FROM LIABILITY TO ABILITY – GETTING A DEAL DONE

LIABILITY AND MTCA
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The opinions expressed here are my own, and are not the official position of the Washington Attorney General’s Office or the Department of Ecology.
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How did MTCA start?

  • The Hazardous Waste Cleanup Act.
    • Initiative 97B.
  • Which would win?
What did the voters do?

- Voters determined they did want a law on the subject (85%)
- Voters chose Initiative 97 over Alternative 97B (56%)
So what exactly is MTCA?

• Cleanup of contaminated sites.
• Creates the financial structure to fund cleanup through a tax on the wholesale value* of hazardous substances.
• Allows the state to recover for natural resource damages resulting from a release or threatened release of hazardous substance.
• The Department of Ecology is granted various rulemaking authority to implement MTCA.

* In the final days of the 2019 legislative session, SB 5993 was passed, creating large-scale changes to how MTCA is funded. The new HST will be a volumetric tax (pending the governor’s signature).
What makes a site?

- Release of a hazardous substance into the environment.
- Site is defined by where a hazardous substance has come to be located.
- Remedial action is required at a site if the contamination is a risk to human health or the environment (i.e., is above the cleanup level).
Your client discovers contamination on their property
Owners and operators are required to report the discovery of a release of hazardous substances that may pose a threat to human health or the environment (see WAC 173-340-300(3) for exemptions).

- Underground Storage Tank—within 24 hours of confirmed discovery.
- Other releases—within 90 calendar days of discovery.
And then what?

• Ecology Conducts an Initial Investigation: WAC 173-340-310
• Ecology Prepares a Site Hazard Assessment: WAC 173-340-320
What makes someone “liable?”

Any past or present relationship with a contaminated site may result in liability.
- current owner or operator
- past owner or operator (at time of release)
- arranger
- transporter
Are there any exceptions to being “liable”?  

YES!

• Exceptions to definition of “owner or operator”:
  • State or local agency that acquired property involuntarily.
  • Lender that did not participate in management.
• Defenses to MTCA liability:
  • Third party defense.
  • Innocent landowner defense.
  • “Plume Clause” defense.
Liability if I loaned money used to buy contaminated property?

• Generally immune from liability so long as maintain the role of a traditional lender.
  • DO NOT become actively involved in management of the property.
  • Exception for temporary control to preserve the value of collateral or mitigate any default.
How to deal with your release: Independent, VCP, or Formal?

- Independent cleanup without consultation
  - Required to send Ecology a report once you are done.

- Independent with consultation (Voluntary Cleanup Program)

- Ecology-supervised cleanup without settlement (Formal)

- Ecology-supervised cleanup with settlement (Formal)
Ecology has discretion to determine if cleanup of a site requires oversight.

- Ecology sends a preliminary status letter to all PLPs for the site.
- Ecology sends a Determination of Status Letter.
- The Remedial Investigation and Feasibility Study will be conducted under an Agreed Order.
- The Cleanup Action Plan, with Ecology’s preferred cleanup alternative will be implemented through a separate Agreed Order or a court-supervised Consent Decree.
Model Remedies

- MTCA rule amendments include provisions for establishing model remedies.
- The purpose is to streamline and accelerate the selection of cleanup actions.
- Sites meeting the criteria for use of a model remedy are not required to conduct a:
  1. Feasibility Study, or
  2. Disproportionate Cost Analysis
Draft Cleanup Action Plan (CAP)

- Ecology will choose the cleanup action alternative.
- The draft CAP must go out for public review/comment.
- The CAP is Ecology’s decision document for the site.
- It will include: a history of the site, cleanup standards for each affected media, the remedy selected, a schedule for remedial actions, ARARs and permits required for the remedial action.
- A SEPA determination on the cleanup action must be done no later than the implementation of the final Cleanup Action Plan.
How to implement the CAP

• Ecology may use an Agreed Order, Enforcement Order or Consent Decree to implement the CAP.

• The state may settle with a PLP for the site if: (1) Ecology determines the proposed settlement will lead to a more expeditious cleanup; and (2) the attorney general agrees to a settlement.

• A settlement is entered as a CD issued by the court.

• The CD may include a covenant not to sue (with reopener clause).

• The CD must include “contribution protection” – a party who has a settlement with the state is not liable for claims for contribution for matters addressed in the settlement.
Filing the Consent Decree

- Ecology will provide the PLPs with a draft CD and CAP.
- The final CD, CAP, and SEPA determination go out for public review/comment.
- Filing the CD resolves and completes the case so no scheduling order is needed.
- Typically the matter is handled ex parte.
Satisfaction of Order or Decree

• An AO is complete when all of its provisions have been satisfied and Ecology issues a written notification.

• A CD is complete when all of its provisions have been satisfied, Ecology issues a written notification to the parties, and the judge orders a dismissal.

• An order or decree is not complete if post-cleanup remedial actions are necessary to control or monitor the remaining contamination.

  • Ecology may provide the PLP with a status letter once all construction work has been completed and only monitoring and/or periodic reviews are required.
Prospective Purchaser CDs:

• Parties who are wanting to settle liability prior to becoming PLPs:
  • Cannot already be liable at that site.
  • Substantial new resources to facilitate cleanup.
  • Expedite remedial action.
  • Proposed development or reuse cannot:
    • contribute to the existing release or threatened release.
    • interfere with the remedial actions.
    • increase health risks to persons at or in the vicinity.
What is a *de minimis* settlement?

- MTCA authorizes a settlement with a PLP where the amount of contamination contributed by the PLP is “insignificant in amount and toxicity.” RCW 70.105D.040(4).

- TCP Policy 520C (established January 2006, revised December 2016) provides a process for evaluating if a party qualifies as a *de minimis* PLP.

- A *de minimis* settlement may be “cash out” or for certain activities a combination of both.
What about other PLPs? How do you cost recover?

- A private right of action, including a claim for contribution, is available for recovery of remedial action costs from another PLP.
- The court will determine if the person is liable under MTCA, and if so will apportion liability based on any equitable factors the court considers appropriate.
- Action must be brought within 3 years from the date remedial action confirms cleanup standards are met.
What’s been going on in the courts?

- Douglass v. Shamrock Paving, Inc. (WA Supreme Court)
- Pope Resources v. DNR (WA Supreme Court)
- Pakootas v. Teck Cominco Metals, Ltd. (9th Circuit)
- Travelers Indemnity Company v. City of Richland (9th Circuit)
- Seattle Times Co. v. LeatherCare Inc. (9th Circuit)
- Port of Anacortes v. Frontier Industries, et al. (COA, Div1)
- Clean Water Act groundwater cases
  - Hawaii Wildlife Fund v. County of Maui (Ninth Circuit)
  - Upstate Forever v. Kinder Morgan (Fourth Circuit)
  - Sierra Club v. Virginia Electric Power Co. (Fourth Circuit)
  - Tennessee Clean Water Network v. Tennessee Valley Authority (Sixth Circuit)
  - Kentucky Waterways Alliance v. Kentucky Utilities Co. (Sixth Circuit)
Questions?