NO. 47861-7-II

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

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Under Washington's Model Toxics Control Act ("MTCA"), the "owner or operator" of a contaminated site is strictly liable for the cleanup. RCW 70.105D.040(1)(a)-(b). The Port Gamble Bay and Mill Site (the "Site") is contaminated with hazardous substances from historic sawmill operations. Defendant Washington State Department of Natural Resources ("DNR") manages and asserts ownership over a large portion of the Site. DNR and its predecessor (collectively, "DNR") exercised control over and maintained an ownership interest in the Site throughout more than a century of sawmill operations, when nearly all of the contamination occurred. DNR had the statutory responsibility to protect the aquatic lands at the Site and the authority to prevent the contamination. It did neither. Instead, DNR collected rent from the now defunct sawmill operator and turned a blind eye to the polluting operations.

The only issue in this appeal is whether DNR is liable at the Site as an "owner or operator" under MTCA. This question turns simply on whether DNR is "a person with any ownership interest in the [Site] or who exercises any control over the [Site]." RCW 70.105D.020(22). DNR will claim it cannot be an "owner or operator" because the State of Washington owns the land "in fee." But MTCA broadly imposes liability on a party with "*any* ownership interest," and this Court's previous application of

MTCA supports that state agencies may not hide behind the State's "fee" ownership.[1] Moreover, DNR's "ownership interest" cannot reasonably be disputed when the agency routinely claims to own and exercises all of the rights of an owner over land at the Site. And regardless of ownership, DNR is also liable as an "owner or operator" because it had the "authority to control the cause of the contamination at the time the hazardous substances were released into the environment."[2] DNR exercised this authority by directly authorizing the contaminating activity.

Based on the above facts, the Washington State Department of Ecology ("Ecology") concluded that DNR is liable. But the trial court ruled without explanation that DNR is not liable—even though the court was required to give "substantial weight" to Ecology's interpretation of the statute it administers. The trial court erred, and Ecology's long-standing interpretation of MTCA is correct.

A private party with DNR's ownership power and control over the Site would never escape MTCA liability. The plain language of MTCA and this Court's precedent make it unquestionably clear that state agencies must be treated exactly the same as private parties. Without the same incentive of liability, a state agency may pollute or profit from polluting

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[1] *See PacifiCorp Envtl. Remediation Co. v. Wash. St. Dep't of Transp.*, 162 Wn. App. 627, 259 P.3d 1115 (2011)

[2] *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992)

uses of its land with impunity. The Court should therefore reverse the trial court and hold that DNR is liable under MTCA for its role at the Site.

II. ASSIGNMENT OF ERROR

The Superior Court erred in denying the Appellants' Motion for Summary Judgement and granting summary judgement to DNR on the issue of DNR's liability under MTCA. The Superior Court also erred in denying the Appellants' Motion for Reconsideration.

III. STATEMENT OF ISSUE

The only issue in this appeal is whether DNR is liable as an "owner or operator" under MTCA at the Port Gamble Bay and Mill Site.

IV. STATEMENT OF THE CASE

A. Factual Background

This case pertains to liability for costs of environmental cleanup of a contaminated site under MTCA. The Port Gamble Bay and Mill Site includes a large stretch of Port Gamble Bay, the area of the former Pope & Talbot sawmill, and upland areas to the west and south of the former sawmill. Clerk's Papers (CP) 77. The Site is contaminated from historical sawmill operations, and the sawmill company is now bankrupt.

Ecology's role at contaminated sites is to identify potentially liable parties ("PLPs") and compel them to perform the cleanup. PLP status means Ecology believes it has "credible evidence" to determine that a

party is liable at a site under MTCA. RCW 70.105D.020(26). Under MTCA, owners and operators of a facility are strictly liable for cleanup of the entire site. RCW 70.105D.040(2).

At this Site, Ecology named the following parties as potentially liable as either current or former "owners or operators": (1) Pope & Talbot ("P&T"), which owned and operated a sawmill at the Site for nearly 150 years; (2) Appellants Pope Resources, LP and OPG Properties, LLC (collectively, "PR/OPG"), which respectively own and manage portions of the upland and tideland areas of the Site; and (3) DNR, which has managed, leased, and retained an ownership interest in the aquatic lands at the Site for more than 100 years.

1. Pope & Talbot

P&T and its predecessors continuously operated a sawmill at Port Gamble from 1853 until 1995. CP 78. Throughout this time, P&T maintained a mill facility adjacent to the Bay and conducted water-dependent operations throughout the Bay. *See* CP 78. These operations included chip loading and log transfer facilities on aquatic lands, burning wood and wood waste, in-water log storage, and placement of creosote-treated pilings. CP 78. Ecology has alleged that these activities resulted in the release of contaminants at the Site, including cadmium, carcinogenic polycyclic aromatic hydrocarbons (cPAHs), dioxins/furans,

and wood waste that results in toxic breakdown products, including phenols, resin acids, and total and dissolved sulfides. CP 78.

After being named a PLP, P&T filed for bankruptcy in 2007, leaving only PR/OPG and DNR as viable PLPs. *See* CP 18. Under MTCA's joint and several liability scheme, the remaining PLPs are liable for P&T's share of cleanup costs. *See* RCW 70.105D.040(2).

2. Pope Resources and OPG Properties

PR/OPG never operated the sawmill at the Site. *See* CP 77. Pope Resources has been named a liable party because it owns the tidelands of the Bay, the majority of the former mill area, and surrounding upland areas. *See* CP 77. Co-Appellant OPG Properties is a subsidiary of Pope Resources that manages its real estate holdings. CP 77. OPG Properties has never conducted operations at the Site, but has been named as a PLP.

Pope Resources was formed in 1985 when P&T spun off its timberland, real estate, and development branch into a separate independent company. *See* CP 280. As part of the transaction, P&T transferred its real estate holdings, including those at Port Gamble, to Pope Resources. CP 77. In exchange, Pope Resources assumed a $22.5 million mortgage and paid other consideration. CP 324. Pope Resources then leased the mill area to P&T in an arms-length deal. CP 77; 60.

In the decades following Pope Resources' formation, P&T and Pope Resources operated as separate companies with separate lines of business, and substantially different executives, directors, and shareholders. In the late 1990s, Ecology requested investigations into the environmental condition at the Site, and PR/OPG and P&T strongly disagreed regarding the proper allocation of cleanup obligations under the parties' earlier property transfer agreement. CP 61. After years of contentious negotiations, PR/OPG and P&T resolved their dispute in 2002 by entering into a settlement agreement that terminated the lease. CP 61. When P&T entered bankruptcy, PR/OPG filed a claim as a creditor. CP 328. PR/OPG is not a successor to P&T's liabilities, and no creditor of P&T has ever sought to recover from PR/OPG. CP 328. PR/OPG has been named a liable party at this Site because of its separate roles of owner and manager, not because of any relationship with P&T. *See* CP 77.

3. DNR

DNR has controlled and exercised an ownership interest in the Site for more than 100 years. When Washington became a state in 1889, the State assumed ownership of the aquatic lands within its boundaries. *See* Wash. Const. Art. XVII; *In re Tortorelli*, 149 Wn.2d 82, 90-91, 66 P.3d 606 (2003). Aquatic lands include tidelands and submerged beds (or

"bedlands"). Submerged beds are the area waterward of the line of extreme low tide.

The year after statehood, the legislature created DNR's predecessor, "The State Land Commission," granting the agency the "general supervision and control of all public lands now owned by, or the title to which may hereafter vest in, the state, to be registered, leased, and sold." Laws of 1890, ch. 8, § 2; CP 363. DNR has maintained this control to the present day. DNR's role with respect to the aquatic lands is currently codified at RCW 79.105.010, which states: "The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these lands for the benefit of the public." DNR assumed the role of the state, and DNR's role includes an obligation to protect these aquatic lands. RCW 79.105.030.

a. DNR Sold Tidelands at the Site to P&T.

