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PRIVATE ENFORCEMENT OF ENVIRONMENTAL LAW: AN ANALYSIS OF THE MASSACHUSETTS CITIZEN SUIT STATUTE

By Gregor I. McGregor❖

I. INTRODUCTION

Those who oppose vesting in the private citizen a power of law enforcement to protect the environment may argue that such a citizen-right-of-action will flood the courts, harass industry, trade administrative discretion for judicial fiat, create patchwork standards for environmental quality, and require complex decisions from incompetent courts. They may also argue that a provision for citizen suit in Massachusetts is simply not needed.

Proponents may counter that the courts themselves control the floodgates, that environmentalists are entitled to their day in court, that a citizen-right-of-action does not displace but instead supplements agency enforcement, that pollution control is an area not conducive to predetermined codes and standards, and that courts are at their best when called upon to settle disputes of fundamental policy. They may further assert that society is in no position to refuse environmental enforcement assistance from whatever source.

Effective September 7, 1971, citizens and political subdivisions of Massachusetts possess a new cause of action against damage to the environment, a right to enforce state and local environmental law. On that day, Chapter 732 of the Acts of 1971 was enacted, made effective immediately by an emergency preamble.

It is, of course, impossible to foresee the specific environmental benefits which will accrue from the new statute. Nevertheless, it is appropriate at this time to examine the most important changes effected by the citizen suit statute and the tactical con-

siderations which will be of interest to those who sue or are sued thereunder. The parallel citizen-right-of-intervention will also be considered briefly. Where helpful, comparison will be made with the first citizen suit statute, enacted in Michigan (effective October 1, 1970) and with others enacted thereafter in Minnesota (approved June 7, 1971) and Indiana (effective September 2, 1971); comparison will also be made with parts of the federal Clean Air Amendments of 1970 (effective January 1, 1971). For convenience the new Massachusetts statute is printed as an appendix to this article and the other acts are cited here for reference: Act 127 P.A.1970, Mich. Comp. Ann. §§691—1201—1207, also found at 1 ELR 43001—43002; M.S.A. 116B.01—14, Ch. 952 of Minn. Session Laws; Indiana Public Law 182 (I.C. 13—6); federal Clean Air Act, 42 U.S.C. 1857 *et seq.*, as amended through 1970 by PL 91—604, which added sec. 304, found at 1 ELR 41224—41225.

II. THE CHANGES EFFECTED

A. *The General Provisions*

Chapter 732 of the Acts of 1971 amends Chapter 214 of the Massachusetts General Laws, dealing with equity jurisdiction and procedure, by inserting section 10A. That section gives to any ten persons domiciled in Massachusetts and to any political subdivision of the Commonwealth standing to sue in equity for declaratory or equitable remedies against damage, actual or probable, to the natural resources of Massachusetts. The right to sue is conditioned on the ground that the environmental damage which is caused or threatened be a violation of a statute, ordinance, by-law or regulation whose major purpose is to prevent or minimize such damage. Preliminary injunctive relief, including a temporary restraining order, may issue if irreparable damage will otherwise result.

No action under the statute may be commenced unless twenty-one days prior to such commencement written notice has been directed by certified mail to the Attorney General, the respondent, and the agency charged with enforcing any applicable statute, ordinance, by-law or regulation. An exception to this requirement of notice is provided where a temporary restraining order is justified. A defense is expressly available to any respondent who is in good faith compliance with an administrative pollution abatement schedule or implementation plan, if such a

schedule or plan has as its purpose the alleviation of the environmental damage complained of. An exception to such a defense arises when there is a danger to the public health and safety.

Successful petitioners may be permitted reimbursement for their costs, including reasonable fees for expert witnesses. Attorney's fees, however, are expressly precluded, as are damages generally. The court may require a surety or cash bond of petitioners in an amount not to exceed five hundred dollars in order to secure costs to the respondent should he prevail.

The statute provides that any citizen suit shall be advanced for speedy trial. None may be compromised without prior court approval. Finally, the cause of action is expressly made supplemental to all other common law or statutory rights and remedies.

