No. 94066-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

INTERESTED UNDERWRITERS AT LLOYD'S, LONDON, et al.,

Appellants,

and

ARROWOOD INDEMNITY COMPANY, MARINE INDEMNITY INSURANCE COMPANY OF AMERICA, INDEMNITY MARINE ASSURANCE COMPANY, LTD

Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Discretionary review should not be granted because none of the bases for review under RAP 13.4(b) apply. The Court of Appeals' (COA's) opinion (OPIN) is necessarily heavily influenced by LMI's numerous procedural errors and failures to establish an adequate record below, which is likely why the OPIN was designated not for publication.[1]

II. STATEMENT OF THE CASE

The Port accepts and incorporates the facts set forth by the COA. The Port will provide appropriate citations for the further facts it discusses in its arguments below.[2]

III. ARGUMENT

LMI misconstrue the OPIN and mischaracterize the record in order to manufacture a basis for review. In reality, the OPIN neither conflicts with prior decisions nor involves a substantial public interest.

A. The COA's Refusal to Find Actual and Substantial Prejudice as a Matter of Law is Consistent with this Court's Prior Decisions

LMI argue that the COA should have found prejudice as a matter of law based on the Port's discovery of contamination in 1991 and 1997.

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[1] *See e.g.,* OPIN 17, 19, 23, 30-31, 33, 36, 42-43, 44-45, 52. LMI argue that the unpublished OPIN will still be cited in other cases, but the OPIN is not precedential and the party citing it must so advise the court. The OPIN can be cited only for its reasoning, and would be easily distinguishable and limited to its facts because of the problems with the record and LMI's procedural errors.

[2] LMI do not include a Statement of the Case section in their petition for review ("PFR"), and expressly state that they agree with the COA's recitation of facts. LMI's arguments, however, include numerous factual assertions that are unsupported by the OPIN or any citation to the record. *See e.g.,* PFR 15-17.

LMI ignore the fact that it is their burden to **prove** actual and substantial prejudice and obtain a ruling on any late notice defense. As to the TPH site claims under the primary policies, the trial court rejected their pretrial motions to declare actual and substantial prejudice as a matter of law because there were disputed facts, subsequent to which there was a trial at which the jury found they had failed to prove actual and substantial prejudice,[3] and LMI did not challenge the sufficiency of the evidence to support that verdict under CR 50. OPIN 25. The existence of disputed facts sufficient to defeat LMI's pre-trial motion is thus a verity on appeal. As to the TWP site claims under the primary policies, LMI failed to raise even a triable issue of fact in response to the Port's summary judgment motion and then failed to assign error to the trial court's order striking their late notice defense. OPIN 23; CP 8687-89; Br. of Appellants 2-3. This determination that LMI was *not* prejudiced as a matter of law, is thus a verity on appeal. As to the excess policies, LMI never brought a summary judgment motion on any alleged late notice under the excess policies.[4] Further, LMI did not assign error to the trial court's subsequent post-trial order granting the *Port's* motion for summary judgment as to the

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[3] Refusal to review such an order is proper under *Weiss v. Lonnquist*, 173 Wn.App. 344, 354, 293 P.3d 1264 (2013).

[4] Contrary to LMI's assertion, the trial court never determined the Port breached any provision in the excess policies. LMI's 2012 motion that resulted in the late notice ruling they rely upon addressed only the notice provisions in the primary policies, which were significantly different than the excess policies. CP 1437-54, 5019. The trial court's 2013 ruling did not reverse its prior order. When LMI tried to argue that the 2012 order related to the excess policies, the court clarified that this order never applied to the excess policies. 10/4/2013 RP 87.

excess policies.[5] Br. of Appellants 2-3; OPIN 19. Thus, the trial court's determination that they were not prejudiced by any *alleged* late notice under the excess policies is a verity on appeal.

Even if LMI had preserved the issue for appeal, the COA's refusal to find prejudice as a matter of law on the facts of this case is consistent with prior precedent. The existence of late notice that resulted in actual and substantial prejudice are questions of fact as to which the insurer has the affirmative burden of proof. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wn.2d 411, 427, 191 P.3d 866, 876 (2008). Speculation is insufficient. An insurer must provide evidence of concrete detriment resulting from delay, some specific advantage lost or disadvantage created, which has an identifiable prejudicial effect on the insurer's ability to evaluate, prepare or present its defenses to coverage or liability. *Id.* at 430; *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn.App. 480, 491, 918 P.2d 937 (1996). Although Washington courts have, on occasion, found prejudice as a matter of law, this Court has clarified that these are "extreme cases," and the results of the cases should not be read to create a *per se* rule that every time an investigation is delayed the insurer can deny the claim. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 420-421, 295 P.3d 201 (2013).

