NO. 94084-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The sole issue in this appeal turns on statutory interpretation. The Court of Appeals applied the plain language of the Washington Model Toxics Control Act ("MTCA"), RCW 70.105D, to determine that the Washington Department of Natural Resources ("DNR") has "any ownership interest or exercises any control" over the Port Gamble Bay and Mill Site. In doing so, the Court of Appeals confirmed the status quo interpretation of MTCA, which the Washington Department of Ecology ("Ecology") has applied to all parties—including DNR—for decades. The Legislature has acknowledged and implicitly ratified this interpretation, and even DNR has internally conceded its liability at the Site.

Yet DNR would like this Court to believe that the Court of Appeals' decision creates a public interest crisis and a sharp turn from existing precedent. DNR is wrong. First, DNR's entire "substantial public interest" argument under RAP 13.4(b)(4) hinges on the premise that MTCA treats public agencies differently than private parties. In reality, the statute says just the opposite, and this Court has recognized that Ecology relies on the liability of both private *and* public entities to promptly fund cleanups. Second, DNR claims the Court of Appeals'

decision conflicts with Division I precedent, but the cases identified by DNR are highly distinguishable and did not "adopt" a different standard.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals correctly concluded that DNR is an "owner or operator" under RCW 70.105D.020 of the Model Toxics Control Act at the Port Gamble Bay and Mill Site.

III. RESTATEMENT OF THE CASE

A. Factual Background

This case pertains to liability for the cleanup of a contaminated site under MTCA. The Port Gamble Bay and Mill Site includes upland and aquatic areas contaminated from the historical sawmill operations of Pope & Talbot and its predecessors (collectively, "P&T"). Pollution in the Bay is primarily wood waste from log storage and carcinogenic polynuclear aromatic hydrocarbons (cPAHs) from creosote-treated pilings. *See* CP 78.

The Bay includes "tidelands," which stretch down to the extreme low tide line, and "bedlands," which are all aquatic lands beyond the tidelands to the center of the Bay. CP 77. Pope Resources is the current owner of upland areas of the Site and the tidelands, and OPG Properties is a subsidiary that manages Pope Resources' real estate holdings (collectively, "PR/OPG"). CP 77. While the State owns the bedlands in

fee, the State acts through DNR to manage those lands, and DNR describes itself as the "owner." *See* RCW 79.105.010; CP 158, 163, 169.

Ecology's role at contaminated sites is to identify potentially liable parties ("PLPs") and compel them to perform the cleanup. PLP status means Ecology believes it has "credible evidence" to determine that a party is liable at a site under MTCA. RCW 70.105D.020(26). Under MTCA, current and former "owner[s] or operator[s]" of a facility are strictly liable for cleanup of the entire site. RCW 70.105D.040(2). At this Site, Ecology named P&T, PR/OPG, and DNR as PLPs.

P&T openly conducted expansive sawmill operations throughout the Bay and the adjacent uplands for nearly 150 years. *See* CP 78, 149, 266. In 1893 and 1913, DNR's predecessor (collectively, "DNR") reviewed and approved P&T's application to purchase the tidelands at the Site. *See* CP 95-101. DNR knew the purchaser was a mill operator. *See id.* Despite its knowledge of P&T's unauthorized operations throughout the Bay, DNR did not require P&T to enter a lease until 1974. CP 103. Even then, DNR required P&T to lease only a portion of the areas where P&T openly operated. *See id.* DNR's leases with P&T expressly authorized overwater log storage in a specific area of the Bay that DNR determined to be "highly suitable" for that purpose. *See id.*; CP 123.

When the lease was renewed in 1991, DNR acknowledged that log storage caused pollution and knew that P&T used other areas of the Bay without authorization. CP 134 (internal memorandum recognizing contamination problems created by wood waste from P&T's operations); CP 124, 136-38. But DNR continued to collect rent from P&T while acquiescing to the polluting activity. And DNR failed to use its leasing powers to restrict P&T's pollution in other parts of the Bay.

