Part 201 Statute Of Limitations Bars MDEQ From Recovering Response Costs

The Michigan Court of Appeals recently held that the Michigan Department of Environmental Quality (MDEQ) could not recover costs it incurred in responding to a release of hazardous substances because MDEQ waited more than six years after physical on-site construction of the remedial action began before filing its cost recovery complaint.

In 1983, a release of heating oil was discovered at a bulk storage plant in Frankfort, Michigan owned by Woodland Oil Company, Inc. (Woodland). Woodland developed a three-phase cleanup plan for the Frankfort site. On April 20, 1989, the MDEQ project manager for the site approved Woodland's plan and advised it to proceed with Phase I, the removal of approximately 2,500 cubic yards of contaminated soil. Woodland removed the contaminated soil, emptied all the storage tanks at the bulk storage plant, reconditioned them, and built a new bulk storage plant. Because of a dispute between Woodland and the former site owner over who was responsible to perform the rest of the cleanup, MDEQ took over the cleanup in 1991 and began to implement Phase II of Woodland's remediation plan, which included groundwater monitoring. It is uncertain whether additional releases of heating oil and gasoline have occurred since 1991.

On April 11, 1997, MDEQ filed a complaint in Ingham County Circuit Court seeking to recover MDEQ's response costs from Woodland under Part 201 of the Natural Resources and Environmental Protection Act (Part 201). The trial court dismissed MDEQ's complaint before trial, because it ruled that MDEQ's claim was barred by two separate provisions of the Part 201 statute of limitations: 1) M.C.L. § 324.20140(1)(a), which requires that a party seeking to recover response activity costs must file a complaint within six years after the beginning of physical on-site construction activities for the remedial action selected or approved by MDEQ; and 2) M.C.L. § 324.20140(2) which (before it was amended in June, 2000) required a party seeking to recover response activity costs "that accrued prior to July 1, 1991" to file a complaint no later than July 1, 1994.

MDEQ appealed to the Michigan Court of Appeals, arguing in part that Woodland had released gasoline or oil at the site after July 1, 1991. On March 31, 2000, the Michigan Court of Appeals, relying on its subsequently-reversed decision in *Shields v. Shell Oil Co.*, 237 Mich. App. 682 (1999), *reversed*, 463

Mich. 939 (2000), affirmed the trial court's decision, but sent the case back to the trial court to determine whether MDEQ had presented enough evidence that Woodland had released gasoline or oil after July 1, 1991. Because the Court of Appeals based its decision entirely on the July 1, 1994 deadline in M.C.L. § 324.20140(2), it did not consider whether the six year statute of limitations in M.C.L. § 324.20140(1)(a) applied to the case.

On July 29, 2000, Governor Engler signed legislation amending the section of the statute of limitations that applies to pre-1991 response costs, so that the July 1, 1994 deadline for filing a cost recovery complaint applies only to response activity costs that were incurred before July 1, 1991. The amendment allows MDEQ or other plaintiffs to recover response activity costs incurred after July 1, 1991, regardless when the hazardous substances were released, as long as the plaintiff files a complaint within the six year limitations period provided in M.C.L. § 324.20140(1)(a). See, "New Law Allows Recovery Of Pre-1991 Response Costs, But Not Pre-1991 NRD," *Michigan Environmental Compliance Update*, Vol. 11, No. 6 (Sept. 2000).

On December 27, 2000, the Michigan Supreme Court reversed the Court of Appeals decision in *Shields v. Shell*. See, "Michigan Supreme Court Reverses Statute Of Limitations Decision", *Michigan Environmental Compliance Update*, Vol. 11, No. 11 (February, 2001). It also nullified the Court of Appeals decision in the *Woodland Oil* case and sent it back to the Court of Appeals for appropriate action.

After hearing new arguments from both sides, the Michigan Court of Appeals concluded that the July 1, 1994 deadline in M.C.L. § 324.20140(2) did not apply to MDEQ's claim against Woodland because MDEQ was not seeking to recover any costs incurred before July 1, 1991. Although its complaint was not clear on that point, MDEQ's attorneys told the trial court at the hearing on Woodland's motion for summary judgment that MDEQ limited its claim to costs incurred after July 1, 1991.