B. *The Right of Action*

The Massachusetts citizen suit statute is expressly directed at "any destruction, damage, or impairment, actual or probable, to any of the natural resources of the commonwealth." Petitioners need not show causal harm to themselves or to any other persons by virtue of such environmental damage. No weighing of the commercial or other usefulness of natural resources is required. This destruction, damage or impairment of natural resources would *per se* be actionable except that the Legislature included an express proviso that the Superior Court have jurisdiction only over environmental damage which is violative of an environmental statute, ordinance, by-law, or regulation. Unlike those of Michigan, Minnesota and Indiana, the Massachusetts citizen suit statute authorizes private enforcement only of legislative enactments and administrative regulations. The statute expands in startling fashion the class of possible petitioners so as to include private citizens and political subdivisions, but the statute does not add any substantive protection for natural resources.

C. *Standing and Related Matters*

The Massachusetts statute has no requirement of damage to any petitioner or any other person. Standing is conferred upon any ten persons who are domiciled in Massachusetts. By comparison, Michigan, Minnesota, Indiana and the Clean Air Act confer standing on any one resident. As do the other states, Massachusetts confers standing also upon any political subdivision.

“Person” under the statute is left undefined, although earlier pieces of citizen suit legislation, from which St. 1971, c. 732 was derived, used the term broadly to include any group organized under Massachusetts law, any public authority or state or local agency, department, body or official, any association, partnership, corporation, company or business organization, the Commonwealth, any group of individuals, any joint stock company, trust, estate, public or quasi-public corporation or body, and any other legal entity or legal representative, agent or assign. See, variously, Senate No. 637, House No. 5023, House No. 5233, Senate No. 1415; see also Senate Nos. 749 and 800, and House Nos. 438, 1176, 1177, and 1576.

Since no definition of “person” was included in the citizen suit statute as enacted, a definition must be gleaned from other statutes and cases. Mass. G.L. c. 4, §7, provides that absent a contrary intent the word “person” in a statute shall include corporations, societies, associations, and partnerships. By its terms this definition is not exclusive, but the Massachusetts cases are singularly unhelpful in supplying information regarding what other entities fall under the rubric “persons.” By and large, the court decisions are limited to interpreting the word in narrow statutory circumstances. *E.g.*, *Attorney General v. City of Woburn*, 322 Mass. 634, 637 (1948) (sewers); *City of Somerville v. Commonwealth*, 313 Mass. 482, 486 (1943) (public relief); *China Clipper Ship Restaurant, Inc. v. Yue Joe*, 312 Mass. 540, 542 (1942) (trade regulation); *Mary Madden v. City of Springfield*, 131 Mass. 441, 442 (1881) (highways).

“Domicil” under the Massachusetts statute is, like “person,” left undefined. Although the law of domicil may differ for different purposes, such as voting and taxation, it would appear that the Massachusetts Legislature intended to apply the general rule of domicil to the citizen suit statute. According to Massachusetts common law,

“what the law means by domicil is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined.” *Bergner and Engel Brewing v. Dreyfus*, 172 Mass. 154, 157 (1898).

Chief Justice Rugg of the Supreme Judicial Court elaborated

upon the Massachusetts law of domicile as developed in cases subsequent to *Dreyfus*:

The ascertainment of the domicile of a person is mainly a question of fact. . . . General principles governing the nature, acquisition and change of domicile are settled. An exact and comprehensive definition of domicile is difficult. In general it is said to be the place of one's actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode. Every one must have a domicile somewhere. Every one has a domicile of origin. A domicile once established continues until a new one is acquired regardless of changes in temporary sojourn. Mere absences from home even for somewhat prolonged periods do not work a change of domicile. Intention without the concurrence of the fact of residence is not sufficient to change or to create domicile. Both must coexist. Aspiration, hope, desire or mere verbal assertion, although evidence of intention, cannot overcome the force of irrefutable facts. Cases arise in which there is a distinction between domicile and residence. A person may have a residence in one place for various reasons comparatively temporary in nature such as performing the duties of an office, transacting a business, seeking improvement in health, pursuing pleasure or visiting relatives, and yet have his permanent home or domicile in a different place. *Tuells v. Flint*, 283 Mass. 106, 109 (1933).

