

In the Crosshairs: Political and Legal Landscape for MPCA Enforcement Against Foundries

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September 16, 2024

Legal Notice

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Speaker



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Brian Bell assists clients in obtaining environmental and operating permits for controversial industrial, energy, and natural resources projects. As part of this work, Brian advocates for companies before local, state, and federal regulatory bodies and on judicial review. Brian also represents clients in defending against agency enforcement actions.

Brian has litigated cases in district and appellate courts throughout the country, including in Minnesota, Wisconsin, and Montana. Brian also represents clients conducting environmental due diligence in mergers and acquisitions, and real estate transactions.

A long-exposure photograph of a multi-lane highway at night, showing vibrant light trails from cars in shades of blue, red, and white. The road curves into the distance under a dark sky.

Agenda

- **Overview**
- **Enforcement Methods and Authorities**
- **Foundry Case Studies**

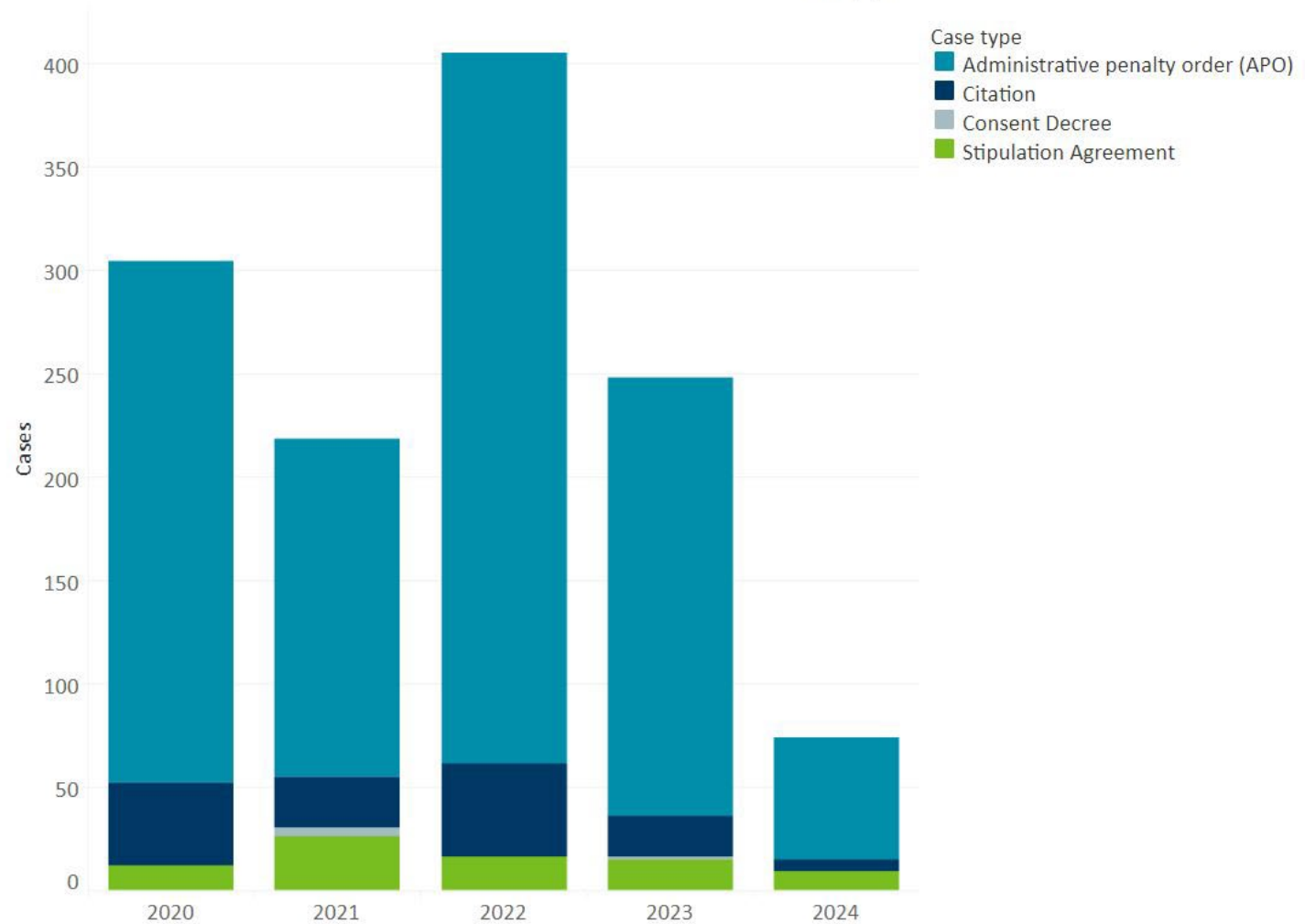
Overview

Political and Legal Landscape for MPCA Enforcement Against Foundries

Enforcement Actions by Year

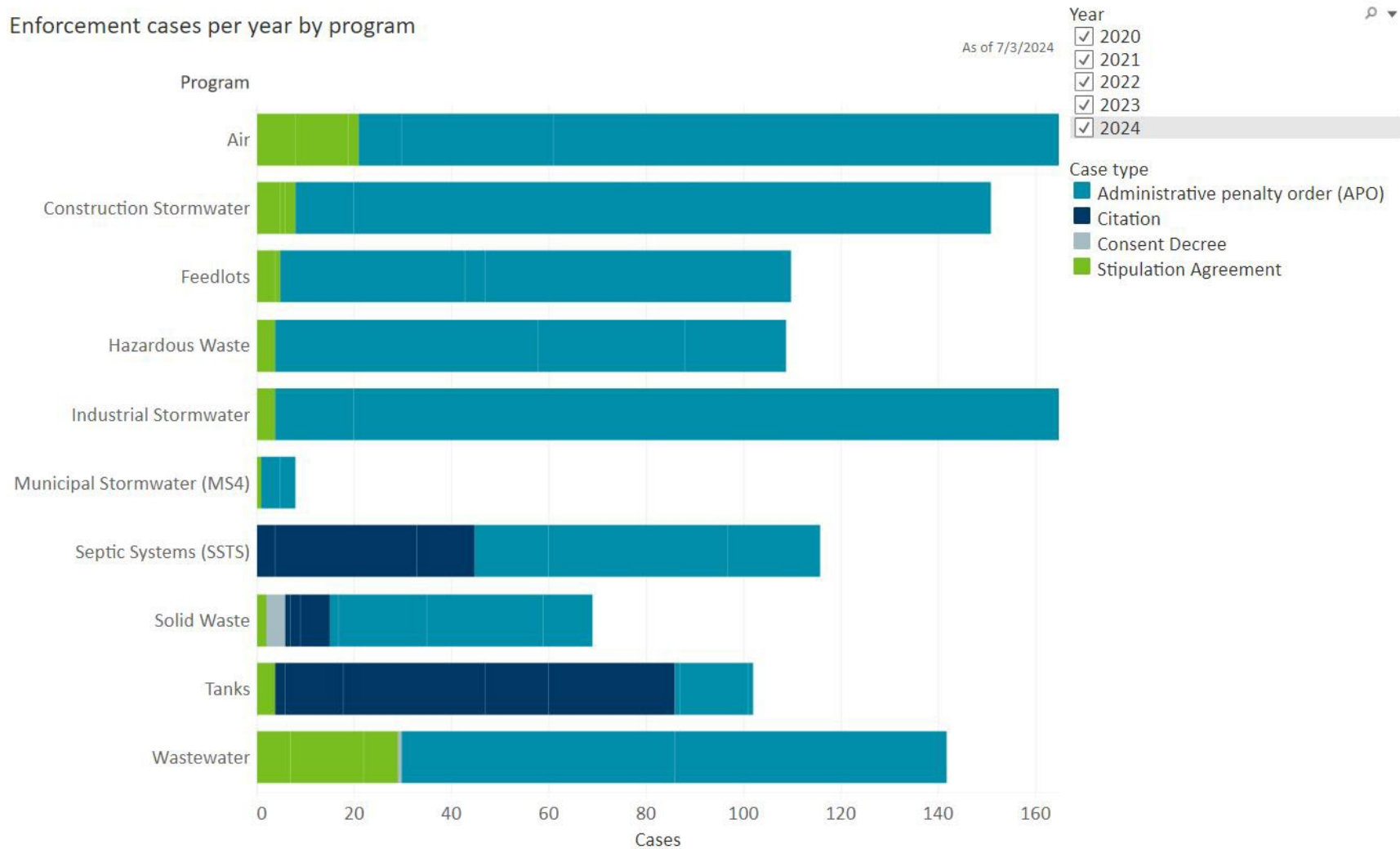
Enforcement cases per year

Program
As of 7/3/2024
(All)



