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Washington Supreme Court Upholds Investigation Costs as a Remedial Action Under the Model Toxics Control Act But Restricts Recovery of Cleanup Costs

Construction and Environmental Legal Update

The Washington Supreme Court has affirmed in a unanimous ruling that the costs to test soil for hazardous substances qualify as a “remedial action” under the Washington Model Toxics Control Act (MTCA), but the costs incurred to clean up contaminated soil may not be if the testing shows the contamination is below established cleanup levels.

In *Douglass v. Shamrock Paving, Inc.*, the plaintiff property owner sued Shamrock for trespass, nuisance and contribution under MTCA after Shamrock fueled equipment, cleaned machines and stored materials on Douglass’ vacant property during a paving project. An unknown amount of lube oil spilled on the property and Douglass hired a consultant to investigate the extent of the contamination. Three soil samples were tested and measured lube oil at 2,000 mg/kg, 800 mg/kg and 400 mg/kg. The Washington Department of Ecology (Ecology) soil cleanup standard for lube oil is 2,000 mg/kg, which is conservatively set to be protective of human health and the environment, absent an Ecology site-specific determination. Douglass removed approximately 68 tons of soil from the property, after which two confirmation samples tested well below the cleanup standard.

A jury returned a verdict in favor of Douglass on the trespass and nuisance claims, but the trial court denied recovery under MTCA because Douglass failed to prove that the lube oil posed a threat to human health or the environment. Division Three of the Court of Appeals reversed and held that Douglass’ soil testing was a remedial action under MTCA, but the cleanup was not.

The Washington Supreme Court agreed with the Court of Appeals. It said the statutory definition of “remedial action” includes any investigative or monitoring activities in order to determine the risk or potential risk to human health. The Court declined to limit the scope of the definition to

only actions that result in identification of a threat. The Court stated, “The investigations concern *any* release of a hazardous substance, not a specified quantity that exceeds the cleanup level.” How much Douglass might recover for the investigative costs still is to be determined according to equitable principles.

But, the Court also agreed with Division Three and the trial court that Douglass’ election to proceed with removing soil that did not exceed the cleanup standard did not qualify as a “remedial action.” According to the Court, soil that met Ecology’s published cleanup levels meant that “[t]here was no threat to eliminate or minimize and, thus, no remedial action costs to recover for cleanup.”

Three lessons emerge from this decision:

- First, in any environmental cost recovery or contribution action under MTCA, investigative costs likely are recoverable because the sole purpose of the investigation is to determine whether a threat exists. Recovery does not depend upon the outcome of the investigation.
- Second, while those investigative costs may be considered a “remedial action,” they are not automatically recoverable — in whole or in part — because they are subject to weighing equitable factors. For example, as the Court pointed out, if Shamrock had spilled one drop of lube oil and Douglass paid for an investigation of his entire property, recovery may be little to none.
- Third, because the established cleanup standards are considered protective of human health and the environment, the mere presence of a hazardous substance is not enough to recover the cleanup costs. Rather, the contamination must — at a minimum — exceed the established cleanup standards, unless Ecology has ordered a more restrictive cleanup level. Since Ecology typically does not set a site-specific standard, a property owner runs a high risk of not recovering their cleanup costs under MTCA if the soil removed is below the established cleanup level.