New Law Allows Recovery Of Pre-1991 Response Costs, But Not Pre-1991 Natural Resource Damages

On June 29, 2000, Governor John Engler signed House Bill #5418, which became Public Act 254 of the Public Acts of 2000, thus apparently bringing an end to the controversy over whether the statute of limitations (or statute of repose) contained in Part 201 of the Natural Resources and Environmental Protection Act (NREPA) prevents a party from recovering environmental response costs under state law when the hazardous substances were released before July 1, 1991, and the claimant did not commence a cost recovery suit by July 1, 1994. This legislation is very important for the Michigan Department of Environmental Quality (MDEQ), because without it, MDEQ would be barred from recovering response costs incurred by the State at numerous sites that were contaminated by pre-1991 releases of hazardous substances, even though MDEQ did not learn of the contamination until recently. However, the legislature declined MDEQ's request to amend the statute of limitations as it affects claims for natural resource damages (NRD). Public Act 254 amends Michigan law so that it now says what most environmental lawyers thought it said before the controversial *Shell v. Shields* decision.

The controversy regarding the statute of limitations in Part 201 arose in October, 1999, when the Michigan Court of Appeals issued a decision holding that the statute of limitations/statute of repose in Part 201 of the NREPA bars a private party (and apparently also the State of Michigan) from recovering any environmental response costs and NRD resulting from releases of hazardous substances which occurred before July 1, 1991, unless a court action to recover such costs or damages was filed before July 1, 1994. *Shields v. Shell*, 237 Mich. App. 682 (1999) (motion for leave to appeal pending). The Court of Appeals held that a claim for recovery of response costs accrues when the contamination occurred, not when the plaintiff spends money in response to the contamination. See, Dunsky, "Delay Prevents Gas Station Owner From Recovering Costs," 10, *Michigan Environmental Compliance Update*, No. 7 (Oct. 1999). The unsuccessful plaintiff in *Shields v. Shell*, supported by the Michigan Attorney General, has asked the Michigan Supreme Court to review and overrule the decision of the court of appeals. The supreme court has not yet acted on that petition.

In February, 2000, at the request of MDEQ, seventeen Michigan legislators introduced House Bill #5418, which would have legislatively overruled the court of appeals decision. Correctly sensing that many Michigan legislators were willing to support the bill, MDEQ persuaded a committee of the Michigan House of Representatives to include language in the bill that would not only have overruled the court of appeals decision regarding recovery of environmental cleanup costs, but would also have expanded MDEQ's legal authority to recover NRD caused by releases of hazardous substances that occurred before July 1, 1991. See, Dunsky, "MDEQ Asks Legislature To Overrule Shields v. Shell And Revive Claims For Environmental Cleanup Costs," Vol. 11 *Michigan Environmental Compliance Update*, No. 2 (May, 2000). Key members of the House of Representatives, however, recognized that there was no justification for addressing the issue of NRD in legislation intended to overrule the *Shields v. Shell* decision, and removed all references to NRD from the bill before it was approved by the House.

As enacted by the House and the Senate and signed by the Governor, Public Act 254 amends M.C.L. § 324.20140 by deleting the words "response activity costs and" creating a new subsection (3), which provides that: "For recovery for response activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994." This new language applies the July 1, 1994 cut-off date only to "response activity costs that were incurred" before July 1, 1991, rather than to "response activity costs and natural resources damages that accrued" before July 1, 1991. Thus, the critical question for purposes of the statute of limitations is now when the response cost were "incurred," rather than when the hazardous substances were released to the environment. The amendment leaves subsection M.C.L. § 324.20140(2) unchanged as it relates to claims for NRD that "accrued" before July 1, 1991. That is, any action to recover NRD that accrued before July 1, 1991 is barred unless a complaint was filed by July 1, 1994. It is not entirely clear whether this means that the State would be barred from recovering *any* NRD resulting from releases of hazardous substances which occurred before July 1, 1991, or whether this means that the State may still recover for lost use values attributable to the period from July 1, 1991 forward. The rationale expressed by the Michigan Court of Appeals in *Shields v. Shell* indicates that claims for *all* NRD, including NRD attributable to the period after July 1, 1991, would be barred if the release of hazardous substances occurred before July 1, 1991.

The net result of this legislation is to preserve the requirement in Michigan law that the State must commence any action under Part 201 of NREPA to recover NRD resulting from a pre-1991 release of hazardous substances no later than July 1, 1994.

This article was prepared by Christopher J. Dunsky, a partner in our Environmental Department, and previously appeared in the September, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.