EJCDC®

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

October 2020

Hugh Anderson
EJCDC Legal Counsel
608-798-0698
hugh.anderson@aecdocuments.com

The following case summaries and comments are general in nature and should not be taken as legal advice or counsel. The summaries and comments are solely the views of the author based on a preliminary review of the cited cases. The contents of this document do not represent the official position of EJCDC, its sponsoring organizations, or its members, on any topic.

1. **Issue:** Timeliness of construction defect claims—commencement of California's 10-year statutory repose period. *Hensel Phelps Construction Co. v. Superior Court*. Court of Appeals of California (2020).

   Summary: Hensel Phelps was the general contractor on a mixed-use project in San Diego. The project included construction of a residential condominium tower. The contract between Hensel Phelps and the original owner/developer included a requirement to substantially complete the work by a specified time, and defined Substantial Completion in a lengthy, detailed provision that identified five prerequisites for Substantial Completion. On May 24, 2007, the project architect signed the Certificate of Substantial Completion (apparently using the standard AIA form for that purpose); the owner/developer recorded a notice of completion with the city on July 10, 2007.

   After completion, the residential units were sold to individual owners, and the Smart Corner Owners Association assumed the management and maintenance obligations for the residential tower. On July 6, 2017, Smart Corners formally notified Hensel Phelps of a construction defect claim, based on allegations of problems with the project's windows, doors, roof, plumbing, parking structure, and other features. The lawsuit that followed alleged a single cause of action arising under California's Right to Repair Act. Under that statute, construction defect claims must be initiated within:

   > …10 years after substantial completion of the improvement but not later than [10 years after] the date of recordation of a valid notice of completion.

   The Right to Repair statute does not define Substantial Completion, other than specifying that the 10-year repose period is triggered, at the latest, by the recording of a valid notice of completion.

   Hensel Phelps moved for summary judgment, arguing that under the provisions defining Substantial Completion in the construction contract, Hensel Phelps had attained Substantial Completion on May 24, 2007, and the 10-year defect claim period began to run on that date; therefore the Smart Corner claim was late by more than a month. In response Smart Corner pointed out that it was not a party to the construction contract, and that the Substantial Completion provisions in that contract were not definitive in establishing whether Substantial Completion had occurred for purposes of the statute.

   The trial court denied the Hensel Phelps motion for summary judgment. The court ruled that Hensel Phelps "had not provided any authority to support its argument

that its contractual definition of substantial completion should apply to the statute [of repose]." In addition, the court found that there were triable issues of fact regarding when Substantial Completion had occurred under the definition in the construction contract. Hensel Phelps appealed the adverse decision.

Decision: In the California Court of Appeal, Hensel Phelps argued that the determination of Substantial Completion by the parties to a construction contract should be "conclusive" and binding in all later litigation. Specifically, Hensel Phelps called for a "bright line rule that, if an AIA Certificate of Substantial Completion is issued and all the provisions of the Certificate have been complied with," then the date of the Certificate conclusively commences the 10-year repose period. This "bright line" standard would give certainty to the parties and other potential claimants as to the deadline for bringing a claim, and would be consistent with the reasons for having a statute of repose, which include avoiding the uncertainties of traditional legal concepts regarding accrual of claims, and adherence to an "independent, objectively determined and verifiable event."

The Court of Appeal concluded that what matters in applying the statute is not the contracting parties' agreement regarding the definition or accomplishment of Substantial Completion, such as the issuance of a Certificate, but rather "the actual state of construction of the improvement and whether it is substantially complete." The court further held that a standard of "actual state of completion" provides sufficient certainty to the construction industry:

> The statutory standard of substantial completion ensures that contractors and developers can, on the basis of evidence available to them, determine with reasonable certainty when their liability for construction defects will end.

The court rejected what it portrayed as Hensel Phelps's demand for "absolute certainty," and was dismissive of the position that without being able to rely on the date of the Certificate of Substantial Completion it would be "impossible" for a general contractor to know when its liability will end. In fact, the court pointed out that the statute explicitly does create a "bright line" end for exposure to claims, if there is a recorded notice of completion.

The court's rejection of the contractor's position also emphasized the impropriety of conferring "on private parties [the two contracting parties] the ability to determine when the limitations period begins to run on another party's [a third party's] claim."

