

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

In the Matter of the Administrative Order
Designating the Vierling Animal Feeding
Operation as a Concentrated Animal
Feeding Operation

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on June 12 and 13, 2007 at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota. The record remained open for the filing of posthearing briefs and replies. The hearing record in this matter closed with the receipt of the final reply brief on November 9, 2007.

Robert B. Roche, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency (MPCA Staff). Patrick Kelly and Trevor Oliver, Kelly & Fawcett, P.A., 2350 Piper Jaffray Plaza, 444 Cedar Street, Saint Paul, MN 55101, appeared on behalf of Respondents Michael and Becky Vierling, d/b/a Vierling Farms. Kevin Reuther, Staff Attorney for the Minnesota Center for Environmental Advocacy (MCEA), 26 East Exchange Street, Suite 206, St. Paul, MN 55101-1667, appeared on behalf of the MCEA.

STATEMENT OF THE ISSUES

Whether the Vierling Farms' feedlot constitutes a Concentrated Animal Feeding Operating within the meaning of Minn. R. 7020.0205 (F) and 40 C.F.R. § 122.23 (c)(3)?

The Administrative Law Judge concludes that the Vierling Farms' feedlot is a Concentrated Animal Feeding Operating within the meaning of those provisions.

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

FINDINGS OF FACT

1. Michael and Becky Vierling operate a Grade-A certified dairy farm in Scott County, Minnesota. The farm lies within the city limits of Prior Lake, north of County Highway 42 and southeast of Pike Lake Trail.¹ Pike Lake Trail is a gravel road adjacent to Pike Lake.² The Vierlings have between 60 and 80 dairy cows on the farm. The farm has been owned by the Vierling family for over 125 years.³

2. On November 4, 1996, the MPCA issued an administrative penalty order (APO) to the Vierlings for failure to notify the Agency of a discharge of manure-contaminated water into Pike Lake. The discharge complained of in the APO was runoff from rain and snowmelt from the farm's feedlot into Pike Lake. The Vierlings appealed the APO and the ALJ recommended that the APO be dismissed, due to the absence of "evidence that the MPCA has a practice of requiring reporting of normal manure runoff from feedlots or pastures."⁴ The MPCA issued an interim feedlot permit, rescinded the APO, and negotiated with the Vierlings regarding how to address continued contamination of runoff from the farm reaching Pike Lake.⁵

3. The animals on the farm are kept in two different barns, which are separated by a loafing lot of approximately 140' x 160'. The overall topography downslope from the farm has three different parts: 1) the land between the fenceline of the lot and the culvert inlets located in the road ditch, 2) the culverts located below the road, and 3) the land between the culvert outlets and Pike Lake. A naturally-existing buffer area is located within the first area, covered with naturally occurring vegetation including grasses and weeds. The ground surface has shallow gullies formed by precipitation, manure-contaminated runoff, and sediment. The shortest flow distance between the open lot fence line and the road ditch is approximately 75 feet. Pike Lake is approximately 175 feet from the boundary of the Vierling farm.⁶

4. In addition to the dairy facilities, the Vierling farm has a 370-acre field used for growing crops that is located upslope from the feedlot. The field borders County Highway 42 on the south.⁷ The Vierlings spread manure from the loafing lot onto the field, which drains into a coulee that runs down the middle of the field and continues downslope along the southwestern boundary of the loafing lot.⁸ Manure and manure contaminated runoff from the Vierling farm washes into the coulee and then

¹ Pike Lake Trail is also referred to as Pike Lake Road.

² Tr. Vol. 1, at 98 (Eldred).

³ Exhibit 11, Vierling Direct, at 1; Transcript Vol. 2, at 226-229 (Vierling).

⁴ ITMO the Administrative Penalty Order (APO) Issued to Michael Vierling, OAH Docket No. 7-2200-10942-2 (ALJ Findings of Fact, Conclusions and Recommendation issued July 3, 1997) (<http://www.oah.state.mn.us/aljBase/22000942.rt.htm>).