Pursuant to its authority, DNR sold tidelands at the Site to P&T in 1893. The sale included the tidelands extending from the uplands to the line of mean low tide. CP 272-79. In 1913, DNR approved the transfer of additional tidelands to P&T, extending to the line of extreme low tide. CP 97. Correspondence from this period between DNR and P&T reveals that DNR knew the tidelands would be sold to a mill company and knew that the mill company owned the adjacent upland areas. CP 99-101.

b. DNR Leased to P&T.

More than eighty years after the tideland sale, DNR required P&T to enter a formal lease for a sewer outfall and for a section of the aquatic lands that P&T had long occupied in the Bay. It is unclear why DNR did not require a lease earlier, and it is also unclear why DNR chose to lease only a small portion of the aquatic lands that P&T used in its operations.

(1) The 1974 Lease

In 1974, DNR first leased to P&T a 53-acre portion of aquatic lands in the Bay approximately one mile south of the mill site ("Lease Area"). CP 103-06; CP 108. The lease allowed "[l]og storage, rafting, and booming," with annual rent of $1,855.00 to be paid to DNR. CP 103.

Through the terms of the lease, DNR acted as and retained the primary rights of an owner in the Lease Area. DNR reserved the right to access the Lease Area at "all reasonable times for the purpose of securing compliance" with the lease and reserved the right to grant easements to third parties. CP 104. It also restricted P&T's ability to construct improvements or sublease without consent. CP 104. In the event that P&T caused damage to the Lease Area, DNR reserved the right to "immediately enter [the Lease Area] and take such action as necessary to cease such damages or use." CP 106. Moreover, the lease specifically required that P&T would "be responsible for regular cleanup and upland

disposal sufficient to prevent excessive accumulation of any debris on the leased area." CP 105.

(2) The 1980 Lease

The 1974 lease was in effect until 1979, and in 1980, DNR and P&T executed a second lease with substantially identical terms. CP 111-14. By this time, rent payments had increased to $6,095.00 per year. CP 111. The use of premises was still limited to a "[b]ooming and log storage area." CP 111. This lease was in effect until 1989. CP 111.

(3) The 1991 Lease

In 1991, DNR and P&T executed a third lease, which was backdated to 1989 with an expiration date of May, 2001. CP 116-21. The 1991 Lease increased the size of the Lease Area to 72.06 acres. CP 108. The initial rent payment was $11,748.35, and rent was adjusted annually as the lease progressed. CP 117. As in earlier leases, DNR retained significant authority over the property. *See* CP 119. In deciding to renew and expand the lease, DNR concluded that the "area is highly suitable for this type of use [log storage]." CP 123.

Through the 1991 lease, DNR managed decisions regarding the presence of pollutants and compliance with environmental regulations. *See* CP 119. For instance, the 1991 lease prohibited the "deposit" of "pollutants," purported to restrict P&T's use of hazardous substances, and

required compliance with related regulations. CP 119. The 1991 lease further required that P&T would conduct tests or investigations "requested by the state . . . during the term of the lease as are reasonable and necessary to ascertain the existence, scope, or effects of Hazardous Substances on the [Lease Area], adjacent Property, or associated natural resources . . . ." CP 120. Nothing indicates that DNR required investigations or otherwise enforced these provisions.

(4) Sewer Outfall Lease

DNR also leased a separate section of aquatic lands to P&T for use as a sewer outfall from 1975 until after P&T ended its operations. *See* CP 126-29. DNR noted that the outfall "discharge[ed] effluent into an existing geoduck clam bed of commercial density," preventing use of the area for food cultivation. CP 131. DNR required P&T to compensate it for the income lost from reduced geoduck production. CP 131.

c. DNR Knew of Contamination and Unauthorized Activity at the Site.

When the lease was renewed and expanded in 1991, DNR knew of potential contamination and knew that P&T used other areas of the Bay without authorization, but DNR did nothing.

In a June, 1991 internal memorandum, a staff member of DNR asked: "Is there any problem w/ contamination @ this site & the adjacent

to-be-leased areas? Please make sure this issue is dealt w/ next time around if there's any problems (bark can cause bad problems)." CP 134.

In another internal communication in 1991, DNR acknowledged that "[t]he Pope and Talbot Company currently is occupying more area than [lease] # 12795 with log storage and pilings. See photos. We will be addressing the use of these other areas. Requiring P&T to have surveys done and get under lease." CP 124. Photographs from this period show log storage in areas well beyond the original or expanded Lease Area, and DNR acknowledged these unauthorized uses with written annotations on the photographs. CP 136-38.

Nothing indicates that DNR addressed or required a lease for these unauthorized uses. *See* CP 140 ("[W]e do not appear to have commented or expressed any interests in this area in the past."). It was only after P&T closed the mill and requested cancellation of the lease in 1996 when DNR finally required P&T to conduct sampling to evaluate the condition of the sediments, but again, only in the Lease Area. *See* CP 143-46. Ultimately, DNR never terminated the lease, and the lease expired in 2001. CP 148.

d. DNR Claims to be an "Owner" at the Site and at Other Washington Locations.

In both internal correspondence and public presentations, DNR has consistently asserted that it owns the submerged beds at the Site, and it has even acknowledged that its ownership leads to liability. For example:[3]

- "Fact: **DNR owns** the land underneath the jetty [feature of the former sawmill] as well as a portion of the land where the two southern docks are located." CP 158.
- "[W]e will need to inform Ecology of **our ownership** and interests at this site immediately . . . ." CP 140.
- "DNR would be liable for . . . [an amount reflecting an] 'ownership' share . . . ." CP 163. [4]
- In a Powerpoint presentation from approximately 2007, DNR identifies "the Players" at the Site, describing itself as "**Landowner.**" CP 169. [5]

4. Cleanup Actions at the Site

PR/OPG have funded and performed a series of remedial actions for the past two decades. CP 61. Over that time, PR/OPG have spent several million dollars investigating and cleaning up the Site. CP 61. In December, 2013, PR/OPG entered a Consent Decree with Ecology. CP 71-79. The Consent Decree requires PR/OPG to implement a Cleanup

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[3] See CP 9-10 (citing other sections of the record) for many other examples of DNR's ownership claims at this Site and across the state.

[4] While allocation of liability is not at issue in this appeal, DNR's "cost estimate" in this document greatly underestimates its liability by ignoring equitable factors that augment DNR's liability and by ignoring that, under MTCA's joint and several liability scheme, DNR shares responsibility for P&T's "orphaned" share of liability. *See* CP 163.

[5] This presentation predated P&T's bankruptcy, so DNR described P&T as the "PLP" and Pope Resources as a party with only a "Minor Role[]." CP 169.

Action Plan ("CAP") in the Bay portion of the Site—nearly all of which belongs to DNR. *See* CP 73, 77. Implementation of the CAP to clean up DNR's land is expected to cost more than $20 million. CP 61. The Consent Decree anticipates that future agreements may require additional cleanup of other areas of the Site, which are still being evaluated. CP 73. Even though Ecology determined DNR is a PLP and even though DNR has been present at the Site for almost 100 years more than PR/OPG, DNR refused to participate in the Consent Decree and has refused to meaningfully participate in remedial actions at the Site. *See* CP 61, 77.