Comment: A close reading of the *Hensel Phelps* decision reveals that the Court of Appeal acknowledged that the date of Substantial Completion determined by the

parties at the end of construction often will be "persuasive indirect evidence of the state of construction [completion]," though not conclusive, as asserted by Hensel Phelps. Thus the importance of contractually defining Substantial Completion (see EJCDC® C-700 2018, Paragraph 1.01.A.42), and contractually establishing procedures for Substantial Completion (see EJCDC® C-700 2018, Paragraph 15.03, and EJCDC® C-625—Certificate of Substantial Completion), is in no way diminished by the ruling in this case.

The appellate court also confirmed that the parties to a contract may contractually alter the statutory limitations periods for claims between them. This approach is taken in some EJCDC documents, such as EJCDC® E-500, in which the Owner and Engineer agree that any claims between them will accrue no later than the date of Substantial Completion (cutting short potential discovery-based accrual times).

Although the decision was adverse to the specific general contractor in this specific circumstance, it ultimately may be beneficial to contractors. Architects and engineers do not always issue Certificates of Substantial Completion, and when certificates are issued the date is not always accurate or favorable to the contractor. Non-standard contracts may contain unreasonable definitions or conditions that purport to deny substantial completion has occurred, even after owner use and occupancy of the project. The *Hensel Phelps* case confirms that in California actual Substantial Completion, based on facts, is the prevailing standard for defect claims, not the potentially inaccurate or non-existent formal completion documentation of the project. In some situations this will allow contractors to prove an earlier actual date of Substantial Completion, thus shortening the period of exposure to claims.

---

2. **Issue:** Project owner's liability for delays arising from design review comments that deviated from the contractually-established design process. *Appeals of RBC Construction Corp.* Armed Services Board of Contract Appeals (2020).

   Summary: The U.S. Army Corps of Engineers entered into a $12.3 million design-build contract with RBC Construction Corp., for design and construction of an Army Reserve Center in San Juan, Puerto Rico. Under the contract RBC was permitted to use fast-track design submittals, which would allow RBC to obtain approval for construction of specific portions of the project while the design process was still in progress for subsequent components of the work. The contract documents included detailed procedures for contractor submittals, and for government review and comments.

In February 2012 RBC submitted a fast-track site and foundation package. One of the submitted drawings showed a 40,000-gallon cistern for fire suppression below the foundation of the assembly hall building. Under the contractual submittal procedures, government comments on the site and foundation package were due in 14 days.

The contractual submittal procedures stated that the preliminary hydraulic calculations for a fire cistern were to be submitted in a later catch-all submittal called the interim design package. However, apparently the project planners had not anticipated that the design-build contractor might choose to locate the cistern under one of the foundations. When the cistern was depicted in the site and foundation package, the government required RBC to provide the cistern design calculations as a prerequisite to approval of the site and foundation package. The completion and approval of the package was ultimately delayed substantially, resulting in a contractor claim for additional time and compensation, and an appeal to the Armed Services Board of Contract Appeals.

Decision: On appeal, RBC contended that the government's insistence on receiving fire cistern hydraulic calculations as part of the site and foundations package constituted a constructive change to the contract, resulting in an entitlement to an equitable adjustment. The government countered that by including the fire cistern in the footprint of one of the buildings, rather than as an external tank, RBC had caused the change, and was obligated to submit the calculations concurrent with the other foundation-related design submittals, in order to allow "a complete design analysis." Government witnesses testified that the ultimate concern was that if RBC had undersized the cistern in the fast-track drawing—if an analysis of the hydraulic calculations later showed that a 40,000-gallon cistern was not sufficient to meet the facility's fire suppression needs—then a portion of the foundation might need to be torn out to allow for installation of a larger cistern.

The Board concluded that although the government's position regarding analysis of the fire cistern design was "eminently reasonable," nonetheless the government's own contract documents expressly stated that the hydraulic calculations were not required until the subsequent interim design submittal. The Board acknowledged that if RBC had undersized the cistern in the foundation submittal, it could be expensive and time-consuming to modify the foundation. According to the Board, the government had been well intentioned, and was "attempting to save RBC from itself," but by demanding the hydraulic calculations out of sequence—a sequence the government itself had established—the government caused a compensable delay.

