NO. 94084-3

Court of Appeals No. 47861-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

A company that spends well over a hundred years polluting the State's aquatic lands should not be allowed to shift liability for that pollution to the State's taxpayers. But this is exactly what Division II of the Court of Appeals, in a 2-1 decision, allowed in this case when it found the Department of Natural Resources (DNR) to be an "owner or operator" of aquatic lands at Port Gamble under the Model Toxics Control Act (MTCA). In doing so, the majority opinion splits with Division I precedent defining "operator" liability under RCW 70.105D.020(22), and largely ignores the aquatic lands statutes and article XVII, section 1 of the state constitution, which define whether or not DNR is an "owner" of such lands for purposes of liability under MTCA.

DNR manages approximately 2.6 million acres of state-owned aquatic lands. The Court of Appeals' decision expands DNR's potential liability for hazardous substances on all of these lands. Under the Court of Appeals' opinion, DNR's status as a land manager is sufficient to make it an "owner or operator" under MTCA. This decision has broad ramifications, potentially subjecting the taxpayers to hundreds of millions of dollars in liability for pollution caused by others. Accordingly, this Court should grant review under RAP 13.4(b)(2) and 13.4(b)(4) because

the decision in this case is in direct conflict with two published Court of Appeals' decisions, and involves an issue of substantial public interest.

II. IDENTITY OF PETITIONER

Petitioner is the Washington State Department of Natural Resources, an agency of the State of Washington. DNR was the respondent in the Court of Appeals and the defendant in the Kitsap County Superior Court.

III. COURT OF APPEALS DECISION

DNR seeks review of the Court of Appeals, Division II, decision in *Pope Resources, LP and OPG Properties, LLC v. Washington State Department of Natural Resources*, No. 47861-7-II (filed December 28, 2016). A copy of the decision is in Appendix A.

IV. ISSUE PRESENTED FOR REVIEW

Whether the trial court correctly determined that DNR is not an "owner or operator" under RCW 70.105D.020 of the Model Toxics Control Act at Port Gamble, and accordingly whether the Court of Appeals erred by reversing that decision.

V. STATEMENT OF THE CASE

A. Factual Background.

Port Gamble Bay is located in Kitsap County and encompasses more than two square miles of subtidal and shallow intertidal habitat just

south of the Strait of Juan de Fuca. CP at 266. Port Gamble itself has an extensive history of mill use, going back to well before Washington became a state. *Id.* DNR, as the manager of the State's 2.6 million acres of aquatic lands, is the manager of the state-owned aquatic lands at Port Gamble. *Id.*

In 1853, the Puget Mill Co., which was the predecessor to Pope and Talbot, began operating its sawmill on Port Gamble Bay. *Id.* The mill itself was constructed on fill and pilings, and a long dock extended north of the mill over tidelands to deep water. *Id.*

In 1893, and again in 1913, the State of Washington sold tidelands around the mill site and south of the mill site along the western and eastern shores of Port Gamble Bay to the Puget Mill Co. CP at 266-67, CP at 272-79, CP at 97.

In 1925, the McCormick Lumber Co. acquired Puget Mill Co. holdings in bankruptcy and began to build a new mill. CP at 267. The State did not authorize the wharf or other facilities constructed over aquatic lands at the Site, and it is not clear from DNR records whether or not these facilities even extended onto state-owned aquatic lands. *Id.* In 1938, the McCormick Lumber Co. went bankrupt and its holdings were reacquired by Puget Mill Co. Puget Mill Co. became Pope and Talbot in 1940. *Id.*

The Pope and Talbot mill operated until its closure on November 30, 1995. *Id.* Throughout its history, the Port Gamble Site's uses included a sawmill, log transfer facilities, wood chip loading facilities, log rafting and storage areas, hog fuel boilers, and three landfills located along the western shoreline. *Id.* Pope and Talbot's activities resulted in the release of hazardous substances at the Site. CP at 78.

In 1985, Pope and Talbot spun off its timberland and development properties in Washington and created Pope Resources. CP at 267. Ownership of the uplands and adjacent tidelands at Port Gamble were transferred to Pope Resources at that time. *Id.* In 1998, Pope Resources formed Olympic Property Group (OPG) to manage and develop its real estate holdings. CP at 267, 280.

Mill operations and associated log storage occurred at Port Gamble throughout the Site's history, and well before any authorization by DNR. CP at 148-49, CP at 267. The vast majority of these operations did not occur on state-owned aquatic lands, and the bulk of those that did occur on these lands were done largely without DNR's approval. *Id.* It was not until July 16, 1974, that DNR entered into a bedlands[1] lease with Pope and Talbot covering approximately 72 acres of state-owned aquatic lands for

[1] Beds of navigable water are those lands lying waterward of and below the line of the extreme low tide mark in navigable tidal waters. *See* RCW 79.105.060(2) (defining beds of navigable water). "Bedlands" is used interchangeably with the term "beds of navigable water." WAC 332-30-106(9).

log storage, rafting, and booming. CP at 267-68, CP at 103-06. These activities were already occurring on the Site prior to this lease. CP at 148-49.

Lease No. 10459 was renewed in 1980. CP at 268, CP at 111-14. In 1991, DNR and Pope and Talbot executed Lease No. 20-012795 for the same area previously covered by Lease No. 10459. CP at 268, CP at 116-21. In total, DNR leased the bedlands in the southwestern portion of Port Gamble Bay to Pope and Talbot from 1974 until 1996, when Pope and Talbot requested that DNR cancel its lease. CP at 268. DNR did not authorize Pope and Talbot or its predecessors to use any of the aquatic lands at this Site until 1974. *Id.*

DNR's authorization to Pope and Talbot on the Site was limited to leasing 72 acres in the southwestern portion of the bay, and this authorization only allowed log storage, booming, and rafting, and not any other uses. *Id.* These activities had been going on for a significant period of time, likely decades, in that location prior to any lease with the State. CP at 149. The leases prohibited hazardous, toxic, or harmful substances, and the accumulation of debris.[2] CP at 113, 119, CP at 268.

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[2] The State also had a sewer outfall lease (No. 9744) with Pope and Talbot. CP at 268. This outfall operates under a permit issued by the Department of Ecology and is not part of the Port Gamble cleanup site. *Id.* CP at 282. Accordingly, it is not material for the purposes of this appeal.

DNR did not control the finances of the facility at Port Gamble, manage the employees of the facility, manage the daily business operations of the facility, or have authority to operate or maintain environmental controls at the facility. CP at 269. DNR did not control Pope and Talbot's decisions regarding compliance with environmental laws or regulations, or Pope and Talbot's decisions regarding the presence of pollutants, and DNR did not authorize the release of any hazardous substances on the Site. *Id.* DNR also had no regulatory authority over the mill operations at the Site, as regulation of the pollution from the mill is primarily under the jurisdiction of the Department of Ecology (Ecology) and its predecessor, the Pollution Control Commission. *Id.*

Based on pollution found at the Site, on May 9, 2007, Ecology sent letters to Pope and Talbot and DNR notifying them that Ecology considered them to be potentially liable persons under MTCA at Port Gamble. CP at 89, 335. Ecology also named Pope Resources and Olympic Property Group (Pope Resources) as potentially liable persons at the Site. CP at 75. Pope and Talbot filed for bankruptcy in 2007. CP at 267.

B. Proceedings Below.

On December 5, 2014, Pope Resources sued DNR in the Kitsap County Superior Court to recover cleanup costs at Port Gamble from the pollution caused by Pope and Talbot. CP at 1-10. Pope Resources

subsequently filed a motion for summary judgment seeking to establish DNR's liability at Port Gamble as an "owner" or "operator" under MTCA. CP at 33.

DNR responded by filing a countermotion to Pope Resources' summary judgment. CP at 229. DNR argued in its countermotion that it was not liable under MTCA as an "owner" or "operator" at Port Gamble because it does not have any ownership interest at the Port Gamble Site, and because it did not exercise sufficient control over Pope and Talbot's polluting operations to be liable as an "operator" under applicable Washington precedent. *Id.*

Kitsap County Superior Court Judge Anna M. Laurie granted summary judgment to DNR, concluding that DNR was not liable as an "owner" or "operator" at Port Gamble under RCW 70.105D.020, and dismissed Pope Resources' suit against DNR with prejudice. CP at 368-70. Pope Resources moved for reconsideration of this decision, which the trial court denied. CP at 382. Pope Resources then sought review from Division II of the Court of Appeals. CP at 384.

On December 28, 2016, the Court of Appeals, in a 2-1 decision, reversed the trial court's grant of summary judgment to DNR. *Pope Resources*, slip op. at 1. In its opinion, the majority held that DNR's statutory authority as a land manager makes it liable as an "owner or

operator" under MTCA. *Id.* at 9. The dissent would have affirmed the trial court, concluding that DNR's statutory management authority does not give it any ownership interest in state-owned aquatic lands, and that under applicable Division I precedent, DNR did not exercise sufficient control over the Port Gamble facility to have "operator" liability. *Id.* at 14-19.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court should accept review under RAP 13.4(b)(2) and RAP 13.4(b)(4) because the Court of Appeals' decision involves an issue of substantial public interest by greatly expanding taxpayer liability under MTCA for contamination caused by the acts of third parties on State-owned land, and is in direct conflict with two published opinions from Division I: *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). This conflict creates significant uncertainty as to the activities that will trigger "owner or operator" liability under MTCA, and this Court should accept review to provide clarity and a uniform standard under RCW 70.105D.020(22).

