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Chapter 8: Environmental Law

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C H A P T E R 8

Environmental Law

RICHARD H. JOHNSON *and* JEFFREY G. MILLER

§8.1. Introduction. Perhaps the most significant development in environmental law in Massachusetts during the 1971 SURVEY year was the enactment of Chapter 732 of the Acts of 1971. Chapter 732 added to the General Laws two important provisions that created rights in private individuals and political subdivisions to compel compliance with environmental laws and regulations: first, it added Section 10A to G.L., c. 214 to permit ten or more persons or any political subdivision to sue in equity to prevent “damage to the environment”;¹ second, it added Section 10A to G.L., c. 30A to allow ten or more persons to intervene in any adjudicatory proceeding in which “damage to the environment” is or might be in issue.² Although the new statutes are brief, some rather complex questions of legislative intent and statutory interpretation are likely to arise when citizens or political bodies attempt to exercise their new rights in court. Parts A and B of this chapter, which analyze the statutory language of Chapter 732, reveal some of the more difficult issues and potential problems.

A person dealing with large quantities of oil in Massachusetts, whether as the owner or operator of a vessel, oil terminal, bunkering operation, tank farm, oil storage unit, or oil transportation device, must comply with both federal and state statutes and regulations. While these parallel sets of laws are not drastically inharmonious, each contains its own vagaries; together they create a veritable maze of regulations, potential double liability, and an operational difficulty of some consequence to vessel owners.³ Part C of this chapter will explore the scope of applicable federal and Massachusetts statutes and regulations, note some questions relating to them, and discuss their practical operation.

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§8.1. ¹ Acts of 1971, c. 732, §1.

² *Id.* §2.

³ The lack of congruence in federal and state water pollution laws is not typical; for the most part, federal-state cooperation and parallel treatment is achieved. But compare 33 U.S.C. §§1153, 1155-1158 with G.L., c. 21, §§26-53. The atypical situation existing in Massachusetts is probably best explained by the relative haste with which federal water pollution legislation was drafted and the almost complete lack of water pollution legislation in states other than Massachusetts at the time the federal bill was drafted. Since very few states had water pollution legislation extant, the federal authorities did not concern themselves with accommodating the legislation that did exist.

A. PRIVATE RIGHT OF ACTION

§8.2. **Scope of the right.** The private right of action created by G.L., c. 214, §10A arises from any circumstances in which “damage to the environment” is a potential consequence. *Damage to the environment* is defined in the statute as “any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth” and includes, without limitation,

air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of sea-shores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites.¹

In Section 10A the legislature appears to have intended to shelter under the term *natural resources* every aspect of the physical environment that might be damaged by man. In its ordinary meaning, *natural resources* would seem to include virtually all of the Commonwealth’s natural, physical assets.² Although *natural resources* is not statutorily defined for the purposes of Section 10A, it is defined by the statute that establishes the responsibilities of the Department of Natural Resources; as there defined, *natural resources* includes all fish, game, birds, forests, cultivated flora, land and soil resources, water, minerals, and natural deposits.³ This specific definition of *natural resources* would certainly seem to be included within the general meaning of the term as it appears in Section 10A. The intent of the legislature is not so clear, however, as to the injuries against which the environment is to be protected as comprehended by “destruction, damage or impairment.” The only other time those terms are used is when the statute declares that “damage to the environment” does not encompass “any insignificant destruction, damage, or impairment” to the natural resources of the Commonwealth.⁴ In framing the “insignificant damage” exclusion, the legislature may have contemplated two objectives: (1) to exclude strictly personal environmental wrongs such as cutting down a healthy tree upon one’s own land or polluting one’s own pond, and (2) to allow the court some flexibility in disregarding de minimis injury where the potential environmental harm appears upon first examination to be trivial (e.g., in the case where a factory emits one objectionable puff of smoke in lighting its boiler). Because the “insignificant damage” clause necessitates a preliminary determination on the part of a court as to the extent of the damage alleged, thus protecting against frivolous suits, the terms “destruction, damage and

§8.2. ¹ Acts of 1971, c. 732, §1, adding §10A to G.L., c. 214.

² *Natural resources* is defined as “capacities (as native wit) or materials (as mineral deposits and waterpower) supplied by nature.” Webster’s Third New International Dictionary 1507 (1961).

³ G.L., c. 21, §1.

⁴ Acts of 1971, c. 732, §1. (Emphasis added.)

impairment” ought to be very broadly construed so as to carry out the intent of the legislature to reach every possible significant injury to the environment.

In giving the courts the power to screen out causes of action involving insignificant damage, the legislature did not provide a yardstick for measuring “significance.” The significance of environmental damage could be measured in terms of monetary injury, by the extent of physical damage to the environment, or with reference to the ease with which the damage can be repaired. The continual pollution of a stream with phosphates in small quantities might not cause much monetary damage, but could very well permanently change the character of the stream. The apparent legislative intent to ignore only private environmental damage and environmental damage that is truly *de minimis* would seem to suggest that any environmental damage that was not purely private or *de minimis* would fall within the ambit of the statute.

Petitioners may enforce their rights under the new statute only when the environmental damage complained of violates “a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.”⁵ Ordinarily, it should not prove difficult to determine whether the major purpose of a particular statute or rule is to prevent or minimize environmental damage. The Compendium of Environmental Legislation⁶ contains over a hundred pages of citations to and brief descriptions of environmental laws and regulations. The major purpose of substantially all of the laws and regulations listed in the compendium clearly appears to be the prevention of damage to the environment. Other legislative and administrative pronouncements, however, may raise a “major purpose” issue. Zoning ordinances, for instance, could be construed as having as their major purpose the prevention of environmental damage:

Zoning regulations and restrictions shall be designed among other purposes to lessen congestion in the streets; to conserve health; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, park and other public requirements; to conserve the value of land and buildings; to encourage the most appropriate use of land throughout the city or town; and to preserve and increase its amenities.⁷

Comparing the quoted language with the definition of *damage to the environment*, it can be seen that of the reasons for zoning regulation listed above, only “conserving health” and “securing safety from fire, panic and other dangers” are not comparable with specific environ-

⁵ Acts of 1971, c. 732, §1.

⁶ Mass. Office of Comprehensive Health Planning, Compendium of Environmental Legislation (1970).

⁷ G.L., c. 40A, §3.

mental injuries enumerated in Section 10A of Chapter 214. Arguably even these two clauses could be construed as designed to prevent destruction of natural resources. Thus, an activity that violates a zoning ordinance and causes or threatens to cause damage to the environment would seem to be an appropriate instance for invoking the new enforcement mechanism.⁸

Because of the generality of many of the existing environmental regulations, the new private suit remedy offers some challenging opportunities to make law. The air pollution control regulations, for instance, provide:

No person owning, leasing, or controlling a source of noise shall willfully, negligently, or through failure to provide necessary equipment, service, or maintenance or to take necessary precautions cause, suffer, allow, or permit unnecessary emissions from said source of noise.⁹

Perhaps Section 10A would allow ten citizens to force a contractor on a construction site to install mufflers—where possible—on all pneumatic hammers, on the ground that their noise emissions are “unnecessary.” Examination will disclose an almost limitless number of other such possible applications of the environmental regulations presently in force. With sufficient citizen interest and available legal representation, many environmental regulations and statutes that previously have been loosely or never enforced may be tested in court by citizen prosecutors.

It is unclear whether a violation of federal laws and regulations will support a cause of action under the new private remedy statute. Although nothing in the statutory language denies enforcement to federal laws and regulations that have environmental protection as their purpose, a novel constitutional question would be presented if Section 10A were interpreted to provide for private enforcement of federal law. Some federal statutes provide for their own private remedy;¹⁰ where the federal remedy conflicts with the state remedy, the latter is obviously invalid with respect to federal law because of the supremacy clause of the Constitution. Where federal law is silent as to private enforcement, however, the issue is not so clear. In an analogous situation, the federal courts have held that a state court determination of standing to raise federal questions does not bind federal courts,¹¹ and it would seem that for the same reasons a state statute cannot confer upon a new

⁸ It is stating the obvious to say that an activity that violates a zoning ordinance but does not cause damage to the environment is not subject to citizen suit under the new Section 10A; without damage to the environment, there is no cause of action under Section 10A.

⁹ Mass. Air Pollution Control Regulations, Regulation 10.1 (1970). The regulations are discussed generally in 1970 Ann. Surv. Mass. Law. §26.3.

¹⁰ E.g., 42 U.S.C. §1857h-2 (providing for a private suit in a federal district court to enforce federal and state air pollution standards). Under Section 1857h-2(e), remedies provided by state statutes or by common law are not precluded by the federal right of action.

¹¹ *Coleman v. Miller*, 307 U.S. 433, 465-466 (1939).

class of persons the standing to enforce federal laws and regulations. If the federal law in question can be interpreted as affording a private remedy only by implication, it would not seem inconsistent with the federal scheme to permit enforcement by means of the state-created remedy.¹² A related issue is whether federal jurisdiction can be invoked either on the ground that a “federal question” has arisen because of a violation of federal law, or that diversity jurisdiction exists because the defendant is a nonresident of Massachusetts. Although Section 10A speaks in terms of relief being granted by a superior court of the Commonwealth, that should not in itself defeat federal jurisdiction.¹³

§8.3. Procedure. General Laws, c. 214, §10A¹ creates a cause of action with respect to damage to the environment “whether caused by the respondent alone or by the respondent and others acting jointly or severally.” A petition may be filed in equity or for declaratory relief in the superior court in the county in which damage to the environment is threatened or occurring; such petition must be filed by “not less than ten persons domiciled within the commonwealth,” or by “any political subdivision of the commonwealth.” The court will not act on any petition “unless the petitioners, at least twenty-one days prior to the commencement of such action, direct a written notice of such violation or imminent violation by certified mail to the agency responsible for enforcing [the statute, etc., being violated], to the attorney general, and to the person violating or about to violate the same.” The notice requirement may be waived by the court and a temporary restraining order issued immediately if the petitioners show that “irreparable damage will result unless immediate action is taken.” The petitioner may be required by the court to post a surety or cash bond of up to \$500 “to secure the payment of any costs which may be assessed against the petitioners in the event they do not prevail.” An action brought under Section 10A is to be advanced for speedy trial and may not be compromised “without prior approval of the court.” If the court finds in favor of the petitioners, it may assess their costs, which may include “reasonable fees of expert witnesses but not attorney’s fees.” Damages will not be awarded, even if there is a finding in favor of petitioners.