B. Procedural History

PR/OPG filed a Complaint against DNR in Kitsap County Superior Court on December 5, 2014, seeking contribution and declaratory judgment. MTCA allows a party to "bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs." RCW 70.105D.080. PR/OPG alleged that DNR is liable as a current or former "owner or operator" of the Site under RCW 70.105D.040. CP 8. In its Answer, DNR asserted that it "is not among the categories of persons liable under MTCA, and in particular is not among the persons who fall under the definition of 'owner or operator' under RCW 70.105D.020." CP 21.

PR/OPG moved for summary judgment on the issue of DNR's liability as an "owner or operator" under MTCA. PR/OPG's motion did not seek a determination regarding the extent of DNR's liability or an equitable allocation of liability; PR/OPG instead sought only a declaration on the threshold issue of whether DNR is liable at the Site. DNR's response and countermotion asked the court to deny PR/OPG's motion, to issue an order finding that DNR is not liable, and to dismiss the case.

On June 8, 2015, the trial court granted summary judgment to DNR. The trial court provided no written or oral explanation for its ruling. The order stated simply that "Defendant is not among the categories of persons alleged by plaintiffs [to be] liable under the Model Toxics Control Act (MTCA) at the Port Gamble Bay and Mill Site, and accordingly, Defendant is not an 'owner' or 'operator' as those terms are defined under RCW 70.105D.020."[6] CP 369. On June 17, 2015, PR/OPG filed a motion asking the court to reconsider its ruling, which the court denied the next day with no explanation. PR/OPG timely appealed.

V. ARGUMENT

A. Standard of Review

This Court reviews orders entered on summary judgment de novo, performing the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*,

[6] The trial court's only addition to DNR's proposed order was the line "alleged by plaintiffs."

150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The trial court's legal conclusions are therefore entitled to no deference. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 485. The parties and the trial court judge all agreed that there are no genuine issues of material fact at issue here.

The issue here is statutory interpretation, which is an issue of law reviewed de novo. *Camarata v. Kittitas Cnty.*, 186 Wn. App. 695, 703, 346 P.3d 822 (2015). However, courts must give "substantial weight" to an "agency's interpretation of the statute it administers." *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 207, 263 P.3d 1251 (2001). Here, that agency is Ecology, not DNR.

On cross motions for summary judgment, the Court must "consider all the facts and inferences in the light most favorable" to the non-prevailing party—PR/OPG. *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 610, 105 P.3d 1012 (2005). Thus, any question regarding whether the facts are sufficient to establish DNR's liability must be resolved in PR/OPG's favor.

B. Summary of MTCA Definitions and Applicability

Washington's MTCA governs liability for cleanup of contaminated sites. MTCA was modeled after the federal Superfund law, the

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The scope of liability under MTCA is laid out in RCW 70.105D.040, which imposes liability for cleanup on five different categories of persons, including an "owner or operator":

> [T]he 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**;

RCW 70.105D.040(1) (emphasis added).

Importantly, "[e]ach person who is liable under [RCW 70.105D.040(1)] is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances." RCW 70.105D.040(2). MTCA liability therefore does not depend on principles of causation or culpability; instead, a party is strictly liable simply if it fits within one of the five categories. Here, PR/OPG have alleged that DNR is liable under only two categories—current or former "owner or operator."

DNR does not dispute that it is a "person" under MTCA, which defines "person" as any "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, **state government agency**, unit of local government, federal government agency, or Indian tribe." RCW 70.105D.020(24) (emphasis added). DNR

also does not dispute that the Site is a "facility"[7] under MTCA, for which a "person" may be liable if it meets one of the statutory categories.

DNR disputes only whether it is a current or former "owner or operator" at the Site as described in subsections (a) and (b) of RCW 70.105D.040(1). Thus, the key provision in this appeal is RCW 70.105D.020(22), which broadly defines the term "owner or operator" as follows:

> Owner or operator means:
>
> (a) Any person with any ownership interest in the facility or who exercises any control over the facility . . . .

RCW 70.105D.020(22).

1. MTCA Applies Broadly to Public Entities to the Same Extent as Private Parties.

Two key principles must guide the Court's application of this definition. First, the statute expressly states that its "**main purpose** . . . is to **raise sufficient funds to cleanup all hazardous waste sites** and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters." RCW 70.105D.010(2) (emphasis added). As explained further below, MTCA accomplishes this goal by imposing liability broadly.

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[7] A "facility" includes "any site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located." RCW 70.105D.020(8).

Second, MTCA treats state agencies *exactly the same* as private parties. MTCA defines a "person" to include a "state government agency," and nothing in the statute differentiates between private and public entities. In fact, MTCA's liability categories expressly apply to "*any* person." RCW 70.105D.040 (emphasis added). Washington's Supreme Court has acknowledged that, in order to accomplish MTCA's broad purpose, "[l]imited state funds are raised for [MTCA] clean up projects through a tax on hazardous waste, but for the most part, clean up is paid for and performed by those **public or private entities** identified by Ecology as 'potentially liable persons.'" *Asarco Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 *amended on denial of reconsideration*, 49 P.3d 128 (Wash. 2002) (emphasis added).

This Court has also confirmed that state agencies are not entitled to special treatment under MTCA. *See PacifiCorp Envtl. Remediation Co. v. Wash. St. Dep't of Transp.*, 162 Wn. App. 627, 259 P.3d 1115 (2011). In *PacifiCorp*, Division II held that the State Department of Transportation (WSDOT) was liable under MTCA for its role in allowing contamination to flow into the Thea Foss Waterway, which was part of the Commencement Bay Superfund Site in Tacoma. *Id.* at 635-40. Importantly, WSDOT's status as a state agency was irrelevant to the Court's analysis of WSDOT's liability, which focused exclusively on

MTCA's broad liability provisions. *See id.* at 662-64. After concluding that WSDOT was liable, the Court considered equitable factors relevant to WSDOT's share of the overall cleanup costs. *Id.* at 664-72. The Court affirmed the substantial judgment entered by the trial court, and the Court's analysis considered the exact equitable factors that Washington courts apply to any private party.[8] *See id.* The Court therefore confirmed what is unmistakable from MTCA's plain language—courts must treat public agencies the same as private parties under MTCA.

2. The Trial Court Misapplied MTCA.

Despite MTCA's broad "owner or operator" definition, its definitive policy statement, and its unequivocal application to state agencies, the trial court ruled that DNR is not an "owner or operator" at the Site. While the court provided no explanation for its ruling, DNR argues that it cannot be an "owner or operator" because "the State" is the true "owner" of the bedlands at the Site. DNR's argument is rooted in RCW 79.105.010, which says the State "owns these aquatic lands in fee and has delegated to [DNR] the responsibility to manage these lands." In DNR's view, neither the State nor DNR is liable as an "owner" because only "persons" can be liable under MTCA, and the definition of "person" includes a "state government agency" but does not include just "the State."

[8] In fact, the Court held that WSDOT's share of costs was augmented because of its "recalcitrance" in failing to assist the investigation and cleanup processes. *Id.* at 669-72.

See RCW 70.105D.020(24). Thus, even though DNR can be liable as a "state government agency," DNR argues that the State is the actual "owner" at the Site and that the State cannot be liable. DNR also argues that its "management" at the Site does not make it liable as an "owner or operator," claiming that it does not "exercise[] any control over the facility." *See* RCW 70.105D.020(22).

The trial court and DNR are wrong, and DNR's attempt to escape MTCA liability must fail. The question in this case is simply whether DNR is an entity "with any ownership interest . . . or who exercises any control over the [Site]." By jointly defining the term "owner or operator," MTCA makes it clear that the Court must apply this phrase holistically to determine whether the plain language encompasses DNR. The undisputed facts leave no doubt that DNR fits within the plain meaning of this phrase.

