



## "NEW DIRECTIONS IN ENVIRONMENTAL PROTECTION"

### THE ATTORNEY GENERAL'S ROLE IN ENVIRONMENTAL LAW ENFORCEMENT

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**APRIL 14, 1993**

150720



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ACQUISITIONS

To the Citizens of Massachusetts:

A new challenge has engaged our country's attention, raising for us all the question of how we create a "sustainable society." Such a society would appreciate that we live in a world of limited resources, requiring us to set priorities to minimize our harmful environmental impacts.

When I took my oath of office, I promised I would use the office of Attorney General to help identify and reinforce those priorities. Through aggressive but fair enforcement of our environmental laws and regulations, I have tried to emphasize that environmental violations are serious and detract significantly from our efforts to achieve "sustainability."

In a little over two years, that commitment has resulted in the prosecution of over 60 affirmative state civil cases, resulting in the ordering of approximately \$8,574,620 in penalties and cost recoveries. The Environmental Strike Force has prosecuted 19 criminal cases, resulting in the ordering of \$750,000 in criminal fines and penalties. Sentences have included time in state prison and houses of correction.

My office has identified several areas to which our criminal and civil prosecution has been devoted:

\* **POLLUTION PREVENTION:** Through strict enforcement of our air, water, and hazardous waste laws and regulations, the office is committed to working toward reductions in the amount of solid waste our citizens produce and shifting the investments we make in polluting materials and energy plants to cleaner alternatives that weigh our actual energy needs. That is why some of our prosecutions have resulted in source reduction settlements. That is why we have raised a consistent opposition to plant sitings in light of their environmental impacts and our energy requirements. And, to establish that government itself is not above such a commitment, we have worked with the Governor's office, which recently issued an executive order instructing state entities to develop pollution prevention measures and environmental compliance plans for their facilities.

\* **ENFORCING A NEW CORPORATE REALITY:** Many companies have incorporated environmentalism into their business agendas because it is a sound corporate strategy. My office has

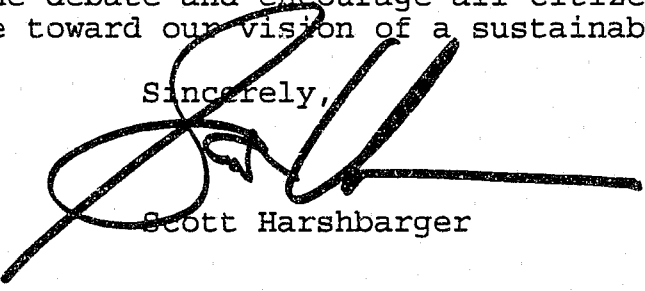
dedicated resources to "leveling the playing field" by vigorously prosecuting those businesses that disregard our environmental regulations and thereby undermine fair competition. And though not limited in effect to the business community, we also have spearheaded an effort to enact tough new legislation that would step up criminal sanctions and assign felony designations to the most egregious environmental crimes. We are committed to seeing that the polluter pays.

\* **PART OF THE URBAN AGENDA:** Environmental harm to our urban communities contributes to the overall sense of despair, lack of hope, and demoralization that violent crime and lack of economic opportunity instill in poor inner city residents. As part of my larger urban agenda, I have directed resources to address the urban environment. My Lead Paint Task Force, vigorous prosecution of illegal dumping and a commitment to enforcing clean air requirements have been a crucial part of that urban agenda.

This report details our civil and criminal environmental enforcement activity over the past two years. Yet, this report is more than a collection of prosecutorial numbers. It is an illustration of how the Environmental Protection Division and the Environmental Strike Force have made these priorities a hallmark of their enforcement efforts.

As you read this account of our environmental protection efforts, please consider it as a part of a larger dialogue about our future. Prosecutions alone will never be the answer. I hope this report will add to the debate and encourage all citizens of the Commonwealth to strive toward our vision of a sustainable society.

Sincerely,



Scott Harshbarger

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## ENVIRONMENTAL ENFORCEMENT HIGHLIGHTS: 1991-1993

### ENHANCED ENFORCEMENT

#### CRIMINAL PROSECUTIONS

Criminal prosecution efforts have accelerated.

- \* Prosecuted 19 cases in first two years; involving 39 defendants; 16 convictions.
- \* Compared to years prior to this Administration, have doubled the pace of prosecution.
- \* Prosecuted cases resulting in the ordering of approximately \$750,000 in criminal fines and penalties.
- \* Beginning to see imposition of jail time for environmental offenses, including unprecedented state prison sentences imposed for fishing in contaminated waters which had been closed by Massachusetts officials.

#### CIVIL CASES

Civil enforcement cases handled through the date of this report resulted in scores of court orders that required compliance with applicable law.

- \* Handled over 60 affirmative cases; approximately \$8.5 million in penalties, cost recoveries and other payments have been ordered.
- \* Worked with the Environmental Protection Agency, the Department of Justice and the state Department of Environmental Protection to resolve Superfund cases. In addition to the millions of dollars ordered for state cases, three resolved Superfund cases, prosecuted together by the United States and the Commonwealth, have resulted in \$147,000,000 in recoveries and restoration funds ordered.
- \* Recovered approximately \$3 million in payment for asbestos abatement.
- \* Handled three misleading environmental advertising claims with several other states resulting in a total recovery to the states of \$310,000.
- \* Currently handling 29 cases defending the regulatory and enforcement actions of state environmental agencies and officials.

## CLEAN STATE INITIATIVE

\* The Attorney General's office initiated a dialogue with Governor Weld resulting in an executive order designed to assure environmental compliance on the part of state facilities and to encourage pollution prevention on the part of the state itself.

## SETTING NEW PRIORITIES

### ENHANCING OUR LAWS: PROPOSED LEGISLATION

\* The Environmental Trust Fund and Forfeiture Act calls for the forfeiture of assets used and proceeds gained from the commission of environmental crimes. Monies derived would go into a fund for state and local law enforcement.

\* The Environmental Endangerment Act would assign felony designations for the most egregious crimes and would call for convicted organizations to conduct environmental audits.

\* The Conscientious Employee Protection Act offers protection to employees who cooperate with law enforcement in the investigation of job-related legal violations.

### INCREASED OUTREACH TO THE ENVIRONMENTAL COMMUNITY

\* Sponsored statewide training to local police, fire and regulatory authorities on environmental enforcement.

