat. § 115.01, subd. 11 as "any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." "Nonpoint source" is defined in Minn. R. 7050.0130, subp. 5 as "a land management or land use activity that contributes or may contribute to ground and surface water pollution as a result of runoff, seepage, or percolation and that is not defined as a point source under Minnesota Statutes, section 115.01, subdivision 11."

15. Minn. R. 7020.2225, regulates the discharge and application of manure and process wastewater. The rule states, in pertinent part:[114]

> Subpart 1. **In general.**
>
> A. Manure and process wastewater must not be applied to land in a manner that will:
>
> (1) result in a discharge to waters of the state during the application process, except that manure and process wastewater application is allowed onto seasonally saturated soils that are seeded to annual farm crops or crop rotations of perennial grasses or legumes; or
>
> (2) cause pollution of waters of the state due to manure-contaminated runoff.
>
> Subp. 7. **Manure and process wastewater application for land within 300 feet of open tile intakes.** Manure and process wastewater applied within 300 feet of open tile intakes, and where manure-contaminated runoff may flow into the open tile intake, must be injected or incorporated within 24 hours of application according to the schedule in items A and B unless other agency-approved water quality protection management practices are implemented in accordance with item C.
>
> A. All liquid manure and process wastewater applied within 300 feet of open tile intakes must be injected or incorporated within 24 hours of application beginning October 23, 2000.
>
> . . . .

16. The MPCA has established by a preponderance of the evidence that Appellants applied liquid manure and process wastewater within 300 feet of an open drain tile intake and failed to properly incorporate the waste into the soils. As a result, Appellants' application of liquid manure and process wastewater to land caused pollution to the waters of the state due to manure-contaminated runoff. The MPCA has, therefore, established that Appellants violated Minn. R. 7020.2225, subps. 1, 7.

17. Minn. Stat. § 116.072 provides that, if a violation occurs, the Commissioner may impose monetary penalties against the violator. For violations that have been corrected or where appropriate steps have been taken to correct the action, the penalty must be forgiven.[115] For violations that are serious, however, the

[114] Minn. R. 7020.2225, subps. 1, 7.
[115] Minn. Stat. § 116.072, subd. 5(a).

Commissioner may impose a penalty that shall not be forgiven, even if correction action is taken.[116]

18. When imposing a penalty, the MPCA may consider:[117]

(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.

19. According to Minn. Stat. § 116.072, subd. 6(c), the administrative law judge may not recommend a change in the amount of the proposed penalty unless the judge determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.

20. Based upon the application of the factors set forth in Minn. Stat. § 116.072, subd. 2, the Administrative Law Judge finds the monetary penalty unreasonable.

21. Utilizing the penalty matrix employed by the MPCA, the Administrative Law Judge finds that the gravity of Appellants' deviation from compliance more accurately falls within the "moderate" category, instead of the "major" category. The Judge further concludes that the potential for harm remains in the "major" category. Therefore, under the MPCA's matrix, a penalty of between $3,600 and $8,100 is appropriate:[118]

Penalty matrix:

		Deviation from Compliance		
		Minor	**Moderate**	**Major**
Potential for Harm	**Major**	$2,100 ↔ $3,600 ↔ $5,100	$3,600 ↔ $5,850 ↔ $8,100	$5,100 ↔ $7,600 ↔ $10,000
	Moderate	$600 ↔ $1,350 ↔ $2,100	$1,100 ↔ $2,350 ↔ $3,600	$2,100 ↔ $3,600 ↔ $5,100
	Minor	$100 ↔ $350 ↔ $600	$300 ↔ $700 ↔ $1,100	$600 ↔ $1,350 ↔ $2,100

[116] *Id.* at subd. 5(b).
[117] Minn. Stat. § 116.072, subd. 2(b).
[118] Ex. 3 at 7.

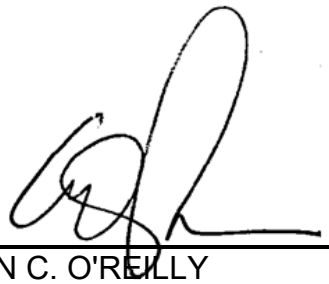
22. Viewing the totality of the evidence and applying the factors set forth in Minn. Stat. § 116.072, subd. 2, as more fully discussed in the Memorandum below, the Administrative Law Judge respectfully recommends that the Commissioner impose a non-forgivable penalty of $5,850, which is an amount in the mid-range of the appropriate penalty matrix category.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby respectfully recommended that the Commissioner **AFFIRM** the Administrative Penalty Order issued to Appellants but **AMEND** the amount of the non-forgivable penalty to $5,850.