And the result is the same regardless of whether DNR is alleged to be liable as an "owner or operator" or just an "owner" or an "operator." First, DNR is liable as an "owner" because it has "any ownership interest," as demonstrated by the agency's repeated claims of ownership and its exercise of ownership rights. Second, DNR is liable as an "operator" because it had the "authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Kaiser*, 976 F.2d at 1341. And finally, DNR's liability at the Site is

consistent with the view of Ecology—the agency entrusted with interpreting and enforcing MTCA—which has alleged that DNR is liable for its management of aquatic lands at this Site and many others.

C. DNR is Liable as an "Owner or Operator" under MTCA because it has An Ownership Interest.

The trial court erred in ruling that DNR is not an "owner" at the Site. First, DNR fits within the plain language of MTCA's definition of an "owner or operator" because DNR possesses a bundle of rights that amounts to "any ownership interest" in the Site. Second, this Court's *PacifiCorp* decision supports that a state agency may be liable as an "owner or operator" even if "the State" owns land in fee. Third, DNR unquestionably believes that it has an "ownership interest" in the Site because it routinely claims to be the owner—except when ownership leads to liability. And fourth, even under a narrow view of "ownership" applied in some federal CERCLA cases, DNR is liable as an "owner."

1. The Plain Language of MTCA's "Owner or Operator" Provision Encompasses DNR because It Has All the Rights of an Owner.

The trial court's ruling wrongly ignored MTCA's broad definition of "owner." Again, MTCA defines an "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22) (emphasis added). No

Washington case has analyzed the "owner" prong of this definition, but the plain language leaves little doubt as to the correct application here.

a. "Owner" Liability under MTCA is Broader than CERCLA in Order to Fulfill MTCA's Remedial Purpose.

The breadth of MTCA's "owner or operator" definition is best understood by comparing to CERCLA's definition of the same term. CERCLA defines an "owner or operator" as simply "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). As noted, MTCA was heavily patterned after CERCLA, and when MTCA uses different language, courts consider the difference a clear indication of MTCA's statutory intent. *See Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992) (stating that Washington courts look to CERCLA cases as "persuasive" authority but declining to follow CERCLA cases where MTCA's language differs).

Thus, MTCA's drafters made a deliberate choice to broaden the limited definition of "owner or operator" in CERCLA to include much more expansive language, extending to a person with "*any* ownership interest"—not just on the person "owning" the facility. This is consistent with MTCA's broad remedial goals and its "main purpose . . . to raise sufficient funds to clean up all hazardous waste sites." RCW 70.105D010(2).

It is also consistent with other instances where MTCA expands the pool of potentially liability parties beyond those who would be liable under CERCLA. For instance, MTCA and CERCLA both impose liability on a party who "arranged for disposal or treatment" of hazardous substances at a site, but MTCA takes it a significant step further by extending liability to parties who "otherwise generated hazardous wastes disposed of or treated" at the site. RCW 70.105D.040(1)(c).[9]

Thus, looking to CERCLA for comparison, it is unquestionable that MTCA's definition of "owner or operator" is meant to be broader. DNR argues that it cannot be an "owner or operator" when the State is the "fee owner." But by using the phrase "any ownership interest," MTCA's drafters clearly did not intend to limit "owner or operator" liability to merely the person whose name is recorded on title to real property. If the statute only encompassed fee owners, then MTCA would have simply followed CERCLA's limited definition, instead of expanding MTCA's reach to those with "any ownership interest." Thus, by following DNR's

[9] In fact, this Court has confirmed that MTCA's liability provisions may be broader than CERCLA even when the language does not appear broader. In *PacifiCorp*, the Court considered whether "arranger" liability under MTCA requires a specific intent to dispose, as the U.S. Supreme Court had recently concluded was necessary for "arranger" liability under CERCLA. This Court soundly rejected WSDOT's argument and held that a party may be an "arranger" even without "intent" to dispose of a hazardous substance, thereby preserving MTCA's broader applicability. *PacifiCorp*, 162 Wn. App. at 663-64.

interpretation, the trial court effectively read the definition of "owner or operator" out of MTCA and re-wrote the definition to mirror CERCLA.

b. DNR's Bundle of Rights is an "Ownership Interest" in the Site.

Moreover, DNR's limited interpretation conflicts with the plain language of the statute because it contradicts Washington law's concept of "ownership."[10] The Washington Supreme Court has held that the "chief incidents of the ownership of property are the rights to its possession, use and enjoyment, and to sell or otherwise dispose of it according to the will of the owner." *In re Eckert's Estate*, 14 Wn.2d 497, 504, 128 P.2d 656 (1942) (citing 1 Blackstone's Commentaries 138). Thus, ownership is not a mere status that one either has or does not have. Instead, "ownership" and "property" are more accurately described as a "bundle of rights." *See Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012) ("'Property' is best described as certain rights pertaining to a thing, not the thing itself. Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc.") (internal citations omitted); *Lowe v. Rowe*, 173 Wn. App. 253, 264, 294 P.3d 6 (2012) ("Control over the land is part of the bundle of sticks associated with land ownership and use.") (internal citations omitted).

[10] As explained further below, this limited interpretation also contradicts Ecology's interpretation of MTCA.

MTCA's use of the phrase "any ownership interest" therefore shows an intent to be consistent with Washington law by incorporating the "bundle of rights" concept into "owner or operator" liability. This broad language makes it clear that more than one type of "ownership interest" may be sufficient to establish liability under MTCA.

DNR has each of the "chief incidents of ownership of property" at the Site and is thus liable as a person with "any ownership interest" or who "exercises any control" over the Site. *See Eckert's Estate*, 14 Wn.2d at 504. First, DNR has the right to possess, use, and enjoy property within the Site. *See Kiely*, 173 Wn.2d at 936. DNR revealed that it has these rights by temporarily transferring aspects of these rights to P&T. It was DNR, not "the State," that leased part of the Site to P&T, oversaw the leases, and put in place (but never enforced) restrictions on P&T's right to use the property. *See* CP 102-21 (leases). It is also DNR, not "the State," that possesses permitting authority over dredging projects and other aquatic uses on the submerged beds at the Site. *See* WAC 332-30-122(1)(a); CP 217 ("No work may be conducted [on the submerged beds at the Site] before a use authorization is issued.").

Second, DNR has the right to "sell or otherwise dispose" of the property "according to [its] will." *In re Eckert's Estate*, 14 Wn.2d at 504. It was DNR, not "the State," that granted P&T's application to purchase

the tidelands at the Site. *See* CP 220-22. And finally, DNR has the right to exclude others, which "is an essential stick in the bundle of property rights." *Excelsior Mortgage Equity Fund II, LLC v. Schroeder*, 171 Wn. App. 333, 344, 287 P.3d 21 (2012). DNR has exercised this right, albeit selectively, by ejecting unauthorized users of land at the Site. CP 224.

In sum, it is therefore irrelevant whether the DNR or the State is "owner" for the purposes of title. MTCA liability requires only that a person have "any ownership interest" *or* "exercise any control," and DNR has every right essential to property ownership. If only the "fee owner" could be liable, as DNR argues, then MTCA would not have used language that unambiguously contradicts such a limited interpretation.

2. This Court's Precedent Supports DNR's "Owner" Liability.

DNR's entire argument hinges on RCW 79.105.010, which describes the State as the "fee" owner of aquatic lands and DNR as the "manage[r]." But DNR is not the first agency to make this argument, and the statutory relationship established between DNR and the State is not unique. In fact, a similar relationship exists between WSDOT and the State. Statute provides that the "right, title, and interest to the right of ways" of Washington's highways is vested in the "state of Washington." RCW 47.04.040. This includes all "appurtenances" and "drainage

facilities." *Id.* Moreover, RCW 47.01.260 states that WSDOT has "all powers" related to "operating[] and maintaining state highways, including . . . drainage facilities." RCW 47.01.260. Thus, the State has title to all highway rights-of-way and therefore owns them in "fee," but WSDOT manages the highways on the State's behalf.