Enforcement Actions by Program Type

Enforcement cases per year by program



Enforcement Methods and Authorities

Political and Legal Landscape for MPCA Enforcement Against Foundries

Enforcement Methods

Inspections
Requests for Information (RFI)

Alleged Violations Letter (AVL)
Letter of Warning (LOW)
Notice of Violation (NOV)

Field Citation
Administrative Penalty Order (APO)
Schedule of Compliance (SOC)
Stipulation Agreement (STIP)
Emergency Powers
Criminal Proceedings

Inspection

- **Most permits require permittees to allow inspections**
- **Scheduled or surprise**
- **Determine compliance**
- **Gather information for enforcement action**
- **May request documents**



Requests for Information (RFI)

- Most permits require permittee to provide information upon request
- Often occurs after or as part of inspection, though trend towards pre-inspection RFI
- Request documents or narrative response
- Determine compliance
- Used to support enforcement actions



Alleged Violations Letter (AVL)

- Hybrid between NOV and RFI
- Typically after an inspection or RFI
- Allege violations
- Provide an opportunity to respond
- Request additional information



Minnesota Pollution Control Agency

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800-657-3864 | Use your preferred relay service | info.pca@state.mn.us | Equal Opportunity Employer

April 20, 2017

The Honorable Bill Mars
Mayor, City of Shakopee
129 Holmes St. S.
Shakopee, MN 55379

RE: Alleged Violations Letter
City of Shakopee, Scott County

Dear Mayor Mars:

On March 9, 2017, the Minnesota Pollution Control Agency (MPCA) staff conducted an audit of the City of Shakopee's Stormwater Pollution Prevention Program (SWPPP) under the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Small Municipal Separate Storm Sewer System (MS4) General Permit (MS4 Permit) and identified the following alleged violations.

This letter describes actions you should take to correct the violations.

Please respond within ten days with facts or circumstances we should consider in determining whether and what level of enforcement action is appropriate. Page numbers of the MS4 Permit are included so you can easily find information related to the alleged violations.

Alleged Violations

National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Small Municipal Separate Storm Sewer System (MS4) General Permit (MS4 Permit) [MNR040000]

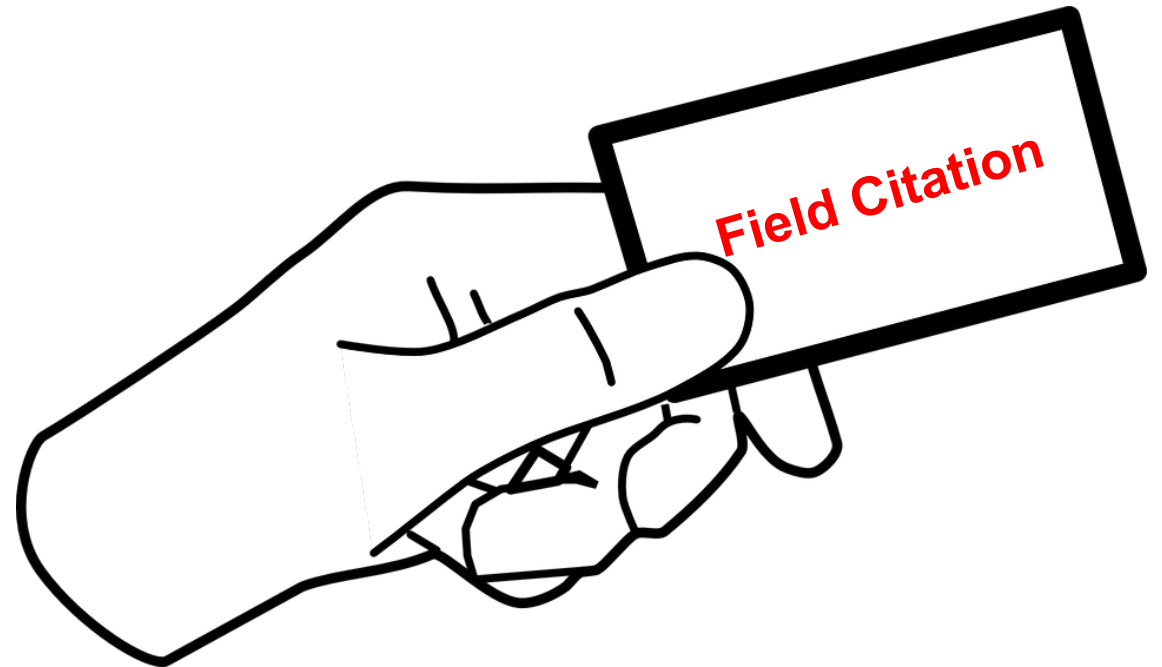
1. Failure to inspect and document each site inspection using an inspection checklist or other written means as required under Part III.D.4.f.(2) (page 14).
2. Failure to revise the existing Post-Construction Stormwater Management program to include a regulatory mechanism(s) that incorporates the requirements under Part

