No. 69568-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AUBURN VALLEY INDUSTRIAL CAPITAL LLC,
a Washington limited liability company,

Plaintiff/Respondent

v.

ROSS B. HANSEN, as single person, and NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company,

Defendants/Appellants.

# RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF ASSOCIATION OF WASHINGTON BUSINESS


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## I. INTRODUCTION

The Association of Washington Business ("AWB") filed an amicus brief expressing concern about (1) the application of Model Toxics Control Act ("MTCA") requirements to "the interior, roof, and loading dock of a leased industrial building left 'broom clean' in accordance with lease provisions" and (2) the "imposition of MTCA liability in a private cause of action after the state Department of Ecology ... determined that the subject property is not a MTCA cleanup site." AWB Br. at 1.

Auburn acknowledges that AWB members have legitimate interests in "MTCA law and policy issues." AWB Br. at 2. However, the two concerns AWB has raised in this case are unwarranted. Both of AWB's concerns are based on contentions that are contrary to the factual record and are contrary to applicable legal precedent.[1]

The trial court entered 155 findings of fact and 31 conclusions of law in support of its November 2012 judgment, which held NW Mint liable under MTCA and under a commercial lease for expenses Auburn

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[1] It is possible that AWB did not have an adequate opportunity to review the trial court record in this case. AWB's amicus brief does not contain a single citation to the factual record in support of any of its arguments. For example, there is no indication that AWB reviewed the 912-page environmental closure report which documents releases of hazardous substances to the environment outside of the building. Ex. 173 (pp. 127, 481, 588-89). AWB has simply cited to portions of NW Mint's brief regarding factual issues, an approach that results in a repetition of NW Mint's view of the case instead of a presentation of AWB's own "unique perspective, not represented by the parties." AWB Motion at 2.

incurred to clean up contamination caused by NW Mint's operations. CP 1703-34 (Findings of Fact and Conclusions of Law dated October 15, 2012); CP 1735-37 (Order Amending Findings of Fact and Conclusions of Law dated November 14, 2012); CP 1738-43 (Judgment dated November 14, 2012). AWB has not identified a single finding of fact or conclusion of law that it contends is erroneous or unsupported by the extensive record evidence in this case. The trial court record and Washington law support the trial court's careful and detailed determinations regarding NW Mint's MTCA liability.

## II. RESPONSE TO AWB'S AMICUS ARGUMENT

### A. AWB Misapprehends the Nature of the Auburn Property and Misconstrues the Applicable MTCA Cleanup Standards.

Contrary to AWB's statements (AWB Br. at 1, 3, 7), the contaminated property in this case is not "industrial" as that term is defined under MTCA. This is a critical flaw in AWB's understanding of the Auburn property and the MTCA issues in this case. The Auburn property is subject to "residential" cleanup standards under MTCA, not "industrial" cleanup standards. MTCA regulations require that cleanup levels must be based on estimates of the "reasonable maximum exposure" expected to occur under both current and future site use conditions. WAC 173-340-740(1)(a).

AWB contends that MTCA cleanup standards for "predominantly residential land use sites" should not be applied to the Auburn "industrial" property. AWB Br. at 7. This argument ignores MTCA's "reasonable maximum exposure" regulation, which requires that cleanup standards must be based on residential land use whenever residential use is a possibility at a site. WAC 173-340-740(1). This requirement was confirmed by Ecology's representative, Russ Olsen, who testified at trial that the Auburn property would not qualify as an "industrial" site under MTCA because the local zoning code allows the property to be used for residential and day care purposes. RP 8/13 at 170. Therefore, residential cleanup standards were properly applied to the Auburn property. Even NW Mint's own expert conceded that "residential," not "industrial," cleanup standards apply to the Auburn property. RP 8/20 at 78.

