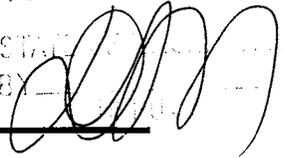


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COURT OF APPEALS

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STATE OF WASHINGTON
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NO. 39699-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PACIFICORP ENVIRONMENTAL REMEDIATION COMPANY, a
Delaware corporation; and PUGET SOUND ENERGY, a Washington
corporation,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, a
department of the State of Washington,

Appellant.

**APPELLANT WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION'S AMENDED OPENING BRIEF**

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I. INTRODUCTION

The trial in this case was about the cause of recent sediment contamination in the Thea Foss Waterway (Waterway) and which parties should be responsible for the Waterway cleanup costs. Because the overwhelming evidence showed that it was caused by stormwater and not coal tar that had infiltrated a highway drainage system, the trial court erred when it found the Washington State Department of Transportation (Transportation) liable for paying a significant portion of the Waterway cleanup costs that were incurred by plaintiffs PacifiCorp Environmental Remediation Company (PacifiCorp) and Puget Sound Energy (PSE; together “the Utilities”).

II. ASSIGNMENTS OF ERROR

1. In its November 10, 2008 order, the court erred when it granted the Utilities’ motion for partial summary judgment ruling that Transportation was liable for releases from the South A Street drainage systems.
2. The court erred in finding that “Defendant ignored repeated requests from Ecology to stop the discharge of PAHs to the Waterway from the DA1 line and also failed to respond to voicemail or email until Ecology ‘elevated’ the request to higher management.” Finding of Fact (FF) C.11.

3. The court erred in finding that “[i]n March 2003, approximately 11 years after Defendant found coal tar material was infiltrating the DA-1 line, Defendant completely severed the connection between the DA-1 line and the City’s storm sewer system.” FF C.12.

4. The court erred in finding “[a]n undetermined amount of PAHs was released into the Waterway from discharges from the DA-1 line.” FF C.14.

5. The court erred in finding that “Defendant unreasonably delayed implementing a solution to the releases from the DA-1 line to the Waterway.” FF C.15.

6. The court erred in finding that “Defendant caused releases of PAHs into the Waterway during SR 509 construction.” FF D.4.

7. The court erred in finding that “Defendant’s decision to refuse to engage in negotiations with Ecology became a barrier for moving the cleanup project forward.” FF H.3.

8. The court erred in finding that “[i]n order to get the DA-1 line removed from service, Ecology employees were forced to elevate the situation to upper management.” FF H.4.

9. The court erred in finding that “Defendant engaged in persistent, uncooperative behavior with Ecology.” FF H.5.

10. The court erred in finding that “Mr. Costa opined . . . that the increase of PAHs were not solely due to the DA-1 line,” FF I.17.

11. The court erred in finding that “[t]he testimony of Mr. Dalton and Mr. Costa illustrates the difficulty in distinguishing various releases of hazardous substances into the Waterway.” FF I.19.

12. The court erred in finding that “[b]ased on the testimony of Mr. Dalton and Mr. Costa, the Court finds that there was some increase of PAHs in the Waterway that were caused by Defendant’s construction of SR 509 and construction and operation of the DA-1 line. . . . The court further finds that hazardous substances were released into the Waterway by the actions of the Plaintiffs, Defendant, and others.” FF I.20.

13. The court erred when it applied the incorrect burden of proof, requiring defendant Transportation to disprove any liability rather than requiring plaintiffs Utilities to prove Transportation’s share of liability.

14. The court erred in concluding that “[a] ‘release’ or series of ‘releases’ of hazardous substances, as defined in RCW 70.105D.020(20), was caused by the actions of the Defendant.” Conclusion of Law (CL) A.2.

15. The court erred in concluding that “[t]he SR 509 bridge and the DA-1 line are ‘facilities,’ as defined in RCW 70.105D.020(4).” CL A.4.

16. The court erred in concluding that “Defendant is an ‘owner or operator,’ as defined in RCW 70.105D.020(12), of facilities, including the SR 509 bridge and the DA-1 line.” CL A.5.

17. The court erred in concluding “Defendant was an ‘owner or operator,’ as defined in RCW 70.105D.020(12), of facilities, including the SR 509 bridge and the DA-1 line, at the time of disposal and release of hazardous substances from such facilities into the Waterway.” CL A.6.

18. The court erred in concluding that “Defendant possessed hazardous substances and arranged for their disposal at the facilities, including the Waterway.” CL A.7.

19. The court erred in concluding “Defendant is liable with respect to the Waterway under RCW 70.105D.040(1)(a), (b), and (c).” CL A.8.

20. The court erred in concluding that “Plaintiffs are entitled to recover remedial action costs, including contribution, declaratory relief, and reasonable attorneys’ fees and expenses.” CL A.12.

21. The court erred when it failed to make necessary conclusions regarding the quantity of hazardous substances released, if any; the toxicity and the risk to human health and the environment posed by those materials; and whether the releases created the need for remedial action.

22. The court erred by failing to determine Transportation’s share of remedial action costs before applying equitable factors or offsetting collateral payments previously made to Utilities and their assignors.

23. The court erred in concluding that “Mr. Dalton and Mr. Costa’s testimony establish that there was some increase of PAHs caused by Defendant’s construction and operation of the DA-1 line and the construction of the SR 509 bridge project,” CL B.2.

24. The court erred in concluding that “Defendant discharged enough PAH contamination into the Waterway to effect the total concentration of PAHs in the Waterway and to require that remedial action costs be incurred.” CL B.3.

25. The court erred in concluding that “Defendant knew that the DA-1 line was an ongoing method of transport of hazardous substance to the Waterway and failed to act upon their knowledge.” CL B.5.c.

26. The court erred in concluding that “[a]fter installing the DA-1 line, Defendant delayed taking actions necessary to stop the discharge of hazardous substances into the Waterway to the point of nearly delaying the remedy of the Waterway.” CL B.6.

27. The court erred by concluding that “Defendant demonstrated very little cooperation with any other agencies to prevent the harm. Defendant ignored facts as well as phone calls and chose to fight any notion of responsibility rather than work cooperatively to stop the discharge of hazardous substances from the DA-1 line into the Waterway.” CL B.7.

28. The court erred in concluding that “Defendant’s fair share of the past cleanup costs amounts to \$6 Million.” CL B.8.

29. The court erred in stating that it considered collateral payments reimbursing the Utilities and their assignors when those payments do not appear to have been taken into account in determining the amount to allocate to Transportation. CL B.9.

30. The court erred in awarding \$6 million in past cleanup costs to the Plaintiffs without identifying the basis for the award.

31. The court erred in entering a declaratory judgment awarding future cleanup costs of the entire Waterway to the Utilities.

32. The court erred in awarding the Utilities their attorney fees.

33. The court erred in denying Transportation's motion for reconsideration after a U.S. Supreme Court decision set out a significant change in the interpretation of "arranger for disposal" under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which is worded nearly the same as the "arranger for disposal" definition under the Model Toxics Control Act (MTCA).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should partial summary judgment on liability have been precluded because whether coal tar or stormwater had caused the Waterway contamination was an issue of fact? (Assignment of Error No. 1.)

2. Are the court's findings and conclusions that Transportation was liable supported by substantial evidence, and should the court have reconsidered this conclusion in light of the recent Supreme Court ruling that limited the interpretation of "arranger for disposal" under federal law that is very similar to MTCA? (Assignment of Error Nos. 18, 19, 20, 21, 24, 33.)

3. Were the court's findings and conclusions that Transportation's SR 509 construction work caused a "release of hazardous substances" to the Waterway supported by substantial evidence when no witness testified to a release, and no other evidence supported the finding? (Assignment of Error Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 33.)

4. Were the court's findings and conclusions that Transportation's construction and operation of the South A Street drain systems caused an increase in polycyclic aromatic hydrocarbons (PAHs) in the Waterway supported by substantial evidence when the only evidence that the court considered regarding the chemical characterization of the Waterway contamination was that of Transportation's expert, who testified that the contamination came from stormwater runoff and not from the coal tar that infiltrated the drain systems? (Assignment of Error Nos. 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 28, 31.)

