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Pope Resources: Redefining Liability Under MTCA

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In late May, the Washington Supreme Court issued an important decision affecting the scope of liability for cleanup at contaminated sites. In *Pope Resources, LP v. Wash. Dept. of Natural Resources*, No. 94084-3 (Wash. May 24, 2018) (en banc), the Court held that the Washington State Department of Natural Resources ("DNR") was not a liable party under the Model Toxics Control Act ("MTCA") for the cleanup of the Port Gamble Bay and Mill Site on the Kitsap Peninsula. The decision has potentially far-reaching consequences for public and private parties alike at all contaminated sites in Washington state.

DNR and the Port Gamble Site

The State of Washington owns most aquatic lands (aka sediments or submerged lands) in fee. DNR has legislative authority to manage these lands, including leasing them to various public and private entities.

In 1974, DNR began leasing aquatic lands in Port Gamble to Pope & Talbot, Inc. and its various related entities ("Pope Resources"). Pope Resources operated a saw mill and wood products manufacturing facility on the adjoining upland, and used the aquatic lands for various activities, including in-water log storage and transportation. The aquatic leases included indemnification language that broadly shifted liability from the State and DNR to Pope Resources for "any and all liability" including damages to natural resources.

In 2007, both Pope Resources and DNR were named as "potentially liable parties" (or "PLPs") under MTCA by the Washington State Department of Ecology ("Ecology"). DNR chose to not participate in remedial activities, and Pope Resources sued DNR for contribution. Pope Resources asserted that DNR qualified as an "owner or operator" because, by leasing and managing the land for the state, DNR exercised an "ownership interest" and had "control" over the property. Both parties conceded that the State did not qualify as an "owner or operator" of the aquatic lands under MTCA because the State is not listed as an entity that can be a "person" under the statute.

DNR filed for summary judgment, asserting that it was not an "owner or operator" under MTCA. DNR prevailed before the Superior Court, but the decision was reversed by the Court of Appeals. The reversal in the Court of Appeals was not particularly surprising, and seven amicus petitioners disagreed with some aspect of DNR's position, if not outwardly requesting the Court of Appeals to reverse, which it did. However, the Supreme Court reversed the Court of Appeals and reinstated the Superior Court's decision, granting summary judgment in favor of DNR.

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The Port Gamble Decision

The Supreme Court held that DNR was not an "owner" of the aquatic lands in Port Gamble because DNR merely managed these lands for the owner, the State of Washington. The Court was not persuaded that DNR exercised "any ownership interest" when it leased property because leasing is only one "stick" in the bundle of rights typically held and exercised by owners of property. This interpretation ignores the plain language of MTCA, which provides broad liability for "any ownership interest" – a fact noted by three dissenting justices.

The statutory definition of "owner" liability under MTCA was previously considered a low bar, but with the *Pope Resources* decision, the Court adopted a very narrow interpretation, implying that MTCA ownership liability could only arise from "deeds, grants, patents, or other instruments conveying ownership interest." The Court reasoned that the State did not transfer "any ownership interest" to DNR when the legislature delegated management authority.

Even more surprisingly, the Supreme Court also held that DNR was not an "operator" because DNR's role as leasing agent and manager did not represent control over operational decisions and the management that related to contamination. The Court held that DNR had no role in the day-to-day operations of Pope Resources, including decisions about the storage or disposal of hazardous substances, and, therefore, did not have sufficient control over the site to be an "operator" under MTCA.

The Court adopted the more narrow definition of an "operator" under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in *United States v. Bestfoods*, 524 U.S. 51 (1998). While MTCA was modeled after CERCLA, the plain language of MTCA liability for an "operator" is broader on its face, addressing "*any* control" rather than specific control over pollution-related matters. As noted by the dissent, the Supreme Court disregarded any distinction in the language of the two statutes regarding "operator" liability.

Impacts of the *Pope Resources* Decision on MTCA Liability

Key takeaways from the decision and their effect on MTCA liability include:

(1) DNR will assert similar arguments at other sediment cleanup sites across the state on state-owned lands managed by DNR. Even though the Court left open the possibility that DNR *could* be liable as an "operator" under different circumstances at other sites, a finding of liability is not likely to occur at sites where DNR only acts under its leasing and land management role. Because DNR leases and manages other property in addition to aquatic lands, this decision could be applied to any state-owned property managed by DNR.

(2) The Court significantly narrowed both "owner" and "operator" liability under MTCA, for both public and private entities alike. In disregarding distinctions in MTCA's plain language, the Court narrowed the definition of these terms under MTCA to make them more akin to "owner" and "operator" liability under federal law. "Owner" liability under MTCA now likely requires fee title ownership, which disrupts the commonly accepted interpretation of MTCA "ownership" as being broader than just fee title. For "operator" liability, the burden of proof to demonstrate "control" or decision-making authority over issues affecting site contamination is now greater than what was previously drafted and intended under MTCA.

(3) A narrower scope of liability for "owners" and "operators" will mean fewer "potentially liable persons" under MTCA to allocate shares of liability for remedial action costs. The Court analyzed the contractual shifting of liability in lease agreements, which will be of greater importance in allocating the risk for environmental harm between a tenant and a landlord, especially if the landlord is not the "owner" in fee of the property.

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