### B. The Trial Court Correctly Interpreted and Applied MTCA Requirements to the Auburn Facility.

AWB correctly states that "MTCA's liability trigger is a release or threatened release of a hazardous substance that may pose a threat to human health or the environment." AWB Br. at 4, citing RCW 70.105D.040. In this case, the record supports the trial court's findings that there were both releases and threatened releases of hazardous substance metals as a result of the contamination left by NW Mint at the

Auburn property.[2] Findings of Fact Nos. 101-03, 106 [CP 1720-21]; Conclusions of Law Nos. 3, 5, 7, 12, and 13. [CP 1729-30]; Ex. 58; Ex. 79; Ex. 170 (Tab F, photos 44-49); Ex. 173 (pp. 127, 481, 588-89); RP 8/14 at 57; RP 8/20 at 22 (NW Mint's expert's estimate of a release of "a microgram per minute" of silver fumes to the environment during melt operations); Ex. 160, ¶ 16(e) (Dr. John Schell's opinion that cleanup action at Auburn facility was appropriate to address the "ongoing risk of a release or threatened release of these hazardous substance metals outside of the facility to the environment").

The contamination was not limited to "interior" areas of the Auburn property, as AWB alleges. AWB Br. at 1, 5-7. The trial court correctly found that hazardous substances from NW Mint's operations had been "released" to the "environment" outside of the building leased by NW Mint.[3] Findings of Fact Nos. 101-03, 106 [CP 1720-21].

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[2] AWB concedes that "hazardous metal substances" were "present to some degree" at the Auburn facility. AWB Br. at 5. However, this seriously understates the extent and nature of the contamination at this site. The high level of hazardous substance metal contamination from NW Mint's operations at the Auburn property exceeded MTCA cleanup levels, which are established for the protection of human health and the environment. WAC 173-340-700(2); Ex. 160, ¶¶ 9-11, 16 (Declaration of Dr. John Schell).

[3] Hazardous substance metals from NW Mint's metal fabrication operations were discharged to locations outside of the building. Both of NW Mint's own environmental/MTCA experts testified that hazardous substance metal fumes and residues were released to outside air and outside roof areas from the roof exhaust vent above the molten metal furnace. RP 8/14 at 57; RP 8/20 at 22-24; Ex.

### C. MTCA Does Not Exclude Hazardous Substances in the Form of "Dust".

AWB asserts, without citing any legal authority, that the presence of hazardous substances in "interior/exterior building dust" at the Auburn property should not be considered a "release" of "hazardous substances" into the "environment" under MTCA.[4] AWB at 5 (emphasis added). However, MTCA contains no exclusion for hazardous substances in the form of "dust."

MTCA cleanup regulations specifically apply to particles "less than two millimeters [.0787 inches] in size," which is inclusive of "dust" and other small particles. WAC 173-340-740(7). In addition, MTCA regulations specifically allow "more stringent cleanup levels" to be applied at sites where hazardous substances are present "to address the potential health risk posed by dust at a site." WAC 173-340-740(1)(c)(iii)

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170,Tab F, Photos 44-49. This evidence of hazardous substance discharges to outside (ambient) air is uncontroverted evidence that there was a "release" of "hazardous substances" to the "environment," which is a basis (along with the threatened releases of hazardous substances) for NW Mint's MTCA liability. RCW 70.105D.040(1)(b); Conclusions of Law Nos. 3, 5, 7, 12, and 13 [CP 1729-30].

[4] AWB undermines its own argument that contamination was limited to interior building areas by conceding that "hazardous meal substances" were present "on some external building surfaces" and also on "near-exterior areas, such as a roof or loading dock" at the Auburn property. AWB Br. at 5.

(emphasis added).[5]

It is logical to apply MTCA to sites where hazardous substances are present in the form of dust. MTCA is intended to apply "conservative" cleanup standards to protect human health and the environment.[6] Experts on both sides testified at trial that dust particles and metal vapor fumes pose a greater human health risk than larger particles of hazardous substances. RP 8/6 at 35-36; RP 8/9 at 18-20; RP 8/20 at 175. It would be illogical and contrary to the statute's purposes to exclude small particles of hazardous substances (dust) from MTCA's liability scheme where such small particles pose greater human health risks.[7]

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[5] NW Mint's Answer to AWB's amicus brief states: "The [MTCA] regulation that mentions dust covers circumstances where 'dust [is] generated by contaminated soil.'" NW Mint Answer at 4. However, MTCA regulations do not contain the phrase "dust generated by contaminated soil." Instead MTCA regulations provide that more stringent cleanup standards may be applied at sites where "necessary to address the potential health risk posed by dust at a site." WAC 173-340-740(c)(iii). MTCA does not limit this authority to "dust generated by contaminated soil" as alleged by NW Mint.