5. Should the court have awarded the Utilities \$6 million in cleanup costs based only on the finding that there was a release of a hazardous substance, despite finding that there was "very little credible evidence" regarding the amount of hazardous substances released, and without making the findings required by RCW 70.105D.080 and *Seattle City Light I* or calculating Transportation's base share before considering

equitable factors? (Assignment of Error Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 28, 30, 32, 33.)

6. Were the court's findings and conclusions that Transportation was "recalcitrant" and "uncooperative" in its dealings with the Washington State Department of Ecology (Ecology) supported by substantial evidence when Transportation had been working cooperatively with Ecology for nearly 20 years at the former gas plant site? (Assignment of Error Nos. 2, 3, 5, 7, 8, 9, 22, 25, 26, 27.)

7. Should the court have ordered Transportation to pay to the Utilities a significant part of the City of Tacoma's (City) cleanup costs plus two percent of future costs, when there was no evidence of impact to the City Work Area? (Assignment of Error Nos. 19, 20, 21, 22, 23, 24, 28, 30, 31.)

8. Before awarding contribution, should the court have calculated whether the Utilities and their assignors paid for any cleanup costs they did not cause and then offset the collateral payments obtained by the Utilities and the assigning parties, so as to avoid double reimbursement and transfer to the taxpayers of the cleanup costs caused when the Utilities' predecessors left the contamination on the site? (Assignment of Error Nos. 20, 21, 22, 29, 30.)

IV. STATEMENT OF THE CASE

A. Transportation's SR 705 Construction

In 1984-87, Transportation built SR 705, an elevated highway along the Thea Foss Waterway (then known as City Waterway). During highway planning, the City of Tacoma requested that Transportation extend South A Street underneath SR 705. Report of Proceedings (RP) at 783-84, 871, 873-76; Ex. 210, at 2; Ex. 949, at 1. South A Street has no function as a state highway. RP at 783, 867; Ex. 210, at 2; Ex. 949, at 1; *see* Appendix A for a map of this area.

Prior to construction, Transportation discovered contaminated soil and learned that a manufactured gas plant had previously operated in that location. RP at 777; Ex. 29 at TF-PSE 82061661-68. The plant generated coal tar waste, which had caused the soil contamination. Ex. 29, at TF-PSE 82061661-68. Coal tar contains hazardous substances known as polycyclic aromatic hydrocarbons, or PAHs. RP at 1170; Ex. 29, at TF-PSE 82061661-68. PAHs are also found in other materials, including creosote, other petroleum products, vehicle exhaust, woodsmoke, and stormwater runoff. RP at 1175-78, 1199-201, 1207-09, 1234-35.

Because of the terrain, Transportation had to excavate the contaminated area to build South A Street. RP at 777, 784-85, 857. Transportation cleaned up the construction area under the supervision of

Ecology, removing all contaminated soil and replacing it with clean soil. RP at 778-83, 785, 791-99; Exs. 957, 960, 961, 963, 964, 979. Transportation completely removed coal tar sources on the construction site, and if a contaminated pipe could not be completely removed, Transportation filled it with concrete to prevent the coal tar from entering the site. RP at 793. Transportation sent the coal tar waste to a permitted landfill for proper disposal, constructed concrete vaults onsite to hold the less contaminated soil, and decontaminated equipment to avoid spreading contaminants. RP at 779-81, 792-94, 796. This cleanup work cost Transportation about \$5.3 million. CP at 1896 (FF B.5).

Because South A Street had a high water table, Transportation installed a french drain in the clean soil under South A Street to prevent damage to the street and to prevent flooding on this emergency route. RP at 785-89, 799, 868-69, 871; Ex. 925. The street also included standard stormwater drainage. RP at 785-86, 788, 860, 868, 870-71, 877. The french drains emptied into the stormwater catch basins, and the storm drainage in turn emptied into the City's storm sewer system. RP at 643-44, 712, 786, 788, 860, 862-63, 866, 881, 912; Exs. 7, 259. This part of the City's storm sewer ultimately empties into the head of the Thea Foss Waterway. *Id.*

In 1992, Ecology found coal tar in one of the catch basins. RP at 629-32, 638-39, 857-58. Ecology then discovered that the french drain had become contaminated with coal tar, which had apparently migrated from offsite through the clean soil into the french drain and then into the catch basin. RP at 646-48, 704-06. After discussions with Transportation, Ecology directed the City to plug the connections between the french drain and the catch basins to prevent further migration into the storm sewer. RP at 858, 860-61; Ex. 100 at 4.

In 1993, PSE and PacifiCorp, Transportation, and the City of Tacoma all signed an agreed order with Ecology to cleanup contaminants under South A Street. RP at 858-59; Ex. 100.¹ The City told Transportation not to remove the french drain while the City investigated whether the french drain could be used as part of a remedial action for the coal tar contamination; Ecology did not direct otherwise. RP at 728, 859-60, 911; Ex. 103, at TF-PSE 82063053, 82063068, 82063079-82. By 1996, that option had been rejected, and Transportation removed the french drain and replaced the contaminated catch basins during the SR 509 bridge construction project. RP at 662-63, 857-863, 865-66. Despite that work, coal tar was later found to have again infiltrated the remaining storm drain system. RP at 666-67, 866-67, 870.

¹ The Utilities are successors to the former owners and operators of the gas plant. RP at 103; Ex. 100, at 2.

The City insisted on keeping the street open to traffic. RP at 871-72, 899-900; Ex. 952. This meant that Transportation still needed to maintain a storm drain system for South A Street to prevent flooding, increasing the cost of stopping infiltration.² RP at 867-73, 911; Exs. 209, 949, 951; *compare* Ex. 203 *with* Ex. 941. Transportation prepared several designs for reconstructing the street to both drain stormwater and alleviate the coal tar contamination, all costing several hundred thousand dollars. RP at 871-79; Exs. 209, 210, 941, 949, 951. At the direction of Ecology, Transportation asked the City and the Utilities to fund their share of the plan, but all refused. RP at 872-79, 910-11; Exs. 210, 951.

The Environmental Protection Agency (EPA) had set a deadline to control potential upland contamination sources before cleaning up the Waterway, which was part of the Commencement Bay Superfund site. RP at 678, 880; Ex. 259. With that deadline imminent and no source of funds available for a comprehensive fix, Transportation was forced to take “interim” action by removing a section of the City’s storm drain system, cutting off the South A Street drainage from the storm sewer system. RP at 881-884; Exs. 259, 261. After that time, the street flooded and had to be closed during storms. RP at 884-85; Ex. 261.

² Although South A Street was a city street and not a state highway, the City of Tacoma refused to take responsibility for it because of the contamination. RP at 670-71; Ex. 210, at 2; Ex. 949, at 1.

B. Transportation's SR 509 Construction

In the early 1990s, Transportation began planning to relocate SR 509 to a new bridge crossing the Waterway. RP at 816-18; Exs. 805, 806. Knowing that the Waterway was part of a Superfund site, Transportation worked with EPA and Ecology to obtain approval of the design. RP at 816-18, 885-87; Exs. 805, 806, 807, 833. Transportation also signed an agreed order with Ecology under which Ecology supervised the removal of hazardous materials. Ex. 833.

To comply with the agreed order and prevent contamination from entering the Waterway, Transportation (1) hired an experienced construction inspector solely to supervise the contractor's compliance with environmental requirements; (2) educated Transportation and contractor staff about the importance of not spreading contamination; and (3) specified in the contract how the contractor must remove contaminated material without allowing it to escape into the Waterway. RP at 818-21, 829-31, 887-88. Transportation had multiple safeguards and backup plans to prevent, contain, or cleanup any contamination or spill before it reached the Waterway. RP at 831-53.

