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Inside this Issue

IT'S WILDFIRE SEASON: CAN YOUR FIRE DISTRICT COLLECT "ABATEMENT" COSTS ON CERTAIN FOREST LANDS?

Under Washington law, fire protection districts in King,[1] Pierce[2] and Kitsap[3] Counties have been explicitly delegated the **"responsibility"** to protect certain "forest lands" that are not within the protection zone of the Department of Natural Resources (DNR). *See* WAC[4] 332-24-710-730. "Forest land" under Washington law means "any *unimproved lands* which have enough trees, standing or down, or flammable material, to constitute in the judgment of (DNR), a fire menace to life or property." RCW 76.04.005 (11) (emphasis added).

This begs the question: Is your fire district being compensated for protecting "forest lands" that are either owned or operated upon by a private party or a municipal corporation or quasi-

[1] For Kitsap County: https://apps.leg.wa.gov/wac/default.aspx?cite=332-24-710

[2] For Pierce County: https://apps.leg.wa.gov/wac/default.aspx?cite=332-24-720

[3] For King County: https://apps.leg.wa.gov/wac/default.aspx?cite=332-24-730

[4] For new readers, "WAC" stands for the Washington Administrative Code.

municipal corporation, including but not limited to counties, cities and port districts?

We ask because WAC 332-24 only speaks to the *responsibilities* of fire districts to protect those certain "forest lands"; WAC 332-24 does not address how fire districts are to be *compensated* for the "protection" of these unimproved lands.

Furthermore, how can your district[5] be compensated in the following situation: What if you have within your district a timber company that is conducting significant logging? What if the company leaves all of its "timber slash" piled up, therefore making any fire load and risk substantial? How might a fire district put in place a rule that requires these companies to clean up the "fuel load" within 10 days of logging? In other words, how might the district recover costs for "abating" this fuel if the timber companies do not comply with the 10-day directive? The answer to these questions depends on the definitions of the terms "department," "abatement," and "additional fire hazard" under WAC 332-24-005,[6] and how those definitions might be reconciled with the undefined term "responsibility" under WAC 332-24-710-730 set forth above.

Here are the most-important definitions relevant to the above questions: The term "department" means the DNR "or its authorized representatives." WAC 332-24-005 (9).[7] The term "abatement" means "the *elimination* of additional fire hazard by burning, physical removal, or *other means*." *Id.*[8] at (1) (emphasis added). "Additional fire hazard" includes but is not limited to "forest debris which is likely to further the spread of fire and thereby endanger life or property." RCW 76.04.005.

And now, the meat and potatoes: DNR "may, **following ten days' notice** to the owner(s) and/or *person(s)* responsible for an *extreme* fire hazard that must be abated, summarily cause it to be abated." WAC 332-24-658 (emphasis added). This means that one who owns or operates upon certain forest land[9] may be deemed liable to a district for abatement costs when that person is responsible for the extreme hazard. Of course, the term "extreme" is not defined in WAC 332-24-005, but common sense should prevail.

After DNR summarily abates the extreme hazard, the responsible owner or person is then liable for up to *twice* the cost of the abatement, under RCW 76.04.660 (6). The costs of abatement shall include the salaries and expenses of people and equipment utilized to abate the hazard.[10]

Again, prior to summarily abating an extreme fire hazard, DNR must provide ten days' written notice, giving the responsible person time to abate the hazard on their own. How might that be accomplished? Your district should consult legal counsel with respect to any written notice.

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[5] For purposes of this article, when referring to a "district," we are only referring to fire districts in Kitsap, King and Pierce Counties.

[6] https://apps.leg.wa.gov/wac/default.aspx?cite=332-24-005

[7] When referring herein to "DNR," we are referring not only to DNR but to its authorized representatives.

[8] For new readers, "Id" means a reference to the previously cited authority (WAC 332-24-005).

[9] The forest land that is subject to the abatement rules discussed herein is set forth under WACs 332-24-710-730.

[10] Again, "abatement" means the "elimination of additional fire hazard by burning, physical removal, or *other means*." WAC 332-24-005 (1).

Most importantly, prior to considering what would be included in the above written notice, here is the all-important question: Are the above districts "representatives" of DNR, merely by having been tasked with the **"responsibility"** of protecting certain forest lands? We argue that *yes*, this language is sufficient to make the above fire districts representatives of DNR and therefore entitled to seek abatement costs from owners of forest land or persons operating on forest land, pursuant to RCW 76.04.660 and the WACs implementing that statute—set forth above.[11] After all, why would the Washington Legislature and the DNR specifically delegate the responsibility to protect these forest lands and at the same time completely strip these districts' ability to manage how that protection may occur?