"Political subdivision of the commonwealth" under the Massachusetts citizen suit statute may be taken to mean at least a city, town, county or district of Massachusetts, but the phrase suffers from a dearth of statutory and judicial treatment. Such treatment as there is suggests that a "political subdivision" under Massachusetts law is any public unit of more or less geographical nature. *E.g.*, Mass. G.L. c. 32B, §2 (group insurance) and c.32, §1 (retirement systems); see also *Boston El.Ry.Co. v. Welch*, 25 F.Supp. 809, 810 (1939). It is important to note, in addition, that under the new citizen suit statute, any political subdivision has standing to sue alone, without the need to join with nine other petitioners. This right of enforcement in cities, towns, counties and other political subdivisions will do much to improve their position vis-a-vis polluters against whom the only remedies previously available were local ordinances and by-laws, common law nuisance, trespass and negligence, and certain limited statutory redresses. An example of such an improved position occurs with respect to the inland wetlands protection statute,

Mass. G.L. c. 131, §40, whereunder the rights of municipalities will no longer be restricted to securing access to development plans and making recommendations to the state Department of Natural Resources; the city or town may now enforce the wetlands statute itself. Similarly, municipal agencies, such as police and fire departments and boards of health, need no longer rely solely upon approval of the state Department of Public Health for authority to enforce state air pollution regulations (see Mass. G.L. c. 111, §142B); the city or town may now enforce air pollution statutes and regulations in its own right.

D. News for Polluters

Prospective respondents should recognize that liability is joint and several. This provision therefore alleviates a traditional difficulty which has confronted the petitioner suing a polluter whose discharge may have been small, not measurable with certainty, or not traceable to any but a collective of air or water polluters. Of note, however, is the express exclusion from the definition of "damages to the environment" of such destruction, damage or impairment as is "insignificant". The exclusion suggests that a requisite semblance of measurability, if not causal certainty, is retained.

Also of note is that one is subject to suit and to the equitable powers of the court not only for actual effects but also for merely "probable" destruction, damage or impairment of natural resources. While this may be understood to reach more than merely possible results, some further guidance is provided by *Cotters Case*, 333 Mass. 28, 31 (1955) where the Supreme Judicial Court asserted that "the lexical meaning of the word 'probably' is 'in all likelihood.'" One lexicon, *Black's Law Dictionary*, also suggests that what is probable has the appearance of truth or foundation in reason or experience, or has "more evidence for than against." *Black's*, Rev. 4th ed., West Pub. Co. (1968).

Lastly, but very importantly, it appears that the Commonwealth, its agencies and its political subdivisions may be immune from citizen suit under the Massachusetts statute. Although the term "respondent" in the initial paragraph is not further clarified, the court's jurisdiction and remedies in the second paragraph are limited to persons. Specific statutory exceptions can be found (*e.g.*, Administrative Procedure Act, Mass.

G.L.c.30A §1(4)), but under Massachusetts common law “[t]he word ‘person’ is not apt to describe a municipality.” *Howard v. City of Chicopee*, 299 Mass. 115, 121 (1937). As to other political subdivisions it should be noted that the Legislature indicated its intent to differentiate between persons and political subdivisions in establishing standing to sue under the citizen suit statute. Absent mention of political subdivisions in providing for liability to suit, it could be maintained that the Legislature chose to exclude political subdivisions as potential respondents. Absent inclusion of the Commonwealth as respondent, it could be maintained that there is no waiver of sovereign immunity. At least one bill has been filed to close these statutory gaps (House No. 4064 of 1971). Even if such a bill does not pass, at least one argument could help to close them: since the Legislature chose to provide for effective private enforcement of environmental law, the Legislature intended that the statute, ordinance, bylaw or regulation in question determine the scope of possible respondents.

