

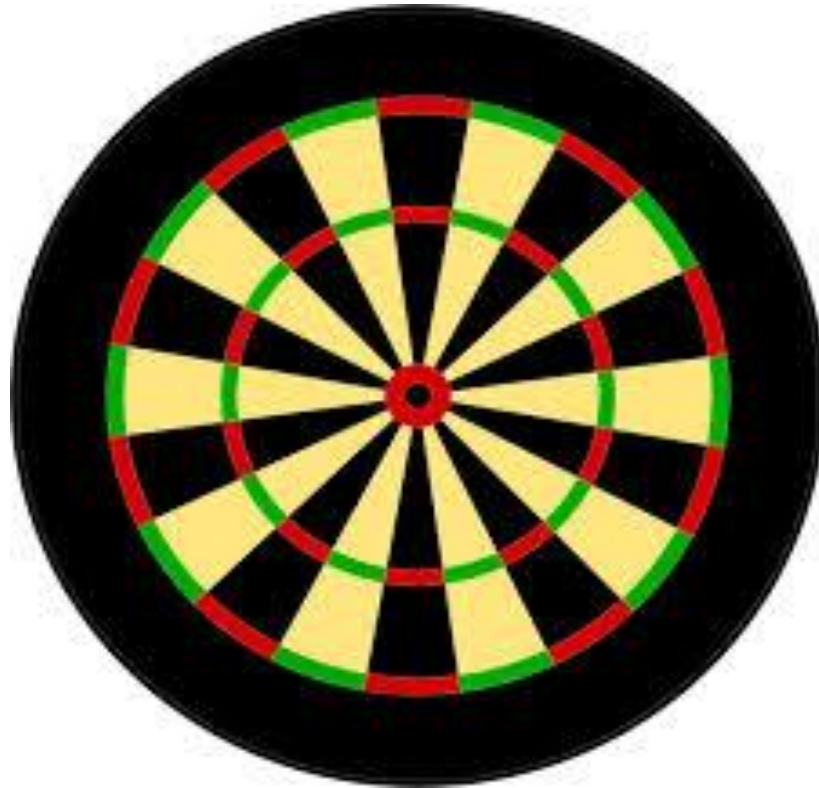
ENFORCEMENT UNDER CHAPTER 21E

**LSPA Monthly Meeting
February 11, 2014**

Jane A Rothchild, Esq.
Chief Regional Counsel, Western Regional Office



How it Begins



Types Of Enforcement

- Criminal (AG or DA)
- Civil (AG)
- Administrative (MassDEP)



Identification of Violations/Cases

- Inspections
- Self-reported violations
- Notifications of releases (late)
- Reports from local officials
- Audits
- Database reviews
- MassDEP may get a “tip” regarding suspected violations



Types of Enforcement Responses

- “Lower Level Enforcement”
 - Notice of Non-Compliance (NON)
- “Higher Level Enforcement”
 - Administrative Consent Order (ACO)
 - Administrative Consent Order with Penalty (ACOP)
 - Unilateral Administrative Order (UAO)
 - Notice of Intent to Assess a Civil Administrative Penalty (PAN)



Notice of Non-Compliance

- **Notice of Noncompliance (NON)** means a **written** notice given to a regulated entity by DEP and which says that the regulated entity has failed to comply on any specified occasion with one or more requirements.
 - Lists the requirements not complied with
 - Contains reasonable deadlines to come into compliance with the requirements or by which to submit a proposal to come into compliance.



Higher Level Enforcement

How the Process Works



Deciding the Appropriate Response to Non-Compliance

- Regional Enforcement Review Committee
 - Staff prepare and present cases, including a proposed penalty, for review by experienced enforcement staff
 - Committee approves an enforcement response
- Enforcement Response Guidance (ERG)
 - framework for MassDEP to use in exercising its enforcement discretion
 - intended to enhance the fairness, consistency, predictability, deterrence value and efficiency of the MassDEP enforcement process
 - intended to further the overall mission of MassDEP by advancing certain goals and objectives.
 - intended to help MassDEP managers and staff use sound professional judgment