If each of several persons is damaging the environment to an insignificant extent, but the cumulative effect of their actions is significantly damaging the environment, the question may arise as to whether each person may be sued separately or whether they all must be joined in the action. By creating a right of action where damage to

¹² See *J. I. Case Co. v. Borak*, 377 U.S. 426, 433-435 (1964) (private right of action is implied in Section 14(a) of the Securities Exchange Act of 1934).

¹³ See *Railway Co. v. Whitton’s Admr.*, 80 U.S. 270 (1871) (state-created rights cannot constitutionally be confined to state courts where federal jurisdiction is otherwise competent).

§8.3. ¹ Acts of 1971, c. 732, §1.

the environment has occurred, “whether caused by the respondent alone or by the respondent and others acting . . . severally,” the legislature has indicated that the cause of action ought to exist with respect to an individual doing insignificant damage to the environment if the cumulative effect of his damage and the damage of others falls within the prohibition of the statute. Statutory interpretation notwithstanding, however, it would seem prudent to join all parties who were contributing to the environmental damage.

The requirement that ten or more petitioners commence the action would ordinarily not appear difficult to satisfy if any kind of harm beyond the “aggrieved neighbor” situation is involved. The statute speaks in terms of a court’s determination of the issue “upon the petition of not less than ten persons”; a decrease in the number of petitioners subsequent to the filing of the petition should not be ground for dismissal as long as the case is otherwise meritorious. Although the “ten person” prerequisite has merit as an arbitrary standard for distinguishing between “public” and “private” harm, it ought not to be read as requiring that, if at any point in the suit there are not ten petitioners who can proceed, the action may not be maintained. Prudent petitioners, however, will choose to join with several more than ten to avoid an attempted dismissal by the respondent during the course of the proceedings should one or more petitioners fail to continue for any reason.

The notice provision outlined in the statute is obviously intended to give public officials and the alleged offender time to put their affairs in order in hopes of avoiding litigation. Once a suit has been commenced, a court ought to take the three-week period into account in granting any further extensions to the defendants. The more specific the notice, the more resistant a court ought to be to requests of further delays of any kind in the proceedings. It may be wise, therefore, for petitioners to set aside their presumably normal reluctance to disclose their case too fully at the outset; they should specify in the notice at least the facts that would appear in the petition itself, perhaps in even more detail than would normally be the case for an initial pleading. Disclosure of detailed allegations in the notice will also assist any reviewing agency in its attempts to take early action. Since questions may arise as to the agency responsible for enforcement of the statute or regulation being violated, prudence would dictate sending notice to any agency of state government which might conceivably be involved. Notice to the regional office of the federal Environmental Protection Agency would also probably be helpful, even if not required by the statute, since that agency may frequently be a potential intervenor.

The requirement that no suit or action shall be compromised without prior court approval is consistent with the protection of the public interest that is the purpose of Section 10A. Once the requisite number of petitioners have commenced an environmental damage suit, none of them is free, as an individual, to call a halt to the proceedings. An

analogy is provided by the federal rule of civil procedure governing class actions. Rule 23(e) provides that “a class action shall not be dismissed or compromised without the approval of the court.” It has been held that Rule 23 requires the proponents of a settlement in a class action to show that the settlement is “fair and reasonable,” weighing the likely results of the litigation against the consideration received by the class for not going forward.² In a real sense, Section 10A is a “class action” since any number of petitioners can join and since most types of environmental damage will affect a group much larger than the petitioners. Presumably, before approving a proposed settlement in a Section 10A equity proceeding, a court will weigh the likely outcome of going forward and determine whether the settlement is “fair and reasonable” to all who might be affected. When settlement is proposed prior to any significant use of discovery, it may be necessary for the court to inquire into the merits of the parties’ claims in order to determine the fairness and reasonableness of the proposed settlement. Furthermore, before allowing the parties to compromise even where the settlement proposal appears “fair and reasonable,” the court should ascertain that the proposed compromise meets the approval of the responsible agencies.

§8.4. Defenses. The new private right of action statute, G.L., c. 214, §10A, states:

It shall be a defense to any action taken pursuant to this section that the respondent is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the petitioners demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction.¹

The statutory defense applies principally with respect to water pollution. The Department of Natural Resources has sought to enforce its regulatory water quality standards by means of abatement orders that have been issued against specific polluters.² The abatement orders frequently prescribe a timetable in accordance with which the polluter must achieve compliance with the water quality standards over a period of months or years. When a Section 10A action is brought against a polluter who is subject to such an abatement order, he may raise in his defense his compliance with the order. If the polluter is “in compliance in good faith” with the order, he has an absolute defense unless it can be shown that he is endangering public health and safety.

² *Norman v. McKee*, 290 F. Supp. 29, 32 (N.D. Cal. 1968).

§8.4. ¹ Acts of 1971, c. 732, §1.

² Water quality abatement schedules may be issued as part of a compliance order, pursuant to G.L., c. 21, §44, by the Water Pollution Control Division of the Department of Natural Resources.

The legislature has left to the courts the definition of "in compliance in good faith." It does not seem likely that the legislature intended to permit a defense based upon asserted good faith where in fact there has been no substantial compliance with the applicable abatement schedule or implementation plan. The best of motives or the purest of hearts is irrelevant if the pollution level does not reflect them. If the legislature intended to provide a defense for the polluter who was in substantial compliance with an abatement schedule although violating the schedule in an insignificant way, it probably had in mind those situations in which a court of equity would normally refrain from acting against a defendant who was using his best efforts to comply with a schedule.

An understanding of the basic purposes of the statute may be helpful in discerning the meaning of "compliance in good faith." Section 10A marks a basic departure by the legislature from the common law tradition that places the power to enforce public rights in the hands of public officials and denies that power to private citizens,³ even where private interests are also affected. The legislature would not have modified the traditional common law rules unless there was concern on the part of the legislature over the job being done by the administrative agencies charged with enforcing environmental legislation. Had the legislature been satisfied with the motivation and aggressiveness of the enforcement agencies, it could merely have added to existing budgets and provided for more employees, steps that would have been consistent with enforcement tradition. The inclusion of private citizens in the environmental standards enforcement scheme is clearly a response to overwhelming concern on the part of the Commonwealth's citizens that sufficient progress was not being made in the fight against pollution.

It may also be helpful to describe a common scenario that has as its parties a polluter and a state agency. The former agrees with the latter to cease polluting a particular waterway in accordance with an abatement schedule. After failing to comply, the polluter approaches the state agency and complains either that the compliance deadlines are too short to permit the incorporation of necessary technological changes, or that control technology is not being developed rapidly enough to make compliance feasible, or that compliance with the established deadlines would cause severe economic hardships. An administrative or, less frequently, a judicial extension is granted.⁴ The polluter then fails to comply with the extended schedule and seeks further extensions. The effect of continued extensions is the creation of a "license to pollute."

With the above example in mind, the intent of the legislature can perhaps be better discerned. "In compliance in good faith" should be read as imposing two separate standards upon the polluter who would

³ Cf. *Jones v. Town of Great Barrington*, 273 Mass. 483, 174 N.E.118 (1930).

⁴ G.L., c. 21, §46 gives the superior court jurisdiction in equity to enforce abatement orders issued by the Division of Water Pollution Control.

claim the defense: not only must he be in substantial compliance with an effective abatement schedule, but also he must show that the extensions of his abatement schedule, if any, have been requested and obtained in good faith. By reading “good faith” as a separate requirement, the merits of a polluter’s entire course of action may be examined judicially. A polluter who had obtained repeated extensions of his schedule despite the feasibility of his compliance with the original or succeeding schedules would have no defense; nor would he have a defense if he could not fully justify his present scheduled deadline. Only by shining judicial light on an entire course of dealing can the presence or absence of good faith be determined. It is consistent with the requirement of a separate good faith standard that the abatement schedule or implementation plan be “judicially enforceable,” i.e., it should already be in effect, so that a judge may order compliance therewith if necessary, and it should be definite in its deadlines and standards, so that a judge can determine whether it is indeed being met.

The compliance defense is not valid if the petitioners can show that the court is justified in retaining jurisdiction of the case by reason of danger to the public health and safety created by the polluter. This provision again demonstrates the legislature’s intention to provide for judicial review of administrative decisions. If a polluter is in compliance with an abatement schedule but the schedule discharge level constitutes “a danger to public health and safety,” there is obviously something wrong with the abatement schedule. By empowering the court to retain jurisdiction over the proceedings in spite of the respondent’s compliance, the legislature has indicated that in such a case the court should fashion an appropriate remedy to prevent further danger to public health and safety until such time as the administrative agency involved takes steps to provide a suitable revised abatement schedule. There is no requirement that the danger be immediate. Although one might expect that the factor of immediacy would normally be present, there may be some circumstances where that need not be so. If, for instance, a particular abatement schedule permitted chemical discharge levels that would probably, over a period of time, render marine life commonly harvested from the polluted waters unfit for human consumption, it is submitted that a court would be justified in requiring the revision of the abatement schedule to eliminate the existing long-range danger, even though the full impact of the discharges might not be felt for several years.

It should be no defense to a petition alleging damage to the environment that the respondent is a political subdivision of the Commonwealth. The court hearing the petition is empowered to restrain the “person” causing or about to cause environmental damage. The General Laws provide that the construction of *person* in any statute shall include, in addition to individuals, “corporations, societies, associations, and partnerships.”⁵ The Supreme Judicial Court has held that

⁵ G.L., c. 4, §7 (23).

the statutory construction of *person* ordinarily does not include the Commonwealth or any political subdivision.⁶ However, in *Attorney General v. City of Woburn*,⁷ a special statute authorizing the attorney general to obtain an injunction against “whoever” polluted a river in Woburn was construed to permit injunctive relief against the city for discharging sewage and other waste into the river. Given the legislature’s clear intention to permit general enforcement of environmental laws and the specific inclusion in the scope of “damage to the environment” of such predominantly municipal violations as “improper sewage disposal” and “improper operation of dumping grounds,” a forceful argument can be made that a municipality should be construed as a “person” for the purposes of the new law. Furthermore, municipalities should enjoy no immunity from private enforcement of laws and regulations which would be enforced against them by the appropriate public authorities. Construing *person* broadly so as to include political subdivisions is reasonable, for such a construction will not subject political subdivisions to new regulations but will merely make their compliance with existing regulations more likely. Cases holding that *person* does not embrace political subdivisions are generally distinguishable on the ground that they involve situations where the contrary holding would have created new financial or other restrictive obligations upon governmental entities. No new obligations would be created were Section 10A held to apply to political subdivisions.

