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' REPLY BRIEF

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I. INTRODUCTION

MTCA liability applies to any state government agency "with any ownership interest in the facility or who exercises any control over the facility." It is important to refocus this dispute on this central statutory language. It is also important to emphasize that MTCA is a strict liability statute that applies based purely on status—not based on fault or culpability. This appeal presents only the threshold legal question of DNR's status as a liable party. The allocation of liability between the parties is a separate stage in the litigation, at which DNR could be allocated a small share of costs based on equitable considerations. At this stage, however, equitable arguments related to each party's share of liability are irrelevant. The only issue in this appeal is whether, under the undisputed facts, DNR has "any ownership interest . . . or [] exercises any control over" the Site.

It is undisputed that DNR exercised every right and attribute of ownership over property with the exception of fee title. DNR:

- leased the land and profited from its commercial use (CP 103-29);
- exercised the power to eject unauthorized users from the land (CP 224);
- maintained but failed to properly invoke its expansive authority to restrict environmentally harmful uses of the land (CP 103-29; 134; 161);

- knew of P&T's unauthorized use of land for polluting activity and continued to collect rent instead of enforcing the lease or requiring a more expansive lease (CP 124; 134-140);
- exercised its right to alienate by approving P&T's application to purchase tidelands (CP 220-22);
- exercised the right to control how the Site was used (CP 103-29; 224);
- directed the location of P&T's polluting activity by designating areas of the Site as "highly suitable" for log storage, which it knew caused pollution (CP 123; 134);
- routinely acted like and called itself the owner of aquatic lands at the Site and other locations around the State (CP 148-77).

It is difficult to comprehend how a party with those property rights can claim that it does not have "*any ownership interest* . . . or [] *exercise*[] *any control*" over the Site. Under any rational reading of that phrase, DNR is liable. The statutory language itself is particularly crucial because there is no MTCA case law that fully analyzes this definition.[1] The Court's task in this appeal is therefore to apply the natural language of the "owner or operator" definition to DNR.

DNR tries to distance itself from this clear statutory language by focusing on "the State's" role instead of its own, relying on and misconstruing minimally applicable case law, and muddying the issue with misguided and irrelevant "policy" arguments. To accept DNR's

[1] As discussed further below, the only two cases addressing this definition involve non-analogous facts where only the "operator" aspect of the "owner or operator" definition was at issue.

position, this Court would need to ignore the plain language and expressly stated intent of MTCA. It would also need to disregard its own case law establishing that state agencies must be treated like private parties under MTCA. And importantly, the Court would need to *directly reject* the interpretation of MTCA long-employed by Ecology, which DNR has conceded is entitled to substantial weight.

II. ARGUMENT

A. DNR is an "Owner or Operator" under the Plain Language of MTCA.

1. MTCA Must be Interpreted Holistically.

MTCA jointly defines the term "owner or operator" to include *any* state agency with "any ownership interest . . . or who exercises any control over" a contaminated site. DNR attempts to slice this phrase into separate parts and avoid application of its plain meaning. *See* DNR's Resp. 8, 13. But the Court must apply MTCA's joint definition of "owner or operator" holistically to determine whether the plain language encompasses DNR. *See Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 839, 47 P.3d 567, *as amended on denial of reconsideration* (Aug. 13, 2002) (emphasizing "**[a] common sense reading of the phrase as a whole**" to interpret statute) (emphasis added); *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (rejecting interpretation that would "isolat[e]" words within phrase).

No Washington case has fully applied MTCA's unique "owner or operator" definition, and as described further below, the cases relied on by DNR offer limited insight. As a result, this Court's analysis should focus simply on whether, under the undisputed facts, DNR is an entity "with any ownership interest . . . or who exercises any control" by applying this key phrase in its entirety. *Dep't of Labor & Indus. v. Kinville*, 35 Wn. App. 80, 86-87, 664 P.2d 1311 (1983) (relying on "everyday" usage and common reading of plain language to interpret statutory language where "no prior decision has concentrated on the entire phrase" at issue).

2. DNR's Focus on the Omission of "the State" is Irrelevant and Misguided.

MTCA unambiguously provides that a "state government agency" is a "person" that may be liable under any statutory category. *See* RCW 70.105D.020(22), (24). Instead of addressing this reality directly, DNR diverts attention to "the State's" status under MTCA. But PR/OPG did not sue "the State." The issue in this appeal is DNR's ownership interest and control over the Site, which is evident regardless of "the State's" role.

DNR says the plain and unambiguous definition of "person," which does not include "the State," must "guide the Court's analysis." DNR's Resp. 16. This is disingenuous. DNR is not asking for an honest application of the plain language of the statute. DNR instead suggests that

the Court should *infer* from the omission of "the State" that DNR gets the benefit of the doubt and cannot be liable because it is a publically funded arm of the State. *See* DNR's Resp. 13-16.

This inference would directly contradict the language of the statute, which expressly includes a state agency in the definition of "person" for the undisputable purpose of imposing liability on state agencies that fit within the statutory categories. There is no distinction between state agencies and any other type of "person" who may be liable. Thus, if the Court relied on the omission of "the State" from MTCA to limit state agency liability, the Court would render superfluous the language specifically equating "state government agencies" with any other liable "persons."[2] *Roggenkamp*, 153 Wn.2d at 624 ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). In interpreting a statute, the Court's job is to apply the plain language of the statute, not to rely on omissions to make inferences that flatly contradict that language.