E. The Standard for Preliminary Relief

Under the citizen suit statute the court having jurisdiction may prior to a trial on the merits restrain actual or threatened damage to the environment. The standard for such preliminary relief is left unspecified but for a showing of “irreparable damage,” which will justify the court’s waiving the twenty-one day notice requirement and issuing a temporary restraining order.

This standard of “irreparable damage” theoretically differs from the usual requisites for a temporary restraining order issued *ex parte*. Mass. G.L. c. 214, §9 declares that loss or damage must be not only irreparable but also “immediate.” Such disparity in standards may prove to have little practical effect, but it is interesting to observe that the requisite showing for a temporary restraining order is significantly eased if no proof of immediate environmental harm need be adduced. Proof of the irreparable nature of environmental insult would seem the lighter burden.

F. The Citizen Right of Intervention

Broad public access to state decision-making is provided by section 2 of the Massachusetts citizen suit statute. In state administrative hearings, alleged polluters are for the first time held accountable for their damage, the nature and extent of environ-

mental injury is for the first time factually adjudicated, and negotiation begins over abatement schedules. Citizen intervention at this stage could have a more profound effect upon Massachusetts pollution control than even the main subject of the new statute, the citizen right to sue.

The state Administrative Procedure Act, Mass. G.L. c. 30A, is amended by inserting section 10A. Any ten persons are given the right to intervene in any state adjudicatory proceeding in which damage to the environment is or might be at issue. Such intervention is limited to that issue and to the elimination or reduction of the damage. With limited exception, any intervener may introduce testimonial and other evidence and may make written or oral argument. The status of party is conferred on each intervener in order to secure the benefits of the Administrative Procedure Act, including the right of judicial review under section 14.

Several aspects warrant special note. First, there is no restriction on domicile or residence of the ten interveners. Second, intervention is conditioned not upon a showing that the proceeding will have a substantial and specific effect upon the interveners, as under existing law, but upon a showing merely that damage to the environment is or might be at issue. *Cf.* Mass. G.L. c. 30A, §10(4). Third, once the requisite showing is made, intervention is not left to the discretion of the agency as in §10(4), but is instead mandatory. Lastly, the citizen intervention provision mandates that any decision in such a proceeding include the disposition of the environmental damage issue. This would appear to establish a cause of action enforceable by petition for a writ of mandamus or petition for judicial review through §14(8) (c), (d).

It furthermore appears that intervention is not limited to proceedings before what might be termed pollution agencies. Intervention into any proceedings is permitted; there is no requirement that the environmental damage in question be violative of a statute, ordinance by-law or regulation. The broad definition of "damage to the environment" is adopted from the citizen suit section of the statute, but whereas the citizen cause of action is conditioned upon statutory or other regulatory violation, the citizen right of intervention is *not*. Intervention thus may prove a powerful tool for citizens to assure proper cognizance by all agencies of the environmental consequences of agency action.

Also significant is the array of administrative benefits which

accrue to each intervener. Among the rights at the time of agency hearing are entitlement to receive reasonable notice of time and place and of the issues involved (Mass. G.L. c. 30A §11(1)), to issue subpoenas in the name of the agency (§12(3)), to adduce testimonial and other evidence (§11(3)), to receive a decision based on the evidence presented (§11(4)), to receive notice of material judicially noticed (§11(5)), to obtain an official record of the proceedings—verbatim if requested and paid for (§11(6)), and to receive a decision accompanied by reasons and the necessary determinations of law and fact (§11(8)). Among the obligations of each intervener is the duty to properly make an appearance following receipt of notice of the proceeding (Mass. G.L. c. 30A, §1(3) (b)) and to adduce “evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs” (§11(2)). On this point of evidence it should be noted that under Massachusetts administrative law agency decisions need be founded only upon “substantial evidence,” not upon the preponderance of the evidence (§§1(6) and 14(8) (e)).

