

Counties' Use of Administrative Penalties for Solid and Hazardous Waste Violations

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Counties have used administrative penalties for polluters judiciously, and the Legislature should continue to grant them that authority.

In 1995, the Legislature allowed county boards to issue administrative penalty orders (APOs) for violations of county solid and hazardous waste ordinances.¹ APOs contain fines up to \$10,000, although part or all of the fine may be forgiven if the violation is corrected. This authority is effective from August 1, 1996 through August 1, 1999.² The law required counties that have adopted APO ordinances to report to the Legislative Auditor on administrative penalty activity through August 1, 1998.³

The law also requested that the Legislative Audit Commission direct the Legislative Auditor to evaluate the data and recommend whether the county administrative penalty authority should be continued, discontinued, or continued with modification.⁴ In response to this legislation, the Legislative Audit Commission approved a study of county use of administrative penalty orders in April 1998. We asked:

- **How many counties have passed ordinances authorizing administrative penalty orders and how many**

orders have they issued? How large have the penalties been and what percentage of the fines have been forgivable?

- **Have counties approved implementation plans and have they issued penalties consistent with their plans? Have APOs resulted in correcting the violations or preventing them from recurring?**
- **Have counties been fair in their use of administrative penalty orders? Should their authority to issue APOs be continued?**

To conduct this research, we surveyed all 87 counties to determine whether they had adopted an administrative penalty order ordinance, and we conducted phone interviews with the counties that indicated they had passed one. We also reviewed several county ordinances and implementation plans, and we interviewed staff from the Minnesota Pollution Control Agency (MPCA) and representatives of the waste management industry.

¹ *Minn. Laws* (1995) ch. 247, art. 1, sec. 39 and *Minn. Stat.* §116.072, subd. 1(b).

² *Minn. Stat.* §116.072, subd. 1(c).

³ *Minn. Stat.* §116.072, subd. 12 (a).

⁴ *Minn. Stat.* §116.072, subd. 12 (b).

We found that only a few counties had approved APO ordinances and only two APOs had been issued through 1998. County, MPCA, and waste industry representatives were generally supportive of APOs and thought that their use by counties should be continued.

BACKGROUND

In 1987, the Legislature authorized the Minnesota Pollution Control Agency to issue administrative penalty orders of up to \$10,000 for violations of hazardous waste regulations.⁵ The law required the agency to forgive penalties if the violation is corrected, but penalties for serious and repeat violations may be nonforgivable.⁶ In 1991, our office evaluated MPCA.⁷ Although we found that the agency had made effective use of administrative penalty orders in enforcing hazardous waste regulations, we concluded that MPCA lacked the enforcement tools to encourage prompt compliance with other environmental regulations. In response to the report's recommendations, the 1991 Legislature extended MPCA's administrative penalty order authority to include air, water, and solid waste environmental regulations.⁸

The figure shows the number of APOs issued by MPCA since it first received APO authority for hazardous waste violations in 1987. As shown, the agency's

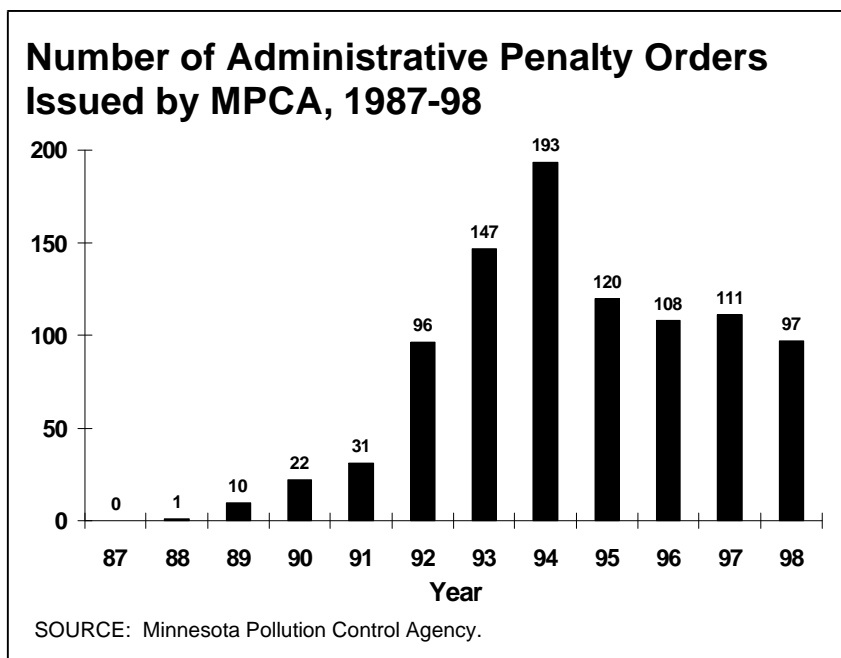
use of APOs grew considerably in the 1990s, with a big increase occurring in 1992 as a result of the expansion of APO authority to other areas of environmental regulation. MPCA's APO activity peaked in 1994 and has declined by about half since then.