§8.5. Remedies. After determining whether there has been or is about to be “damage to the environment” under G.L., c. 214, §10A,¹ but before the final determination of the case, the court may restrain the person causing or about to cause the damage. Clearly the court may order the complete cessation of pollution or may sanction its continuance upon immediate action by the pollutor to lessen his discharge. A court would also have the power, within the normal limits of general equitable principles, to direct the offender to repair the damage he had caused.

A finding by the court in favor of petitioners allows the court to impose their expenses upon the respondent, exclusive of damages and attorneys’ fees. This limitation on the relief granted is clearly intended to prevent “strike suits” and is another indication of the legislature’s intent to benefit public rather than private interests. It is still possible to recover damages under a separate cause of action, however, since the last part of the statute provides:

Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause

⁶ *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962); *Mrugala v. City of Boston*, 330 Mass. 707, 115 N.E.2d 148 (1953).

⁷ 322 Mass. 634, 79 N.E.2d 187 (1948).

§8.5. ¹ Acts of 1971, c. 732, §1.

of action herein authorized shall be in addition to any such right or remedy.²

B. STATUTORY RIGHT OF INTERVENTION

§8.6. Right of intervention in adjudicatory proceedings. Section 10A of G.L., c. 30A states:

[N]ot less than ten persons may intervene in any adjudicatory proceeding as defined in [G.L., c. 30A, §1], in which damage to the environment as defined in [G.L., c. 214, §10A], is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue. Notwithstanding any other provision of [Chapter 30A], any intervenor under this section may introduce evidence, present witnesses and make written or oral argument, except that the agency may exclude repetitive or irrelevant material. Any such intervenor shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of [Chapter 30A], including specifically the right of appeal.¹

Section 10A is intended to permit active citizen participation in administrative hearings in which damage to the environment might be in issue. It is hoped that diligent citizen intervention and responsiveness on the part of the appropriate agency will make recourse to the courts unnecessary. Perhaps inadvertently, this section does not explicitly sanction intervention by cities and towns. Under Section 10 of Chapter 30A, however, cities and towns have been permitted to intervene without explicit statutory grounds when questions of concern to their inhabitants are raised in an adjudicatory proceeding.² Presumably a similar conclusion will be reached with respect to Section 10A.

Intervention is allowed only in “adjudicatory proceedings,” which include proceedings in which an administrative hearing is required by constitutional or other statutory provisions to determine the legal rights, duties, or privileges of specifically named persons.³ The right of intervention thus does not extend to the ordinary rule-making proceeding.⁴

Intervention is limited to the question of environmental damage

² *Ibid.*

§8.6. ¹ Acts of 1971, c. 732, §2.

² *Sudbury v. Department of Public Utils.*, 351 Mass. 214, 218 N.E.2d 415 (1966); *Wilmington v. Department of Public Utils.*, 340 Mass. 432, 165 N.E.2d 99 (1960).

³ G.L., c. 30A, §1(1).

⁴ *Westland Housing Corp. v. Commissioner of Insurance*, 352 Mass. 374, 377-380, 225 N.E.2d 782, 785-787 (1967).

“in order that any decision in such proceeding shall include the disposition of such issue.” Read literally, the above quoted language indicates that intervention would be permitted only for the purpose of pointing out that an environmental damage issue exists. Such a narrow interpretation is not consistent, however, with the general rights afforded to such intervenors to participate in the hearing and to have the status of a party to the proceedings. A reading more consistent with legislative intent would provide that upon the introduction of proof by the intervenors that environmental damage is or might be at issue, the agency proceedings must be expanded to include argument on, and agency consideration of, that issue. Furthermore, the agency’s decision must dispose of the issue explicitly by appropriate action, either by determining that the issue is not involved in the proceedings or by deciding the issue on the merits (either decision being open to appeal on the part of the intervenors as a consequence of their general right to appeal).

C. OIL POLLUTION

§8.7. **The federal scheme.** In response to oil spill disasters such as the *Torrey Canyon* incident off England and the Santa Barbara Channel spill,¹ Congress included in the Water Quality Improvement Act of 1970² comprehensive federal legislation with respect to oil pollution.³ In the act, Congress declared: “[I]t is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States. . . .”⁴ Congress defined *oil* quite broadly,⁵ but in the substantive provisions of the legislation prohibited only discharges of oil in “harmful quantities”—with certain exceptions.⁶ Congress instructed the president to determine by regulation the quantities of oil that were harmful to public health or welfare,⁷ and specifically required the determination of “harmful quantities” with respect to shellfish, wildlife, public or private property, shoreline, or beaches.⁸ *Harmful quantities* has been defined by regulation as discharges of oil that violate applicable water quality standards or that cause a film, sheen, or discoloration on the water

§8.7. ¹ See 115 Cong. Rec. 9015-9052, 9259-9293, 29,046-29,102, 28,947-29,008 (1969), 116 Cong. Rec. 8975-9008 (1970) (House and Senate debates on the Water Quality Improvement Act) [hereinafter cited as Debates]; see particularly 115 Cong. Rec. 29,095 (1969) (statement of Senator Kennedy) and 115 Cong. Rec. 9020-9021 (1969) (statement of Representative Cramer).

² Pub. L. No. 91-224, §§101-112, 84 Stat. 91. The sections of the Water Quality Improvement Act that pertain to oil pollution are codified in 33 U.S.C. §1161.

³ 33 U.S.C. §1161.

⁴ Id. §1161(b)(1).

⁵ Id. §1161(a)(1), which defines *oil* as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.”

⁶ Id. §1161(b)(2)(A), which permits “discharges into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended. . . .”

⁷ Id. §1161(b)(2)(B).

⁸ Id. §1161(b)(3).

surface or adjoining shoreline, or sludge deposits beneath the water or on the adjoining shoreline.⁹ The owner or operator of a vessel or of an onshore or offshore facility from which oil is knowingly discharged in violation of the federal statute is subject to a civil penalty of \$10,000, to be assessed by the commander of the Coast Guard district in which the spill occurs.¹⁰ In addition, such owner or operator, except under certain circumstances, is liable to the United States for the actual costs of removing the oil discharged.¹¹ The maximum liability is limited as follows: (a) for vessels, \$100 per gross ton of ship displacement or \$14,000,000, whichever is less;¹² and (b) for onshore and offshore facilities, \$8,000,000.¹³ If the discharge is caused by the act of a third person, he is liable to the United States for the cost of oil removal and is subject to roughly the same limits of liability.¹⁴ In any event, the removal is to be accomplished in accordance with a national contingency plan for the removal of oil spills.¹⁵ The limits of liability noted above do not apply where the discharge is the result of willful negligence or willful misconduct within the privity or knowledge of the owner, in which case there is no limit to the liability of the owner or operator for cleanup costs.¹⁶ The secretary of the Department of the Interior may, by regulation, set lower limits of liability for onshore facilities that do not present a substantial risk of oil discharge.¹⁷ It is not clear whether a court would impose unlimited liability on an operator for a spill caused by willful negli-

⁹ 18 C.F.R. §610.3 (1971). Exceptions are provided for discharges from properly functioning vessel engines, certain demonstration projects, and as permitted in the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended. *Id.* §§610.5, 610.6, 610.8. Other provisions of the convention were implemented in 33 U.S.C. §§1001-1015, 1161(b)(2)(A).

Massachusetts water quality standards allow no oil whatsoever in the waters of the state or allow it only in such amounts as result from waste treatment facilities providing appropriate treatment. Mass. Div. of Water Pollution Control, *Water Quality Standards* (filed March 6, 1967) [hereinafter cited as *Water Quality Standards*]. It must therefore be assumed that all oil spills in state waters will be of "harmful quantities" of oil as defined by Massachusetts and hence in violation of the state water pollution standards, whether or not federal standards are violated.

¹⁰ The statute places the responsibility of assessing civil penalties on the secretary of the department under which the Coast Guard is operating, currently the Department of Transportation. 33 U.S.C. §1161(b)(5). The authority to assess civil penalties has been delegated to the various Coast Guard district commanders. 33 C.F.R. §153.03(b)(1) (1971). It should be noted that port clearance for vessels whose owners or operators have been assessed with a fine for polluting may be withheld until the fine is paid. 33 U.S.C. §1161(b)(5); 19 C.F.R. §4.66a (1971).

¹¹ 33 U.S.C. §1161(f); the excepted circumstances are spills resulting from an act of God, act of war, negligence on the part of the United States, or the act of a third party, whether negligent or not. It is not clear who is to bear the liability where a nonnegligent act of the United States caused an oil spill.

¹² *Id.* §1161(f)(1).

¹³ *Id.* §§1161(f)(2), (3).

¹⁴ *Id.* §1161(g).

¹⁵ §1161(c). The national contingency plan has been published: Council on Environmental Quality, National Oil and Hazardous Substances Pollution Contingency Plan (Aug. 1971).

¹⁶ 33 U.S.C. §§1161(f)(1)-(3).

¹⁷ *Id.* §1161(f)(1).

gence within the knowledge of the owner but not within the privity or knowledge of the operator.