⁵ Exhibit 2, Sullivan Direct, at 2 and Attachment 1.

⁶ Exhibit 10, Brynildson Direct, at 7-9.

⁷ There is a residential subdivision on the south side of County Highway 42, but the primary drainage from that area is provided by storm sewers that drain to a holding pond. From that holding pond, the drainage travels by storm sewer main to a discharge point west of Pike Lake Trail. Tr. Vol. 1, at 109-110 (Eldred).

⁸ Exhibits 4 and 5.

drains off the property. The drainage flows through culverts under Pike Lake Road. Manmade ditches run along both sides of Pike Lake Road and flow into the culvert. Any manure and manure contaminated runoff leaving the Vierling farm would flow from the coulee into the ditches. The ditches then connect to two culverts that run under the road and discharge into Pike Lake.⁹

5. The MPCA maintains that the ditch has occasionally become overloaded with manure from the Vierling facility. When this happens, the manure flows directly over Pike Lake Road and into Pike Lake.¹⁰ Cattle manure contains fecal coliform bacteria, nutrients, total suspended solids, and biochemical oxygen demand, which affect the quality of surface waters. Excessive amounts of fecal coliform can cause disease in people or animals who consume or swim in the water. Excessive nutrients can cause excessive growth of aquatic plants and harmful algae in the water, essentially choking the surface water and making it less suitable for both aquatic life and aquatic recreation. As those organisms die and decompose, oxygen needed for other aquatic organisms is consumed and therefore unavailable. Excessive total suspended solids basically make a surface water cloudy and dark, rendering that water less suitable for aquatic recreation. Excessive total suspended solids can also harm aquatic life by making it more difficult to find food, breathe through gills, and reproduce when spawning beds are clogged with deposited sediment. Biochemical oxygen demand consumes oxygen which is harmful to aquatic life and negatively affects the entire aquatic ecosystem.¹¹

6. In December, 1998, the City of Prior Lake complained to the MPCA that the Vierling farm was the source of continued manure discharges to Pike Lake.¹²

7. On November 4, 1999, MPCA staff inspected the Vierling farm to determine if the farm should be designated as a Concentrated Animal Feeding Operation (CAFO). MPCA staff concluded that the facility could be designated as a CAFO, but decided to try to work with the Vierlings to remedy the pollution problem without having to go through the CAFO designation process. MPCA staff discussed the options available with the Vierlings and their legal and technical representatives that would avoid having to go through the CAFO designation process.¹³

8. Linda Lehman, Senior Environmental Scientist for CH2 M. Hill Hanford Group, was the Vierlings' technical consultant, assisting them with the design of remedial measures and the monitoring plan put into place to measure the runoff from the feedlot. Lehman proposed an abatement plan consisting of three phases:

- Phase I required the Vierlings to install berms on the upstream side of the cattle lot, to divert any run-on flow from other fields and reduce the amount of water crossing the lot. Phase I also involved the installation of Geobales, a

⁹ Exhibit 10, Brynildson Direct, at 9.

¹⁰ *Id.*

¹¹ Exhibit 10, Brynildson Direct, at 2-3.

¹² Exhibit 2, Sullivan Direct, at 3.

¹³ Exhibit 2, Sullivan Direct, at 3-4.

recycled carpet product designed to trap and filter solids from rainwater runoff.

- Phase II contemplated adding additional Geobales and/or repositioning existing bales to better address the runoff from the cattle lot.
- The final corrective plan [Phase III] called for installing a culvert along the lower slope of the existing cattle lot and constructing a filter strip over the culvert. The culvert would then extend the drainage approximately 400 feet to the south before allowing runoff to enter the existing ditch system. The combination of the filters and the increased distances would significantly reduce the potential of any pollution from the runoff from the Vierling cattle area.¹⁴

9. In September, 1999, the Vierlings submitted a final Corrective Action Plan (the Plan) based on Lehman's proposal. The Plan was approved by the MPCA in September, 2001.¹⁵

