



BEST & FLANAGAN

Legal Hot Topics for Construction Industry

Presentation to MAPA

Permit Liability Re: SWPPP and NPDES Permits

- Number of MPCA citations has increased in recent years.
- Many owners and contractors growing tired of perceived frivolous citations and starting to defend against citations.
- Disputes between owner and contractor re: MPCA violations/penalties.
- Joint disputes by owner and contractor against MPCA for SWPPP violations/penalties.

Permit Liability Re: SWPPP and NPDES Permits

- Owner/Contractor disputes re: SWPPP violations and/or MPCA citations.
- Owner develops SWPPP, but Contractor is signatory on NPDES permit.
- MPCA often signs off on approval of SWPPP but later issues citation for violation of SWPPP.
- Is owner liable for MPCA citation? Contractor? Both?

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- Defenses to MPCA Citation at District Court/ALJ:
 - Did the violation occur; and
 - Does the violation warrant the penalty “immediately assessed” by the Commissioner.
- Defenses to MPCA Citation at Court of Appeals:
 - Error in application of the law the Administrative Law Judge or District Court;
 - The findings of the MPCA are arbitrary and capricious; or
 - The findings of the MPCA are unsupported by substantial evidence.

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- Error in application of the law by the Administrative Law Judge or District Court
 - Difficult defense given the scope and breadth of the MPCA & deference the court gives to MPCA decisions.
 - “[d]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education and experience.” Minn. Ctr. For Env’tl. Advocacy v. MPCA, 644 N.W.2d 457, 463 (Minn. 2002).
 - “When an agency’s decision relies on applying technical knowledge and expertise to the facts, we give deference to the decision.” In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils., 768 N.W.2d 112, 119 (Minn. 2009).
 - “The MPCA has technical expertise regarding water, air, and land pollution.” MCEA v. MPCA, 644 N.W.2d at 465.

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- The findings of the MPCA are arbitrary and capricious if the agency:
 - Relied on factors not intended by the legislature;
 - Entirely failed to consider an important aspect of the problem;
 - Offered an explanation that runs counter to the evidence; or
 - Decision is so implausible that it could not be explained as a difference in view or result of the agency's expertise. (See Citizens Advocating Resp. Dev. V. Kandiyohi Cnty. Bd. Of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006)).
- “[i]f the agency’s decision represents its will, rather than its judgment, the decision is arbitrary and capricious.” (See Pope Cnty. Mothers v. MPCA, 594 N.W.2d 233, 236 (Minn. App. 1999)).

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- Citations Unsupported by Substantial Evidence:
 - Common defense to MPCA citations.
 - Documentation is key to defense as owner/contractor have the burden of proof on appeal of MPCA violation.
 - Documentation is also key to MPCA on rebuttal of owner/contractor proof.

Changing of the Guard on Public Projects

- Retirements from public entities and ownership structure changes with construction companies has resulted in a significant shift regarding disputes on public projects.
- Exacerbated by size and complexity of projects, legislative changes, increased agency enforcement actions and project personnel requirements.
- Old Process vs. New Process/Emerging Trend.

Changing of the Guard on Public Projects

- Examples of new process/emerging trends.
- Document, Document, Document.
 - Specs regarding time for notice of changed conditions, differing site conditions, extra work, etc.
 - Specs regarding daily logs, equipment hours, labor, etc. for force account work.
 - Compaction tests, roll tests, etc.
 - Bid documents, boring reports, etc.
 - Change Orders.
 - Other project documentation.

Questions?

Justin P. Short

Justin P. Short is a partner in the firm's Construction, Real Estate and Litigation practice groups where he represents contractors, real estate developers, and commercial landowners. Mr. Short specializes in construction claims pertaining to highway and bridge contracts, Department of Transportation claims, federal MATOC agreements, mechanic's liens, bond claims, bid protests, indemnity obligations, construction contract disputes and commercial and multi-family residential construction defects. He has represented contractors on these construction matters throughout Minnesota, North Dakota, South Dakota, Iowa, Illinois, Arizona, Texas, Colorado, Arkansas, New Mexico, Mississippi, Florida and North Carolina.

Justin is a frequent lecturer on construction and real estate industry topics through the State Bar Association, Thompson-West Corporation, HalfMoon Education Inc., as well as private seminars to contractors, real estate developers and commercial landowners.





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Justin P. Short

jshort@bestlaw.com