Case No. 69568-1

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

AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,
a Washington limited liability company,

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

ANSWER OF DEFENDANTS/APPELLANTS TO THE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF WASHINGTON BUSINESS

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ARGUMENT

Defendants/Appellants Ross Hansen and Northwest Territorial Mint, L.L.C. (collectively "NW Mint") submit this Answer to the Amicus Curiae Brief of the Association of Washington Business ("AWB"). NW Mint agrees with AWB that (1) the Model Toxics Control Act ("MTCA") does not apply to metallic dust generated during manufacturing operations and contained within the interior of an industrial building; and (2) the Washington Department of Ecology ("Ecology") properly exercised its discretion in determining that MTCA did not apply to the Premises. The trial court committed error by misinterpreting MTCA and refusing to give any deference to Ecology, the agency charged with interpreting and enforcing MTCA.

A. MTCA only applies to soil, vapor, ground water, surface water and sediment. The trial court erred in determining that MTCA applied to metallic dust on interior surfaces in an industrial building.

Auburn's MTCA case and the trial court's decision depend on the adoption of Auburn's proposition that indoor dust falls within MTCA's definition of "soil."[1] Acceptance of this definition, with the resulting regu-

[1] *See* FOF 99; 8/9, RP 74, 77-78.

lation of hazardous substances contained indoors, would extend MTCA far beyond its intended application.

MTCA's primary purpose is the "beneficial stewardship of the *land, air, and waters* of the state[.]"[2] MTCA addresses "releases" of "hazardous substances" to the "environment."[3] Regulations implementing MTCA define "environment" as:

> any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air [in] Washington.[4]

By its terms and as implemented in regulations and practice, MTCA applies only to the listed environmental media – air, soil, sediment, and water.[5] No land, water, or ambient air is at issue in this case.[6]

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[2] RCW 70.105D.010(1)-(2) (emphasis added).

[3] RCW 70.105D.020, RCW 70.105D.040; WAC 173-340-200. MTCA defines a "release" as "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." RCW 70.105D.020 (25); WAC 173-340-200.

[4] WAC 173-340-200. "Ambient air" means outside air. *See Cyker v. Four Seasons Hotels Ltd.*, No. 90-11929-Z, 1991 WL 1401 (D. Mass. 1991) (citing regulations and cases); *see also 3550 Stevens Creek Assoc. v. Barclays Bank of Cal.*, 915 F. 2d 1355, 1359-60 (9th Cir. 1990) (indoor air is not the "environment"). MTCA was patterned after CERCLA, including its definition of "environment." *See generally Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992). ("As such, federal cases interpreting similar language in CERCLA and SARA are persuasive, albeit not controlling, when interpreting . . . MTCA.").

[5] *See, e.g.*, WAC 173-340-200, WAC 173-340-700(2) , WAC 173-340-708(3)(b) , 173-340-700 through -760, tbls. 720-1—747-5 (all specific to ground water, surface water, soil, sediment and air).

The regulations implementing MTCA define "soil" as "a mixture of organic and inorganic solids, air, water, and biota that exists on the earth's surface above bedrock, including materials of anthropogenic sources such as slag, sludge, etc."[7] The definition's first clause makes clear that all soil must: (1) contain "a mixture of organic and inorganic solids, air, water and biota"; and (2) "exist on the earth's surface above bedrock[.]"[8] The second clause explains that materials meeting these two threshold criteria may also include "materials of anthropogenic sources."[9] Materials generated by industrial and manufacturing operations are not soil, since they are do not contain organic solids, air, water and biota.[10]

The MTCA statute does not mention dust. The regulations that implement MTCA mention the word in one subsection and address each

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[6] *See* 8/14, RP 11, 13, 18-19, 33 (no MTCA media contaminated).

[7] WAC § 173-340-200. "Soil biota" is defined as "invertebrate multicellular animals that live in the soil or in close contact with the soil." *Id.*

[8] WAC 173-340-200. Merriam-Webster defines "bedrock" as "the solid rock underlying unconsolidated surface materials (as soil)." *See* http://www.merriam-webster.com/dictionary/bedrock. Defining everything that exists anywhere above bedrock—not just the surface immediately above it—as soil would read all limits out of MTCA and basic earth science definitions of "soil."