Well, what next? With respect to "abatement" costs, who should your district contact for further information as to such costs? We ask because the collection of abatement costs on forest lands, by a fire district in King, Kitsap or Pierce Counties is highly irregular, and therefore such districts likely do not have information on abatement costs. Consequently, perhaps the best source would be DNR itself, as DNR is the agency that is generally tasked with abatement on forest lands.

And importantly, because fire districts may not act beyond the statutes that create them or take actions that are not permitted by regulation, statute, or the Washington Constitution,[12] we do not find that a district may collect *pre-abatement* costs, despite the term "other means" under the definition of "abatement." RCW 76.04.660, only permits collection of up to *twice* the salaries and expenses of equipment and personnel utilized to abate a fire hazard, and only *after* that hazard has been abated by DNR.[13]

Of course, fire districts are empowered to "protect life and property." RCW 52.02.020.

In closing, if certain parties are not satisfied that the term "responsibility" is sufficient to render a district a "representative" of DNR,[14] therefore permitting the district to abate fire hazards on certain forest lands and collect costs for such abatement, then how might your district be *made* a "representative" of DNR? This is simple: by interlocal agreement with DNR, pursuant to RCW 39.34. Let the wildfire season begin.

IMPORTANT CASE REGARDING USE OF PUBLIC FUNDS TO SUPPORT OR OPPOSE A BALLOT PROPOSITION

Late Breaking News, Crucial for All Public Agencies: In a case decided May 21, 2019, Division II of the Washington Court of Appeals decided an important case concerning RCW 42.17A.555, part of the Fair Campaign Practices Act (FCPA).

The State of Washington, through the Attorney General, brought this issue forward in spite of the Public Disclosure Commission finding no violation.

[11] To be clear, when we speak of "forest land" we are only speaking of that land which fire districts have been explicitly delegated the responsibility to protect under 332-24-710-730.

[12] *See City of Tacoma v. Taxpayers of the City of Tacoma*, 108 Wn.2d 679, 686, 743 P.2d 793, 796 (1987) (municipal corporations are creatures of statute).

[13] Again, "abatement" means the "elimination of additional fire hazard by burning, physical removal, or other means." WAC 332-24-005 (1).

[14] Importantly, the regulations delegating this responsibility are under the same code section for "Hazard Abatement," further bolstering the concept that the term "responsibility" confers "representative" status on the above districts: https://apps.leg.wa.gov/wac/default.aspx?cite=332-24

The case resulted from the efforts of the Port of Tacoma to block the Save Tacoma Water (STW) initiatives from reaching the election ballot a couple of years ago. As our readers should know, a public agency such as the Port of Tacoma or a fire district/RFA cannot use public funds or resources to support or oppose a ballot proposition. *See* RCW 42.17A.555.

In this decision the Court of Appeals found that the Port of Tacoma's legal expenditures (in bringing legal actions such as declaratory judgment complaints) did not fit within any exception to the FCPA. First, the Court found that the exception for actions taken at an open public meeting does not include an action to authorize a lawsuit. (This exception is usually used to support a resolution of an elected board expressing its support for one of its own ballot propositions or—occasionally—opposing some other agency's ballot proposition, if for example that encroaches on the first agency's tax structure or causes pro-rationing.)

The Court said that all statutory exceptions must be construed narrowly so that argument by the port was a non-starter.

The second issue is whether the initiation of litigation might fit within the "normal and regular" exception. Incredibly, the port basically argued that it is normal and regular for the port to engage in litigation of many types and therefore the exception applied. This Court relied on language in WAC 390-05-273 that bars such expenditures to oppose a ballot proposition unless there is a "constitutional, charter, or statutory provision *separately authorizing* such use."[15]

Because there was no such provision that would allow a port to sue to block initiatives, the expenditure was not "normal and regular" for the port. The lesson to be learned from this case is that, when using that normal and regular exception to the PDC rules, an agency had better be prepared to cite statutory authority for the specific expenditure.