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A. This Case Presents a Matter of Substantial Public Interest Because the Court of Appeals' Decision Greatly Expands Taxpayer Liability for Contamination Caused by Others on State-Owned Property.

The Court of Appeals' decision significantly expands taxpayer liability for contamination caused by the acts of third parties on State property, and this decision warrants review under RAP 13.4(b)(4). Under this decision, DNR, as the manager of the State's 2.6 million acres of aquatic lands, will likely have liability for all hazardous waste on these lands, regardless of any DNR involvement in the polluting activities, based solely on DNR's management authority. This outcome results from the Court of Appeals' holding that "DNR's *authority* includes those rights associated with an ownership interest. Accordingly, we hold that *the statutory rights conferred on DNR by the legislature amount to 'any ownership interest' in the Site." Pope Resources*, slip op. at 9 (emphasis added). This expansion of State taxpayer liability goes against MTCA's purpose to hold polluters responsible, and also undercuts its goal to "raise sufficient funds to cleanup all hazardous waste sites . . ." RCW 70.105D.010.

Washington voters passed MTCA as Initiative 97 in 1988 and modeled it after its federal counterpart, the Comprehensive Environmental

Response, Compensation, and Liability Act (CERCLA).[3] Like CERCLA, MTCA establishes liability based on several categories of liable "persons." Those categories are listed under RCW 70.105D.040(1)(a)-(e) and include current or former owners or operators of a facility, arrangers, transporters, and certain sellers of hazardous substances. *Id.*

Relevant to this Petition, the term "owner or operator" is defined under RCW 70.105D.020(22)(a) as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22)(a).[4] The first part of this definition establishes a person's liability as an "owner" of a facility, and the latter establishes a person's "operator" liability. While a state agency can be a liable "person" under MTCA, the State itself cannot. *See* RCW 70.105D.020(24). Liability under MTCA is explicitly joint, strict, and several. *See* RCW 70.105D.040(2).

1. 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.

Contrary to the Court of Appeals' opinion, DNR does not have *any* ownership interest in state-owned aquatic lands; it is merely a land manager as authorized by the Legislature and can only carry out those

[3] CERCLA is codified beginning at 42 U.S.C. § 9601.

[4] A copy of RCW 70.105D.020, along with other relevant statutes, is included in Appendix B.

functions directed by the Legislature. While the majority opinion relies upon common law property ownership concepts, as well as a dictionary definition of "manage" to conclude that DNR has an "ownership interest" in the State's aquatic lands, this analysis disregards the explicit statutory authority under which DNR functions. *Pope Resources,* slip op. at 8-10.[5] Indeed, the dissent correctly concludes that "DNR, a state agency, is in fact the manager of the aquatic land but does not have an ownership interest in the facility." *Pope Resources*, slip op. at 16.

The State's ownership of its aquatic lands is a fundamental sovereign interest. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997). This ownership right is declared in the state constitution, wherein Washington:

> asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. Const. art. XVII, § 1.

Under RCW 79.105.010, the Legislature "recognizes that the state owns these aquatic lands in fee and has *delegated to the department the responsibility to manage these lands for the benefit of the public.*" (Emphasis added.) *See also* RCW 79.105.060(20) (State-owned aquatic

[5] The Court of Appeals also cites to a house bill report as persuasive authority. *Id.* at 8, n.3. However, the bill associated with this report, HB 2623, was not an amendment to either MTCA or DNR's aquatic lands statutes, and was never passed by the Legislature. *See* HB 2623, 56th Leg., Reg. Sess. (Wash. 2000).

lands are "tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways *owned by the state and administered by the department* . . . [and] does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department.") (emphasis added); and RCW 79.105.020 (the aquatic lands statutes "articulate a management philosophy to guide the exercise of the *state's ownership interest and the exercise of the department's management authority* . . ."). Based on this unambiguous statutory language, DNR does not have any ownership interest in the State's aquatic lands; it only manages them.

The Court of Appeals' opinion disregards these statutes to conclude that DNR's management authority gives it an ownership interest in state-owned aquatic lands. *Pope Resources*, slip. op. at 9. However, DNR, as a creature of statute, "has only those powers either expressly granted or necessarily implied by the legislature." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). Had the Legislature wanted to give DNR an ownership interest in state-owned aquatic lands, it would have explicitly done so.

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2. 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.

It is undisputed that the State itself cannot be a liable "person" for the purposes of hazardous waste liability under MTCA. *See* RCW 70.105D.020(24). Indeed, Pope Resources conceded before the trial court that "the State of Washington cannot be liable under MTCA." CP at 308. Despite MTCA's unambiguous intent to exempt the State itself from liability, the Court of Appeals' holding that DNR's statutory authority to manage aquatic lands gives rise to liability under MTCA eliminates this exemption. *See Pope Resources,* slip op. at 9. In fact, it is hard to imagine state-owned lands that are not under the management authority of an agency.

The facts of this case illustrate the problem of holding DNR responsible for the polluting acts of a third party based on its statutory authority to manage the State's aquatic lands. Pope and Talbot, and its predecessors, conducted mill operations on the Site, including log booming, storage, and rafting, for a significant period of time before entering into a lease. CP at 267. Moreover, log booming, storage, and rafting took place in the location of the eventual lease area for decades before DNR's lease with Pope and Talbot. CP at 149. The lease terms

prohibited the release of hazardous substances and the accumulation of debris. CP at 103-06, CP at 111-14, CP at 116-21.

The Court of Appeals' decision penalizes DNR for attempting to get environmental compliance from a polluter using state property. This same logic would also attach hazardous waste liability to any other DNR management activity on the State's aquatic lands, regardless of any connection to pollution. This consequence of the Court of Appeals' decision is broad-reaching and supports review by this Court.

3. The Court of Appeals' Analysis Improperly Eliminates the Distinction Between "Owner" and "Operator" Liability Under RCW 70.105D.020(22).

Taken together, MTCA's definitions provide that a state agency can be liable as an "owner or operator" of a facility where that agency either has "any ownership interest in the facility" *or* where that state agency "exercises any control over the facility." RCW 70.105D.020(22)(a) (emphasis added). The former language establishes "ownership" liability, while the latter establishes the standard for "operator" liability at a site and focuses on a state agency's involvement in the polluting activity.

As the dissent notes, "[a]lthough the majority does not distinguish between the terms owner and operator, the plain language of the statute at issue clearly differentiates between the two." *Pope Resources,* slip op.

at 15. Courts in this state have recognized that "owner" and "operator" liability are two separate categories under MTCA. *See, e.g., Unigard*, 97 Wn. App. at 428, n.27. The Court of Appeals' merging of these two concepts creates a significant amount of ambiguity that warrants this Court's review.

B. This Court Should Accept Review Because the Court of Appeals' Opinion Conflicts with *Taliesen* and *Unigard*, Which Adopted the Federal Standard for Operator Liability Under *U.S. v. Bestfoods*.

In addition to the reasons discussed above, this Court should grant review under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with two published opinions from Division I: *Taliesen* and *Unigard*. This split leads to uncertainty for every property owner or manager in the State, as there are now two inconsistent tests for determining operator liability under MTCA. The Court should correct this disparity.

Division I in both *Taliesen* and *Unigard* adopted the federal test of *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), and applied that test to evaluate operator liability under MTCA. *See Taliesen Corp.*, 135 Wn. App. at 128; *see also Unigard,* 97 Wn. App. at 429. In *Taliesen,* Division I considered the difference between MTCA's

and CERCLA's operator provisions, and then adopted the federal standard. In *Taliesen*, two of the liable parties argued that:

> The Act [MTCA] imposes liability on any person who has "any control" over a facility. [former] RCW 70.105D.020(12)(a). Golder and Razore propose that the Legislature's use of the word "any" shows an intent for a broader sweep of operator liability under the State Act than under the federal Act. Razore argues that since Murphy obviously had physical control over the drilling equipment, Murphy fits within the statutory definition of having "any control" over a facility.

Taliesen, 135 Wn. App. at 126.

The *Taliesen* court recognized that "federal cases interpreting similar 'owner or operator' language in the federal act are persuasive authority in determining operator liability." *Taliesen*, 135 Wn. App. at 127. As with its previous decision in *Unigard,* the *Taliesen* court concluded that the appropriate test to determine operator liability under MTCA is that an "operator" "must manage, direct, or conduct operations specifically related to pollution. . . ." *Taliesen,* 135 Wn. App. at 128 (quoting *Bestfoods*, 524 U.S. at 66-67). In reaching this decision, the *Taliesen* court stated that "the persuasive authority of the federal cases demonstrates *that the key word in our state statute is 'control', not 'any.'*" *Id.* (emphasis added). This is the standard that the Court of Appeals should have applied in this case, and it failed to do so. This failure creates a split with Division I that should be resolved by this Court.