\* As part of our larger urban agenda, initiated a Lead Paint Task Force. Resulted in a comprehensive report suggesting legislative and regulatory changes to further lead abatement.

\* Developed with the Massachusetts Association of Conservation Commission a referral system for wetlands violations.

### POLLUTION REDUCTION FIRST

\* Integrated source reduction concepts into resolution of enforcement cases.

\* Handling three siting controversy cases in Halfmoon, New York; Taunton; and New Bedford.

\* Embarked on a model project on Cape Cod, with the close cooperation of the local fire chiefs and the Barnstable County Department of Health, to enforce state fire regulations regarding monitoring and testing of underground storage tanks.

## FOCUS ON ENERGY ISSUES

\* Arguing for cleaner alternatives to coal-fired plants and consideration of actual energy needs in plant siting controversies.

\* The state Department of Public Utilities adopted our "environmental externalities" position, which calls for the weighing of costs such as health care, economic effects on property and quality of life, when utilities are considering the most "cost effective" energy to buy and sell.

\* Have been a forceful advocate for nuclear safety issues and continue to monitor operations of nuclear plants in and near Massachusetts.

## **New Directions**



## **A. SETTING NEW PRIORITIES**

The most important role of the Attorney General in the environmental area is in enforcing the state's environmental laws. It is critical that the office target its resources where they will do the most to protect the environment and, especially, the public health. Implementation of this principle has, for example, resulted in an increased emphasis on air pollution, an environmental and public health issue that affects all citizens of the Commonwealth in a significant way, and on the risks associated with hazardous wastes and materials in areas of increased risk of human exposure, such as the workplace.

**-CLEAN STATE INITIATIVE:** Some of the worst and oldest environmental violations in the Commonwealth are by state agencies. Not only are these problems important in themselves, but they also threaten to undermine the credibility of the Commonwealth's enforcement efforts against others. Relying on his independent statutory powers to protect the environment, Attorney General Harshbarger initiated a dialogue with Governor Weld, seeking to ensure that the state's own environmental problems are addressed promptly. Extensive discussions resulted in Governor Weld's promulgation of an executive order designed to bring state agencies into compliance. Attorney General Harshbarger will monitor implementation of the executive order and take additional steps, where appropriate.

**-PROTECTING THE URBAN ENVIRONMENT:** Environmental problems have a disproportionate impact on urban dwellers, people of lower income and people of color. Such residents should not be forced to bear the burden of less than adequate environmental protection simply because they do not possess the same "political clout" as others. Consistent with the general commitment of the office to make urban problems a top priority, the office is firmly committed to seeing that environmental degradation in our urban communities is treated for what it is: urban violence. As the office as a whole continues to fight the traditional forms of violence that face urban communities, we will also target environmental hazards that are assaults on the lives of our urban citizens. We have already put an increased emphasis on environmental

enforcement in urban areas, and we will continue to work with local officials and other community leaders to look for new approaches. For example, in late 1991, the Attorney General convened a statewide task force to try to achieve a consensus on the critically important and difficult issues involving the poisoning of children caused by lead paint and other sources of lead. The Lead Poisoning Task Force issued a report in 1992 proposing legislative and regulatory changes to further poisoning prevention and increased lead abatement, and it is currently working on education and outreach programs. In conjunction with the work of the task force, the office has brought several enforcement actions against lead removal contractors and landlords, including a prosecution against a Wakefield apartment house owner who was criminally convicted of improper lead removal activities, and a criminal indictment against a lead paint removal contractor in Brockton.

## **B. STRENGTHENING OUR ENFORCEMENT LAWS**

Attorney General Harshbarger has drafted, submitted and is actively supporting several bills that would dramatically increase effective environmental law enforcement in the Commonwealth.

**-ENVIRONMENTAL TRUST FUND AND FORFEITURE ACT:** Modelled after the highly effective Massachusetts drug asset forfeiture statute, the Environmental Trust Fund and Forfeiture Act would greatly enhance the tools available to environmental law enforcement by:

- \* Giving courts the authority to order forfeiture of assets used in, and proceeds derived from the commission of environmental crimes. This authority both heightens the deterrence of such crimes and increases the ability of law enforcement to respond to ongoing environmental threats. Forfeiture would occur only where a prosecution has resulted in a criminal conviction, and the bill contains safeguards for innocent property owners.
- \* Directing civil and criminal environmental fines and penalties, and forfeiture proceeds, to state and local law enforcement agencies involved in the investigation and prosecution of environmental crimes.

Forfeiture of assets illegally obtained by criminally violating the environmental laws of the Commonwealth would also level the playing field for those businesses that abide by those laws.

**-ENVIRONMENTAL ENDANGERMENT ACT:** The Environmental Endangerment Act would allow for felony prosecution against those offenders who knowingly or recklessly cause a substantial risk of serious physical injury to another person, or substantial risk of damage to natural resources or private property. Felony prosecution would greatly enhance the fines levied and the jail sentences imposed. The bill also would give courts the authority to order organizations convicted of environmental crimes to conduct environmental audits designed to prevent recurrence of illegal polluting activities. The bill would serve as a strict deterrent to the most egregious forms of environmental crime.

**-CONSCIENTIOUS EMPLOYEE PROTECTION ACT:** Commonly known as the "whistleblower protection bill," this act would protect those employees who cooperate with law enforcement and other authorities in the investigation of job-related legal violations. The Act provides such employees with a private right of action to remedy retaliation suffered on the job as a result of their cooperation. The Act also permits the Attorney General to bring civil enforcement actions to redress and penalize such retaliatory activities. The Attorney General has found that environmental violations frequently occur in the context of ongoing business activities, and that employees concerned and knowledgeable about such violations are apprehensive that cooperation with law enforcement will result in loss of livelihood. This bill would go a long way in protecting such conscientious employees and, therefore, in bringing environmental violations to light.

### **C. INCREASED OUTREACH TO THE ENVIRONMENTAL COMMUNITY**

**-STATEWIDE TRAINING SESSIONS:** The Attorney General has spearheaded an environmental protection effort to provide statewide training to local police, fire and regulatory authorities on environmental enforcement.

**-ENVIRONMENTAL TASK FORCE:** At the beginning of 1991, Attorney General Harshbarger directed his environmental staff to undertake a major priority setting project. This included internal "brainstorming," as well as numerous meetings with agency officials, public interest groups and representatives of industry. Through the creation of an Environmental Task Force to advise the office on our goals and actions, these outreach efforts continue.