[9] WAC 173-340-200. Merriam-Webster defines "anthropogenic" as "of, relating to, or resulting from the influence of human beings on nature." *Id.*

[10] Auburn's expert admitted that the metal dust from NW Mint's manufacturing operations did not meet this definition of "soil." 8/09, RP 78.

medium separately and distinctly.[11] The regulation that mentions dust covers circumstances where "dust [is] generated by contaminated soil."[12] The common sense reading of this regulation is that while dust may be a component of soil, it is not—as Auburn contends and the trial court found—the equivalent of soil.[13]

MTCA regulates contamination in soil, vapor, ground water, surface water and sediment. It does not regulate hazardous substances found indoors; more particularly, it does not apply to metallic dust generated during manufacturing operations and contained within the interior of an industrial building. Ecology has never ordered the remediation of a building or pursued enforcement or cost recovery actions under MTCA based on the indoor presence of hazardous substances.[14] If contamination of a building interior results from processes that occur inside the building, but

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[11] In subsections (c)(i)-(v), WAC 173-340-740(1)(c) describes media that can be affected by contaminated soil: groundwater, surface waters, vapors, and dust. The regulation explicitly distinguishes between soil (described in section (c) and subsection (c)(ii)) and dust (described separately, in subsection (c)(iii)).

[12] WAC § 173-340-740(c)(iii), states that Ecology "may require more stringent soil cleanup standards than required by this section where, based on a site-specific evaluation, the department determines that this is necessary to protect human health and the environment. ... The following are examples of situations that may require more stringent cleanup levels: ... (iii) Concentrations necessary to address the potential health risk posed by dust at a site".

[13] Ecology determined that the metallic dust in the Premises was not soil for the purposes of MTCA. 8/13, RP 152. The trial court ignored this determination.

[14] 8/13, RP 22.

there is no exterior source of contamination, Ecology would not regulate that contamination under MTCA.[15]

The trial court's decision expands MTCA's reach into interior spaces in manufacturing and industrial facilities. Since other state agencies, such as WISHA, already regulate these facilities, the application of MTCA to interior spaces will likely to result in inter-agency conflict and public confusion.

MTCA is an "outdoor" statute: it protects against the contamination of land, air and water. The Legislature never intended for MTCA to apply to interior spaces. This Court should reverse the trial court's improper application of MTCA to metallic dust generated during manufacturing operations and contained within the interior of an industrial building.

B. Ecology properly exercised its discretion in determining that MTCA did not apply to the Property. The trial court committed error by ignoring the agency's determination.

AWB correctly argues that the public should be entitled to rely upon Ecology's determinations concerning the statutes it is responsible for interpreting and administering. The trial court abused its discretion by substituting—without explanation—its judgment for that of Ecology.

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[15] 8/13, RP 35.

Ecology established the Voluntary Cleanup Program ("VCP") pursuant to its authority under WAC 173-340. The VCP is a program within Ecology to administer independent cleanup actions.[16] The VCP's purpose is to allow owners and operators of contaminated sites to enter into an agreement with Ecology to review cleanup related documents and issue opinions regarding compliance with MTCA.[17] If Ecology accepts a site into the VCP, the agency will review the environmental data and issue an opinion regarding whether the proposed cleanup meets MTCA's requirements.

The main reason Ecology rejects a site from the VCP is because it determines that the environmental contamination doesn't meet MTCA's threshold requirements.[18] Drawing upon its expertise and appropriately exercising its discretion, Ecology **twice** rejected VCP applications for the Premises. Ecology determined that MTCA didn't apply to the Premises because (1) no release of hazardous substances to the environment occurred; (2) there was no contamination of a MTCA-regulated media (soil, vapor, ground water, surface water or sediment); and (3) the Premises

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[16] 8/14, RP 13.

[17] 8/13, RP 12-13.