C. The Court of Appeals' Decision Gives an Incentive for Polluters to Contaminate State-Owned Aquatic Lands and then Sue the State for this Contamination.

The Court of Appeals' decision will subject State taxpayers to substantial liability for hazardous waste on the State's 2.6 million acres of aquatic lands under DNR's management authority. This result will occur regardless of whether or not DNR actually engaged in any management activities on such lands, and regardless of whether such management activities caused any pollution. This shifts a huge burden onto the taxpayers of this state, and does not serve one of MTCA's purposes to "raise sufficient funds to clean up all hazardous waste sites . . . ." RCW 70.105D.010(2). Instead, this decision serves to help subsidize those entities actually responsible for contaminating state-owned aquatic lands, giving them an incentive to pollute the State's lands, and then sue the State for costs. This, in effect, turns MTCA from a polluter-pays statute into one of the largest public works statutes in state history. This decision cannot stand, and accordingly this Court should accept review under RAP 13.4(b)(2) and 13.4(b)(4).

VII. CONCLUSION

This case raises issues of substantial public interest regarding the significant expansion of taxpayer liability for pollution caused by third parties on the State's lands. The Court of Appeals' decision ignores

DNR's statutorily defined role as a land manager, and not an owner, of the State's aquatic lands, and conflicts with two published Division I cases regarding "owner or operator" liability under MTCA: *Taliesen* and *Unigard*. DNR respectfully requests the Court grant this Petition for Review.

RESPECTFULLY SUBMITTED this 26th day of January, 2017.

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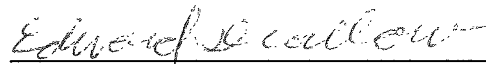

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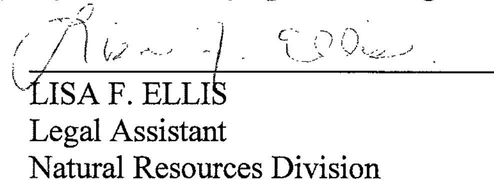
I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 26th day of January, 2017, at Olympia, Washington.



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 28, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POPE RESOURCES, LP, a Delaware limited partnership; OPG PROPERTIES, LLC., a Washington limited liability company, Appellants, v. THE WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, a Washington state agency, Respondent.	No. 47861-7-II PUBLISHED OPINION

LEE, P.J. — Pope Resources LP and OPG[1] (collectively, Pope) sued the Department of Natural Resources (DNR) for contribution of cleanup costs for contamination at the Port Gamble Bay and Mill Site (collectively, the Site) under the Model Toxic Control Act (MTCA).[2] The superior court granted summary judgment to DNR based on DNR's argument that it was not liable as an "owner or operator" under MTCA. Pope appeals the summary judgment order dismissing the action against DNR. We hold that DNR is an "owner or operator" under MTCA and reverse the superior court's summary judgment order.

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[1] OPG was formerly known as Olympic Property Group LLC.

[2] 70.105D RCW.

FACTS

A. Leases to Pope & Talbot

In 1893, the State of Washington sold some tidelands at Port Gamble, which Pope & Talbot Inc. (P&T) eventually came to own, and where P&T operated a lumber mill.[3] In 1974, Washington State, "acting by and through" DNR, leased aquatic lands just west of the mill to P&T for log storage.[4] Clerk's Papers (CP) at 103. That lease, among other things, listed the permitted uses on the site as log storage, rafting, and booming. The lease (1) required specific methods of log booming and prohibited certain other methods, like "[f]ree rolling of logs"; (2) placed limitations on the type and assembly of log rafts; (3) provided that P&T could not remove valuable material without prior consent, fill any lands, or allow debris or refuse to accumulate; (4) prohibited assignment or other transfer of the lease without DNR's prior consent; and (5) allowed DNR to remove any improvements that were made to the property without proper consent and to enter the property "at all reasonable times." CP at 104-05.

In 1979, DNR executed another lease with P&T[5] that contained substantially similar terms, restricting the permitted uses and allowing DNR access to the premises. In 1991,[6] DNR again executed another lease with P&T. Because P&T had been occupying lands outside the expiring lease, DNR expanded the property covered under the 1991 lease. In internal notes relating to the

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[3] In 1975, DNR also executed a lease with P&T for a waste outfall from the lumber mill.

[4] The former mill and leased aquatic lands neighboring the mill comprise the Site.

[5] As with the 1974 lease, the 1979 lease was between Washington State, "acting by and through" DNR, and P&T.

[6] The 1991 lease was backdated to 1989.

1991 lease, DNR noted that P&T had added pilings to the water and that the area was "highly suitable" for log storage. CP at 123. Ultimately, P&T's lease expired in 2001.[7]

B. SITE CONTAMINATION AND LIABILITY

The Department of Ecology (Ecology) determined that the activities at the Site between 1853 and 1995 had resulted in the release of hazardous substances. Ecology found that activities at the Site, such as log storage and rafting, and the pilings that facilitated storage and transportation of logs, resulted in contamination at the Site.

Ecology named Pope[8] and DNR as "potentially liable persons" under MTCA. CP at 75. Ecology issued a cleanup action plan, and Pope and Ecology entered into an agreement to implement the plan. Pope took remedial actions to clean up the Site.

DNR has referred to itself as the owner of the Site. In a lease summary, DNR noted that "[a]ctual ownership lines in the mill area are questionable and it is possible that DNR may own part of the mill site." CP at 148. Further, in internal documents regarding issues at the Site, DNR stated, "[W]e will need to inform Ecology of our ownership and interests at [the Port Gamble Bay] site immediately." CP at 140; *accord* CP at 153 (noting in an internal e-mail that it (DNR) was the owner of the Site). DNR also admitted that it has a share of liability for remedial actions at the Site for the leased area. Despite this, DNR did not enter into any agreement to clean up the Site.

Pope sued DNR for contribution for cleanup costs under RCW 70.105D.080. DNR asserted that it was not among the categories of persons liable under MTCA. Pope moved for

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[7] In 1985, P&T created Pope Resources, and transferred its interests in the Port Gamble Bay to Pope. Pope subsequently formed OPG to manage its real estate holdings. In 2007, P&T filed for bankruptcy.

[8] Pope notes that initially, Ecology named P&T a potentially liable person, but P&T was no longer liable after P&T entered bankruptcy. P&T's liability is not at issue in this appeal.

summary judgment, arguing that DNR was liable under MTCA because DNR is an "owner and operator" of the Site. DNR responded and filed a countermotion for summary judgment, arguing that it is not an "owner" or "operator." CP at 229-30. Both parties agreed that the underlying facts are undisputed and that the only issue is whether DNR is an "owner" or "operator" of the Site.

The superior court granted DNR's summary judgment motion and dismissed the case with prejudice.[9] Pope appeals.

ANALYSIS

We review a superior court's order granting summary judgment de novo, performing the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is appropriate if we find that there is no genuine issue of material fact, construing the facts in favor of the nonmoving party. *Van Scoik v. Dep't of Nat. Res.*, 149 Wn. App. 328, 332, 203 P.3d 389 (2009).

A. MTCA—GENERAL PROVISIONS

In 1988, Washington voters approved MTCA (chapter 70.105D RCW).[10] *Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 (2002). MTCA's declared policy is to hold parties accountable for "irresponsible use and disposal of hazardous substances." *See* RCW

[9] Pope moved for reconsideration of the superior court's order, which was also denied. In Pope's assignment of error, it states that the superior court erred in denying its motion for reconsideration. However, it does not address the motion for reconsideration in its issue statement or offer other argument or authority. Accordingly, we do not address the superior court's denial of Pope's motion for reconsideration. **RAP 10.3(a)(6)**; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[10] MTCA was enacted through the initiative process, and we apply the same general rules of statutory construction in interpreting initiatives. *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480 (1988).

70.105D.010(2). The legislature provided that MTCA is to be liberally construed. RCW 70.105D.910.

MTCA authorizes Ecology to identify "potentially liable persons," who include the current and former property owners or operators, polluters, and transporters of waste.[11] RCW 70.105D.040(1)(a), (b), (c), (d). MTCA holds liable the "owner or operator" of the facility in question, or any person who owned or operated the facility at the time the hazardous substances were released or disposed.[12] RCW 70.105D.040(1)(a), (b). Each liable person "is strictly liable, jointly and severally, 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). Liable persons have a statutory right to seek contribution from others potentially liable under the statute. RCW 70.105D.080.