Comment: The owner-approved final site and foundation package contained a 40,000-gallon fire cistern, just as RBC had originally proposed. RBC had apparently been confident that its initial calculations would be sustained, and was willing to take the risk that it had undersized the tank, and would consequently need to tear it out and reconstruct the foundation. The government was not willing to allow that gamble to play out, and was therefore forced to pay for the resulting delay.

Perhaps the fast-track specifications could have been written to state that any additional facilities included in a package (beyond the required package elements) would need to be designed in full. This would have protected the government from unanticipated design features, such as the cistern being located within a building footprint, but at the same time might have detracted from fundamental goals of the fast-tracking.

RBC was also awarded 11 days of delay for the government's failure to respond to the site and foundation package within the required 14 days. The decision indicates that a more common turnaround time would have been 30 days. As one of the government engineers opined, the government "shot itself in the feet" by committing to a 14-day review and response.

---

3. **Issue:** Applicability of statute that prohibits the contractual elimination of tort liability, to a contract clause waiving the right to subrogation. *Rural Mutual Insurance Co. v. Lester Buildings, LLC.* Supreme Court of Wisconsin (2019).

   Summary: A farm owner contracted with Lester Buildings for the design and construction of a new barn; the owner also contracted separately with a concrete company, Van Wyks, for foundations, walls, and piers (columns). The contracts contained typical waiver-of-subrogation clauses, in which the parties waived claims against each other to the extent the claims were covered by property insurance.

   Three years after completion, strong winds collapsed half the barn, killing or causing catastrophic injuries to a large number of cattle. The owner's property insurer, Rural Mutual, paid $650,000 to rebuild the barn, and for the loss of the cattle. A lawsuit ensued in which Rural Mutual sought to recover the money it had paid out on the property policy, under the right of subrogation, from Lester Buildings and Van Wyks (the Contractors). According to Rural Mutual, the barn collapsed because of the misplacement of steel rebar cages in the concrete piers that supported the roof. The Contractors denied that the design or workmanship was at fault, and raised the threshold defense that the waiver of subrogation clauses in their contracts must be enforced to bar Rural Mutual's claims.

Rural Mutual countered that a Wisconsin statute made the waiver of subrogation clauses "against public policy and void." Wisconsin Statute Section 895.447 ("the Statute") provides as follows:

> Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

The trial court granted summary judgment in favor of the Contractors, and the intermediate court of appeals affirmed that decision, remarking that Rural Mutual's argument that the statute voided the subrogation clauses was "woefully insufficient." The case was appealed to the Supreme Court of Wisconsin.

Decision: The Wisconsin Supreme Court affirmed the two lower court decisions that had enforced the waiver of subrogation clauses. The court concluded that the waivers of subrogation did not "limit or eliminate tort liability"—the actions targeted in the Statute—but rather merely shifted responsibility for damages from the Contractors to the property insurance company.

In support of its ruling, the court pointed out that the project owner's remedies against the Contractors were not limited by the waiver of subrogation clauses, because in addition to collecting insurance proceeds for covered losses, the project owner was able to recover other damages for uncovered losses, and for the insurance deductible, from the Contractors—and in this instance the owner did exactly that. (A dissent in the case criticized the majority for focusing on the remedies available to the owner, rather than on the tort liability of the Contractors—the statute refers only to tort liability.)

Comment: One of the flaws in Rural Mutual's attempt to avoid the application of the waiver of subrogation clauses was the fact that the insurance policy expressly permitted the insured (the property owner) to waive the right to recovery (waive subrogation rights) "without voiding the coverage." The court observed:

> Rural Mutual received a benefit, in the form of premium payments, for expressly allowing its insured to allocate risk in this way. We will not rewrite Rural Mutual's policy to exonerate it from a risk that it contemplated and for which it received a premium.

Property insurance companies (including builder's risk insurers) do not like waivers of subrogation, but most accept them as a cost of doing business, and we may assume that these costs are accounted for in the premiums paid for property/builder's risk insurance.

Waivers of subrogation are an important part of the risk allocation structure built into the various interrelated EJCDC standard contracts, including the construction contracts (see EJCDC® C-700 2018, Paragraph 6.05), design services agreements (see EJCDC® E-500 2020, Paragraph 6.04.G), and construction subcontracts (see EJCDC® C-523, Paragraph 10.03.K). The prices agreed to in these contracts assume that certain specific categories of loss that may occur in connection with the project will be covered by insurance, rather than becoming the subject of a liability battle between and among the owner, design professionals, and contractors.