**-MACC PROJECT:** In 1992, the office and the Massachusetts Association of Conservation Commissions set up a process for significant wetlands violations to be referred and evaluated for possible state enforcement action.

**-TAKINGS PROJECT:** In 1992, the U.S. Supreme Court issued its opinion in Lucas v. South Carolina Coastal Council. Many environmentalists became concerned that the changes in the law of "regulatory takings" wrought by the case would have the effect of gutting important environmental programs, especially those protecting wetlands. The legal import of the case is actually quite narrow. Through speeches, continuing education panels and articles, the office has been involved in a major outreach effort to correct any misperceptions about what the case said and did not say. The office has also offered to consult with municipal counsel who face similar issues.

#### **D. POLLUTION REDUCTION FIRST**

**-INTEGRATING SOURCE REDUCTION INTO ENFORCEMENT:** The office has put a new emphasis on the reduction of pollutants at their source, as opposed to so-called "end of the pipe" solutions. To the extent possible, we have tried to integrate this principle into our enforcement work. As demonstrated by examples discussed below, we have initiated some "first-of-their-kind" settlements, under which companies have agreed to reduce their use of toxics beyond what is otherwise required by law.

**-MODEL UNDERGROUND STORAGE TANK PROJECT:** Many of our worst contamination problems are caused by leaking underground storage tanks. In order to stop such problems before they start, the office in 1992 embarked on a model project to enforce the state fire regulations regarding monitoring and testing of underground storage tanks. This project, initiated on Cape Cod, with the close cooperation of the local fire chiefs and the Barnstable County Department of Health, resulted in all 33 contacted parties immediately taking steps to test their tanks or to remove them completely. We are now considering applying this model to other parts of the Commonwealth.

## **E. NEW FOCUS ON ENERGY ISSUES**

In the past, the office has put huge resources into nuclear power issues. The hazards posed by nuclear power are significant, and the office is still involved in many nuclear-related issues. There has been a major new emphasis, however, on the environmental hazards posed by non-nuclear facilities, which contribute approximately 40 percent of all air pollution. The office's current focus on energy issues includes:

**-OPPOSING UNNECESSARY ENERGY FACILITIES:** The office has taken a very active role in opposing the siting of three coal-fired power plants in Halfmoon, New York; New Bedford; and Taunton. Our opposition is based on the grounds that the energy is not needed and that cleaner alternatives such as conservation and natural gas are available.

**-MAJOR SJC VICTORY:** In a case involving one of the three power plants mentioned above, the office won a major victory in the Supreme Judicial Court. The Court accepted our argument that the state siting agency violated applicable law by failing to give adequate consideration to the full range of energy alternatives, by failing to perform the proper balancing of statutory goals, and by failing to state adequate grounds for its decision.

**-ENVIRONMENTAL EXTERNALITIES:** The office has been actively involved in seeking to ensure that the true costs of energy production and the burning of fossil fuels will be reflected in the process through which utilities purchase and sell their power. In 1992, the office won a major victory when the state Department of Public Utilities issued its decision setting "environmental externalities" for various air pollutants. We are now defending that decision in an appeal before the Supreme Judicial Court.

### **-NUCLEAR SAFETY ISSUES:**

In 1992, we submitted comments to the Nuclear Regulatory Commission, opposing proposed regulations that would allow for a generic environmental impact statement for the relicensing of nuclear power plants across the country. The office also continues to monitor the operations of nuclear plants in and near Massachusetts, and is monitoring the decommissioning of the Yankee Atomic plant in Rowe.

### **-DAM RELICENSING:**

The office has recently intervened in federal relicensing proceedings regarding three hydroelectric dams on the Deerfield and Westfield Rivers. We are not opposing the dams, but are seeking to ensure that appropriate conditions are put on the relicensing so that the environment and recreational opportunities are adequately protected.

## **F. IMPROVED INFRASTRUCTURE**

Consistent with the overall emphasis on running a highly professional law office, the Environmental Protection Division has sought ways to increase its efficiency and otherwise improve its performance. Projects it has undertaken in this regard include:

**-TRAINING AND SUPERVISION:** The environmental staff is encouraged to take advantage of training opportunities both within and outside the office, and EPD holds "brown bag" seminars on environmental litigation topics at least once a month. Additionally, a system of regular supervision has been formalized.

**-STATE-FEDERAL MEMORANDUM OF UNDERSTANDING:** In cases that involve contaminated sites on the federal "National Priority List," Massachusetts and the federal government work closely together to try to ensure that the contamination is abated and that the parties responsible for the contamination pay for any public costs incurred. Because there is no general agreement between states and the federal government about how such prosecutions will be handled, however, too often, public resources are wasted in attempting to resolve, on a case-by-case basis, contested issues between the governments. The office is leading an effort joined by most of the other New England states to negotiate a memorandum of understanding between the state and federal governments to change this situation by resolving any differences on a generic basis. In this manner, the governments can then redirect our valuable resources toward tackling the real problems.

**-BANKRUPTCY PROJECT:** As the number of bankruptcy filings increases, so does the number of bankruptcy cases involving state environmental claims. In an effort to improve and streamline our environmental bankruptcy practice, EPD, with the assistance of lawyers from other parts of the office, has developed guidelines for state handling of environmental bankruptcy matters.



**Who Handles Environmental Issues in the  
Attorney General's Office?**

**A. Public Protection Bureau/Environmental Protection**  
**Division**

The Environmental Protection Division (EPD) is one of the largest divisions within the office's Public Protection Bureau. It is made up of eighteen assistant attorneys general, six paralegals, and six support staff. EPD serves as litigation counsel on environmental issues for state agencies, particularly those within the Executive Office of Environmental Affairs. The division handles all of the Commonwealth's civil litigation to enforce the environmental protection programs established by state law, as well as all suits brought by the Commonwealth to cleanup contaminated sites. EPD also handles most of the defensive litigation where actions of state environmental officials are challenged. In addition, based on the Attorney General's broad authority to protect the environment of the Commonwealth, the division initiates and intervenes in other state and federal proceedings on significant environmental issues, such as those involving the siting of energy facilities. While the Attorney General is the courtroom lawyer for the Commonwealth agencies, he is also an independently elected constitutional officer who has been separately charged, by statute, with protecting the environment.

**B. Public Protection Bureau/Regulated Industries Division**

Together with EPD, the Regulated Industries Division works on environmental energy issues.