An "owner or operator" under MTCA is "[a]ny person with *any ownership interest* in the facility or who *exercises any control* over the facility." RCW 70.105D.020(22) (emphasis added). Thus, to be liable as an "owner or operator," one must be a "person," as defined under RCW 70.105D.020(24). MTCA defines "person" as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *state government agency*, unit of local

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[11] Under MTCA, "'Potentially liable person' means any person whom the department finds, based on credible evidence, to be liable under RCW 70.105D.040. The department shall give notice to any such person and allow an opportunity for comment before making the finding, unless an emergency requires otherwise." RCW 70.105D.020(26).

[12] "'Facility' means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), 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, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located." RCW 70.105D.020(8).

government, federal government agency, or Indian tribe." RCW 70.105D.020(24) (emphasis added).

Neither party disputes that a state agency is a person and that the Site is a facility. The question here is whether DNR is an "owner or operator" under MTCA.

B. STATUTORY INTERPRETATION

Whether DNR is liable under MTCA as an "owner or operator" of the Site is a question of statutory interpretation, which we review de novo. *PacifiCorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 662, 259 P.3d 1115 (2011). Our goal in interpreting the statute is to ascertain and carry out the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To do so, we first look to the plain language of the statute. *Id.* "When the legislature has expressed its intent in the plain language of a statute, we cannot substitute our judgment for the legislature's judgment." *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705 (2015); *accord Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) ("An unambiguous statute is not subject to judicial construction."), *cert. denied*, 538 U.S. 1057 (2003).

To evaluate the plain language, we consider the text of the provision in question, the context of the statute in which the provision is found, and related statutes. *Jametsky*, 179 Wn.2d at 762. Legislative definitions in the statute control, but in the absence of a statutory definition, courts may reference a standard dictionary to give a term its plain and ordinary meaning. *Fraternal Order of Eagles*, 148 Wn.2d at 239. We do not add language to an unambiguous statute under the guise of interpretation. *In re Estate of Mower*, 193 Wn.2d 706, 713, 374 P.3d 180 (2016).

"'A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.'" *Fraternal Order of*

Eagles, 148 Wn.2d at 239-40 (quoting *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130 (2002)). "This court is not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.'" *Id.* at 240 (quoting *Keller*, 143 Wn.2d at 277).

C. "OWNER OR OPERATOR" OF THE SITE

DNR argues that it is not an "owner or operator" of the Site under MTCA because the State owns the aquatic lands within the Site.[13] We disagree and hold that DNR is liable under MTCA as an "owner or operator" of the Site based on DNR's ownership interest in the aquatic lands within the Site.

1. Any Ownership Interest

The parties do not dispute that the State of Washington owns the aquatic lands within the Site. Although DNR admits it has the right to manage the aquatic lands within the Site, DNR asserts that it does not have a "bundle of rights" associated with property ownership because it only has the powers given to it by the legislature. Br. of Resp't at 17. Thus, DNR argues that it cannot be an owner because the State, not DNR, is the owner. Pope argues that the State's fee ownership does not preclude DNR from holding "any ownership interest" under MTCA. We agree with Pope.

RCW 70.105D.020(22) broadly defines "owner" as "[a]ny person with *any ownership interest* in the facility." "Any" is defined as "[o]ne or some, regardless of sort, quantity, or number"; "[a]ny quantity or part"; and "[t]o any degree or extent." WEBSTER'S II NEW COLLEGE DICTIONARY 51 (1999). "Ownership" is defined as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." BLACK'S LAW

[13] DNR's argument is contrary to the position taken in its own documents where it acknowledges that it owns the Site, and that it needed to inform Ecology of its ownership and interests at the Site.

DICTIONARY 1138 (8th ed. 2004). And "interest" is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." BLACK'S LAW DICTIONARY 828 (8th ed. 2004).

The 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.

Here, the legislature has expressly delegated to DNR the responsibility to manage the aquatic lands within the Site. *See* RCW 79.105.010. DNR repeatedly asserted its right to manage the aquatic lands within the Site, and it has extensively exercised its right to manage the aquatic lands within the Site by dictating what activities are allowed and not allowed. Thus, based on the plain language of the statute and on DNR's statutory rights with regard to the property, DNR has an "ownership interest" in the Site.[14]

Washington's common law principles of property ownership support this plain language interpretation of "ownership interest." Property ownership in Washington has been determined by evaluating the "bundle of sticks" associated with property ownership and use, such as the right to use, possess, exclude, alienate, and control. *See Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012) ("Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc."); *Lowe v. Rowe*, 173 Wn. App. 253, 264, 294 P.3d 6 (2012) ("Control over the land is part of the bundle of sticks associated with land ownership and use.").

[14] Even if the plain language of "any ownership interest" is ambiguous, the legislative documents support the conclusion that DNR is liable based on having an "ownership interest." For example, House Bill analysis provided: "The Department of Natural Resources is a potentially liable party and potentially responsible party on behalf of the state because it owns or manages the contaminated sites on state-owned aquatic lands." House of Representatives Bill Analysis, HB 2623, at 2 (Jan. 28, 2000).

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. *See* CP at 217 (DNR noting that it evaluates proposed uses as "proprietary manager of state-owned aquatic lands").

Thus, DNR's authority includes those rights associated with an ownership interest. Accordingly, we hold that the statutory rights conferred on DNR by the legislature amount to "any ownership interest" in the Site.

2. Exercise Any Control

DNR also argues that it did not exercise control over the polluting activities at the Site, and therefore, it cannot be held liable under MTCA as an "owner or operator." We disagree.

The plain language of RCW 70.105D.020(22) is unambiguous. As noted, a person who exercises *any* control over the facility is liable under MTCA. RCW 70.105D.020(22)(a); RCW 70.105D.040(1)(a). MTCA does not define "control," so we look to its usual and ordinary meaning. *Fraternal Order of Eagles*, 148 Wn.2d at 239. "Control" means: "To exercise authority or influence over: DIRECT." WEBSTER'S II NEW COLLEGE DICTIONARY 246 (1999); *accord* BLACK'S LAW DICTIONARY 353 (8th ed. 2004) ("To exercise power or influence over").

The legislature has granted DNR authority to manage the Site, including the authority to execute leases and determine appropriate uses of the property. *See* RCW 79.105.010. And DNR has exercised that authority here.

At the Site, DNR exercised its statutory authority by allowing the activity that led to the contamination. DNR controlled the permitted uses of the aquatic lands within the Site and expressly authorized Pope to use the leased aquatic lands for log storage, noting that "the area is

highly suitable for" log storage. CP at 123. DNR also expressly authorized log rafting and log booming. In the leases, DNR provided that specific methods had to be used for log booming and prohibited certain other methods of log booming, like "[f]ree rolling of logs." CP at 105. The leases also placed limitations on the type and assembly of log rafts. Ecology determined that contamination at the Site, in part, was related to the activities related to log storage, log rafting, and log booming. Thus, DNR has exercised control over the aquatic lands within the Site and is, therefore, an "owner or operator" under MTCA.

Moreover, DNR has repeatedly admitted that it manages the aquatic lands within the Site, holds management authority over those aquatic lands, and acts a land manager. "Manage" means: "1. To direct or control the use of. 2. a. To exert control over. b. To make submissive to one's authority, discipline, or persuasion." WEBSTER'S II NEW COLLEGE DICTIONARY 664 (1999); *accord* BLACK'S LAW DICTIONARY 979 (8th ed. 2004) (defining "general manager" as a person who administers or supervises the affairs of an organization, "who has overall control" of an organization). Therefore, based on DNR's own characterization of its role as a land manager, DNR controls the use of the aquatic lands within the Site and is, therefore, an operator under MTCA.[15]

DNR contends that state law requires that an operator under the MTCA must have active involvement in the operational decisions specifically related to pollution at the Site. The crux of DNR's argument is that it does not meet the definition of "operator" under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980) and state court cases interpreting CERCLA.

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[15] In discussing whether it has any ownership interest under MTCA, DNR repeatedly asserts that it is a land manager, has only management authority, and does not own the Site. But DNR does not reconcile that position with its claim that it is does not exercise any control over the Site.

In support of its contention, DNR cites *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006) and *Unigard Insurance Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999). *Taliesen*, citing *Unigard*, noted that "[b]ecause [MTCA] was heavily patterned after its federal counterpart [CERCLA], federal cases interpreting similar 'owner or operator' language in the federal act are persuasive authority in determining operator liability." *Taliesen*, 135 Wn. App. at 127. However, although MTCA was modeled after CERCLA, the applicable provision here—namely, the definition of an "owner or operator"—is different.

CERCLA defines "owner or operator," in relevant part, as "any person who owned, operated, or otherwise *controlled activities at such facility immediately beforehand*." 42 U.S.C. § 9601(20)(A) (emphasis added). MTCA defines "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises *any control over the facility*." RCW 70.105D.020(22) (emphasis added).

In both *Taliesen* and *Unigard*, the courts analyzed liability under CERCLA without discussing the definitional differences between CERCLA and MTCA. *See Taliesen*, 135 Wn. App. at 127; *see also Unigard*, 97 Wn. App. at 428. Because the language of the provision in MTCA differs from the language in CERCLA, *Taliesen*'s and *Unigard*'s holdings relying on an interpretation of CERCLA liability are not persuasive.