[6] "[MTCA] contains policies that state, in part, each person has a fundamental and inalienable right to a healthful environment and it is essential that sites be cleaned up well. Consistent with these policies, cleanup standards and cleanup actions selected under this chapter shall be established that provide conservative estimates of human health and environmental risks that protect susceptible individuals as well as the general population. ... [C]ost shall not be a factor in determining what cleanup level is protective of human health and the environment." WAC 173-340-702(3, 6) (emphasis added).

[7] AWB contends that MTCA regulations permitting more rigorous cleanup standards for "dust" are intended to apply only to "land use sites with particular exposure scenarios, such as residential development sites" and not "industrial properties." AWB Br. at 6. This argument is based on AWB's misunderstanding

There is no factual or legal basis for challenging the trial court's determination of NW Mint's MTCA liability based on the fact that the hazardous substances were in the form of "dust" instead of larger sized particles.

### D. NW Mint's Soil/Dust Arguments are Contrary to MTCA Regulations and NW Mint's Own Evidence

NW Mint has submitted what it calls an "answer" to AWB's amicus, which actually does not answer any of what AWB has to say but instead attempts to revamp NW Mint's own argument from "dust" to "soil." NW Mint's "soil" argument has no more merit than its "dust" argument.

NW Mint's Answer to AWB's brief includes a number of revamped arguments intended to persuade this Court that a party such as NW Mint should be allowed to contaminate a "facility" (defined under in MTCA to include a "building") and avoid liability for cleanup so long as the contamination can be characterized as "dust." This case is not about

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regarding MTCA's requirement to establish the "reasonable maximum exposure" scenario based on the current and future use of a site. WAC 173-340-740(1).

In this case, the fact that residential and day care uses are allowed under the local zoning code means that (1) the Auburn property cannot be classified as an "industrial" property under MTCA and (2) residential use of the site must be considered the "reasonable maximum exposure" scenario under WAC 173-340-740(1). RP 8/13 at 170 (Russ Olsen); Ex. 203 (Auburn Zoning Code). As a result, AWB's own argument (that more rigorous cleanup standards for "dust" should apply only to sites with residential exposure scenarios) actually supports Auburn position that MTCA's "dust" regulation applies to the Auburn property.

household "dust." It is about hazardous substance metal residues and fume particulates much smaller than grains of sand that were demonstrated to be present at concentrations exceeding cleanup levels established to protect human health and the environment. Ex. 160, ¶ 16.[8]

In its answer to AWB's amicus brief, NW Mint contends that Ecology determined that "the metallic dust in the Premises was not soil for purposes of MTCA." NW Mint Answer to AWB Amicus Br. at 4, fn. 13. NW Mint overlooks the testimony of this Ecology employee in which he admitted that "dust" is not excluded from the definition of soil and that Ecology has preserved its authority to regulate dust as soil.

> Q. And I think you said something about MTCA doesn't regulate dust -- or I think what you said is, dust is not soil under MTCA. Remember testifying that way?
> Correct.
> Q. Where in MTCA regulations, is dust excluded from the definition of soil?
> A. It's not.
> Q. So dust is regulated as soil if it meets the size fraction that's enumerated in the regulation?
> A. Ecology would reserve the right, correct.

RP 8/13 at 173 (cross-examination of Russ Olsen by Auburn's counsel)

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[8] As explained by Dr. John Schell, Auburn's toxicologist, the primary human health risk factor in determining and applying cleanup standards is the potential for a person to be in contact with the hazardous substances. RP 8/9 at 74-80. It would make no sense to limit MTCA to narrowly defined areas of the environment (such as undisturbed areas of "soil"). MTCA's own terms make it clear that it applies to a "facility," a "building" and a " land surface" such on developed property.