**C. Public Protection Bureau/Consumer Protection Division**

Together with EPD, the Consumer Protection Division works on environmental advertising issues.

**D. Government Bureau:**

Together with EPD, the Government Bureau handles defensive environmental litigation.

**E. Criminal Bureau:**

Four assistant attorneys general in the Criminal Bureau spend all of their time prosecuting criminal violations of the state's environmental laws. This represents more than a doubling of resources from the prior administration. These criminal prosecutors serve as a component of the state Environmental Strike Force (see below), working closely with state and environmental police officers assigned to the Office of the Attorney General and with Strike Force personnel at the Department of Environmental Protection (DEP).

**F. Environmental Strike Force**

The Environmental Strike Force is overseen by Attorney General Harshbarger and Environmental Affairs Secretary Trudy Coxe. The Strike Force is an interagency body designed to combine and strengthen the enforcement capability of existing agencies for the purpose of

identifying and prosecuting high priority environmental offenses. Serving on the Strike Force are criminal and civil prosecutors from the Office of the Attorney General, environmental police officers, state police officers and technical staff from DEP. The daily operations of the Strike Force are overseen by a Chief, who is one of the assistant attorneys general in the Criminal Bureau, and by a Director at DEP.

The investigative muscle of the Strike Force has resulted in many of the prosecutions listed below. Most of the other cases were referred to the office by DEP, by the Massachusetts Water Resources Authority or by other state agencies. These agencies provided valuable technical support and deserve much of the credit for any successes achieved.

## **Environmental Enforcement by the Attorney General**

A. THE ENFORCEMENT PHILOSOPHY  
OF THE OFFICE OF THE ATTORNEY GENERAL

The most important role that the Office of the Attorney General has in the environmental area is to enforce the state's many environmental laws. These laws govern air pollution, water pollution, wetlands protection, solid and hazardous waste, fish and wildlife, toxic use reduction, water supply, pesticides, waterways and billboards. Such enforcement can be achieved through both civil and criminal prosecutions.

Criminal prosecutions provide the most potent weapon in the enforcement arsenal, bringing the threat of jail time and the moral stigma of being labelled a criminal. Such prosecutions are appropriately reserved for violations that are particularly egregious in terms of either the knowing or reckless nature of the violation or the extent to which the public or the environment was placed at risk.

The enforcement philosophy of the office can best be described by the expression "tough but fair." Environmental violations are not "victimless," and enforcement needs to be tough in order to deter such conduct. Fines and penalties must be high enough so that environmental violations are seen as more than a cost of doing business. Tough enforcement is also important because it "levels the playing field" for business. The majority of our businesses comply with environmental

laws and should not suffer a competitive disadvantage to those who flout them. In order to be legitimate, however, enforcement must also be fair and balanced. This means that similar violations are treated with similar sanctions, and that when aggravating or mitigating circumstances are presented, they should be taken into account. The office is currently reviewing our penalty mitigation policies to try to ensure that companies that go out of their way to try to comply with the law are treated appropriately.

## **B. THE RECORD: ENVIRONMENTAL ENFORCEMENT CASES**

### **1. AIR POLLUTION:**

#### **CIVIL CASES**

##### **Commonwealth v. Teknor Apex**

This case, which involved a factory in Attleboro, was originally referred to the office for alleged violations of the state's Clean Air Act. After the case was referred, we took a multi-media approach that examined all environmental compliance issues uncovered at the plant. A consent judgment was entered into in August of 1992 that required the company to pay an \$850,000 penalty and to make an investment of over \$2 million in environmental improvements, including the installation of water and air pollution equipment. The judgment also required the company to bring itself into compliance with state permitting requirements, to do an assessment of potential contamination at the plant and to reduce the use of toxics in its manufacturing processes.

##### **Commonwealth v. Consolidated Rail Corp. (Conrail)**

This hotly litigated case is the first in the nation to challenge the freight rail industry's practice of continuously idling its diesel locomotives. Unnecessary locomotive idling causes significant amounts of air pollution and creates severe nuisance problems for those living near train yards. We recently entered into a partial settlement in the case under which Conrail agreed to curtail unnecessary idling in warm weather completely, and agreed to reduce its idling in cold weather. As part of the settlement, Conrail also agreed to test some innovative technology that could provide an alternative to winter idling. Other issues, including the railroad's claim that federal law preempts the case and the Commonwealth's request for additional relief, are still pending.



#### Commonwealth v. Findley

This air pollution case involved a defendant in bankruptcy. In January 1993, the bankruptcy court approved our settlement with the company that requires payment of a \$100,000 penalty out of the bankrupt estate. The company is bringing its emissions of certain toxic pollutants into compliance with the Clean Air Act.

#### Commonwealth v. Brewer Petroleum

This case involved the alleged failure of an employee of a gasoline distributor to comply with state regulations that mandate the use of "vapor recovery equipment" when gasoline is transferred from a tank truck to tanks at service stations. In February of 1993, we obtained a consent judgment that enjoined further violations of the regulations and that required the defendants to pay \$40,000 in civil penalties. The settlement is also noteworthy in that it required defendants to publish an "open letter" to the gasoline distributor industry notifying it of the terms of the settlement and urging compliance.

#### Commonwealth v. Marathon

In February of 1993, we filed suit against a service station operator who failed to install vapor recovery systems mandated by state regulation. The case is pending. Together with Brewer Petroleum, as well as other matters that are pending, the Marathon case demonstrates the office's commitment to strictly enforce DEP's vapor recovery regulations, which are a critical component of the Commonwealth's strategy to clean up its air.

#### Commonwealth v. Bay State Smelting

The Division filed this case in the end of 1991 against Bay State Smelting, located in Somerville. In March of 1992, the office obtained a permanent injunction prohibiting the illegal operation of smelting equipment and an incinerator, and requiring compliance with state hazardous waste, water pollution and air pollution laws. Cleanup of the plant is nearly completed, although other aspects of the case are still pending.

#### Commonwealth v. Lynn Water and Sewer Commission

Through a consent judgment, the office obtained an injunction prohibiting the illegal burning of municipal sludge. The settlement also required Lynn to pay a penalty of \$20,000.