A previous Wisconsin appellate decision had held that the Statute did not invalidate indemnification clauses in construction contracts. The court concluded that an indemnification clause did not "limit or eliminate tort liability," rather the clause reallocated responsibility to the indemnitor. The same logic could even apply to a limitation of liability clause: it could be said that such a clause does not really limit or eliminate tort liability, but rather reallocates that liability to the party willing to accept the limitations of the clause.

A recent commentator aptly described the Statute as "perplexing." It was originally intended to be an anti-indemnity statute, similar to those enacted in various states to protect subcontractors and others from having to accept burdensome indemnification obligations. Severe revisions during the legislative drafting process resulted in a statute whose purpose and application are obscure. Many years after its enactment, the author of the bill that resulted in the Statute—a retired state senator—stated that by the time the bill was passed, nobody knew what it meant or why they were passing it.

---

4. **Issue:** Insured status of contractors under owner-purchased builder's risk insurance policy. *Factory Mutual Insurance Co. v. Skanska USA Building, Inc.* United States District Court, District of Massachusetts (2020).

   Summary: Novartis hired Skanska USA as the general contractor for construction of a biomedical research laboratory in Cambridge, Mass.; Skanska in turn retained Cannistraro LLC as a subcontractor. Novartis purchased a builder's risk policy that designated Novartis itself, its subsidiaries, and any Novartis partnership or joint venture as "Insured."

During construction, a threaded cleanout plug failed and released city water into the construction site, causing substantial damage. Novartis submitted a claim for loss to the builder's risk insurance company, Factory Mutual, which paid the claim. Factory Mutual contended that the loss was caused by Skanska and its subcontractor, and brought a federal lawsuit against them.

Under prevailing law, an insurer that has paid a claim for loss has a right of subrogation—the insurer (here, Factory Mutual) stands in the shoes of the insured (Novartis), and may seek recovery from a third party that caused the loss. It is common on construction projects for the primary parties (owner, contractor, subcontractors, A/Es) to waive claims against each other to the extent covered by property insurance, and to waive the insurance company's right to subrogation. On this project, however, Novartis and Skanska had deleted such a subrogation waiver from their contract, during the drafting process. Because the contractual waiver of subrogation was not available as a barrier to Factory Mutual's claim against them, Skanska and its subcontractor instead invoked the anti-subrogation doctrine, which provides:

> [T]hat an insurer has no right of subrogation against its own insured, and thus may not seek indemnification against a third-party if the third party also happens to qualify as an insured under the policy.

In support of the argument that they qualified as insureds, despite not being named as such in the insurance policy or in any related insurance certificate, Skanska and its subcontractor pointed to a clause in the builder's risk policy that said that the policy "also insures the interest of contractors and subcontractors in insured property during construction…to the extent of the Insured's legal liability…." An analysis of this provision ("Legal Liability Clause") was at the core of the court's consideration of a motion for summary judgment by Skanska and its subcontractor.

Decision: The federal district court rejected the Skanska/sub contention that they qualified as insureds, for purposes of the anti-subrogation doctrine. The court held that the Legal Liability Clause referring to insuring the interests of contractors and subcontractors was by its terms applicable to "the extent of [Novartis's] legal liability," not the contractors'/sub's legal liability. This was significant because Factory Mutual's lawsuit was based on the direct liability of Skanska and the subcontractor, not on Novartis's negligence or other culpability. Thus the Legal Liability Clause did not confer insured status, at least not in this specific context.

Comment: The contractual waiver of subrogation is the established means for avoiding cross-claims and subrogation claims with respect to property losses on a construction project. (See examples in EJCDC contracts, as cited in the summary of the *Lester Buildings* case above.) The federal district court in the *Factory Mutual* case rightly viewed the deletion of that waiver from the Novartis-Skanska contract as a significant problem for the Skanska/sub position that they were shielded from subrogation.

The court did observe in a footnote that it had "labored to make meaningful sense" of the Legal Liability Clause, and that a federal court in Oregon had also struggled with the same clause, in an unrelated case involving a similar Factory Mutual policy. The Massachusetts court expressed its frustration ("What exactly does that phrase [clause] mean in practical terms?"), mentioned but did not endorse a possible explanation, and closed the footnote with advice for the insurance company:

> It is left to Factory Mutual to consider whether this provision might benefit from greater clarity going forward.