Furthermore, both *Taliesen* and *Unigard* are distinguishable. In *Taliesen*, the court addressed whether a subcontractor was liable for following the instructions of an "owner or operator," and found that the subcontractor did not have authority over the site because it did not have authority to decide where to drill, and the drilling was the cause of the contamination. *Taliesen*, 135 Wn. App. at 128. In *Unigard*, the court addressed whether a corporate officer and sole shareholder can hide "behind the corporate shield" for the actions of the corporate "owner or

operator." *Unigard*, 97 Wn. App. at 428-29. Here, DNR had authority to control the activities allowed on the aquatic lands within the Site and actually exercised that control.

Ecology, the agency tasked with administering MTCA, disagrees with DNR's interpretation of operator liability and describes the logical result of DNR's position. "DNR's proposed standard . . . would effectively replace the existing words of the statute—an owner or operator is one who exercises '*any control* over the facility,'—with a materially different and narrower set of words: an owner or operator is one who exercises '*actual control* over the *polluting activity*.'" Br. of Amicus Curiae Ecology at 7 (citation omitted). Ecology is tasked with administering MTCA and its regulations, and we defer to the administrating agency's interpretation of the statute. RCW 70.105D.030; *Shaw v. Dep't of Ret. Sys.*, 193 Wn. App. 122, 128, 371 P.3d 106 (2016); *Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 136, 356 P.3d 753 (2015).

In liberally construing MTCA, we hold that DNR is an "owner or operator" of the Site. Thus, the superior court erred by granting DNR summary judgment and dismissing the contribution action against DNR.

3. DNR's Policy Concerns

DNR argues that Pope's interpretation of MTCA would be inconsistent with the purposes of MTCA and would subject Washington taxpayers to excessive liability. DNR claims that if we hold that DNR is an "owner or operator,"

> [I]t is easy to conceive that the State's potential liability could be extensive for contamination on the State's 2.6 million acres of aquatic lands that DNR manages. This liability would attach regardless of any DNR involvement with the activities that led to the pollution.

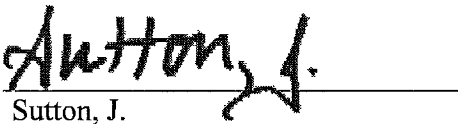
Br. of Resp't at 26. But these are policy arguments. Such policy arguments are better suited for the legislature's consideration.

In addition, DNR conflates the threshold determination of liability under MTCA with the final apportionment of the extent of liability. We are tasked with determining whether summary judgment on the issue of whether DNR can be liable as an "owner or operator" is appropriate—not the scope or propriety of the final apportionment of the extent of liability. As Ecology notes, "[i]t is possible for DNR to be liable for a site under MTCA and not bear any equitable portion of the cleanup costs for the site." Br. of Amicus Curiae Ecology at 16 n.8 (citing *Seattle City Light v. Dep't of Transp.*, 98 Wn. App. 165, 174, 177, 989 P.2d 1164 (1999) (holding that the Department of Transportation was liable under the MTCA, but that it was not responsible for any of the cleanup costs)). Thus, we decline to determine the legal issue before us based on policy concerns.

We hold that DNR is an "owner or operator" under MTCA and reverse the superior court's summary judgment order.

Lee, P.J.

I concur:



Sutton, J.

MELNICK — (dissent) I respectfully dissent from the majority's interpretation of the term "owner or operator" as it is used in RCW 70.105D.020. I would therefore affirm the trial court's determination that the Department of Natural Resources (DNR) is neither an owner nor an operator of the facility under the Model Toxic Control Act (MTCA). DNR is the manager of the state-owned aquatic lands.

In coming to this conclusion, I agree with the majority that we utilize the plain meaning of the statutes in question. In pertinent part, the following statutes are critical to the analysis.

I. STATUTES

A. MTCA – Chapter 70.105D RCW

> "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), 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, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

RCW 70.105D.020(8).

"'Owner or operator' means: (a) Any person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22).

"'Person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe." RCW 70.105D.020(24).

B. Public Lands – Title 79 RCW

Pursuant to RCW 79.02.010 the aquatic lands at issue in this case are owned by the State. "'Aquatic lands' means all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters." RCW 79.105.060(1). Management of the aquatic lands is delegated to DNR. RCW 79.105.010; RCW 79.105.210(4).

The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. RCW 79.105.010. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these lands for the benefit of the public. RCW 79.105.010.

RCW 79.105.210(4) states, "The power to lease state-owned aquatic lands is vested in the department, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.105 through 79.140 RCW."

II. DNR IS NOT AN OWNER OF THE FACILITY BECAUSE IT DOES NOT HAVE AN OWNERSHIP INTEREST IN THE FACILITY.

Although the majority does not distinguish between the terms owner and operator, the plain language of the statute at issue clearly differentiates between the two.

An "'owner'" is "[a]ny person with any ownership interest in the facility." RCW 70.105D.020(22)(a). An "'operator'" is any person "who exercises any control over the facility". RCW 70.105D.020(22)(a). As the majority points out, the parties do not dispute that the state owns the property on which the facility is located. *See* RCW 79.105.010. Under MTCA, the state is not a person, but DNR is. RCW 70.105D.020(24). The majority, however, holds that DNR has an ownership interest in the site and is not a mere manager. I disagree.

DNR is a creature of statute and derives its power from the legislature. "An agency may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority." *Northlake Marine Works, Inc. v. Dep't of Nat. Res.*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006). "DNR has been granted authority to manage state aquatic lands." *Northlake Marine Works, Inc.*, 134 Wn. App. at 287.

In coming to this conclusion, I am mindful that the legislature has emphasized, "The purpose of RCW . . . 79.105.010 through 79.105.040 is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority, and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands." RCW 79.105.020. The legislature specifically says that the state has an ownership interest in aquatic lands and DNR has management authority. RCW 79.02.010(1); RCW 79.105.210.

I would note that although MTCA does not define "ownership interest," the legislature has defined this term in a wholly different context. It is the only definition of "ownership interest" I could find in our statutes. In RCW 2.48.180(1)(c), the legislature, in part, defined "'[o]wnership interest'" as "the right to control the affairs of a business." I find this definition to be persuasive in the current context.

DNR, a state agency, is in fact the manager of the aquatic land but does not have an ownership interest in the facility.[16]

[16] Some amici cite to *Oberg v. Dep't of Nat. Res.*, 114 Wn.2d 278, 279, 787 P.2d 918 (1990), for authority. However, in that case, a statute utilized in analyzing the issues specifically defined "DNR as an owner of forest land.

III DNR Is Note An Operator Of The Facility Because It Does Not Exercise Any Control Over The Facility.

It is equally clear that DNR is not the "operator of the facility." It does not exercise control of the facility or the site. While DNR manages the site on behalf of the state, it does not exercise control of the facility. RCW 79.105.010; RCW 79.105.060(20).

This recognition seemed obvious to DNR and the Department of Ecology (Ecology). In December 1992, Ecology and DNR executed a Memorandum of Understanding (MOU). It recognized that aquatic lands are "owned by the people of the State and administered by the Washington Department of Natural Resources. . . . As the public's custodian of those lands, DNR has a vital interest in ensuring that they are free of contamination." Clerk's Papers (CP) at 283.

This MOU articulated the difference between operating the facility and managing it. DNR may have reasonable defenses to MTCA liability which "may apply to situations where DNR did not: control the finances of the facility, manage the employees of the facility, manage the daily business operations of the facility, or have authority to daily operate/maintain environmental controls at the facility." CP at 289. This language in the MOU evinces Ecology's recognition that DNR's role as a manager was to act as the public's custodian of the land, and that it would not be liable under MTCA unless it played an active role in controlling the operation of the facility. In this case, it must be remembered that Ecology only named DNR as a potentially liable person.

By analogy, and assuming the same definitions apply, an owner of rental property can have an agent who finds renters for the property and signs the leases. If that agent signs a lease setting conditions for the rental property, including authorizing the renter to have a dog, and that dog subsequently bites somebody, under the majority's reasoning, the agent is potentially liable because it operated the rental property. Such a conclusion is at odds with our jurisprudence.

Both *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 128, 144 P.3d 1185 (2006), and *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 428, 983 P.2d 1155 (1999), take a similar approach. Both cases interpreted MTCA and, because it was modeled on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[17] used the federal law as persuasive authority in determining how we should interpret our state law. They relied on interpretations of CERCLA, including *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct 1876, 141 L. Ed. 2d 43 (1998), which it found persuasive.

In both *Taliesen and Unigard*, we adopted the CERCLA liability standard that, "[w]ith few exception," courts have been unwilling to impose CERCLA liability upon an non-owner of the property if the party did not participate in, or actually exercise control over, the operations of the facility. *Unigard*, 97 Wn. App. at 429; *Taliesen*, 135 Wn. App. at 127. In *Taliesen*, we said, "The persuasive authority of the federal cases demonstrates that the key word in our state statute is 'control', not 'any.'" 135 Wn. App. at 128. The contractor who worked on the property did not have "'any *control*' in the decision-making sense intended by [CERCLA]. The trial court properly concluded that [he] did not have operator liability." *Taliesen*, 135 Wn. App. at 128.