In its answer to AWB's amicus brief, NW Mint offers a strained interpretation of the MTCA definition of "soil." NW Mint Answer at 3. NW Mint's interpretation ignores the phrase "including materials of anthropogenic sources such as slag, sludge, etc." WAC 173-340-200. Applying its restrictive interpretation, NW Mint concludes that "[m]aterials generated by industrial and manufacturing operations are not soil, since they are [sic] do not contain organic solids, air, water and biota." *Id.* No legal authority is cited for this narrow interpretation. Moreover, this interpretation conflicts with the testimony of NW Mint's own MTCA expert, Peter Jewett, who testified about his experience at a cleanup site where "pure slag" was treated as "soil" and where "soil" cleanup levels" were applied to that slag.[9]

> Q. [Dr. Schell] made the assumption that dust could be treated as soil for purposes of method B; is that your understanding?
>
> A. Yes, well, not only the definition of soil, but also that whole conceptual site model of the exposure scenario associated with soil. So, for example, if we want to get in the definition, I think he talked about man-made stuff, I think he used an example, slag. So slag is a by-product of steel manufacturing, and it's like this really gritty, granular,

[9] NW Mint's reference to the testimony of Auburn's toxicologist (NW Mint Answer at 3, fn. 10) regarding the MTCA definition of "soil" is misleading. Dr. Schell provided a detailed explanation that his risk assessment and his development of soil cleanup standard was based on the MTCA regulation allowing "more stringent" cleanup levels for where "necessary to address the potential health risk posed by dust at a site." RP 8/9 at 75-80; WAC 173-340-740(1)(c)(iii).

> course sand, is kind of what it looks like. So as an example of that, just to clarify how that definition works, we recently completed a cleanup here and -- completed a cleanup here in Kent, where we cleaned up slag. It was about an acre that was about ten, fifteen feet thick. There was scotch broom growing all over it, there were critters trying to dig through it, you could walk on it, you could dig it, you can put it on your hand and the could fall on it, percolate through it. So we absolutely applied soil cleanup levels to that slag. It was pure slag, no doubt about it. So those cleanup levels were selected based on a soil definition and a soil exposure scenario.

RP 8/9 at 42-43 (testimony of Peter Jewett) (emphasis added).

### E. "Land Surface" Should Not be Ignored or Narrowly Applied When Interpreting the MTCA Definition of "Environment."

AWB refers to the definition of "environment" found in MTCA regulations. AWB Br. at 5, citing WAC 173-340-200. However, AWB does not explain why the term "land surface," a term included in the MTCA definition of "environment," should be interpreted to exclude "interior building spaces" or "external building surfaces."[10] Federal courts applying the federal counterpart to MTCA have awarded investigation and cleanup costs even when the contamination is limited to interior building

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[10] The term "environment" is defined under MTCA regulations to include "any ... ambient air" and "any ... land surface." WAC 173-340-200. Although Washington appellate courts have not specifically addressed the interpretation of "land surface" under MTCA, federal cases interpreting the federal counterpart to MTCA have consistently interpreted "land surface" to include not only exterior land surfaces but also interior building surfaces. *See infra* footnote 10.

areas.[11] Auburn relies on a number of federal cases in support of a broad interpretation of the "land" and "land surface" as those terms are used in MTCA.[12] Auburn Response Brief at 38, fn. 47.

AWB has offered no response to these federal cases cited by Auburn, all of which clearly hold that polluting parties such as NW Mint can be required to pay cleanup costs for interior building contamination.[13]

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[11] The federal counterpart to MTCA is the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* Washington courts rely upon CERCLA cases as persuasive authority when interpreting MTCA. *ASARCO v. Dep't. of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 (2002) ("MTCA was modeled on CERCLA, and we have found CERCLA case law persuasive in interpreting MTCA").

[12] *See, e.g., BCW Associates, Ltd. v. Occidental Chemical Corp*, No. 86-5947, 1988 WL 102641 (E.D.Pa. 1988) (awarding over $967,000 in response costs to investigate and remediate hazardous lead dust entirely within an industrial building, even without any evidence of an actual release to the environment). In *BCW*, the polluting party argued that disposal of hazardous substances within the interior space of a warehouse was not disposal "into or on any land or water. *Id.* at 17. The *BCW* court rejected that "unduly narrow" interpretation: "It is clear that Congress intended the term "land" to encompass buildings and other types of real estate ...." *Id.* The same result was reached in *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 792 (D. N.J. 1989) (spills or leaks of PCB's entirely within the plant building are considered "disposal" within the meaning of CERCLA). *See also United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993) (reasoning that "if the phrase 'any land' is read so narrowly as to include only the open environment, the latter portion of the definition – such that the substances 'may enter the environment or ... the air ... or the water' – is mere surplusage" and holding that spilling of chemicals inside a building constitutes "disposal" under CERCLA); *Emhart Industries, Inc. v. Duracell Int'l, Inc.*, 665 F.Supp. 549, 574 (M.D. Tenn. 1987) (spilling of hazardous substances (PCBs) indoors constituted "disposal" under CERCLA).