Pope Resources was formed in 1985 when P&T spun off its timberland, real estate, and development branch into a separate independent company. *See* CP 280. As part of the transaction, P&T sold its real estate holdings, including those at Port Gamble, to Pope Resources. CP 77. Pope Resources then leased the mill area to P&T in an arms-length deal. CP 77; 60. In 2007, P&T filed for bankruptcy, leaving DNR and PR/OPG as the only viable PLPs at the Site. *See* CP 18. PR/OPG never operated the sawmill at the Site. *See* CP 77. PR/OPG has been named a liable party at this Site because of its separate roles of owner and manager, not because of any relationship with P&T. *See* CP 77.

PR/OPG has cooperated with Ecology to fund and perform cleanup actions at the Site for the past two decades. In December, 2013, PR/OPG entered a Consent Decree with Ecology, which requires PR/OPG to clean up the Bay portion of the Site, even though PR/OPG owns only a small

portion of the Bay and has never conducted polluting operations in the Bay. CP 71-79. PR/OPG is currently implementing the cleanup action, which is expected to cost more than $26 million. *See* CP 61. While DNR has been identified as a PLP, profited from and permitted the pollution, and claims ownership over the vast majority of the Bay, DNR has refused to meaningfully participate in remedial actions at the Site. *See* CP 61, 77.

B. Procedural History

PR/OPG filed a Complaint against DNR in Kitsap County Superior Court on December 5, 2014, seeking contribution and declaratory judgment. MTCA authorizes "a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs." RCW 70.105D.080. PR/OPG alleged that DNR is liable as a current or former "owner or operator" of the Site under RCW 70.105D.040. CP 8. A private MTCA action includes two phases: liability and allocation. In the first, the court considers only whether the defendant fits within one of MTCA's categories of liable persons. In the second, the court allocates costs between the parties "based on such equitable factors as the court determines are appropriate." RCW 70.105D.080.

PR/OPG and DNR each moved for summary judgment on the issue of DNR's liability, and the trial court granted summary judgment to DNR

without oral or written explanation. PR/OPG appealed, and Division II reversed the trial court. The Court of Appeals applied the plain language of the statute and concluded that DNR is liable under MTCA as an "owner or operator" because DNR is a "person with any ownership interest in the facility or who exercises any control over the facility."

C. Applicable MTCA Provisions

DNR generally glosses over the actual statutory language at issue in its Petition because DNR cannot prevail when that language is applied as written. MTCA was passed by citizen's initiative in 1988 as a State counterpart to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). MTCA imposes liability for the cost of cleaning up contamination on the current or former "owner or operator" of a facility.[1]

MTCA broadly defines the term "owner or operator" to include "[a]ny person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22). And a "person" includes an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, **state government agency**, unit of local government, federal government agency, or Indian tribe."

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[1] A "facility" includes "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(8). The parties do not dispute that the Site is a "facility."

RCW 70.105D.020(24). Importantly, "[e]ach person who is liable . . . is strictly liable . . . for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances." RCW 70.105D.040(2). Hence, a state agency with any ownership interest or which exercises any control over a contaminated area is strictly liable for cleanup costs, regardless of fault or causation.

IV. REASONS WHY REVIEW SHOULD BE DENIED

DNR argues the Court should accept review under RAP 13.4(b)(2) and RAP 13.4(b)(4), claiming that the Court of Appeals' decision involves an issue of substantial public interest and conflicts with two Division I decisions. In reality, the Court of Appeals merely confirmed the status quo, and its decision aligns with existing case law. PR/OPG addresses DNR's arguments under corresponding headings below.

A. RAP 13.4(b)(4) – This Case Does Not Present a Matter of Substantial Public Interest in Need of Review.

In its Petition, DNR repeatedly states its "public interest" argument as follows: "[T]he Court of Appeals' decision greatly expands taxpayer liability for contamination caused by the acts of third parties on State-owned property." DNR's Pet., at 9 (see also pages 1, 8, and 17). There are at least three misleading and fundamentally flawed propositions built into this unsupported assertion.