The majority says these cases were wrongly decided. However, it is axiomatic that "the Legislature is presumed to know the existing state of the case law in those areas in which it is legislating." *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994); *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008); *Osborn v. Grant Cty. By & Through Grant Cty. Comm'rs*, 130 Wn.2d 615, 623, 926 P.2d 911 (1996). In addition, the "prior judicial use of a term

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[17] 42 U.S.C. § 9601 and its 1986 reenactment, the Superfund Amendments and Reauthorization Act of 1986 (SARA).

City of Seattle (Seattle City Light) v. Dep't of Transp., 98 Wn. App. 165, 170, 989 P.2d 1164 (1999)

will be considered since the legislature is presumed to know the decisions of this court." *In re Marriage of Gimlett*, 95 Wn.2d 699, 702, 629 P.2d 450 (1981).

Here, DNR signed the lease which established permitted uses for the property; however, DNR did not exercise control over the facility. Because DNR did not have an ownership interest in or control over the operations of the facility, I respectfully dissent.

Melnick, J.

APPENDIX B

RCW 70.105D.020

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agreed order" means an order issued by the department under this chapter with which the potentially liable person or prospective purchaser receiving the order agrees to comply. An agreed order may be used to require or approve any cleanup or other remedial actions but it is not a settlement under RCW **70.105D.040**(4) and shall not contain a covenant not to sue, or provide protection from claims for contribution, or provide eligibility for public funding of remedial actions under RCW **70.105D.070**(3) (k) and (q).

(2) "Area-wide groundwater contamination" means groundwater contamination on multiple adjacent properties with different ownerships consisting of hazardous substances from multiple sources that have resulted in commingled plumes of contaminated groundwater that are not practicable to address separately.

(3) "Brownfield property" means previously developed and currently abandoned or underutilized real property and adjacent surface waters and sediment where environmental, economic, or community reuse objectives are hindered by the release or threatened release of hazardous substances that the department has determined requires remedial action under this chapter or that the United States environmental protection agency has determined requires remedial action under the federal cleanup law.

(4) "City" means a city or town.

(5) "Department" means the department of ecology.

(6) "Director" means the director of ecology or the director's designee.

(7) "Environmental covenant" has the same meaning as defined in RCW **64.70.020**.

(8) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), 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, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

(9) "Federal cleanup law" means the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

(10)(a) "Fiduciary" means a person acting for the benefit of another party as a bona fide trustee; executor; administrator; custodian; guardian of estates or guardian ad litem; receiver; conservator; committee of estates of incapacitated persons; trustee in bankruptcy; trustee, under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender. Except as provided in subsection (22)(b)(iii) of this section, the liability of a fiduciary under this chapter shall not exceed the assets held in the fiduciary capacity.

(b) "Fiduciary" does not mean:

(i) A person acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person;

(ii) A person who acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or any other person. It is prima facie evidence that the fiduciary acquired ownership or control of the facility to avoid liability if the facility is the only substantial asset in the fiduciary estate at the time the facility became subject to the fiduciary estate;

(iii) A person who acts in a capacity other than that of a fiduciary or in a beneficiary capacity and in that capacity directly or indirectly benefits from a trust or fiduciary relationship;

(iv) A person who is a beneficiary and fiduciary with respect to the same fiduciary estate, and who while acting as a fiduciary receives benefits that exceed customary or reasonable compensation, and incidental benefits permitted under applicable law;

(v) A person who is a fiduciary and receives benefits that substantially exceed customary or reasonable compensation, and incidental benefits permitted under applicable law; or

(vi) A person who acts in the capacity of trustee of state or federal lands or resources.

(11) "Fiduciary capacity" means the capacity of a person holding title to a facility, or otherwise having control of an interest in the facility pursuant to the exercise of the responsibilities of the person as a fiduciary.

(12) "Foreclosure and its equivalents" means purchase at a foreclosure sale, acquisition, or assignment of title in lieu of foreclosure, termination of a lease, or other repossession, acquisition of a right to title or possession, an agreement in satisfaction of the obligation, or any other comparable formal or informal manner, whether pursuant to law or under warranties, covenants, conditions, representations, or promises from the borrower, by which the holder acquires title to or possession of a facility securing a loan or other obligation.

(13) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in RCW **70.105.010** (1) and (7), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter **70.105** RCW;

(b) Any hazardous substance as defined in RCW **70.105.010**(10) or any hazardous substance as defined by rule pursuant to chapter **70.105** RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

(14) "Holder" means a person who holds indicia of ownership primarily to protect a security interest. A holder includes the initial holder such as the loan originator, any subsequent holder such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market, a guarantor of an obligation, surety, or any other person who holds indicia of ownership primarily to protect a security interest, or a receiver, court-appointed trustee, or other person who acts on behalf or for the benefit of a holder. A holder can be a public or privately owned financial institution, receiver, conservator, loan guarantor, or other similar persons that loan money or guarantee repayment of a loan. Holders typically are banks or savings and loan institutions but may also include others such as insurance companies, pension funds, or private individuals that engage in loaning of money or credit.

(15) "Independent remedial actions" means remedial actions conducted without department oversight or approval, and not under an order, agreed order, or consent decree.

(16) "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in a facility securing a loan or other obligation, including any legal or equitable title to a facility acquired incident to foreclosure and its equivalents. Evidence of such interests includes, mortgages, deeds of trust, sellers interest in a real estate contract, liens, surety bonds, and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased facility, or legal or equitable title obtained pursuant to foreclosure and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against the facility that are held primarily to protect a security interest.

(17) "Industrial properties" means properties that are or have been characterized by, or are to be committed to, traditional industrial uses such as processing or manufacturing of materials, marine terminal and transportation areas and facilities, fabrication, assembly, treatment, or distribution of manufactured products, or storage of bulk materials, that are either:

(a) Zoned for industrial use by a city or county conducting land use planning under chapter **36.70A** RCW; or

(b) For counties not planning under chapter **36.70A** RCW and the cities within them, zoned for industrial use and adjacent to properties currently used or designated for industrial purposes.

(18) "Institutional controls" means measures undertaken to limit or prohibit activities that may interfere with the integrity of a remedial action or result in exposure to or migration of hazardous substances at a site. "Institutional controls" include environmental covenants.

(19) "Local government" means any political subdivision of the state, including a town, city, county, special purpose district, or other municipal corporation, including brownfield renewal authority created under RCW **70.105D.160**.

(20) "Model remedy" or "model remedial action" means a set of technologies, procedures, and monitoring protocols identified by the department for use in routine types of clean-up projects at facilities that have common features and lower risk to human health and the environment.

(21) "Operating a facility primarily to protect a security interest" occurs when all of the following are met: (a) Operating the facility where the borrower has defaulted on the loan or otherwise breached the security agreement; (b) operating the facility to preserve the value of the facility as an ongoing business; (c) the operation is being done in anticipation of a sale, transfer, or assignment of the facility; and (d) the operation is being done primarily to protect a security interest. Operating a facility for longer than one year prior to foreclosure or its equivalents shall be presumed to be operating the facility for other than to protect a security interest.

(22) "Owner or operator" means:

(a) Any person with any ownership interest in the facility or who exercises any control over the facility; or

(b) In the case of an abandoned facility, any person who had owned, or operated, or exercised control over the facility any time before its abandonment;

The term does not include:

(i) An agency of the state or unit of local government which acquired ownership or control through a drug forfeiture action under RCW **69.50.505**, or involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title. This exclusion does not apply to an agency of the state or unit of local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility;

(ii) A person who, without participating in the management of a facility, holds indicia of ownership primarily to protect the person's security interest in the facility. Holders after foreclosure and its equivalent and holders who engage in any of the activities identified in subsection (23)(e) through (g) of this section shall not lose this exemption provided the holder complies with all of the following:

(A) The holder properly maintains the environmental compliance measures already in place at the facility;

(B) The holder complies with the reporting requirements in the rules adopted under this chapter;

(C) The holder complies with any order issued to the holder by the department to abate an imminent or substantial endangerment;

(D) The holder allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the holder are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The holder does not exacerbate an existing release. The exemption in this subsection (22)(b)(ii) does not apply to holders who cause or contribute to a new release or threatened release or who are otherwise liable under RCW **70.105D.040**(1) (b), (c), (d), and (e); provided, however, that a holder shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release;

(iii) A fiduciary in his, her, or its personal or individual capacity. This exemption does not preclude a claim against the assets of the estate or trust administered by the fiduciary or against a nonemployee agent or independent contractor retained by a fiduciary. This exemption also does not apply to the extent that a person is liable under this chapter independently of the person's ownership as a fiduciary or for actions taken in a fiduciary capacity which cause or contribute to a new release or exacerbate an existing release of hazardous substances. This exemption applies provided that, to the extent of the fiduciary's powers granted by law or by the applicable governing instrument granting fiduciary powers, the fiduciary complies with all of the following:

(A) The fiduciary properly maintains the environmental compliance measures already in place at the facility;

(B) The fiduciary complies with the reporting requirements in the rules adopted under this chapter;

(C) The fiduciary complies with any order issued to the fiduciary by the department to abate an imminent or substantial endangerment;

(D) The fiduciary allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the fiduciary are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The fiduciary does not exacerbate an existing release.