[13] AWB refers to the *BCW* case in a footnote, but its attempt to distinguish the *BCW* case is unavailing. As in the *BCW* case, there was evidence at the Auburn facility that "dust from a prior occupant, pervasively present in the [building] ... could be released into the environment." AWB Br at 6, fn. 2. *See, e.g.,* Ex. 160,

This is consistent with the scope of MTCA liability, under which parties such as NW Mint who "operated the facility at the time of disposal or release of the hazardous substances" can be held liable for "all remedial action costs."[14] RCW 70.105D.040(1)(b) and (2) (emphasis added).

AWB urges this Court to narrow the broad and protective scope of MTCA and to adopt a rule that MTCA cannot be applied to a site where hazardous substances are present in a building. AWB at 7. This argument is contrary to the legislature's statement that MTCA is to be "liberally construed to effectuate the policies and purposes of this act," including the protection of human health and the environment. RCW 70.105D.910. NW Mint's argument is also contrary to MTCA's specific liability provisions. MTCA liability applies to "[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(b) (emphasis added). Under MTCA, "facility" is defined under MTCA to include "a building" and also "any site or area where a hazardous substance ... has been deposited, stored,

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¶ 16(e) (Dr. John Schell's opinion that cleanup action at Auburn facility was appropriate to address the "ongoing risk of a release or threatened release of these hazardous substance metals outside of the facility to the environment").

[14] The MTCA definition of "facility" is "(a) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance ...has been deposited, stored, disposed of, or placed, or otherwise come to be located." RCW 70.105D.020(4) (emphases added)

disposed of, or placed, or otherwise come to be located." RCW 70.105D.020. The result is that MTCA applies to the Auburn facility, and NW Mint is liable for Auburn's investigation and cleanup costs.[15]

No federal court decision under CERCLA or Washington court decision under MTCA supports AWB's argument that NW Mint, as the operator who caused hazardous substance contamination at the Auburn facility (inside and outside of the leased building), should be allowed to escape liability for the investigation and cleanup of the contamination.[16]

**F. AWB Misconstrues Ecology's Involvement in This Case.**

AWB mistakenly contends that "responsible officials" of the Department of Ecology "determined that the [Auburn] property is not a MTCA cleanup site." AWB Br. at 1. No citation to the record is provided to support this assertion, and it is flatly contradicted by the testimony of Russ Olsen, the only Ecology employee who made any statements regarding MTCA related to the Auburn property. AWB is apparently

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[15] NW Mint's arguments about the MTCA definitions of "soil" and "environment" would lead to the absurd result that a party such as NW Mint could dispose of hazardous substances on "land surface" such as a parking lot or school playground without any risk of MTCA liability. No court has ever interpreted MTCA or its federal counterpart, CERCLA, to allow a polluting party to avoid cleanup liability in such circumstances.

[16] It seems unlikely that AWB members who own commercial, residential or industrial property would share the view expressed in AWB's amicus brief, advocating an approach to MTCA that would allow polluting tenants to avoid liability for contamination they leave behind when they vacate leased facilities.

unaware that Mr. Olsen testified at trial that neither he nor Ecology would issue an opinion regarding whether any property "is a MTCA site."

> ... the purpose of the Voluntary Cleanup Program is to deal with independent cleanup sites, where the owner is actively pursuing cleanup in accordance with the regulation[s]. It isn't there to define sites or for purpose of sites, or whether or not something is a site.

RP 8/13 at 150 (emphasis added).

Mr. Olsen's testimony refutes any contention by AWB that Ecology made a "determination that MTCA did not apply to the site." AWB at 8.