In the *PacifiCorp* case, plaintiffs alleged that WSDOT was liable as an "owner or operator." The deed for the property at issue confirms that it was owned in fee by "the State of Washington."[11] Even so, the trial court concluded that WSDOT was liable as a former and current "owner" under MTCA. *See PacifiCorp*, 162 Wn. App. at 662.

On appeal, WSDOT made the *exact same* argument to this Court that DNR relies on here. WSDOT argued that it cannot be an "owner or operator" because "[WSDOT] is not the owner of that property; the State of Washington is."[12] WSDOT further claimed that the plaintiffs could not "overcome the language of [the] deed."[13]

But this Court was not persuaded by those arguments. The Court first concluded that WSDOT was liable as an "arranger" and then stated that it "need not address . . . [the] related alternative theories of DOT liability." *Id.* at 662 n.113. The Court therefore did not fully analyze

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[11] *See* Pierce County Deed no. 8410090001.
[12] Appellant's Reply Brief at 18, *PacifiCorp Envtl. Remediation Co., et al. v. Washington State Department of Transportation*, No. 39699-8-II (Wash Ct. App., July 2, 2010).
[13] *Id.*

WSDOT's "owner" liability, but the Court expressly stated that WSDOT's argument that it was not an owner "fail[ed]":

> DOT argues that it is not liable under the MTCA as a matter of law because the trial court erred by concluding that DOT was liable as a past "owner" (RCW 70.105D.010(1)(a)), as a current "owner" (RCW 70.105D.040(1)(b)), and as an "arrang[er]" (RCW 70.105D.040(1)(c)) under the MTCA. **These arguments fail.**

Id. at 662 (emphasis added). The Court further held that "the trial court did not err in ruling that DOT was liable under the MTCA **for its ownership and operation** of the DA–1 Line French drains and their contribution to the Waterway contamination." *Id.* at 659.

DNR's attempt to recycle WSDOT's misguided old theory must be rejected. Having specifically held that WSDOT's argument that it was not an "owner" failed under circumstances strikingly similar to this case, the Court would contradict itself by holding in DNR's favor here.[14]

3. DNR Calls Itself an Owner Except When Faced With Liability.

DNR's belated attempt to distinguish itself from the State for purposes of MTCA "ownership" contradicts its own admissions and fails as a matter of law. The "State's" status as "fee" owner of the submerged

[14] This application of MTCA is not unique to state agencies. For instance, OPG Properties does not own any property or conduct operations at the Site but merely "manages" property on Pope Resources' behalf. Like DNR, OPG Properties was named a PLP at the Site (separately from Pope Resources) because of its "management." *See* CP 77.

beds at the Site cannot be questioned. But DNR claims that it is merely the state agency that "manages" the Site, and not the "State," and thus cannot be liable as an "owner" under MTCA.

But in any context outside of MTCA, DNR readily asserts that it is *the owner* of aquatic lands. When refusing to terminate P&T's lease in 1999, DNR appealed to P&T's sensibilities "as a fellow landowner." CP 161. And when Ecology planned a meeting of stakeholders at the Site that did not include DNR, DNR complained that Ecology had left out "the owner of the bedlands." CP 153.

At the trial court, DNR attempted to dismiss these repeated claims of ownership by stating that DNR staff merely sometimes use the term "DNR land" as a "shorthand reference." CP 241. But this is false. In fact, the same DNR employee who made this claim in a declaration before the trial court has affirmatively asserted DNR's ownership over the aquatic lands at Port Gamble and declared DNR's right to eject trespassers. CP 360 ("[W]e [DNR] own the underlying land, and the improvements are in trespass.") (emphasis added).

In another instance, DNR's staff suggested that only a "landowner" like DNR could require an adequate cleanup of its land:

> One of the concerns we have is that cleanup levels and standards that the regulating agencies might accept could be very different, ie. [sic] lower, than what we as

> landowners would like. This is particular [sic] the case in the Port Gamble situation because it is a very valuable and productive area for geoducks . . . .

CP 214 (emphasis added). Like any other landowner that profits from the commercial use of its land, DNR wants to maximize "valuable and productive" areas. Yet DNR doesn't think it should have to pay for the contamination that resulted from its tenant's use of those areas—a use it approved and required as a term of the lease.

These communications are just examples of many that reveal a pattern: DNR touts its ownership when ownership provides power, but DNR disclaims its ownership when ownership leads to unwanted responsibility. DNR can point to no legal authority to support its apparent belief that its status as a state agency somehow gives it the benefits of ownership with none of the drawbacks. DNR sat back while P&T allegedly polluted immediately adjacent areas of DNR's land for more than a century. And DNR gladly accepted rent payments from P&T for more than 20 years, profiting directly from P&T's allegedly contaminating operations without taking any action to stop it. After reaping the benefits of its ownership, DNR now expects PR/OPG to fully fund the cleanup of pollution that DNR profited from and allowed to happen. But a "landowner" like DNR is a liable party under MTCA—plain and simple.

DNR has argued that, even though it repeatedly claims to own the aquatic lands at Port Gamble, these claims do not change the nature of its legal ownership. But DNR misses the point. The fact is that MTCA imposes liability on a party with "any ownership interest"—not just the fee title holder. PR/OPG does not argue that DNR's assertions alter fee ownership, but the agency's repeated claims that it owns these aquatic lands are tantamount to *an admission that it has "any ownership interest in" or "exercises any control over" the Site.* DNR insists that it owns these lands in all other contexts because it has all the power and rights of an owner, and the exercise and assertion of these powers provides compelling, uncontroverted evidence that DNR has an "any ownership interest" or "exercises any control." A party cannot arduously assert ownership over property and then claim that it does not have ***any*** ownership interest or control over that same property.

4. Even Applying CERCLA's Narrow Concept of Ownership, DNR Would Be Liable as an "Owner or Operator."

As noted, MTCA's expansive definition of "owner or operator" contrasts with CERCLA's corresponding provision, which defines an "owner or operator" as simply "any person owning or operating such facility . . . ." 42 U.S.C. § 9601(20)(A)(ii). Given this difference, CERCLA case law offers minimal guidance when determining who is an

"owner." *See Bird-Johnson*, 119 Wn.2d at 427. Still, DNR would be liable even if CERCLA's definition of an "owner" applied to this case.

Under CERCLA, federal courts have primarily applied one of three tests for "owner" liability: (1) "site control," (2) "de facto ownership," and (3) common law ownership.[15] Applying the "site control" test for "owner" liability, DNR's liability is clear. DNR retained complete control over the submerged beds at the Site, including control over the Lease Area throughout P&T's occupancy.[16] *See* CP 102-21 (leases). DNR also qualifies as a "de facto owner" under the Second Circuit's test because it retained every essential incident of ownership of the submerged beds at the Site. Finally, even under the Ninth Circuit's more narrow common law test, DNR would be liable as an owner because, as explained above, Washington state common law "ownership" exists when a person possesses a sufficient "bundle of rights," and DNR has the complete bundle of ownership rights over the submerged beds at the Site.

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[15] For courts applying each respective test, see *United States v. S. Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984) *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 449-51 (9th Cir. 2011).

[16] Because MTCA holistically defines "owner or operator," the "site control" test bears the closest resemblance to MTCA's plain language by combining the considerations for "owner" and "operator" liability into a cohesive analysis.