MPCA issued 12 APO's for solid waste violations in 1997-98. Three had forgivable penalties, eight had nonforgivable penalties, and one was partially forgivable and partially nonforgivable. Violations were typically for illegal dumping of waste, operating a waste storage or transfer facility without a permit, and landfill operation violations. The penalties ranged from \$1,000 to \$10,000 with a median penalty of \$3,000. MPCA issued 29 APOs for hazardous waste violations in 1997-98. Ten of

them were forgivable, 8 were nonforgivable, and 11 were partially forgivable and partially nonforgivable. The penalties ranged from \$275 to \$9,350, with a median penalty of \$3,273.

In 1995, the Legislature authorized county boards to adopt ordinances containing procedures for issuing APOs for violations of county solid and hazardous waste ordinances or license requirements.⁹ As required by the 1995 law, several counties met with MPCA in 1996 to develop a model APO ordinance and implementation plan.¹⁰ In addition, MPCA conducted a day-long training session on issuing APOs in June 1996.

The law also establishes criteria for determining when to issue an APO and how much the penalty



5 *Minn. Laws* (1987), ch. 174, sec. 1.

6 *Minn. Stat.* §116.072, subd. 5.

7 Office of the Legislative Auditor, *Pollution Control Agency* (St. Paul, 1991).

8 *Minn. Laws* (1991), ch. 347, Art. 1, secs. 9-13.

9 *Minn. Laws* (1995) ch. 247, art. 1, sec. 39.

10 *Minn. Stat.* §116.072, subd. 1 (b).

should be. These include the willfulness of the violation, the amount of health and environmental damage, the number and history of violations, and the economic benefits derived by the violator from not adhering to regulations.¹¹ The law requires counties to forgive penalties if the violation is corrected, but penalties for serious and repeat violations may be nonforgivable.¹² Penalties issued by counties for solid waste violations may not exceed \$2,000 for the first violation and \$5,000 if the violation persists, and may only be assessed if the violation results in potential or actual harm to the public health or the environment.¹³ County boards must approve the issuance of an APO.

State law requires Twin Cities metropolitan area counties to adopt hazardous waste ordinances and to enforce state and county regulations pertaining to hazardous waste generators and treatment, storage, and disposal sites in their counties.¹⁴ In contrast, non-metro counties only regulate solid waste collection and disposal.

FINDINGS

We sent questionnaires to solid waste officers in all of Minnesota's 87 counties and to the Western Lake Superior Sanitary District (WLSSD) to determine whether they had adopted an APO ordinance.¹⁵ We found that:

- **As of September 1, 1998, seven counties and the WLSSD have adopted ordinances allowing them to issue APOs.**

The seven counties are Anoka, Carver, Clearwater, Dakota, McLeod, Ramsey, and St. Louis. We conducted telephone interviews with the solid waste officers of these counties and the planning manager for WLSSD about their experiences with their APO ordinances. Most of the solid waste officers said that their county adopted an APO ordinance to have an additional tool for dealing with solid and hazardous waste violations. Counties traditionally have had to rely on criminal prosecution or license revocation to punish violators. County officials said that county attorneys and the courts were not assigning a high priority to prosecuting environmental violations, especially if they had a full slate of traditional violent and property crime cases. In addition, criminal prosecution takes too long and does not always result in correcting the violation.

Five of the solid waste officers in counties with APO authority believed that, even if they do not use their APO authority, having APOs as an enforcement option helps them gain cooperation and compliance from violators. The other three solid waste officers were not sure that APO authority had any effect, noting that violators may not even know about the counties' APO

ordinance. County solid waste officers reported that, in most cases, verbal or written warnings followed by a formal "notice of violation" have resulted in the violators correcting the problem. In fact, we found that:

- **Through the end of 1998, only two administrative penalty orders had been issued by counties.**

The two penalties were issued by Dakota County and the Western Lake Superior Sanitary District (WLSSD). Dakota County issued an APO with a \$3,360 forgivable penalty to a specialty chemicals company that had abandoned 42 containers of hazardous waste in a storage locker. Before issuing the APO, the county contacted the company and asked it to remove the chemicals and sent several warning letters. When the company failed to remove the chemicals, the county removed them. The company has not paid the penalty and county officials said that they would probably have to take the company to court to collect it. The case is still open.