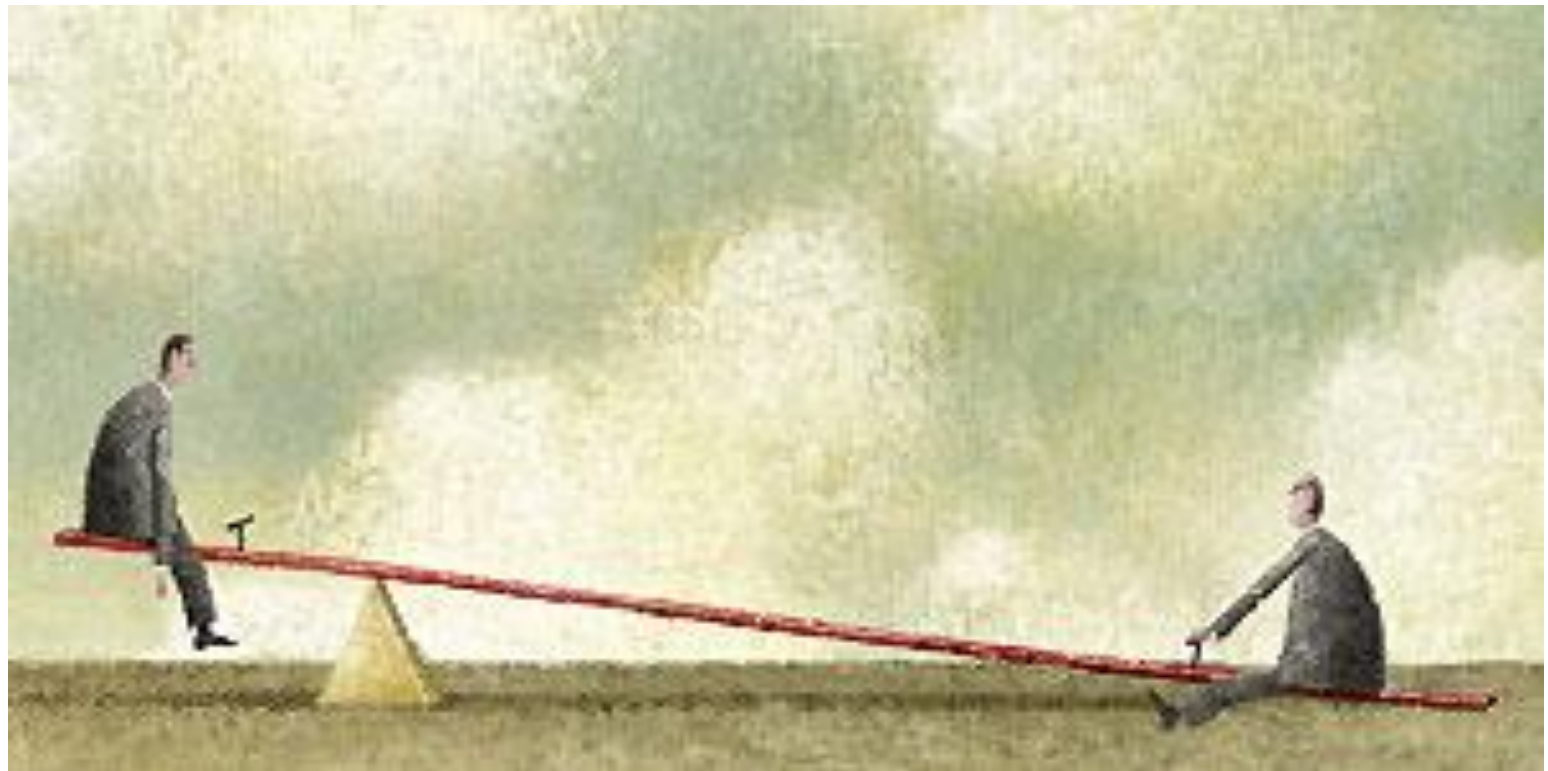


Enforcement is Fact Specific

- MassDEP considers facts both when evaluating the evidence in a case and when calculating penalties
- No two cases are ever exactly the same
- “Consistency”: similar cases with similar facts should have similar results



Why do We Assess Penalties?



Calculating the Amount of a Civil Administrative Penalty



Civil Administrative Penalties

- Administrative Penalty Act, M.G.L. c. 21A, § 16, and regulations, 310 CMR 5.00
- Authorizes MassDEP to assess civil administrative penalties on a person who violates a law that MassDEP has responsibility to enforce, or a regulation, order, license, or approval issued or adopted by MassDEP
- Prior NON is the rule, not the exception
- Statute enumerates several exceptions to the rule



Statutory Preconditions

Exceptions when written notice **not** required include when the failure to comply:

- Was part of a pattern of noncompliance
- Was willful and not the result of error
- Consisted of failure to report a release of OHM
- Consisted of failure to maintain a permanent solution or ROS
- Consisted of failure to comply with AUL



Factors Applied in Determining Amount of Administrative Penalty

- Actual and potential impact
- Actual and potential damages suffered
- Steps taken to prevent noncompliance
- Steps taken to return promptly to compliance
- Steps taken to remedy and mitigate harm
- Previous failure to comply
- Economic benefit of noncompliance
- Deterring future noncompliance
- Financial condition of violator
- Public interest
- Other factors

Mitigation Policies

- Small Businesses
- Municipalities
- Self-Audit → Self-Policing
- Homeowners
- Supplemental Environmental Projects (SEP)
- Environmental Management Systems*