## Suits Against EPA For Failing to Comply With Its Duties Under the Clean Air Act

The United States Environmental Protection Agency (EPA) plays a critical role in the administration of the federal Clean Air Act, for example, through setting national ambient air quality standards. In several recent cases, the Commonwealth brought suit against EPA for violations of its duties under the act. Joining the Commonwealth as plaintiffs in the cases were several other states and various public interest groups. Two of the cases were settled through consent decrees that required the EPA to perform its duties within a designated period of time. The third became moot when EPA promptly complied.

### **2. WATER POLLUTION:**

#### **CRIMINAL PROSECUTIONS**

- \* Illegal disposal of waste related to the dumping of human waste directly into the Chicopee River by owner and building manager of an office park (\$5,000 and \$2,500 fines, respectively, for each defendant). Industrial park's sewage treatment system broke down, and rather than pay to repair system, defendants pumped raw sewage from sewer line to storm drain discharging directly to the River.
- \* Illegal discharge of raw sewage into a City of Worcester storm drain, resulting in a violation of the Clean Waters Act (case brought jointly with Worcester County District Attorney's office -- \$3,175 in fines and \$1,500 in cleanup costs). Defendant septage hauler pumped septage out of apartment building basement and discharged to storm drain rather than taking it to treatment facility.
- \* Illegal discharge of asbestos-laden water into the Charles River (case brought jointly with U.S. Attorney's office -- four-month federal sentence, \$125,000 fine).

## **CIVIL CASES**

### Commonwealth v. Interstate Brake

In February of 1992, the office obtained a consent judgment requiring Interstate Brake of Worcester to reduce the use of toxic materials in its brake relining operations and to cease the discharge of hazardous materials to Worcester's sewer system. This case illustrates the office's emphasis on reducing the use of toxics wherever possible. The judgment also required the company to pay a penalty of \$100,000.

### Commonwealth v. New England Power Company

This case arises from New England Power's alleged use of an inadequate chlorination system at its Brayton Point facility, and a resulting fish kill. In July of 1992, the office obtained a consent judgment that required payment of \$500,000, including \$315,000 in penalties, \$100,000 in environmental damages, \$75,000 to the Atlantic States Marine Fisheries Commission for a striped bass management plan, and \$10,000 toward an environmental education project. As part of the office's commitment to reducing the use of toxics wherever possible, the settlement also required the company to switch to "targeted chlorination," to reduce substantially the use of chlorine.

### Commonwealth v. Leahy Construction Company

This case involved the illegal disposal of "septage" in Holden. Septage is the concentrated waste product that is produced by pumping out septic tanks. The case was settled in July 1992, through a consent judgment that required the payment of a \$100,000 penalty, plus \$30,000 for an education project about the hazards of septage and \$5,000 to the Holden Conservation Commission.

### Commonwealth v. Amesbury Circuit

In May of 1992, the office brought suit against an Amesbury manufacturer for allegedly discharging pollutants into the sewer system in violation of applicable law. The case was resolved through a consent judgment that required the company to pay a \$105,000 penalty and to install wastewater treatment/recycling equipment.

### Commonwealth v. Forrow Builders, Inc.

This case involves the Paul Revere condominium development in Millbury, which was constructed with inadequate septic systems. EPD sought far-reaching relief, including a freeze on assets and the voiding of fraudulent conveyances, against developers who have no continuing interest in the project. In July of 1992, the court granted a preliminary injunction requiring the developers to pump out septic systems at the site and freezing their assets while the lawsuit was resolved.

### MWRA cases

In late 1991, the office began a new enforcement project with the Massachusetts Water Resources Authority (MWRA). For the first time, the office initiated litigation on behalf of the MWRA to enforce violations of the MWRA's regulations governing the discharge of contaminants into the sewer system. This project has resulted in four consent judgments requiring compliance with MWRA regulations and requiring the payment of a total of \$515,000 in penalties. The cases involved H.B. Fuller Corp. in Wilmington, Regalite Plastics Corporation in Newton, Lapuck Laboratories in Watertown, and Laser Photonics in Bedford.

### Commonwealth v. Secretary of Defense

This is another case that grew out of the office's new relationship with the MWRA. In May of 1992, the office brought suit against the federal government regarding the Army research laboratories in Natick. We sued the Army for allegedly discharging mercury and other pollutants into the MWRA sewer system, in violation of the federal Clean Water Act. The suit, which is still pending, also alleges that the Army violated state and federal law involving the discharge of millions of gallons of heated water into Lake Cochituate.

### Municipal wastewater treatment cases

An important part of the office's work is to ensure that the municipalities of the Commonwealth adequately dispose of the sewage generated by their residents. In the last two years, the office has entered into a consent judgment requiring the Town of Plymouth to construct a new sewage treatment plant. Together with the federal

government, the office has also taken various actions to ensure that the City of New Bedford complies with a consent decree previously entered. Also in close cooperation with the federal government, the office obtained a consent decree requiring the City of Gloucester to eliminate illegal discharges of raw sewage in North Gloucester by extending its sewer system to this area. Recently, Gloucester and the Commonwealth agreed to modify the decree to allow the city to attempt to demonstrate that innovative subsurface disposal systems may be used in a portion of North Gloucester as an alternative to extending the sewer system.

#### Municipal septage cases

A major environmental problem in the Commonwealth has been the use of unlined lagoons that many towns have been using for the disposal of septage. In late 1991, the Office of the Attorney General and DEP initiated an ambitious project to close down all such lagoons across the Commonwealth. In February of 1992, the Commonwealth filed suit against the town of Lakeville and obtained a consent decree requiring the town to stop operating the 15 unlined lagoons in which it was permitting the disposal of septage. We then informed town counsel of the remaining towns with illegal septage lagoons that DEP would attempt to negotiate closure schedules with the towns, but that we would bring suit, if administrative approaches were unsuccessful. Truro's, Wellfleet's and Provincetown's lagoons have all since been closed. Enforcement against those municipalities who have not yet complied is ongoing.

### **3. SOLID & HAZARDOUS WASTE:**

#### **CRIMINAL PROSECUTIONS**

- \* Illegal burning of hazardous wastes without a proper license arising from use of a boiler to burn rags that had been used to clean up flammable and toxic chemicals (\$50,000 fine, \$200,000 payment to the Environmental Challenge Fund). Employee of defendant corporation died in connection with fire caused by unlicensed rag burning practice.