First, the decision does not expand the liability of DNR or any other state agency. Ecology identified DNR as a PLP ten years ago, so its liability at the Site does not come as a surprise. Moreover, Ecology has alleged for decades that DNR is liable as an "owner or operator" at many similar sites around the State and has entered into settlements with DNR to resolve its liability at those sites. Ecology has made it clear by continuing to pursue and settle with DNR that it relies on DNR's liability as an "owner or operator" to "raise sufficient funds" for cleanup, which is MTCA's core goal. RCW 70.105D.010. In fact, Ecology submitted an amicus brief at the Court of Appeals to express its disagreement with DNR's unsupported interpretation of MTCA.[2]

Importantly, the Legislature knows and accepts that DNR faces liability under MTCA. DNR has settled its MTCA liability at other sites, and the Legislature has appropriated money for settlements. Nearly two decades ago, House analysis of a proposed bill stated: "[DNR] is a potentially liable party . . . on behalf of the state because it owns or manages the contaminated sites on state-owned aquatic lands." House Bill Analysis, HB 2623, at 2 (Jan. 28, 2000). As the Court of Appeals noted, DNR has even admitted internally that it is liable for at least part of this Site. Slip

[2] The Court of Appeals properly deferred to Ecology's interpretation, as the law requires courts to give substantial weight to an agency's interpretation of the statutes it administers. Slip Opinion, at 12 (citations omitted).

Opinion, at 3. Thus, the Court of Appeals merely confirmed how Ecology, the Legislature, *and* DNR have interpreted MTCA since its enactment, and the alleged "expansion" of liability is illusory.

Second, DNR's "taxpayer liability" argument relies on the presumption that public entities should be treated differently than private parties under MTCA. But MTCA says exactly the opposite. MTCA defines a "person" who may be liable to include a "state government agency," with no distinction between such agencies and corporations or municipalities. RCW 70.105D.020(24). Moreover, this Court has acknowledged that, in order to accomplish MTCA's broad purpose, "[l]imited state funds are raised for [MTCA] clean up projects through a tax on hazardous waste, but for the most part, clean up is paid for and performed by those **public or private entities** identified by Ecology as 'potentially liable persons.'" *Asarco Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 *amended on denial of reconsideration*, 49 P.3d 128 (Wash. 2002) (emphasis added).[3]

Also, DNR's concern for the "taxpayers" is a smoke screen in view of the income DNR generates by directly authorizing polluting activity.

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[3] DNR ignores *PacifiCorp Environmental Remediation Co. v. Washington Department of Transportation*, 162 Wn. App. 627, 259 P.3d 1115 (2011), but effectively asks the Court to overrule that case. There, Division II held the Department of Transportation liable under MTCA under the same standard as a private party. Thus, Washington courts have confirmed what is unmistakable from MTCA's plain language; courts must treat public agencies the same as private parties under MTCA.

Like any private landowner, DNR sets lease terms and rates, chooses its tenants, and uses lease proceeds to fund its management operations. *See* RCW 79.105.210(4); RCW 79.64.040.[4] DNR can (and does) require tenants to indemnify it for environmental exposure, and like any other landlord, DNR takes the risk that its tenant will become insolvent. *See* CP 120. DNR also saves operating expenses by refusing to allocate resources necessary to oversee its tenants and prevent pollution. DNR's "public interest" argument that its MTCA liability falls directly to the "taxpayers" is therefore factually inaccurate and disingenuous.

And Third, DNR suggests that its "liability for contamination *caused by* the acts of third parties" presents a public interest concern, but the plain language of the statute resolves that concern. By expressly imposing "strict" liability, MTCA's drafters unequivocally determined that "causation" is *not* a relevant policy consideration at the liability phase. RCW 70.105D.040(2). A court may not second guess that determination.[5] As explained below, however, DNR may invoke certain defenses to liability for contamination caused by third parties when it has exercised proper care. Moreover, at the allocation phase, DNR may argue that its

[4] In 2015, DNR produced more than $313 million in revenue, including more than $30 million from aquatic lands leases, while receiving approximately $20 million total from the state general fund. *See* DNR 2015 Annual Report, at 8, 11, available at http://file.dnr.wa.gov/publications/em_annualreport15.pdf.

[5] Under DNR's argument, PR/OPG also would not be liable, as it never conducted contaminating operations at the Site.

share of liability should be small or nonexistent because "causation" is a relevant equitable factor.