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[5]After the Phase 1 trial, the Port filed a summary judgment motion seeking an order declaring coverage under the excess policies. The order granting this motion disposed of LMI's late notice defense to coverage under the excess policies. CP 20210-11. At trial, LMI never sought any determination of late notice as to the excess policies and instead requested certification of the merits for immediate appeal under CR 54(b), thus representing that there were no further issues to be determined with regard to the merits.

Even in these "extreme cases," the courts engaged in a close evaluation of the specific injury alleged by the insurer. *Staples* at 421. LMI cannot prove actual and substantial prejudice from any delay in the Port's notice, so they assert that prejudice should be presumed based solely on the amount of time since the discovery of contamination. None of the cases cited by LMI (nor any other Washington cases) stand for that proposition. [6]

LMI argue that in the environmental context, late notice has been held prejudicial as a matter of law (PFR 5), but their cited authorities include cases that do not address the late notice defense.[7] And of all the

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[6] *Felice v. St. Paul Fire and Marine Ins. Co.,* 42 Wn.App. 352, 711 P.2d 1066 (1985) (Insured delayed notice to malpractice insurer of guardian removal action which he defended himself and lost, until one day before appeal period ended; court found removal action not a covered claim and in *dicta* found prejudice from delay)(Criticized by *Pub. Util. Dist. No. 1 of Klickltat Cty v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020(1994); *Key Tronic Corp. v. Saint Paul Fire & Marine Ins. Co.,* 134 Wn. App. 303, 139 P.3d 383 (2006), *review denied,* 160 Wn.2d 1011 (2007)(Insured chose not to submit claim to insurer until after settling entire underlying claim); *Sears, Roebuck & Co. v. Hartford Accident and Indemnity Co.*, 50 Wn.2d 443, 313 P.2d 347 (1957)(Insured notified insurer one week before trial; prejudice analysis was *dicta)*(Criticized by *Mut. of Enumclaw v. USF*, 164 Wn.2d at 429); *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.,* 100 Wn. App.546, 997 P.2d 972 (2000) (Insured did not notify insurer of impending trial date or settlement conference; policy covered defamation damages, but insurer deprived of ability to conduct investigation before settlement which characterized entire payment as defamation damages when other non-covered claims were asserted)(Criticized by *Mut. of Enumclaw v. USF,* 164 Wn.2d at 429); *Benham v. Wright*, 94 Wn.App.875, 973 P.2d 1088 (1999) (Prejudice from notice after default judgment was undisputed by plaintiff, who argued that insured had no obligation to provide notice when he was unaware the accident caused injuries).

[7] *Herman v. Safeco Ins. Co. of America*, 104 Wn.App. 783, 17 P.3d 631 (2001)(insured violated cooperation clause, insurer prejudiced because insured refused to provide requested financial information necessary to determine whether claim for fire and theft was fraudulent); *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998)(insured violated cooperation clause, insurer prejudiced because insured refused to provide requested financial information necessary to determine whether claim for theft of

cases they cite to, only one Washington case,[8] *Unigard v. Leven,* involved an environmental claim. 97 Wn.App. 417, 983 P.2d 1155 (1999). That court did not find prejudice based solely on the seven year delay. The court found actual and substantial prejudice because there were patently viable defenses to Leven's personal MTCA liability arising out the operations of his company that Unigard was precluded from raising because Leven assumed personal liability for his company's MTCA liability in exchange for the sale of that company. *Id.* at 432, 1163.

LMI also mischaracterize the holding in *Staples,* when they cite to it for the proposition that "this Court has instructed that 'extreme' late notice could potentially result in prejudice as a matter of law." PFR 8. The *Staples* case did not address the insurer's late notice defense, it analyzed whether an insurer was required to show prejudice before denying coverage for the failure to submit to an examination under oath. *Staples*, 176 Wn.2d 404. In *Staples*, this Court found that summary judgement was *not* appropriate because there were genuine issues of material fact, and the insurer had not "shown prejudice to the degree necessary for summary judgment." *Id.* at 419 . It also reiterated that

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property was fraudulent); *Staples v. Allstate Ins. Co.,* 176 Wn.2d 404, 295 P.3d 201 (2013)(insured failed to submit to examination under oath, which the court did *not* find prejudicial as a matter of law).

