RUBERTO, ISRAEL & WEINER

riw.com

Environmental Remediation Claims Under Chapter 21E: A (Very) Brief Overview

By Matthew Welnicki on September 10, 2026

First, a caveat. I am a lawyer. But I am not your lawyer unless we have a formal engagement. Second, if you have come across this brief overview because you received a lawsuit or demand for environmental remediation costs, I would strongly recommend that you do retain counsel. The process can be daunting and confusing. Sometimes quite scary. If you are simply curious about a potential liability associated with storing or working with hazardous materials (a definition that changes over time), this overview should help you understand the importance of a fulsome risk assessment.

The state and federal Legislatures have crafted special statutory schemes to address who pays to remediate releases of oil or other hazardous substances. At the federal level, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) governs. In Massachusetts, the recovery process is guided by Chapter 21E. There is a good deal of overlap in the way these statutes function. This overview will focus on Chapter 21E – that should give you a general idea of the main issues.

When a release of oil or hazardous materials has been discovered, the property (or vessel) owner or operator generally has a responsibility to remediate the problem. In turn, the owner or operator can look to others to pay an equitable share of the response costs, whether all or part. The types of potentially responsible parties are identified in Section 5(a). I note here that oil and hazardous materials are not always treated the same way as evidenced by the omission of "oil" in some of the Section 5(a) categories. An owner or operator can also seek to recover "property damage" resulting from the release. This includes the diminished value of the property after the remediation efforts are completed. For example, sometimes remediation efforts are insufficient to restore the property to its pre-release condition and future-use limitations need to be imposed.

A question that sometimes arises is what constitutes the recoverable response costs. The answer is: it depends. Under Chapter 21E, the entity that cleans the property can only seek to recover "reasonable" response costs. Section 4 imposes a duty to undertake response actions "determined by reference to the Massachusetts contingency plan," a set of regulations established by the Massachusetts Department of Environmental Protection. There is a solid argument that cost incurred outside of, or at least inconsistent with, the MCP are not eligible for reimbursement. Another way to look at the issue is that a release imposes liability on the responsible party – that liability being to the Commonwealth or MassDEP (which might have to clean the property itself). The responsible party then has a right of contribution against any other responsible parties. So the right of contribution only extends to the first responsible party's liability to the Commonwealth. If that original liability is defined by the MCP, then the contributory liability follows suit.

PROFESSIONALS

Matthew Welnicki

PRACTICES

Litigation

Chapter 21E and the MCP not only identify what should be done, but also who oversees the remediation and how things are reported to the MassDEP. The work is usually overseen by a Licensed Site Professional who has special training and certifications. The LSP, therefore, serves an important part of determining not only how a site is remediated, but also the costs that will be the subject of the recovery actions. In a disputed cost recovery action, parties typically retain LSPs as one of their lead experts.

The amount of recoverable costs is only part of the equation. There must still be a determination as to the equitable allocation. The goal is to evaluate and assign the parties' relative degrees of contribution to the contamination. There is no exhaustive list of factors that must be considered, and they must all be viewed in the "totality of the circumstances." Some of these factors can include the parties' relative degree of care with respect to the hazardous materials, the amount of material generated or stored by each party, and the parties' respective knowledge or fault. This is done on a case-by-case basis and the jury (or judge) can consider any appropriate factor to balance the equities. It is important to remember the flexibility of this approach, especially where there can be several different properties and many past owners potentially responsible for a wide-spread contamination.

Consider the situation where PCBs (polychlorinated biphenyls) or PFAS materials (perfluoroalkyl and polyfluoroalkyl substances) are discovered at a site (or in the water). These substances once were widely used in a variety of applications. There can be several potential parties, each with varying degrees of responsibility. While each might be strictly liable for contributing to the overall contamination, their share of remediation costs must be determined in a fair and equitable way. Of course, things can become complicated where entities no longer exist or it is difficult to determine the actual sources of the contamination.

Other questions often asked relate to the time period for bringing a cost recovery action. Section 11 provides a statute of limitations that is triggered by the latest of several things, including three years after all response costs have been incurred or even after a notice letter is sent to the potentially responsible party. This establishes a very generous window and ensures that owners who discover contamination can look back many years (or decades) for other responsible parties. As to property damage, the statute of limitations is three years from suffering the damages or reasonable discovery of a potentially responsible party. In practice, the property damages might not be incurred until after remediation is finished and it is determined whether there is an ongoing diminution of value due to restrictions.

With the above in mind, the life of a cost recovery action can look a little different from other litigation. The process typically starts with the Section 4A notice process. A party looking to recover remediation costs sends a demand letter to potentially responsible parties putting them

on notice of things like the nature of the claim and the basis for their potential liability. The receiving party has 45 days to respond and can request additional information. Both sides are then expected to confer in good faith about the issues, including the exchange of relevant information. Either party may request mediation.

Section 4A requires that the party seeking recovery follow these pre-litigation steps before filing a lawsuit based on Chapter 21E claims. And the statute provides that a failure to negotiate in good faith or asserting claims without a good faith basis can result in an award of attorney's fees and litigation costs. After a lawsuit is filed, defendants can bring in other potentially responsible parties without the need to follow this pre-suit process. In practice, a plaintiff might target a small group of defendants hoping that those defendants will identify and bring in others.

This pre-suit process can prove helpful to all parties. Early mediation can result in certainty and the avoidance of expensive litigation that could include very high discovery and expert costs. Where the remediation is not yet complete, it can be an opportunity for potentially responsible parties to agree to take over or participate in the remediation process.

Once in suit, a Chapter 21E claim can take years to resolve. Issues of liability and damages as well as unique statutory defenses need to be addressed. Often, experts will be needed to trace the hazardous materials back to the source and estimate the quantities released over time (some chemicals can be "fingerprinted"). The relevant issues can span many different areas, including construction, products, property valuation, and lost profits. The environmental litigation team needs to be in a position to handle many different things that might arise.

A few final risk assessment points are worth mentioning. Owners and operators should do their due diligence before taking over a property. While Chapter 21E might help after a discovery, chasing down other pockets of funds after-the-fact is not the most efficient solution to an avoidable problem. Indemnity agreements are useful, but only as good as the indemnitor. While Chapter 21E permits risk transfer, it does not allow one party to absolve itself from the original liability to others. Insurance is also very important and owners and operators should consider purchasing (or requiring others to purchase) special environmental policies. Most commercial liability and property insurance policies contain broad pollution exclusions.

Hopefully this brief overview provides some initial insight into the unique Chapter 21E process and the risks associated with environmental remediation. If you are looking for representation in this area, please reach out to see if we can be a good fit.

Matthew Welnicki *is a Shareholder in the firm's* ***Litigation Department****. With over twenty years of practice, Matt's experience spans regulatory issues, contract negotiation and drafting, policy formation, shareholder disputes, antitrust claims, product and tort defense, environmental remediation, and commercial, construction, and insurance disputes. You can reach him at mcw@riw.com or* ***(617) 570-3522.***

POSTED IN: **NEWS**