1. DNR Has an Ownership Interest in the Aquatic Lands Pursuant to its Statutory Management Authority.

DNR argues that the "Court of Appeals' opinion disregards DNR's statutes and the state constitution to erroneously conclude that DNR has 'any ownership interest' in state-owned aquatic lands." DNR's Pet. at 10, Section VI.A.1. In fact, the Court of Appeals' decision reasonably interprets those provisions in conjunction with MTCA. DNR's entire argument hinges on RCW 79.105.010, which establishes that the State owns aquatic lands in "fee" and "has delegated to [DNR] the responsibility to manage these lands for the benefit of the public." DNR argues that the Court of Appeals erred by relying on common law property ownership concepts to interpret the phrase "ownership interest" and relying on the dictionary definition of the undefined statutory term "manage." DNR's Pet. at 11. Yet DNR does not suggest an alternative approach or articulate how the Court of Appeals' approach led to error.

In actuality, the Court of Appeals thoroughly evaluated the nature of DNR's statutory authority—and the specific management acts of DNR at the Site—to conclude that DNR has an "ownership interest":

> Here, DNR undisputedly has statutory authority to manage the aquatic lands within the Site. *See* RCW 79.105.010.

> DNR has exercised its right to manage at the Site by leasing the aquatic lands, excluding others from the aquatic lands, and controlling the allowed uses on the aquatic lands.

Slip Opinion at 9. As a result, DNR's arguments fail because "[t]he plain language of MTCA **does not limit liability to persons with an ownership interest in fee simple**. Rather, the plain language provides that a person legally having some of the 'bundle of rights' to use, manage, or possess the property is liable." *Id.* at 8 (emphasis added).

Additionally, Ecology has repeatedly and directly rejected DNR's argument that its statutory "management authority" falls short of *any* ownership interest. In fact, in letters notifying DNR of its PLP status, Ecology stated: "In accordance with RCW 79.105.060(20), **DNR is directed by law to administer aquatic lands owned by the State of Washington. As such, DNR is the owner of a "facility" as defined in [MTCA]**." CP 340, 346 (emphasis added); *see also* CP 46-48; 192-212.

As the Court of Appeals recognized, DNR's attempt to disclaim ownership falls flat when the agency "has referred to itself as the owner of the Site" repeatedly. Slip Opinion, at 3 (citing examples). DNR touts its ownership interest when it wants to exert the rights of an owner, but DNR disclaims its ownership interest when faced with unwanted responsibility.[6]

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[6] Moreover DNR is not the first state agency to make this argument and fail. Statutes establish a similar relationship between the Department of Transportation (DOT) and "the State." *See* RCW

2. The Court of Appeals' Analysis of RCW 70.105D.020 Properly Recognizes that State Government Agencies May be Liable.

Next, DNR argues that the "Court of Appeals' analysis of RCW 70.105D.020 fails to give effect to MTCA's intent to exempt the State itself from liability." DNR's Pet., at 13, Section VI.A.2. DNR's arguments are logically irreconcilable. First, DNR claims the Court of Appeals erred by failing to distinguish it from "the State" in applying MTCA's definition of "owner." But DNR then claims the Court of Appeals erred by failing to consider it the functional equivalent of "the State" in applying MTCA's definition of "person."

In truth, this position, like DNR's prior position, is flatly contradicted by the statute. MTCA's definition of "person" does not include "the State," but it does include a "state government agency." The Court of Appeals therefore recognized that the simple question in this case is whether DNR, as a state agency, has any ownership interest or exercised any control over the Site. Yet DNR argues that the Court of Appeals should have looked past what the statute actually says and instead enforced what the statute does *not* say.

47.01.260 (providing that the State has the right, title, and interest to state highways, while DOT "operat[es] and maintain[s] state highways"). In the *PacifiCorp* case, DOT argued it cannot be liable under MTCA because "[DOT] is not the owner of that property; the State of Washington is." App.'s Reply at 18, *PacifiCorp Envtl. Remediation Co., et al. v. WSDOT*, No. 39699-8-II (Wash Ct. App., July 2, 2010). The trial court rejected that argument. The Court of Appeals did not specifically evaluate DOT's "owner or operator" liability, but stated that DOT's argument against "owner" liability "fail[ed]." *See PacifiCorp*, 162 Wn. App. at 662.