[8] LMI also cite to an Oregon environmental case *Carl v. Oregon Auto Ins.Co./North Pacific Ins. Co.*, 141 Or.App. 515, 918 P.2d 861 (1996). In that case the insured removed all contaminated soils and sole source of contamination before notifying insurers. In addition, that case applied Oregon law on the application of the late notice defense, which is significantly different from Washington law, and the fact that the OPIN may conflict with a foreign decision is not a basis for review by this Court. RAP 13.4(b).

> we have required a showing of prejudice in nearly all other contexts to prevent insurers from receiving windfalls at the expense of the public . . .

Id. at 418. No Washington appellate court has determined that an insurer was prejudiced as a matter of law because of delayed notice unless something occurred during the delay to foreclose the insurer's ability to assert viable defenses to liability. Here, nothing precluded LMI from raising any defense to liability, or pursuing other liable parties for costs LMI is actually obligated to pay on the Port's behalf at either site. Thus, even if LMI had properly preserved the issue for appeal, the COA's refusal to find prejudice as a matter of law is consistent with prior decisions.

1. The TWP/MFA Site

In their motion below, LMI's only evidence of late notice prejudice for this occurrence was the payment of certain costs to monitor IP's remediation of the site[9] and an unsupported allegation of their inability to assert the migratory or "plume defense" to the Port's MTCA liability, a defense that the trial court found was never viable.[10] CP 1441-43, 1448, 1452. LMI's current claim that they could have asserted a different defense to MTCA liability (under RCW 70.105D.040(3)(a)(iii))

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[9] LMI also claimed these costs were not damages from a liability and provided evidence that the Port had not entered into any agreement with Ecology to remediate the site. (The Port dismissed its damages claims, so it never pursued recovery of these costs.)

[10] The trial court determined, based upon the evidence, including LMI's own expert's testimony, that this "plume defense" was never applicable to the Port. CP 5035-38. LMI did not appeal this order. App. Br. 2-3.

was not raised below and they fail to identify evidence that would support each element of that defense. LMI's arguments about deceased witnesses are also pure speculation. Even if those witnesses were knowledgeable about the site history or the cleanup, there is no evidence that their testimony could have supported any defense to the Port's liability or to coverage. The OPIN is consistent with prior decisions, and it should not be reviewed.

2. TPH Site

The fact that LMI sought dismissal of the TPH Site claims as *premature* belies their argument that this is an extreme case in which late notice prejudice should be found as a matter of law.[11] Although the trial court found the Port's notice of its claims was late, the trial court did *not* determine when the Port should have provided notice and the trial court did *not* find that the Port's notice was *nineteen years late.* CP 5019. The trial court denied LMI's late notice motions with respect to the primary policies because there were disputed issues of fact as to whether LMI was actually and substantially prejudiced by the delayed notice.[12] CP 8699-702, 16863-66. LMI's alleged prejudice from the Port's breach of the primary policies' notice provisions was then tried to a jury, and the jury

[11] As discussed above, LMI sought dismissal of the TPH Site claims based upon the Port's alleged lack of liability for that contamination. CP 11315-31, 12779-84, 6360-72, 7736-39. The Washington State Department of Ecology ("Ecology") did not issue a potentially liable person ("PLP") letter to the Port until May 11, 2016, ***after the trial on the Port's coverage claims***.

[12] *See* Br. Resp't 24-27.

found in favor of the Port. CP 18651. The COA's refusal to review the denial of a pre-trial motion based upon disputed issues of fact when there was a subsequent trial on the merits, is consistent with this Court's decision in *Weiss.* 173 Wn.App. at 354.

Even if there had not been a subsequent jury trial, the COA's decision not to find prejudice as a matter of law is consistent with the Washington authority discussed above. LMI have not alleged that there was ever a defense to the Port's MTCA liability for the TPH Site, let alone one that they are now foreclosed from raising. Their alleged prejudice from an inability to investigate is also unsupported by the record, including their own witness' testimony. *See* Br. Resp't 43-45. This Court made it clear that an insurer cannot deny coverage every time an investigation is delayed. *Staples*, 176 Wn.2d at 420-21. LMI's claims regarding the alteration of the site (the ones that actually relate to the TPH site at all)[13] relate only to the Calloway Ross UST. The timing of the insignificant release from this small UST is irrelevant to LMI's coverage defense for the substantial contamination from the Standard Oil and Longview Fibre pipelines and storage tank that was undisputedly released during the policy periods. 11/14/2013 RP 1513-17. Nor do LMI's complaints about deceased witnesses with unknown testimony rise to the level of actual and substantial prejudice as a matter of law. *Canron, Inc. v.*

[13] LMI allege the Port removed two underground storage tanks "USTs" at its old mechanic shop, PFR 7 n.9, but these tanks are not a part of the TPH Site, so their removal could not prejudice LMI. *See* 11/12/2013 RP 1004-08.