The grounds for judicial review are stated in Mass. G.L. c. 30A, §14(8). Review itself may not be sought later than thirty days from receipt of notice of the final decision of the agency (§14(1)), and intervention of right in a judicial review proceeding already pending in Superior Court is available only to those who were parties to the agency proceeding under review (§14(2)). This illustrates the advisability for conservation organizations and other groups to acquaint themselves early with the agency regulation-making process so important to later enforcement proceedings and judicial review. Requests for notice of all public hearings involved in the promulgation of regulations may be filed in advance pursuant to Mass. G.L. c. 30A, §2(1)(b) and 3(1) (b).

Some limitations on the citizen right of intervention should be noted. First, the right is to intervene in, not to initiate, agency proceedings. Second, the right is to intervene only in an “adjudicatory proceeding” before an “agency” as defined in Mass. G.L. c. 30A, §1(1) and (2). Therefore participation is possible only in so called “fair hearings” before state agencies. Lastly, perhaps indicative of litigation to come, the right to intervene is limited to persons. No mention is made of political subdivisions such as cities and towns, and, as pointed out above, “persons”

is not under Massachusetts law taken to refer to political subdivisions. *Supra*, part II(D). It might be argued, however, that the Administrative Procedure Act's definition of "person" should obtain: for the purposes of Mass. G.L. c. 30A, the word person "includes all political subdivisions of the commonwealth" (§1(4)). This line of reasoning would generate the interesting result, however, that not just one but ten political subdivisions would be necessary for intervention under the new statute. Under the present chapter 30A perhaps the existing standards for intervention by a city or town present less difficulty (§10(4)).

III. TACTICAL CONSIDERATIONS

A. *Desired Results at the Lowest Cost*

Environmental civil enforcement litigation may serve a wealth of purposes. Among them, court action will prod the uncooperative polluter, enlighten the well-meaning but ignorant polluter, and punish the polluter who operates in bad faith. Litigation provides a forum for the thoughtful resolution of some of the more complex problems raised by a technological society and is an avenue to the ultimate goal of prevention or abatement of environmental injury.

This ultimate goal should be more easily achieved by way of the Massachusetts citizen suit statute. The petitioner will have access to traditional equitable remedies, including affirmative and negative injunctive relief (both temporary and permanent) which is enforceable by means of a contempt petition. The statute also provides for the declaratory relief which is available under Mass. G.L. c. 231A. An indirect but no less tangible result might be the spurring of the reluctant state or local administrative agency to take action, since simply filing a citizen suit will open up administrative enforcement to scrutiny. The new Massachusetts statute will not, however, serve as a substitute for a classic mandamus action against an inactive agency, since the new cause of action is directed only at persons who cause or threaten environmental damage and who in so doing violate law.

Both these traditional and less direct results may be achieved at a considerable saving in expense over other litigation. Bond or surety is discretionary with the court and costs are expressly recoverable, including reasonable fees for expert witnesses. On this point, under Massachusetts law,

“[t]he word ‘costs’ in connection with proceedings in courts imports an allowance to a party by way of either penalty against a defendant party or indemnity to a victor. It is an incident of litigation. So far as awarded to the successful party, costs are designed to mitigate to a greater or less extent the *necessary expenses* incurred in the conduct of litigation.” (Emphasis added.) *Boynton v. Tarbell*, 272 Mass.142, 144 (1930)

The recognition by the citizen suit statute of expert witness fees as a necessary expense in conducting environmental litigation is commendable, but it should be noted that the statute narrows the allowance of costs from their mandatory assessment called for by Mass. G.L. c. 261, §1. Furthermore, reimbursement under the statute will follow the traditional distinction between costs and expenses, and the latter will be disallowed. *Mealey v. Fegan*, 274 Mass., 599, 601 (1931).

The provision for twenty-one days written notice under the citizen suit statutes acts to postpone the filing of a bill of complaint, except when a temporary restraining order is warranted. This requisite delay is soundly based, for it prevents crowding of the docket and unnecessary use of the court but still provides an incentive to respondent or agency to initiate corrective action. It may be expected that mere service of the requisite twenty-one day notice may often achieve the results of litigation and thereby render litigation unnecessary. The costs would be minimal and no attorney's appearance would be required. In some cases, no doubt, petitioners may find it advantageous to postpone the filing of a bill of complaint beyond the minimum period of delay since, rights preserved, no advantage is lost. It should be recognized that the requisite notice should be sent to each one of the local and state agencies with any jurisdiction over the environmental offenses complained of.