Next, the Court of Appeals had to decide whether the trial court had correctly ruled that the six year statute of limitations in M.C.L. § 324.20140(1)(a) barred MDEQ from recovering response costs. That section, which was not affected by the June, 2000 amendment, and was not discussed in the Supreme Court's *Shields v. Shell* decision, states that actions to recover response activity costs must be commenced "within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by" MDEQ.

MDEQ acknowledged that M.C.L. § 324.20140(1)(a) applied to the Woodland site, but argued that the six year limitations period had not begun to run because Woodland had not performed a "remedial action." MDEQ claimed that there was no "remedial action" because: 1) there was never a "final plan" to remediate the site; 2) the three-phase cleanup plan which Woodland submitted to MDEQ in 1989 did not meet the statutory requirements of M.C.L. § 324.20118(2) for a "remedial action plan"; and 3) MDEQ never "approved or selected a remedial action." MDEQ argued that the work that Woodland performed, including the excavation and removal of 2,500 cubic yards of contaminated soil, was only an "interim response activity" that was insufficient to trigger the six year statute of limitations.

The Court of Appeals rejected MDEQ's arguments. It evaluated the statutory definitions of "response activity," "remedial action," and "remedial action plan," and concluded that:

> An "interim response activity" is essentially a quick response to a release . . . . In other words, it is a temporary activity until a plan can be developed to implement a remedial action. (Citation omitted.) A "remedial action," on the other hand, is essentially a work plan that is designed and implemented to completely eliminate a hazard. Contrary to [MDEQ's] analysis, a "final plan" is not needed to give rise to a "remedial action."

Applying this reasoning to the facts in the case, the Court of Appeals concluded that Woodland's extensive work was "not a quick response," but instead a "remedial action." The fact that MDEQ is apparently still conducting response activities at the site in accordance with Woodland's three-phase plan supported the court's conclusion. The court rejected MDEQ's argument that a response activity cannot be a "remedial action" if it does not comply with the requirements of M.C.L. § 324.20118(2), because that provision does not define "remedial action," but merely explains what a "remedial action" is required to accomplish. Therefore, the court concluded that the work performed by Woodland and by MDEQ constituted a "remedial action."

MDEQ argued that it had never "approved" a remedial action plan. The court rejected this argument because on April 20, 1989, the MDEQ project manager for the site sent a letter to Woodland that approved the Woodland plan and told Woodland to begin cleanup work.

Finally, the court ruled that "physical on-site construction activities for the remedial action" began in 1989 when Woodland removed 2,500 cubic yards of contaminated soil, eight years before MDEQ filed its cost recovery complaint in 1997. Therefore, the court concluded that the six year limitations period

began to run in 1989, and that M.C.L. § 324.20140(1)(a) prevented MDEQ from recovering any response costs related to the remedial action.

However, the court held that if there was additional contamination at the site that was not covered by the remedial action plan approved in 1989, MDEQ may be entitled to recover response activity costs related to such contamination. Therefore, the Court of Appeals sent the case back to the trial court to consider whether MDEQ had incurred costs related to contamination not covered by the 1989 remedial action plan.

This decision is the second time in less than two years that the Michigan Court of Appeals has interpreted the Part 201 statute of limitations to defeat a cost recovery claim by MDEQ. The decision is important because it is the first time a Michigan appellate court has construed the six year statute of limitations in M.C.L. § 324.20140(1)(a). In recent years, MDEQ and many private parties have preferred to identify cleanups, including many large-scale cleanups, as "interim response activities" rather than "remedial actions," perhaps to avoid some of the requirements associated with final remedial action plans. As a result of this decision, MDEQ may be less willing to pretend that large-scale cleanups are "interim response activities," and may require that parties comply with all statutory and regulatory requirements for remedial actions. Or, MDEQ may simply act more promptly in filing complaints to recover its response costs.

MDEQ has filed a motion asking the Court of Appeals to reconsider its decision.

Attorney General v. Woodland Oil Co., Inc. (Mich. Ct. of App. July 27, 2001).

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