Before excavating to build the bridge piers in the Waterway, Transportation's contractor installed caissons to prevent the spread of contamination. RP at 822-31. The contractor excavated material from the

caissons before filling them with concrete. *Id.* Transportation required specific procedures to prevent contaminated material removed from the caissons from entering the Waterway. *Id.*

C. Utilities' Actions and Claims

In 2003, the Utilities signed a consent decree with EPA agreeing to cleanup the sediments in the head of the Waterway. CP at 832-58; RP at 188, 190-93; *see* Ex. 821, at 2. The Utilities also settled with the City of Tacoma and other liable parties. CP at 860-85; RP at 196; *see* Ex. 821. Both the consent decree and the settlement agreement defined the head of the Waterway as the Utilities' Work Area. CP at 832-85; *see* Ex. 821, at 2. The City agreed to cleanup the remainder of the Waterway, the City Work Area, under a separate consent decree. RP at 188-91; *see* Ex. 821, at 3. The City and most other settling parties assigned their potential contribution claims against Transportation to the Utilities. CP at 860-85; RP at 199-200; *see* Ex. 821, at 7-9.

D. Summary Judgment Motions and Trial

The court ruled on summary judgment that Transportation was technically liable for releasing some amount of PAH from the drain systems to the Waterway, but that the Utilities would still be required to prove that this release caused the Utilities to incur cleanup costs. CP at 1724-26, 1829; RP at 38. The court also ruled that Transportation

was not liable as an owner of any facility and was not liable for substances included in routine highway stormwater runoff. CP at 1718-20, 1829.

1. Contamination sources.

At trial, the Utilities' expert, Matthew Dalton, opined that because the head of the Waterway sediment PAH contaminant levels increased after the 1986 installation of the french drain, that the increase in PAH must be caused solely by the french drain. CP at 1836 (FF I.6-I.8); RP at 545-47, 575-76. Previously, however, when he had prepared reports during the cleanup, Mr. Dalton had concluded that stormwater, not the french drain, was the source of the PAH in the head of the Waterway. CP at 1836 (FF I.10); RP at 463, 488-90, 495-96, 533-36, 540-44; Ex. 815, at 2, 6, 11-13; Ex. 835, at 1-13; Ex. 830, at 1-17. The trial court found that Mr. Dalton's opinion at trial was a change from his opinion expressed in the 1999 report. CP at 1836 (FF I.8-I.10).

Transportation called expert chemist Helder Costa, who responded by analyzing how contaminant levels changed over time throughout the Waterway, expanding Mr. Dalton's analysis to areas that could not be affected by the french drain. RP at 1183, 1227-49. But unlike Mr. Dalton, Mr. Costa also analyzed the actual chemical nature of the PAHs in the sediments to determine their source. He did so by analyzing (1) the extent to which exposure to air, light, and water had "weathered" the sediment

PAH samples, to determine if the sediment PAH came from a fresh source of coal tar or from stormwater (RP at 1183, 1193-94, 1197-202, 1205-06, 1255-67), and (2) a ratio of two individual PAHs found in the sediment, fluoranthene and pyrene, which has different ranges for different sources of PAH and can be used to identify which potential PAH source contributed to the sediment contamination (RP at 1207-09, 1211-12, 1217-22, 1267-88). Mr. Costa then concluded that the coal tar observed in the drain system was not the source of the increase in Waterway sediment PAH, but rather that stormwater runoff caused the increase. RP at 1253-54, 1266-67, 1288-89.

Mr. Costa found further support for his conclusion in a national study of sediment PAH concentrations in lakes. This study showed similar trends in sediment PAH concentrations in Lake Ballinger just north of Seattle, which does not have an industrial contamination source but rather is impacted by stormwater runoff. RP at 1690-95; Ex. 1058.

2. Other reimbursements received by the Utilities and Assignors.

The Utilities and Transportation stipulated to the amounts of several collateral payments that reimbursed the Utilities or their assignors for remedial costs they paid above their own fair share. The City of Tacoma, one of the assignors, received \$24,700,000 from Ecology and

\$11,857,102 from its insurers reimbursing cleanup costs. CP at 1779-81. Other assignors received approximately \$4.5 million in insurance reimbursement for cleanup costs. Sealed “Stipulation to Admission of Aggregate Assigning Party Insurance Evidence” filed 12-4-08; Sealed Exs. 1049, 1049A; RP at 1870. PacifiCorp received insurance reimbursements for cleanup sites including the Thea Foss Waterway that covered 69 percent of past and estimated future costs for all those sites. *See* Sealed “Stipulation re: Insurance Evidence” filed 11-25-08; RP at 1870. Applying that 69 percent reimbursement rate to PacifiCorp’s claimed cleanup costs, PacifiCorp’s insurers reimbursed \$7,767,477 of PacifiCorp’s Thea Foss Waterway cleanup costs. *See* Ex. 288, at CD 1000614. PSE received insurance reimbursements for cleanup sites including the Thea Foss Waterway that covered 58 percent of past and estimated future costs for all those sites. *See* Ex. 1028, at 8-9; Ex. 1030A; RP at 1870. Applying that 58 percent reimbursement rate to PSE’s claimed cleanup costs, PSE’s insurers reimbursed \$2,440,023 of PSE’s Thea Foss cleanup costs. *See* Ex. 288, at CD 1000614.

The trial court awarded the Utilities \$6 million of their cleanup costs, as well as 2 percent of all future monitoring and maintenance costs incurred by both the Utilities and the City. CP at 1843 (FF C.1-C.2); CP at 1882. After the court’s decision but before the final judgment was

entered, the United States Supreme Court issued its decision in *Burlington Northern Santa Fe Ry. Co. v. United States*, in which the Court set a stricter standard for establishing “arranger” liability under CERCLA. Because CERCLA cases may be used by state courts in interpreting MTCA, Transportation asked the court to reconsider its liability ruling. The motion to reconsider was denied.

V. SUMMARY OF ARGUMENT

The trial court noted in its findings and conclusions that Transportation had been determined to be a liable party on summary judgment, but that the ruling “did not establish whether the release had caused remedial action costs.” CP at 1829. The trial court’s finding of liability was erroneous because the inferences were not drawn in favor of Transportation. At trial, the evidence did not support a conclusion that Transportation was an “operator” or “arranger,” or that any Transportation activity “caused remedial action costs.” Rather, the court found that there was “very little credible evidence” about the amount of material released. CP at 1840-41 (CL B.3).

The testimony of Transportation’s expert and the contemporaneous reports prepared by the Utilities’ expert both established that the increased Waterway contamination came from stormwater runoff, and not from any Transportation activity. The court erred by incorrectly placing the burden

of proof on Transportation and by failing to make the plaintiff Utilities prove the contribution elements this Division previously established.

In addition, the court erred by concluding that Transportation was “recalcitrant” in spite of a nearly 20-year history of working cooperatively with regulatory agencies. The court also erred by failing to consider that the Utilities and their assignors had previously been reimbursed for all they were entitled to in a contribution action, which was the cleanup costs they did not cause. As a result, the court’s award improperly and inequitably makes Washington taxpayers pay for cleanup costs actually caused by those parties.

VI. ARGUMENT

A. Summary Judgment – Standard of Review

Review of a summary judgment order is de novo, and the appellate court applies the same standards and engages in the same analysis as the lower court, considering only the same written materials submitted to the trial court. RAP 9.12; *Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9, 12 (2006); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party is entitled to judgment when “there is no genuine issue as to any material fact,” a reasonable factfinder reviewing all the undisputed facts would be able to reach only one conclusion, and, therefore, “the moving party is entitled to judgment as a matter of law.”

CR 56(c); *Wilson*, 98 Wn.2d at 437. A court considers the facts and the reasonable inferences from those facts in the light most favorable to the non-moving party. *Wilson*, 98 Wn.2d at 437.

B. Trial – Standards of Review

This court must determine whether substantial evidence supports the challenged findings of fact. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). There is substantial evidence only if the record contains enough evidence to persuade a reasonable, rational, and fair-minded factfinder that the challenged finding is true. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008); *Hegwine*, 162 Wn.2d at 353. When a trial court has not made findings in favor of the party with the burden of proof, then the lack of a finding is a finding *against* that party. *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 546, 547, 874 P.2d 868 (1994).