Fed. Ins. Co., 82 Wn.App. 480, 491, 918 P.2d 937 (1996)(speculation insufficient); *Mut. of Enumclaw v. USF Ins. Co.*, 164 Wn.2d 411.

The Port's payment of past costs or alleged inability to recover these costs cannot be prejudicial to LMI when LMI are not obligated to reimburse the Port for any such costs. Moreover, the only entity LMI identify as unavailable for contribution or subrogation claims is Calloway Ross, but they fail to demonstrate what additional costs Calloway Ross might be liable for, or that it had assets to pursue even in the 1990s.[14] This is not the type of "extreme case" discussed in the authorities LMI rely upon, and the COA's decision not to find prejudice as a matter of law on this record does not merit review.

B. The COA's Decision on LMI's Request for a New Trial on their Late Notice Defense Should Not be Reviewed

Again, LMI did not preserve this issue for appeal. As discussed above, LMI's failure to present sufficient evidence below to create a disputed issue of fact, and their failure to assign error to the trial court's orders granting the Port's summary judgment motions is fatal to their appeal with respect to the excess policy claims and the TWP Site claims under the primary policies. The COA's refusal to grant LMI a new trial on their late notice defense to these claims should not be reviewed.

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[14] Contrary to LMI's claim that they were forced to rely only on testimony from the Port's environmental manager hired in 2010 (PFR 7 n.9), the Port's environmental manager from 1991 to 2010 (Judy Grigg) was deposed by LMI and testified at trial. 11/13/2013 RP 1187; CP 13721. She testified that the reason the Port did not further pursue Calloway Ross was because "they just didn't have any money." CP 10170. The trial court found LMI's evidence of Calloway Ross' alleged insurance insufficient as a matter of law to establish that it ever had available coverage for this type of liability. CP 10170.

1. LMI failed to preserve their objections to the alleged exclusion of evidence

With respect to their late notice defense to the TPH Site claims under the primary policies, LMI failed to support their accusations of excluded evidence with citations to the record. Their general reference to the large volume of documents they unilaterally labeled as their "offer of proof" and failed to offer any foundation for is utterly insufficient. PFR 11. Documents LMI actually laid a foundation for were admitted, and they never offered any other documents at trial. Nor did they assign error to any ruling excluding that evidence. *See* Br. Resp't 27 n.22. Although the trial court allowed them to file the volumes of documents for the record, it admonished LMI that they would need to take additional steps to establish the documents (which neither the trial court nor Port counsel had reviewed) were actually excluded.[15] 11/6/2013 RP 467-68. More importantly, LMI's claim that the trial court erred in evaluating LMI's preservation of the record is not a basis for review. RAP 13.4(b).

2. LMI failed to preserve their objections to the late notice jury instruction

As discussed in detail in The Port's prior briefing, LMI failed to preserve their objection to (and actually agreed to the proposed language

[15] LMI's reliance upon the order denying their summary judgment motion is also misplaced because it determined there were disputed facts. It did not exclude evidence, it described the factual issue created by the evidence LMI presented, and the form of the order was proposed by LMI. CP 16865. LMI failed to assign error to the order on the parties' motions in limine that they raise for the first time in the PFR. App. Br. 2-3.

in) the trial court's jury instruction on late notice prejudice.[16] The trial court crafted this instruction after all evidence was presented. The categories identified in the instruction described evidence of prejudice that LMI actually presented at trial,[17] and as the COA recognized, the instruction did not preclude the jury from considering other factors (if it believed there was evidence of prejudice presented outside of the categories described).[18] The trial did not adopt either party's proposed instruction but combined language proposed by both LMI and the Port, and then **asked each party to make a record of their objections to that final instruction**. 11/19/2013 RP 1951-58, 2002. LMI failed to clarify at that time,[19] the points of law and reasons upon which they claimed the court was committing error with that instruction.[20] 11/19/2013 RP 2007-08. Consistent with this Court's prior decisions, the COA determined that

[16] Br. Resp't 51-52; Answer to Mot. for Recons. 15-17; 11/18/2013 RP 1944, 1946-1947; CP 5013-16, 16445, 16455, 16839, 18620, 18623, 18644.

