CHANGING HATS DOES NOT CHANGE LIABILITY UNDER CONSENT ORDER

Once a party has entered into an environmental consent order with the State of Michigan, it is very difficult to avoid responsibility for complying with the order. That is the message of a recent decision by the Michigan Court of Appeals involving the Richmond Sanitary Landfill.

In 1991, Richmond Sanitary Landfill, Inc. (Richmond I) entered into a consent order with the Michigan Department of Natural Resources to address environmental violations related to the operation of a landfill. William G. McCarthy (McCarthy) became president of Richmond I in 1992. Later that year, Richmond I was restructured for tax reasons and merged into a new corporation also named Richmond Sanitary Landfill, Inc. (Richmond II).

When the lender foreclosed its mortgage on the landfill in 1995, a limited partnership known as Osceola County Waste Services, L.P. (OCWS) purchased the landfill at the foreclosure sale. The general partner of OCWS was Environmental Rehab, Inc. (ERI), and a corporation for which McCarthy was the sole officer, shareholder, and director.

In 1995, the Michigan Attorney General sued Richmond II, OCWS, ERI and McCarthy for violations of the 1991 consent order. The trial court granted a motion by the Attorney General to hold all defendants liable for the consent order violations. The defendants appealed to the Michigan Court of Appeals.

OCWS and ERI argued that they had no obligation to comply with the consent order because they were not parties to that case. The consent order states that it is "binding on the parties to this action, their officers, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Consent Order." The Court of Appeals agreed with the trial court that, although neither OCWS or ERI was a party to the action,

or an "officer," "servant," or "employee" of a party, the consent decree was nonetheless binding on OCWS and ERI because they had actual notice of the consent order when they acquired the landfill in 1995. McCarthy was aware of the consent order when he became president of Richmond I in 1992, and his knowledge was attributable to OCWS and ERI. The Court of Appeals also found that OCWS and ERI were "in active concert or participation with" both Richmond I and Richmond II, because the term "active concert or participation" refers to someone who is "legally identified with the party or, at least, deemed to have aided or abetted the party in the conduct in question." The Court concluded that OCWS and ERI were "in active concert and participation" with Richmond I and Richmond II because McCarthy's presence in all the corporations and partnerships involved in the case was "pervasive and controlling."

The Court of Appeals also upheld the trial court's judgment that McCarthy himself was personally liable for the violations of the consent order. An individual officer or director of a corporation can be personally liable if he exercised control over the facility and had knowledge of environmental violations at the facility. McCarthy had taken some steps to avoid personal liability, including having his companies hire a separate waste management services company to operate the landfill so that McCarthy did not handle day-to-day management of the landfill. However, the Court of Appeals held that McCarthy was personally liable nonetheless because he himself was responsible for selecting the waste management companies hired to operate the landfill, and because McCarthy was personally involved in negotiating compliance issues with the State of Michigan.

State enforcement authorities may point to this opinion as precedent for holding corporate officers personally responsible for environmental compliance even when they hire independent management companies to conduct day-to-day operations. The unusual facts in this case, and the

fact that the opinion is unpublished, however, may limit the applicability of this decision to future cases.

Attorney General and Department of Environmental Quality v. Richmond Sanitary Landfill, Inc., *et al*., Mich. App. 231608, Opinion dated September 13, 2002.

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