

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

In the Matter of the Administrative Penalty
Order (APO) Issued to Michael Vierling

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on March 25, 1997 at the Offices of the Minnesota Pollution Control Agency in St. Paul. The record in this matter closed on June 9, 1997.

William P. Hefner, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared on behalf of the Staff of the Minnesota Pollution Control Agency ("Agency", "MPCA"). Patrick J. Kelly, Bannigan & Kelly, P.A., 1750 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101, appeared on behalf of Michael Vierling.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 116.072, subd. 6(e), the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least five days, and an opportunity has been afforded to each party adversely affected to comment on the recommendations. The Commissioner must consider such comments before issuing his final decision. Exceptions to this Report, if any, shall be filed with Commissioner Peder Larson, Minnesota Pollution Control Agency, 550 Lafayette Road, St. Paul, MN 55155-4194.

STATEMENT OF ISSUE

Whether the Nonforgivable portion (a \$500 fine) of an Administrative Penalty Order issued to Michael Vierling for alleged violation of Minn. Stat. § 115.061 should be affirmed because Mr. Vierling failed to notify the Agency when manure and contaminated run-off from his feedlot entered Pike Lake as a result of rainfall and snowmelt water flowing across the feedlot.

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

FINDINGS OF FACT

1. Michael Vierling and his wife, Becky Vierling, operate a 500-acre dairy farm in Scott County, Minnesota. The farm lies within the city limits of Prior Lake, north of County Highway 42 and east of Pike Lake Trail. The farm is owned by Michael's

mother, Helen Vierling, who inherited the farm upon the death of her husband (Michael's father), Leo Vierling, in September of 1995. Michael and Becky Vierling began operating the farm several months before Leo Vierling's death, when the elder Vierling became too sick to work. The farm has been owned by the Vierling family for over 135 years.

2. The Vierling farm contains a cattle feedlot at which approximately 60 cows eat, drink and produce animal waste. The feedlot was established by Leo Vierling in 1984. It lies approximately one-quarter mile north of highway 42 and measures approximately 200 yards from north to south. The east-west width is approximately 200 yards on the north and 220 yards on the south. Pike Lake Trail, a two-lane gravel road, runs parallel to the west side of the feedlot and is separated from it by a shallow ditch approximately 30 feet wide. The road curves to the northeast as it runs by the feedlot, which accounts for the shorter east-west width on the feedlot's north side. Approximately 75 feet west of the road lies the eastern shoreline of Pike Lake. Pike Lake is approximately one-quarter to one-half mile wide (east-west) and one-half to three-quarter mile long (north-south). The 75-foot strip between the lake's shoreline and Pike Lake Trail west of the Vierling property is occupied by a dense stand of hardwood trees.

3. The shoreline of Pike Lake is owned by approximately six landowners, including the Vierlings. North of the Vierling property, the east shoreline is occupied by what appears to be a hobby farm that has several horses pasturing on small hills that appear to drain, in part, into Pike Lake. A YMCA Camp is situated on the north-northwest shore of the lake. During the camp (summer) season, approximately 30 horses are pastured at the camp on small hills that appear to drain, in part, to the lake.

4. The Vierling feedlot slopes up approximately 15 feet from north to south and 20 feet from east to west. A roofed shelter structure with a cement floor measuring approximately 50 feet by 35 feet is located in the northwest sector of the lot approximately 10 feet up the slope from the lot's lowest point. A 20 foot by 15 foot feed pen is situated west and slightly north of the shelter. From the shelter and feed pen area, the feedlot slopes down approximately 10 feet in altitude to a watercourse, or "ravine" that runs east to west across the south side of the feedlot, approximately 10-15 yards north of the lot's south end. The ravine is several feet deep at the east end of the feedlot, but relatively shallow (less than 12 inches deep) at the west end as it runs out of the feedlot, through a culvert under Pike Lake Trail and empties into Pike Lake. It appears that any water draining the feedlot flows through the ravine.