In order to enable the United States to take prompt and effective steps to ensure that oil spills are removed, the statute requires that the person in control of the source of an oil spill immediately notify the appropriate federal agency of the spill.¹⁸ In general, the appropriate agency for spills in coastal waters is the Coast Guard; for spills in inland waters, the Environmental Protection Agency.¹⁹ Failure to give immediate notice subjects the person in control of the pollution source to a maximum fine of \$10,000 and imprisonment of up to one year.²⁰ If gross pollution from a vessel is threatened, as would be the case if a vessel such as the *Torrey Canyon* were involved, the statute provides that the vessel may be removed or destroyed by the government.²¹

All vessels and barges that are in excess of 300 gross tons and use the waters or ports of the United States must establish and maintain evidence of financial responsibility of \$100 per gross ton or \$14 million, whichever is less, to meet their potential liability to the United States under any provision of the oil pollution legislation.²² The evidence required may be supplied by evidence of insurance, by surety bonds, by qualification as a self-insurer, or otherwise; where one owner possesses a fleet of vessels, the requirement of evidence of financial responsibility is limited to the maximum liability of the largest vessel in the fleet.²³

Probably no other aspects of the federal legislation received so much attention or were so controversial as those dealing with financial responsibility and limits of liability.²⁴ The Senate version of the legislation provided that liability for the removal of oil discharged would be limited to \$125 per gross ton, with a maximum liability of \$14 million;²⁵ the House bill called for \$100 and \$10 million, respectively.²⁶ There seems little doubt that the lower limit of liability in the House bill was set at the behest of American shipping and British insurance interests, both of whom argued that insurance in excess of the limits set by the House bill would be unattainable, and that damages paid as a result of unlimited liability could bankrupt vessel owners, among others.²⁷ That a higher maximum limit was ultimately adopted, apparently without preventing the affected vessel owners

¹⁸ Id. §1161(b)(4).

¹⁹ Exec. Order No. 11,548, 3 C.F.R. 151 (Comp. 1970); 33 C.F.R. §153.105 (1971).

²⁰ 33 U.S.C. §1161(b)(4).

²¹ Id. §1161(d).

²² Id. §1161(p)(1).

²³ Ibid.

²⁴ See Debates, n.1 *supra*.

²⁵ S. 7, 91st Cong., 2d Sess. (1970).

²⁶ H. 4148, 91st Cong., 2d Sess. (1970).

²⁷ The contentions of the shipping industry are aired in 115 Cong. Rec. 29,048 (1969) (statement of Senator Muskie) and 115 Cong. Rec. 9020-9021 (1969) (statement of Representative Cramer).

from acquiring the required insurance or bonds, belies the arguments advanced by those special interests.²⁸ With supertankers well in excess of 200,000 gross tons operating today, and with costs for clean-up operations running as high as \$118 per gross ton in the case of the *Torrey Canyon*,²⁹ it is obvious that the potential cleanup costs of a major oil spill could easily exceed the maximum limits on liability established by the legislation. Once it is accepted that those who cause oil spills must bear the cost of removing the polluting oil, there seems very little reason to put any limit on the liability for cleanup costs. It is conceded by the shipping industry that, barring those few instances of natural disaster that are excepted in the section, oil spills are universally the result of negligence.³⁰ Therefore, any liability for cleanup costs would be accompanied by negligence on the part of the transporter. The risk that financial hardship or bankruptcy might result from the liability of an underinsured shipowner or operator for cleanup costs can be forestalled if shipowners will carry adequate insurance.

The act authorizes the president to remove the oil discharged into navigable waters of the United States unless he determines that the owner or operator responsible for the discharge will do so.³¹ The president is charged with the responsibility of preparing and maintaining a national contingency plan that provides for the coordinated containment, removal, and dispersal of discharged oil, and the minimization of the damage caused by the oil. As part of the plan, the president is to assign duties among various agencies, provide for appropriate equipment, establish an adequately trained and equipped cleanup strike force, provide for a surveillance system, establish a national coordinating center, and identify appropriate techniques for containing, removing, and dispersing spills.³² The president is also charged with the responsibility of issuing regulations that are consistent with the plan and that set forth procedures for removing discharged oil, establishing local and regional contingency plans, establishing procedures to prevent offshore oil spills, and establishing procedures governing the inspection of vessels to reduce the likelihood of oil spills.³³ Violation of the federal regulations subjects the owner or operator to a \$5000 fine, which may be assessed and compromised by the president.³⁴ The president has delegated his responsibilities under the act variously to the Secretaries of Interior and Transportation, the Federal Maritime Commission, the Council on Environ-

²⁸ It was predicted at the time that the maritime insurance industry would quickly adjust to any limit on liability set by Congress, or, indeed, to a complete lack of liability. Letter of Allan I. Mendelsohn to Senator Muskie, reprinted in 115 Cong. Rec. 29,049 (1969). Mendelsohn, *Maritime Liability for Oil Pollution*, 38 Geo. Wash. L. Rev. 1 (1969).

²⁹ 115 Cong. Rec. 29,048 (1969) (statement of Senator Muskie).

³⁰ *Id.* at 28,954 (statement of Senator Muskie).

³¹ 33 U.S.C. §1161(c)(1).

³² *Id.* §1161(c)(2).

³³ *Id.* §1161(j)(1).

³⁴ *Id.* §1161(j)(2).

mental Quality, and the administrator of the Environmental Protection Agency.³⁵ Pursuant to its delegated authority, the Council on Environmental Quality prepared a national contingency plan, which was published in June 1970. The original plan was superseded by another plan published by the council in July 1971. A revolving fund of \$35 million, which is to be supplemented by all sums collected by the United States under the provisions of the act, was established to carry out the national contingency plan.³⁶ The appropriations for the fund were also a subject of compromise in Congress, with the Senate bill calling for a fund of \$50 million³⁷ and the House bill for \$20 million.³⁸

There are other federal acts relating to pollution control, viz., the Refuse Act of 1899³⁹ and the Oil Pollution Act of 1961,⁴⁰ the latter of which was enacted to implement the International Convention for the Prevention of Pollution of the Sea by Oil, 1954.⁴¹ The Refuse Act prohibits the discharging of refuse matter into the navigable waters of the United States without a permit from the Army Corps of Engineers.⁴² It is well established that refuse matter includes oil,⁴³ and that no permits are to be issued by the Army Corps of Engineers for discharges of oil in harmful quantities.⁴⁴ Violations of the Refuse Act give rise to both civil and criminal actions: injunctive relief is available to prevent the continuance of discharges or the potential of future discharges,⁴⁵ and criminal penalties for violations of the act include fines of \$500 to \$2500 and a maximum of one year imprisonment per violation.⁴⁶ Vessels are liable in proceedings in rem for fines levied against them, and officers of vessels knowingly violating the act may have their license revoked or suspended.⁴⁷ In the case of a corporate defendant, criminal penalties also attach to responsible corporate officers for violations of the act and have been so imposed in recent antipollution actions.⁴⁸ The number of oil spill cases

³⁵ Exec. Order No. 11,548, 3 C.F.R. 151 (Comp. 1970).

³⁶ 33 U.S.C. §1161(k).

³⁷ S. 7, 91st Cong., 2d Sess. (1970).

³⁸ H. 4148, 91st Cong., 2d Sess. (1970).

³⁹ 33 U.S.C. §401 et seq.

⁴⁰ Id. §§1001 et seq.

⁴¹ May 29, 1961, [1961] 2 U.S.T. 2989, T.I.A.S. No. 4900.

⁴² 33 U.S.C. §407.

⁴³ *United States v. Standard Oil Co.*, 384 U.S. 224 (1966); *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952); *La Merced*, 84 F.2d 444 (9th Cir. 1936).

⁴⁴ 33 C.F.R. §209.131(d)(11)(ii) (1972). It may well be that industries using significant amounts of oil will be required to take precautions to prevent leakage or spillage of such oil in order to obtain discharge permits from the Army Corps of Engineers pursuant to Exec. Order No. 11, 574, 3 C.F.R. 188 (Comp. 1970). The requiring of such precautions would appear to be consistent with the corps' regulations. 33 C.F.R. §§209.131(c)(1), 209.131(d)(5)-(9), 209.131(d)(11) (1972).

⁴⁵ *Missouri v. Illinois*, 180 U.S. 208 (1901). Injunctive relief is also available under the Water Quality Improvement Act of 1970, 33 U.S.C. §1161(c).

⁴⁶ 33 U.S.C. §411. One interesting aspect of the penalty provisions is that one-half of any fine assessed is to be paid to persons giving information leading to the conviction of the discharger.

⁴⁷ Id. §412.

⁴⁸ E.g., *United States v. J. J. O'Donnell Woolens, Inc. and J. J. O'Donnell, Sr.*,

brought under the Refuse Act,⁴⁹ despite the existence of a predecessor⁵⁰ to the Water Quality Improvement Act, indicates the versatility of the Refuse Act as an enforcement tool, and illustrates as well the more limited usefulness of the predecessor of 33 U.S.C. §1161. With the passage of the federal Water Quality Improvement Act and its more effective civil remedies, the use of the Refuse Act in connection with oil pollution control can be expected to diminish. However, since the Refuse Act makes dischargers criminally liable and since it is enforceable directly by the Justice Department, the act should have a continuing role in pollution abatement actions.

The Oil Pollution Act of 1961⁵¹ is more narrow in scope than the Refuse Act. Enacted to implement an international convention, it forbids the discharge of oil from ships within 50 miles of the seacoast,⁵² with several exceptions.⁵³ The legislation is criminal in nature and provides penalties comparable to those provided in the Refuse Act.⁵⁴ Enforcement of the act is aided by making ships liable in actions in rem for any fine levied under the act and denying them clearance from United States ports until such penalties are paid.⁵⁵ The licenses of masters and officers of offending ships may also be suspended or revoked.⁵⁶ As an additional enforcement aid, ships are required to keep oil logs noting operations in which discharge of oil may occur.⁵⁷ There have been no cases reported yet under this act.

§8.8. The Massachusetts scheme. The Massachusetts Clean Waters Act¹ deals, inter alia, with both onshore and offshore oil pol-

Crim. No. 71-221-G (D. Mass., Nov. 17, 1971), in which Mr. O'Donnell and his corporation, which had allegedly discharged refuse matter (other than oil) into navigable waters in violation of the Refuse Act, were both charged with criminal violations. Both entered pleas of *nolo contendere*, and both were fined \$500 on each of five counts.

⁴⁹ 33 U.S.C. §§401 et seq.

⁵⁰ Former 33 U.S.C. §§431 et seq.

⁵¹ 33 U.S.C. §§1001 et seq.

⁵² *Id.* §§1002, 1011.