The exemption in this subsection (22)(b)(iii) does not apply to fiduciaries who cause or contribute to a new release or threatened release or who are otherwise liable under RCW **70.105D.040**(1) (b), (c), (d), and (e); provided however, that a fiduciary shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release. The exemption in this subsection (22)(b)(iii) also does not apply where the fiduciary's powers to comply with this subsection (22)(b)(iii) are limited by a governing instrument created with the objective purpose of avoiding liability under this chapter or of avoiding compliance with this chapter; or

(iv) Any person who has any ownership interest in, operates, or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property, if:

(A) The person can demonstrate that the hazardous substance has not been used, placed, managed, or otherwise handled on the property in a manner likely to cause or contribute to a release of the hazardous substance that has migrated onto the property;

(B) The person has not caused or contributed to the release of the hazardous substance;

(C) The person does not engage in activities that damage or interfere with the operation of remedial actions installed on the person's property or engage in activities that result in exposure of humans or the environment to the contaminated groundwater that has migrated onto the property;

(D) If requested, the person allows the department, potentially liable persons who are subject to an order, agreed order, or consent decree, and the authorized employees, agents, or contractors of each, access to the property to conduct remedial actions required by the department. The person may attempt to negotiate an access agreement before allowing access; and

(E) Legal withdrawal of groundwater does not disqualify a person from the exemption in this subsection (22)(b)(iv).

(23) "Participation in management" means exercising decision-making control over the borrower's operation of the facility, environmental compliance, or assuming or manifesting responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise.

The term does not include any of the following: (a) A holder with the mere capacity or ability to influence, or the unexercised right to control facility operations; (b) a holder who conducts or requires a borrower to conduct an environmental audit or an environmental site assessment at the facility for which indicia of ownership is held; (c) a holder who requires a borrower to come into compliance with any applicable laws or regulations at the facility for which indicia of ownership is held; (d) a holder who requires a borrower to conduct remedial actions including setting minimum requirements, but does not otherwise control or manage the borrower's remedial actions or the scope of the borrower's remedial actions except to prepare a facility for sale, transfer, or assignment; (e) a holder who engages in workout or policing activities primarily to protect the holder's security interest in the facility; (f) a holder who prepares a facility for sale, transfer, or assignment or requires a borrower to prepare a facility for sale, transfer, or assignment; (g) a holder who operates a facility primarily to protect a security interest, or requires a borrower to continue to operate, a facility primarily to protect a security interest; and (h) a prospective holder who, as a condition of becoming a holder, requires an owner or operator to conduct an environmental audit, conduct an environmental site assessment, come into compliance with any applicable laws or regulations, or conduct remedial actions prior to holding a security interest is not participating in the management of the facility.

(24) "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe.

(25) "Policing activities" means actions the holder takes to ensure that the borrower complies with the terms of the loan or security interest or actions the holder takes or requires the borrower to take to maintain the value of the security. Policing activities include: Requiring the borrower to conduct remedial actions at the facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, regulations, and permits during the term of the security interest; securing or exercising authority to monitor or inspect the facility including on-site inspections, or to monitor or inspect the borrower's business or financial condition during the term of the security interest; or taking other actions necessary to adequately police the loan or security interest such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower.

(26) "Potentially liable person" means any person whom the department finds, based on credible evidence, to be liable under RCW **70.105D.040**. The department shall give notice to any such person and allow an opportunity for comment before making the finding, unless an emergency requires otherwise.

(27) "Prepare a facility for sale, transfer, or assignment" means to secure access to the facility; perform routine maintenance on the facility; remove inventory, equipment, or structures; properly maintain environmental compliance measures already in place at the facility; conduct remedial actions to cleanup releases at the facility; or to perform other similar activities intended to preserve the value of the facility where the borrower has defaulted on the loan or otherwise breached the security agreement or after foreclosure and its equivalents and in anticipation of a pending sale, transfer, or assignment, primarily to protect the holder's security interest in the facility. A holder can prepare a facility for sale, transfer, or assignment for up to one year prior to foreclosure and its equivalents and still stay within the security interest exemption in subsection (22)(b)(ii) of this section.

(28) "Primarily to protect a security interest" means the indicia of ownership is held primarily for the purpose of securing payment or performance of an obligation. The term does not include indicia of ownership held primarily for investment purposes nor indicia of ownership held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons, for maintaining indicia of ownership, but the primary reason must be for protection of a security interest. Holding indicia of ownership after foreclosure or its equivalents for longer than five years shall be considered to be holding the indicia of ownership for purposes other than primarily to protect a security interest. For facilities that have been acquired through foreclosure or its equivalents prior to July 23, 1995, this five-year period shall begin as of July 23, 1995.

(29) "Prospective purchaser" means a person who is not currently liable for remedial action at a facility and who proposes to purchase, redevelop, or reuse the facility.

(30) "Public notice" means, at a minimum, adequate notice mailed to all persons who have made timely request of the department and to persons residing in the potentially affected vicinity of the proposed action; mailed to appropriate news media; published in the newspaper of largest circulation in the city or county of the proposed action; and opportunity for interested persons to comment.

(31) "Redevelopment opportunity zone" means a geographic area designated under RCW **70.105D.150**.

(32) "Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

(33) "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

(34) "Security interest" means an interest in a facility created or established for the purpose of securing a loan or other obligation. Security interests include deeds of trusts, sellers interest in a real estate contract, liens, legal, or equitable title to a facility acquired incident to foreclosure and its equivalents, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale

and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, easements, and consignments, if the transaction creates or establishes an interest in a facility for the purpose of securing a loan or other obligation.

(35) "Workout activities" means those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Workout activities include: Restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owed to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owed to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

[**2013 2nd sp.s. c 1 § 2; 2007 c 104 § 18; 2005 c 191 § 1; 1998 c 6 § 1; 1997 c 406 § 2; 1995 c 70 § 1; 1994 c 254 § 2;** 1989 c 2 § 2 (Initiative Measure No. 97, approved November 8, 1988).]

NOTES:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW **1.08.015**(2)(k).

Findings—Intent—2013 2nd sp.s. c 1: "The legislature finds that there are a large number of toxic waste sites that have been identified in the department of ecology's priority list as ready for immediate cleanup. The legislature further finds that addressing the cleanup of these toxic waste sites will provide needed jobs to citizens of Washington state. It is the intent of the legislature to prioritize the spending of revenues under chapter **70.105D** RCW, the model toxics control act, on cleaning up the most toxic sites, while also providing jobs in communities around the state." [**2013 2nd sp.s. c 1 § 1.**]

Effective date—2013 2nd sp.s. c 1: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2013." [**2013 2nd sp.s. c 1 § 20.**]

Application—Construction—2007 c 104: See RCW **64.70.015**.

RCW 70.105D.040

Standard of liability—Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter **70.105** RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (B) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. 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 party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (3)(b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (3)(b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (3)(b) is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (3)(b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with clean-up standards under RCW **70.105D.030**(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(c) A settlement agreement may contain a covenant not to sue only of a scope commensurate with the settlement agreement in favor of any person with whom the attorney general has settled under this section. Any covenant not to sue shall contain a reopener clause which requires the court to amend the covenant not to sue if factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment.

(d) A party who has resolved its liability to the state under this section shall not be liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other liable parties but it reduces the total potential liability of the others to the state by the amount of the settlement.

(e) If the state has entered into a consent decree with an owner or operator under this section, the state shall not enforce this chapter against any owner or operator who is a successor in interest to the settling party unless under the terms of the consent decree the state could enforce against the settling party, if:

(i) The successor owner or operator is liable with respect to the facility solely due to that person's ownership interest or operator status acquired as a successor in interest to the owner or operator with whom the state has entered into a consent decree; and

(ii) The stay of enforcement under this subsection does not apply if the consent decree was based on circumstances unique to the settling party that do not exist with regard to the successor in interest, such as financial hardship. For consent decrees entered into before July 27, 1997, at the request of a settling party or a potential successor owner or operator, the attorney general shall issue a written opinion on whether a consent decree contains such unique circumstances. For all other consent decrees, such unique circumstances shall be specified in the consent decree.

(f) Any person who is not subject to enforcement by the state under (e) of this subsection is not liable for claims for contribution regarding matters addressed in the settlement.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a prospective purchaser, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action at the facility consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the facility, or increase health risks to persons at or in the vicinity of the facility.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of brownfield property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit in addition to cleanup.

(c) A settlement entered under this subsection is governed by subsection (4) of this section.