10. On September 12, 2001, the MPCA Staff concluded in a report that the runoff from the Vierling farm was an imminent threat to the environment. This rendered the Vierling farm ineligible for participation in the open lot agreement program. This was due to the site being extremely susceptible to contaminated runoff to Pike Lake due to the proximity of the site to the lake, the slope, the lack of vegetation, and the coulee in the middle of the lot.¹⁶ This runoff would include approximately 9,100 to 12,200 pounds of nitrogen which, reduced by storage and handling losses, could be available for discharge to Pike Lake. The report noted that "Water from Pike Lake eventually discharges to the Minnesota River which has been identified as one of the leading sources of nitrogen to the Mississippi River Basin."¹⁷ The Minnesota River is approximately five miles from Pike Lake.¹⁸

11. The Plan approached the problem of contaminated runoff in three phases, set out in a Memorandum of Understanding (MOU) as follows:

Phase I will consist of two components: upstream clean water diversions and solids capture system. The upstream diversions will be constructed along the upstream side of the feedlot to prevent storm water and related run-off from reaching the feedlot. The upstream diversions will be constructed with an interior composed of field rock and then covered with native soil between nine inches and 12 inches thick. The Farm will use a recycled carpet product known as Geohay® to develop a solids/sediment capture system that reduces or eliminates solids/sediment loading and transport to receiving waters. This system will be installed below the location of the feedlot between the road bed and the Farm. The Farm will

¹⁴ Exhibit 13, Lehman Rebuttal, at 3.

¹⁵ Exhibit 2, Sullivan Direct, Attachment 1, at 1.

¹⁶ Exhibit 8, Trapp Direct, at 2, and Attachment 1.

¹⁷ Exhibit 8, Trapp Direct, Attachment 1, at 2.

¹⁸ Tr. Vol. 1, at 147 (Trapp).

complete the installation of Phase I by September 15, 2003. The Farm and the MPCA will work cooperatively to collect water quality samples that will be used to evaluate and assess the effectiveness of the Phase I corrective actions with respect to compliance with applicable water quality compliance targets (Section III.B.4. of this MOU). A copy of the Plan is found as Attachment A to this document.

Phase II is designed as a contingency in the event that Phase I fails to achieve compliance with applicable water quality compliance targets (Section III.B.4. of this MOU). Phase II provides for additional Geohay® systems to capture solids/sediments from the feedlot. The Farm and the MPCA will work cooperatively to collect water quality samples that will be used to evaluate and assess the effectiveness of the Phase II corrective actions with respect to achieving the applicable water quality compliance targets of this MOU. Water samples will be collected according to the Plan found in Attachment A of this document. Phase II will be installed by June 1, 2004, in the event that the Phase I corrective actions fail to meet the water quality compliance targets of this MOU.

Phase III is designed as a contingency in the event that Phase II fails to achieve compliance with applicable water quality compliance targets (Section III.B.4 of this MOU). The final remediation design of the feedlot (approved by the MPCA in September 2001), consists of running a culvert along the lower slope of the existing feedlot and constructing a vegetative filter strip over the culvert and draining to the south approximately 400 feet and joining an existing roadside ditch for some distance before discharging to Pike Lake. During construction and installation of the filter strip system, Geohay® will continue to be used until the vegetative cover is established on the filter strip. The Farm and the MPCA will work cooperatively to collect water quality samples that will be used to evaluate and assess the effectiveness of the Phase III corrective actions with respect to compliance with applicable water quality standards. Water samples will be collected according to the Plan found in Exhibit A of this document. Phase III will be installed by November 1, 2004, in the event that the water quality compliance targets of this MOU are not achieved by through the implementation and operation of the Phase II corrective actions.¹⁹

12. The MOU set out specific water quality targets for five-day biochemical oxygen demand (BOD5), fecal coliform, total suspended solids, and phosphorus. The targets were set at levels with twice the contaminant allowed under the State discharge standards. Only upon successfully meeting these less stringent target levels during Phases I or II would the Vierlings be eligible to enter the MPCA Open Lot Agreement (OLA) which would defer full compliance with State standards until 2010.²⁰ The

¹⁹ Exhibit 2, Sullivan Direct, Attachment 1.

