

Washington's MTCA – No Intent Required

Court affirms judgment against DOT for arranging the disposal of contaminated groundwater into the Thea Foss Waterway

By [David C. Weber](#)

In 1986, during construction of a highway in Tacoma, Washington, the Washington State DOT installed a drainage pipe to help stabilize the road bed. It turned out that this pipe was draining significant amounts of polluted groundwater into the Thea Foss Waterway, which is a portion of the Commencement Bay Superfund Site. DOT allowed this pipe to continue to discharge pollution for 17 years, long after it recognized that it was polluting the Waterway. The cost to DOT to sever the pipe and stop the ongoing contamination of the Waterway was less than \$50,000. The cost to clean up the Waterway has exceeded \$116 million.

On July 19, the Washington Court of Appeals determined that DOT was liable under Washington's cleanup statute, the Model Toxics Control Act (MTCA), for arranging for the disposal of contaminated groundwater into the Waterway. See *PacifiCorp Environmental Remediation Company (PERCO) and Puget Sound Energy (PSE) v. WSDOT*, 2011 WL 2811378 ([Wash. Ct. App. July 19, 2011](#)). In its decision, the court upheld the trial court's six million dollar judgment against DOT, a declaratory judgment for 2% of all future costs incurred by the defendants in monitoring and maintaining the Waterway remedy, and over \$1.6 million in fees and expenses. The court's decision is significant in several respects.

Decision underscores the importance of State law in private cleanup disputes.

Like many other states, MTCA is patterned after the federal cleanup statute, CERCLA. In enacting CERCLA, Congress expressly preserved the right of states to impose additional liability or requirements with respect to the release of hazardous substances. In Washington, MTCA was adopted by voter initiative in 1989 to "make polluters pay." To further the goal of the expeditious cleanup of hazardous waste, statutorily responsible parties are strictly liable for the remedial action costs associated with investigation and remediation. RCW 70.105D.010(5). Unlike CERCLA, MTCA explicitly provides for strict, joint and several liability. This difference results in greater potential exposure for defendants in cost recovery and contribution cases under MTCA.

In this case, DOT had denied any responsibility for cleaning up the Waterway. It claimed that it never intended to arrange for the disposal of hazardous substances. And, without that "intent," DOT argued, it was not liable under MTCA. DOT relied upon the U.S. Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009). In *Burlington Northern*, the Court held that an entity could only be held liable as an arranger under CERCLA if it took intentional steps to dispose of a hazardous substance. The court rejected DOT's reliance on *Burlington Northern*, stating: "The United States Supreme Court's interpretation of CERCLA does not trump our state courts' interpretation of Washington's comparable Act." *Id.* at *15. The court concluded that arranger liability under MTCA does not require a plaintiff to prove that the defendant had the specific intent to dispose of a hazardous substance. *Id.*

Before the decision in *Burlington Northern*, Washington courts had concluded that MTCA arranger liability did not require proof that a defendant intended to dispose of a hazardous substance. See *Taliesen Corp. v. Razore Land*

Co., 135 Wn. App. 106 (2006); *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn. App. 564 (2005); *Seattle City Light v. WSDOT*, 98 Wn. App. 165 (1999). Courts considered an intent requirement “incongruous” with MTCA’s strict liability structure. *Modern Sewer*, 125 Wn. App. at 572.

As the Supreme Court continues to seemingly narrow the scope of liability under CERCLA, state cleanup laws, such as MTCA, will play a much bigger role in cost recovery litigation and site clean-up strategies.

Riddell Williams represented PSE in this case.

If you have any questions about this Newsletter, please contact the author listed above or the Riddell attorney with whom you normally consult.

The **Riddell Williams Environmental and Natural Resources Group** has played a key part in addressing some of the region’s most challenging environmental issues. Our group’s clients include utilities, international pulp and paper manufacturers, petroleum companies, regional energy companies, airlines and airfreight carriers, steel manufacturers, waste management companies, technology businesses, real estate development partnerships, private landowners and some of the state’s leading environmental groups.

Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192

Telephone: 206.624.3600
Facsimile: 206.389.1708
www.riddellwilliams.com