- \* Brimfield man and companies convicted on charges of operating waste tire dump. Defendants amassed over 10 million tires, creating threat of fire, air and water pollution, and mosquito breeding grounds. Defendants repeatedly solicited and accepted tires after DEP ordered that tire dumping stop. President sentenced to House of Correction; sentence stayed until September, 1993, and defendant ordered to take steps to reduce risk of fire and prohibited from taking additional tires.
- \* Company, company president and employee indicted on several charges of violating Massachusetts hazardous waste storage and transfer laws, including storage in a manner endangering human health and transfer to unlicensed transporter. A fourth defendant, a company in New Bedford, found guilty on four charges and fined \$400,000. Three co-defendants' cases still pending.
- \* Three men indicted on charges of operating a widespread illegal tire dumping scam in six cities and towns. Citizen complaints included allegations that defendants set up fake tire recycling companies, dumping tires in warehouses and truck trailers which defendants rented. Defendants allegedly failed to pay rents and abandoned the warehouses and trailers full of tires. Case pending.
- \* Illegal transportation and dumping of hazardous waste in a residential area of Fall River (\$15,000 fine, \$6,500 restitution for cleanup, probation and community service imposed). Defendant corporation hired unlicensed individual who disposed of some 15 drums of hazardous wastes by driving them to a vacant lot in a residential area, where he punctured the drums (permitting the wastes to escape) and ran.
- \* Illegal transportation and disposal of hazardous waste in Worcester related to the abandonment and leaking of a truck trailer loaded with waste oil, gasoline and other hazardous wastes (time in the House of Correction, probation and forfeiture of vehicles used for transportation of waste). Having performed illegal disposal at commercial site, trucker hid leaking drums beneath soil in trailer, and transported them to a residential road. After being ordered to hire a licensed contractor to clean up leaking waste, defendant surreptitiously removed truck, which was later found after police search.

- \* Illegal disposal of hazardous wastes (lacquer thinner) in Worcester by the owner of a Worcester auto body shop (time in the House of Correction, probation, \$2,100 restitution for cleanup). Seven drums, one of which was leaking, were abandoned by the side of the road near a residential area.
- \* Illegal operation of asbestos waste transfer station (\$10,000 fine, probation). After being ordered to close one illegal transfer station, corporation and its president established another in an isolated rural area, where asbestos waste was transferred between trucks. Employees were untrained and unequipped to handle asbestos, some of which was released during the transfer operations.
- \* Man indicted for one count of illegal handling of solid waste, three counts of violating state air pollution laws and one count of operating an unlicensed asbestos business. Defendant allegedly removed asbestos from a Dorchester home and used parking lot of a neighboring day care center to store improperly containerized asbestos. Case pending.
- \* Illegal dumping of waste oil near a residential area in Foxborough (probation, \$500 fine). Waste oil was transported to and dumped at a site under development for low-income housing.
- \* Illegal removal of asbestos from apartment building (defendant pled to sufficient facts). Landlord had unlicensed and untrained handyman remove asbestos from apartment building basement, resulting in gross contamination of tenants' property.

## **CIVIL CASES**

### Commonwealth v. City of Lowell

In June of 1992, the office entered into a consent judgment requiring the City of Lowell to close and cap what DEP had deemed the worst municipal landfill in the state.

Commonwealth v. Hyde Park Landfill, Inc.

In a suit filed in April of 1992, the office obtained a preliminary injunction that enjoined operation of this unpermitted landfill and that froze the assets of its owners and operators. The case is pending.

Commonwealth v. General Electric

In this case, the Commonwealth alleged that General Electric had illegally disposed of photochemical waste down a sink. Photochemical waste is a hazardous waste under state law. The case was resolved by a consent judgment that required GE to pay \$250,000 in penalties. The judgment also required GE to pay an additional \$75,000 to be used for a novel educational program to teach other generators of photochemical waste about the hazards of this waste, how to reduce the amount generated and how to dispose of the remainder properly.

Commonwealth v. Rubchinuk

This case involves an illegal solid waste dump in Middleton that the operators have refused to close and cap. The office had the operators thrown in jail on a civil contempt charge. We finally consented to have them released when they agreed to cooperate with a receiver appointed by the court to close the landfill. Monitoring and enforcement continues.

Commonwealth v. Patriot/Prolerized of New England

This case involved alleged violations of the state's hazardous waste laws regarding the handling and disposal of ground auto bodies. The case was resolved through a consent judgment that required the payment of \$125,000 in civil penalties.

Commonwealth v. Duro Industries

In this case, the Commonwealth alleged that the defendant violated state water pollution and hazardous materials laws by pumping the contents of a disused storage tank (containing water mixed with residual chemicals) into the sewer system. The case was settled for a \$40,000 penalty.

Commonwealth v. Tresca Brothers

In a suit brought in 1992, the Commonwealth alleges that a sand and gravel operation disposed of oil contaminated wastes at its site in Millis in violation of state hazardous waste laws. The case also includes



allegations of air, water and wetlands violations, illustrating the office's multi-media perspective on environmental enforcement.

#### **4. WETLANDS PROTECTION:**

##### **CRIMINAL PROSECUTIONS**

- \* Illegal alteration of a wetland (30 days suspended sentence and \$42,000 fine). Developer repeatedly used chainsaws and bulldozer to clearcut and dredge wetlands, in contravention of earlier government orders and without complying with the Wetlands Protection Act.

##### **CIVIL CASES**

###### **Commonwealth v. Urkiel**

This case, alleging illegal filling and alteration of wetlands in Deerfield, was filed in February, 1992. A preliminary injunction to enjoin further alteration and an attachment for \$100,000 (to secure penalties) were issued by the Court. The case is pending.

###### **Commonwealth v. Van Wyck**

This case was settled through a consent judgment that required the restoration of damaged wetlands in Essex. The settlement also required the payment of \$75,000 in civil penalties, if the injunctive relief required was not performed in compliance with the court judgment.

###### **Commonwealth v. Scannell**

We obtained a preliminary injunction in June of 1992 prohibiting the unauthorized opening of "great ponds" on Nantucket, a practice that involves digging of trenches between the ponds and the ocean. The defendant had repeatedly engaged in this practice, with attendant destruction of enormous areas of wetlands and habitat. The Court granted our motion for summary judgment in December of 1992, and in March of 1993 issued a permanent injunction barring such action unless all necessary approvals are first obtained.

###### **Commonwealth v. Holm**

In September of 1992, the office obtained a preliminary injunction barring the defendant from altering wetlands in Gardner. In March of 1993, we filed a Contempt Complaint alleging violations of the Court's preliminary injunction.