⁵³ The exceptions to the act's prohibition against the discharge of oil from ships are: (1) when a ship other than a tanker is proceeding to a port not provided with facilities adequate for reception, without causing undue delay, it may discharge such residues and oily mixtures as would remain for disposal if the bulk of the water had been separated from the mixture, provided such discharge is made as far as practicable from land (*id.* §1002(b)); (2) if, in the opinion of the master, special circumstances make it neither reasonable or practicable to retain the oil or oily mixture on board, it may be discharged outside the prohibited zones (*id.* §1002(c)); (3) when discharge of oil or oily mixtures is necessary to secure the safety of a ship, prevent damage to ship or cargo, or to save life at sea (*id.* §1003(a)); (4) when the escape of oil or of oily mixtures is the result of damage to a ship or unavoidable leakage (*id.* §1003(b)); (5) when the discharge is the result of purification or clarification of fuel oil or lubricating oil, provided that such discharge is made as far from land as practicable (*id.* §1003(c)); (6) the act does not apply to the discharge from the bilges of a ship of an oily mixture containing no oil other than lubricating oil that has drained or leaked from machinery spaces (*id.* §1004).

⁵⁴ *Id.* §1005.

⁵⁵ *Ibid.*

⁵⁶ 33 U.S.C. §1006.

⁵⁷ *Id.* §1008.

§8.8. ¹ Acts of 1966, c. 685, §1, inserting G.L., c. 21, §§26-53.

lution. The Division of Water Pollution Control of the Department of Natural Resources is responsible for containing and removing oil spills and determining the persons liable for violation of the act.² The act provides that chemicals may not be used in oil removal unless they have been approved by the division,³ and under the legislation polluters are made liable to the state for costs incurred by the division in investigating, containing, and removing an oil spill, and to third persons for any damage to their real and personal property.⁴ Criminal penalties are also provided: a fine of up to \$10,000 for each day the violation continues, or imprisonment for up to two years for each spill, or both. All recovered costs and fines are to be credited to an account from which may be appropriated amounts for financing the further investigation, containment, and removal of oil spills.⁵ The act imposes a fine of up to \$5000 on the owner or operator of a potential oil pollution source, who, as soon as he has knowledge of a spill from such source, fails to notify the director of the division immediately.⁶ The act also provides for the licensing of all terminals loading oil onto or discharging oil from vessels.⁷ The division is authorized to promulgate and enforce rules and regulations for prevention of oil spills, is required to inspect periodically equipment used in marine terminal operations, and may order the replacement of defective equipment.⁸ Acting under this authority, the director has issued regulations,⁹ the scope of which includes (a) the contents of the pretransfer agreement between vessel and terminal personnel regarding transfer operations, precautions to be taken in vessel and terminal operation during transfer, and procedures regarding the use and care of transfer hoses;¹⁰ (b) the selection of sites for oil terminals, the design and adequacy of their drainage systems, and the diking of oil storage tanks;¹¹ and (c) procedures to be followed on the occurrence of an oil spill, including prompt notification of the division, and a requirement that the person responsible for the spill take immediate steps to stop any continuing discharge and to contain and remove the oil from the waters of the Commonwealth.¹²

Oil terminal and wharf owners and operators are required to employ

² G.L., c. 21, §27(10).

³ *Ibid.* Approved chemicals are listed in Mass. Div. of Water Pollution Control, *Use of Chemicals, Materials or Techniques to Treat Oil Spills* (Pub. No. 5394, 1970).

⁴ G.L., c. 21, §27(10).

⁵ *Ibid.* In addition, oil spills that violate water quality standards are punishable by fines of up to \$1000 for each day they continue. G.L., c. 21, §42.

⁶ *Id.* §27(10).

⁷ *Id.* §50.

⁸ *Ibid.* See also the provisions for licensing of marinas by the division, G.L., c. 91, §59B.

⁹ Mass. Div. of Water Pollution Control, *Rules for the Prevention and Control of Oil Pollution in the Waters of the Commonwealth* (filed June 10, 1969) [hereinafter cited as *Regulations*].

¹⁰ *Regulations* §§4.01 to 4.04.

¹¹ *Id.* §§5.01 to 5.04.

¹² *Id.* §§7.01 to 7.05.

trained crews and to acquire floating booms capable of encircling ships engaged in loading or unloading oil. The crews are apparently required to lay the booms around the ship transferring oil whenever there is a spill, and to remove the oil so contained before the ship can proceed.¹³ The language of the provision is not a model of clarity. Although the provision requires the employment of a “trained crew,” it neglects to mention for what the crew is to be trained. From the context of the words used, it appears that the crew is to be trained in the control of oil pollution, or, at a minimum, in the use of the required boom in the entrapment and removal of spilled oil. That the crew must actually position the boom to contain a spill is only implied by the provision of the act that empowers the director to order the owner or operator of a terminal or wharf, when such person is found by the director to have negligently caused oil pollution, to encircle with a boom every ship discharging oil.¹⁴ The implication and the provision are weakened by the failure of the act to provide for spills caused by the negligence of the ship’s owner or its crew, and by the failure of the act to empower the director to order the encirclement of ships loading oil in cases where there has been as yet no oil spilled.

Operating an unlicensed terminal is punishable by a fine of \$100 per day, and violations of the section regarding the containment and removal of oil are punishable by fines of up to \$1000 per day and the revocation of terminal licenses.¹⁵ The act also provides that all vessels, including barges, discharging or receiving cargoes of oil in the Commonwealth must post a bond in favor of the Commonwealth in the amount of \$25,000, or otherwise satisfy the division that they are financially responsible. If oil is discharged into the waters of the Commonwealth from a vessel, its bond is forfeited to the extent of the costs incurred by the division in containing and removing the oil. A vessel violating the provisions of the section is subject to a fine of up to \$5000.¹⁶

The regulatory provisions applying to vessels must be read together with sections subjecting persons discharging oil into the waters of the Commonwealth to a fine of not more than \$1000¹⁷ and to double damages in an action in tort for property damage caused by the oil.¹⁸ The personal liability and double damages provisions are for some reason codified in the chapter dealing with public ways and works rather than in the chapter dealing with the Department of Natural Resources. Liability under the provisions is limited to discharges which cause pollution, contamination, nuisance, or a potential injury

¹³ G.L., c. 21, §50A provides: “[The director] shall require every such owner or operator to encircle every ship or vessel depositing oil at his wharf or terminal with such a boom.”

¹⁴ *Ibid.*

¹⁵ G.L., c. 21, §§50, 50A. Licenses for oil terminals are to be renewed annually. Regulations §8.03.

¹⁶ G.L., c. 21, §50B.

¹⁷ G.L., c. 91, §59.

¹⁸ *Id.* §59A.

to the public health. It can be assumed that discharges which cause violations of state water quality standards cause pollution within the meaning of the personal liability and double damages provisions. Since Massachusetts water quality standards allow no oil in or on the waters of the Commonwealth or allow oil only in such quantities as may result from discharges from appropriate waste treatment facilities,¹⁹ it can also be assumed that *all* oil spills will constitute violations of these sections. To the extent that the Massachusetts statute would impose liability without recognizing the exceptions provided by the federal Water Quality Improvement Act, e.g., exceptions for spills resulting from an act of God, act of war, negligence on the part of the United States, or the act of a third party, whether negligent or not,²⁰ its constitutionality is questionable.²¹

It should be noted that another set of statutes, codified in the chapter dealing with marine fish and fisheries, governs discharges of oil that injure fish.²² These statutes prohibit the discharge of oil and other substances into coastal waters if such discharge could materially injure fish, either directly or by affecting their reproduction cycle, under penalty of a fine of up to \$500 and imprisonment of up to one year.²³ A person causing damage to fisheries by such discharge is also liable to the city or town whose fisheries were injured and to any person having fishery rights therein for double damages in tort.²⁴

§8.9. Comment. The national contingency plan places primary responsibility for containing and removing oil spills on state or regional agencies, federal intervention not being required except in the event of major spills.¹ Since the state Division of Water Pollution Control is capable of handling most spills and since Massachusetts has happily not experienced a major spill since the passage of the federal legislation, governmental response to oil spills in the Commonwealth has come from the division rather than from federal agencies.² Since the federal program does not underwrite the costs of state

¹⁹ Mass. Div. of Water Pollution Control, Water Quality Standards (filed March 6, 1967).

²⁰ 33 U.S.C. §1161(f).

²¹ In *American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971), a three-judge district court held unconstitutional a Florida statute imposing unlimited strict liability on onshore facilities and offshore vessels and facilities for cleanup costs or damages resulting from oil spills in the navigable waters of Florida. The Florida act had recognized none of the defenses contained in the federal legislation. Since Massachusetts does not explicitly recognize the defenses noted in the federal legislation, the Massachusetts statute may be subject to constitutional attack on the same grounds.

²² G.L., c. 130, §§22-27.

²³ *Id.* §23.

²⁴ *Id.* §24.

§8.9. ¹ Council on Environmental Quality, National Oil and Hazardous Substances Pollution Contingency Plan §§2020.1, 2020.2 (1971).

² Statement by Donald L. Corey, supervising sanitary engineer, Mass. Div. of Water Pollution Control [hereinafter cited as Corey], noted in Transcript of Proceedings at the Third Enforcement Conference of the Environmental Protection Agency Relating to Boston Harbor 317-325 (1971) [hereinafter cited as Boston Harbor Transcript]. The

programs (the national contingency plans calls for a federal response to oil spills in those states without agencies capable of responding to oil spills), there is some dissatisfaction on the state level with the structure of the federal program.³

Upon notification of an oil spill, the initial reaction of the responding agency, whether federal or state, normally is to attempt to persuade the discharger to cease discharging and to take immediate steps himself to contain and remove the oil.⁴ To this end the agency offers technical and procedural advice as to the best methods of containment and removal. Since the alternative is removal by state or federal agencies, with a charge back of costs to the discharger and possible criminal action, voluntary compliance by the polluter is the usual case and is estimated to occur in 90 percent of all cases.⁵ The extent of voluntary compliance is indicated by the fact that the state has spent only \$250,000 on cleanup of oil spills during the past three years, while the estimated total cost for cleanup of oil spills in the state was between \$1 and \$2 million annually.⁶ In the event that the discharger does not immediately take adequate steps to terminate the discharge, the responding agency will usually seek appropriate injunctive relief. If the discharger does not take immediate steps to contain and remove the discharged oil, the responding agency will normally contract the job to a specialized oil removal firm. Upon completion of the cleanup, the agency will initiate legal action to recover the costs and to seek criminal penalties where appropriate.