[17] *Bombardi v. Pochel's Appliance & TV Co.*, 9 Wn.App. 797, 515 P.2d 540, *modified on other grounds*, 10 Wn.App. 243 (1973)(a party's theory of the case must be supported by substantial evidence before it may be argued to the jury).

[18] The instruction indicated that the Jury *should* consider certain factors, not that they were only allowed to consider those factors. CP 18644. Counsel for LMI specifically agreed to this language. 11/19/2013 RP 1954-55.

[19] LMI cite to a written objection raised in Reply Br. of Appellants that addressed completely different proposed instructions that were never given. PFR 12; CP 16840; *c.f.* CP 16455, 18644. This is insufficient to preserve their objection to the given instruction.

[20] *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979), citing *Dravo Corp. v. L.W. Moses Co.*, 6 Wn.App. 74, 83, 492 P.2d 1058 (1971). When the objection does not apprise the trial judge of the theory and precise points of law involved, those points will not be considered on appeal. *Id.* at 298, citing *Haslund v. Seattle,* 86 Wn.2d 607, 614-15, 547 P.2d 1221 (1976).

LMI failed to preserve the issue for appeal.

C. LMI's Fortuity Argument Against Coverage for the TWP/MFA Site is Contrary to the Record and Unsupported by Authority

The Port agrees that an insured should not be allowed to knowingly acquire liability and then seek insurance coverage for that liability. But that is not what happened in this case.[21] There are multiple parcels that makeup the TWP Site. The Port purchased the MFA parcels in the 1960s and the IP Plant parcel in 1999. It did not purchase the "TWP Site" in 1999. The Port sought coverage for the liability arising from its **ownership of the MFA parcels since the 1960s**.[22] The trial court and the COA properly recognized that this liability extended to the entire TWP Site. CP 5038; OPIN 10; RCW 70.105D.040, 70.105D.020(8). Contrary to LMI's repeated, unsupported accusations, the Port did not knowingly acquire the liability for which it sought coverage in 1999. It unknowingly acquired that liability in the 1960s. Defs.' Exs. 13, 15. And it was still unaware of that liability when it purchased the LMI policies in the late 1970s and 1980s. 11/7/2013 RP 577-81, 636-37, 639; CP 18649-50.

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[21] LMI's entire known loss argument is void of any citations to the record and based entirely on their *ex cathedra* accusation that the Port acquired its TWP Site liabilities in 1999. LMI continue to ignore the evidence and legal authorities on which the trial court relied to determined as a matter of law that no defense to liability was available prior to the 1999 purchase, and that this purchase did *not* increase the Port's liabilities.

[22] *See* Br. Resp't 4; Answer to Mot. for Recons. 13-15.

The OPIN is consistent with the known loss or fortuity doctrine.[23] Because this defense operates like an exclusion, the insurer has the burden of proving the insured subjectively knew of the loss or knew there was a substantial probability of the liability **at the time the policy incepted** in order to defeat coverage.[24] LMI's summary judgment motion seeking dismissal of the TWP/MFA Site claims based on their known loss argument (and the occurrence requirement in the policies)[25] was premised solely on the fact that the Port purchased the IP Plant area in 1999. LMI failed to present any evidence that this purchase increased the Port's existing liability from its ownership of the MFA area. The trial court denied LMI's motion and determined that the Port's liability by virtue of its ownership of the MFA area was unchanged by the 1999 acquisition of the Plant area. CP 5015, 5038. LMI did not raise their known loss defense at trial. Consistent with *ALCOA, PUD*, and all of the fortuity principles cited by LMI, the COA determined that LMI failed to prove, as a matter of law, that the Port knew there was a substantial probability of liability[26]

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[23] *Newmont USA, Ltd. v. Am. Home Assurance Co.,* 795 F. Supp.2d 1150, 1162 (2011); *PUD*, 124 Wn.2d at 805; *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000).

[24] *Newmont,* 795 F. Supp.2d at 1162-1163; *PUD,* 124 Wn.2d at 805.

[25] The evidence LMI provided to support both defenses was identical and proved only that the Port purchased the Plant area in 1999 under a purchase and sale agreement with IP. CP 1641-55.