[18] 8/13, RP 14.

was not a hazardous waste site requiring remediation under MTCA.[19] Ecology based these decisions on "factual matters which are complex, technical, and close to the heart of the agency's expertise."[20]

The general rule is that "the Department of Ecology's discretionary decisions should not be set aside 'absent a clear showing of abuse.'"[21] This standard requires a showing that Ecology exercised its discretion "in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons."[22]

There is no evidence that Ecology abused its discretion by rejecting the VCP applications after determining that MTCA did not apply to the Premises. The trial court did not find Ecology's decisions to be unreasonable, based upon improper grounds or unjustified by the facts. Nothing in

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[19] *See* Exhibits #260 and 285; 8/13, RP 39-40, 43-44, 48-50, 152, 205-07, 209-210.

[20] *Hillis v. Department of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

[21] *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 776, 947 P.2d 732 (1997) (quoting *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984). *Accord Schuh v. Department of Ecology*, 100 Wn.2d 180, 186, 667 P.2d 64 (1983); *Islam v. Dep't of Early Learning*, 157 Wn. App. 600, 618, 238 P.3d 74 (2010).

[22] *Dep't of Ecology v. United States Bureau of Reclamation*, 118 Wn.2d 761, 767, 827 P.2d 275 (1992) (quoting *Schuh,* 100 Wn.2d at 186). *Accord Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010) ("An agency's decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances."). *See Probst v. Dep't of Ret. Sys.*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012) ("An agency's decision is arbitrary and capricious if it results from willful and unreasoning disregard of the facts and circumstances.").

the record explains why the trial court ignored Ecology's discretionary decisions; indeed, the trial court's findings do not even mention Ecology.

The regulations that implement MTCA (WAC 173-340 *et seq.*) are highly technical and require complex factual determinations. The trial court was required to "accord substantial deference to the agency's interpretation of law in matters involving the agency's special knowledge and expertise."[23] The trial court should have "accord[ed] 'great deference' to Ecology's interpretation of its own regulation, 'as the agency has expertise and insight gained from administering the regulation that the reviewing court does not possess.'"[24]

The trial court erred by refusing to give any deference to Ecology's interpretation of MTCA and by improperly substituting its judgment for that of the agency.[25] NW Mint respectfully submits that this Court should

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[23] *Overlake Hosp. Ass'n*, 170 Wn.2d at 50. *See Dep't of Ecology v. United States Bureau of Reclamation*, 118 Wn.2d at 767 (while on issues of law the trial court could substitute its judgment for that of Ecology, "the agency's interpretation of the law is given substantial weight due to the agency's special expertise."). Further, "substantial judicial deference" to an agency's views is appropriate "when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." *Hillis,* 131 Wn.2d at 396. *Accord Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 502, 39 P.3d 961 (2002); *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 754, 271 P.3d 331 (2012).

[24] *Tiger Oil Corp.*, 166 Wn. App. at 754 (quoting *Overlake Hosp. Ass'n,* 170 Wn.2d at 56).

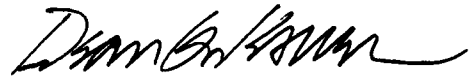
[25] *See Schuh*, 100 Wn.2d at 187 ("Here, the court gave no weight to [Ecology's] expertise in the area, but again substituted its judgment for that of [Ecology]. Again the court erred."). By way of analogy, Ecology—in the proper exercise of its discretion—denied

show "great deference" to Ecology's interpretation of its own regulations by reversing the trial court's determination that MTCA applied to the Premises.

CONCLUSION

The trial court's ruling that MTCA applies to indoor dust contravenes the statute's plain language and ignores Ecology's explicit interpretation of the statute's applicability. The Court should reverse the trial court's judgment that Auburn asserted a valid claim under MTCA.

Respectfully submitted this 7th day of February, 2014.

By 

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the VCP applications because it determined that MTCA did not apply to the Premises. It would have been improper for the trial court to issue a writ of mandamus directing Ecology to grant the VCP applications, since "mandamus will not lie to compel a discretionary act." *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314. 685 P.2d 1068 (1979). *Accord Cmty. Care Coal. of Wash. v. Reed*, 165 Wn.2d 606, 615, 200 P.3d 701 (2009); *In re Pers. Restraint of Richard J. Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). Yet, by awarding judgment to Auburn on its MTCA claim, the trial court effectively nullified Ecology's determination that MTCA did not apply to the Premises.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 6, 2014, a copy of the Answer of Defendants/Appellants to the Amicus Brief of the Association of Washington Business was filed with the Court of Appeals and served upon the parties as indicated below:

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