In his position as supervisor of the Voluntary Cleanup Program ("VCP") within the regional (Bellevue) office of the Department of Ecology, Mr. Olsen wrote two letters in response to VCP applications submitted by NW Mint's attorneys. NW Mint's attempts to mislead and manipulate Mr. Olsen by submitting incomplete and misleading VCP applications and NW Mint's attempts to mislead the trial court regarding Ecology's responses to these VCP applications are described in detail in Auburn's Response Brief, pp 32-26, and need not be repeated here.

Neither of the two letters written by Mr. Olsen regarding the VCP applications can be viewed as "Ecology's own determination of its MTCA jurisdiction." AWB Br. at 9. MTCA's cost-recovery statute, MTCA regulations and Mr. Olsen's testimony confirm that the determination of

MTCA liability and the award of remedial action costs in Auburn's lawsuit against NW Mint are within the exclusive jurisdiction of the courts, not Ecology. RCW 70.105D.080; WAC 173-340-545(1); RP 8/13 at 120-21, 161-63.

To the extent NW Mint had hoped to use Mr. Olsen's letters as evidence as to whether there was a release of hazardous substances to the environment (outside of the building) at the Auburn site, this was a factual determination on which the trial court was entitled to weigh evidence. It was not a matter of Ecology's "jurisdiction" in a private cost-recovery lawsuit.

Auburn and NW Mint's own experts provided evidence of releases to the "environment" outside of the Auburn building. RP 8/14 at 57; RP 8/20 at 22-24; Ex. 170,Tab F, Photos 44-49. In contrast, Mr. Olsen's first letter (stating that "[f]rom the information provided, metal dust did not enter the 'environment'") was based on incomplete application information that did not include Auburn's final closure report for the cleanup, which provided evidence of hazardous substance releases outside of the building. Ex. 260; RP 8/13 at 99. His second letter was based on "skimming" over 1,000 pages of reports and data tables for "approximately" one hour. Ex. 285; RP 8/13 at 137. The trial court properly weighed this factual evidence and found that hazardous

substances had been released to the environment at the Auburn facility during the time of NW Mint's operations. Findings of Fact Nos. 101-03, 106 [CP 1720-21].

### G. The Trial Court, Not Ecology, Has Exclusive Authority to Decide MTCA Cost-Recovery Actions.

AWB asserts that the trial court's decision on Auburn's cost-recovery claim against NW Mint "ignor[ed] Ecology's own determination of its MTCA jurisdiction." AWB Br. at 9. In fact, there is no jurisdictional conflict between Ecology's Voluntary Cleanup Program and the judicial determination of MTCA remedial action cost-recovery claims under RCW 70.105D.080. The determination of MTCA liability and the determination of the amount of remedial action costs to be awarded are matters within the exclusive jurisdiction of the courts, not Ecology.

MTCA's "Private right of Action" provides for recovery of "remedial action costs:

> Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter.

RCW 70.105D.080 (emphasis added).

Ecology's "Private Right of Action" regulations provide the following guidance to courts regarding the "substantial equivalence" determination in a private cost-recovery action:

> The purpose of this section is to facilitate private rights of action and minimize department staff involvement in these actions by providing guidance to potentially liable persons and the court on what remedial actions the department would consider the substantial equivalent of a department-conducted or department-supervised remedial action. In determining substantial equivalence, the department anticipates the requirements in this section will be evaluated as a whole and that a claim would not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action.

WAC 173-340-545(1).

NW Mint called Russ Olsen as a trial witness to testify in an attempt to show that his VCP letters should be binding on the court. His testimony, consistent with MTCA's cost-recovery provisions and Ecology regulations regarding private cost-recovery actions did not help NW Mint. Instead, he confirmed that Ecology does not intrude into the judicial role of the courts in MTCA litigation:

> Q. Okay. Then, I'm going to ask you in pieces about the next sentence. First of all, Ms. Ferrell [NW Mint's counsel] says, that, "I," she, "I was informed that Ecology does not give advisory opinions in private litigation." Is that your understanding of Ecology's position regarding private MTCA litigation?
> A. Correct.
> Q. And that would be your position as an employee of Ecology and as a manager in the VCP program; correct?
> A. As a supervisor, correct.