²⁰ Exhibit 2, Sullivan Direct, Attachment 1.

Vierlings understood that solving the runoff problem was essential to the MPCA not designating the farm as a CAFO.²¹ The State standards and MOU target levels are as follows:²²

| Pollutant | State Standard | MOU |
|------------------------|-----------------------------------|-----------------------------------|
| BOD5 | 25 milligrams per liter | 50 milligrams per liter |
| Fecal Coliform | 200 organisms per 100 milliliters | 400 organisms per 100 milliliters |
| Total Suspended Solids | 30 milligrams per liter | 60 milligrams per liter |
| Phosphorus | 1 milligram per liter | 2 milligrams per liter |

13. The MPCA and the Vierlings agreed on a monitoring plan that would have water quality samples drawn at specified locations and times so that the samples could be tested by an accredited laboratory. The sampling points were located above the feedlot and cropland (near the culvert along County Highway 42) and below the feedlot, where runoff passes through a culvert to Pike Lake. Linda Lehman and Michael Vierling were responsible for collecting the samples.²³

14. On October 25, 2001, the MPCA sent the Vierlings notice of approval of the Plan and the MOU. The need to have the Vierling farm meet the target standards for runoff was reiterated. The Vierlings request to assess compliance by deducting the pollutant levels detected at the County Highway 42 sample point was rejected. A modified timeline was set out for the three abatement phases, with Phase III being installed by July 1, 2003. This due date for the Phase III corrective action was later modified to November 1, 2004.²⁴ The letter also noted that the farm had been preliminarily designated a CAFO and that the MOU was a good faith effort to remedy the water quality problem without imposing the CAFO requirement of a National Pollutant Discharge Elimination System (NPDES) permit. The letter also stated:

In the event that you choose not to install the corrective actions, or, installation of the approved corrective actions does not adequately remedy the situation, the MPCA may designate your facility as CAFO and require an NPDES permit.²⁵

²¹ Tr. Vol. 2, at 238-239 (Vierling).

²² Exhibit 2, Sullivan Direct, at 5.

²³ Exhibit 2, Sullivan Direct, at 6-7; Tr. Vol. 1, at 66-70, 73, 77-78 (Sullivan).

²⁴ Tr. Vol. 2, at 240 (Vierling).

²⁵ Exhibit 14.

15. In 2001, the Vierlings installed approximately 10 geobales in groups of 1-3 bales placed end-to-end, along the flow path of the runoff. The geobales were staked down to hold them in place. There were also small berms placed along the edge of the lot with the geobales. These small berms were approximately 12" to 18" high and appeared to have been constructed by pushing the soil and organic materials in the general area into a pile. A long black plastic prism shaped tube was also used to divert runoff at the site.²⁶

16. Phase II was installed in 2002, because the geobales washed out under the force of runoff.²⁷

17. Testing was performed on water samples provided by Lehman and Vierling, taken at approximately six month intervals between November, 2001 and October 2006. No samples were taken in the fall of 2002.²⁸ These samples showed consistent discharges exceeding the MOU limits for total suspended solids and phosphorus. The BOD5 discharges were within the MOU and State discharge limits in all but one sample since June, 2003. The fecal coliform samples were unusable due to the holding time exceeding 6 hours.²⁹

18. In 2003, Jim Sullivan, Principal Planner and Kim Brynildson, Principal Engineer (both with the MPCA), visited the Vierling farm. Brynildson told Michael Vierling that the geobales were not properly placed to prevent contaminated runoff from reaching Pike Lake.³⁰

19. On April 28, 2004, Brynildson and Paul Trapp, MPCA hydrologist, accompanied by a representative of the Prior Lake-Spring Lake Watershed District, visited the Vierling farm. The MPCA staffers told the Vierlings that the abatement process was not working and that the cows needed to be moved or dairy farming discontinued at the site. Becky Vierling responded that the water sampling had shown the geobales to be effective.³¹

