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MEMORANDUM

SEP 13 1988

TO: All Attorneys
FR: Nancer Ballard and Paul Nightingale *NB 10/1*
RE: "Oversight Charges" to be Levied Against Parties Responsible for Conducting Site Cleanups Pursuant to the Massachusetts Oil & Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E.
DATE: September 8, 1988

In late August, the Massachusetts Department of Environmental Quality Engineering ("DEQE") announced that, pursuant to M.G.L. c. 21E, it would begin charging all parties responsible for the release of oil or hazardous materials to the environment in Massachusetts, including those who voluntarily undertake to investigate and clean up such releases, a substantial amount of money for DEQE's oversight of such investigations and cleanups. The proposed oversight charges include the government's costs of (a) time spent reviewing and overseeing the implementation of site assessment information and remedial proposals submitted to DEQE by responsible parties, (b) time spent supervising personnel that conduct the reviews, (c) time spent administering the statutory public participation requirements, (d) time spent assessing other locations which are not ultimately listed as confirmed disposal sites, (e) fringe benefits, (f) training, sick time, holidays, vacations, (g) support costs (e.g., utilities, rent, travel, etc.), (h) research and development, and (i) overhead for other state government activities which supposedly support the Chapter 21E program.

DEQE estimates that these oversight charges will currently be assessed at \$573 per day and will total anywhere from \$50,000 for "small uncomplicated" releases to \$500,000 for "complex" sites. Furthermore, the amount DEQE estimates it will charge to defray other state governmental expenses exceeds the cost that will be charged for DEQE's direct labor at a site.

The charges as currently proposed, would be assessed against all responsible parties without regard to fault, degree of cooperation, or financial ability to pay. While there is an exception to the rates described above for parties who obtain a waiver of DEQE's approval requirements, this waiver provision only covers non-priority sites, and a party seeking such a waiver must pay a non-refundable \$3,000 application fee, regardless of whether DEQE actually grants the waiver.

The proposed regulations raise a number of significant legal and policy issues, including the following:

- o Whether it is fair to charge parties who did not cause or contribute to a release of oil or hazardous material for these significant oversight costs. Such parties are already saddled with the burden of paying for either their own or the government's direct costs of investigating and cleanup up sites. These additional levies may well constitute an act of overreaching by the state government.
- o Whether DEQE has the statutory authority to charge parties voluntarily undertaking site investigation and cleanup with the state government's oversight costs;
- o Whether the lack of regulatory controls over the time and money spent by DEQE and other state agencies on "oversight" constitutes an institutional incentive for DEQE to spend more than the required time on oversight, especially since the oversight charges assessed are more than triple DEQE's direct per hour labor costs;
- o Whether DEQE has the statutory authority to charge any responsible party for the state government's "indirect" costs, even if these costs are somehow allocated to the Chapter 21E program;
- o Whether these oversight fees and indirect costs will create a disincentive for responsible parties who would otherwise be willing to voluntarily conduct site cleanups;
- o Whether there will be many responsible parties unable to pay the proposed oversight fees and indirect costs;
- o Whether the oversight fee and indirect charge scheme may discourage responsible parties from proposing innovative or non-conventional treatment or disposal methods which could potentially be more effective and less costly than conventional options, because these parties will not want to incur the extra costs involved in DEQE's review and assessment of unfamiliar treatment or disposal options.

On August 24, 1988, the DEQE held a public information meeting on the proposed regulations, and on September 2, 1988, a hearing to solicit public comments was held. Numerous trade associations, businesspersons, and others who are or may be responsible for cleanup of a site attended the September 2 hearing and spoke against the proposal for numerous reasons.

including those outlined above. As a result, DEQE has agreed to postpone implementation of all but the waiver application provision of the regulations from October 3, 1988 to an undetermined date later this fall. Meanwhile, DEQE plans to reformulate more detailed regulations concerning oversight charges, to hold two more public information meetings and two more public comment meetings, and to solicit further written comments. As noted earlier, the waiver application fee provisions will go into effect on October 3, 1988.

DEQE's proposed regulations will impact all persons who own property contaminated with oil or hazardous material, all manufacturers, distributors or retailers that use or store oil or hazardous material, all owners of underground storage tanks, and any clients involved in the purchase use or consumption of petroleum products. If you believe that any of your clients may be affected by this proposed regulation and would like more information about it, please contact one of us. We now expect to submit comments on these regulations to DEQE on behalf of a number of clients. If you believe any of your clients would be interested in participating in this effort, please let us know.

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