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## SUPREME JUDICIAL COURT CLARIFIES COST RECOVERY UNDER CHAPTER 21E

Earlier this year the Supreme Judicial Court issued a much-anticipated decision clarifying the law on recovery of cleanup costs and attorneys' fees under the state's "Superfund" law, M.G.L. c. 21E. The Court addressed an issue that had not been examined in the 25-year history of Chapter 21E and concluded that minor deviations of the Massachusetts Contingency Plan (MCP) will not bar recovery of response costs. The SJC also confirmed that attorneys' fees incurred in implementing a site cleanup (as opposed to litigation-related fees) are recoverable as response costs under Chapter 21E. The case is titled *Michael D. Bank, trustee, et al. v. Thermo Elemental, Inc., et al.*

The case involves commercial property in Waltham where trichloroethylene (TCE) was detected in groundwater in 1988. The property owner undertook assessment actions and ultimately filed a Response Action Outcome statement. During the course of the 12-year response action period, the owner "violated" the MCP by not submitting a Phase II Scope of Work and by conducting response actions after a waiver had expired.

The property owner filed a lawsuit seeking reimbursement of response costs from prior tenants of the property and their corporate successors. The case ultimately went to trial, where a jury awarded the owner 100 percent of his response costs. The defendants appealed the jury verdict and the SJC took up the case (bypassing the Appeals Court). The defendants argued that the plaintiff's two deviations from the MCP barred recovery of all response costs.

In its decision, the SJC took a "plain meaning" approach to the statutory language and concluded that the only condition M.G.L. c. 21E, § 4 imposes on a private party's recovery of response costs is that the response action undertaken

be “necessary and appropriate,” that the costs be “reasonable,” and that the private party follow the pre-suit notice and settlement procedures set out in section 4A. The Court explained that the MCP helps to define the contours of “a necessary and appropriate response action” but that does not mean that exact compliance with every detail of the MCP operates as a condition precedent to recovery of any response costs.

The decision noted that accepting the defendants’ interpretation of section 4 could discourage private parties from undertaking cleanup actions on their own in response to contamination, contrary to the goals of Chapter 21E. Our firm submitted an *amicus curiae* (friend of the court) brief on behalf of the LSP Association, which expressed this as a significant concern of these hazardous waste site cleanup professionals.

Relying in part on a Supreme Court case interpreting an analogous provision of CERCLA, the SJC also ruled that attorneys’ fees that are “closely tied to the response action” may be recovered as response costs. Attorneys’ fees associated with cost recovery litigation are separately recoverable for parties who “advance the purposes of” Chapter 21E.

Although the SJC decision is helpful to LSPs and attorneys, perhaps the most telling information in the case is the amount of money spent on response actions and litigation in this matter. The property owner incurred approximately \$800,000 in response costs (including approximately \$90,000 in attorneys’ fees), without even having to perform remediation. The litigation costs and fees totaled approximately \$1.1 million. The property owner recovered all expenses.

The Court’s decision should encourage parties to clean up contamination, knowing that they may be able to recover their response costs and attorneys’ fees.

For more information on the decision or Chapter 21E, please contact Michelle O’Brien.