Letter of Warning (LOW)/Notice of Violation (NOV) (Non-Monetary)

- **LOW**
 - **Alleges violations**
 - **Requires corrective action (7-30 days)**
 - **Less serious violations**
- **NOV**
 - **Alleges violations**
 - **Requires corrective action (>30 days)**
 - **More serious violations**

Field Citation

- Solid waste, spills, and tank violations
- \leq \$2,000
- Appealable to Office of Administrative Hearings



Schedule of Compliance (SOC)/Stipulation Agreement (STIP)

- **SOC**
 - **Negotiated agreement**
 - **Provides a schedule for final compliance**
 - **Permittee should have an understanding of what's needed to get into compliance**
 - **No monetary penalty, but . . .**
 - **Stipulated penalties for failure to meet compliance schedule**
- **STIP**
 - **Negotiated agreement**
 - **May provide a schedule for final compliance**
 - **Monetary penalty imposed, which may exceed APO statutory cap**
 - **Stipulated penalties for failure to comply with agreement**
 - **Can impose oversight costs if they exceed \$25,000**

Administrative Penalty Order (APO)

- Forgivable
- Nonforgivable
- Combined.

Minn. Stat. § 116.072



Administrative Penalty Order (APO) (cont.)

- **Up to \$25,000 (new)**
- **Considerations**
 - **Base Penalty**
 - **Severity**
 - **Seriousness**
 - **Adjustments**
 - **Willfulness**
 - **Compliance history**
 - **Economic benefit gained by alleged violator**
 - **Other**
 - **Repeated violation must be at least 10% higher than previous violation (but can't exceed \$25,000)**
- **Administrative order: same but no monetary penalty**

APO/AO

- **May require corrective action within 30 days**
- **Respond showing violation corrected or appropriate steps towards correcting the violation have been taken**



Challenging APO

- 30 days
- Expedited administrative hearing
- District court review



APO: Expedited Administrative Hearing

- Office of Administration Hearings
- Hearing must occur within 30 days of request
- Administrative law judge makes only a *recommendation*
- May only recommend reduced penalty if “unreasonable”
- May comment on recommendation before MPCA issues decision
- Appealable to court of appeals within 30 days



District Court Review

- State district court
- ***MPCA has burden to establish by a preponderance of evidence that***
 - A violation occurred,
 - Regulated party is responsible for the violation, and
 - Penalty amount is justified.