MTCA's omission of the "the State" does nothing to exempt state agencies from liability for carrying out the business of "the State" in a manner that places it within one of the categories of liable persons. The State must act through its agencies, and MTCA makes clear that those

[2] As explained further below, the Court would also have to ignore its own precedent, which treats state agencies exactly like private parties regardless of "the State's" role.

agencies are liable on the State's behalf. If, as DNR claims, the fact that an agency exists to fulfil the State's sovereign role meant that a state agency could not be liable, then state agencies could never be liable. But that is clearly not the case. *See* RCW 70.105D.020(24).[3]

3. DNR Ignores the Actual Key Difference Between CERCLA and MTCA.

PR/OPG agrees with DNR that, when MTCA differs from CERCLA, it shows a clear indication of statutory intent. *See* DNR's Resp. 14-15; App. Br. 22. DNR relies on this principle to emphasize that MTCA doesn't include "the State" but ignores that MTCA includes a different definition for "owner or operator." DNR avoids this issue because it cannot deny that MTCA was written to be broader than CERCLA.

CERCLA defines "owner or operator" to include simply any person "owning or operating" a facility. 42 U.S.C. § 9601(20)(A)(ii). MTCA was enacted eight years later and was "heavily patterned" after CERCLA. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-428, 833 P.2d 375 (1992). Thus, MTCA's drafters considered and rejected CERCLA's definition in favor of more expansive language. MTCA goes

[3] DNR has adopted contradictory, self-serving perspectives of its role. DNR desperately tries to distinguish itself from "the State" to avoid liability because statute provides that "the State" owns land at the Site in fee. *See* DNR's Resp. 17-18. But at the same time, DNR says the omission of "the State" from the definition of "person" precludes DNR's liability. *Id.* at 16. Thus, DNR is asking the Court to give it the benefit of the State's omission from the definition of person because it is inherently part of "the State," while simultaneously arguing that it cannot be liable because it is not "the State."

beyond just those "owning or operating" a site to include any person "with any ownership interest . . . or who exercises any control" over the site. RCW 70.105D.020(22).

The plain language of the CERCLA definition clearly includes a "fee" owner, even a fee owner with a small percentage of total ownership.[4] But by using more expansive language, MTCA's drafters must have intended to accomplish *more than what CERCLA accomplishes*. Since CERCLA already holds liable any "fee" owner, then MTCA's "owner or operator" definition must apply to those with something less than "fee" ownership but who still possess "any ownership interest . . . or [] exercise[] any control."

The expansion of liability beyond just "fee" owners is consistent with Washington's concept of "ownership." As explained in PR/OPG's Opening Brief, "ownership" of "property" in Washington means more than simply "fee" ownership and is more accurately represented by rights to enjoy, possess, and control. *See* App. Br. 24-26.[5] It is therefore logical that Washington's cleanup law would apply to more than "fee" owners.

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[4] *See United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3d Cir. 1993) *overruled on other grounds by United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161 (3d Cir. 2005) (confirming that owners of minor portion of site are liable for entire site).

[5] DNR fails to offer any substantive response to the binding legal authority in PR/OPG's Opening Brief regarding the nature of "ownership" and its applicability to DNR. Instead, DNR dismisses these cases as inapplicable to "the State." But PR/OPG never made any such argument regarding "the State." DNR has falsely attributed this argument to

This concept of MTCA liability is also consistent with MTCA's stated purpose. MTCA expressly provides that "[t]he provisions of this act are to be liberally construed to effectuate the policies and purposes of this act." RCW 70.105D.910. And the "policies and purposes" of MTCA are not left to conjecture. The statute's first section, titled "Declaration of policy," states that the "***main purpose***" of MTCA is to "**raise sufficient funds** to clean up 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).[6]

It is therefore completely indefensible to interpret MTCA's broad "owner or operator" definition as applicable to only "fee" owners. If "fee" ownership is the only ownership that leads to liability, as DNR argues, then both the words "any" and "interest" in the phrase "any ownership interest" are rendered superfluous. To accept DNR's position would be to negate MTCA's clear intent to expand liability and re-write MTCA's "owner or operator" definition to mirror CERCLA, even though the drafters specifically rejected CERCLA's definition.[7]

PR/OPG because DNR has no valid legal response to the legal authority actually relied on by PR/OPG.

[6] *See also Union Elevator & Warehouse Co. v. Wash. Dep't. of Transp.*, 171 Wn.2d 54, 67, 248 P.3d 83 (2011) (relying on statute's policy statement to aid interpretation).

[7] As explained in PR/OPG's Opening Brief, DNR would be liable even under CERCLA under the standard adopted by most federal courts, despite the fact that CERCLA is narrower than MTCA. App. Br. 31-32.

Having established that MTCA's "owner or operator" definition is broader than CERCLA and applies beyond "fee" owners, the Court must conclude that DNR fits within that definition. If DNR does not have "any ownership interest" here, then what non-"fee" owner would ever qualify as an "owner" under MTCA? DNR has all of the essential rights and powers of an owner at the Site, and by its own admissions, DNR is the owner in all respects with the exception of fee title. Thus, DNR must be an "owner or operator" if MTCA's expansion of liability has any effect.

4. *PacifiCorp* Supports that DNR May Not Hide Behind the State or its Status as a Public Agency.

DNR dismisses this Court's holding in *PacifiCorp Envtl. Remediation Co. v. WSDOT*, 162 Wn. App. 627, 259 P.3d 1115 (2011) because the Court in that case analyzed only "arranger" liability. DNR's Resp. 27. PR/OPG recognizes that the *PacifiCorp* court did not fully analyze "owner or operator" liability, *see* App. Br. 28, but *PacifiCorp* still provides key insights here.

This Court concluded that WSDOT's argument that it was not an "owner or operator" failed. This is not merely PR/OPG's interpretation of the case, as DNR suggests—it is a quote.[8] *See* DNR's Resp. 28-29. The

[8] "[WS]DOT argues that it is not liable under the MTCA as a matter of law because the trial court erred by concluding that [WS]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

Court also concluded in *PacifiCorp* that "the trial court did not err in ruling that [WS]DOT was liable under the MTCA **for its ownership and operation** of the DA–1 Line French drains." *Id.* at 659 (emphasis added). And these French drains were owned by the State in fee. Thus, even though the Court did not fully analyze the "owner or operator" issue in *PacifiCorp*, the Court expressly stated its disagreement with WSDOT's argument that it was not an "owner or operator."