5. On May 2, 1996, Peter Sandberg, Feedlot Compliance Coordinator in the Agency's water quality division, acting on the basis of some anonymous complaints that had come to his attention and on an oral report from one of his colleagues, inspected the Vierling feedlot (with Mr. Vierling's permission). No water was flowing through the culvert leading from Vierling's ravine to the shoreline side of Pike Lake Trail at the time, but Mr. Sandberg observed a substance he assumed to be pieces of solid cow manure at the lakeshore end of the culvert under Pike Lake Trail. He did not collect a sample of the substance. He does not recall if he went to the lakeshore which, due to higher water levels at that time, was approximately 50 feet west of the roadway. He did not collect any samples of water from Pike Lake.

6. After the inspection on May 2, 1996, Mr. Sandberg informed Michael Vierling orally that he had observed evidence of cow manure solids having run off the feedlot in a watercourse toward Pike Lake, that Vierling should have informed the Agency of the problem and that Mr. Vierling would have to take measures to correct the situation.

7. Mr. Sandberg wrote to Michael Vierling on May 7, 1996 to follow up in writing his inspection of the feedlot area and subsequent discussion with Vierling. Sandberg's letter (Exhibit 3) informs Vierling that runoff containing manure and dissolved manure was entering Pike Lake from his feedlot and "represents a serious water pollution problem" that "needs to be corrected". The letter informs Vierling that he is required to apply for a permit for the feedlot by filing a "completed application [which] must include an approvable plan for eliminating the discharge of manure contaminated run off to Pike Lake" on or before June 13, 1996. The letter states that an application form was enclosed. Mr. Vierling has no recollection of receiving an application form with the May 7, 1996 letter.

8. At the time of inspecting the feedlot, Mr. Sandberg was unaware that Mr. Vierling had already initiated a process to abate any potential pollution problem that may be caused by the runoff of manure or dissolved manure in or from the feedlot. Shortly after the death of his father, Mr. Vierling consulted with the Scott County office of the United States Department of Agriculture's Natural Resource Conservation Service (NRCS) regarding what he needed to do to stay in compliance with all applicable regulatory requirements. After being informed that his feedlot presented a potential pollution problem, Vierling took the advice of Stan Wendland, the Service's District Conservationist, and began to scrape manure from the feedlot every day to spread on his cultivated fields (he had been scraping the manure off the feedlot earlier, but not on every day).

The NRCS also advised him to construct a manure pit to collect runoff and manure from the feedlot, a process that became complicated further when Vierling was informed that the City of Prior Lake and the Prior Lake/Spring Lake Watershed District were considering the construction of a National Urban Roadways Program (NURP) Storm Sewer Collection Pond for runoff from Highway 42 in the same place as Vierling wanted to construct his manure pit. In that connection, Vierling was opposed by the Scott County Highway Department, which preferred a site for the NURP pond on his land. As a result of the increasingly complicated situation, Vierling retained a private consulting firm (Technical and Regulatory Evaluations Group, Inc.) in February, 1996 to work on the siting of both his manure pit and the storm sewer collection pond and to assist him to coordinate appropriately with various governmental entities.

In April, 1996 Mr. Vierling applied with the Minnesota Board of Water and Soil Resources for financial assistance in constructing his manure pit. Initial review of that application was to be done by the Scott Soil and Water Conservation District.

9. Sometime between May 7 and June 12, 1996 Vierling sent Mr. Sandberg a rough sketch of his planned manure pit in an effort to comply with the application deadline. Upon receiving the sketch, Agency staff personnel misfiled it, and it has not been recovered.

10. At all times relevant here, Mr. Vierling assumed that he could not go ahead on an application to the MPCA for a feedlot permit until a design was completed for his manure pit. For that phase of the process, Vierling has relied on the completion of the design by Mr. Wendland and his staff at the NRCS. Production of a specific, detailed design has been delayed by the fact that the site Vierling prefers for the project is the same piece of property the City and Watershed District considered condemning for the site of the Highway 42 runoff collection pond.^[1]

11. On August 5, 1996, Mr. Sandberg issued a letter (Exhibit 7) to Mr. Vierling, which letter acknowledged that Vierling has consulted with "Mr. Wedlund (sic) of the Scott County SWCD" (the reference is to Stan Wendland, District Conservationist for the NRCS), had retained a consultant and that the situation was complicated by the proposal for location of the storm water retention (NURP) pond. The letter alleges that Vierling has taken no steps to remove manure from the feedlot "or to minimize or abate the pollution", that the feedlot constitutes a pollution hazard and that he has not applied for a feedlot permit. Vierling was given 10 days to respond in writing.