WLSSD issued an APO to a paper manufacturer that improperly deposited hydrogen peroxide in its industrial landfill. When WLSSD inspectors discovered this, they immediately removed the hydrogen peroxide and cleaned up the site to prevent environmental damage. WLSSD issued a \$682 nonforgivable APO to recover its cleanup costs. The company cooperated with the investigation, paid the penalty, and indicated that

¹¹ *Minn. Stat.* §116.072, subd. 2.

¹² *Minn. Stat.* §116.072, subd. 5.

¹³ *Minn. Stat.* §116.072, subd. 5a.

¹⁴ *Minn. Stat.* §473.811, subds. 5b and 5c.

¹⁵ The Western Lake Superior Sanitary District is authorized to act as a county on waste management issues in Duluth and surrounding parts of St. Louis and Carlton counties.

it had made procedural changes to ensure that the violation would not recur.

In addition to the two county APOs already issued, Carver County was preparing to issue an APO to a garbage hauler for failing to separate recyclables from municipal waste. A county official told us that the county previously had problems with this hauler and had issued several warning letters and a notice of violation. County staff have recommended a \$3,200 APO due to multiple repeat violations.

Other than publishing their proposed ordinances and holding public hearings when they were adopted, counties have done little to publicize their APO ordinances. However, several of the counties participated with MPCA in drafting a model APO ordinance and implementation plan. We reviewed some of the county ordinances and implementation plans and found them to be consistent with the criteria in statute for determining when to issue an APO, whether it should be forgivable or nonforgivable, and the amount of the penalty. For solid waste violations, the county ordinances provide for a gradation of enforcement actions - requiring the county to issue a letter of warning, followed by a formal notice of violation, before finally issuing an APO.¹⁶ We also reviewed the two APOs issued by counties and found them to be well documented, listing the specific county ordinances and

MPCA rules that were violated and the actions resulting in the violations. County staff consulted with MPCA staff to determine the amount and forgivability of the penalty.

We contacted representatives of two major waste management companies and two waste management associations. They agreed that, so far, counties have been reasonable in their use of APOs. While they supported continuation of county APO authority, they felt that there is not a sufficient track record to rule out future counties' abuse of their APO authority. As a result, they favored extending the expiration date for counties' APO authority for three to five years and then re-evaluating whether to eliminate the expiration date entirely.

CONCLUSIONS AND RECOMMENDATIONS

APOs do not provide the traditional safeguards of the criminal justice system such as the right to a jury trial and the requirement that the charges are proved beyond a reasonable doubt, and the use of APOs could be abused.¹⁷ However, based on our interviews with county officials and our review of county ordinances and the two APOs issued in 1998, we conclude that:

- **So far, counties have used administrative penalty orders with caution and discretion**

and have complied with statutory requirements.

Officials from the counties with APO authority believe that APOs give them an additional enforcement weapon that is administratively simpler to use than criminal sanctions and less harsh than license revocation. As a result, most of the county solid waste officers we interviewed believe that APO authority should be continued.¹⁸

Clearly, counties have not used their new power indiscriminately, issuing only two APOs through 1998. Accordingly, we recommend that:

- **The Legislature should amend *Minn. Stat.* §116.072, subd 1 (c) and remove the August 1, 1999 expiration date for county APO authority.**

The Legislature can always modify or abolish county APO authority in the future if it finds that counties are abusing their APO authority.

For additional information, contact David Chein at 651/297-1917. For copies of the report, call 651/296-4708. This report is also available at our web site, <http://www.auditor.leg.state.mn.us/pe9906.htm>.

¹⁶ The warning letter and notice of violation are required by *Minn. Stat.* §116.072, subd. 5a before a county can issue an APO for a solid waste violation.

¹⁷ The recipient of an APO may appeal to an administrative law judge or to the district court See *Minn. Stat.* §116.072, subsd. 6 and 7.

¹⁸ One county solid waste officer was hired after the county had passed its APO ordinance. He did not know why the county passed the APO ordinance and thought that his county's solid waste ordinances could be adequately enforced without using APOs.