DNR cites no support whatsoever for its contention that the absence of "the State" from the definition of "person" was intended to exempt state agencies from liability for managing state-owned land. And this contention is unsustainable in view of the statute's broad definition of "owner or operator," which clearly encompasses such management activities and explicitly applies to state agencies. As DNR notes, "it is hard to imagine state-owned lands that are not under the management authority of an agency." DNR's Pet., at 13. The result is that Ecology and private parties must seek recovery from the responsible state agency—as they have for decades—instead of suing "the State" and seeking recovery from the state general fund. The result is *not*, as DNR argues, to absolve state agencies of liability so long as "the State" holds fee title, even when the agency itself fits within one of MTCA's categories of liable persons. Such an interpretation ignores the plain language and context of MTCA's broad liability scheme, which courts must "liberally construe." Slip Opinion, at 5 (quoting RCW 70.105D.910).

DNR claims that this case "illustrate[s] the problem of holding DNR responsible" because it "penalizes DNR for attempting to get compliance from a polluter." DNR's Pet., at 13-14. This could hardly be further from the truth. For one, DNR's finger pointing at P&T is an equitable argument, which as the Court of Appeals recognized, "conflates

the threshold determination of liability under MTCA with the final apportionment of the extent of liability." *See* Slip Opinion, at 13.

Moreover, the Court of Appeals' decision properly incentivizes pollution prevention, while DNR's position rewards acquiescence. DNR argues that it can be liable only if it is actively involved in environmental decision making at the facility (which it was in any event), but that it cannot be liable for simply standing by and allowing the pollution. If DNR were correct, it could allow and profit from pollution with impunity. But by imposing liability on *any* entity with an ownership interest or who exercises control, as MTCA requires, the Court of Appeals' decision incentivizes those in a position to prevent contamination to act.

3. The Court of Appeals Correctly Applied MTCA's "Owner or Operator" Definition as Written.

DNR next argues that the "Court of Appeals' analysis improperly eliminates the distinction between 'owner' and 'operator' liability under RCW 70.105D.020(22)." DNR's Pet., at 14, Section VI.A.3. Once again, DNR complains that the Court of Appeals applied MTCA's plain language instead of re-writing as DNR would prefer. The statute establishes five categories of liable persons: (1) the current "owner or operator"; (2) one who formerly "owned or operated" at the time of a release; (3) one who

arranged for the disposal of hazardous substances; (4) a transporter of hazardous substances; and (5) certain sellers of hazardous substances. RCW 70.105D.040(1). Moreover, the statute defines "owner or operator" jointly to mean any "person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22). Thus, while the statute defines other terms separately, the drafters chose to define "owner or operator" status as a single category of liability. DNR's argument to the contrary relies on a single case that did not implicate any "ownership interest." *See* DNR's Pet. At 15. Nothing in that or any other decision supports ignoring the plain language of the statute when, as here, the facts implicate the full "owner or operator" definition.

B. RAP 13.4(b)(2) – There is No Conflict Between this Decision and Distinguishable Cases Where Federal Law Has Been Used for Guidance.

DNR argues that the Court of Appeals' decision conflicts with *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006) and *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), *as amended* (Apr. 24, 2000), but neither case "adopted" the federal test for "operator" liability as DNR claims.

First, DNR faults the Court of Appeals for not applying the CERCLA "operator" standard without ever acknowledging that CERCLA's "owner or operator" definition differs substantially from

MTCA's. In fact, CERCLA defines "owner or operator" tautologically as "any person owning or operating such facility," 42 U.S.C. § 9601(20)(A)(ii), while MTCA's broad definition extends to those "with any ownership interest" or who "exercise any control." RCW 70.105D.040(1). Once again, DNR believes the Court of Appeals should have ignored the actual language of MTCA.

Moreover, there is no conflict in need of this Court's attention. In *Taliesen*, Division I considered whether a subcontractor was liable as an "operator" for drilling a hole into an underground oil storage tank. 135 Wn. App. at 125. The court held that the subcontractor was not liable because it had no authority to decide where to drill or whether to stop drilling. *Id.* at 125-26. The court looked to federal cases as persuasive authority where liability "depend[ed] upon authority to control decisions about how to dispose of waste, not mere physical control over the instrumentality that causes disposal or release." *Id.* at 127. The court held that it was not "mechanical" control that makes one liable as an "owner or operator" under MTCA, but control "in the decision-making sense." *Id.* at 128. Division I did not "adopt" the federal standard as controlling law, but merely consulted federal law as persuasive in a highly distinguishable scenario. Here, "decision-making" control is precisely what DNR

possesses and has exercised over the Site. There is therefore no inconsistency between *Taliesen* and Division II's decision here.[7]

C. DNR's Backwards Incentive Argument Has No Basis in Reality.

The final section of DNR's Petition appears to restate its "public interest" argument under RAP 13.4(b)(4). As noted above and as recognized by the Court of Appeals, DNR's equitable arguments are completely irrelevant to this stage of the litigation. The only issue is whether DNR fits the definition of "owner or operator" at Port Gamble, which is a simple statutory interpretation question.