A true factual finding is an assertion that something has, is, or will be happening without any assertion as to the legal effect of that event. *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974). The legal effect of a particular fact is a legal conclusion (“ultimate fact”). *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954-44, 29 P.3d 56 (2001).

Conclusions and issues of law are reviewed de novo. *Hegwine*, 162 Wn.2d at 353. Determination of which legal standard applies to the facts is also an issue of law. *Rasmussen*, 107 Wn. App. at 954. Determining whether the facts and findings justify the court's conclusions of law (including ultimate fact "findings") is also an issue of law. *Hegwine*, 162 Wn.2d at 353; *Rasmussen*, 107 Wn. App. at 954-55, 957.

Mislabeled conclusions and findings are nevertheless reviewed using the standard appropriate to their actual character: substantial evidence for factual findings and de novo for legal conclusions. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

C. Transportation did not "Arrange to Dispose of a Hazardous Substance" when it Constructed the State Highways or Their Drainage Systems

The Model Toxics Control Act (MTCA) defines who is liable for a release of hazardous substances at a particular facility. Liable parties include the current owner or operator of the facility as well as those who, at the time of the release of a hazardous substance, owned or operated the facility, arranged to dispose of the hazardous substance at the facility, or transported the hazardous substance to the facility. RCW 70.105D.040(1).

The trial court erred in ruling on summary judgment that Transportation was a liable party because of the South A Street drain system because there were unresolved issues of fact. The Utilities' own

expert witness had previously stated that the drains had no measurable effect on sediment quality. CP at 1287, 1406-08. That fact contradicted the Utilities' argument that Transportation was liable. The facts set out at trial then supported the conclusion that neither the drains nor the SR 509 bridge construction should be a basis of liability.

1. Under the standard set out in *Burlington Northern, Transportation did not “arrange for disposal of a hazardous substance.”*

The United States Supreme Court recently addressed requirements for arranger liability under CERCLA in *Burlington Northern and Santa Fe Ry. v. United States*, ___ U.S. ___, 173 L.Ed.2d 812, 129 S. Ct. 1870 (2009).³ In that case, the site owner had spilled pesticide at the facility during deliveries from the supplier. The district court and Ninth Circuit held that the supplier was an arranger, because spilling some pesticide was inherent in delivering it. *Burlington Northern*, 129 S. Ct. at 1876-77. The Court reversed, holding that a party is not an arranger unless it intended to dispose of a hazardous substance. *Burlington Northern*, 129 S. Ct. at 1880.

³ Federal cases interpreting CERCLA are persuasive authority for interpreting similar statutory language in MTCA. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992). This Division has previously used federal CERCLA cases to interpret the scope of MTCA's arranger liability. *City of Seattle v. Washington State Dep't of Transp.*, 98 Wn. App. 165, 172-73, 989 P.2d 1164 (1999) (*Seattle City Light I*).

Although the supplier was aware that “minor, accidental spills” occurred, the supplier had taken numerous steps to prevent spills. *Id.* The Court determined that these facts did not prove that the supplier intended spills to occur. *Id.*

The Court further held that mere knowledge of spills did not prove intent to dispose of a hazardous substance. Knowledge can be evidence of intent, but “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal.” *Id.* at 1880.

2. Transportation did not arrange for disposal when it installed the South A Street drainage system.

There is no evidence that Transportation *caused* the release of coal tar into the soil in the first place; rather, the evidence established that it was released during the operation of the manufactured gas plant. CP at 1838 (FF A.1, A.2, A.4); Ex. 100. The only question is whether Transportation’s actions are evidence of an objective intent to dispose of hazardous substances.

Like the supplier in *Burlington Northern*, Transportation became aware of releases, but took multiple steps to prevent and then stop the releases. It built the drain system (and the city street) in completely clean soil. Transportation built the drain to prevent collapse or flooding of the City street, not to remove contamination, which had already been

removed. Before building the drains, Transportation also spent considerable time and millions of taxpayer dollars cleaning up the gas plant site under Ecology supervision, at a time when few parties were doing CERCLA cleanups. In fact, the trial court concluded that Transportation “did not intentionally transport this waste, but attempted to manage the hazardous substances” that were found during construction. CL B.4.b; CP at 1907.

Neither do Transportation’s actions after the coal tar infiltration was discovered show intent to dispose of hazardous substances. Transportation worked with the City and Ecology to appropriately deal with the contamination. The City plugged the french drain connections to the catch basins, but kept the drain in place for possible use in a cleanup project. When that option was discarded, Transportation removed the french drain and rebuilt part of the storm drain. To prevent re-contamination, it removed or grouted contaminated pipes.

When the coal tar infiltrated the storm drain system, even without the french drains, Transportation planned construction that would keep the City’s street functioning while stopping infiltration. When the City and the Utilities refused to pay their share, Transportation was forced to remove a section of storm drain connecting the South A Street storm drain and the City’s storm sewer, even though the street flooded during storms.

None of these actions show an intent to dispose of hazardous substances. They demonstrate an intent to comply with state regulations, work with state regulators, and conduct a proper, thorough cleanup. Transportation cannot be considered an “arranger for disposal.”

The court erred in concluding that Transportation was an “arranger,” and erred in refusing to reconsider its decision after *Burlington Northern*. Also, the court concluded that Transportation did not intend to “transport” hazardous substances, and this conclusion does not support a legal conclusion that Transportation was an arranger. CL B.4.b; CP at 1907.

3. The drainage system can only be a basis for arranger liability in this case, not “owner or operator” liability.

The trial court concluded that the french drain/storm drain system, SR 705, and SR 509 were all “facilities” under RCW 70.105D.020(5). CP at 1838. The court also concluded that Transportation was liable as an “owner or operator” of those facilities under RCW 70.105C.040(1)(a) and (b). *Id.* However, the relevant facility for determining a defendant’s category of liability is the one for which cleanup costs are being sought. The Utilities sought contribution for the cost of cleaning up the Waterway, not for the cost of cleaning up the highways or the drain systems. Whether those places are facilities and whether Transportation

owns/operates them is therefore irrelevant to determining Transportation's relationship to the Waterway, the facility for which the Utilities were recovering costs. Conclusions of Law A.4, A.5, and A.6 are erroneous.

On the Utilities' motion, the trial court excluded evidence of costs that Transportation paid to cleanup these same highways and drains, holding that those costs were irrelevant to the Waterway cleanup costs and therefore could not offset the Waterway costs. CP at 1728; RP (Nov. 3, 2008) at 7-15. The court thus excluded cleanup costs for the sites that Transportation actually operated. Consistently, the only cost evidence submitted by the Utilities was for the Waterway itself. *See, e.g.*, RP at 955-56. Therefore, the court erred in ruling on summary judgment and in concluding after the trial that Transportation was liable for the Waterway cleanup costs because it "owned or operated" the South A Street drainage system.

Also, operator liability "only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992). Transportation did not have this degree of control over the coal tar that migrated into the drain and thus cannot be an "operator."

4. Transportation did not arrange for disposal when it built the SR 509 bridge.

Transportation's intent in building the SR 509 bridge was to build part of the state highway system, not to dispose of hazardous substances. There was no evidence that Transportation had any objective intent to dispose of hazardous substances. Again, the evidence was to the contrary, as Transportation took numerous precautions, under Ecology supervision, to *prevent* any release. Building a state highway using the best means available for protecting the Waterway is not evidence of an intent to dispose of hazardous substances and cannot be the basis of arranger liability. The court therefore erred in concluding that Transportation was an arranger because of this construction.

D. The Court's Findings That the SR 509 Bridge Construction Caused Releases of Hazardous Substances to the Waterway Were not Supported by the Evidence

In Findings of Fact D.4 and I.20, the trial court found that construction of the SR 509 bridge resulted in releases of hazardous substances to the Waterway. CP at 1833, 1837. As findings of ultimate fact, these should be treated as conclusions of law, along with Conclusion of Law B.2. None were supported by the evidence at trial.