Dated: July 14, 2021



ANN C. O'REILLY
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Pollution Control Agency (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least five days. Within those five days, the parties may file comments on, or exceptions to, this Report and the Commissioner will consider those comments and exceptions in making a final decision. Parties should contact Peter Tester, Temporary Commissioner, 520 Lafayette Road, St. Paul, MN 55155, (651) 296-6300, to learn the procedure for filing exceptions or presenting argument. The Commissioner's final order may be appealed in the manner provide for in Minn. Stat. §§ 14.63 to 14.69 (2020).

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within

90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020).

Under Minn. Stat. § 14.62, subd. 1 (2020), the MPCA is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

Pursuant to Minn. Stat. § 116.072, subd. 6(f), if a hearing has been held and a final order issued by the Commissioner, the penalty shall be paid by 30 days after the date the final order is received unless review of the final order is requested under Minn. Stat. §§ 14.63 to 14.69. If review is not requested or the order is reviewed and upheld by the Court of Appeals, the amount due is the penalty, together with interest accruing from 31 days after the original order was received at the rate established in Minn. Stat. § 549.09.

MEMORANDUM

Appellants do not contest that the liquid manure they applied to the Subject Property between October 22 and 23, 2018, entered the drain tile system and was ultimately discharged into waters of the state.[119] Instead, Appellants challenge the MPCA's fine determination, asserting that the violations asserted are duplicative and do not arise to a "major deviation" from compliance. Because Appellants do assert some disagreement with the violations in their challenge to the monetary penalty, the violations will be addressed first, before discussing the reasonableness of the fine.

Minn. Stat. § 115.061(a): Duty to Notify MPCA

Minn. Stat. § 115.061(a) requires that "every person" notify the MPCA "immediately" of a discharge, accidental or otherwise, of any substance "under its control which, if not recovered could cause pollution to the waters of the state." The statute also requires that dischargers take immediate action as may be "reasonably possible to minimize or abate pollution of waters of the state."[120]

Appellants first contend that, because Mr. Vogel, the landowner, notified the MPCA of the discharge, and because the MPCA appeared on site on October 23, 2018, Appellants were relieved of their duty to report. At trial, Mr. Loxtercamp argued that reporting the discharge to the MPCA after the MPCA had already arrived on the property was analogous to calling 911 to report a fire after the fire trucks had already arrived to put out the flames.[121] Appellants' arguments misconstrue the requirements of the law.

Minn. Stat. § 115.061(a) requires that "every person" notify the MPCA "immediately" of a discharge of a substance "under its control." Here, Appellants were in control of the discharge because Jerry's Pumping was applying the liquid manure to the

[119] Appellant's Closing Brief at 1.
[120] Minn. Stat. § 115.061(a).
[121] Test. of J. Loxtercamp.

fields. Therefore, even if Mr. Vogel first advised the MPCA of the discharge, Appellants had an independent duty to report the discharge to the MPCA as the party causing and controlling the discharge. This is particularly important considering that the evidence suggests that, had Mr. Vogel not reported the discharge to the MPCA, it is unlikely Appellants would have made such report on their own.

Appellant's employee, Mr. Hornick, testified that Mr. Vogel advised him that liquid manure was pooling around, and had entered, Intake #2 on the afternoon of October 22, 2018. Therefore, Appellants had a duty to report the discharge as early as October 22, 2018. The MPCA did not arrive on the Subject Property until 11:30 a.m. on October 23, 2018. The fact that the MPCA arrived to investigate the report on October 23, 2018, did not relieve Appellants of their duty to report on October 22, 2018, when Appellants' employee was first made aware of the discharge. Therefore, even accepting Appellants' "fire truck" argument, Appellants still had a duty to report the discharge on October 22, 2018, when it was first advised of the problem.

Appellants, as the dischargers, also had a duty under Minn. Stat. § 115.061(a) to take immediate action "reasonably possible" to minimize or abate the pollution to the waters of the state. While Mr. Hornick applied some animal bedding around Intake #2 on October 22, 2018, in response to Mr. Vogel's concern, Appellants did not properly incorporate the liquid manure into the ground to prevent the pooling and runoff that ultimately discharged into the stream and creek. As the pictures prove, on October 23, 2018, when the MPCA arrived, there was extensive pooling of the liquid manure throughout the fields, around the two drain tile intakes, and along the stream bed. It was apparent that Appellant's "injection" method of application was not properly incorporating the liquid into the soils and it was accumulating on the ground, allowing excess runoff to enter the drain tile intakes and, thus, the nearby water bodies. However, because Appellants did not own the necessary equipment to plow the fields, they could not properly incorporate the manure into the soils. Consequently, they failed to take the action reasonably necessary to abate or minimize the discharge and continued to apply the fertilizer to the fields on October 23, 2018.