[15] https://apps.leg.wa.gov/wac/default.aspx?cite=390-05-273

LABOR CONCEPTS: AFFIRMATIVE ACTION

Washington law, pursuant to Initiative 200, passed in 1998, prohibits "preferential treatment" of individuals or groups on the basis of race, sex, color, ethnicity, or national origin. *See* RCW 49.60.400. Initiative 1000[16] ("I-1000"), recently passed into law by the Washington Legislature, amends RCW 49.60.400. I-1000 creates what is known as the Washington State Diversity, Equity, and Inclusion Act.

I-1000 adds the following protected Classes who may *not* be granted "preferential treatment": age, sexual orientation, disability, or honorably discharged veteran or military status. More importantly, I-1000 enables—but does not require—the "state"[17] or any "state agency" to enact affirmative action laws and/or policies. In other words, I-1000, by itself, does not *require* employers, at this time, to enact affirmative-action policies.

Importantly, under I-1000, no "state" or "state agency" may enact an affirmative action law or policy that uses quotas or results in "preferential treatment" of any individuals or groups in the protected Classes above. Ultimately, membership in any of the Classes above can only be used as *a* "factor" in an

[16] http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Initiatives/Initiatives/INITIATIVE%201000.pdf

[17] The term "state" under RCW 49.60.400 includes Washington State itself, but also includes "special districts," which logically include but are not limited to port districts, water-sewer districts or fire protection districts; the term "state" also includes counties and cities. *See* RCW 49.60.400 (8).

employment[18] decision; under I-1000, said membership in a Class may *not* be the "sole qualifying factor" used when making an employment decision.

Based on the above, your public agency need not enact affirmative-action policies, and your public agency need not amend any collective-bargaining agreement currently in effect. But stay tuned.

Furthermore, citizen groups and/or political action committees may seek to place a referendum on the November ballot, in an effort to repeal I-1000.

On another note: why not enact an affirmative-action policy? This is a policy question for your agency, and we voice no opinion one way or the other. Washington State has now legally sanctioned affirmative action, effective July 28, 2019[19]—within the bounds set forth under I-1000—unless and until I-1000 is repealed by the people.

LABOR CONCEPTS 2.0: IS OFF DUTY CONDUCT RELATED TO EMPLOYMENT?

The classic lawyer answer is—it depends! We have found over many years that sometimes, but not always, off duty conduct (or misconduct) does have an employment nexus. Suppose a firefighter is enrolled, pursuant to a court order, in an anger management class. However, due to a police report being filed, the Fire Chief learns that this firefighter has blown up at a fellow "student" in the class who is peacefully trying to calm him down, and the firefighter tries to run him over with his vehicle in the parking lot. What can you do with such information, and is it "work related"? We think it is and we think the Chief needs to confront it at least with an informal counseling session and perhaps more if the firefighter resists the intervention.

Suppose a total stranger to your department—a female—contacts the Fire Chief and complains that one of your firefighter employees is stalking her because she is an ex-girlfriend who wants to get back together with. (I know, never end a sentence with a preposition.) Without more information about this firefighter, and any work issues, I advised the Fire Chief to call him aside and speak with him.

Something like this is appropriate to present this note of caution (a heads up): "I don't know if this is true but if the shoe fits…I just wanted you to know a woman called me and said you have been stalking her and she wants you to cut it out or she will seek a restraining order." Just a word to the wise…the Chief tells the firefighter that he is not going to investigate or consider this work-related, but just in case there is cause for concern, the firefighter might want to know that she called to complain. Hopefully, no more calls will be received from this person, but if this continues it may be different.

IN OR OUT OF THE LEGISLATURE: WHAT LAWS ARE ACTUALLY "ON THE BOOKS" NOW?

Here is a subtle but relevant legislative change going into effect on July 28, 2019: Engrossed Senate Bill 5958 would amend RCW 39.34.030 only slightly but significantly for those agencies that would like to engage in cooperative purchasing or "piggybacking" on another agency's procurement.

This bill would change RCW 39.34.030(5)(b) as follows:

[18] We speak here only of affirmative action in the *public employment* context, while admitting that affirmative action policies and I-1000 have impacts extending beyond the employment arena.

[19] https://app.leg.wa.gov/billsummary?BillNumber=1000&Initiative=true

"(b) With respect to one or more public agencies purchasing or otherwise contracting through a bid, proposal, or contract awarded by another public agency or by a group of public agencies, any ((statutory)) obligation ((to provide notice for)) with respect to competitive bids or proposals that applies to the public agencies involved is satisfied if the public agency or group of public agencies that awarded the bid, proposal or contract complied with its own statutory requirements…."