[26] The MTCA liability at issue did not even exist when the Port purchased the policies in the 1970s and early 1980s, so that liability could not have been known.

from contamination on its MFA property prior to purchasing the policies.[27] OPIN 33; *Newmont*, 795 F.Supp.2d at 1162-63; *PUD,* 124 Wn.2d at 805; *ALCOA,* 142 Wn.2d 529. This decision does not merit review.

D. The COA's Decision on the Port's Occurrence Evidence is Consistent with Well Settled Precedent

For the same reasons discussed above, the COA's refusal to overturn the order denying LMI's pre-trial occurrence motion for the TWP/MFA Site claims need not be reviewed.[28] Moreover, it should not be reviewed because there was a subsequent trial on the disputed factual issue.[29] *Weiss*, 173 Wn.App. at 354. The COA reviewed the evidence the Port presented at trial and, consistent with prior decisions of this Court, determined that evidence to be sufficient to sustain the jury's verdict. OPIN 42; *Mut. of Enumclaw v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 725-26, 315 P.3d 1143 (2013)(CR 50 motion can only be granted if there is no substantial evidence **or reasonable inference** to sustain the jury's verdict). LMI's allegations that the COA erred in finding substantial

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[27] LMI also fail to cite to evidence supporting their claim that the Port increased its liability by purchasing the Plant area. The actual record establishes the opposite. The Port obtained an indemnity from IP, and IP has already completed construction of the remedial alternative required on that property by the consent decree. CP 2707.

[28] An insured must prove that it did not subjectively expect or intend the property damage prior to policy inception to meet the occurrence requirement. *Overton v. Consol. Ins. Co.,* 145 Wn.2d 417, 428, 38 P.3d 322 (2002). *Queen City Farms v. Cent. Nat'l Ins. Co.,* 126 Wn. 2d 50, 882 P.2d 703 (1994). The COA's decision to uphold the trial court order is consistent with this precedent.

[29] LMI did not file any pre-trial motions on the occurrence requirement for the TPH Site claims. Although LMI filed CR 50 motions with respect to both sites, LMI only address the TWP/MFA Site in the PFR.

evidence to support the jury's verdict, is not a basis for review under RAP 13.4(b). Nor did the COA err. The Port presented direct evidence that the Port did not expect or intend groundwater contamination between 1980 and 1986, and evidence from which a reasonable inference could be drawn that the Port had no such expectations or intentions prior to 1980.[30]

E. The COA's Decision on the Pollution Jury Instruction Is Consistent with Established Precedent

LMI mischaracterize the given jury instruction when they claim the trial court allowed the jury to evaluate only "whether the insured had knowledge that the pollution event caused property damage rather than whether the insured expected the open, obvious, and documented pollution events." PFR 2. Consistent with *Queen City Farms*,[31] Jury Instruction No. 11 directed the jury to determine whether the Port proved it "did not expect or intend the *discharge or release* of contaminants into the groundwater." CP 18645(emphasis supplied).[32] It did not instruct the jury to evaluate whether the Port knew of the resulting property damage. Further, LMI failed to preserve their objection to the actual jury instruction that was given at trial.

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[30] *See* OPIN 37-42; Br. Resp't 19-20, 22, 36; Answer to Mot. for Recons. 14-15.

[31] *Queen City Farms,* 126 Wn. 2d 50(when insured knowingly placed hazardous materials in lagoon thought to contain the material, the escape of material into groundwater was the polluting event that must not be expected or intended, not the initial placement as the insurers, including LMI, argued).

[32] Similarly, the special verdict form asked the jury "Did the Port of Longview prove the Port did not expect or intend release to groundwater . . . prior to the Policy Period" CP 18650.

1. LMI failed to object to Instruction No. 11

LMI claim the COA erred in determining that LMI failed to preserve their objection to the jury instruction on application of the pollution exclusions in the excess policies. The COA did not err. An objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.[33] Neither the written objection LMI cite to, nor their CR 50 motion apprised the trial court of why they objected to the language in the instruction that was actually given. LMI had filed a written objection to a substantially different version of the instruction that was filed months before trial.[34] CP 16840. LMI then proposed its own version of the instruction with the same language they now seek to appeal. CP 16000. When the trial court crafted the final instruction using language taken from both the Port's and LMI's proposed instructions and directed the parties to state their objections to the court's instructions, LMI failed to object to that language. 11/19/2013 RP 1966-71, 2007-08. Nor did LMI's CR 50 motion explain the basis for their objection to the given instruction. It actually argued the standard set forth in Jury Instruction No. 11 ("discharge, dispersal, release, or escape

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[33] *Stewart*, 92 Wn.2d at 298; *Dravo*, 6 Wn. App. at 83; *Haslund*, 86 Wn.2d at 614-15.