Appellants are in the business of applying liquid manure. Therefore, they had a duty to ensure that they had the equipment necessary to incorporate the manure into the soil – even compacted and wet soils -- before it could be discharged into public waters. By failing to incorporate the manure when they were first alerted to the issue, Appellants violated their obligation under Minn. Stat. § 115.061(a) to take immediate and reasonable action to minimize the discharge of pollution.

The MPCA has, thus, established by a preponderance of the evidence that Appellants violated Minn. Stat. § 115.061(a) in two different ways: by failing to notify the MPCA of the discharge and failing to take timely and reasonable action to minimize or abate the pollution.

Minn. R. 7020.2225: Application of Manure

Minn. R. 7020.2225, subps. 1 and 7 prescribe how manure and process wastewater may be applied to land. Subpart 7 states that all liquid manure and process wastewater applied within 300 feet of an open drain tile intake "must be injected or incorporated within 24 hours of application."[122] Subpart 1 prohibits any application of manure to land that "cause[s] pollution of waters of the state due to manure-contaminated runoff."[123] Thus, if the application of manure near a drain tile intake causes pollution to waters of the state -- for example, because the manure is not being absorbed into the soil and is entering the tile intake – the 24-hour period for incorporation does not apply. At no time is manure application allowed when it causes pollution of waters of the state.

Here, Appellants admit that its application of liquid manure entered into the drain tile system.[124] In addition, Appellants do not dispute the laboratory tests that show manure from the drain tile system entered the intermittent stream and Seven Mile Creek, waters of the state. Thus, Appellants do not dispute that a discharge of manure occurred into waters of the state for which it was responsible.

Although Jerry's Pumping was using an "injection" method to apply the liquid manure, due to the wetness and compaction of the soil, the liquid manure was not being absorbed in the fields and was pooling in various locations, including the area around the drain tile intakes. Once the manure entered the drain tile system, it was headed to waters of the state. Therefore, Appellants were not entitled to 24 hours to complete the incorporation because the discharge was already occurring during the application when the manure began entering the intakes. By allowing manure-contaminated runoff to enter the drain tile intakes and discharge into waters of the state, Appellants were in violation of Rule 7020.2225, subp. 1A(2).

Minn. R. 7050.0210: Nuisance and Pollution Prohibited

Minn. R. 7050.0210, subp. 2, prohibits the discharge of any waste into the waters of the state "so as to cause any nuisance conditions." Subpart 7 of the rule prohibits the discharge of waste in such quantity or manner so as "to cause pollution as defined by law." Liquid animal manure is a pollutant when discharged into waters of the state.[125]

Mr. Malakowsky testified, and the pictures depict, a foaming substance (consistent with liquid manure) being discharged from Subject Property's drain tile system (via a culvert) into the intermittent stream.[126] This area also had a strong smell of manure.[127] Appellants do not dispute that the liquid manure entered the drain tile

[122] Minn. R. 7020.2225, subp. 7.
[123] *Id.* at subp. 1A(2).
[124] Appellants' Closing Brief at 1.
[125] Minn. Stat. § 115.01, subd. 17 (2020) (including animal waste in definition of "sewage"); Minn. R. 7020.0300, subp. 9c (including animal manure as a pollutant in the definition of "discharge").
[126] Test. of D. Malakowsky; Ex. 6 at 63-68.
[127] Test. of D. Malakowsky.

system.[128] The unrefuted evidence (i.e., pictures and laboratory tests) further show that the liquid manure emptied into the intermittent stream and traveled into the Seven Mile Creek.[129] Given the conditions that existed around the culvert -- foaming water, high *E-coli* content, and foul smell – the discharge of the liquid manure contaminated runoff into the stream resulted in pollution of the waters and caused a nuisance condition to exist. Accordingly, the MPCA has established that Appellants violated Minn. R. 7050.0210, subps. 1, 7.

Imposition of Monetary Penalty

The crux of Appellants' argument is that the monetary penalty imposed is unreasonable. Appellants contend that its violations were not a "major deviation from compliance." Appellants assert that: (1) the three violations charged are redundant and duplicative because all arise out of the same course of conduct; (2) the discharge was accidental or, at least, inadvertent; (3) this is Appellants' first ever violation; and (4) Appellants immediately complied with all of the MPCA's abatement and remediation directives to ensure that the condition was corrected by October 24, 2021.

