Updates
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Washington Supreme Court Narrows “Owner or Operator” Liability, Exempts DNR From Cleanup Law Liability

In a decision issued last month, the Washington Supreme Court narrowed "owner or operator" liability under the Model Toxics Control Act, RCW 70.105D (MTCA). In *Pope Resources, LP v. Wash. Dept. of Natural Resources*, the court held that the Department of Natural Resources (DNR) is not liable as an owner or operator under MTCA, even though it managed state-owned lands that became contaminated by timber operations conducted by a private lessee.

The *Pope Resources* decision has important implications for anyone who owns, manages, leases or operates a business on property that may be contaminated, which we consider in this update.

Background: MTCA Owner or Operator Liability and CERCLA's *Bestfoods* Standard

Potentially liable persons (PLPs) under MTCA include current and former owners or operators of a facility where hazardous substances have been released. MTCA defines an "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility." MTCA's definition of "person" includes state agencies but does not include the state itself.

MTCA was modeled on the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA). Several Washington courts interpreting MTCA have followed federal courts' interpretation of the scope of "operator" liability under CERCLA. CERCLA defines "owner or operator," in relevant part, as "any person who owned, operated, or otherwise controlled activities" at a facility. The United States Supreme Court has held that CERCLA operator liability attaches only to entities that manage, direct, or conduct operations specifically related to the polluting activity or make decisions about compliance with environmental regulations. *See United States v. Bestfoods*, 524 U.S. 51 (1998).

Port Gamble Site and Procedural History

Under Washington law (RCW 79.105.010), authority to manage state-owned aquatic lands has been delegated to the DNR. Through leases executed in 1974, 1979 and 1991, the state, "acting by and through" DNR, leased certain aquatic lands in Port Gamble Bay adjacent to a lumber mill to Pope Resource's predecessor for log storage, rafting and booming. DNR referred to itself as an owner at the site in internal documents.

Industrial activities at the site resulted in the release of hazardous substances, and the Washington Department of Ecology, which oversees the implementation and enforcement of MTCA, named DNR and Pope as PLPs. Pope entered into an agreement with Ecology to conduct remedial actions. DNR declined to participate, and Pope sued DNR for contribution of cleanup costs.

The superior court granted summary judgment in favor of DNR, but the court of appeals reversed, holding that DNR's management interests in the aquatic lands satisfied the broad MTCA definition of owner, which requires "any ownership interest." The court of appeals also held that DNR's control of the lands through the lease satisfied the MTCA standard for operator liability, which requires exercise of "any control." In amicus briefs, Ecology proffered an expansive view of MTCA owner/operator liability and argued in favor of DNR liability at the site. In a 6-3 decision, the state supreme court reversed the court of appeals.

Washington Supreme Court's Decision

The supreme court held that DNR could not be an "owner" at the site because the management and leasing authority delegated by the state to DNR did not convey "any ownership interest" in the site, as required by MTCA. The court rejected the court of appeals' holding that DNR's management of the aquatic lands at the site was akin to a property right and sufficient to give DNR an ownership interest. The court's opinion suggests that only a "real property ownership interest" conveyed by "deeds, grants, patents, or other instruments" would be sufficient to trigger MTCA owner liability.

The court also held that DNR is not an operator at the site because it did not exercise control over the polluting activities at the site. The court of appeals had held that MTCA imposes operator liability on persons who exercise "any control," citing language that is different from, and much broader than, CERCLA's operator liability language. The supreme court rejected the court of appeals' rationale, and, instead, focused on the overall similarity between MTCA and CERCLA. The court agreed with prior Washington court decisions relying on federal courts' interpretation of operator liability under CERCLA and adopting the *Bestfoods* standard for MTCA operator liability. The court agreed with those decisions that the key MTCA language is "control," not "any." Applying *Bestfoods*, which requires that an entity must direct, manage or conduct the pollution-causing activities, the court held that DNR's activities did not constitute requisite operator control.

Notably, the supreme court accorded no deference to Ecology's position as the state agency that is responsible for administering MTCA. The court found Ecology's view that DNR should be liable as an "owner or operator" was inconsistent with the statute's plain language. The court stated Ecology's position risked "unintended, if not absurd, consequences, thus obviating the rationale for deference."

Three justices dissented, focusing on the operator issue. In the dissenters' view, *Bestfoods* and federal court interpretations of CERCLA should not define MTCA operator liability because, simply, MTCA's language is different. The dissent argued that MTCA's broader definition of operator should be given effect to implement the statute's goal of imposing liability on persons who exercise "any control" over a contaminated site.

Broader Implications for Potential MTCA Owners and Operators

As the manager of 2.6 million acres of aquatic lands in Washington, DNR faced potentially broad MTCA liability under the court of appeals' opinion. After *Pope Resources*, DNR can *never* be an "owner" of aquatic lands under MTCA, and DNR's usual aquatic leasing activities are insufficient to trigger "operator" liability under the federal *Bestfoods* standard. Therefore, PLPs like Pope Resources that face liability at sites where polluting activity occurred on DNR-leased aquatic lands will be unable to pursue DNR for contribution under MTCA. Further, Ecology cannot direct DNR to engage in cleanup activities at these sites.

The decision also has implications for private parties connected to contaminated sites. On balance, *Pope Resources* is likely to favor private parties because the court significantly narrowed the scope of "owner or operator" liability under MTCA. To trigger "owner" liability, a person's interest likely must be linked to a conveyed "real property ownership interest." After *Pope Resources*, it is unclear whether interests such as those conveyed in leases or easements will trigger owner liability.

Even more significantly, the court's interpretation of "operator" liability narrows MTCA's reach. "Any" control is no longer sufficient to trigger operator liability. Instead, applying the *Bestfoods* standard, entities will trigger operator liability only when they control operations specifically related to the polluting activity or make decisions about compliance with environmental regulations. In addition, private parties engaged in MTCA disputes with Ecology may be bolstered by the court's decision to not defer to the agency's interpretation of the statute.

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