

GASOLINE DISPENSER IS NOT A “FACILITY” UNDER PART 201 OF NREPA

In a recent unpublished opinion, the Michigan Court of Appeals held that a gasoline dispenser is not a “facility” for purposes of Part 201 of the Michigan Natural Resources and Environmental Protection Act (NREPA). Perhaps because the opinion is unpublished, the court’s decision does not fully explain the facts of the case. Nonetheless, it provides enough facts to make an intelligent guess as to the events that resulted in the lawsuit.

Omega Environmental, Inc. (Omega) sued Saco & Sons, Inc. (Saco), probably for unpaid environmental consulting fees. Saco filed a counter-claim against Omega, and also filed a claim against C.F. Fick & Sons, Inc. (Fick), who apparently owned a gasoline dispenser on the property in question. Saco’s claim against Fick was based on the theory that Fick owned the gasoline dispenser, that the gasoline dispenser was a “facility” under Part 201 of NREPA, and that Fick was, therefore, liable for cleanup costs on the property because Fick was the owner or operator of a “facility” from which there was a release of hazardous substances.

The trial court submitted to the jury the question of whether the gasoline dispenser was a facility. The jury determined that it was not, and found that Fick was therefore not liable under Part 201. The jury also held that Omega was liable to Saco in the amount of \$4,100, representing one-half of one percent of the total cost of remediating contaminated soil on the property.

On appeal, the court of appeals held that the trial judge should not have asked the jury to determine whether the gasoline dispenser was a “facility” because that is a question of law that must be determined by a judge rather than a jury. Part 201 defines “facility” as “any area, place, or property where a hazardous substance in excess of [certain concentrations] has been released,

deposited, disposed of or otherwise comes to be located.” The court of appeals held that the language of this definition focuses on real property, not personal property such as gasoline dispensing equipment. The court concluded that because a gasoline dispenser is not a “facility” Fick could not be held liable under Part 201 as the owner of the gasoline dispenser.

The definition of “facility” in the federal Comprehensive Environmental Response, Compensation and Liability Act (commonly known as CERCLA or Superfund) is different. The term “facility” is defined in CERCLA to mean either any building, structure, installation, equipment, etc., or any site or area where a hazardous substance has been deposited or come to be located.

Part 201 was generally modeled after CERCLA, but the two statutes are different in certain important respects. This decision points out that the definition of “facility” is one point on which the two statutes differ.

Omega Environmental, Inc. v. Saco & Sons, Inc., et al., Mich. App. No. 223195 (unpublished opinion Sept. 20, 2002).

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