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MassDEP enforcement activities: Drilling down! - by Susan Bernstein

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The Massachusetts Department of Environmental Protection (“MassDEP”) continues their enforcement activities in all areas under their jurisdiction.

MassDEP may take enforcement action against permit holders, against those entities conducting or failing to conduct certain activities in the absence of a permit, and merely as part of a random inspection or audit.

Entities using certain regulated materials and conducting certain regulated operations should be aware of MassDEP’s ongoing enforcement activities, since part of the enforcement process is to draw attention to violations in order to prevent others from doing the same. In many instances there may be lack of knowledge or awareness that a violation has occurred; however the mere activity or the omission thereof is often categorized within MassDEP’s enforcement guidelines as an “intentional act.”

As the real estate market continues to offer development opportunities, those who are recipients of Notices of Non-compliance or tagged with violations are well advised to engage appropriate consultants and knowledgeable attorneys in order to respond to such Notices and to attempt to negotiate penalties. Despite the appearance of unfairness and lack of actual intent to violate, the laws that apply to MassDEP’s enforcement authority often make the accused “strictly liable” for their violations, regardless of fault or actual intent. The more dangerous the violation, the greater the penalty. However, there are MassDEP policies, such as performing a supplemental environmental project (“SEP”), that enable a violator to reduce its penalty in exchange for performing a beneficial service to the community that one would not otherwise be required to do; a small business policy, to assist qualifying businesses the chance to defer or spread out payments; and various incentives for homeowners, small businesses and municipalities.

For the first quarter of 2019 (January 1 through March 31, 2019), MassDEP took enforcement actions against violators of hazardous waste management and cleanup, wetlands, air pollution and asbestos, underground storage tanks (“USTs”), solid waste, public water supply and drinking water, and groundwater discharges. The majority of the enforcement actions taken during the first Quarter of 2019 were in the following areas: waste site cleanup (MGL c. 21E); drinking water supply issues; and USTs. The later related to the failure to timely remove or close-in-place single walled steel tanks, even though by the compliance actually occurred before the enforcement occurred.

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