The Court's rejection of WSDOT's argument is notable because DNR's circumstance is highly similar. *See* App. Br. 26-27. WSDOT and DNR have both argued that they cannot be an "owner or operator" for managing land owned by "the State." Thus, DNR is not the first agency to have tried and failed to hide behind the State's "fee" title. And DNR makes no attempt to distinguish itself from WSDOT, aside from claiming that *PacifiCorp* did not address "the State's unique and fundamental sovereign interest in the ownership of its aquatic lands." DNR's Resp. 27-28. But this is irrelevant. The issue here is DNR's role, not "the State's." The statute makes clear that "the State" owns aquatic lands in "fee," and DNR "manages" those lands. RCW 79.105.010. This arrangement is not materially distinguishable from the State-owned drains in *PacifiCorp*. *See* App. Br. 26-27. Given this similarity, it would be inconsistent—at the

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'arrang[er]' (RCW 70.105D.040(1)(c)) under the MTCA. **These arguments fail.**" *Id.* at 662 (emphasis added).

very least—for the Court to hold that DNR is not an "owner or operator" in light of its statements in *PacifiCorp*.

Finally, regardless of its relevance to the "owner or operator" issue specifically, the *PacifiCorp* case confirms a key proposition: MTCA treats state agencies exactly like private parties. MTCA's plain language should make it unnecessary to even address this point, but DNR spends the bulk of its brief trying to convince this Court that it deserves special treatment as a publically funded agency. But in *PacifiCorp*, the Court considered both the threshold legal issue of WSDOT's liability (which is at issue here) and, after establishing liability, WSDOT's equitable share of costs. The Court's analysis of these issues never once considers WSDOT's status as a public agency. *PacifiCorp*, 162 Wn. App. at 662-72. Further, the Court applied the exact same equitable factors in the exact same manner that they are applied to private parties. *Id.* In fact, the Court affirmed the trial court's decision to impose a large share of responsibility on WSDOT for its "recalcitrance" in failing to assist with the cleanup efforts before the lawsuit. *See id.* at 669-72.[9]

[9] DNR strangely says "[i]t is important for this Court to note that DNR is not requesting a determination of, nor need this Court address, whether a state agency can ever be considered an 'owner' under MTCA." DNR's Resp. 9. To be clear, MTCA: (1) expressly defines "person" to include a "state government agency"; (2) states that "the following *persons* are liable with respect to a facility," and identifies the current or former "owner or operator"; and (3) defines "owner or operator" to include "*any person* with any ownership interest . . . or who exercises any control." RCW 70.105D.020(22), (24); RCW 70.105D.040. Thus, any claim that a state agency cannot ever be liable as an

B. DNR's Role at the Site Serves as Proof of its "Ownership Interest."

1. DNR's Role as "Land Manager" is Precisely Why it is Liable as an "Owner or Operator."

DNR emphasizes repeatedly that statute provides it with power to only "manage," believing this absolves it of liability. For support, DNR notes that Ecology's PLP letters and settlements have identified the State as "owner" and DNR as the land manager. But Ecology's identification of DNR as a "manager" of State-owned lands only supports PR/OPG's position. It is precisely this management authority that makes DNR liable. The letters and settlements make it unequivocally clear that Ecology (and Ecology's attorneys) believes DNR is liable *specifically because* of DNR's role as "manager" of land that "the State" owns in fee. *See* App. Br. 43-45 (citing several examples from the record). DNR simply ignores and never even tries to explain why Ecology names DNR as a PLP specifically on the basis of its role as "land manager."

The legislature is aware that Ecology applies the statute in this way and has been for years. While DNR says the legislature would change the law if it thought DNR should be liable, *see* DNR's Resp. 15, the

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"owner or operator" would be frivolous. The statutory language is so clear that it is not subject to a good faith dispute.

legislature has acknowledged that DNR is already liable under MTCA without even considering changing the law. *See* App. Br. 46.[10]

2. DNR Has the Authority of a Fee Owner Over the Aquatic Lands at the Site.

DNR's "management" involves all of the powers and decision-making typical of an owner, despite DNR's claims that "the State" fulfilled this role instead. *See* DNR's Resp. 16-21. The State delegated all major functions of ownership to DNR. From its inception, DNR has had "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 1889, ch. 8, § 2 (included at CP 363) (emphasis added). As a result, DNR had (and still has) more than enough authority over the aquatic lands to constitute "any ownership interest . . . or [the] exercise[] of any control."

DNR has continually exercised the power of an owner. DNR claims that "the State" transferred tidelands, DNR's Resp. 19, but it was DNR's predecessor that reviewed and approved applications to purchase tidelands. *See* CP 220-22. And DNR has consistently exercised the rights to control, exclude, and possess by ejecting unauthorized users,

[10] DNR is not the only "land manager" who is liable under MTCA. As noted, OPG Properties was named as a PLP separately from Pope Resources, its parent company, on the basis that OPG *manages* land owned by Pope Resources. *See* App. Br. 28 n.14.

authorizing the use of certain locations for polluting activity, and asserting ownership and complete power over the aquatic lands.[11]

As Ecology has alleged repeatedly, DNR's level of interest in the aquatic lands is sufficient to establish "any ownership interest . . . or [the] exercise[] of any control" and to result in MTCA liability. The same would be true of any private party with the same level of interest. This is the only reasonable interpretation of the statute because, if DNR's ultra-management of land does not lead to liability, then only the fee title holder or a direct "operator" of polluting activity such as P&T could be liable. Such a result would contradict the statute's broad language.