D. DNR is Liable as an "Owner or Operator" under MTCA because it Exercises Any Control.

It is indisputable that DNR had the authority—and the duty—to control disposal of waste at the Site. This alone makes DNR an "operator" under the "decision-making control" standard adopted by Washington courts. But even more damning is that DNR exercised its authority by specifically authorizing and profiting from the release of hazardous substances onto the aquatic lands. And where DNR did not authorize the contaminating activities, it willingly looked the other way. Moreover, while any landlord may have some level of control over the land it leases, DNR has a heightened level of control because it is statutorily enabled and required to protect the land. The Court should reverse the trial court decision's evisceration of MTCA's "owner or operator" provision and hold that a party who directly authorizes and profits from contaminating activity cannot escape liability.

1. Operator Liability Under MTCA is Expansive.

Washington case law supports holding DNR liable as an "operator." As noted, MTCA defines an "owner or operator" to include any person "who exercises any control over the facility . . . ." RCW 70.105D.020(22)(a). In applying this broad definition, Washington courts

have confirmed that "the key to operator liability [is] the authority to exercise control" over disposal of the hazardous waste:

> To determine whether a party is an operator, the courts do not consider the extent of involvement . . . . To be an operator, the party must have authority to exercise control over the facility.

Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 126, 144 P.3d 1185 (2006) (emphasis added) (quoting trial court).

Two Washington cases have directly analyzed "operator" liability under MTCA.[17] First, in *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), *as amended* (Apr. 24, 2000), the court held that a shareholder of a corporation cannot be liable for contamination unless the shareholder directly participated in the contaminating operations in his/her personal capacity. *Id.* at 429-30. The court noted that, in the corporate context, any other approach would risk imposing "liability on those who had no knowledge of or ability to control activities at the site." *Id.* at 429 n.29. But that concern is not present in this case, as discussed further below.

In the second case, *Taliesen v. Razore*, the court considered whether a subcontractor was liable as an "operator" for drilling a hole into an underground oil storage tank. 135 Wn. App. at 125. The court held

[17] In each of these cases, the court addressed only the "operator" prong of "owner or operator" liability because the facts did not involve any ownership interest.

that the subcontractor was not liable because it had no authority to decide where to drill or whether to stop drilling. *Id.* at 125-26. The court relied on federal cases where liability "depend[ed] upon authority to control decisions about how to dispose of waste, not mere physical control over the instrumentality that causes disposal or release." *Id.* at 127. The court therefore held that it is not "mechanical" control that makes one liable as an "operator," but control "in the decision-making sense." *Id.* at 128. Such control may include "decisions about compliance with environmental regulations." *Id.* (citing *United States v. Bestfoods*, 524 U.S. 51, 67, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)). This largely mirrors the Ninth Circuit's standard for "operator" liability under CERCLA, which applies "expansively . . . to extend to any party with the 'authority to control the cause of the contamination at the time the hazardous substances were released into the environment.'" *San Pedro*, 635 F.3d at 452 n.9 (citing *Kaiser*, 976 F.2d at 1341).[18] Under this test, "the term 'operator' is not limited to the primary or most responsible person or entity, but everyone who is potentially responsible." *City of*

[18] Washington courts have looked to federal CERCLA cases as persuasive authority in construing MTCA's "operator" provision because the "federal standard focuses on participation in, and the exercise of control over, the operations of a facility . . . ." *Taliesen*, 135 Wn. App. at 127 (emphasis added). Thus, unlike in the "owner" context—where the MTCA definition diverges notably from the CERLCA standard—federal "operator" cases are helpful because MTCA's definition similarly focuses on "control." *See* RCW 70.105D.020(22)(a). However, Washington courts have not foreclosed the possibility that MTCA "operator" liability is broader than CERLCA in some circumstances. *See Taliesen*, 135 Wn. App. at 127-29.

Moses Lake v. United States, 458 F. Supp. 2d 1198, 1226 (E.D. Wash. 2006) (internal citations omitted)

2. DNR Maintained Expansive "Decision-Making" Control over Waste Disposal at the Site.

Here, control in the "decision-making sense" was precisely what DNR maintained over the contaminating activities at the Site. Moreover, DNR's unique role as "steward" of aquatic lands gives it more expansive decision-making control over the Site than a typical landlord. *See* CP 92-93. Pursuant to its statutory authority, "DNR manages [aquatic lands] to preserve their environmental integrity that is linked to our quality of life." CP 227. Statutes provide that DNR must strive to provide a "balance of public benefits," including: encouraging public use, fostering water-dependent uses, ensuring environmental protection, and generating revenue when it is consistent with other benefits. RCW 79.105.030. DNR therefore exercises control over the land it leases (and chooses not to lease) with the statutory power and obligation to protect the environment. No typical commercial landlord has this level of power and control.

Armed with this power, DNR made the decision to lease part of the Site to P&T for log storage, and made the decision to allow log storage and mill operations on other parts of the Site without a lease. *See* CP 102-21. In fact, DNR concluded that the "area is highly suitable for this type

of use [log storage]." CP 123. While the *Taliesen* court declined to impose liability on a party who did not decide where to drill or whether to stop drilling a hole that inadvertently punctured an oil tank, DNR specifically decided where P&T could conduct contaminating operations and could have stopped those operations at any time.

By leasing the land for this purpose, DNR *directly authorized* the release of contaminants onto the aquatic lands. For instance, the lessor of a gas station does not authorize contamination because a gas station causes pollution only when there is an accident or when it is operated improperly. In fact, a lessee that allowed such pollution would generally breach the lease. But DNR's lease with P&T authorized log storage in water, which inherently and inevitably involves the release of wood waste onto aquatic lands. This pollution was not a breach of the lease, but an accepted and natural result of the use authorized by the lease. In fact, DNR knew that the log storage was causing contamination but did nothing. *See* CP 134. Moreover, DNR allowed P&T to deposit hazardous PAHs directly into the environment by permitting the installation of thousands of creosoted pilings throughout the Bay. Wood waste and PAHs are the contaminants that are driving the need to clean up the Site. CP 78.

The trial court therefore concluded that a party who *directly authorizes* the release of contaminants at a site did not "exercise any

control" so as to be liable under MTCA. Besides clearly and irrationally contradicting the language of the statute, the trial court's conclusion also dramatically limits MTCA's applicability and conflicts with its purpose. MTCA imposes liability regardless of culpability, but in this instance, the trial court adopted a standard that allows highly culpable parties that profited from and directly allowed contamination—such as DNR—to walk away from that contamination without paying a dime for cleanup. This is a profound misapplication of Washington's broad cleanup law. DNR not only had the authority to control disposal of waste, which is all MTCA requires for liability, DNR exercised that authority by specifically authorizing activities that were known to release waste.

In addition to directly authorizing contamination, DNR demonstrated its "authority to control decisions about how to dispose of waste," *see Taliesen*, 135 Wn. App. at 127, by requiring P&T to "be responsible for regular cleanup and upland disposal sufficient to prevent excessive accumulation of any debris on the leased area." CP 105 (emphasis added). Yet DNR made the decision to not enforce this provision and to authorize a use that inherently released "debris."

Moreover, DNR exercised its control over "decisions about compliance with environmental regulations," *see Taliesen*, 135 Wn. App. at 128, by prohibiting the "deposit" of "pollutants," restricting P&T's use

of hazardous substances, and explicitly demanding compliance with related regulations. *See* CP 119. In fact, the 1991 lease obligated P&T to conduct tests or investigations "requested by the state . . . during the term of the lease as are reasonable and necessary to ascertain the existence, scope, or effects of Hazardous Substances . . . ." CP 120. The 1991 lease therefore specifically highlighted DNR's position to require investigation into the environmental condition of the Lease Area and the surrounding areas of the Site. Despite this crucial "decision-making" control over the environmental condition of the Site, DNR did not require P&T to do any investigation until after the mill shut down and the damage was already done. DNR had decision-making control over P&T's activities and over the source of the contamination but chose not to exert that authority.