Pros and Cons of Administrative Review & District Court Review

Expedited Administrative Review	District Court Review
Relatively fast	MPCA has burden of proof
Cheaper	Build the record
MPCA still makes final decision	Less deferential to MPCA
Limited chance to building the record	Longer
	More expensive

Pros and Cons of Administrative Review & District Court Review

Kasal v. Minnesota Pollution Control Agency, (Minn. Ct. App. May 10, 1994)

- Minn. Stat. § 116.072 provides two methods for an initial appeal of an administrative penalty order. Subdivision 6 permits appeal to an administrative law judge. We review the administrative agency's findings of fact under the **substantial evidence** standard. But subdivision 7 permits appeal to a district court for a **de novo trial**. We review the trial court's findings of fact under the clearly erroneous standard.
- We recognize that the “**substantial evidence**” standard requires **more deference** to the agency's expertise and its decision than does the “clearly erroneous” standard.
- **Thus, a party may find it advantageous to challenge an agency's administrative penalty order in district court rather than the office of administrative hearings.**

Emergency Powers

- **May shut facility down immediately if there is “an imminent or substantial danger” or “other acts of concern”**
- **“Other acts of concern”**
 - **Falsification of records,**
 - **History of noncompliance,**
 - **Chronic or substantial permit violations,**
 - **Where there is evidence of danger to the health or welfare or evidence of environmental harm**
- **May be issued without notice or hearing**
- **Court may issue an injunction to cease operations**



Emergency Powers Available

- **Suspend or revoke a permit,**
- **Issue an order to cease operations,**
- **Require financial assurances,**
- **Modify a permit,**
- **Require additional agency oversight,**
- **Pursue other actions necessary to abate pollution and protect human health**



Criminal Enforcement

- Rarely Used
- Can be either against individuals or the company itself
- Requires cooperation of the county attorney or attorney general
- Misdemeanor
 - “Willfully or negligently” violates environmental laws
 - ≥ 90 days imprisonment; \geq \$1,000 fine
- Felony
 - Knowingly violates environmental laws
 - \geq \$1 million fine
 - \geq Ten years in jail

A Tale of Two Foundries

Political and Legal Landscape for MPCA Enforcement Against Foundries

Smith Foundry

- **May 2023: EPA conducts surprise inspection in May 2023**
- **August 2023: EPA issues NOV**



Smith Foundry: Alleged Violations

- **Failure to comply with operation, maintenance, and recordkeeping requirements**
- **Failure to maintain baghouse inspection and maintenance records**
- **Failure to record and maintain records of baghouse pressure drops**
- **Failure to prevent PM from becoming airborne**
- **Failure to demonstrate compliance with SIP emissions limits**
- **Failure to notify MPCA of deviations and equipment break downs**

Smith Foundry

- **June 4: EPA announces settlement with Smith**
 - **\$80,000**
 - **Shutdown two pouring and cooling lines**
 - **Permanently shutdown remaining pouring and cooling, and shake out with 12 months**
 - **Limit liquid metal poured > 2,884 tons**
 - **Maintain finishing operations**
- **July 26: Smith Foundry announces it will shutdown permanently by August 15**

Northern Iron Pre-Litigation (NI)

- **April 2023**: MPCA issues NOV alleging NI installed equipment at its facility without obtaining a permit amendment
- **July 2023**: NI MPCA enter a stipulation agreement
 - NI pays \$41,500
 - NI must submit modeling to the MPCA
 - NI must submit a major permit amendment
- **October 2023-March 2024**: NI and MPCA go back and forth on modeling protocol
- **March 2024**: MPCA demands that NI enter an amended stipulation agreement limiting NI to melting ten tons of scrap per day

Northern Iron Litigation

- **April 2024**: MPCA issues administrative order (AO) limiting NI to melting 10 tons per day
- **May 2024**: NI appeals AO in Ramsey County district court; submits alternative compliance plan; NI moves for a temporary injunction
- **May-June 2024**: MPCA and NI try unsuccessfully to mediate the dispute
- **June 2024**: NI installs air monitors
- **July 2024**: Court holds hearing and grants temporary injunction
- **September 2024**: Northern Iron submits application for major permit amendment

Smith Foundry v. NI

Smith Foundry	NI
EPA took enforcement lead	MPCA took enforcement lead
Very activist community	Paperwork violations alleged
Many violations alleged	Monitoring was well-below levels
MPCA was embarrassed	Judicial challenge
No court challenge	Me

Political Landscape

- **Major climate legislation passed**
- **Sustained pressure on regulated parties in environmental justice communities**
- **More inspections and air monitoring**
- **More onerous permit terms, potentially including monitoring**
- **Greater use of emergency orders**
- **VP Walz?**
- **Gov. Flannagan?**

Questions



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