Enforcement procedures depend upon initial notification of the appropriate agency that an oil spill has occurred. Both federal and state legislation require the person in charge of the polluting facility to give such notice, under threat of criminal penalties. The vessel at sea poses particularly difficult enforcement problems because the detection of bilge or ballast water discharges is virtually impossible if the vessel is able to put sufficient distance between itself and the discharge before the spill is observed.⁷ Fear of prosecution is a relatively minor deterrent in such instances. Detection of discharges from stationary sources also may be difficult at times; the tracing to its origin of an oil slick on a river, if there are several possible upstream dischargers and the slick is not promptly detected, imposes impossible

division understands that "[f]ederal agencies will not normally be involved in supervision or clean-up of small to moderate oil pollution incidents . . . [but] will be directly involved in any major oil pollution incident." Mass. Div. of Water Pollution Control, *Use of Chemicals, Materials or Techniques to Treat Oil Spills* (Pub. No. 5394, 1970).

³ Statement by Corey, noted in Boston Harbor Transcript 322.

⁴ Council on Environmental Quality, National Oil and Hazardous Substances Pollution Contingency Plan §§504.2, 504.3 (1971); Mass. Div. of Water Pollution Control, *Rules for the Prevention and Control of Oil Pollution in the Waters of the Commonwealth* §§7.01, 7.02 (filed June 10, 1969) [hereinafter cited as Regulations].

⁵ Statement by Corey, noted in Boston Harbor Transcript 321.

⁶ *Ibid.*

⁷ Such discharges are within the category of those prohibited. Regulations §3.03. But see 33 U.S.C. §§1002(b), 1003.

problems. Vigorous prosecution of dischargers who fail to report spills is necessary to accomplish fully the goals of both state and federal legislation. Since the number of probable oil discharges is relatively small, word of prosecution can be expected to spread quickly. Furthermore, since liability for failure to report spills is personal rather than corporate, the incentive for persons in charge of operations that result in spills to report the pollution would be great if the risk of criminal prosecution were real.

The major point of operational difficulty between the federal and state pollution prevention programs relates to financial responsibility requirements. Federal law makes oil polluters liable to the United States for costs incurred by it in the removal of oil and requires vessels to evidence financial responsibility, by bond or otherwise, to meet such liability. At the same time, the federal government expects the state to bear the responsibility for dealing with most oil spills. Federal law, however, has no provision regarding the liability of oil polluters to the state for its costs in the removal of oil; even if such liability otherwise exists, federal law does not provide that the bonds or insurance required by vessels as evidence of their financial responsibility will be available to meet the liability of such vessels to the state. Thus if states wish to be reimbursed for their costs they must, as Massachusetts has done, enact legislation with respect to reimbursement and financial responsibility or bonding of vessels. A financial responsibility requirement, however, creates difficulties for the state and shipowners alike. Conscientious administration of such a program detracts from the limited manpower available to the division for the prevention of pollution and the enforcement of pollution control laws. The necessity of maintaining bonds that satisfy both federal and state authorities may cause confusion, duplicated expense, and much paperwork for ship owners. Foreign flag vessels that do not call frequently at Massachusetts ports are especially burdened by the new financial responsibility requirements. Some foreign vessels, unaware of the local bonding requirement, have been forced to stand off Massachusetts waters until the requirements have been met. The obvious confusion, frustration, and expense created by the state bonding requirement has raised the fear that some vessels would refuse to call at Massachusetts ports, particularly when other ports in the vicinity are free of bonding requirements. If this fear is realized, it could contribute to the decline of the state's ports. On the other hand, it may be argued that once shippers are aware of the separate bonding requirements, the confusion and frustration will dissipate. The necessity for two bonding requirements could easily be removed by amending 33 U.S.C. §1161(p) to provide that bonds or insurance used to meet the federal requirement of financial responsibility could be used to meet liabilities to the states for expenses incurred in containing and removing spills.⁸ It should

⁸ It should be noted that the original House bill provided that funds recovered by the United States under the legislation and added to the revolving fund for oil spill clean-up were to be "available to reimburse a State or political subdivision thereof that assists

be noted that Representative Wright, one of the authors of the House bill, observed the following with respect to bonds used to satisfy the federal financial responsibility requirements:

[I]t would be my assumption that these assets, as any other assets owned by the firm or the individual involved, after the satisfaction of any claim to the Government would be liable to a judgment of a court of competent jurisdiction in a suit by a person damaged other than the Government.⁹

Experience is too limited to indicate whether federal and state responses will be adequate to limit oil pollution to acceptable levels. The existing legislation appears to offer a sufficient vehicle to accomplish the objective. The primary question is whether the resources allocated to the job, in terms of money and manpower, are sufficient. Some progress has been noted, particularly in Boston Harbor where the chronic oil film has noticeably diminished as a result of oil terminal regulation and stricter policing of vessel discharges.¹⁰ This is only a beginning, however, and must be expanded and improved upon if the stated national and local objectives are to be achieved.

D. STUDENT COMMENT

§8.10. Inaction of town government in correcting source of water pollution: McMahon v. Town of Grafton.¹ For decades public health officials, both state and federal, have expressed alarm over the deteriorating quality of the Blackstone River and its tributaries. Considered by some of these officials as one of the worst polluted rivers in the Commonwealth, it has been the subject of two enforcement conferences conducted under the aegis of the federal Water Pollution Control Administration.² Because of the discharge of raw sewage from its municipal drainage system, the town of Grafton (hereinafter called the town) has been identified as a major polluter of the Blackstone

in the removal of any discharged oil or matter." H. 4132, 91st Cong., 2d Sess. §17(h)(1) (1970). Representative Monagan observed: "This provision serves to guarantee swift and effective remedial efforts since the affected States can undertake costly cleanup operations with the assurance that their expenditures will be reimbursed." 115 Cong. Rec. 9290 (1969). These expectations, however, depended upon interpreting the word "assists" broadly to include those cases in which the United States took no part in cleanup activities, i.e., where state assistance, in effect, was merely to relieve the federal government of any involvement. A reading of the bill in its entirety, however, tends to cut against such a broad interpretation.

⁹ 115 Cong. Rec. 9286 (1969).

¹⁰ Statement by Corey, noted in Boston Harbor Transcript 318-322.

§8.10. ¹ Eq. No. 91356 (Suffolk Super. Ct., filed Mar. 24, 1970). At the time this action was commenced, Thomas C. McMahon was director of the Division of Water Pollution Control in the Massachusetts Department of Natural Resources.

² Department of Health, Education, and Welfare, Proceedings, Conference on Pollution of the Interstate Waters of the Blackstone and Ten Mile Rivers and their Tributaries (Jan. 1965); Federal Water Pollution Control Administration, Proceedings (Second Session) (May 1968).

River. Since 1946 it has been apparent to the town that the construction and installation of a sewerage system would be necessary to eliminate the public health problem posed by the lack of a proper treatment facility for Grafton's sanitary wastes.³

Increasing concern over the continued pollution of the Commonwealth's waters prompted the 1966 enactment of the Massachusetts Clean Waters Act,⁴ which created the Division of Water Pollution Control (hereinafter called the division) within the Department of Natural Resources. The division was vested with the "duty and responsibility . . . to enhance the quality and value of water resources and to establish a program for the prevention, control, and abatement of water pollution."⁵ In 1968, under the authority of the Clean Waters Act, the division entered a finding of facts and issued a consent order regarding sanitary waste disposal by the town of Grafton. It was signed by the selectmen as representatives of the town and ordered the town to take steps to construct a sewerage system to eliminate the alleged pollution of the Blackstone River. The system was to provide treatment in accordance with water quality standards promulgated by the division under legislative mandate. Pursuant to what was then Section 46 of the act,⁶ the consent order incorporated time limitations for the various steps to be taken by the town, culminating in the completion of a municipal sewerage system by mid-1972. No judicial appeal was taken by the town, either as to the reasonableness of the timetable in the schedule or as to the division's authority to act in this matter. As of this writing the town has refused to comply with any aspect of the order, notwithstanding court decrees mandating affirmative action by the town in compliance with the implementation schedule prescribed by the order.

As a result of a suit filed by the division in Suffolk Superior Court, a final decree was entered in October 1970 by Judge Collins,⁷ ordering the town to vote an appropriation of such funds as would be necessary to comply with the division's consent order. Subsequently, a town meeting article calling for such an appropriation was defeated. Further litigation resulted in a finding of contempt by Judge Lurie in April 1971, whereby the town was fined \$2000 for its contempt and was again ordered to comply. In his order, Judge Lurie cited *Commonwealth v. Town of Hudson*⁸ for the proposition that the courts are not powerless to deal effectively with recalcitrant town meetings. The decision in *Hudson*, quoted extensively and with em-

³ In 1946 the town of Grafton submitted a report to the state Department of Public Health relative to the location of a sewage disposal plant in Grafton.

⁴ Acts of 1966, c. 685, §1, amending G.L., c. 21 by adding §§26-50.

⁵ G.L., c. 21, §27.

⁶ Now §44, as changed by Acts of 1970, c. 704.

⁷ Under the provisions of G.L., c. 212, §2, the judges of the superior court system are assigned, in rotation, to sittings of the superior court in various locations. In the course of its progress in Suffolk Superior Court, the Grafton case was heard by Judges Collins, Lurie, and Brogna.

⁸ 315 Mass. 335, 52 N.E.2d 566 (1943).

phasis by Judge Lurie in this first contempt adjudication, evolved from a fact situation somewhat analogous to that presented in the instant case. In 1942 the Massachusetts legislature enacted a statute whereby the Department of Public Health was vested with the task of protecting public water supplies. To that end, the department was empowered to order all public and private agencies maintaining such water supplies to provide whatever equipment and treatment the department deemed necessary for the protection of the public health during the course of the Second World War. After determining that the water supplied to the town of Hudson was inadequately treated, the department, pursuant to the provisions of the legislative directive, sent a notice to the town ordering it to chlorinate its water supply. Despite this order, town meeting articles providing for the appropriation of money for such equipment did not pass. Faced with this defiance of the department's order, the Commonwealth brought suit in equity, as provided by the statute, to enforce the order against the town.