Special administrative remedies may be developed as a result of litigation under the act. Unlike the Michigan, Minnesota, and Indiana statutes, the Massachusetts statute does not expressly provide for referral or remand to administrative agencies for disposition of a case, but a petitioner or respondent or both may request administrative disposition, perhaps with the court retaining jurisdiction in order to later review the agency decision or to rely on its determination of the facts. For other cases the appointment of a master may best ease the court's burden while meeting the litigant's needs. In either event, if agency referral

or remand or use of a master does not merely protract the litigation, the principal goal of pollution prevention or abatement may be reached at a minimum of cost. The ultimate danger is that such use of agency time will cause a relaxation of existing agency monitoring efforts and will jeopardize present pollution enforcement measures carried out on the basis of carefully planned policies and priorities.

B. *Selection of Petitioners*

By the terms of the citizen suit statute the remedies conferred do not replace existing common law and statutory relief. Any insurmountable difficulties met in bringing a citizen suit, including location of proper petitioners, would dictate either recourse to traditional doctrines of nuisance, negligence and trespass, or perhaps seeking permission of the Attorney General to commence a public trust action. Within the confines of the citizen suit statute, though, the petitioner who is unsuccessful at recruiting nine others might successfully implore a municipality or other political subdivision to commence an action, as no minimum number of parties would then be needed. The prospects of joining as petitioner the state or local agency charged with enforcing the applicable law should also be considered.

As to the selection of individual petitioners, fairness to respondents and the importance of success would dictate the selection of more than the ten minimum required, with careful attention to domicil and to the need for petitioners who sue in good faith and in full knowledge of and agreement with the purposes and nature of the proceeding.

C. *Defenses*

Good faith compliance with an administrative "implementation plan" or "abatement schedule" may prove but one of many affirmative defenses raised against Massachusetts citizen suits. None are precluded by the statute, and the Michigan, Minnesota, and Indiana acts suggest that a respondent in equity might successfully show that there is no feasible and prudent alternative to damage to the environment or that his conduct is consistent with promotion of the public health, safety, or welfare. Importantly, the defense specified in the Massachusetts statute will be of little present value except in water pollution cases since only the Division of Water Pollution Control in the Department of Natural

Resources employs abatement schedules in aid of state pollution enforcement.

When employed, however, the defense of good faith compliance will place considerable pressure on state and local agencies. Both petitioner and respondent will seek the favors of the agency in advance of litigation and each may seek to subpoena agency officials during the progress of litigation. While the prospective petitioner will seek to learn the existence of outstanding agency plans or schedules and the status of compliance therewith, the prospective respondent will seek to confirm compliance or seek to moot a prospective case by creation or amendment of an abatement schedule. These pressures can be expected to continue during litigation, and the testimony of agency officials may be crucial to resolution of an affirmative defense. It would appear advisable for all parties to approach appropriate agencies, if at all, long before litigation commences and for the prospective respondent to appear with proposed abatement schedule in hand.

The defenses of collateral estoppel and *res judicata* will aid in preventing a multiplicity of lawsuits, as may be threatened against a large industry, but these tactics, however, also point up the need for aggrieved parties to coordinate their litigation and to avoid the pitfalls of inadequate publicity of actions and poor prosecution of early cases. Consolidation of cases may be another defensive tactic which will at least minimize a respondent's exposure to the risks of assessed costs, (Mass. G.L. c. 261, §8) but consolidation can also redound to petitioners' benefit. *Burke v. Hodge*, 211 Mass. 156, 158-59 (1912); *Lumiansky v. Tessier*, 213 Mass. 182, 189 (1912); see 9 Mass. Prac. (Mottla), c. 27, §§673, 674.