20. On May 21, 2004, Trapp visited the Vierling Farm unannounced and observed the efforts to protect Pike Lake from manure and manure-laden runoff from the Farm's feedlot from entering Pike Lake. Light rain was falling and runoff was observed traveling across the feedlot area, into the ditches by Pike Lake Trail, through the culverts under Pike Lake Trail, and into Pike Lake. Runoff was washing down the driveway and heading north into the ditches that connect to Pike Lake via the culverts that run under the road. The rip rap in the ditch was not holding the water back. Runoff also was channeling and flowing off the property through the tire tracks in the driveway. Water was visibly running down the open lot and around the geobales that had been installed as a control measure. This runoff was actively discharging directly to Pike

²⁶ Exhibit 10, Brynildson Direct, at 10.

²⁷ Tr. Vol. 2, at 328 (Lehman).

²⁸ *Id.*, at 324 (Lehman).

²⁹ Exhibit 2, Sullivan Direct, Attachments 41-43; Tr. Vol. 1, at 47-50 (Sullivan).

³⁰ Tr. Vol. 2, at 193 (Brynildson); Tr. Vol. 2, at 269 (Vierling).

³¹ Ex. 15.

Lake through a culvert. Trapp also noted that manure spread on the upper farm field was being washed into the feedlot area.³²

21. Trapp took water samples from the culvert under Highway 42, upstream of the Vierling farm, at the fenceline of the farm along Pike Lake Trail (prior to the runoff entering the ditch), and at a culvert discharging to Pike Lake from the ditch on the east side of Pike Lake Trail. These samples were delivered to the Minnesota Department of Health Environmental Laboratory for analysis.³³ The results were as follows:

| Pollutant (MOU Standard) | Hwy 42³⁴ | Fence³⁵ | Pike Lake³⁶ |
|---|----------------------------|---------------------------|-------------------------------|
| BOD5 (50 milligrams/L) | 4.7 mg/L | 29 mg/L | 25 mg/L |
| Fecal Coliform (400 organisms per 100 milliliters) | 900 organisms /100 ml | 640,000 organisms /100 ml | 1.3 million organisms /100 ml |
| Total Suspended Solids (60 milligrams/L) | 200 mg/L | 3,700 mg/L | 330 mg/L |
| Phosphorus (2 milligrams/L) | 0.628 mg/L | 6.07 mg/L | 2.93 mg/L |

22. Trapp discussed the visual observations of manure and manure-contaminated runoff with Michael Vierling. Vierling indicated that he understood that the geobale system was not preventing pollutants from reaching Pike Lake.³⁷

23. In April and May 2004, Craig Eldred, Public Works Supervisor for the City of Prior Lake, made three visits to clean out the ditches along Pike Lake Trail adjacent to the Vierling feedlot.³⁸ The only portions of the ditches that he cleaned were those adjacent to the Vierling feedlot.³⁹ Manure and mud runoff were present in the ditches and on the roadway. While Eldred did not see the manure runoff coming from the Vierling farm, the manure was located where runoff from the Vierling farm travels. Eldred noted that some of the geobales had “blown out” toward the ditch.⁴⁰ On one occasion, the volume of silt was so large that Eldred needed to “jet” the culvert running

³² Exhibit 8, Trapp Direct, at 4-7, and Attachments 2-29; Tr. Vol. 1, at 122-137 (Trapp).

³³ Exhibit 8, Trapp Direct, at 8-7; Tr. Vol. 1, at 138-142 (Trapp).

³⁴ Exhibit 8, Trapp Direct, Attachment 30.

³⁵ *Id.*, Attachment 31.

³⁶ *Id.*, Attachment 32.

³⁷ Tr. Vol. 1, at 134-135 (Trapp).

³⁸ He also conducted a similar clean-up, removing silt from the ditches, at the same location in June 2005. Exhibit 7, Eldred Direct, at 1; Tr. Vol. I, at 92 (Eldred).

³⁹ Tr. Vol. I, at 92 (Eldred).