Pursuant to Minn. Stat. § 116.072, subd. 2, when imposing a penalty, the MPCA 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.

If the administrative law judge finds that, based upon these factors, the proposed penalty is unreasonable, the judge may recommend a different monetary penalty.[130]

Here, the MPCA has not established that the gravity of Appellants' violations subjects them to the highest category of penalties imposed by the agency. Therefore, the Administrative Law Judge recommends a reduced fine commensurate with the gravity of Appellants' offenses.

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[128] Appellant's Closing Brief at 1.
[129] Exs. 6, 8.
[130] Minn. Stat. § 116.072, subd. 6(c).

The MPCA forum determined that Appellants' conduct represented a "major" deviation from compliance and presented "major" potential for harm. Consequently, it imposed a non-forgivable penalty of $8,500, which falls in the most severe penalty category in the MPCA's matrix. However, based upon the statutory factors, the MPCA has failed to establish sufficient evidence to support its penalty determination.

First, the MPCA has failed to present evidence that Appellants' violations were willful, despite its argument in its closing brief.[131] When determining the fine, the MPCA forum specifically found that Appellants' actions were not willful, otherwise it would have imposed an adjustment under that category. Instead, the forum noted "The MPCA evaluated this case for willfulness and determined that no adjustment was warranted."[132]

The evidence supports a finding that Appellants' actions were negligent, but they were not willful. Appellants did not purposefully discharge pollutants into the water. Rather, their negligent application of liquid manure on wet and compacted soils resulted in pooling and they did not have the proper equipment to incorporate the manure fast enough. While their actions were highly negligent, they were not willful, as determined by the MPCA forum in their determination.[133]

Second, the three violations arise out of the same incident and course of conduct and have overlapping elements. Specifically, the violations involved a failure to notify the MPCA and two violations[134] involving the discharge of pollution, all from the same event. This was not a situation where a regulated party had multiple violations of varying types.

Third, Appellants have no history of prior violations.

Fourth, the MPCA does not allege that Appellants gained economic benefit by committing the violation and the Administrative Penalty Order does not identify any additional factors that, in the interest of justice, require the imposition of a more significant fine.[135]

Finally, Appellants immediately complied with the MPCA's direction by plowing the excess liquid manure into the soil and applying separated solids to prevent further discharge, thereby preventing further discharge and abating the polluting conditions. While Appellants do not dispute that a discharge of pollution occurred into waters of the state and that Appellants were responsible for such a discharge, there is no evidence the discharge resulted in damage to humans, animals, air, water, land, or other natural resources. There was no fish kill or other long-term effects.

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[131] MPCA Closing Brief at 8.
[132] Ex. 3 at 8.
[133] *Id.* (The forum specifically found that the violations were not willful when it declined to impose the adjustment for willfulness.)
[134] Each with two subparts.
[135] *Id.* at 8-9.

The potential for harm, however, was significant. Appellants negligently allowed large areas of liquid manure to pool in fields and enter into the drain tile intakes on the Subject Property without taking the necessary timely action to incorporate the manure into the fields or otherwise prevent it from entering the drain tile intakes. As a result, liquid manure, a pollutant, entered into waters of the state through both the intermittent stream and Seven Mile Creek, a designated trout stream. Therefore, Appellant's violations were serious and subject to a non-forgivable penalty.

The penalty imposed in the Administrative Penalty Order, however, exceeds that which is consistent with Appellants' deviation from compliance. Appellants' deviation from compliance more accurately falls within the "moderate" category. Using a "moderate" deviation from compliance and a "major" potential from harm, the MPCA's penalty matrix suggests a fine between $3,600 and $8,100:

Penalty matrix:

		Deviation from Compliance		
		Minor	**Moderate**	**Major**
Potential for Harm	**Major**	$2,100 ↔ $3,600 ↔ $5,100	$3,600 ↔ $5,850 ↔ $8,100	$5,100 ↔ $7,600 ↔ $10,000
	Moderate	$600 ↔ $1,350 ↔ $2,100	$1,100 ↔ $2,350 ↔ $3,600	$2,100 ↔ $3,600 ↔ $5,100
	Minor	$100 ↔ $350 ↔ $600	$300 ↔ $700 ↔ $1,100	$600 ↔ $1,350 ↔ $2,100

Considering the facts as a whole and applying the factors set forth in Minn. Stat. § 116.072, subd. 2, the Administrative Law Judge respectfully recommends that the Commissioner impose a non-forgivable penalty of $5,850. This amount is in the mid-range of the appropriate penalty matrix category and is a more reasonable reflection of the gravity of Appellants' violations.

A. C. O.