12. Mr. Vierling called Sandberg on August 7, 1996 in response to receipt of the Agency's "10-day letter" described in the preceding Finding. Vierling told Sandberg he did not have an application form for a feedlot permit, and Sandberg mailed one to him promptly. Sandberg told Mr. Vierling that he should respond if any of the facts in the August 5 letter to him were not correct "and we will take that into account". (Exhibit 8).

13. On August 14, 1996, Vierling's consultant, Linda Lehman, President of Technical & Regulatory Evaluations Group, Inc., answered Sandberg's August 5 letter in writing (Exhibit 16). Lehman's letter acknowledges receipt of an Animal Feedlot Permit application by mail sent on August 8, and explains that Vierling will not be able to "submit a completed design" until Mr. Wendland "completes the design and defines the total cost of the project". The letter explains again the holding up of plans due to the pendency of a decision on locating the NURP pond and calls the Agency's attention to a July 17, 1996 letter from the Scott Soil and Water Conservation District tabling State (Board of Water and Soil Resources) cost share funding until at least 1997 because the "project is still in the preliminary planning state." The letter also asked Sandberg for certain technical advice and assistance in order to complete the application properly.

14. NRCS personnel met with the Vierlings on September 9, 1996 in an effort to develop a cost estimate for a pollution abatement system (manure pit). See Exhibit 15.

15. On November 4, 1996, the Agency issued an Administrative Penalty Order (APO), fining Mr. Vierling \$2,000.00, \$1,500.00 of which was declared forgivable if corrective action is taken, and \$500.00 of which was declared nonforgivable because of the serious nature of Violation Number 1. Violation Number 1 alleges that Vierling violated Minn. Stat. § 115.061 because the Agency "has not been notified when manure and contaminated run off from the feedlot has entered Pike Lake as a result of rainfall and snowmelt water flowing across the feedlot." The second (forgivable) violation was Vierling's failure to apply for a feedlot permit, which is required because the feedlot operation constitutes a pollution hazard. See Exhibit 10.

16. To calculate the penalty in the APO, the two cited violations were considered together. Exhibit 9, at 2. The penalty calculation factor of the potential for harm was rated at moderate, due to the characteristics of manure. *Id.* The deviation from compliance factor was rated as serious, because:

Mr. Vierling has been well aware of the problem, and of the requirement to apply for a permit for some time. He has knowingly not complied. He has also been aware that manure was reaching the lake and has failed to take remedial steps.

Exhibit 9.

17. On November 25, 1996, Ms. Lehman, on behalf of Mr. Vierling, filed a written request for review and this hearing process followed.

18. On March 3, 1997, the Agency wrote to Mr. Vierling, which document waived the forgivable penalty of \$1,500.00 in the APO because Vierling had, on January 3, 1997, submitted a permit application that fulfilled the Corrective Action Requirements of the Administrative Penalty Order (proposed facility modifications, a manure management plan and interim pollution prevention measures).

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 116.072.

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

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

4. For the purposes of this proceeding, Michael Vierling is a "responsible person" within the meaning of Minn. Stat. § 115.061.

5. Mr. Vierling did not violate Minn. Stat. § 115.061 by failing to notify the Agency when manure and runoff from his feedlot entered Pike Lake as a result of rainfall and snowmelt water flowing across his feedlot.

6. It is appropriate to repeal the Administrative Penalty Order issued against Michael Vierling on November 4, 1996 and to cancel the nonforgivable penalty of \$500 imposed in that Order.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Administrative Penalty Order (APO) issued against Michael Vierling on November 4, 1996 be REPEALED and the \$500 nonforgivable penalty in that Order be CANCELLED.

Dated this 3rd day of July, 1997.

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped, No Transcript Prepared.

NOTICE

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

MEMORANDUM

The only issues presented in this matter are: 1) whether Michael Vierling was required to notify the MPCA under Minn. Stat. § 115.061 that runoff was leaving his field; and if so, 2) whether the MPCA assessed a penalty appropriate for that failure to notify.

