Court Holds Future Cleanup Costs Unavailable Under Former Michigan Environmental Response Act

In an unpublished opinion, the Michigan Court of Appeals recently held that a party could not recover future cleanup costs under the former Michigan Environmental Response Act (MERA), Mich. Comp. Laws § 299.601 *et seq*., which is the predecessor to Part 201 (Environmental Remediation) of the Michigan Natural Resources and Environmental Protection Act, Mich. Comp. Laws § 324.20101 *et seq*.

B & B Associates (B & B) sued Amoco Oil Company (Amoco) under MERA for gasoline contamination on property owned by B & B that was formerly owned and operated as gas station by Amoco. Amoco owned the property from 1967 through 1983 and operated a gas station on it throughout that period. The gas station contained underground storage tanks (USTs), piping, and dispensers. Amoco sold the property to a third party in 1983, which never operated any business on the property, but instead leased it back to Amoco. The third party sold the property to B & B in 1985, which operated a restaurant on the property until 1990. B & B removed the USTs in 1986. Environmental testing performed in connection with a proposed sale of the property in 1990 showed the presence of gasoline contamination in the area where the USTs and dispensers were formerly located.

B & B brought an action against Amoco under MERA seeking payment of the costs B & B would incur in the future to clean up the gasoline contamination. The trial court awarded B & B $250,000 to cover future response activity (i.e., cleanup) costs. Amoco appealed, arguing that Section 12 of MERA does not provide for the recovery of future (i.e., not yet incurred) cleanup costs. The Michigan Court of Appeals agreed with Amoco.

The court analyzed the following subsections of MERA, which describe the damages recoverable under MERA from a liable party:

> [2] A person described in subsection (1) shall be liable for all of the following:
>
> (a) All cost of response activity lawfully ***incurred*** by the state relating to the selection and implementation of response activity under this act.
>
> (b) Any other necessary ***costs of response activity incurred*** by any other person consistent with rules relating to the selection and implementation of response activity promulgated under the act.
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> . . .
>
> (3) The ***costs of response activity*** recoverable under subsection (2) shall also include:
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> . . .

> (b) Any other necessary ***costs of response activity*** reasonably ***incurred*** by any other person prior to the promulgation of rules relating to the selection and implementation of response activity under this act. A person seeking recovery of these costs has the burden of establishing that the costs ***were*** reasonably ***incurred under the circumstances that existed at the time the costs were incurred***.

Slip op. at 2, quoting former Mich. Comp. Laws § 299.612(2) and (3) (emphasis in original).

The court emphasized that the Legislature used the past tense in referring to recoverable costs: "The term 'incurred' is past tense. Section 12 contemplates costs that have already been expended to clean up a site." *Id*. The court held that the clear language of MERA did not support awarding future cleanup costs. The court further opined that a reading of MERA to only encompass costs already incurred was consistent with the general intent of the statute and also was consistent with the cases that have interpreted the analogous provisions of the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq*. Therefore, the court ruled that B & B was entitled to only the costs it had already incurred and was not entitled to any award of future response activity costs.

Amoco next sought a ruling that the trial court's finding that Amoco was responsible for the contamination was clearly erroneous. Amoco argued that the property could have become contaminated when B & B removed the USTs in 1986. B & B's expert witness testified, however, that the contractor which performed the UST removal did so in a normal and acceptable manner. Further, the court observed that a report prepared by Amoco's own consultant indicated that the gasoline contaminated soils around the USTs were removed and replaced with clean sand at the time the USTs were removed. Amoco also asserted that there were possible sources of the gasoline contamination other than Amoco's gasoline station. B & B's expert testified, however, that all gas stations have releases from the USTs, pipes, dispensers, customers spills, or from spills when product is delivered into the USTs. The court observed that Amoco never presented any evidence to support the existence of offsite sources of the contamination and that the report prepared by Amoco's consultants likewise made no mention of a possible offsite source. Therefore, the court held that the trial court's finding that Amoco was responsible for the contamination was not clearly erroneous.

B & B Associates v. Amoco Oil Co., No. 208588 (Mich. Ct. App. Jan. 4, 2000).

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