[34] Although the Port's proposed instruction contained similar language to the final instruction, it also contained additional language that was not included in the final instruction. *Cf* CP 16454, 18654. Thus, LMI's generic objection that the instruction did not comply with Washington law did not inform the trial court of the basis for their objection, especially given that LMI included the same language to which they now object in their own proposed instruction. CP 16000. *See also*, Port's Answer to LMI's Mot. for Recons. 23.

of pollutants") as the basis for the motion. CP 18590-91. The COA correctly (and consistent with prior authority) decided that LMI failed to preserve this issue for appeal.

2. The COA expressly determined that the given instruction was consistent with *Queen City Farms*

The COA also determined that the jury instruction was consistent with this Court's holding in *Queen City Farms*, that the insured's knowledge of the release of contamination, rather than the resulting property damage, was the determinative factor for the application of the pollution exclusion in LMI's excess policies. *Queen City Farms*, 126 Wn.2d at 67-69; OPIN 44. Instructing the jury to decide whether the Port expected or intended the "**discharge or release of** contaminants into the groundwater" is consistent with that holding. CP 18645(emphasis supplied). Moreover, *Queen City Farms* differentiated between the release of contamination and the resulting property damage when analyzing a fact pattern in which the insured knew that it was depositing hazardous substances into a landfill, but believed the hazardous substances would be contained. 126 Wn.2d 79. Here, there is no evidence the Port knew what IP was depositing into the ditch or that it contained hazardous substances. LMI's only evidence of the alleged "open and obvious polluting event" was the fact that the MFA ditch was visible in photographs. This establishes that it was an open and obvious *ditch,* not an open and obvious "polluting event." Thus, as *Queen City Farms* predicted, this is simply a case where the damage/discharge distinction (between the occurrence

requirement and the pollution exclusion exception) is insignificant as a practical matter. 126 Wn.2d at 89. The jury instruction and the COA's decision is consistent with *Queen City Farms*.

F. The COA's Decision to Award the Port its *OSS* Fees for the Excess Policy Claims is Consistent with this Court's *PUD* Decision

The COA's opinion is consistent with this Court's holding in the *PUD* opinion that "we cannot authorize the imposition of *Olympic Steamship* fees, however, when an insured has **undisputedly failed to comply with the express coverage terms**, and the noncompliance may extinguish the insurer's liability under the policy." [35] As there was no undisputed failure by the Port to comply with any terms in the excess policies, the *PUD* opinion does not preclude the Port from recovering the *OSS* fees it incurred to successfully litigate coverage under these policies. *See* Answer to Mot. for Recons. 1-13.[36]

Further, LMI's assertion that they are entitled to a trial on the Port's right to attorney fees for the excess policy claims is a red herring. *PUD*

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[35] *PUD*, 124 Wn.2d at 815; *Olympic Steamship Co. v. Centennial Ins. Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991) [hereinafter *OSS*].

[36] None of the other cases cited by LMI preclude *OSS* fees when the insurer alleges a breach that is disputed by the insured, and the insurer fails to prove and secure a determination of the alleged breach or that factual determination is not made because it is unnecessary for the coverage analysis. *Unigard*, 97 Wn. App. 417 (court found no coverage due to prejudice and thus insured not entitled to fees); *PUD,* 124 Wn.2d 789 (undisputedly settled entire underlying claim without consent of insurer); *Liberty Mutual v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001)(insured undisputedly failed to notify insurer of the settlement of underlying claims); *Travelers Property Cas. Co. v. Stresscon, Corp*., 370 P.3d 140 (Colo.2016)(applying Colorado law to coverage, not fee analysis where insured breached voluntary payment provision not present in Port's policies).

denied fees only for an insured's **undisputed** non-compliance with an express policy term. *PUD,* 124 Wn.2d at 815. LMI could never prove at trial that the Port's alleged non-compliance with the excess policies' notice provisions was *undisputed*.[37] And even if it would not contravene public policy, judicial economy, and common sense to allow a trial solely on the entitlement to a post-judgment award of fees (especially when the determination of the entitlement to fees is reviewed *de novo*), LMI failed to preserve this issue for appeal. As discussed above, the Port successfully moved for summary judgment on the excess policies. That motion included a dismissal of LMI's late notice defense to coverage under those policies, yet LMI failed to present evidence to raise a triable issue of fact on the late notice element of their defense.[38] LMI also represented to the trial court in the hearing on their motion for CR 54(b) certification, that with respect to the Port's pending claim for *OSS* fees, that "all the facts for that have been determined by both sides." 8/1/2014 RP 11. And after