---

5. **Issue:** Surety's performance bond obligations when contractor violates federal subcontracting requirements. *Hanover Insurance Company v. Dunbar Mechanical Contractors, LLC.* United States Court of Appeals (2020).

   Summary: Dunbar Mechanical Contractors is a Service Disabled Veteran Owned Small Business (SDVOSB). Dunbar bid on an Army Corps of Engineers ditch and tributary project in Arkansas. The project was an SDVOSB set-aside project, which required bidders to be SDVOSB entities to qualify for an award of contract. Dunbar was the low bidder at $2.047 million, and was awarded the contract.

   Immediately after receiving the award of contract, Dunbar entered into a subcontract with Harding Enterprises, which was not an SDVOSB. Harding's scope of work was to provide "all work" in the prime contract proposal, for $1.794 million. Hanover Insurance subsequently issued a subcontract performance bond, in the full amount of the subcontract.

   During the course of the project Dunbar terminated Harding for cause, and brought a claim under the performance bond against Hanover. Hanover investigated the project and discovered that Dunbar had subcontracted more than 85% of the prime contract, in apparent violation of the controlling federal regulation, which required SDVOSB contractors to spend at least 15% of the cost of performance for SDVOSB services. In federal court, Hanover argued that the Dunbar-Hanover subcontract was

illegal, eliminating the surety's obligations under the subcontract performance bond. The district court agreed, holding that the subcontract "undisputedly violated federal law," that illegality provides grounds for rescission of the subcontract, and that Hanover was not required to fulfill the obligations of the subcontract performance bond. The district court also noted that Hanover should be shielded from acting in furtherance of an illegal subcontract, and from involvement with potential false claims against the government.

Dunbar appealed the adverse ruling of the district court.

Decision: The United States Court of Appeals for the Eighth Circuit reversed the district court's ruling in favor of the surety. The court found that the controlling federal regulation for SDVOSB contracts specifically required that the SDVOSB entity spend at least 15% for SDVOSB personnel. As a result, a determination of compliance could not be made until the completion of the project, when all costs, including possible change orders, could be reviewed. The court noted that the regulation could have established a prospective restriction on subcontracting, determined as of the outset of the project, but instead focused on final costs (spending). Thus the court of appeals held that the district court determination of an illegal contract was premature, because performance had not yet been completed.

As to the surety's concerns about participating in an illegal or fraudulent scheme, the court of appeals recommended that Hanover, as performing surety, create a safe harbor for itself by giving notice to the government of the potential for false claims if there was no further modification of the spending percentages.

Comment: Contract clauses that restrict subcontracting (or, from another perspective, that require a certain degree of self-performance by the prime contractor) should be carefully written to accomplish the objectives of the restrictions. In the Hanover case, the objective of the federal regulation for SDVOSB projects appeared to be to assure that a minimum amount of federal funds would flow down to SDVOSB personnel and employees. If, as the court of appeals held, the determination of compliance could only be made at project's end, there would not be any opportunity for an adjustment that would help serve the objectives.

The parties and the courts involved with this dispute seemed to take as a given that a surety's performance bond obligations are excused if the contract whose performance is assured proves to be illegal. This makes sense, but the decision does not fully explain the authority and mechanism for this.

---

6. **Issue:** Commercial General Liability insurance policy's coverage of claim for property damage caused by a subcontractor's defective work. *Skanska USA Building, Inc. v. M.A.P Mechanical Contractors, Inc.* Michigan Supreme Court (2020).

   Summary: Skanska USA was the construction manager at risk on a medical center project. Skanska subcontracted the HVAC work to M.A.P. Mechanical Contractors (MAP). MAP held a commercial general liability (CGL) policy issued by Amerisure. Skanska and the project owner were additional insureds under the CGL policy.

   MAP installed a steam boiler and related piping as part of the HVAC system. In doing so, MAP installed some of the expansion joints backward. Over time, the faulty joints resulted in significant damage to concrete, steel, and the heating system itself. Skanska repaired and replaced the damaged property, and submitted a claim to Amerisure for the $1.4 million cost of the remedial work. Amerisure denied that the CGL policy covered the claimed costs; after a progression through the trial court and Michigan's Court of Appeals, the insurance dispute reached the Michigan Supreme Court.