1. There was no evidence that a release occurred during SR 509 construction.

The only witnesses who were present during the SR 509 bridge construction were Dean Moberg, the Transportation project engineer who supervised construction, and Marv Coleman, Ecology's site manager. Mr. Moberg detailed the steps that Transportation took to prevent any Waterway contamination. Mr. Coleman did not testify that the bridge construction released any hazardous substances to the Waterway. Mr. Dalton speculated about releases but admitted he lacked personal knowledge and was not on the site until after construction was complete. RP at 517-21. The Utilities simply failed to prove that Transportation spread the pre-existing contamination at the SR 509 construction site. Finding of Fact D.4 is not supported by substantial evidence.

2. The SR 509 construction was done with a high degree of care.

The court also concluded that the SR 509 construction work was done with a "high" "degree of care." Conclusion B.6; CP at 1842. A party doing construction work in a contaminated area may become liable if it mishandles the contaminated material. *See, e.g., Kaiser Aluminum*, 976 F.2d at 1341-43 (contractor was potentially liable under CERCLA when it spread contaminated soil in uncontaminated areas). But a person is not liable under MTCA if the contamination results from the act or

omission of a third party, so long as the person handles the material with utmost care. RCW 70.105D.040(3)(a)(iii). There are no MTCA cases that define “utmost care.” Electrical transmission cases generally treat it as a high duty of care that is expected of a person or entity with specialized expertise handling dangerous material or equipment. *See, e.g., Martinez v. Grant Cy. P.U.D. No. 2*, 70 Wn. App. 134, 137, 851 P.2d 1248 (1993).

In this case, Transportation presented *uncontested* evidence from the construction supervisor that it handled the contaminated material encountered at the SR 509 site as a party with a high level of expertise would be expected to—that is, with utmost care. Transportation’s expert also testified that there was no evidence that the construction affected the sediment PAH level. RP at 1241. The trial court’s conclusion that Transportation handled the abandoned coal tar with a “high” “degree of care” equates to a conclusion that Transportation acted with “utmost care.”

No substantial evidence supports the findings that contamination reached the Waterway during SR 509 construction. But even if it did, under RCW 70.105D.040(3)(a)(iii), the Utilities, not Transportation, caused the release when they abandoned the coal tar at the gas plant site; Transportation cannot be liable when it treated substances released by a third party with utmost care.

E. The Court's Findings and Conclusions that Transportation's Activities Contributed to Sediment Contamination and Caused Cleanup Costs is not Supported by Substantial Evidence

At trial, the overwhelming quantity of evidence proved that stormwater runoff, not coal tar, caused the increases in Thea Foss sediment PAH levels. The court found the testimony of Transportation's expert, Helder Costa, to be credible and discounted the testimony of Utilities' expert, Matthew Dalton, as being in conflict with his earlier reports. Therefore, the record did not contain enough evidence to convince a reasonable factfinder that coal tar from the South A Street drains caused any increase in sediment PAH levels. Thus, substantial evidence does not support those findings.

The Utilities' expert, Mr. Dalton, who had worked at only two other manufactured gas sites (also owned by the Utilities), assumed that because the increase in sediment PAH levels occurred at the same time that the french drain was in service, that the additional PAH must have come from the french drain. CP at 1835-36 (FF I.2, I.6-I.8).

PAHs are some of the chemicals that are found in coal tar and stormwater runoff. The observation of an increase in the total concentration of these constituent chemicals does not identify which source these chemicals came from. To do that, Mr. Costa, who had worked at over 30 similar sites (CP at 1837, FF I.16), looked at three

different lines of evidence to determine whether Mr. Dalton's assumption was correct, and concluded that it was not. Rather, the increase in PAH was due to an increase in contamination from urban stormwater runoff, and not from coal tar. While Mr. Dalton supported his conclusion with a mere correlation, Mr. Costa analyzed the chemical characteristics of the sediment PAH. Mr. Costa's testimony was the only testimony from a credible witness on the chemical source of the PAHs.

1. **The changes in PAH levels over time do not support a conclusion that the PAH came from coal tar; rather, they indicate that it came from stormwater.**

Mr. Costa explained that accurately analyzing changes in contaminant levels over time requires either regularly sampling the same location or examining a core sample. RP at 1227. He reviewed several Waterway core samples collected during the site investigation and found that PAH levels increased over time throughout the Waterway, beyond the area potentially impacted by the South A Street drains. RP at 1248-49. He concluded that there was a regional effect on the Waterway. RP at 1249.

Mr. Costa also relied on a study by the United States Geological Survey that concluded that increased stormwater contamination from urban growth caused higher sediment PAH levels in several lakes around the country. Ex. 1058; RP at 1692-95. This study included Lake

Ballinger just north of Seattle. The authors compared increases in sediment PAH levels over time, measured in sediment cores, to increases in average daily traffic in the surrounding area. The increases in PAH levels, particularly at Lake Ballinger, correlated with increases in traffic. During the same time period, Pierce County traffic increased by 49 percent and traffic around Lake Ballinger increased a nearly identical 50 percent. Ex. 321; Ex. 1058 (Figure 4). The PAH increase in Lake Ballinger were very similar to those at Thea Foss. Ex. 1058 (Figure 3). As Lake Ballinger had no industrial source of PAH contamination, this study strongly suggests that a region-wide increase in stormwater PAH caused the increase in Waterway sediment PAH, not the coal tar in the South A Street drains.

The Utilities also relied on a decrease in sediment PAH levels following the 1986-96 increase that appeared to correlate with changes made to the South A Street drain systems. But Mr. Costa identified the same increase and decrease in sediments throughout Thea Foss and in the Lake Ballinger sediments, areas well beyond the influence of the South A Street drains. RP at 1694; RP at 1248; Ex. 1058 (Figure 4). Whether changes in weather, traffic volumes, or other air quality impacts such as woodstove use contributed to this increase and subsequent decrease is unknown. *See* RP at 1649-52. What is known is that the pattern was not

unique to the area adjacent to the drains—the head of the Thea Foss Waterway—but rather was part of a regional trend. As such, substantial evidence does not exist in the record to support the court’s finding that the coal tar in the South A Street drains increased Waterway sediment PAH contamination.

2. The “weathering characteristics” of the sediment samples indicate that stormwater deposited the PAH.

Next, Mr. Costa examined the “weathering” of the various Waterway sediment samples as compared to that of the coal tar found in the South A Street drains. PAH compounds “weather” as they are exposed to water, air, or sunlight. When that happens, the lighter molecular weight PAHs (LPAH) tend to evaporate or to dissolve in water, leaving behind a greater proportion of the higher molecular weight PAHs (HPAH). This ratio of lighter to heavier PAH (LPAH/HPAH) indicates how weathered a particular sample is. A very low ratio indicates a very weathered material; a higher ratio indicates a less weathered material that has been less exposed to the environment.

The PAHs in stormwater are very weathered, due to the forces that they have been subjected to. Sediment PAH caused by stormwater will be considerably more weathered and thus have a much lower ratio than sediment PAH caused by a fresh coal tar source that has been protected

from the environment, such as that found in the South A Street drains. If the drains were carrying their less-weathered coal tar to the Waterway sediment, then it would make the sediment samples less weathered, in other words, have a higher ratio. RP at 1263-67.

Mr. Costa compared the weathering ratios of the Waterway sediment samples collected in 1984-86 (before the South A Street drain installation) with the samples collected in 1994-96 (after the drain installation). He expected that if a fresh coal tar source caused the increased PAH levels, the 1994-96 samples would be less weathered than the 1984-86 samples. However, he discovered that the later samples were actually *more* weathered than the earlier ones, demonstrating that stormwater, not coal tar, was the source of the PAH in those sediment samples. By itself, this evidence disproved the Utilities' correlation theory that the South A Street drains caused the increase in PAH. RP at 1267.