DNR attempts to dismiss the nature of its authority by repeatedly emphasizing that it "can only carry out those functions directed by the Legislature." *See, e.g.*, DNR's Resp. 18. DNR apparently believes that, because "the State" gave the agency its authority, DNR itself has no real authority and cannot be liable. This is an odd argument because *every* state agency has only those powers given to it by the legislature. Under DNR's rationale, no state agency could ever be liable under MTCA because the state agencies are always exercising their authorized powers. As explained above, this reasoning contradicts MTCA's plain language,

[11] *See* App. Br. 6-12; 28-31; 36-41 (citing many examples in the record); *see also 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.").

which expressly holds state agencies liable. Moreover, Ecology has found that DNR is liable specifically because DNR is "directed by law to administer aquatic lands." CP 340 (emphasis added).

3. DNR Cannot Write Off its Claims of Ownership Over Aquatic Lands.

DNR routinely claims to own aquatic lands at Port Gamble and around the State. DNR argues that these claims do not "change[] the legal reality of DNR's role," DNR's Resp. 21, but once again, DNR falsely attributes an argument to PR/OPG. PR/OPG never claimed that DNR's assertions alter fee ownership. *See* App. Br. 31. The point is that MTCA imposes liability on those with less than fee ownership, and DNR's insistence in all other contexts that it owns the aquatic lands dramatically undermines its current claim that it does not even have "any ownership interest . . . or [] exercise[] any control."[12]

C. DNR is Liable as an "Owner or Operator" Because it "Exercised Any Control" Over Site Operations.

1. DNR Misrepresents the Proper Legal Standard.

Washington's limited "owner or operator" case law does not preclude—but in fact supports—DNR's liability as an "owner or operator"

[12] DNR claims that, when Aquatic Resources Division Manager Kristin Swenddal claimed that "we" own the aquatic lands, she actually meant "the State," not DNR. DNR's Resp. 21 n.6. If true, this merely amplifies DNR's duplicity. DNR *is* "the State" when it wants to assert power, but DNR strenuously denies being "the State" to avoid MTCA liability. Moreover, the record includes many examples of DNR expressly claiming that *DNR* owns the land. *See, e.g.*, CP 153 (Ms. Swenddal complaining that Ecology convened a meeting without "mention[ing] DNR—the owner of the bedlands").

here. In Washington's two such cases (both Division I), the facts implicated only the "operator" aspect of "owner or operator" liability, which is not the case here. DNR relies on these cases to claim that Washington courts have "specifically rejected" the idea that "authority to control" is key to "owner or operator" liability, but this is false. DNR's Resp. 31. DNR claims this is so because the court in *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), *as amended* (Apr. 24, 2000) stated that the "weight of authority strongly favors application of the actual-participation/exercise of control standard." *Id.* at 428. But DNR ignores the preceding sentence, in which the court clarified that it was adopting this standard in an attempt "to identify the appropriate standard for imposing CERCLA liability on an officer or shareholder of the corporate owner of a" contaminated site. *Id.* (emphasis added). Contrary to DNR's claim, this case did not adopt a categorical "actual-participation" test for MTCA operator liability.[13]

Additionally, DNR relies on *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006) to support its belief that Washington's "operator" standard is narrow. *See* Def.'s Resp. 16. But in

[13] Moreover, as DNR points out, the *Unigard* court "decline[d] to adopt this standard because it may be used to impose liability on those who had no knowledge of or ability to control activities at the site." Def.'s Resp. 17:9-13 (citing *Unigard*, 97 Wn. App. at 429 n.29) (emphasis added). But here, the undisputed facts establish that DNR had BOTH knowledge of and the ability to control the activities at Port Gamble. This is precisely the type of party that MTCA intended to hold responsible.

that case, the Court of Appeals 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." *Taliesen*, 135 Wn. App. at 127 (emphasis added). The court therefore relied on the very same "authority to control" test that DNR claims was rejected years earlier in *Unigard*. The court concluded that a party who drilled a hole at the direction of another had no such control. *Id.* at 127-28. By contrast, DNR had expansive decision-making control over P&T's operations through the leases and its statutory responsibility to protect the aquatic lands. *See* App. Br. 36-42.[14]

2. Federal Case Law is Not On Point or Relevant.

DNR's digression on federal case law is irrelevant for two reasons. First, DNR relies on cases from various circuits to suggest that the standard from *United States v. Bestfoods*, 524 U.S. 51, 67, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) has been adopted in all contexts, not just for veil-piercing issues. But DNR ignores that the Ninth Circuit has directly confirmed that it still follows the "expansive" "authority to control" test. *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 452 n.9 (9th Cir. 2011) (citing *Kaiser Aluminum & Chem. Corp. v.*

[14] As stated in PR/OPG's Opening Brief, DNR mischaracterizes its role at the Site by claiming that contamination resulted from P&T's activities "not under DNR's jurisdiction." DNR's Resp. 37. This claim is both irrelevant and inaccurate. *See* App. Br. 41-42.

Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992)). Importantly, when looking to CERCLA case law for guidance, the *Taliesen* court relied on the Ninth Circuit's *Kaiser* case and its broad "authority to control" standard. 135 Wn. App. at 127. Thus, *Taliesen* confirms that the federal cases cited by DNR do not represent Washington law.

Second, the cases cited by DNR involve the government either contracting for services or performing a regulatory role. *See* DNR's Resp. 33-36. They do not involve a government entity's proprietary role. DNR's proprietary role and actions as a commercial landlord uniquely implicate MTCA's requirement of "any ownership interest . . . or [the] exercise of any control." MTCA treats a state agency in this role exactly the same as a private party. *See PacifiCorp*, 162 Wn. App. at 662-72.[15]

3. DNR Mischaracterizes the Significance of its Leasing Activities.

DNR says it is "undisputed" that its "involvement . . . was limited to leasing" 72 acres and that the "only" question is whether or not the leases make DNR an "operator." DNR's Resp. 37-38. This is false.