Still, DNR claims that the decision will provide an "incentive to pollute the State's lands and then sue the State for costs," thereby converting MTCA from a "polluter-pays statute" into a "public works statute." DNR's Pet., at 17. This assertion is not only false but completely nonsensical.

First, as noted, DNR can and does require indemnity from its tenants. So the vast majority of those who have contributed to pollution on State-owned aquatic lands have no cause of action against DNR. Additionally, as the Court of Appeals recognized, DNR once again

[7] DNR also claims that *Unigard* "adopted" the federal standard for "operator" liability as articulated in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). Both *Unigard* and *Bestfoods* pertained to the liability of a parent company or shareholder for subsidiary company's liability. The *Unigard* court looked to *Bestfoods* as persuasive authority on this specific topic, but did not in any way adopt the *Bestfoods* standard as the universally applicable rule for "owner or operator" liability under MTCA. 97 Wn. App. at 428-30.

"conflates the threshold determination of liability under MTCA with the final apportionment of the extent of liability." *See* Slip Opinion, at 13. The sole issue here is the threshold determination of liability. Any party who pollutes DNR land (whether or not under a lease) would be able to recover *only* DNR's fair share of costs after a final apportionment. In many cases, DNR's equitable share of liability may be very small or nonexistent, and the lessee will be stuck with the vast majority of the cost.[8] As a result, DNR's claim that lessees will have an incentive to "pollute then sue" is, frankly, absurd. DNR misrepresents the nature of cost recovery under MTCA to create the illusion of a "substantial public interest" concern because the truth presents no such concern.

Second, DNR argues that it will be liable at all Washington aquatic lands, regardless of its own actions or its level of involvement. That is also false. MTCA provides third-party defenses that limit a person's liability for acts that could not have been foreseen through the exercise of care. A "person" is not liable if contamination

> was caused solely by . . . [a]n act or omission of a third party (including but not limited to a trespasser) . . . . This defense only applies where the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third

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[8] *Seattle City Light v. Dep't of Transp.*, 98 Wn. App. 165, 174, 989 P.2d 1164(1999) (holding that the Department of Transportation was liable under MTCA, but was not responsible for any of the cleanup costs).

> party, and the foreseeable consequences of those acts or omissions . . . .

RCW 70.105D.040(3)(a)(iii). Here, DNR cannot claim this defense because it knew P&T operated on its land, knew P&T's operations caused pollution, and in fact, authorized and profited from the polluting activity. But if DNR stewards aquatic lands as its statutes require and as the public expects of any landowner, then the agency will not be liable.[9]

V. CONCLUSION

The Court of Appeals' decision confirmed the status quo and produced no inconsistency with existing precedent. PR/OPG respectfully requests that the Supreme Court deny DNR's Petition for Review.

RESPECTFULLY SUBMITTED this 24th day of February, 2017.

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[9] Moreover, the Court of Appeals' conclusion that DNR "exercised any control" over the facility in this case hinged, in part, on DNR's role in allowing and leasing for log storage, which caused pollution. *See* Slip Opinion, at 9-10. If DNR has no knowledge (or reason to know) of polluting activity on aquatic lands, then DNR does not permit the activity and does not "exercise any control" over the facility.

PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be served a true copy of the document entitled RESPONDENTS' ANSWER TO PETITION FOR REVIEW to which this is attached, by electronic mail on the following:

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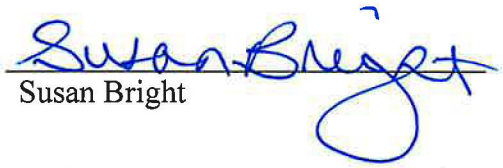
Executed at Bellevue, Washington this 24th day of February, 2017.



Susan Bright