3. The fluoranthene to pyrene ratio of the various samples indicate that stormwater caused the sediment PAH increase.

Merely noting an increase in sediment PAH does not reveal the outside PAH source, but analyzing the chemical components of the actual sediment PAH can. PAHs include a large number of different aromatic hydrocarbons, including fluoranthene and pyrene. The ratio of these two compounds is relatively constant for each type of PAH source. Coal tar

(like that produced at the gas plant) has a ratio between .6 and .8; stormwater has a ratio between .9 and 1.2. RP at 1208-09. The ratio for a sample that is a mixture of the two will fall between those two ranges. RP at 1221. Mr. Costa explained that he has used this ratio at numerous sites, and that scientists commonly rely on it to distinguish sediments with a coal tar source from sediments with a stormwater source. RP at 1207.

Mr. Costa calculated the ratios for sediment samples taken prior to the drain installation (1984-86) and compared them to the ratios for sediment samples collected after the drain installation. If coal tar from the drains was causing the increase in PAH in the Waterway sediment, then the fluoranthene-to-pyrene ratios for the later sediment samples should have been lower than the ratios for the earlier sediment samples because the ratio for coal tar is lower than it is for stormwater. However, the ratios were higher, demonstrating that stormwater caused the PAH increase, since stormwater's ratio is higher. RP at 1286-88.

Mr. Costa also reviewed some of the data produced by Mr. Dalton for the Utilities during the cleanup planning. One of these was a map of the head of the Waterway showing both the stormwater outfalls and the "Standard Chemical Area," a known coal tar contaminated area. Ex. 835 (Figure 17). The map also shows fluoranthene-to-pyrene ratios plotted for the various sample locations. Mr. Costa noted that the ratios in the

vicinity of a known coal tar source on the west bank of the Waterway were in the range expected for coal tar. He noted a similar set of ratios in the vicinity of another known coal tar seep under the SR 509 bridge. But the fluoranthene-to-pyrene ratios for sediment samples further away from those sources were in the stormwater range, indicating that stormwater caused the PAH increase in Waterway areas not impacted by the two known coal tar sources. RP at 1679-81.

Mr. Costa also analyzed data from a sediment core sample collected in the head of the Waterway during cleanup planning. The more recently deposited sediments had increasingly higher ratios, indicating an increasing influence from stormwater over time rather than coal tar. Ex. 835 (Figure 16); RP at 1278-79. Thus, every analysis of the actual chemistry and source characteristics of Waterway sediments showed that stormwater caused the increases in Thea Foss sediment PAH levels, not the coal tar found in the South A Street drains.

During his many years as the Utilities' consultant, Mr. Dalton authored several reports. In his September 14, 2000 report, Mr. Dalton noted that the PAHs found in a sediment trap in the head of the Waterway had fluoranthene-to-pyrene ratios in ranges that were "indicative of stormwater." Ex. 835, at 5. Mr. Dalton went on to state in this report:

While the DA-1 line⁴] may have caused the release of oily material containing PAHs to the head of Thea Foss, the releases do not appear to have substantially impacted bottom sediment quality.

Comparison of sediment trap data with Waterway sediment data indicates a strong similarity in sediment quality and supports the finding that *stormwater discharge is a primary source of sediment contamination*.

Ex. 835, at 5 (emphasis added); RP at 534-35.

So Mr. Dalton's earlier work at Thea Foss agreed with Mr. Costa's analysis of the source of the increased PAH levels in the Thea Foss sediment. Both experts used the same scientifically accepted source ratio. Both concluded that, except for areas near the coal tar seeps, the PAH source was stormwater and not coal tar.

Despite this agreement, the trial court made conflicting causation findings regarding the source of sediment PAH. The court made a "non-finding" that the expert testimony showed it was hard to distinguish among potential sources of Waterway PAH. CP at 1837 (FF I.19). The trial court also found that there was "very little credible evidence" regarding "the amount" of PAH released by Transportation. CP at 1840-41 (CL B.3). Logically, these findings cannot provide a basis to

⁴ The term "DA-1" referred to the center survey line of South A Street on the SR 705 construction plans. It came to be used to describe alternately the french drain system, the storm water collection system, or both. For clarity, we are using the specific terms "french drain" or "storm drain" to more accurately describe the changes in the system over time.

make Transportation (and the taxpayers) pay half the Utilities' costs. Yet the trial court also made conflicting findings that the South A Street drains released PAH to the Waterway and increased the PAH in Waterway sediments. Moreover, as the above summary reveals, the only causation evidence supported findings that PAH sources can be distinguished and that the stormwater, not coal tar, caused the PAH increase in the Waterway.

The court erred in finding that Mr. Costa testified that "the increase of PAHs were not solely due to the DA-1 line, but also to stormwater runoff." CP at 1903 (FF I.17). Mr. Costa testified rather that the evidence he reviewed disproved Utilities' contention that the drains caused the PAH increase, and that there was no basis for allocating any costs to Transportation. RP at 1288-89.

No physical or chemical analysis of actual Waterway sediments supported the trial court's findings that coal tar from the South A Street drains or SR 509 construction caused any PAH increase in the head of the Waterway. As the trial court found, the Utilities' expert testified merely that the timing of the increase in PAH in the head of the Waterway coincided with the operation of the South A Street drains. CP at 1836 (FF I.6-I.8). Transportation presented actual scientific causation evidence, determining where the sediment contamination came from by analyzing

the sediment sample results. Coincidence is not causation, and no reasonable factfinder could find that a correlation proved causation in the face of overwhelming contrary causation evidence.

Were this a jury verdict, this court could conclude that the jury had simply chosen to believe Mr. Dalton and to disregard Mr. Costa. *See, e.g., Harrison v. Whitt*, 40 Wn. App. 175, 179, 698 P.2d 87 (1985). But the trial court entered specific findings that contradicted its ultimate finding of fact that coal tar from South A Street caused an increase in Waterway PAH levels. Review of the court's overall findings on expert testimony reveals that the court found Mr. Costa more consistent and credible than it did Mr. Dalton. The challenged causation findings thus lack support.

To summarize, the crucial issue was causation: which contaminant source caused the increase in Waterway sediment PAH? Mr. Costa presented the only credible causation evidence, concluding that stormwater was the source. Substantial evidence does not exist to support findings that Transportation caused any increase in Waterway PAH, despite Mr. Dalton's correlation testimony. *See, e.g., Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 941-42, 640 P.2d 1051 (1982) (jury found written contract did not exist despite its admission as exhibit because one party testified to signing involuntarily; substantial evidence did not support the jury's finding). A

reasonable factfinder who credited Mr. Costa's testimony, as the trial court did, could agree that the PAH increase and drain operation were correlated in time but could not reasonably find that the drain operation *caused* the PAH increase.

Of course, the trial court's findings that Transportation caused a release of hazardous substances into the Waterway sediments and created the need for a cleanup are actually findings of ultimate fact paralleling the statutory elements. As such, they are actually conclusions of law, reviewed de novo to determine whether true factual findings support them. *See Leschi*, 84 Wn.2d at 283; *Rasmussen*, 107 Wn. App. at 954-55, 957. But the trial court did not make those necessary findings, nor could they be supported with substantial evidence. For example, the trial court did not make—and could not have made—any finding regarding a particular spill or spills during construction of SR 509. And the trial court did not make—and could not have made—any finding that PAH in the sediments was chemically linked to the PAH discovered in the french drain. Without such specific findings, the findings of ultimate fact that Transportation released a hazardous substance (CL A.2, A.6, A.7; FF I.20) are not supported and must be reversed.

F. The Trial Court Applied the Wrong Burden and Standards of Proof when it Determined that the Utilities were Entitled to Recover Remedial Action Costs, and the Trial Court's Findings do not Support its \$6 Million Award

Proof of liability for a release is merely proof of one of several elements required to obtain contribution for cleanup costs under RCW 70.105D.080.⁵ RCW 70.105D.080; *City of Seattle v. Washington State Dep't of Transp.*, 107 Wn. App. 236, 240, 26 P.3d 1000 (2001) (*Seattle City Light II*); *City of Seattle v. Washington State Dep't of Transp.*, 98 Wn. App. 165, 174-77, 989 P.2d 1164 (1999) (*Seattle City Light I*); see *Union Station Assoc., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1218, 1225-26 (W.D. Wash. 2002).