D. *The Breadth of the Statute*

If the proper case presents itself the argument might be attempted that the Massachusetts citizen suit statute makes damage to the environment *per se* actionable, with no requirement that the damage be as well a violation of any statute, ordinance, by-law or regulation. The argument is founded upon the statute's structure.

Although the first paragraph of the statute serves but a definitional purpose, the definition of "damage to the environment" is extended to any of the natural resources of the Commonwealth and expressly includes items not covered by any comprehensive

state scheme of statutory or other regulation, such as noise and "open spaces" and "natural areas." Certain earlier versions of the Massachusetts citizen suit legislation expressly limited "damage to the environment" to statutory or regulatory violations, a limitation not retained in House No. 5916 of 1971 as enacted as St. 1971, c. 732 (*e.g.*, see Senate No. 637 and House No. 438). Moreover, other earlier versions of citizen suit legislation unequivocally limited the new cause of action to enforcement of statutes, ordinances and regulations (House No. 5023, House No. 5233, and Senate No. 1415; see also Senate No. 800 and House No. 1176). Such clear limitation, appearing in Senate No. 1415 as passed by the Massachusetts Senate and sent to the House on May 5, 1971 (Senate Journal 1208), was conspicuously absent from the response by the House: House No. 5916 was reported out of the Committee on Third Reading and was substituted for the Senate bill on July 13, 1971 (House Journal 2066-2067). The proviso of statutory or other violation in this substituted bill, passed by both House and Senate substantially in its original form, arguably conditions only the granting of preliminary injunctive relief, not the entire cause of action.

This argument is contingent on either disregarding the semicolon in the second paragraph of the statute or applying the proviso clause to only the next preceding clause, both of which may be permitted by canons of statutory interpretation. *Dowling v. Board of Assessors of Boston*, 268 Mass. 480, 488 (1929); *Attorney General v. City of Methuen*, 236 Mass. 564, 573 (1921). Therefore, the paragraph would be read in two parts, each authorizing distinct court action. First, the court "may" entertain in equity the issue of damage to the environment; second, the court "may," before final determination, grant restraining relief as to environmental damage which constitutes a statutory or regulatory violation. Such a limitation upon preliminary relief would make eminently good sense if the cause of action does indeed extend even to environmental damage which results from conduct which is in conformance with all applicable law.

It could be further maintained that the spirit of the statute is directed at damage to the environment, not violations of law, since some stress is laid, for purposes of preliminary relief and court retention of jurisdiction, on "irreparable damage" and "danger to the public health and safety." Arguably, the Legislature could not have intended to frustrate so broad a purpose by

confining the cause of action to the strictures of existing statutory and regulatory enforcement. As a final note, it is observed that not only the structure but also the title of Senate No. 1415 was altered, as discussed above, by the substituted House No. 5916. An act "to secure a Right of Action to Enforce Statutes and Regulations Protecting the Natural Resources of the Commonwealth" became one "Establishing a Cause of Action for Certain Persons [and "Political Subdivisions," added by the Senate, Senate Journal 1873] For the Purpose of Protecting the Natural Resources and Environment of the Commonwealth." It is the law in Massachusetts that the title is in a legal sense a part of every statute and may be considered in construing the statute. The title cannot extend or restrict the scope of an act if already manifested by unambiguous language in the body of the statute, but the Massachusetts citizen suit statute may present a case where, as in earlier cases, "the title becomes important as a declaration by the Legislature of the object of the act." *Proprietors of Mills v. Randolph*, 157 Mass. 345, 350 (1892), relied upon in *Wheelwright v. Tax Commissioner*, 235 Mass. 584, 586 (1920) and further refined by *Charles I. Hosmer, Inc. v. Commonwealth*, 302 Mass. 495, 501 (1939).

Admittedly, a broad interpretation of the citizen cause of action as outlined above must account for language in the third paragraph of the statute which prescribes twenty-one days notice. One possible interpretation would limit the requirement of notice to instances of statutory or other violation of law, when preliminary injunctive relief is prayed for but no irreparable damage is threatened. In such circumstances, the Legislature might have concluded, written notice to an appropriate agency and to the Attorney General, plus a requisite twenty-one day delay, is desirable.