⁴⁰ Tr. Vol. I, at 106-107 (Eldred).

under Pike Lake Road to remove the deposited material. The City placed riprap in the ditches in an effort to slow the movement of water and thereby reduce the amount of pollution reaching Pike Lake. The material hauled away from these maintenance operations contained manure.⁴¹

24. On March 21, 2005, Jeff Janacek visited the Vierling Farm and witnessed manure and manure-laden runoff caused by snow melt traveling from the feedlot entering Pike Lake. Janacek was investigating the status of mitigation efforts at the Vierling farm on behalf of the MCEA. Cattle were in the feedlot and Janacek observed manure running from the feedlot into Pike Lake. Janacek documented his observations with photographs of the feedlot and surroundings.⁴²

25. On April 19, 2005, Brynildson and Brian Schweiss, a PCA staff engineer, conducted an inspection of the Vierling farm. Schweiss observed a visible path of sediment from the Vierling lot down to the culvert under Pike Lake Road and into Pike Lake itself. Schweiss observed sediment under, around, and beyond each of the geobales. While water was not flowing through the culverts near Pike Lake, Schweiss concluded that manure contaminated runoff “continued and will continue to wash into Pike Lake” from the Vierling feedlot.⁴³ The Vierlings were present during the inspection. Schweiss told them that the abatement measures were not working.⁴⁴

26. Schweiss noted that the geobales were only staked in place and some of the geobales had not been removed from their packaging. He indicated that correct installation would require removing the packaging, then that the geobale be partially unrolled in the upslope direction, and the unrolled portion buried. This form of installation prevents erosion from opening gaps underneath the geobales. Leaving a geobale in its packaging eliminates the filtering effect of the product.⁴⁵

27. Brynildson noted that the feedlot's proximity to surface water and the way the land at the feedlot site lays out results in efficient transport of contaminants into Pike Lake. The size of the feedlot, absence of vegetation, condition of the ground, and the slope of the ground toward Pike Lake are all factors supporting regulation of the feedlot as a CAFO. The presence of a naturally-existing buffer area was noted, but the presence of shallow gullies formed by the flow of precipitation and manure-contaminated runoff and sediment allows for pollutants to pass through that area unabated.⁴⁶

28. Brynildson observed that the geobales and other runoff control structures have held back some water and sediment, but these runoff controls, including the geobales, were not adequately placed or of a sufficient size to prevent the flow of manure-contaminated runoff from the property and ultimately into the lake. Manure-

⁴¹ Exhibit 7, Eldred Direct, at 1; Tr. Vol. I, at 91-96 (Eldred).

⁴² Exhibit 1, Janacek Direct.

⁴³ Exhibit 9, Schweiss Direct, at 4.

⁴⁴ Tr. Vol. 1, at 158-159 (Schweiss).

⁴⁵ Tr. Vol. 1, at 167-168 (Schweiss).

⁴⁶ Exhibit 10, Brynildson Direct, at 6-9.

contaminated runoff was able to flow around, under, and over the geobales and other structures to the road ditch, through the culverts below the road, and into the lake. Since the use of the geobales and other measures are not preventing the facility from polluting Pike Lake, Brynildson concluded that the Vierling farm should be designated as a CAFO.⁴⁷

29. The Phase III abatement measures under the MOU were never installed.⁴⁸ The deadline for admission to the Open Lot Agreement program passed in 2005. The Vierling farm was ineligible for participation in that program due to the MPCA's determination that the farm posed an imminent threat to the environment.⁴⁹

30. The Vierlings improved the feedlot area in ways not called for in the MOU. Large amounts of woodchips were deposited in areas to facilitate travel by cows and vehicles without leaving ruts. Additional riprap was deposited in locations where runoff was particularly severe.⁵⁰ The improvements do not prevent the runoff from reaching Pike Lake.

31. On April 7, 2006, the MPCA issued an Administrative Order designating the Vierling farm as a CAFO. The Administrative Order noted that the Vierling farm is located within a special protection area established by Minn. R. 7020.0300, subp. 23 and that the farm does not meet the standards for feedlots in such an area.⁵¹

32. The Administrative Order noted that the Vierlings could appeal the designation of their farm as a CAFO to the Office of Administrative Hearings. The Vierlings filed a timely appeal of the Administrative Order.