Q. As a supervisor. That your job is specifically not to give advisory opinions?
A. Correct.
Q. And that's because the Court decides issues in MTCA cost recovery; correct?
A. Correct.

RP 8/13 at 120-21 (cross-examination of Russ Olsen by Auburn's counsel)

Q. All right. You clarified in this letter [Exhibit No. 285] ... that this letter is limited -- the decision, you called it a decision, is limited to whether Ecology would accept Ms. Ferrell's VCP application; correct?
A. Correct.
Q. That's the only decision you rendered, isn't it?
A. Correct.
Q. You didn't make any determination of release to the environment, you said really the decision itself, what Ecology decided was, you are not going to take this VCP application?
A. Correct.
Q. And you could have done that just because the application was fiddled with, couldn't you?
A. Correct.
Q. Okay. And you state that your letter is not intended to be an opinion regarding other local state and federal requirements; correct?
A. Correct.
Q. That would include all of the issues that are litigated in a cost recovery action; right?
A. Potentially, yes.
Q. You aren't -- you didn't offer -- your decision didn't have anything to do with the issues, the factual and legal issues that are litigated in this lawsuit; isn't that correct?
A. Correct.
Q. Okay. In fact, you specifically state your letter is not determining anything regarding issues to be decided by a court in a MTCA section 80 cost recovery action; right?
A. Correct.
Q. And you specifically state -- and you didn't put this in the first letter, did you?
A. No.
Q. Why did you add it the second time?

A. Comes from the Attorney General's Office.
Q. Were you personally concerned that Ecology was being used in a litigation between a defendant and a plaintiff?
A. That's between me and Attorney General's Office.
Q. Okay. Fair enough. Ecology, in fact, had no authority to make any determination that is before this court in a cost recovery action; isn't that correct?
A. Correct.
Q. Including all of the underlying factual issues, those are solely for the Court to decide and not Ecology; right?
A. I don't know what underlying factual issues you are describing.
Q. Well, everything that goes in to whether there was a substantial equivalent of cleanup, all of the MTCA compliance issues, those are all for the Court to decide; correct?
A. Correct.
Q. Okay. In fact, only the Court applies these equitable facts to resolving factual issues; correct?
A. Correct.
Q. Because that's a judicial function, not a regulatory function of Ecology?
A. Correct.

RP 8/13 at 161-63(cross-examination of Russ Olsen by Auburn's counsel)

Contrary to AWB's contentions, Ecology did not assert jurisdiction in this case over MTCA cost-recovery litigation issues that are solely within the jurisdiction of the court. Ecology has no authority to decide and has never decided a MTCA cost-recovery lawsuit. Mr. Olsen's actions and role as an Ecology employee have been mischaracterized by AWB, probably at the behest of NW Mint. Mr. Olsen's own trial testimony confirms that he and Ecology recognized the court's exclusive role in deciding MTCA cost-recovery lawsuits:

No conflict exists between Ecology's role in reviewing independent and voluntary cleanup actions under the Voluntary Cleanup Program and the court's role in deciding claims for recovery of MTCA remedial action costs. AWB's allegations to the contrary are unfounded.

## III. CONCLUSION

The trial court's award of MTCA remedial action costs (the November 2012) and its award of attorney fees to Auburn as the prevailing party (the June 2013 judgment) are supported by the record evidence and applicable Washington law. Both judgments should be affirmed.[17]

DATED this 7th day of February, 2014.

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[17] The commercial lease between Auburn and NW Mint provides a separate and independent basis for the award of cleanup costs and attorney fees and costs to Auburn. AWB does not dispute Auburn's right to recover of such amounts from NW Mint under that commercial lease. AWB Br. at 11.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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AUBURN VALLEY INDUSTRIAL CAPITAL LLC,
a Washington limited liability company,

Plaintiff/Respondent

v.

ROSS B. HANSEN, as single person, and NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company,

Defendants/Appellants.

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**DECLARATION OF SERVICE**

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I certify that on the date set forth below I served a copy of *Respondent's Answer to Amicus Curiae Brief of Association of Washington Business* on the following counsel:

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