The question presented to the Supreme Judicial Court in the *Hudson* case concerned the ability of a town to defy the orders of a state agency made in conformance with legislative policy. The defendant town argued that the Commonwealth and its courts were powerless to compel a town to discharge adjudicated duties by ordering its electorate to vote in a particular manner. The Court responded to this assertion with a protracted and definitive statement delineating the relationship that exists between the Commonwealth as sovereign and its subordinate governmental units. In emphasizing the nature of this relationship, the Court stressed the fact that the entire concept of the town meeting process, here used by Hudson to thwart legislative mandate, is subject to the paramount authority of the legislature and the courts.

Instead of the jurisdiction of the courts being restricted by reason of difficulty in enforcing their decrees, as the defendants contend, the true principle is that a grant of jurisdiction to the courts carries with it every power necessary to enable them to enforce their decrees and make them completely effective.⁹

Although admitting that the threat of being jailed for contempt—the traditional device for securing compliance with a decree in equity—would be unavailing against a municipality, the Court did state that other remedies, such as contempt fines¹⁰ and seizure of property of select town inhabitants,¹¹ could serve to effect compliance by defiant

⁹ Id. at 346, 52 N.E.2d at 573.

¹⁰ Id. at 347, 52 N.E.2d at 574.

¹¹ Ibid., citing Opinion of the Justices, 297 Mass. 582, 586-587, 9 N.E.2d 189, 191 (1937). "In some of the New England states a peculiar doctrine with reference to municipal indebtedness prevails either by statute or by immemorial usage. According to this doctrine the property of the inhabitants of a municipality may be seized and applied against the corporate obligations in the event that the corporation is unable to pay its debts. This unique and drastic remedy does not seem to have been adopted elsewhere in

towns with an order issued by the Commonwealth.

Similarly, courts in other jurisdictions have seen fit to employ their equity powers against municipal corporations in furtherance of legislative objectives. Under circumstances analogous to those presented in the *Grafton* situation, the New Hampshire Supreme Court, in *State v. Town of Goffstown*,¹² held that the state was entitled to obtain a mandatory injunction to effect the compliance of the defendant town with an order of the New Hampshire Water Pollution Commission. In California a district court of appeals issued a writ of mandamus to compel a county agency to provide for a pound system and a program for the control of rabies.¹³ Another example of the *Hudson* rationale can be found in *City of Huntington v. State Water Commission*, wherein the West Virginia Supreme Court of Appeals stated that

in matters which do not concern the inhabitants of a municipality alone but which are of state-wide interest or concern a municipality can be compelled to carry out the plans of the state and to perform the duties which it imposes.¹⁴

The power enunciated by the Supreme Judicial Court in *Hudson* finds its origin in the nature of the relationship that exists between the state, its courts, and defiant municipalities: "Plainly a town is in no position to defy its creator, the Commonwealth, or to attempt to nullify legislative mandates issued under the authority of the General Court."¹⁵ However, in the *Grafton* case the town has indeed proceeded to defy the legislative mandate of the Clean Waters Act, notwithstanding the fact that the mandate has been reinforced by two court decrees. Despite Judge Lurie's extensive and emphatic references to *Hudson*, a special Grafton town meeting, called expressly for the purpose of placing the sewerage appropriation article before the electorate for the eighth time, failed to vote the money. With this development, the matter was again presented to the superior court for further proceedings on the issue of the town's continued contempt. In this second contempt adjudication the presiding judge took a somewhat surprising volte-face. While acknowledging the fact that the town stood before the court in contempt, Judge Brogna expressed his reluctance to bring the full powers of contempt to bear "to compel the voters to vote in a particular manner."¹⁶ Judge Brogna expressed his

the United States and has in fact been expressly repudiated upon occasion." Coffin, *Enforcement of Judgments Against Municipal Corporations*, 17 Chi.-Kent L. Rev. 226, 235-236 (1939).

¹² 100 N.H. 131, 121 A.2d 317 (1956). "[A court] may use its adequate and ample armory of equitable powers to enforce the principal provisions of any decree that it may issue. . . ." *Id.* at 135, 121 A.2d at 320.

¹³ *Department of Public Health v. Board of Supervisors*, 171 Cal. App. 2d 99, 339 P.2d 884 (Dist. Ct. App. 1959).

¹⁴ 137 W. Va. 786, 800, 73 S.E.2d 833, 842 (1953).

¹⁵ 315 Mass. 335, 345, 52 N.E.2d 566, 573 (1943).

¹⁶ *In re Contempt*, Eq. No. 91356 (Suffolk Super. Ct., July 13, 1971) (interim decree).

opinion that the legislature, in passing the Clean Waters Act, probably did not intend that the act should present the courts with the problem of dealing with defiant towns. He suggested that the attorney general seek to enforce the goals of the act by employing methods other than enforcement in equity. In this regard he mentioned resort to the criminal sanctions of the act¹⁷ and use of the health emergency exceptions to the prescribed method of municipal expenditures.¹⁸ Final resolution of the issue of the town's continued contempt was deferred so as to give the attorney general time to explore various means of enforcement.

It seems unfortunate that Judge Brogna was reluctant to follow the position taken by Judge Lurie in the first contempt adjudication (whereby the town was ordered to take affirmative action in this matter on the basis of the *Hudson* decision). Judge Brogna's decision fails to give full support to the policy embodied in the Clean Waters Act; a final resolution of this suit along the lines he suggested would unduly limit the division to the criminal sanctions of the act in attempting to reach municipal violators, thereby depriving the Commonwealth of the type of flexibility vital to a realistic enforcement of its antipollution laws. Presumably, the grant of both civil and criminal enforcement powers to the division was made to afford that agency sufficient discretion in dealing with varying situations. The view expressed by Judge Brogna, namely, that the legislature probably did not foresee a situation in which full use of a court's equity powers would have to be directed against a municipality, is surely questionable in view of the language of Sections 45 and 46 of the Clean Waters Act. Section 45 says:

The division may require by order a city [or town] . . . to provide and operate [a sewerage system or water pollution abatement facility] in such a manner as is in [the division's] opinion necessary to insure adequate treatment prior to discharge to the waters of the commonwealth. . . .

With regard to the proper forum for enforcement of the division's orders, Section 46 provides that "The superior court shall have jurisdiction in equity to enforce such order. . . ." Unless the legislature assumed that no city or town would ever drag its feet on complying

¹⁷ G.L., c. 21, §42 provides: "Whoever directly or indirectly throws, drains, runs or discharges or permits the discharge into the waters of the commonwealth organic or inorganic matter which shall cause, or contribute to, a condition in contravention of the standards adopted by the division shall be punished by a fine of not more than one thousand dollars. Each day such violation continues shall be a separate offense, punishable by a like fine. For the purposes of this section and [Sections 43-46], inclusive, the words 'whoever' and 'person' shall include political subdivisions of the commonwealth and public corporations."

¹⁸ G.L., c. 44, §31 provides in part that "in cases of extreme emergency involving the health or safety of persons or property," a majority of all the town selectmen can vote to authorize a specific expenditure not appropriated in the regular town meeting ballot.

with such an order, it would appear quite foreseeable that a court in equity might have to make use of its full powers in assuring compliance with the law.

The particular manner in which the Massachusetts legislature has chosen to accomplish its goal in the area of water pollution control is but one aspect of the present case. At stake also is the legislative mandate specifying enforcement in equity or orders issued to other municipalities by other state agencies. Should Grafton and municipalities similarly situated be allowed to persist in their defiance of proper administrative pronouncements, the Commonwealth's ability to exercise vital police controls over its subordinate municipal agencies may be seriously jeopardized. The implications of the division's suit to enforce its order against Grafton may thus extend to many operational facets of the Commonwealth's administrative apparatus.

Although the criminal prosecution and emergency appropriation alternatives suggested by Judge Brogna do find their source in the General Laws,¹⁹ neither route is very promising in a practical sense. The criminal sanctions of Section 42 of the Clean Waters Act can function as a viable tool for the elimination of water pollution, but in the Grafton situation the division is striving to secure compliance with a duly issued implementation schedule. The goal, after all, is the construction of a suitable municipal sewerage system for Grafton. This goal cannot be met simply by fining the town for its continued contempt. The ability of the division to utilize both civil and criminal remedies, alternatively or jointly, is an important factor in the manner in which the division is able to cope with water pollution offenses of varying degrees and kinds. Furthermore, it seems unlikely that a judge who is reluctant to compel an electorate to vote a specific appropriation will choose to invoke criminal proceedings against the municipality that represents that electorate. It would be preferable in the Grafton situation for the courts to promote the legislative policy behind the statute through some direct enforcement of the division's order, rather than by resort to indirect pressures such as the fines provided for in Section 42, which may only interfere with the town's ability to fund the project. To view the civil and criminal provisions of the Clean Waters Act as mutually exclusive is, in fact, a misreading of the statute.

The other course of action suggested by Judge Brogna, namely, the health emergency exception to the prescribed municipal appropriation procedure,²⁰ may prove to be an extremely unsatisfactory method for dealing with defiant town meetings. A court would have to find that Grafton's refusal to appropriate money for a sewage treatment facility posed a health emergency within the meaning of the statute. The Supreme Judicial Court, however, has construed the statute narrowly, for it seems clear that the legislature never intended the health emergency exception to be used as a regular means for enforcing duties

¹⁹ See nn.17, 18 *supra*.

²⁰ See n.18 *supra*.

imposed by legislative mandate. In a 1969 decision, *Rich and Son Construction Co. v. Town of Saugus*, the Court stated that “[t]he statute contemplates the immediate or prompt action that must be taken to avoid risk to persons or property *which cannot await action in due course by or in behalf of the town.*”²¹ (Emphasis added.) It is well recognized that pronouncements of selectmen, no matter how forcefully expounded, will not serve in themselves to create a presumption of such an extreme health emergency.²² However, it is not clear whether the findings of a state regulatory agency, such as the Division of Water Pollution Control, may serve to create such a presumption. In *Hudson*, the Supreme Judicial Court noted that the refusal of the town’s electorate to appropriate such funds as were necessary to comply with the wartime public health order would probably give rise to a finding that such an emergency existed.²³

The situation in cases such as *Grafton*, however, would appear to fall somewhere between the *Hudson* perspective and the rule in *Saugus*. Although the *Hudson* case would serve to posit the authority of a state regulatory agency to act when health emergencies arise, the long-standing history of the Grafton pollution problem and the absence of a wartime setting would make reliance upon the health emergency exception a most uncertain route to follow in light of the decision in *Saugus*. Of course, any reliance on the health emergency exception becomes groundless if the selectmen are as unwilling as the general electorate to vote a particular appropriation. If voter opposition to a proposed outlay is strong, few selectmen may be willing to take the risk of voting for an increase in the tax rate.