### Commonwealth v. Dicroce

In March of 1993, the office obtained a court ruling that the defendant had illegally altered several acres of wetlands in Raynham. Defendant had argued that the work was exempt from the need to obtain state approval. An assessment of penalties and a final determination of the nature of the injunctive relief necessary to restore the wetlands is pending.

### **OTHER MATTERS**

#### Comments On the Federal Definition of "Wetlands"

In 1992, the Attorney General and former Environmental Affairs Secretary Susan Tierney submitted joint comments in opposition to a proposal by the Bush Administration to redefine what constitutes a "wetland" under federal law. The proposal, which would have removed huge amounts of land currently considered "wetlands" from federal protection, was subsequently dropped.

### **5. PESTICIDE:**

#### **CRIMINAL PROSECUTIONS**

- \* Illegal application of pesticides by West Springfield exterminator (\$2,700 fine). Sole proprietor of exterminating company repeatedly denied to Food and Agriculture inspectors that he was still in operation, all the while operating outside the regulatory system, unlicensed and without insurance.

#### **CIVIL CASES**

#### Commonwealth v. Baptiste

This case involved an alleged misuse of pesticides in a cranberry bog that resulted in a fish kill. A consent judgment was entered in August of 1992, that prohibited the use of any pesticides until a water management plan is in place and that imposed a \$30,000 penalty.

#### Commonwealth v. Orkin Exterminating

In another case in which the office alleged that pesticides were misapplied, we obtained a consent judgment that required payment of \$23,600 in civil penalties.

#### Commonwealth v. Central New England Chemical Co.

The Commonwealth, in July of 1991, obtained a court order requiring payment of a \$150,000 civil penalty in a suit against a pesticide application company for allegedly hiring unlicensed applicators on a repeated basis. The case, and the two cases that follow, were handled by a Food and Agriculture attorney under the direction of the Attorney General's office.

#### Commonwealth v. Terminix International Co. Ltd.

This is another suit against a pesticide application company for allegedly hiring unlicensed applicators on a repeated basis. Suit was filed in December of 1992, and the case is pending.

#### Commonwealth v. Lazarus Chemical

In April of 1992, the Commonwealth obtained a consent judgment requiring the payment of a \$7,500 penalty, in a case alleging misuse of a pesticide.

### **6. FISH & WILDLIFE:**

#### **CRIMINAL PROSECUTIONS**

- \* Two men convicted on charges of illegal harvesting of shellfish in contaminated area of Taunton River in Somerset at night. Boat was observed with lights off; defendants were arrested while trying to flee. Each sentenced to two-and-one-half to three years in state prison.
- \* Six South Dartmouth men convicted of illegal harvesting of shellfish in contaminated area of New Bedford Harbor at night. One defendant had been area shellfish warden. Fines ranged from \$1,000 to \$2,500.

**7. LEAD PAINT:**

**CRIMINAL PROSECUTIONS**

- \* Illegal removal of lead paint from apartment unit in Wakefield (\$1,000 fine). Defendant landlord entered apartment while tenants were away and performed illegal and improper deleading, grossly contaminating tenants' property, including the contents of children's room.

**8. ILLEGAL BILLBOARDS:**

**CIVIL CASES**

In re: Ackerley Communications

This case involved a dispute over unlicensed billboards in Roxbury, Dorchester and other urban neighborhoods. In March of 1992, the defendant agreed to remove 96 billboards and to pay \$46,870 in back permit fees to the Outdoor Advertising Board.

## **Cleaning Up Contaminated Sites Across The Commonwealth**

The office spends considerable resources on suits to remedy contamination caused by oil or hazardous materials, including litigation to recover costs incurred by the Commonwealth when it takes cleanup actions. As part of this effort, we are putting new emphasis on not only seeing contaminated sites cleaned up, but also on seeing that the Commonwealth recovers damages for any injury to its natural resources. Our office is committed to the principle that the costs of cleanup and any damages to natural resources should be borne by those who caused the contamination or who are otherwise responsible, and not by the taxpayer-at-large. Because economic realities, in conjunction with the federal bankruptcy laws, often test this principle, the office has recently been engaged in a major review of bankruptcy laws to try to ensure that we are best able to adhere to the "polluter should pay" principle to the extent possible.

In the last two years, cases handled by the office alone or together with the federal Department of Justice have resulted in dispositions requiring the payment of \$153 million in cleanup costs and natural resource damages. Major cases and projects that we have handled include the following:

### PCB Contamination in New Bedford Harbor

This case was brought to its full conclusion in 1992. Total recovery by the state and federal governments is approximately \$110 million. Most of this money will be used for the remediation and restoration of natural resources in New Bedford Harbor.

### Commonwealth v. Karam (a/k/a First Church)

This case involved the leaking of underground gasoline tanks from a gas station into a nearby church in Weymouth. The case was settled in 1993, with the Commonwealth to recover \$700,000 in cleanup costs incurred by DEP.

### McMahon v. Amoco

This case involved a leak from an underground gasoline storage tank that threatened to contaminate Provincetown's principal wellfield. Under a consent judgment filed in 1992, the Commonwealth will receive \$1.8 to \$1.9 million, and Provincetown approximately \$1.2 million, to reimburse them for costs incurred or to be incurred in abating the problem.

### Charles George Landfill

This case involves a heavily contaminated landfill in Tyngsborough. In December of 1992, the state and federal governments lodged a settlement with federal court that provides for over \$35 million in costs and damages, of which over \$12 million will go to the state. The case against the remaining defendants is still pending.

### Commonwealth v. Blackstone Valley Electric Co.

This case involves property in Attleboro that had been contaminated with cyanide wastes. In December of 1992, the Commonwealth won a federal court victory holding various defendants liable for cleanup costs incurred by DEP in responding to the contamination. Issues regarding the amount of liability are still pending.

### Sullivan's Ledge Site

This is a National Priorities List site in New Bedford. A consent decree requiring private parties to perform a multimillion dollar cleanup on a portion of the site was reached by the state and federal governments in 1991. In 1992, the governments entered into a similar settlement for the remaining portion.

#### Commonwealth v. Atlas Tack

The Commonwealth recovered \$825,000 in cleanup costs incurred in cleaning up a contaminated site in Fairhaven. We also obtained an additional \$50,000 in penalties.