But DNR was not the "owner or operator" of just the Lease Area. In fact, DNR had the same control over all aquatic lands at the Site pursuant to its statutory responsibility to "manage these lands for the benefit of the public." RCW 79.105.010. Moreover, this control extends to portions of the actual sawmill area, which DNR inexplicably chose not to lease throughout P&T's operations. *See* CP 81-83. DNR has a duty to the people of Washington to effectively exercise its "decision-making" control over the submerged beds at the Site. DNR's acquiescence throughout most of the Bay only serves to augment its liability. *See*

Weyerhaeuser Co. v. Koppers Co., 771 F. Supp. 1420, 1426-27 (D. Md. 1991) (relying on landowners acquiescence as a factor in imposing substantial share of equitable liability under CERCLA).

In this case, when faced with the choice between its goals of "[g]enerating revenue" and "[e]nsuring environmental protection," DNR brazenly chose the former. Quite simply, a private commercial landlord could never make such a choice and escape MTCA liability, but the trial court effectively re-wrote MTCA to exempt a state agency that had even broader authority to control disposal.

3. DNR has Mischaracterized Its Role at the Site.

In this litigation, DNR has inaccurately suggested that P&T acted as a rogue tenant or trespasser beyond the agency's control or jurisdiction. *See* CP 246-47. For instance, at the trial court, DNR relied on the *Unigard* court's statement that it would not adopt a standard that "may be used to impose liability on those who had no knowledge of or ability to control activities at the site." CP 245 (citing *Unigard*, 97 Wn. App. at 429 n.29) (emphasis added). But as explained above, DNR had BOTH knowledge of and the ability (and the duty) to control the activities at Port Gamble. DNR knew when it sold the tidelands at the Site that the buyer was a mill company and that the mill company owned the adjacent upland areas. *See* CP 99-101. DNR also knew while the mill was operating that P&T

conducted operations throughout the Bay without authorization and knew that those activities caused contamination. *See* CP 40, 124, 134. And as the provisions in DNR's leases with P&T unequivocally establish, DNR had control over the activities that P&T conducted at the Site. *See* CP 102-21. Thus, PR/OPG agrees that the *Unigard* court's reliance on the absence of knowledge and control is highly relevant here because DNR had both. At the trial court, DNR produced no facts to dispute its knowledge or control. *See* CR 56(e).

Additionally, DNR has claimed that the majority of the contamination at the Site occurred as a result of P&T's "mill operations at the north part of the bay and not under DNR's jurisdiction." CP 246. For one, this is irrelevant because, under MTCA's joint and several liability scheme, a party who is liable for any part of a site is liable for the entire site. *City of Seattle v. Wash. Dep't. of Transp.*, 98 Wn. App. 165, 169-70, 989 P.2d 1164 (1999). Moreover, DNR's assertion is simply false. DNR owns the majority of the aquatic lands where wood waste is located and where creosoted pilings have been placed. *See* CP 78. And DNR itself has claimed ownership over a portion of the former sawmill area, which is located on the agency's filled submerged beds. *See* CP 83. DNR also says it is a "[f]act" that it owns land underneath the adjacent jetty and a portion of the land where the two southern docks are located. CP 158.

Mill operations occurred on these areas that DNR claims to own, and DNR had the authority to stop those operations.

The facts are abundantly clear that DNR had the "authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Taliesen*, 135 Wn. App. at 127 (citing *Kaiser*, 976 F.2d at 1341). DNR is therefore liable as an "owner or operator" under MTCA.

E. Ecology has Repeatedly Rejected DNR's Argument and Alleged that DNR is Liable under MTCA.

Ecology has formally asserted that DNR is liable under MTCA at this Site. Moreover, Ecology has alleged for decades that DNR is liable at many similar sites around the State and entered into settlements with DNR to resolve its liability at those sites. The trial court's decision is inconsistent with Ecology's determinations in two crucial ways. First, the trial court's decision directly conflicts with Ecology's interpretation of the plain language of RCW 70.105D.020(22), even though the court was required to give deference to that interpretation. Second, the trial court's decision upsets decades of settled expectations by eliminating Ecology's ability to rely on DNR as a contributing party at sites where DNR authorized contamination.

1. Ecology Interprets MTCA as Applicable to DNR.

DNR's interpretation of MTCA directly contradicts Ecology's. Ecology's role includes notifying and pursuing parties whom it has credible evidence to believe are liable under MTCA. WAC 173-340-500. This role includes implementation and interpretation of MTCA's liability provisions. *See* RCW 70.105D.020(26) (defining a PLP as a person "whom *[Ecology] finds* . . . to be liable") (emphasis added).

Moreover, the trial court was legally required to give deference to Ecology's interpretation. To illustrate, in *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), a trucking company received an opinion from the Department of Labor and Industries ("L&I") that its compensation system complied with the Minimum Wage Act ("MWA"). *Id.* at 206. Employees alleged that L&I's interpretation of the law was entitled to no weight. *Id.* This Court disagreed and held that "**[s]ubstantial weight is given to an agency's interpretation of the statutes it administers that are within the agency's specialized expertise.**" *Id.* at 207 (emphasis added). Here, Ecology administers MTCA, just like L&I administers the MWA. In *Westberry*, L&I was not a party to the case but had previously expressed its view of the legal issue in the case—that is, whether the compensation system complied with the

MWA. Similarly, Ecology has expressed its view on the exact legal issue in this case—whether DNR is liable at the Site under MTCA—by formally naming DNR as a PLP. This Court therefore must give Ecology's interpretation substantial weight.

Ecology has not only alleged repeatedly that DNR is liable under MTCA at this and similar sites, Ecology has *specifically rejected* DNR's argument that it cannot be liable because it only "manages" or "administers" the aquatic lands at Port Gamble.

In fact, in the letter notifying DNR of its PLP status for this Site, Ecology confirmed DNR is liable for "managing" land the State owns:

> "[W]e have credible evidence to support a finding that DNR, as manager of the State's aquatic lands, is a PLP for the release of hazardous substances . . . . DNR is an 'owner or operator' of a 'facility' as those terms are defined in [MTCA]."

CP 335 (emphasis added).[19] Ecology has similarly rejected DNR's argument at other sites by alleging that DNR is an "owner" when it "administer[s]" aquatic lands:

> According to our information, "State-owned aquatic lands" are present within the . . . Site. In accordance with RCW 79.105.060(20), DNR is directed by law to administer

[19] This PLP letter refers to DNR's PLP status only for the former lease area. However, the Consent Decree filed in Kitsap Superior Court confirms "Ecology's determination that [DNR] is a PLP for the Site," which includes all aquatic and upland areas where contamination from mill-related operations has come to be located. CP 77 (emphasis added). DNR also admitted in its Answer to PR/OPG's complaint that Ecology has named it a PLP "for the Site," not just the former lease area. CP 19.

> aquatic lands owned by the State of Washington. As such, DNR is the owner of a "facility" as defined in [MTCA].

CP 340, 346 (emphasis added) (citations omitted). *See also* CP 46-48; 192-212.

In another PLP letter from 2007 for the Whatcom Waterway, Ecology specifically calls out DNR's management role as the basis for its "owner or operator" status:

> Ecology is proposing to find [DNR] liable under RCW 70.105D.040 as an "owner or operator" or "former owner or operator" of the Whatcom Waterway facility (Site). This proposed finding is based on the following evidence:
> 1. The State of Washington (State) owns real property in Bellingham Bay . . . .
> 2. [DNR] manages this real property for the State, and historically leased portions of the real property for commercial activities; and
> 3. Mercury . . . [and other hazardous substances] have been found on this real property . . . .

