

High court: WSDOT must pay for Foss cleanup

■ *The agency is out \$6 million for cleanup costs, plus more than \$1.6 million in attorney fees and court costs.*

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If there were any doubts about the potent weapon for recovery of environmental costs that the Model Toxics Control Act has become, those questions should be dispelled by a July 19 decision from Division Two of the Washington Court of Appeals.

The court's ruling upheld a multi-million dollar judgment against the Washington State Department of Transportation arising out of pollution in Tacoma's Thea Foss Waterway.

The decision in *PacificCorp Environmental Remediation Co. v. WSDOT* demonstrates not only how low the bar can be to proving MTCA liability, but also that a potentially liable party's recalcitrance in the investigation and cleanup process can come back to haunt it in the assessment of damages.

Superfund site

The waterway is part of the hazardous waste areas that comprise the Commencement Bay Superfund site. The city of Tacoma and various utilities spent \$116 million to investigate and cleanup contamination from historic operations, such as a coal gasification plant that operated on the waterway between 1884 and 1924. WSDOT later owned part of the property where the coal gas plant had been located.

In 1986, WSDOT installed a drain system for a connector road under the Interstate 705 freeway. The drains fed into the city storm sewers that emptied into the waterway. WSDOT also built the state Route 509 cable bridge over the waterway.

The drains and the Route 509 construction resulted in releases of hazardous substances into the waterway.

After years of investigation and clean-

up, and little involvement by WSDOT in that effort, the utilities sought to recover from WSDOT some of their cleanup costs that had not been covered by settlements, grants or insurance.

Liability

One of the main issues at trial was whether the contamination from the drains was the cause of contamination in the waterway.

The utilities' expert testified that the drains were the primary source for increases in contamination, but WSDOT's expert testified that the drains were not the sole source.



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Both the trial and appellate courts ruled that WSDOT was liable because the evidence showed some of the contamination came from the drains. According to the appeals court, for WSDOT to prove that it is not liable under MTCA based on its ownership and operation of the drains, the evidence must show that the drain line coal tar "was not responsible for *any* of the increase" in waterway contamination.

In other words, MTCA liability can arise no matter how small the effect, as long as there is proof that the defendant's sources contributed to part of the contamination.

Damages

WSDOT also challenged the trial court's allocation of cleanup costs.

MTCA does not tell courts how to do this; it only instructs that recovery should be based on "such equitable

factors as the court determines are appropriate."

Generally, appellate courts give the trial courts wide latitude, which was the case in this instance. The appeals court decision said that a court can, but is not required to, consider the amount of contamination a party contributed. The court said, while that the amount of contamination may be relevant, the reality is that in many cases it is extremely difficult to dissect the waste and associated cleanup costs.

In addition, the court of appeals approved the trial court's damages determination that factored in WSDOT's recalcitrance. The court found that WSDOT ignored repeated requests from the state Department of Ecology to stop the discharges of contamination into the waterway, failed to respond to Ecology requests until higher management got involved, unreasonably delayed implementing a solution to releases from the drains, and took 11 years after finding coal tar material in the drains to completely sever the connection with the storm sewer system that emptied into the waterway.

In all, WSDOT was held liable for \$6 million in cleanup costs, and for 2 percent of all future costs to monitor and maintain the waterway remedy. It also was held liable for the utilities' \$1.6 million in attorneys' fees and costs for trial, as well as the utilities' appeal fees and costs.

Thus, the WSDOT decision not only re-emphasizes the operation of MTCA's strict liability and equitable allocation scheme — which it shares with its federal counterpart, the Comprehensive Environmental Response, Compensation & Liability Act — but also that there can be a price for lack of cooperation.

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