#### In re: The Circle K Corporation

Under a settlement filed in bankruptcy court and still subject to the court's approval, the Commonwealth will receive approximately \$839,000 to be used toward the cleanup of various sites that were contaminated by gasoline leaking from underground storage tanks.

#### In Re: Microfab

In another case involving a bankruptcy, the Commonwealth reached a settlement with the trustee-in-bankruptcy that freed up \$400,000 to be used toward the cleanup of a site in Amesbury.

#### Commonwealth v. Texaco

The Commonwealth recovered \$575,000 in cleanup costs expended in cleaning up a site in Jamaica Plain caused by a leaking underground storage tank.

#### Massachusetts Military Reservation/Otis

This matter involves the enormous problem of the environmental contamination at the 22,000-acre Massachusetts Military Reservation (MMR) on Cape Cod. There are 52 acres of contamination at and around MMR that pose a serious threat to the water supply. Twenty-one existing municipal wells and several private ones are threatened. The U.S. Department of Defense, through its National Guard Bureau (NGB), has been designated under federal law as the lead agency to conduct the cleanup of the site. NGB, EPA and the U.S. Coast Guard (the current tenant at some contaminated portions of the site) executed a Federal Facilities Agreement (also known as an IAG, or Interagency Agreement) in July, 1991, which the Commonwealth did not sign. The IAG set up a partial timetable for cleanup.

NGB has failed to meet its goals in the first year under the IAG. The Commonwealth submitted comments on proposed modifications to the IAG to EPA and NGB in November, 1992. In these comments, the Commonwealth stated its concerns over the lack of a comprehensive and enforceable long-term plan for remediation at MMR and the



failure of NGB to meet the cleanup schedule, and suggested that the Commonwealth take a more active role in renegotiating the cleanup schedule.

Other forms of pollution at the site include air pollution from the burning of propellant bags. In large part through the efforts of this office, this practice has been stopped.

#### Asbestos Cost Recovery

The office oversees a suit seeking to recover the costs of abating asbestos problems involving various public buildings in the Commonwealth. In the last two years, these cases have resulted in the recovery of over \$3 million. The Division of Capital Planning and Operations and the Department of Education have also played a major role in this litigation.

#### OTHER MATTERS

##### Comments On Proposed Federal Regulations

Together with former Environmental Affairs Secretary Susan Tierney, the Attorney General submitted comments on draft regulations proposed by the federal government regarding natural resource damage assessments. In addition, the Attorney General has been monitoring and commenting on the development of regulations under the new federal Hazardous Materials Transportation Uniform Safety Act (HMTUSA), which may affect the way in which Massachusetts can regulate hazardous material and hazardous waste transporters operating within the Commonwealth.

##### State of Ohio v. EPA

This is a challenge by several states to EPA's interpretation of its statutory authority and duties under the federal Superfund law. Massachusetts led a 13-state amicus effort in support of the plaintiffs. The case asserts the states' position that Congress intended to give them a larger role in cleanup decisions involving sites within their borders and that Congress did not intend to require states to fund 100 percent of long-term operation and maintenance costs. The case is pending.

## **Defensive Cases**

One of the most important functions served by the office is the defense of lawsuits challenging the regulatory and enforcement actions of state environmental agencies and officials. These cases range from scores of small administrative appeals that challenge state permit decisions to larger "impact cases" involving, for example, wholesale challenges to state environmental regulations. Recent examples include the following.

Acme Laundry v. DEOE

In this case, the owners of contaminated property challenged the state's ability to place a "superlien" on the property to help ensure that cleanup would be completed. A decision issued by the Massachusetts Supreme Judicial Court in 1991 upheld the state action.

Massachusetts Marine Trades Ass'n v. DEP

Various parties brought suit seeking to overturn the state's regulations affecting tidelands. These regulations, promulgated by DEP in 1990, serve to protect the public's interest in land along the coast that is currently under water or subject to tidal flow, as well as such lands that had been previously filled, by establishing a comprehensive set of requirements affecting development in those areas. In 1993, the state Appeals Court affirmed a lower court ruling dismissing the suit for failing to frame the challenge by appropriate factual circumstances.

Challenges to State Low Emission Vehicle Regulations

Massachusetts, Maine and New York have all adopted the "low emission vehicle" program, first adopted in California, that sets standards for automobile emissions that are stricter than those set by the federal government. In 1992, the automakers brought suit challenging New York's program. Our office led a six-state amicus effort in support of New York. We are now defending a direct challenge to the Massachusetts program.

Wilson v. Commonwealth

Property owners whose property was damaged by coastal erosion brought suit seeking compensation. They argued that the Commonwealth was responsible because state wetlands regulations prevented them from obtaining permission to erect certain erosion control measures. A contrary ruling would have greatly undermined the Commonwealth's ability to regulate land along the seashore. In 1992, the Supreme Judicial Court ruled that the property owners could not maintain such a suit, except to the extent that they could demonstrate that the state would have approved the measures they sought and did not do so because of unreasonable delay.

## **Environmental Advertising Fraud**

Environmental awareness has generated consumer demand for products that have a reduced impact on the environment. Unfortunately, some companies have attempted to take advantage of this development by making misleading or fraudulent statements about just how "green" their products are. Through EPD and the Consumer Protection Division, the office has been involved in a multi-state Environmental Marketing Task Force. This task force has issued two reports on "Recommendations for Responsible Environmental Advertising." The office has also joined with other states in three enforcement actions involving advertising that the states alleged to be misleading or fraudulent.

#### Chinet Disposable Tableware Settlement

In a settlement announced in March of 1993, Keyes Fibre Co. agreed to discontinue its claims that its "Chinet Disposable Tableware" was biodegradable, recycleable and compostable. The company also agreed to pay \$100,000.

#### General Electric Energy Choice Lightbulb Settlement

A settlement reached in November of 1992 prohibits General Electric from advertising its "Energy Choice" line of lightbulbs as saving energy, reducing pollution or otherwise benefitting the environment relative to other bulbs, until the company can substantiate such claims with competent scientific evidence. The settlement also required GE to pay \$165,000.

#### Ruffies Trashbag Settlement

A settlement reached in March of 1992 prohibits Carlisle Plastics, Inc. from claiming that products designed for disposal in landfills or incinerators are "degradable" and prohibits the company from claiming that they are "compostable," unless the product is specifically designed to break down when disposed of at composting facilities. The settlement also requires the company to pay \$45,000.