The Vierling family has owned and operated the farm at its current location for over 135 years. For that period of time, cattle have been raised and fed there. Pike Lake has been in its current location for even longer. The ravine running through the Vierling property has been there, more or less unchanged, for the entire time the land has been farmed. The feedlot in question was established in 1984.

The current rules regulating animal feedlots were adopted in 1988. Two paragraphs in the preamble of those rules state:

However, livestock, poultry, and other animals produce manure which may, when improperly stored, transported, or disposed, negatively affect Minnesota's environment. When animal manure adds to air, water, or land pollution in the state of Minnesota, it must be controlled.

The following rules for the control of livestock, poultry, and other animal manures have been promulgated to provide protection against pollution from domesticated animals. However, these rules recognize that animal manure often provides beneficial qualities to the soil and to the production of crops.

Minn. Rule 7020.0100.

To carry out the objective of protecting the environment from the detrimental effects of manure, the MPCA adopted standards for permitting animal feedlots. Pastures, defined as fields where animals are fed but vegetation is maintained, are not required to be permitted. Minn. Rule 7020.0300, subp. 3. Fields where animals are fed, but vegetative cover cannot be maintained, are feedlots. *Id.* There is no dispute that the land in question here is a feedlot.

Not all feedlots are required to be permitted, however. The standards for when a feedlot must obtain a permit are set out in Minn. Rule 7020.0500. Existing feedlots are not automatically required to obtain a permit. A permit must be obtained when the operation changes its operation, type, changes its ownership, or a National Pollutant Discharge Elimination System (NPDES) permit application must be filed. Minn. Rule 7020.0500, subp. 1, B-D. In addition, subpart 1a provides:

The owner of any animal feedlot shall be required to make an application for a permit when an inspection by agency staff or a county feedlot pollution control officer determines that the animal feedlot creates or maintains a potential pollution hazard.

Minn. Rule 7020.0500, subp. 1a.

The animal feedlot rules define what constitutes a “potential pollution hazard” in pertinent part as:

. . . a condition which indicates a potential for pollution of the land or waters of the state including:

A. an animal feedlot or manure storage area whose boundaries are located within shoreland or floodplain . . . ; or,

B. an animal feedlot or manure storage area whose construction or operation will allow a discharge of pollutants to the surface waters of the state in excess of applicable standards, including , but not limited to, chapters 7070 and 7055, during a rainstorm event of less magnitude than the 25-year, 24-hour event, or will allow uncontrolled seepage of pollutants into the ground water, or will violate any applicable state rules.

Minn. Rule 7020.0300, subp. 20.

Once a proper feedlot permit application is made, the MPCA will issue the permit if the feedlot complies with the standards for pollution control. Minn. Rule 7020.0500,

subp. 4B. The MPCA may also issue the permit if the applicant can bring the feedlot into compliance at some time in the near future. Minn. Rule 7020.0500, subp. 4B(1) and (2).

The standards for animal feedlots adopted by the MPCA have struck a balance between the need to control potential pollution hazards and the degree of interference feedlot owners are subjected to. Where the owner of livestock is utilizing a field that meets the definition of pasture, no permit is required, even when livestock are in the immediate vicinity of environmentally sensitive resources. When applied to the Vierling operation, no feedlot permit was required until ownership of the property changed. The only other trigger for requiring a permit would be when an agency staffer or county pollution control officer observed the site and determined that a potential pollution hazard exists.

The foregoing analysis is important to the resolution of this matter because the only remaining charge Vierling is subject to is not under the animal feedlot rules at all. Rather, the MPCA is pursuing a nonforgiveable \$500.00 penalty against him for failing to notify the agency that manure-contaminated runoff was entering Pike Lake. The MPCA maintains that Vierling had an obligation under Minn. Stat. § 115.061 to inform the agency of the pollutant discharge posed by the runoff.

Minn. Stat. § 115.061 was adopted in 1969. Laws of Minnesota 1969, Chapter 931, Sec. 4. This is the standard reporting requirement governing responsible persons when discharges of pollutants occur and it states as follows:

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

(b) Notification is not required under paragraph (a) for a discharge of five gallons or less of petroleum, as defined in section 115C.02, subdivision 10. This paragraph does not affect the other requirements of paragraph (a).

Minn. Stat. § 115.061.