(6) As an alternative to a settlement under subsection (5) of this section, the department may enter into an agreed order with a prospective purchaser of a property within a designated redevelopment opportunity zone. The agreed order is subject to the limitations in RCW **70.105D.020**(1), but stays enforcement by the department under this chapter regarding remedial actions required by the agreed order as long as the prospective purchaser complies with the requirements of the agreed order.

(7) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

[**2013 2nd sp.s. c 1 § 7; 1997 c 406 § 4; 1994 c 254 § 4;** 1989 c 2 § 4 (Initiative Measure No. 97, approved November 8, 1988).]

NOTES:

Findings—Intent—Effective date—2013 2nd sp.s. c 1: See notes following RCW **70.105D.020**.

SECTION 4 HOW MUCH MAY BE OFFERED IN CERTAIN CASES — PLATTING OF. No more than one hundred and sixty (160) acres of any granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city or within two miles of the boundary of any incorporated city where the valuation of such land shall be found by appraisement to exceed one hundred dollars ($100) per acre shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block, and not more than one block shall be offered for sale in one parcel.

SECTION 5 INVESTMENT OF PERMANENT COMMON SCHOOL FUND. The permanent common school fund of this state may be invested as authorized by law. [**AMENDMENT 44,** 1965 ex.s. Senate Joint Resolution No. 22, part 2, p 2817. Approved November 8, 1966.]

Amendment 1 (1894) — Art. 16 Section 5 INVESTMENT OF SCHOOL FUND — *None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal or school district bonds.* [AMENDMENT 1, 1893 p 9 Section 1. Approved November, 1894.]

Original text — Art. 16 Section 5 INVESTMENT OF PERMANENT SCHOOL FUND — *None of the permanent school fund shall ever be loaned to private persons or corporations, but it may be invested in national, state, county or municipal bonds.*

Funds for support of education: Art. 9 Section 3.

SECTION 6 INVESTMENT OF HIGHER EDUCATION PERMANENT FUNDS. Notwithstanding the provisions of Article VIII, sections 5 and 7 and Article XII, section 9, or any other section or article of the Constitution of the state of Washington, the moneys of the permanent funds established for any of the institutions of higher education in this state may be invested as authorized by law. Without limitation, this shall include the authority to invest permanent funds held for the benefit of institutions of higher education in stocks or bonds issued by any association, company, or corporation if authorized by law. [**AMENDMENT 102,** 2007 Substitute House Joint Resolution No. 4215, p 3145. Approved November 6, 2007.]

ARTICLE XVII
TIDE LANDS

SECTION 1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

Harbors and tide waters: Art. 15.

SECTION 2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided,* the same is not impeached for fraud.

ARTICLE XVIII
STATE SEAL

SECTION 1 SEAL OF THE STATE. The seal of the State of Washington shall be, a seal encircled with the words: "The Seal of the State of Washington," with the vignette of General George Washington as the central figure, and beneath the vignette the figures "1889."

Custody of seal: Art. 3 Section 18.

State seal: RCW 1.20.080.

ARTICLE XIX
EXEMPTIONS

SECTION 1 EXEMPTIONS — HOMESTEADS, ETC. The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

ARTICLE XX
PUBLIC HEALTH AND VITAL STATISTICS

SECTION 1 BOARD OF HEALTH AND BUREAU OF VITAL STATISTICS. There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct.

SECTION 2 REGULATIONS CONCERNING MEDICINE, SURGERY AND PHARMACY. The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

ARTICLE XXI
WATER AND WATER RIGHTS

SECTION 1 PUBLIC USE OF WATER. The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

ARTICLE XXII
LEGISLATIVE APPORTIONMENT

SECTION 1 SENATORIAL APPORTIONMENT. Until otherwise provided by law, the state shall be divided into twenty-four (24) senatorial districts, and said districts shall be constituted and numbered as follows: The counties of Stevens and Spokane shall constitute the first district, and be entitled to one senator; the county of Spokane shall constitute the second district, and be entitled to three senators; the

RCW 79.105.010

Aquatic lands—Findings.

The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these lands for the benefit of the public. The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature further finds that aquatic lands are faced with conflicting use demands.

[**2005 c 155 § 139; 1984 c 221 § 1.** Formerly RCW **79.90.450**.]

RCW 79.105.020

Purpose—Articulation of management philosophy.

The purpose of RCW **79.105.060**, **79.105.230**, **79.105.280**, and **79.105.010** through **79.105.040** is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority, and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands.

[**2005 c 155 § 101.** FORMERLY PART OF RCW **79.90.450**.]

RCW 79.105.060

Definitions.

The definitions in this section apply throughout chapters **79.105** through **79.145** RCW unless the context clearly requires otherwise.

(1) "Aquatic lands" means all tidelands, shorelands, harbor areas, and the beds of navigable waters.

(2) "Beds of navigable waters" means those lands lying waterward of and below the line of navigability on rivers and lakes not subject to tidal flow, or extreme low tide mark in navigable tidal waters, or the outer harbor line where harbor area has been created.

(3) "First-class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city or within two miles of either side.

(4) "First-class tidelands" means the shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile of either side and between the line of ordinary high tide and the inner harbor line; and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide.

(5) "Harbor area" means the area of navigable waters determined as provided in Article XV, section 1 of the state Constitution, which shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

(6) "Improvements" when referring to state-owned aquatic lands means anything considered a fixture in law placed within, upon, or attached to aquatic lands that has changed the value of those lands, or any changes in the previous condition of the fixtures that changes the value of the land.

(7) "Inflation rate" means for a given year the percentage rate of change in the previous calendar year's all commodity producer price index of the bureau of labor statistics of the United States department of commerce. If the index ceases to be published, the department shall designate by rule a comparable substitute index.

(8) "Inner harbor line" means a line located and established in navigable waters between the line of ordinary high tide or ordinary high water and the outer harbor line, constituting the inner boundary of the harbor area.

(9) "Log booming" means placing logs into and taking them out of the water, assembling and disassembling log rafts before or after their movement in waterborne commerce, related handling and sorting activities taking place in the water, and the temporary holding of logs to be taken directly into a processing facility. "Log booming" does not include the temporary holding of logs to be taken directly into a vessel.

(10) "Log storage" means the water storage of logs in rafts or otherwise prepared for shipment in waterborne commerce, but does not include the temporary holding of logs to be taken directly into a vessel or processing facility.

(11) "Nonwater-dependent use" means a use that can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility.

(12) "Outer harbor line" means a line located and established in navigable waters as provided in Article XV, section 1 of the state Constitution, beyond which the state shall never sell or lease any rights whatever to private persons.

(13) "Person" means any private individual, partnership, association, organization, cooperative, firm, corporation, the state or any agency or political subdivision thereof, any public or municipal corporation, or any unit of government, however designated.

(14) "Port district" means a port district created under Title **53** RCW.

(15) "Public utility lines" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines.

(16) "Real rate of return" means the average for the most recent ten calendar years of the average rate of return on conventional real property mortgages as reported by the federal home loan bank board or any successor agency, minus the average inflation rate for the most recent ten calendar years.

(17) "Second-class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city.

(18) "Second-class tidelands" means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide.

(19) "Shorelands," where not preceded by "first-class" or "second-class," means both first-class shorelands and second-class shorelands.

(20) "State-owned aquatic lands" means all tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways owned by the state and administered by the department or managed under RCW **79.105.420** by a port district. "State-owned aquatic lands" does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department.

(21) "Terminal" means a point of interchange between land and water carriers, such as a pier, wharf, or group of such, equipped with facilities for care and handling of either cargo or passengers, or both.

(22) "Tidelands," where not preceded by "first-class" or "second-class," means both first-class tidelands and second-class tidelands.

(23) "Valuable materials" when referring to state-owned aquatic lands means any product or material within or upon lands, such as forest products, forage, stone, gravel, sand, peat, agricultural crops, and all other materials of value except mineral, coal, petroleum, and gas as provided for under chapter **79.14** RCW. However, RCW **79.140.190** and **79.140.200** also apply to materials provided for under chapter **79.14** RCW.

(24) "Water-dependent use" means a use that cannot logically exist in any location but on the water. Examples include, but are not limited to: Waterborne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks.

(25) "Water-oriented use" means a use that historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and houseboats. For the purposes of determining rent under this chapter, water-oriented uses shall be classified as water-dependent uses if the activity either is conducted on state-owned aquatic lands leased on October 1, 1984, or was actually conducted on the state-owned aquatic lands for at least three years before October 1, 1984. If, after October 1, 1984, the activity is changed to a use other than a water-dependent use, the activity shall be classified as a nonwater-dependent use. If continuation of the existing use requires leasing additional state-owned aquatic lands and is permitted under the shoreline management act of 1971, chapter **90.58** RCW, the department may allow reasonable expansion of the water-oriented use.

[**2005 c 155 § 102.**]

WASHINGTON STATE ATTORNEY GENERAL

January 26, 2017 - 2:45 PM

Transmittal Letter

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Court of Appeals Case Number: 47861-7

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