33. On June 8, 2006, the MPCA issued a Notice of Hearing for a contested case proceeding.

⁴⁷ Exhibit 10, Brynildson Direct, at 11.

⁴⁸ Tr. Vol. 2, at 252 (Vierling).

⁴⁹ Tr. Vol. 1, at 58 (Sullivan).

⁵⁰ Tr. Vol. 2, at 271-274 and 287-290 (Vierling).

⁵¹ MPCA Administrative Order, at 6.

Based on the 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 116.07, subd. 9(c).

2. All procedural requirements 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. The Minnesota standard for assessing feedlots for designation as a CAFO is set out in Minn. R. 7020.0205 (F), which incorporates by reference the Federal standard established in 40 C.F.R. § 122.23, which sets out the following criteria:

- (i) The size of the operation and the amount of wastes reaching waters of the state;
- (ii) The location of the operation relative to waters of the state;
- (iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
- (iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and
- (v) Other relevant factors.⁵²

5. The Vierling farm meets the criteria for designation as a Concentrated Animal Feeding Operation as set out in 40 C.F.R. § 122.23 (c)(3) and incorporated by reference in Minn. R. 7020.0205 (F) (2007).

6. Among the standards that must be met to designate a feedlot as a CAFO, 40 C.F.R. § 123.23 (c)(3) requires that:

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

⁵² 40 C.F.R. § 122.23 (c)(1) and (2)(i-v).

present argument to the Commissioner. Parties should contact Brad Moore, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, 651-296-6300, to ascertain the procedure for filing exceptions or presenting argument.

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. 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 the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

While the Vierling farm has relatively few animals, large volumes of manure and related contaminants are reaching Pike Lake. That water body is only 170 feet from the boundary of the farm. The coulee, culverts and ditches provide a direct path for the wastes to reach Pike Lake. The topography and other factors make discharges of manure a frequent occurrence from the farm to the water body. The efforts to prevent those discharges have failed to prevent manure from reaching Pike Lake and only modestly reduced some of the discharges that occur through snowmelt and other runoff. The application of all five of the criteria in 40 C.F.R. § 122.23(c) strongly support designating the Vierling farm as a CAFO.

The Vierlings maintain that there is no manmade means of pollutant discharge which satisfies the requirements of 40 CFR § 122.23(c)(3). The Vierlings note that they have no manmade waste conveyances on their farm. They maintain that no waste is discharged “directly” into Pike Lake.

The MPCA has demonstrated that manure and manure-contaminated runoff travels from the Vierling farm by way of a coulee, culverts, and ditches to Pike Lake, which is approximately 175 feet away. There is no intermediary location where the discharge collects before reaching Pike Lake. The waste is being discharged directly into Pike Lake within the meaning of the rule.

The Vierlings maintain that any discharge from the Vierling farm is not subject to regulation under the Clean Water Act, due to the Supreme Court’s decision in *Rapanos v. United States*.⁵³ The Vierlings assert that the discharge from the Vierling farm enters an intermittent stream that does not constitute a covered water body to trigger the CAFO requirements.

The majority in *Rapanos* cites the definition in 33 C.F.R. § 328.3 as controlling what waters are protected by the Clean Water Act.⁵⁴ In 33 C.F.R. § 328.3 (a)(3), the term “waters of the United States” expressly includes “intrastate lakes” so long as the “degradation or destruction of which could affect interstate or foreign commerce” The existence of a YMCA camp on Pike Lake amply meets the potential for affecting

⁵³ 547 U.S. ____; 126 S. Ct. 2208 (2006).

⁵⁴ 33 U.S.C. § 1251 *et seq.*

commerce portion of the definition.⁵⁵ Pike Lake is a water of the United States covered under the Clean Water Act receiving discharges of pollutants from the Vierling farm.