In *Seattle City Light I*, Division Two held that although the plaintiffs established that the defendant was liable for a release, they did not prove that the release caused a need for remedial action. *Seattle City Light I*, 98 Wn. App. at 174-77. Thus, plaintiffs failed to prove that the defendant should contribute to the remedial costs. *Id.*

In that case, Division Two identified the additional elements after review of RCW 70.105D.080. Because the plaintiff bears the burden of proving it is entitled to contribution, it must prove all the elements.

⁵ The statute authorizes “a private . . . claim for contribution . . . against any other person liable under RCW 70.105D.040” but only “for the recovery of remedial action costs.” RCW 70.105D.080. A court may adjust that recovery “based on such equitable factors as the court determines are appropriate.” *Id.*

Seattle City Light I, 98 Wn. App. at 175-76. The contribution statute limits recovery to those releases that caused plaintiff to incur specific remedial action costs; therefore, plaintiff must prove that the defendant's release caused the need for a remedial action. RCW 70.105D.080; *Seattle City Light I* at 175-76 (plaintiff must prove "that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment."); *see also Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 133-34, 144 P.3d 1185 (2006) (plaintiff could not recover for removing soil that did not require MTCA cleanup).

To meet this burden, the plaintiff must prove defendant's release independently threatened human health or significantly contributed to the threat created by other releases at the facility. Evidence of quantity and toxicity are relevant. *Seattle City Light I*, 98 Wn. App. at 175. A plaintiff can meet its burden by proving the absolute or comparative quantity and toxicity of the specific substances released by the defendant or by some other method, but must somehow meet this burden. *Id.* at 175-76.

Importantly, Division Two held that the plaintiff must prove the defendant caused a specific share of actual remedial action costs *before* the trial court can begin using equitable factors to adjust allocation of costs

between or among the parties.⁶ *Id.* at 176. Thus, the trial court cannot equitably allocate costs to the defendant upon mere proof that defendant released some quantity; it must first establish defendant's fractional share of responsibility and cost when compared to releases by the plaintiff and others. *See Seattle City Light I*, 98 Wn. App. at 175-78; *see also Taliesen*, 135 Wn. App. at 139-41; *Car Wash Enterprises, Inc.*, 74 Wn. App. at 548 (in both cases, trial court established fractional shares of cleanup costs). That base fractional share can then be adjusted using equitable factors. If there is no "base share," then there is no basis to equitably allocate costs to that defendant.

In this case, the trial court granted partial summary judgment to the Utilities, ruling that Transportation was liable under RCW 70.105D.040(1) for releasing PAH to the Waterway. Consistent with *Seattle City Light I*, the trial court stated that establishing liability did not establish whether that release caused remedial action costs. CP at 1829. But the trial court's findings simply revisit the liability issue, finding that an unknown amount of PAH from Transportation's drain systems reached the Waterway. FF C.11, C.12, C.14, C.15, I.20; CL B.2, B.3, B.5.c, B.6.

⁶ "We . . . hold that *before* a court may equitably allocate remedial action costs . . . , the party seeking contribution . . . must demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment." *Seattle City Light I*, 98 Wn. App. at 176 (emphasis added).

Even if these findings had been supported by substantial evidence, they would not entitle the Utilities to contribution. The trial court found that the Transportation drains released “[a]n undetermined amount of PAHs” (FF C.14), that the conflicting expert testimony made it hard to determine how much Transportation released as compared to other releases (FF I.19), that the Transportation drains caused “some increase of PAHs in the Waterway” as part of releases caused “by the actions of the Plaintiffs, Defendant, and others” (FF I.20 and CL B.2), and that “there is very little credible evidence” regarding the amount of hazardous waste released by Transportation (finding labeled as CL B.3). Significantly, the trial court made no finding regarding the quantity or toxicity of Transportation’s release or of the releases by other liable parties. It made no finding that Transportation’s release created or significantly contributed to a threat to human health.

The Utilities bore the burden of proving the missing disputed findings in order to obtain contribution. On appeal, the absence of specific findings regarding required contribution elements means that the trial court found *against* the Utilities on those issues. *See Car Wash Enterprises*, 74 Wn. App. at 546, 547. The Utilities therefore failed to carry their burden, and this court should reverse.

Despite the Utilities' failure to establish that Transportation's release actually caused remedial action costs, the trial court ordered Transportation to pay a portion of those costs to the Utilities. To do so, the trial court misapplied MTCA and entered erroneous conclusions of law. In Conclusion of Law A.8, the trial court concluded that Transportation was liable under RCW 70.105D.040(1). No conclusion indicates that Transportation's release threatened human health or caused a specific or distinct need for remedial action, but Conclusion of Law A.12 nevertheless declares that "Plaintiffs are entitled to recover remedial action costs," By awarding remedial action costs on a bare showing of liability, Conclusion A.12 conflicts with RCW 70.105D.080 and with Division Two's holding in *Seattle City Light I*.

In Conclusion of Law B.3, the trial court concluded that Transportation "discharged enough PAH . . . to effect the total concentration of PAHs in the Waterway and to require that remedial action costs be incurred." But the court erred because the facts and findings did not justify the legal conclusion. The court admitted it could not determine how much PAH Transportation actually discharged. The court also failed to find that Transportation's release had any effect on human health or the environment. And the court did not make any

findings regarding total Waterway PAH or how much was contributed by each party, necessary prerequisites for Conclusion of Law B.3.

By allowing recovery on a bare showing of any release, Conclusions of Law A.8 and A.12 also allow private contribution plaintiffs to recover based on joint and several liability, another error of law. RCW 70.105D.080; *Union Station*, 238 F. Supp. 2d at 1225. Moving directly to consideration of the equitable factors without first requiring the Utilities to prove that Transportation caused a base share of the costs also improperly shifts the burden of proof to Transportation because the equitable factors require Transportation to distinguish its own contributions. *See* CL B.2.

The trial court also erred when it failed to calculate Transportation's base share of cleanup costs *before* applying the equitable factors, such as the degree of cooperation with regulatory agencies. Instead, the trial court apparently based its \$6 million award in part on this equitable factor without determining that Transportation was responsible for a percentage of actual response costs. There was thus no valid basis to "adjust" that amount using equitable factors.

The Utilities failed to meet their burden. The court therefore erred when it concluded that the Utilities were entitled to remedial action costs

by equitably allocating costs without a basis to award a base share of costs, and by awarding \$6 million in costs.

G. The Trial Court Erred in Finding that Transportation was “Recalcitrant” in Spite of Uncontroverted Evidence of Nearly Twenty Years of Working with Regulatory Agencies in the Cleanup of a Site that Transportation did not Contaminate

The court need not reach this issue unless it concludes that substantial evidence supported the trial court’s findings regarding the source of increased Waterway PAH levels.

Transportation’s involvement with the gas plant site began in 1984 when it discovered coal tar contamination while collecting borings needed for the design of SR 705. The SR 705 construction included a large cleanup project that cost Transportation over \$5 million and was supervised by Ecology. The SR 509 project also involved significant cleanup that was also supervised by Ecology under an agreed order. Transportation worked with Ecology, the City of Tacoma, and the Utilities for years in developing solutions for the South A Street drains after they were infiltrated by the coal tar left on the site by the Utilities’ predecessors. Despite a nearly twenty-year history of effort and costs, the trial court found that Transportation was “recalcitrant” because a staff member delayed in returning phone calls and emails from an Ecology staff member over approximately a three-month period in 2003.

Many of the court's findings of fact regarding this issue are not supported by the evidence, or reflect an incomplete picture of the evidence. As summarized in the Statement of the Case, *supra* at 12-13, Transportation worked extensively with the City and the Utilities to develop a solution that would allow continued storm drainage and safe use of South A Street. But the City and the Utilities refused to help fund that solution, and Transportation lacked the funds to do so itself. When time ran out, the connection between the street's storm drain system and the City storm sewer had to simply be severed, causing periodic flooding closure. While severing the storm drain connection cost less than \$50,000, the evidence established that a proper resolution of the problem would have cost several hundred thousand dollars.

