Michigan Supreme Court Declines To Review Court Of Appeals Decision In Port Huron v. Amoco Oil Company, Leaving Standards For Private Cost Recovery Under Part 201 Of NREPA In Question

On May 9, 2000, the Michigan Supreme Court changed its mind and decided not to review a 1998 decision by the Michigan Court of Appeals in *City of Port Huron v. Amoco Oil Company*, which held that a private party seeking to recover response costs under Part 201 of NREPA need not conduct a remedial investigation if MDEQ did not require one, and setting a relatively low threshold for determining when response costs were "necessary." (See "RI/FS Not Required For City To Recover Cleanup Costs Under MERA," *Michigan Environmental Compliance Update*, August 1998, Vol. 9, No. 5, p. 5.) Normally, a decision by the Michigan Supreme Court not to review a Court of Appeals decision is not especially newsworthy. However, as two dissenting Supreme Court Justices complained, the decision not to review in this case leaves unresolved important questions regarding what a private party must prove when it seeks to recover environmental cleanup costs from another responsible party under Part 201.

The City of Port Huron (City) redeveloped industrial property formerly occupied by Amoco into a luxury condominium project. As part of the project, the City excavated and disposed of approximately 22,000 cubic yards of soil which it contended was contaminated, at a cost of approximately $1.35 million. The City did not attempt to involve either the Michigan Department of Natural Resources (MDNR, now known as the Michigan Department of Environmental Quality or MDEQ) or Amoco (the former owner of the property) in the cleanup. The City did not conduct a remedial investigation (RI), a feasibility study (FS), or prepare a remedial action plan (RAP) before excavating and disposing of the contaminated soil.

After completing the project, the City sued Amoco Oil Company under the former Michigan Environmental Response Act (MERA, now Part 201 of NREPA) to recover the City's response costs. Amoco argued that the City could not recover because: 1) its costs were not "consistent with" the MERA rules because the City had not conducted an RI/FS; and 2) some or all of the City's costs were not "necessary."

The trial judge held that a private party does not always have to conduct an RI/FS, or prepare a RAP, in order to be "consistent with" the MERA rules. The rules merely state that MDEQ "may" require a party conducting a cleanup to perform an RI/FS, and prepare and obtain approval of a RAP. The Michigan Court of Appeals agreed, holding that MDEQ has discretion under the rules to require that a private party conduct an RI/FS, and prepare a RAP. The Court of Appeals held that the City "did not have to establish that it performed [an RI/FS] if the MDNR does not require them. Because the MDNR determined that plaintiff was not required to complete [an RI/FS] the trial court did not err in ruling that plaintiff was entitled to recover its cleanup costs under the MERA."

In response to Amoco's argument that some of the City's costs were not "necessary," the trial court held that the City could not recover approximately $100,000 of its costs because those costs were not related to remediation of the site, and thus were not "necessary costs of response activity." The trial judge held that the balance of the City's costs qualified as "necessary costs of

response activity" because they were required to remediate the site, and because they were also reasonable costs.

On appeal, Amoco argued that the City had failed to prove that its costs were "necessary" because it had inadequate laboratory results to show that all 22,000 cubic yards of soil were in fact contaminated. The City had relied on sight and smell, and results of a photo-ionization detector ("PID") as evidence of contamination for most of the soil which it removed, and obtained laboratory analysis only for soil at the edge of the excavation. The Court of Appeals upheld the trial court's determination on this issue because the City had presented substantial evidence, and because the Court of Appeals felt that the trial court's ruling was not "clearly erroneous."

However, the Court of Appeals held that the trial judge had imposed too stringent a standard on the City when it required that the City's costs must be "reasonable." The Court of Appeals held that a private party seeking to recover response costs incurred after the MERA rules were promulgated on July 12, 1990 need not prove that its response costs were "reasonably incurred," but need only prove that its costs were "necessary" and "incurred consistent with" the MDNR rules. The Court of Appeals noted that Part 201 does not define "necessary," and that the dictionary defines "necessary" in several different ways, one of which means no more than "convenient" or "appropriate." The Court held that for response costs incurred after July 12, 1990, the Michigan Legislature "relaxed the standards governing cost recovery actions after the promulgation of the rules," so that a "private party must only show that its necessary costs of response activity were incurred consistent with the rules." The Court of Appeals ruled that the trial court made a mistake by subjecting the City to a higher standard of proof regarding its costs, requiring that the City show that its costs were "reasonably incurred" rather than merely incurred consistent with the MDNR rules. However, the Court held that this error did not make any practical difference because the trial court had excluded $100,000 of the City's costs which were not truly related to environmental cleanup.

In September, 1999, the Michigan Supreme Court granted Amoco leave to appeal. On May 9, 2000, the Supreme Court changed its mind and denied leave to appeal, stating only that "the Court is no longer persuaded the questions presented should be reviewed by this Court." Justices Marilyn Kelly and Stephen Markman took the unusual step of writing dissenting opinions stating that the Court of Appeals decision presents important issues that the Supreme Court should review. Both Justices seemed concerned that the City had performed its cleanup without involving either Amoco or MDEQ in the process. Justice Markman noted that, while an effort to redevelop a brownfield into a residential development is "highly commendable, it is entirely another question whether all the costs of such efforts are properly recoverable from the former owners of the contaminated site." Without indicating how he might rule on the issue, Justice Markman expressed concern that the Court of Appeals decision might make it too easy for private parties to recover excessive costs resulting from overly zealous cleanups, perhaps making the statutory term "necessary" mean nothing at all. He also expressed concern that, under the Court of Appeals decision, a party might be able to act "consistent with" MDEQ rules simply by keeping MDEQ out of the process. He also posed the question of whether the determination of whether costs are "necessary" requires a balancing of the comparative costs of alternative remedial options. Justice Kelly also expressed interest in the issue of

costs, asking whether "an expensive remediation effort like that performed by [the City]" might be unnecessary if a cheaper method would adequately clean up the property.

The fact that a majority of the Supreme Court decided not to review these issues at this time does not foreclose the Supreme Court from reviewing them in a later case. However, for the time being, the Court of Appeals decision stands, and it appears to make it relatively easy for private parties to recover response costs under Part 201, even if the costs were not absolutely necessary to complete a satisfactory cleanup, and even if the party who performed the cleanup purposely avoided any government oversight.

City of Port Huron v. Amoco Oil Co., Mich. Supreme Court Docket No. 112892, order vacating grant of leave to appeal (May 9, 2000).

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