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[37] The Port presented evidence that it became aware that its loss might implicate the excess policies in 2010. CP 8210; Br. Resp't 25-26. Thus, even if LMI prevailed at trial on the late notice issue, it would still be a disputed breach and not subject to the *PUD* exception to *OSS* fees.

[38] LMI feigns confusion about the trial court's decision to reserve for Phase 2, the late notice determination under the excess policies. PFR 25 n.25. However it was LMI who requested that the trial court do so based on their alleged need to conduct damages discovery. 10/4/2013 RP 72-73, 89-90. After the Phase 1 trial, LMI conducted that damages discovery, but when the Port brought its motion for a summary judgment declaration of coverage, LMI still failed to present any actual evidence that the Port breached the notice provisions in the excess policies. CP 19145-56 at 19147-48.In contrast, they presented evidence to prove the Port's claims would likely never trigger the excess policies. CP 19147-48. The trial court did not decide whether the Port breached the notice provisions of those policies, but instead relied on the complete lack of prejudice evidence in granting the Port's motion. CP 20676-77.

entry of the coverage judgment pursuant to CR 54(b), LMI failed to provide evidence to dispute the Port's evidence on the late notice issue in response to the Port's motion for *OSS* fees. CP 23280-321. It is noteworthy that LMI also fail to cite in their petition for review, to any evidence in the record that *could* prove the Port management knew their damages at either site were "likely to involve" the excess policies prior to 2010.[39] Therefore, even if this Court were inclined to address the application of the *PUD* opinion to an award of *OSS* fees, it should not do so here because of LMI's failure to properly preserve the issue for appeal.

IV. REQUEST FOR SUPPLEMENTAL FEE AWARD

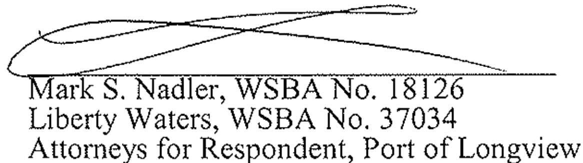
Pursuant to *Olympic Steamship*, the Port requests a supplemental award of attorney fees for answering LMI's PFR.

V. CONCLUSION

For the reasons set forth above, LMI's PFR should be denied and the Port should be awarded its reasonable attorney fees for its excess policy claims.

Respectfully Submitted this 23rd day of February, 2017.

THE NADLER LAW GROUP PLLC



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[39] *See e.g.*, Pl's. Ex. 40 at POL 011018 (Notice required when damages likely to involve excess policies). The Port has over $3 million in primary coverage, and all but one of the excess policies have underlying limits of $500,000. *Id.* at POL 011013.

Appendix

West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.105D. Hazardous Waste Cleanup--Model Toxics Control Act (Refs & Annos)

West's RCWA 70.105D.020

70.105D.020. Definitions

Effective: July 1, 2013
Currentness

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.

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(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.

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(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;

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(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.

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(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.

Credits

[2013 2nd sp.s. c 1 § 2, eff. July 1, 2013; 2007 c 104 § 18, eff. July 22, 2007; 2005 c 191 § 1, eff. July 24, 2005; 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).]

West's RCWA 70.105D.020, WA ST 70.105D.020
Current through amendments approved 11-8-2016.

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West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.105D. Hazardous Waste Cleanup--Model Toxics Control Act (Refs & Annos)

West's RCWA 70.105D.040

70.105D.040. Standard of liability--Settlement

Effective: July 1, 2013
Currentness

(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.

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(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.

Credits

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

West's RCWA 70.105D.040, WA ST 70.105D.040
Current through amendments approved 11-8-2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the Answer to Petition for Review to be filed by email in the Supreme Court of the State of Washington at the following address:

Supreme Court
Temple of Justice
415 12th Ave SW
Olympia, WA 98501-0929
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And that I arranged for a copy of the Answer to Petition for Review to be served on Appellant at the address below, by legal messenger:

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Signed this 23rd day of February, 2017 in Seattle, WA.

Hilary Loya