The breadth of the Massachusetts statute bears upon tactical considerations in yet another way. Under the narrower interpretation private enforcement is limited to statutes, ordinances, by-laws, and regulations whose major purpose is to prevent or minimize damage to the environment. That such a purpose is only one of the many major purposes would be insufficient as a basis for suit since the citizen suit statute specifies that "the major purpose" is the determinant. Accordingly, since "damage to the environment" means damage to natural resources, statutes and regulations which serve primarily the public health, not pri-

marily natural resources, may not be enforceable. Perhaps the State Sanitary Code is among them, and littering prohibitions may differ from solid waste requirements. This entire difficulty may be imaginary, though, because of society's recent blending of public health with environmental considerations. The two are intimately related and in many cases our environmental needs are directly served by our public health measures.

IV. CONCLUSION

As of the date of this writing, notices of the first three prospective citizen suits have been received by the Attorney General. One is contemplated against the town of Wellesley for alleged air and water and wetland violations by the municipal incinerator, the second against the New England Power Company for alleged illegal discharges from its generating facilities in Somerset into the Lee River, the Taunton River and Mount Hope Bay, and the third against the city of Worcester regarding a landfill dump site at Green Hill Park.

For innumerable reasons our pollution control laws may go unenforced. A state or local agency might in a given case lack the time, personnel, or data that is required for enforcement action. It might, after full deliberation, find the matter at hand insignificant. Or it might, because of political partisanship, do nothing at all.

In no instance save the last should any agency feel embarrassed by subsequent citizen enforcement of the law. Citizen monitoring and enforcement, with ample precedent in antitrust and securities fraud litigation, add a healthy, fresh dimension to state and local abatement efforts. Society is in no position to refuse pollution monitoring and enforcement by so widely distributed and resourceful a staff as its own citizenry.



APPENDIX

CHAPTER 732. THE COMMONWEALTH OF MASSACHUSETTS IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY-ONE.

AN ACT ESTABLISHING A CAUSE OF ACTION IN BEHALF OF CERTAIN PERSONS AND POLITICAL SUBDIVISIONS FOR THE PURPOSE OF PROTECTING THE NATURAL RESOURCES AND ENVIRONMENT OF THE COMMONWEALTH.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows

SECTION 1. Chapter 214 of the General Laws is hereby amended by inserting after section 10 the following section:—

Section 10A. As used in this section, “damage to the environment” shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the respondent alone or by the respondent and others acting jointly or severally. Damage to the environment shall include, but not be limited to, 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 seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

The superior court for the county in which damage to the environment is occurring or is about to occur, may, upon the petition of not less than ten persons domiciled within the commonwealth, or upon the petition of any political subdivision of the commonwealth determine the issue in equity or in a petition for declaratory relief, and may, before the final determination of the cause, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

No such action shall be taken 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 said statute, ordinance, by-law or regulation, to the attorney general, and to the person violating or about to violate the same; provided, however, that if the petitioners can show that irreparable damage will result unless immediate action is taken the court may waive the foregoing requirement of notice and issue a temporary restraining order forthwith.

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.

Any suit or action brought pursuant to the authorization contained in this section shall be advanced for speedy trial and shall not be compromised without prior approval of the court.

If there is a finding by the court in favor of the petitioners it may assess their costs, including reasonable fees of expert witnesses but not attorney's fees; provided, however, that no such finding shall include damages.

The court may require the petitioners to post a surety or cash bond in a sum not to exceed five hundred dollars to secure the payment of any costs which may be assessed against the petitioners in the event they do not prevail.

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

SECTION 2. Chapter 30A of the General Laws is hereby amended by inserting after section 10 the following section:—

Section 10A. Notwithstanding the provisions of section ten, not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section ten A of chapter two hundred and fourteen, 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 this chapter, any intervener 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 intervener 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 this chapter, including specifically the right of appeal.

[Effective September 7, 1971.]



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