[15] DNR further relies on a concurring opinion from a federal case to support that the "authority to control" standard is too broad because "any governmental entity has the 'authority' to exert control over a facility." DNR's Resp. 34 (citing *United States v. Township of Brighton,* 153 F.3d 307 (6th Cir. 1998). But no court would impose liability on an agency such as Ecology for failing to regulate something within its jurisdiction. However, regulatory "control" is not the same as an agency's ownership and control over a particular piece of land, such as DNR has here or WSDOT had in *PacifiCorp*.

DNR's "involvement" includes its broader proprietary interest and control over aquatic lands and filled areas throughout the Site.

Moreover, DNR's suggestion that its leasing or active involvement is the only potential source of liability directly contradicts the statute. DNR essentially argues that only certain types of "control" lead to liability, but the statute states that the exercise of *any* control is sufficient.

Further, DNR's argument would incentivize acquiescence. DNR's leases and statutory authority specifically allow the agency to "exercise control" over and direct and manage the operations in the event that P&T caused contamination. *See* CP 102-21. Under DNR's argument, the agency would only risk liability if it had increased its involvement by attempting to enforce the lease provisions or requiring P&T to lease other areas. But since DNR willingly looked the other way after knowing P&T caused pollution in the lease area and other areas without authorization, DNR believes it is exempt from liability because it didn't sufficiently "exercise" the "control" that it had over the property.

Such a standard would result in a perverse incentive for any non-"fee" owner with complete control over how land is used to *avoid* involvement and to take a "hands-off" approach. Any involvement aimed at correcting polluting operations could be construed as "actual exercise" of control. This is why the *Taliesen* court focused on the *authority* to

make *decisions*. *See* 135 Wn. App. at 127. And this is why the *Unigard* court focused on those who have "knowledge of or the authority to prevent" pollution. *See* 97 Wn. App. at 429 n.29. If you have the authority and you fail to use it in the proper manner, then you should be liable. This policy is recognized by MTCA's plain language and by the case law. Those are precisely the parties that MTCA targets with its liability scheme. But DNR's standard creates an arbitrary loophole.

D. This Court Must Give Substantial Weight to Ecology's Interpretation of MTCA.

Ecology interprets MTCA to hold DNR liable at this Site and many others. Without a logical response to Ecology's position, DNR once again falsely attributes arguments to PR/OPG. DNR says that PR/OPG "assert[s]" that DNR's settlements with Ecology show that "DNR 'owns'" aquatic lands. DNR's Resp. 22. DNR also says that Ecology naming DNR a PLP "does not legally establish that DNR actually is" liable. *Id.* But PR/OPG never argued that DNR's settlements show it is the fee owner or that Ecology's PLP determination has conclusive legal effect akin to a court judgment. The significance of Ecology's PLP determinations and settlements is that Ecology interprets MTCA to hold DNR liable. DNR rebuts arguments that PR/OPG never made as a tactic to distract the Court from what it would truly be doing if it adopted DNR's position: blatantly

rejecting the expertise of Ecology and the interpretation Ecology has used for decades to facilitate cleanups.

This Court's precedent makes it clear that such agency determinations are entitled to deference. In *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2001), this Court considered the Department of Labor & Industries' (L&I) determination that a payment system complied with Washington's Minimum Wage Act. Just like Ecology's PLP determination, L&I's determination was not part of an adjudicative process and was not a legally binding agency action subject to review. *Id.* at 205-208. And just like DNR argues here, the plaintiff in *Westberry* argued that L&I's determination was merely an "opinion" entitled to no weight. *Id.* at 206.

This Court rejected that argument. The Court deferred to L&I because regulations specifically gave L&I authority to make such determinations, meaning it was within L&I's "specialized expertise." 164 Wn. App. at 208 (citing WAC 296-128-012(1)(c)). Similarly, MTCA regulations expressly give Ecology authority to make PLP determinations.[16] There is no basis to distinguish between this case and *Westberry*, and the Court must give "substantial weight" to Ecology's

[16] WAC 173-340-500(4) (If "[Ecology] concludes that credible evidence supports a finding of potential liability, then [Ecology] shall issue a determination of potentially liable person status."); *see also* RCW 70.105D.020(26) (defining a PLP as a person "whom [Ecology] finds . . . to be liable")

"interpretation of the statutes it administers that are within the agency's specialized expertise." *Id.* at 207. Importantly, DNR offers no argument or legal authority to the contrary. As a result, DNR has conceded the point that Ecology's determination is entitled to deference.[17]

DNR also points to a 1992 Memorandum of Agreement (MOA) between it and Ecology, which DNR says recognizes that it is "up to the courts, and not Ecology" to determine DNR's liability. DNR's Resp. 23. But the MOA does not say or infer anything of the sort.[18] DNR also appears to argue that the MOA allows Ecology to name DNR a PLP despite believing that DNR has "reasonable defenses" to liability. *Id.* at 24. This is wrong. The "reasonable defenses" referenced in the MOA refer to defenses to PLP status. *See* CP 289. Thus, by naming DNR a PLP, Ecology has already determined that these defenses *do not apply.*[19]

E. MTCA's Policy Does Not Favor DNR.

DNR claims that its liability would be contrary to MTCA's policy because it is funded by taxpayers while PR/OPG was created by P&T. First, these arguments are completely irrelevant because the only issue

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[17] *See State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (holding that responding party "concede[d] this point" after failing to respond to legal argument)
[18] DNR apparently makes this point to confirm that Ecology's PLP determination "does not legally establish that DNR actually is" liable, which PR/OPG never disputed.
[19] Ecology has the legal authority to name those it believes are liable, not to create a special quasi-PLP status state agencies. That would be unlawful. *See* App. Br. 46 n.21. The parties to the MOA clearly recognized this limitation by providing: "Nothing in this agreement alters any law or regulation. It is purely a coordinative instrument." CP 284.

here is whether, as a matter of law, DNR is liable. Equitable arguments are relevant only during the "allocation" phase, after liability is established. Moreover, DNR's "policy" arguments are deeply flawed.

