

## **MPCA Fines Itself Without Prior, Independent Review**

According to a November 2, 2007 story in the Rochester Post Bulletin, MPCA staff in the Superfund and Emergency Response Section's working on the cleanup of groundwater at a former dry cleaning operation in Winona violated water quality standards during the cleanup. The MPCA alleged that the MPCA was late in filing reports and failed to conduct required monitoring of groundwater contaminated with dry cleaning chemicals. The violations were noted and one Division of the MPCA initiated enforcement action against another Division of the MPCA.

Apparently, the MPCA did not consider these highly unusual circumstances to create a conflict of interest of any kind. In most cases where an individual associated with a prosecutor's office engages in allegedly wrongful conduct, the case is immediately referred out to an independent party. Typically, an independent prosecutor (from another jurisdiction) is asked to carefully review the matter and determine the appropriate response. This practice is followed to ensure that there is no undue influence, the rights of all parties are protected and the public is assured that the process is fair.

Private parties who find themselves the subject of MPCA enforcement actions are always assured that the MPCA's process is fair and that the handling of their case is consistent with the handling of similar matters.

The MPCA defended its process and its handling of the case. According to the Rochester Post Bulletin story, an MPCA spokesperson stated that the penalty was assessed "in an effort to treat everyone equally." The case, which named the MPCA as violator, could have been referred to the U.S. Environmental Protection Agency (EPA), the U. S. Attorney's Office or the Minnesota Attorney General's Office for an independent review, assessment and appropriate response.

Instead, on July 25, 2007 the MPCA decided to issue an Administrative Penalty Order (APO) to itself, requiring the payment of a penalty of \$2,790. The MPCA had the option of seeking review before an Administrative Law Judge or in state district court, but chose to simply pay the fine rather than contest the matter.

The MPCA has the authority to enter into Stipulation Agreements where it may seek penalties of up to \$25,000 per day of violation. In determining penalties the MPCA often requires private parties to pay a penalty to address the economic benefit of noncompliance. Here, the MPCA staff chose to issue an Administrative Penalty Order. The statute authorizing those orders, Minn. Stat. §116.072, permits the MPCA to assess penalties of up to \$10,000 per inspection. MPCA staff who prosecuted the matter chose to assess their fellow staff members a penalty of \$2,790 which is on the low end of what the statute permitted.

Hessian & McKasy's Environmental Law Attorney Practice Group has extensive experience in responding to notices and defending enforcement actions brought by federal and state authorities, such as the EPA and the MPCA. We have represented clients in enforcement and permitting matters. We have helped clients prepare for inspections by assisting with environmental and health and safety audits and the development of environmental management systems that are designed to detect and prevent violations. We advise clients of all their available options including reaching negotiated settlements or, when appropriate, seeking judicial review.

Hessian & McKasy attorneys handle the full spectrum of environmental issues encountered by manufacturers, businesses, developers and individuals who have been named in an administrative, civil or criminal enforcement actions. We are regularly involved in negotiations on behalf of our clients with state and federal authorities.

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Joseph G. Maternowski 612-746-5754 [jmaternowski@hessianmckasy.com](mailto:jmaternowski@hessianmckasy.com)