   Decision: The Michigan Supreme Court concluded that faulty subcontractor work that was unintended by the insured may constitute an "accident"—and thus an "occurrence"—under a CGL policy, and therefore Skanska was able to proceed with its claim for remedial costs under MAP's Amerisure CGL policy.

   CGL coverage is predicated on the existence of an "occurrence" as defined by the policy. The policy definition states in part that an occurrence is a type of accident, characterized in Michigan insurance law as "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." One of the primary arguments in the *Skanska* case was whether MAP's erroneous backward installation of the expansion joints constituted an accident and thus an occurrence. Amerisure took the position that an "accident" must include a "fortuity," meaning something over which the insured has no control. The court found this to be an "overly stingy" reading of the word "accident," and that true "fortuity" was not an essential element of an accident for insurance policy purposes.

   The court found that the terms of the standard CGL policy confirm that as a general matter physical injury caused by poor workmanship may be an occurrence; this is the reason the policy contains the "your work" exclusion, which excludes coverage for a contractor's own poor work. But since 1986 a standard exception has applied to the "your work" exclusion:

> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

As the court concluded, if faulty work by a subcontractor could never constitute an "accident" (as Amerisure was in essence asserting) then the subcontractor exception to the "your work" exclusion would not have been necessary and would be rendered meaningless.

The Michigan Supreme Court also explored the contention that an accident cannot include damage that is limited to the insured's own work product. The court concluded that the policy does not limit the definition of "occurrence" by reference to the ownership of the damaged property, and does not distinguish between damage to the insured's work and damage to a third party's property.

Finally, the court rejected Amerisure's argument that a decision favoring Skanska would effectively convert the insurance policy into a performance bond. The court pointed out many obvious distinctions, observed that some overlap in protection does not mean that two risk management tools are identical, and in any event the "CGL policy covers what it covers."

Comment: Michigan joins a trend among the state courts in finding that faulty workmanship may constitute an "occurrence" triggering CGL coverage.

At some future point the insurance industry may modify the standard CGL policy terms to clearly and plainly address coverage for defective construction. This would reduce the need for coverage litigation, and allow for more transparent premium pricing.

Covid-19 Pandemic Note: The decision includes an express thank-you from the court to counsel for agreeing to conduct oral argument using videoconferencing software.

---

7. Issue: Compensability of project delays caused by Ebola outbreak. *The Appeal of Pernix Serka, J.V.* Civilian Board of Contract Appeals (2020).

Summary: The State Department retained Pernix Serka to build a rainwater capture and storage system in Freetown, Sierra Leone (West Africa). When an outbreak of the Ebola virus spread to Freetown, the contractor sought guidance from the U.S. government's contracting officer, suggesting a joint consensus approach; the contracting officer replied that "It is up to you to make a decision as to if your people should stay or leave at this time…but the decision for your people to stay or leave for life safety reasons rests solely on your shoulders…."

The contractor chose to temporarily shut down the work at the site, and was informed by the government that the unilateral action based on circumstances beyond the control of either the government or the contractor would not be subject to an equitable adjustment in price. This viewpoint was affirmed by the Civilian Board of Contract Appeals, based on the provisions of the federal "force majeure" clause.

The Board's decision is under appeal; a full report will be made after a final decision is issued. Among the issues that may be considered are whether the Ebola outbreak constituted a cardinal change to the contract; whether there was a constructive change; and whether there was a suspension of work.

---

8. **Issue:** Engineer's liability for project delays resulting from alleged failure to obtain required permits. (Pennsylvania).

Summary: A Pennsylvania public owner arbitrated a dispute with a sewer project contractor, reportedly resulting in an award for the contractor of $2 million. The damages apparently related to delays or a stoppage of work resulting from the lack of a National Pollutant Discharge Elimination System (NPDES) permit.

According to the public owner, responsibility for obtaining the permit lay with an engineer retained by the owner. A newspaper account indicates that a lawsuit against the engineer is in progress.

The owner's council president was quoted by the local press as saying that "the council is not suing [the engineer] as a person, but is seeking damages from [his] insurance….Essentially, we don't have $2 million sitting in the bank. We are scrambling around to find out whether we can reduce negative outflow of monies by any means within our grasp."

If the case eventually reaches an appellate court and a decision is published, we will report on the outcome.