While admitting its irrelevance, DNR is desperate to link PR/OPG to the former operator of the sawmill, P&T, to the point of misquoting and misrepresenting facts. *See* DNR's Resp. 25.[20] As noted in PR/OPG's Opening Brief, Pope Resources was created by P&T in a spinoff transaction.[21] Pope Resources then leased property at Port Gamble to P&T in an arms-length deal. CP 60. Later, P&T and PR/OPG fought for years to impose liability on each other for this Site, which is not something financially related companies would do. CP 61; *see also* App. Br. 6.

DNR also claims "taxpayers are already contributing $7 million dollars to various projects related to the restoration of Port Gamble Bay."[22]

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[20] Before the trial court, DNR claimed simply that Pope Resources paid "no consideration" for property transferred to it by P&T. CP 243. But the tax case relied on DNR also says that Pope Resources assumed a $22.5 million mortgage. *Pope & Talbot, Inc. v. C.I.R.*, 162 F.3d 1236, 1237 (9th Cir. 1999). DNR now concedes this, but claims that the tax court ultimately valued the properties at between $46.7 million and $59.7 million. DNR's Resp. 25. Again, DNR has simply ignored parts of the case that it doesn't want to acknowledge. The case notes that the transaction also involved the exchange of Pope Resources' limited partnership shares and additional debt assumed. 162 F.3d at 1237. The amount "paid" to P&T for the properties would therefore amount to $41.5 million. *Id.* at 1241. The court's final valuation was $48.5 million based on expert testimony. *Id.* at 1242. This is within the margin of error and belies DNR's claim that P&T gave Pope Resources a bargain for Port Gamble or other properties.

[21] DNR's description of PR/OPG as an "arm" of P&T and references to P&T as PR/OPG's "predecessor" are simply false. These terms have legal meanings that are not implicated under these facts.

[22] DNR equates itself with "the State" to take credit for the State's spending but distinguishes itself from "the State" to disclaim its ownership.

DNR's Resp. 27. To be clear, none of this money is going towards cleanup.[23] The cleanup of the Bay—which is mostly DNR land—is strictly defined by the Consent Decree and is entirely funded by PR/OPG. DNR flatly refused to participate in the Consent Decree and has made no significant contribution to the cost of cleanup or restoration of the Bay.

Finally, DNR's claims that MTCA disfavors public agency liability are baseless. DNR cites just one piece of authority for this proposition—the voters pamphlet for MTCA.[24] The pamphlet simply says that MTCA "makes the polluters pay." DNR would like the Court to infer from this that publically funded agencies do *not* pay—regardless of whether they fit within a statutory category and regardless of whether they authorized, profited from, and ignored the pollution.[25]

There is, in fact, binding legal authority establishing the true policy of MTCA. As described above, MTCA expressly codified its purpose and

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[23] *See* CP 325-29. The majority of this sum simply funded upland land acquisitions for the State and/or Kitsap County. CP 329. And the remaining amounts will not be spent on cleanup or on projects that will facilitate the cleanup. CP 328-29. DNR also highlights staff time related to the Site and its participation in a dredging project with Ecology that costs less than $1 million. DNR's Resp. 27. In the past 20 years, PR/OPG has spent several million dollars and countless staff hours on cleanup, and kept the town of Port Gamble alive at a loss of more than $300,000 per year. CP 329.

[24] DNR relied on this pamphlet at the trial court but never included it in the record. It is attached to this brief for the Court's reference.

[25] If only active "polluters" paid, as DNR claims, then PR/OPG would also not be liable because it merely owns and manages land polluted by others (and in contrast with DNR, PR/OPG was not even present at the Site when most pollution occurred). The "polluters pay" mantra reflects MTCA's intent to ensure that "polluters" are held responsible, not an intent to ensure that only those who qualify as "polluters" will pay. Such an interpretation conflicts with MTCA's strict, status-based system of liability. *See* RCW 70.105D.040(2) ("Each person who is liable under this section is strictly liable . . . .").

requires that its provisions be "liberally construed" to accomplish that purpose. RCW 70.105D.910. Moreover, as Washington's Supreme Court has put it, MTCA cleanups are "paid for and performed by those **public or private entities** identified by Ecology as 'potentially liable persons.'"[26] Neither MTCA's language nor its policy differentiates between public or private entities in any way.

III. 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 January, 2016.

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OPG Properties, LLC

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[26] *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).

PROOF OF SERVICE

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

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

Edward D. Callow
Assistant Attorney General
1125 Washington Street S.E.
Olympia, WA 98504
Email: tedc@atg.wa.gov

Executed at Bellevue, Washington this 25th day of January, 2016.

Susan Bright

ATTACHMENT

1988 VOTERS & CANDIDATES PAMPHLET

EDITION ★★★★ NUMBER 2 ★★★★

WASHINGTON CENTENNIAL

Published by the Office of the Secretary of State

State General Election

NOVEMBER 8, 1988

1988 VOTERS & CANDIDATES PAMPHLET

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Seattle, Washington
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INITIATIVE MEASURE 97

TO THE LEGISLATURE

Note: the ballot title and explanatory statement were written by the Attorney General as required by law. The complete text of Initiative Measure 97 begins on page 18.

Official Ballot Title:

Shall a hazardous waste cleanup p gram, partially funded by a 7/10 of tax on hazardous substances, be ena ed?

The law as it now exists:

State law enacted in October, 1987 provides for a haza waste cleanup program in the State of Washington. The p responsibility for the cleanup of hazardous waste sites is im upon the owner or operator of the site, the person responsi

Statement for

INITIATIVE 97 MAKES THE POLLUTERS PAY

Polluters should pay to clean up their own mess. Initiative 97 would make them do that. *Polluters are forced to clean up their wastes.* If they don't, tough fines and criminal penalties will follow.