One of the primary objectives of the Clean Waters Act is the development of effective sewerage systems in municipalities such as Grafton. It seems logical, therefore, that the court’s response to the Grafton situation should concentrate upon providing a viable formula whereby future administrative orders to municipalities can enjoy meaningful and decisive judicial enforcement. The unregulated discharge of untreated or inadequately treated sewage will continue to have a

²¹ 355 Mass. 304, 307, 244 N.E.2d 300, 303 (1969). The Supreme Judicial Court reviewed an “emergency appropriation” authorized by town selectmen for an immediate contract to adjust insurance claims arising from fire damage to town school buildings. It was held that the task of rebuilding was not “materially expedited” by starting the adjustment process before the town electorate could pass upon that item. Because there was no showing that adjusting such damage had a direct bearing upon emergency action to prevent physical damage within the building, the Court saw no reason for the town to deal with the circumstances outside of normal municipal fiscal procedures. Despite the considerable inconvenience of the loss of use of large areas of the school plant, the length of time necessarily incident to full restoration of the damaged area would not, according to the Court, warrant such precipitous action to adjust insurance claims.

In the Grafton situation, it would be specious to argue that correction of the sewage disposal problem would be “materially expedited” by having the selectmen act in lieu of a town meeting. The pollution condition has existed for many years and will continue during the time necessary for construction of a treatment plant.

²² *Continental Constr. Co. v. City of Lawrence*, 297 Mass. 513, 9 N.E.2d 550, (1937).

²³ 315 Mass. 335, 348, 52 N.E.2d 566, 575 (1943).

devastating effect on the already polluted waterways of the Commonwealth.

Should the Commonwealth lose its ability to sustain a well-rounded approach to the problem of municipal water pollution, one foreseeable result may be the forfeiture of federal funding that now constitutes a significant portion of the division's fiscal foundation. Under the terms of Section 1157 of the Federal Water Pollution Control Act,²⁴ payments made in support of state water pollution control agencies are to terminate whenever "in the administration of [that state agency's] plan there is a failure to comply substantially with . . . [the] requirement" that the plan provide "for extension or improvement of the State . . . program for prevention and control of water pollution. . . ."²⁵ Various amendments to the federal act were proposed in November 1971. Included among them is the following provision:

The Administrator [of the Environmental Protection Agency] shall have authority . . . to reduce . . . the grant payable to such State [water pollution control program] . . . if he determines, based on criteria established in regulations promulgated by him, that the water pollution control program of such State is inadequate in whole or in part.²⁶

It is possible that the evisceration of the Massachusetts Clean Waters Act that would result from a failure to enforce municipal compliance would serve as a basis for a thorough reexamination by the federal Environmental Protection Agency of the adequacy of the Commonwealth's efforts to control water pollution. Should the federal agency take the position that the division's program was inadequate owing to its lack of control over municipalities, the resulting cutback in federal funding would cripple the division's efforts.

In three successive court sittings it has been established that the town of Grafton is bound by the terms of the Clean Waters Act to take such steps as found necessary by the Division of Water Pollution Control to abate the town's pollution of the Blackstone River. As stated in *Hudson*, a town exists as a "subordinate agency of State government"²⁷ and "is in no position to defy its creator, the Commonwealth, or to attempt to nullify legislative mandates issued under the authority of the General Court."²⁸ That Grafton has proceeded to defy such a mandate is a matter of record. The pattern of Grafton's response to the superior court poses a direct challenge to the authority

²⁴ 33 U.S.C. §§1151 et seq.

²⁵ Id. §§1157(f)-1157(g).

²⁶ S. Doc. No. 2770, 92d Cong., 1st Sess. (1971); referred to the Committee on Public Works. From the outset, federal grants to state water pollution control programs have been contingent upon the state meeting a standard of performance in enforcing its water quality program. Certainly it is a logical assumption that such provisions will appear as a control mechanism in future federal enactments in furtherance of this objective.

²⁷ 315 Mass. 335, 344, 52 N.E.2d 566, 572 (1943).

²⁸ Id. at 345, 52 N.E.2d at 573.

of the courts of the Commonwealth to enforce any such legislative policy.

Despite the broad power that *Hudson* apparently conveyed to the Massachusetts judiciary, the superior court faces a formidable dilemma in fashioning a practical method for compelling delinquent municipalities to perform specific affirmative acts. In typical situations, courts may frustrate contemptuous behavior by identifying and punishing persons responsible for the defiance of court orders. The problem of finding a suitable entity upon which the court can exert its pressure is made particularly acute by the town meeting form of government employed in Grafton. Contempt proceedings undertaken against the city council form of government may be facilitated somewhat by the presence of persons representative of the city's official actions.²⁹ The degree of directness of citizen participation in the routine matters of fiscal appropriation and expenditure may assist the court in identifying those who can be held responsible. City councillors, whose identities are known and whose number is fixed, can easily function as such targets. In *City of Vernon v. Superior Court*,³⁰ the California Supreme Court affirmed the conviction and jail sentences of five city councillors for their failure to comply with a mandatory injunction ordering them to provide for the city's sewage disposal. In Grafton and like communities, the use of the direct ballot procedure of the town meeting restricts the ability of the court to meet due process standards in taking action for criminal contempt. The utilization of fines for civil contempt, imposed on the town itself, may serve as one method of exacting compliance by such towns. In *Department of Health v. Borough of Fort Lee*³¹ and *In re West Wildwood*,³² daily contempt penalties were assessed against municipalities until they complied with court orders regarding sewage disposal facilities. It is clear, however, that the repeated use of penal fines works against the funding of municipal facilities, regardless of how effective such fines may be in stressing to the town the court's desire that it act in a certain fashion.

In its effort to compel compliance by the town of Grafton, the court has the choice of continuing the use of contempt fines—albeit at a level more coercive than the \$2000 fine levied in Judge Lurie's decree—or of seeking a method whereby the system could be built without resort to the town meeting process. In enforcing orders duly issued under the exercise of the state's police power, it is necessary that the courts be willing to place upon such delinquent municipalities the

²⁹ "The fundamental . . . distinction between the town and the city organization is that in the former all the qualified inhabitants meet together to deliberate and vote as individuals . . . while in the latter all municipal functions are performed by deputies. The one is direct, the other is representative." Opinion of the Justices, 229 Mass. 601, 609, 119 N.E. 778, 781 (1918).

³⁰ 38 Cal. 2d 509, 241 P.2d 243 (1952) (Los Angeles County).

³¹ 108 N.J. Eq. 139, 154 A. 319 (Ch. 1931).

³² 42 N.J. Super. 282, 126 A.2d 233 (Ch. 1956).

same burdens incurred by other municipalities that voluntarily acquiesce to similar administrative orders. Where town voters adamantly refuse to fulfill the duties imposed upon them by statute, further discharge of such duties may have to be taken out of the hands of the electorate and vested in the court in order that interests vital to the public health may be protected. To this end, a municipality's funds would have to be placed within the reach of the court. Resorting to the full equity powers outlined in *Hudson*, a court may consider itself empowered to isolate and attach municipal funds presently or potentially earmarked for some nonessential governmental activity. Should it prove difficult for the court to delve into the operations of the municipal treasury, there is another source of municipal funds from which a Massachusetts court may draw. The annual state-aid disbursements (the so-called cherry sheets), by virtue of their segregation from other municipal assets during the period in which they are held by the Commonwealth, are an appropriate subject for judicial attachment. The court could sequester sufficient funds to provide for the financing of a sewage treatment facility in Grafton. This procedure could be repeated annually until such time as the town voters evidenced their willingness to discharge their statutory duty or until the facility became operational. As long as this procedure would be necessary, the funds would be payable directly from the Commonwealth to the court. Although such a procedure may appear to be quite drastic in view of the repercussions it would have upon the town's tax rate, the effects should be virtually the same as if the town had voluntarily complied.

There is, moreover, some statutory justification for utilizing portions of "cherry sheet" disbursements to discharge obligations owed to the Commonwealth by municipalities. General Laws, c. 58, §20A provides that if

there is due the commonwealth any sum from such city or town, for any service or cause whatsoever, such sum so due to the commonwealth shall be deducted . . . from the amount so distributable or payable to the city or town, and shall be applied to the payment of the sum so due to the commonwealth.

In light of the subordinate role of a town in its relationship to the Commonwealth, it can be argued that funds granted to towns should be contingent not only upon specific money debts owed the Commonwealth but also upon other social debts owed to the sovereign and the interests it seeks to protect. Taken in concert with the grant of jurisdiction conveyed in *Hudson*, Section 20A would support the premise that "cherry sheet" disbursements are necessarily subject to all paramount claims of the Commonwealth, both legal and equitable, that may arise from a breach of duty by a municipality. The power to effect total compliance is directly within the powers of courts of equity. Here the court has the opportunity to minimize the effect of the obstinate town meeting. In doing so, it could not only reaffirm its authority to order municipalities to perform affirmative acts

essential to the public interest, but it would also formulate a model for solving dilemmas posed by municipalities defiant of administrative authority and legislative policy. In light of the continued refusal of Grafton to meet its obligations under the Clean Waters Act, it may be necessary that the court consider taking such firm and decisive action to insure that the Commonwealth's public health goals are met.

Given the present condition of the Commonwealth's waters and the deleterious effect that the discharge of improperly treated sewage can have upon these resources, it is most undesirable that municipalities should be able to operate contrary to the policies of the Massachusetts Clean Waters Act. In addition to the aforementioned consequences of municipal inaction, such as possible cuts in federal funding, it is also possible that industries and private institutions will begin to challenge the division's orders as applied to them. An equal protection argument may be made if cities and towns are not required to help meet the water quality standards applicable to all waterways, regardless of the source of pollution.

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