The Vierlings maintain that the MPCA failed to make the on-site inspection required by 40 CFR § 122.23(c)(3) to determine that the CAFO requirements are triggered. Since the initial inspection in 1999, the Vierlings have installed several corrective measures. Without a recent assessment of the current state of the Vierling farm, the Vierlings maintain that a CAFO determination cannot be made.

The MPCA staff visited the Vierling farm in 1999, 2003, 2004, and 2005. There is no formal standard for what constitutes an “on-site inspection” under the rule. There is no relevant fact concerning the condition of the Vierling farm that was not known to the MPCA when it issued its Administrative Order in 2006. The number of visits and the assessment and monitoring conducted on those visits is sufficient to meet the inspection standard in 40 C.F.R. § 123.23 (c)(3).

The Vierlings assert that designation of their farm as a CAFO is premature, absent putting into place Phase III of the MOU and determining the results. But they also maintain that the MPCA must provide some assurance that the Phase III measures will be deemed satisfactory before the Vierlings will incur the cost of additional abatement measures.⁵⁶ There is no obligation on the MPCA to assure a discharger that any abatement measure will be accepted as compliance. There is an obligation on those who discharge pollutants to bring their operations into compliance with State standards. In this matter, that means reducing the BOD5, total suspended solids, phosphorus, and fecal coliform levels drastically from those currently discharged to Pike Lake.

Under the MOU, the Vierlings were to have installed Phase III by November 1, 2004. They have not done so, and there is no indication that they are willing to do so, absent assurances that the MPCA will not provide to the Vierlings. The MPCA must act on the discharges that exist, not some hypothetically lower level of discharges that might result from a prospective abatement measure.

The discharge standards to be met under the MOU were criticized by the Vierlings’ consultant as “not real relevant to the feedlot.”⁵⁷ The MPCA has established that the MOU discharge standards are relevant to the State discharge standards that must ultimately be met if the Vierling farm is to avoid designation as a CAFO. Further, the MPCA has demonstrated that the discharged pollutants exceed the MOU standards, particularly in the area of fecal coliform contamination.

The Vierlings assert that, under the MOU, they can deduct upstream pollutant levels from the amount measured downstream of the feedlot. The MPCA clearly and explicitly stated that the pollutant levels measured coming off of the feedlot were the levels that must comply, first with the MOU and ultimately, with the State discharge

⁵⁵ Since Pike Lake qualifies as a covered water body, it is unnecessary to determine if Pike Lake has a significant nexus to the Minnesota River which is also a covered water body. See *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 167 (2001).

⁵⁶ Tr. Vol. 1, at 24 (Vierling Opening Statement); Tr. Vol. 2, at 360-361 (Lehman).

⁵⁷ Tr. Vol. 2, at 361 (Lehman).

standards.⁵⁸ There is language in the Vierlings' draft version of the Plan that the "farm's component of any runoff" may be calculated by deducting upstream levels.⁵⁹ This language was struck out of the MPCA-accepted version of the Plan.⁶⁰ The MPCA clarified in its October 25, 2001, letter that the farm-component language is for seeking contribution from other polluters, not for meeting the Vierlings' own discharge requirements.⁶¹ The clarification occurred before the MOU was finalized and signed.⁶²

The Administrative Law Judge concludes that the Vierling farms' feedlot meets all the standards for designation as a Concentrated Animal Feeding Operation set out in 40 C.F.R. § 122.23 (c)(3). The ALJ recommends that the Administrative Order designating the Vierling farm as a CAFO be affirmed.

R.C.L.

⁵⁸ The Minnesota Court of Appeals has held that an intervening use of water renders the discharge the responsibility of the intervening user. *City of St. Cloud Wastewater Treatment Facility Request*, C3-03-75, 2003 WL 22136314 (Minn.App. September 12, 2003)(citing *Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002)).

⁵⁹ Tr. Vol. 2, at 329 (Lehman).

⁶⁰ Exhibit 6

⁶¹ Exhibit 14.

⁶² Tr. Vol. 2, at 332 (Lehman).