TOUGH LAWS. TOUGH FINES. NO DEALS.

Nearly every week brings news of new toxic catastrophes. *One out of six people who live in Washington could be affected by toxics.* Families around Puget Sound, in Spokane, and in Central Washington *cannot drink their water* because of chemical pollution. Washington is the second worst state west of the Mississippi for hazardous waste sites. Seeping landfills, pesticides, and petroleum products can cause cancer and birth defects. Seniors may be particularly vulnerable. The need for a tough toxics cleanup law now is clear.

THE PEOPLE'S INITIATIVE

For years irresponsible polluters fought hard to avoid a tough law. An initiative was written after polluters blocked legislation to clean up toxic waste. Thousands of volunteers worked very hard to give us the chance to clean up toxics now. *Across the state over 200,000 people signed petitions. Now you have your chance to send a strong message to polluters: You want a tough law, with tough fines and no deals.*

DON'T LET BIG CORPORATE POLLUTERS BUY THE ELECTION

Big oil and chemical companies will spend $1.5 million dollars to convince you to vote against Initiative 97. Don't be fooled. *Initiative 97 is the stronger toxic cleanup pro which will make our environment cleaner and safe today and tomorrow, for our children and grandchil*

Rebuttal of Statement against

• *Strong citizens' initiative eliminates polluters' lo holes.* It forces polluters to clean up their own mess deals. No delays. No watered-down health standards has been carefully reviewed and supported by more th groups, dozens of legislators and signed by 215,000 pe

• *Cleanups, not lawsuits.* I-97 makes cleanups hap now—not later. The initiative prohibits polluters from lawsuits that delay cleanups.

• *More money for farmers, small businesses and re cling* - to clean up our drinking water now and fo future.

Voters Pamphlet Statement Prepared by:

JOLENE UNSOELD, State Representative; JANICE NIEMI, Senator; DAVID BRICKLIN, President, Washington En mental Council.

Advisory Committee: THE REVEREND DR. WILLIAM B. C President, Church Council of Greater Seattle; LAWR KENNEY, President, Washington State Labor Council; H BURTON, Chair, Cascade Chapter Sierra Club; WEND WENDLANDT, Executive Director, Washington Public est Research Group; WANDA HAAS, President, Leag Women Voters of Washington.

posal or release, and the generator or transporter of the waste. ict liability under the law does not apply to persons who, negligence and in accordance with State and federal law, pesticides or fertilizers for the purpose of growing any crops, nursery plants, or farm animals.

The State Department of Ecology is empowered to investigate, rules, establish standards, classify substances as hazardous stances, require remedial actions, establish priorities for site ups, promote hazardous waste reduction and recycling, and ide educational programs. A scientific advisory board is to advise Department.

The person legally responsible for the cleanup of a hazardous e site must be given a reasonable opportunity by the Depart- of Ecology to develop a remedial program, meeting the Depart- standards for the cleanup of the site. The Department, before ing such plan and settlement, must give an opportunity for c comment. The plan, when approved, must be filed with the ior court; then there is a thirty-day waiting period for public ment. As part of an approved cleanup plan, the Department can y some of the costs, agree not to bring suit to compel cleanup in s of the plan, and certify the completion of the cleanup. Such oved cleanup programs are exempted from various permits that d otherwise be required by law.

The Department of Ecology can, for failure to comply with a Department order, seek from the court civil penalties of up to three times the remedial costs incurred by the State and penalties of up to $10,000 per day. The State's costs to clean up a hazardous waste site is a debt secured by a lien on the real property. The Department's orders are subject to review in court.

Private persons can sue the Department of Ecology to compel it to perform any nondiscretionary duty under this law. Private persons can also sue to compel potentially liable persons to comply with the law as well as other common-law and statutory actions. Clean-up contractors are not liable unless they are negligent or grossly negligent.

Owners who know that a significant quantity of hazardous materials has been released or spilled on their property must place a notice of that fact in the county real estate records, and must also notify the State Department of Ecology. When the Department of Ecology discovers such a release or spill, the Department is required to place a notice of such fact in the county real estate records.

The Department of Agriculture may dispose of unusable pesticides collected from licensed pesticide operators. And the Department shall implement a pesticide waste disposal program. The Department of Ecology is to adopt rules allowing the Department to

(continued on page 16.)

tatement against

I-97: FLAWED INITIATIVE MAKES FOR BAD LAW

Initiative 97 is full of good intentions, but contains ious flaws that will hurt many groups in Washington. The iative's purpose was to encourage the legislature to act. It not good law and fails to include many important public ograms, like household hazardous waste collection.

The Initiative simply did not go through the same scru- and public input that the legislature's law did. The gislature worked for three years to create a law that is fair everyone – 97B.

I-97: DELAYS AND LAWSUITS, NOT CLEANUPS

The Initiative will stop the cleanups that are already king place under 97B, the new law. Long delays will result d costs will escalate. The Initiative will result in lawsuits, deanups.

I-97: HURTS TAXPAYERS, AGRICULTURE, SMALL BUSINESSES

The Association of Washington Cities endorses Legisla- e Alternative 97B, not the Initiative. Initiative 97 will result outrageous public cleanup costs with no added protection public health or the environment.

I-97: LIKE THE FEDERAL SUPERFUND, A 99% FAILURE

I-97 is patterned after the federal superfund law that s produced eight years of costly court battles and virtually cleanup. Why replace a law that is working and resulting deanups (97B), with an initiative (Initiative 97) patterned er a federal failure?

Rebuttal of Statement for

Don't fall for I-97, a toxic scare campaign imported from California and financed by out-of-staters. The Seattle Times charges I-97 backers with "demogogery and phony one-liners," such as "make the polluters pay." 97B is the current law; it's already making the polluters pay and cleaning up toxics now. I-97 would overthrow the law and delay cleanups. Out-of-staters are funding a toxic scare campaign to overthrow the law. Keep the *best* law, vote *YES 97B.*

For more information, call (206) 448-4972.