There is no specific mention of manure or animal feedlots in the statute. The language is broad and encompasses “any substance or material . . . which may cause pollution“. The MPCA maintains that there is no requirement to show that any specific level of pollution is contaminating the waters of the state. If the statutory obligation to report “discharges of pollutants” consisting of runoff contaminated by any amount of manure is independent of the feedlot rules, then any person maintaining any number of animals whose manure contaminates runoff is obligated to report that fact to the MPCA

under Minn. Stat. § 115.061. Since the exception for manure used as domestic fertilizer is in the animal feedlot rules (Minn. Rule 7020.0400, subp. 4), rather than in the statute, every person applying manure as fertilizer would also be required to report under the statute when runoff reaches the waters of the state. This is an absurd reading of the statute. There is no evidence that the MPCA has ever considered such an interpretation of the statutory notification standard, much less sought to impose that standard. The only conclusion possible under these circumstances is that the reporting requirement, when applied to animal feedlots, must be read in light of the feedlot rules which specify that a potential pollution hazard exists only if operation of a feedlot will allow a discharge that exceeds specific applicable standards. The record is devoid of evidence establishing that the Vierling feedlot has ever fit within such parameters. Where a precisely drawn, detailed regulatory scheme exists, it preempts a more general regulatory scheme if the two conflict. *Counties of Blue Earth, et. al. v. Minnesota Dept. of Labor and Industry*, 489 N.W.2d 265 (Minn.App. 1992).

There is no mention of reporting runoff as a “discharge” in the animal feedlot rules. The only part of those rules that might be applicable is the provision which states that “Animal manure packs or mounding within the animal feedlot shall not be considered to be manure storage for these parts.” Minn. Rule 7020.0300, subp. 14. This portion of the rules appears to remove any obligation for reporting of a discharge when runoff is coming into contact with the normal amounts of manure ordinarily found on a feedlot. Under such a reading, the obligation to report a discharge would remain where the manure was stored on the feedlot, but not where manure was simply deposited by animals.

The MPCA asserts that Minn. Stat. § 115.061 relies upon self-reporting. MPCA Brief, at 15. The animal feedlot rules do not rely upon reporting that runoff is occurring from a field. Rather, the feedlot rules expressly allow the agency to trigger the permitting requirement when a staffer observes that a site constitutes a “potential pollution hazard”. Minn. Rule 7020.0500, subp. 1a. If the feedlot owner already held an obligation to report runoff under Minn. Stat. § 115.061, then the rule language would be surplusage. The animal feedlot owner would already be under a statutory requirement, not only to report the runoff, but to attempt to recover the manure contaminated water that was entering the waters of the state. The more stringent statutory requirements would affect all owners of livestock, not merely those with operations defined by rule as feedlots. No such practice has been cited by the MPCA in regulating persons raising livestock or operating feedlots. The MPCA is pursuing a penalty for violation of a duty where none exists.

The MPCA has maintained that its penalty of \$500.00 is “very reasonable and exceedingly fair, given the nature of the violation here.” MPCA Brief, at 17. In repeatedly stating its conclusion regarding the propriety of the penalty, comparisons are made to “similarly-situated penalty calculations.” *Id.* at 18. By “similarly situated”, the MPCA means on the penalty grid, not similarly situated agricultural operations. As discussed above, there is no evidence that the MPCA has a practice of requiring reporting of normal manure runoff from feedlots or pastures. If similarly situated agricultural operations are not being pursued for this violation, the imposition of any penalty on Vierling is neither reasonable, nor fair.

One of the adjustment factors mentioned is economic benefit to Vierling for failure to recover and properly dispose of the manure. MPCA Brief , at 18. At no time after the MPCA became aware of the “discharge” from the feedlot was any method of recovery suggested. The economic benefit calculation was not performed because staff had insufficient data upon which to reach a conclusion. The MPCA also stated:

In addition, whatever economic benefit that Mr. Vierling may have enjoyed by not addressing this problem was offset, at least in part, by the economic benefit that was lost through Mr. Vierling’s failure to make use of the nitrogen-rich manure available to him.

MPCA Brief, at 18.