CP 355 (emphasis added).[20]

This case presents an identical factual scenario. DNR admits that the State owns aquatic lands at Port Gamble. CP 17 (¶ 7). DNR admits that it manages and has historically leased those aquatic lands. CP 17-18 (¶ 15-16). And DNR admits that hazardous substances have been found on that property. CP 231 (lines 10-11). These facts are undisputed.

[20] Note that, in this PLP letter and the notice for Port Gamble, Ecology alleges DNR is liable as an "owner or operator" without distinguishing between the two.

Thus, Ecology alleges DNR is liable as an "owner or operator" *even though* the State is the fee owner of the property. In fact, Ecology alleges that DNR is an "owner or operator" *precisely because of* the nature of its "land management authority." DNR cannot rely on the State's fee ownership to escape liability for its own role at the Site.[21]

Yet the trial court concluded that the very agency entrusted with administering MTCA has interpreted the statute incorrectly for decades. The idea that Ecology has misinterpreted the statute is particularly implausible when one considers that DNR must rely on legislative appropriations to resolve its MTCA liability. Thus, the legislature has known for years that Ecology interprets MTCA to hold DNR liable.[22] If

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[21] DNR has attempted to undermine Ecology's PLP determinations by pointing to a "Memorandum of Agreement Concerning Contaminated Sediment Source Control, Cleanup, and Disposal" (MOA) entered between Ecology and DNR in 1992. CP 283-307. DNR argued before the trial court that Ecology's PLP determination should be given little weight because the MOA recognizes that DNR may have "reasonable defenses" to liability. CP 242. Thus, DNR believes that the MOA allows Ecology to name DNR as a PLP *even though* it believes DNR has defenses to liability. However, the plain terms of the MOA show that Ecology will name DNR a PLP only when it concludes that those defenses *do not apply*. Additionally, Ecology is legally authorized to identify and name parties that it concludes are liable. Ecology is NOT authorized to create a special status for state agencies and name the agency as a PLP while actually believing that it has no liability. If the MOA created such an arrangement, then it would be unlawful. Yet this is exactly what DNR claims the MOA accomplishes.

[22] *See* CP 377 (citing House Bill Analysis, HB 2623, Reg. Sess. (Wash. 2000); Senate Bill Report, SB 6150, Reg. Sess. (Wash. 2000)). In these bills, the legislature considered a study of "options for funding contaminated sediment cleanup." While the legislature never voted on whether to authorize the study, the house specifically stated that the impetus for the proposed law was DNR's CERCLA *and* MTCA liability: "The Department of Natural Resources **is a potentially liable party** [which is a MTCA-specific term] and potentially responsible party on behalf of the state **because it owns or manages the contaminated sites on state-owned aquatic lands**." House Bill Analysis, HB 2623, Reg. Sess., at 1 (Wash. 2000). *See also* Laws of 2005, ch. 155, § 121

Ecology's long-standing interpretation was wrong or threatened the harm alleged by DNR, then the legislature would change the law, but it has not.

2. Ecology Relies on DNR's Liability to Facilitate Cleanups at Sites Around the State.

Ecology has entered settlements with DNR to secure DNR's contribution for cleanup at sites around the State. As in the PLP notice letters described above, Ecology alleges in these settlements that DNR is liable for its role as manager of state-owned aquatic lands. These settlements include: the Whatcom Waterway Site, *see* CP 193-95 (consent decree alleging that DNR was a "current or former **owner[] or operator[]**" because it, "as the manager of state-owned lands, previously issued leases for various industrial and commercial activities occurring in the vicinity of, or within, the Site"), and the Commencement Bay Superfund Site, *see* CP 202-08 (complaint alleging that DNR "**owns and operates** facilities from which there has been a release of hazardous substances into the Commencement Bay Environment within the meaning of MTCA" based on the fact that DNR leased aquatic lands to "persons who have released hazardous substances to the environment on the leased lands") (emphasis added throughout). *See also* CP 210-12 (1987 consent

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(appropriating funds to DNR for "settlement costs for aquatic lands cleanup"); Laws of 2005, ch. 518, § 1205 (appropriating funds to DNR to settle MTCA litigation brought against DNR by a private party).

decree for portion of Commencement Bay settling DNR's liability for leasing aquatic lands to owners and operators of mill).

Before the trial court, DNR claimed that a decision in PR/OPG's favor would result in an "unacceptable amount of liability" for DNR as a public agency because it manages land across the state. CP 243. But to suggest that MTCA disfavors state agency liability directly contradicts the law and its stated policy—not to mention this Court's precedent.

Moreover, DNR's previous settlements with Ecology show that DNR's "unacceptable liability" theory must be rejected for two additional reasons. First, DNR suggests that subjecting it to MTCA liability—as the statute mandates—would come as a surprise. But as established above, Ecology has interpreted MTCA this way for decades. DNR has routinely been named liable and has often settled its MTCA liability. So DNR cannot pretend that its MTCA liability would be a sudden change. To the contrary, holding DNR liable under MTCA would simply maintain the status quo.

Second, this Court should be far more concerned with the consequences of ruling in DNR's favor. As noted, MTCA's "**main purpose** . . . is [1] to raise sufficient funds to cleanup all hazardous waste sites and [2] to prevent the creation of future hazards." RCW 70.105D.010. As to the first prong of this purpose, Ecology has made it

clear by continuing to pursue and settle with DNR that it relies on DNR's liability as an "owner or operator" to "raise sufficient funds" for cleanup. But by exempting DNR from liability, the trial court created a new loophole for one of the state's most ubiquitous liable parties. In short, the fact that DNR manages a large amount of land does not support DNR's interpretation of MTCA but actually underscores the importance of facilitating cleanup at these sites by holding DNR accountable.[23]

Further, DNR's position contradicts the second prong of MTCA's "main purpose"—to prevent the creation of future hazards. DNR would like the Court to believe that it will act as a responsible steward of its land without the incentive of liability, but the facts of this case prove otherwise. Under the trial court's ruling, DNR is entitled to knowingly lease to a polluting party and profit from the lease but never face the consequences of its actions. Even more disturbingly, DNR can reap the benefits of its lessee's contaminating operations while a party that did not cause the contamination is forced to pay for the cleanup of DNR's land. Like any

[23] Note that DNR is not automatically liable at every contaminated site with state-owned lands. MTCA includes several defenses to liability, including for "innocent landowners" who had no reason to know of contamination and for those who acted with the "utmost care" and had no "contractual relationship" with the alleged polluting party. RCW 70.105D.040(3)(a)-(b). Here, DNR has not attempted to invoke these defenses, but the defenses may protect DNR from liability at sites where the agency has acted responsibly. Moreover, even if DNR is held liable under MTCA, DNR may ultimately be liable for little or no cleanup costs. Once liability is established, courts consider equitable factors to determine each liable party's share of overall costs. The issue in this appeal is solely whether DNR must take a seat at the table like any other owner or operator. The issue of how much DNR must pay—if anything—is a separate matter to be resolved on remand.

other landowner, DNR profits from commercial uses of its land and must be held accountable. Without question, a private party in DNR's role would never get away with authorizing and profiting from contamination. And the law mandates that this Court treat state agencies exactly like private parties under MTCA.

VI. CONCLUSION

For the reasons set out above, PR/OPG respectfully requests that this Court reverse the trial court's summary judgment ruling and remand this case with instructions to enter summary judgment in PR/OPG's favor on the issue of DNR's liability.

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

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

On this date, I caused to be served a true copy of the document entitled APPELLANTS' OPENING BRIEF to which this is attached, by electronic mail on the following:

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