Voters Pamphlet Statement Prepared by:

MIKE KREIDLER, State Senator; CLYDE BALLARD, State Representative; DAVE STURDEVANT, Clark County Commissioner.

Advisory Committee: DAN EVANS, U.S. Senator; VICKI MCNEILL, President, Association of Washington Cities; RAY HILL, Master, Washington State Grange; ANDREA BEATTY RINIKER, former Director, Department of Ecology; GILBERT S. OMENN, M.D., Ph.D., Chair, Scientific Advisory Board, Department of Ecology.

(Explanatory statement for Initiative Measure 97 is continued here from page 7.)

collect and dispose of household hazardous wastes. The Department provides grants to local governments for household hazardous waste collection and disposal.

The law also makes it a crime (a felony) to be guilty of toxic endangerment.

Until July 1, 1990, petroleum is not subject to the hazardous waste provisions unless it is an extremely hazardous waste or a solid waste decomposition that presents a substantial threat to human health or environment. Petroleum is, however, not exempt from cleanup orders for spills, leaks and discharges.

A State tax of 8/10 of 1% is imposed on the wholesale value of hazardous substances which includes petroleum products except for natural gas, aluminia, petroleum coke and petroleum products exported for use or sale outside the State. 53 percent of the proceeds of that tax is made available to local government and 47 percent to State government for the hazardous waste cleanup program.

The Department of Ecology is to establish fees for water discharge permits to pay the costs of monitoring such permits, but not to exceed a total of $3,600,000 for the 1987-89 biennium.

The Legislature has appropriated to carry out this program $41,600,000 for expenditure through June 30, 1989.

If neither Alternative Measure 97B nor Initiative 97 is approved by the voters, then the current law is repealed effective upon certification of the election results.

The effect of Initiative Measure 97, if approved into law:

If Initiative 97 is approved, then the existing law is repealed on March 1, 1989 and the following becomes the new law:

The primary responsibility for the cleanup of hazardous waste sites would be imposed upon the owner or operator of the site, the person responsible for the disposal or release, and the generator, or the transporter of the waste. The strict liability under the Initiative does not apply to persons who, without negligence and in accordance with State and federal law, apply pesticides and fertilizers for the purpose of growing food crops.

The State Department of Ecology is empowered to investigate, adopt rules, establish standards, classify substances as hazardous substances, require remedial actions, establish priorities for site cleanups, promote hazardous waste reduction and recycling and provide educational programs. A scientific advisory board and regional citizen advisory committees are to advise the Department.

Before the Department finds that a person is potentially liable, the person is to be notified and allowed an opportunity for comment. No settlement can be made by the Department of Ecology with any person who is potentially liable for the cleanup of hazardous waste sites unless the Attorney General agrees to the settlement and the Department finds, after a public hearing, the settlement would lead to a more expeditious cleanup of the hazardous substances. A settlement agreement must be entered as a court order. A settlement may later be reopened if factors are discovered which present a previously unknown threat to human health or the environment. The Department can provide financial assistance only in situations which would result in a more expeditious cleanup and prevention of an unfair economic hardship.

The Attorney General can seek from the court, for failure to comply with a Department of Ecology order, civil penalties of up to three times any costs incurred by the State as a result of persons' refusal to comply and penalties of up to $25,000 a day. The Department's actions are reviewable in court.

Private persons can sue the Department of Ecology to compel it to perform any nondiscretionary duty under this law. Private persons can also pursue common-law and other statutory actions. Cleanup contractors are held to strict liability but if the contractor is by Ecology, the State can be indemnified by the State.

The law also makes it a crime, a felony, to knowingly t treat, store, handle or dispose of a hazardous substance in of this law. Petroleum in underground storage tanks, in co with federal, State and local laws, is not subject to this la there is a release from the tank. However, petroleum is subje hazardous waste provisions.

A State tax of 7/10ths of 1% is imposed on the wholes of hazardous substances which includes petroleum product for natural gas and aluminia. 52.86 percent of the proceeds o is made available to local government and 47.14 percent government for the hazardous waste cleanup program. these funds can be used for solid waste incineration.

The Department of Ecology is to establish annual fees f discharge permits and the maximum fee for municipalities exceed five cents per month per residence contributing to th pality's waste water system.

The Legislature's appropriation of $41,600,000 for the h waste program will expire March 1, 1989 and expenditures date will require a legislative appropriation.

(Explanatory statement for Alternative Measure 97B contin page 9.)

collect and dispose of household hazardous wastes. The De provides grants to local governments for household hazardo collection and disposal.

The law also makes it a crime (a felony) to be guilty endangerment.

Until July 1, 1990, petroleum is not subject to the h waste provisions unless it is an extremely hazardous waste waste decomposition that presents a substantial threat t health or environment. Petroleum is, however, not exe cleanup orders for spills, leaks and discharges.

A State tax of 8/10 of 1% is imposed on the wholesal hazardous substances which includes petroleum products e natural gas, aluminia, petroleum coke and petroleum pro ported for use or sale outside the State. 53 percent of the of that tax is made available to local government and 47 p State government for the hazardous waste cleanup prog

The Department of Ecology is to establish fees for w charge permits to pay the costs of monitoring such permit to exceed a total of $3,600,000 for the 1987-89 biennium

The Legislature has appropriated to carry out this $41,600,000 for expenditure through June 30, 1989.

If neither Alternative Measure 97B nor Initiative 97 is by the voters, then the current law is repealed effect certification of the election results.

The effect of Alternative Me 97B, if approved into law:

If Alternative Measure 97B is approved, then the e enacted in October, 1987 will remain the same. For an exp that law, see the description above under the caption "The Now Exists" **(beginning on page 8).**

DAVIS WRIGHT & TREMAINE

January 25, 2016 - 2:34 PM

Transmittal Letter

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