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Duty To Detect Waste Is Heightened By Judgment

Cos. Need To Disclose 'Historical Releases'

By: Paul Boynton

Companies will face an expanded duty to notify the government of "historical releases" of hazardous materials — even in the absence of test data evidencing pollutants — as the result of a recent consent judgment, say state officials.

Martin E. Levin, chief of the Massachusetts Environmental Strike Force, said that "the duty to notify cannot be avoided [just] by avoiding taking samples."

Levin added noted that the consent judgment resulted from the first-ever case to enforce the duty to report historic releases of hazardous wastes.

Further, companies can't willfully avoid discovering information that hazardous wastes may have been released before the 1983 enactment of the state's environmental protection laws, said Levin, an assistant attorney general.

The obligation to notify the Department of Environmental Protection — mandated under state regulations when a company has knowledge of a release of pollutants — can arise when an entity would reasonably discover the polluting event or events except for willful avoidance of telling information, according to Levin.

"Knowledge can be based on facts and circumstances that would lead a reasonable person to suspect a release has occurred, such as when similar releases have occurred, or the materials handled were hazardous," he maintained.

Some environmental lawyers, however, are questioning what companies need to know before the duty to notify is triggered.

Susan J. Crane, chairwoman of the Boston Bar Association's Environmental Litigation Section, said businesses are concerned because "an essential problem with the consent judgment is that we don't know what level of knowledge is required about historical releases [of pollutants] before the obligation to test further is triggered."

Mary K. Ryan of Boston contended that "the mere suspicion of past releases shouldn't be enough to trigger the duty to notify."

Crane said companies in the past that suspected the release of hazardous materials often avoided conducting tests for fear of eventually being on the hook for clean-up costs.

"The rules have changed, but we don't what they are. It's really murky," said Crane.

Levin, however, asserted "it's really a common sense approach. The definition of knowledge in the regulations is pretty plain, but, basically, it's what knowledge would a reasonable person have under the circumstances."

Levin acknowledged that "a certain amount of due diligence is required in examining further the likelihood that the releases contained hazardous materials at reportable levels. There's a bias in the regulations favoring notification, particularly where we have system of 'privatized' oversight of historical releases."

Crane remarked that the government appears to judge what demonstrates sufficient knowledge by a changeable standard from company to company.

"The knowledge required of a General Electric is quite different than the knowledge of a home owner with a fuel oil spill in the backyard," Crane said. "More sophisticated, bigger entities are held to a higher standard."

Levin disputed that position, saying "who the potentially responsible party might be is not going to control. What a particular company knows about a particular incident will control."

Other environmental law experts said that the consent judgment actually crystallizes company notification requirements.

Lauren Stiller Rikleen of Framingham observed that the decree "clarifies the debate that has existed with respect to the duty to notify and whether you need specific data to look further."

The consent judgment "makes perfectly good sense," according to Christopher B. Myhrum of Springfield. "The regulations don't require lab data to establish knowledge [of a potential release of hazardous waste]."

Ryan agreed that "it signals loud and clear what the DEP and the Attorney General believe what the law is. Confronted with similar facts, this case makes clear what the duty is."

PCB-Laden Fill

Between 1946 and 1972, according to the commonwealth's complaint, soil and debris at a manufacturing plant in Pittsfield owned and operated by the defendant, General Electric Company, were used as fill at various residential properties throughout the city.

The state alleged that even though the defendant had not tested those properties it nonetheless knew as early as 1992 based on test results from other properties in Pittsfield and its own records that the fill materials were likely contaminated with PCBs, a potentially cancer-causing element according to government regulations.

The government asserted that the defendant was obliged to notify the DEP of the potential historical release of hazardous waste, and that it violated Chapter 21E by waiting until November 1996 and May 1997 to do so.

The plaintiff also claimed that the company compounded its violation of the environmental protection statute by providing incomplete and misleading responses to requests for information.

The company in its answer denied the government's allegations. It also asserted that it had no duty to report historic releases, and that it only had to inform the government of potential releases at specific properties if reportable levels of hazardous wastes were confirmed through testing.

MARTIN E. LEVIN

Superior Court Judge John C. Cratsley approved the seven-page consent judgment, which is Commonwealth of Massachusetts v. General Electric Co., Lawyers Weekly No. 12-253-99.

It states that the company's "obligation … to notify the DEP of a release of PCBs or of other oil or hazardous materials … shall not be contingent upon having actual measurements of reportable concentrations or quantities nor upon whether such release occurred before of after the enactment of DEP regulations or the passage of G.L.c. 21E."

The company is required to provide $1 million to a newly-created charitable corporation for community projects, educational activities and further environmental testing.

It must also pay a $200,000 civil penalty to the state, and $50,000 to the Massachusetts Environmental Enforcement Fund.

Unique Case?

Rikleen downplayed the impact on future cases of the financial penalty imposed by the consent judgment.

"In the basic case of a small company which found out about a possible release, but which didn't notify the DEP, and didn't investigate further, I doubt the penalty would be that high," Rikleen said. "The penalty [of $1.25 million] is related to the unique factors in the [General Electric] case."

Ryan observed that the government's position on the level of constructive knowledge triggering the duty to report must be viewed in light of the facts of the case, which she described as uncommon. "It appears that the government alleges General Electric knew where the waste was distributed off-site, and had tested similar waste streams," Ryan remarked. "More typically, an owner-operator of a facility might suspect a prior operator released hazardous wastes, but has no precise knowledge without test samples."

Myhrum said that "if you know your hazardous waste stream is spread all over town, then you probably have an obligation to report [that to the DEP]."

Requests For Information

Levin also indicated that this is the state's first-ever enforcement action based on a failure to fully and accurately respond to DEP requests for information.

The state alleged that General Electric provided untimely and misleading responses, which the company denied.

Levin remarked that "people are held to a high standard in responding to requests for information and they should be forthcoming."