Although we always thought that was what the law meant, some have contended that the statute really only spoke to the notice provisions of applicable bid laws. This statutory change really clarifies that or eliminates any ambiguity. We must realize, however, that the statute still requires compliance and therefore some in-depth study of the procurement you intend to piggyback upon.

In other words, assume you want to piggyback upon a procurement that was governed by the bid laws of Oregon. The "piggybacking" agency would have to make sure the Oregon agency that accomplished the original procurement complied with the applicable provisions of Oregon law (not just notice provisions). Besides notice, typical state laws often contain not only dollar thresholds but also (perhaps more importantly!) "lowest responsible bidder" requirements or some sort of "best value criteria." The bottom line is: you need to check applicable state laws or have your attorney do that for you.

USING HIPAA TO PROVIDE STANDARD OF CARE IN A NEGLIGENCE ACTION

A recent *Arizona* Court of Appeals case points up an interesting controversy regarding HIPAA violations or other medical privacy breaches. Although HIPAA does not itself create a private cause of action for a patient who is impacted by a medical privacy violation, some courts have allowed it to be used indirectly in a negligence case.

In *Shepherd v. Costco Wholesale Corporation*,[20] Division 1 of the Arizona Court of Appeals reversed a trial court decision to completely dismiss all claims against Costco, finding that the negligence claim should survive a motion to dismiss. This court sided with a few other courts in the U.S. in finding that HIPAA may be used to provide evidence of the standard of care (which relates to proving "duty"—one of the four elements of a negligence claim) for the jury to apply.

In Washington, we have long used a concept of "negligence per se" when it can be proven that a defendant violated a positive statute that seems to create a duty of care. Thus, it may be in Washington that a patient whose medical privacy rights are violated (under HIPAA or under the State's Health Care Information Act, chapter 70.02 RCW) could bring a negligence per se case. We are aware of no Washington appellate case that says otherwise. When negligence per se is established it seems there is a lesser quantum of evidence to prove the violation of the applicable standard of care. Proof of a statutory violation seems to make that almost unnecessary.

Suppose for example that a prosecuting attorney contacts a secretary for a hospital district (a health care provider) asking for a medical report of a patient without redaction, for use at trial. The secretary discloses the report to the attorney[21] without redaction. RCW 70.02.060 requires attorneys seeking

[20] https://law.justia.com/cases/arizona/court-of-appeals-division-one-published/2019/1-ca-cv-18-0072.html

[21] And prosecutors are attorneys, not law enforcement agencies: https://www.firehouselawyer.com/Newsletters/September2017FINAL.pdf

such health care information to first give a 14-day notice, followed ultimately by a subpoena, unless of course they can offer a signed patient authorization to release such PHI. Hopefully, secretaries are trained on HIPAA and the Uniform Health Care Information Act, so they know enough not to divulge such confidential information without first contacting the Fire Chief or the department's administration. (See last month's *Firehouse Lawyer* article about the Supreme Court decision holding that RCW 70.02.060 means what it says!)[22]

Speaking of HIPAA, we have seen an uptick lately in potential HIPAA violations. Quinn & Quinn, P.S. would like to hold a Municipal Roundtable and a training session on preventing privacy breaches and dealing with them when they do happen. Some time in June or July, your agency should be on the lookout for a roundtable and training on that topic. We get the weekly HIPAA report by email and the large fines for privacy breaches just keep on coming. Thus far, those headlines have not included our clients, but we should remain vigilant.

SAFETY BILL

Has your agency familiarized itself with the procedures that must be followed when responding to or addressing a hazardous materials incident? Those are set forth under WAC 296-824-500. One such procedure is the use of the "buddy system"—i.e. teams of two or more—in "danger areas." *See* WAC 296-824-50025. The "buddy system" is required when (1) there exist conditions that are immediately dangerous to life and health (IDLH); (2) high levels of exposure to toxic exposure may exist **or** (3) there is potential for the lower flammability level of a hazard substance being exceeded (these three conditions constitute "danger areas"). *See Id.*

Of course, this "buddy system" is the same or substantially the same as the "hot zone rule" for fire departments set forth under WAC 296-305-05000 (8): "Firefighters operating in a hot zone must operate in teams of two or more regardless of rank or assignment." But this "buddy system" rule applies to all employers, public or private which are subject to WISHA. Furthermore, the "buddy system" seems to apply whenever the three conditions in the previous paragraph occur, whether those conditions occur during a hazardous-materials incident or otherwise.

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