* Not technically a mitigation policy; enables penalty to be reduced for “good faith” if violator agrees to develop and implement an EMS



Mitigation Policies, with Small Business Policy as an example

- **Used at the discretion of MassDEP**
- Intended to provide compliance incentives
- Each has prerequisites that all must be met
 - No HLE within past 5 years
 - No actual harm to public health, safety or the environment
 - No criminal conduct
 - Agree to investigate pollution prevention, source reduction, resource conservation opportunities and implement them
 - Agree to return to compliance promptly and remedy noncompliance in a reasonable amount of time
 - Demonstrate a good faith intention to stay in compliance
 - Obtain on-site compliance assistance from LSP/third party/govt. program **or**
 - Conduct an environmental audit **and**
 - Where response actions are required by 21E/MCP, do risk reduction expeditiously and pay any avoided compliance fees



Addressing the Non-Compliance with the Non-Compliant Person

- Notice of Enforcement Conference (NOEC)
- Enforcement Conference
- Negotiation
- Settlement (ACO, ACOP)
- Unilateral MassDEP action if no settlement
- Appeal to OADR
- Further Appeal to Superior Court



Preparing for an Enforcement Conference

- Review the Notice of Enforcement Conference
- Review the file
- Discuss the situation with your client
- If you review MassDEP enforcement actions webpage and find similar cases, find out the facts behind those cases
 - Site File Viewer
 - File Review in MassDEP office



Conducting an Enforcement Conference

- Introductions
- Discussion of the case
 - Not a hearing but a discussion for settlement purposes
 - MassDEP presents its facts
 - Respondent presents its side of the story
 - Proposed resolution
 - Negotiation/Caucus...Settlement?



Administrative Consent Order with Penalty

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of:

ACME BOX COMPANY

File No.: ACOP- WE-14-3075
Release Tracking Number 1-78095

ADMINISTRATIVE CONSENT ORDER WITH PENALTY
AND
NOTICE OF NONCOMPLIANCE

I. THE PARTIES

1. The Department of Environmental Protection ("Department" or "MassDEP") is a duly constituted agency of the Commonwealth of Massachusetts established pursuant to M.G.L. c. 21A, § 7. MassDEP maintains its principal office at One Winter Street, Boston, Massachusetts 02108, and its Western Regional Office at 436 Dwight Street, Springfield, Massachusetts 01103.
2. ACME BOX COMPANY ("Respondent") is a Massachusetts corporation with principal offices located at 1 Contamination Way, in Yourtown, Massachusetts. Respondent's mailing address for the purposes of this Consent Order is 1 Main Street, in Yourtown, Massachusetts..

II. STATEMENT OF FACTS AND LAW

3. MassDEP is responsible for the implementation and enforcement of: M.G.L. c. 21E and the Massachusetts Contingency Plan ("MCP") at 310 CMR 40.0000. MassDEP has authority under M.G.L. c. 21A, § 16 and the Administrative Penalty Regulations at 310 CMR 5.00 to assess civil administrative penalties to persons in noncompliance with the laws and regulations set forth above.
4. Unless otherwise indicated, the terms used herein shall have the meaning given to them by M.G. L. c. 21E and/or the MCP. In addition, the term "Site" or "Sites" shall also mean the real property located at 1 Contamination Way, in Yourtown, Massachusetts ("Property") and any other place or area where oil and/or hazardous material has come to be located, to which MassDEP has assigned Release Tracking Number 1-78095. Respondent is a Responsible Party ("RP") or Potentially Responsible Party ("PRP") for the Site as the person who otherwise caused or is legally responsible for a release of oil from a site or vessel.
5. The following facts and allegations have led MassDEP to issue this Consent Order:



Some Elements of an ACOP

- Statement of Facts & Alleged Violations
- Compliance Schedule for Remedial Actions
- Payment of a Penalty
- No Admission of Liability
- Not Appealable
- Reserves MassDEP rights for further enforcement
- Stipulated penalties for violating its requirements
- Boilerplate is not negotiable for the most part



Alternatives to Settlement

- Notice of Intent to Assess a Civil Administrative Penalty (PAN)
 - Generally the full, calculated penalty
 - Appealable to the Office of Appeals & Dispute Resolution
- Unilateral Administrative Order
 - If non-compliance has not already been remedied
 - Appealable to the Office of Appeals & Dispute Resolution



QUESTIONS?



Helpful Information

- **Enforcement Response Guidance:**
- <http://www.mass.gov/eea/docs/dep/service/enf97001.pdf>
- **MassDEP Enforcement Actions Webpage:**
- <http://www.mass.gov/eea/agencies/massdep/news/enforcement/>
- **Enforcement Regulations, Policies & Guidance:**
- <http://www.mass.gov/eea/agencies/massdep/service/enforcement/enforcement-regulations-policies-and-guidance.html>

