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Regulatory Alert

April 1997

Environmental Law

Massachusetts Prosecutes Gravel and Concrete Industries for Industry-Wide Practices

The Massachusetts Department of Environmental Protection (DEP) and the state's Attorney General continue their prosecution of the sand and gravel and concrete industries for widespread practices not previously thought to be detrimental to the environment. These prosecutions allege violations of state clean water, wetland protection and solid waste disposal laws. The first companies targeted have been forced to pay penalties as high as \$150,000, as well as to change their operations. Future enforcement targets face even higher fines (penalties of \$25,000 per day of violation are authorized) and the possibility of criminal sanctions. Any company which has not yet been prosecuted should consult its attorneys and consultants to determine how its operations measure up to the state's standards. Mintz Levin has defended the majority of sand and gravel and concrete companies prosecuted to date and has gained extensive insight into both the operational issues of concern to the regulators as well as the most efficient ways to address those concerns.

Water Issues

DEP and the Attorney General are cracking down on the way the sand and gravel and concrete industries manage stormwater and wastewater at their facilities. Washing trucks and other equipment with water is commonplace at these facilities. Up until now, most facilities had what the regulators now consider to be insufficient systems to manage the water used in this way. In addition, there was insufficient management of stormwater to prevent it from coming in contact with the materials generated and stored at these facilities. Massachusetts law prohibits any direct or indirect discharge of any "pollutant" into any "waters of the Commonwealth" except pursuant to the terms of a permit issued by the state. "Waters of the Commonwealth" include ponds, streams, wetlands and groundwater. The regulators allege that "pollutants" include sand, gravel and cement as well as any water containing any of these materials. Therefore the Commonwealth is requiring that any water which comes in contact with any of these "pollutants" be managed, whether it is

stormwater or wastewater. Facilities where wastewater is discharged directly to the ground or into water without appropriate treatment or permits face significant sanctions. Facilities where stormwater is insufficiently managed also face high penalties.

Wetland Issues

Many sand and gravel and concrete facilities are located near wetlands which are often created by the operation of the facilities. Whether or not a wetland is naturally occurring does not necessarily affect the degree to which it is protected by state law. DEP and the Attorney General are aggressively enforcing the state wetland protection act against the sand and gravel and concrete industries. Owners and operators of facilities adjacent to wetlands should act now to identify those statutorily protected areas which may be affected by their operations and take those actions necessary to eliminate any such impact. One common impact of sand and gravel or concrete operations is the migration of sediment from a facility into adjacent wetlands. Minor improvements often can eliminate this

impact. However, before any actions are taken in protected areas, necessary approvals must be applied for and received from the appropriate local and state authorities. Owners and operators of facilities that are impacting wetland areas face significant fines as well as the requirement to restore or replace any affected wetlands.

Solid Waste Issues

Massachusetts law prohibits the disposal of solid waste without a permit. Complex state regulations define those activities which constitute a "disposal." DEP and the Attorney General are taking the position that concrete rubble and byproducts from the production of concrete are "solid waste" subject to the Commonwealth's solid waste disposal regulations if they are not recycled under certain specific conditions. Sand and gravel and concrete operations which accumulate concrete waste or byproducts at their facilities for longer than allowed by the applicable regulations face enforcement action.

In addition to the issues identified above, compliance with air, noise and hazardous substance laws and

regulations should be assessed. Significant penalties and business interruptions await those who do not take stock of their environmental compliance now. The good news is that once violations of environmental laws are identified they often can be rectified through relatively minor operational changes.

Mintz Levin and its consulting affiliate ML Strategies have the experience to help companies identify potential problems and rectify them before they become the subject of state scrutiny.

Jeff Porter is a member in Mintz Levin's Boston office practicing in the Environmental and Litigation Sections. His practice involves litigating environmental cases in the federal and state courts, as well as advising clients about environmental regulatory compliance and permitting issues. He is the author of several articles and guest columns on environmental law topics which have appeared in Massachusetts Lawyers Weekly, Banker and Tradesman and The New England Real Estate Journal.