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MASSACHUSETTS DEVELOPMENTS

Oil Spill Leveraged to Boost Environmental Fines

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Dramatically increased environmental penalties have been authorized in Massachusetts via legislation spawned following last year's Buzzards Bay oil spill. These changes, applicable not just to barge operators but to any violator, allow the state to criminalize even negligent violations, to debar state contractors, to levy administrative penalties for inaccurate statements to DEP, and to impose environmental auditors.

The Buzzard's Bay Spill

This story began when, despite good light and weather conditions on April 28, 2003, an oil barge veered outside a well-marked Buzzard's Bay channel, slammed subsurface rocks, and caused a major oil spill. State and federal environmental agencies responded quickly and got results. The barge owner, Bouchard Transportation Co., recently agreed with federal prosecutors to pay a \$10 million criminal fine. Criminal enforcement against the responsible individuals remains likely, while Bouchard and its insurers have taken responsibility for reimbursing the cleanup efforts and compensating affected property owners (www.buzzardsbay.org/oilspill-4-28-03.htm and www.mass.gov/dep/bwsc/files/bouchard/bouchard.htm).

Given these legal repercussions one might think ample response authorities were already in place. Almost as rapidly as they responded to the spill, however, environmental agencies and legislators complained that the state's enforcement toolkit was inadequate. The resulting campaign has successfully leveraged the Buzzard's Bay spill into across-the-board and large increases in state enforcement authorities.

The Environmental Endangerment Act.

The changes emerged through a series of measures. The 2003 Environmental Endangerment Act, adopted as part of last year's budget bill in immediate response to the Buzzard's Bay spill, specifies that violations causing serious environmental damages or risk are now subject to enhanced and criminalized penalties. Under the resulting G.L. c.21L, criminal exposure and penalty size are now determined more by the size of the injury

than by an environmental violator's intent or conduct. That program:

- defined "environmental violation" as any civil or criminal violation occurring under statutes or regulations governing water pollution, hazardous waste, waste site cleanup, air pollution and wetlands protection.
- authorized separate criminal penalties against any person who "knowingly or recklessly" commits an environmental violation, if the violation causes either serious bodily injury to another person, or substantial risk of damage to natural resources *or* to the property of another person in an amount exceeding \$100,000. Maximum fines range from \$100,000 to \$2,000,000 per violation.
- authorized court-appointed auditors to identify all causes of the events leading to a conviction, and to recommend measures and schedules for improvement. Implementing those improvements is mandatory unless the court finds that they are not warranted (under narrow criteria set out by the statute), while sanctions may be imposed for failure to implement the approved recommendations. Such a coercive audit is a first for Massachusetts, where until now audit requirements have been imposed only in negotiated plea bargains, civil consent decrees or administrative orders

No prosecutions have been announced under the Environmental Endangerment Act; prosecutors are presumably awaiting an appropriate disaster. Nevertheless, this summer c.21L was amended to expand its clout.

Debarment. Last year's budget bill also amended c.29 to add repeated or aggravated violation of state or federal law protecting the environment as a basis for debarment from eligibility to bid on public contracts in Mass.

Now, Financial Assurance and More

This summer's follow-on legislation, an Act Relative to Oil Spill Prevention and Response in Buzzards Bay, addresses deficiencies dredged up by the barge spill and then keeps going. In amending G.L. c.21, and with a new G.L. c.21M, financial assurance of at least \$1,000,000,000 will

be required for larger vessels entering Massachusetts waters to receive or deliver petroleum or other hazardous materials. The law imposes a 2-cents/barrel fee to build up a new cleanup fund, and also authorizes the state to designate special environmental interest areas as off-limits to vessels carrying certain hazardous cargoes.

Above all, although little noticed, the Act dramatically expands existing enforcement authorities applicable to *anyone* regulated by environmental laws. Environmental regulators had long proposed most of these changes, but got nowhere until the Buzzard's Bay spill provided a vehicle to steam through the legislative process.

Among its significant changes, the newly signed act authorizes:

- expansion of last year's Environmental Endangerment Act, c.21L, with: (1) criminal penalties for any merely negligent environmental violation (as broadly defined under the Act) causing serious personal injury, a substantial risk to natural resources, or property damage exceeding \$25,000; (2) civil penalties equal and parallel to the Act's criminal penalties (up to \$2,000,000 per violation); and (3) increased criminal penalties to double the "gross gain" or "gross damage," whichever is greater, if the violator derived pecuniary gain from a violation causing serious bodily injury or substantial risk to natural resources or to property of another person.
- increases in regular civil and criminal penalty maximums to \$50,000 per violation for unauthorized discharges to surface water and for

violations of the waste site cleanup statute and regulations.

- administrative penalties calculated to exceed the economic benefit an environmental violator realizes from the noncompliance.
- administrative penalties for knowingly making a false or just inaccurate, incomplete or misleading statement in a document submitted to DEP.

In theory, if a knowing violation causes substantial risk to natural resources while a violator was making a pecuniary gain by deferring maintenance, enforcement personnel may now pursue a repeat violator for up to \$2,000,000 in criminal penalties per violation, or even more if the "gross gain" or "gross damage" exceeds \$2,000,000.

These significant increases to environmental enforcement authorities, which now can exceed the comparable federal penalty provisions, appear to have attracted little notice within the regulated communities during the legislative process. Labeling the legislation as about Buzzard's Bay may have obscured the fact that the legislation applies to all.

Collectively, these changes markedly strengthen the environmental enforcement cards held by Mass. DEP and the Attorney General. Once DEP and the AG absorb their new authorities and develop new penalty guidance materials, there should be dramatic differences in negotiating with those agencies to resolve alleged violations.

For the regulated communities, these laws provide one more strong set of reasons for attention to compliance. That is, after all, the point. ●