That the manure on the feedlot is a rich nutrient cannot be disputed, since it is used as fertilizer in farming operations. There was no “failure to make use of the manure,” since Mr. Vierling was scraping and hauling the manure for use as fertilizer. The capture of nutrients by Mr. Vierling renders problematic the MPCA’s conclusion that the potential for harm was moderate, based only on runoff of manure.

It is significant to note that since there is no evidence of the concentration of manure that was reaching Pike Lake, there is no evidence that Vierling violated any specific pollution standard. The MPCA cites *In the Matter of Dougherty*, 482 N.W.2d 485 (Minn. App. 1992), to support its assertion that an APO can be imposed without proof of a specific amount of pollutant being discharged. MPCA Reply Brief, at 4. The waste involved in *Dougherty* was tested, found to be hazardous waste, and observed to be corroding metal surfaces the waste came in contact with. *Id.* at 487. Unlike the standards for manure, there is no acceptable level of discharge from a waste classified as hazardous. The holding in *Dougherty* does not relieve the MPCA of its burden of proof to show that pollutants in levels exceeding allowable standards were discharged if any penalty is to be imposed under Minn. Stat. § 115.061.

In *Dougherty*, the MPCA visited a site where evidence was present that harmful effects were occurring from the discharge of hazardous waste. Vierling’s operation has been raising cattle in the vicinity of Pike Lake for over 135 years. If any of the dire consequences arising from the “potential pollutants” coming from that operation were to occur, the MPCA would have that evidence. A summer camp is located directly across the lake from the Vierling farm which provides ample opportunities to observe water conditions. There has been no evidence introduced of degraded water quality in Pike Lake from any source of pollutant.

The Administrative Law Judge believes that a farmer’s general duty (if any) to report pollution from feedlot manure is made specific by the feedlot rules. As noted above and in the Findings, it was Mr. Vierling himself who initiated the process which led to his application for a feedlot permit upon a change in the ownership of the farm he operates. He proceeded with filing an application after Agency staff inspected his feedlot in May of last year and informed him of the potential for pollution posed by his

operation. Subsequently, in direct compliance with the statute, Vierling has been recovering any manure deposited in the feedlot as rapidly and thoroughly as possible.

The specific basis for concluding that the failure to report is a serious violation is Mr. Vierling knowing that he was obligated to do so and willfully failing to do so. As reflected in the Findings, above, Mr. Vierling was not aware of any obligation to report runoff. He had already begun remediation of the potential pollution hazard by removing the manure and was engaged in the planning process with two other governmental units to construct a holding pond to eliminate any latent potential pollution. The proper classification of the violation, if any duty to report exists, is minor.

The MPCA has asserted that the finding of a serious violation requires the imposition of a nonforgivable penalty. The statutory provision that authorizes the imposition of a nonforgivable penalty states:

For a repeated or serious violation, the commissioner or county board may issue an order with a penalty that will not be forgiven after the corrective action is taken. The penalty is due by 31 days after the order was received unless review of the order under subdivision 6, 7, or 8 has been sought.

Minn. Stat. § 116.072, subd. 5(b).

The statute does not require imposition of a penalty, but rather affords the Commissioner discretion. Even if the violation is deemed to be serious, the manner in which the regulation of feedlots is carried out, the lack of any action on the part of the MPCA after receiving notice of the runoff, and the novelty of citing a feedlot operator for failure to notify the MPCA that spring runoff is occurring are all reasons to exercise that discretion by not imposing a penalty on Vierling in this matter.

The record in this matter demonstrates that the MPCA has issued an APO and imposed a nonforgivable fine on Mr. Vierling to hasten his application for a feedlot permit. The MPCA's assertion that Mr. Vierling violated an obligation to report a discharge is based on an overly stringent reading of Minn. Stat. 115.061. Even if an obligation to report is assumed, the record in this matter does not support the MPCA's conclusion that the violation is serious, and therefore nonforgivable. Substantial reasons exist to support the exercise of discretion to forgive any penalty that might be imposed. For these reasons, the APO must be repealed and the fine be cancelled.

R.C.L.

^[1] Vierling's consultant was informed informally in February, 1997 by an assistant City Engineer that a decision had been made to site the storm sewer collection pond elsewhere, but NRCS had not, as of the time of the hearing, completed a manure pit design.