The trial court's error arises largely from the failure to distinguish the french drain system and the storm drain system, and lumping them together under the incorrect description of "DA-1 line."⁷ FF C.3; C.11, C.12, C.14, C.15, H.4. By failing to distinguish between the french drain, which was plugged in 1992 and removed in 1996, and the storm drain, which was partially replaced in 1996 and disconnected in 2003, the court

⁷ The term "DA-1" referred to the center line of South A Street (a connection between the former location of South A Street and Dock Street) on Transportation's construction plans. RP at 784.

ignores the work that Transportation did to correct the problem over eleven years' time. FF 9.

The uncontroverted facts showed that Transportation made significant efforts and expenditures over many years to solve the problem and to involve the parties who were responsible for it—the City that wanted the street in the first place, and the Utilities whose predecessors had left the contamination on the site. The court erred in concluding that Transportation was uncooperative. CL B.7.

The “cooperation” factor is considered an “equitable” factor to use in allocation. The court’s complete disregard of nearly twenty years’ worth of costly work by Transportation and focus on the actions of one individual over a short time period was inequitable, and was in error.

H. The Court Erred in Apportioning a Significant Amount of the City’s Cleanup Costs When There was no Evidence of an Impact on the City’s Work Area Caused by Transportation Activities

The trial court allocated \$6 million in cleanup costs to Transportation, but did not set out how the court arrived at that number. Thus we cannot tell how much was a portion of the Utilities’ costs, how much was a portion of the City’s costs, and how much was an adjustment based on the court’s finding that Transportation was recalcitrant. The trial court also awarded the Utilities two percent of *all* future costs incurred by

either the Utilities or the City, based on the City's assignment of its right to sue Transportation.

The City could not assign to the Utilities any more than it had. *Havsy v. Flynn*, 88 Wn. App. 514, 519, 945 P.2d 221 (1997). Had the City chosen to sue Transportation for cleanup costs for its work area, it would have had to prove that Transportation activities impacted the sediment in that area. The City spent more than \$100 million cleaning up its work area. Ex. 288, at CD 1000614; RP at 945-50.

The Utilities' expert, Mr. Dalton, allocated costs that he believed Transportation was responsible for in both the Utilities' Work Area and the City Work Area. He allocated a total of about \$660,000 to Transportation for the City Work Area. Exs. 304, 305. Transportation's expert, Mr. Costa, allocated nothing to Transportation for the City Work Area. Therefore, without considering the other problems with Mr. Dalton's testimony, his allocation of \$660,000 was the only evidence that was before the court of any impact to the City Work Area by Transportation. An allocation any greater, including the two percent of all future City costs, is not supported by the evidence.

I. The Trial Court Failed to Calculate the Excess Costs for Which the Utilities Could Recover and then Failed to Properly Offset Those Excess Costs with Collateral Payments to the Utilities and Assignors

As plaintiffs seeking contribution for cleanup costs, the Utilities could not recover cleanup costs that they actually caused. *See, e.g., Basic Management, Inc. v. United States*, 569 F. Supp. 2d 1106, 1124 (D. Nev. 2008). The Utilities and their assignors are themselves liable parties, responsible for most Thea Foss remedial action costs. A contribution plaintiff can only recover for any costs it paid *above* its own fair share and not for any part of that fair share itself.

The Utilities and their assignors could not recover anything from Transportation without first proving their own share of the cleanup costs *and* also proving that they paid “excess costs” above that fair share. But the trial court made neither finding. By entering Conclusion of Law A.12 that “Plaintiffs are entitled to recover remedial action costs” without first making those findings, the trial court made an error of law. The absence of the two findings must be construed as findings against the Utilities, that is, findings that they did *not* pay more than their fair share. *See Car Wash Enterprises*, 74 Wn. App. at 546, 547. Without a basis for the award, reversal is required.

But even if the trial court had found that the Utilities and their assignors had paid some specific amount of excess Thea Foss remedial action costs, the Utilities could recover from Transportation only those excess costs for which third parties, such as insurers, had not already reimbursed them. Any third party payments offset the excess costs that the Utilities might otherwise recover. *See Basic Management, Inc.*, 569 F. Supp. 2d at 1123-25; *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728, 765-66 (E.D. Tex. 2006). The collateral source rule does not apply in an environmental contribution action to prevent such an offset.⁸ *See Id.*

Collateral payments are applied against the excess costs—rather than total costs paid—because it is only the excess costs for which the Utilities and assignors are not responsible and liable. If the excess cost amount has already been reimbursed, the Utilities cannot force another liable party to pay that amount again or to pay the Utilities’ own fair share of the costs. If the Utilities have been fully reimbursed for the amount of *excess* costs they and their assignors paid, then any contribution obtained from Transportation is a double recovery—paying the Utilities to pollute—even if the Utilities have not been reimbursed for *all* remedial

⁸ The trial court so ruled prior to trial. CP at 1727-29; RP (Nov. 3, 2008) at 39-42. That unappealed ruling binds this court as the law of the case. *See Ralls v. Bonney*, 56 Wn.2d 342, 343, 353 P.2d 158 (1960).

action costs. This is because, as liable parties, the Utilities and their assignors are not entitled to reimbursement for *all* costs.

At the very most, the Utilities and their assignors paid approximately \$36.4 million in excess costs.⁹ Calculation of this amount requires reference to a sealed item so it is not set forth here but could be provided. Even this generous estimate of excess costs was completely reimbursed by third party payments, leaving nothing to recover.

As summarized in the Statement of the Case, PacifiCorp received approximately \$7.75 million in insurance reimbursement, and PSE received approximately \$2.4 million in insurance reimbursement. One assignor, the City of Tacoma, received collateral payments totaling more than \$36.5 million. And other assignors received more than \$4.5 million.

The combined offsets total more than \$51 million. If, despite those stipulated collateral payments, the Utilities are allowed to recover \$6 million from Transportation, they will have been fully reimbursed for all of their costs, and will be inequitably transferring to Washington taxpayers \$6 million of their own fair share of the remedial action costs.

⁹ This total was not found by the trial court and is based on Plaintiffs' own evidence regarding total cleanup costs, the percentage of those costs attributable to non-settling parties, and stipulations specifying cleanup costs paid by non-assigning liable parties. Ex. 288; RP at 1038, 1047-48, 1059; CP at 1777-78; sealed "Stipulation re: Collateral Contribution from BNSF" filed 12-04-08.

The collateral payments have already more than reimbursed the Utilities and their assignors for any excess costs they paid. No award was justified.

J. Transportation Should be a Prevailing Party under RCW 70.105D.080 and Therefore is Entitled to Attorney Fees

The prevailing party in a MTCA contribution action is entitled to recover its attorney fees and actual litigation costs at trial and on appeal. RCW 70.105D.080; *Seattle City Light II*, 107 Wn. App. at 240; *Dash Point Village Ass'n v. Exxon Corp.*, 86 Wn. App. 596, 608-09, 937 P.2d 1148 (1997). Because the contribution claim fails, Transportation will be the prevailing party. *See Seattle City Light II*, 107 Wn. App. at 240. This court should reverse the trial court's fee and cost award, and instead order the Utilities to pay Transportation's fees and costs in both the trial court and on appeal. RAP 18.1(a), (b); RCW 70.105D.080.

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VII. CONCLUSION

For the foregoing reasons, Transportation requests that the Court of Appeals reverse the judgment entered by the trial court on July 31, 2009, reverse the summary judgment granted on November 10, 2008, and order judgment in favor of Transportation.

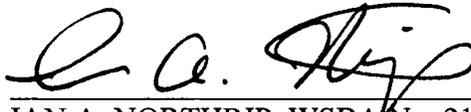
Originally submitted February 17, 2010.

AMENDED brief respectfully submitted May 11, 2010.

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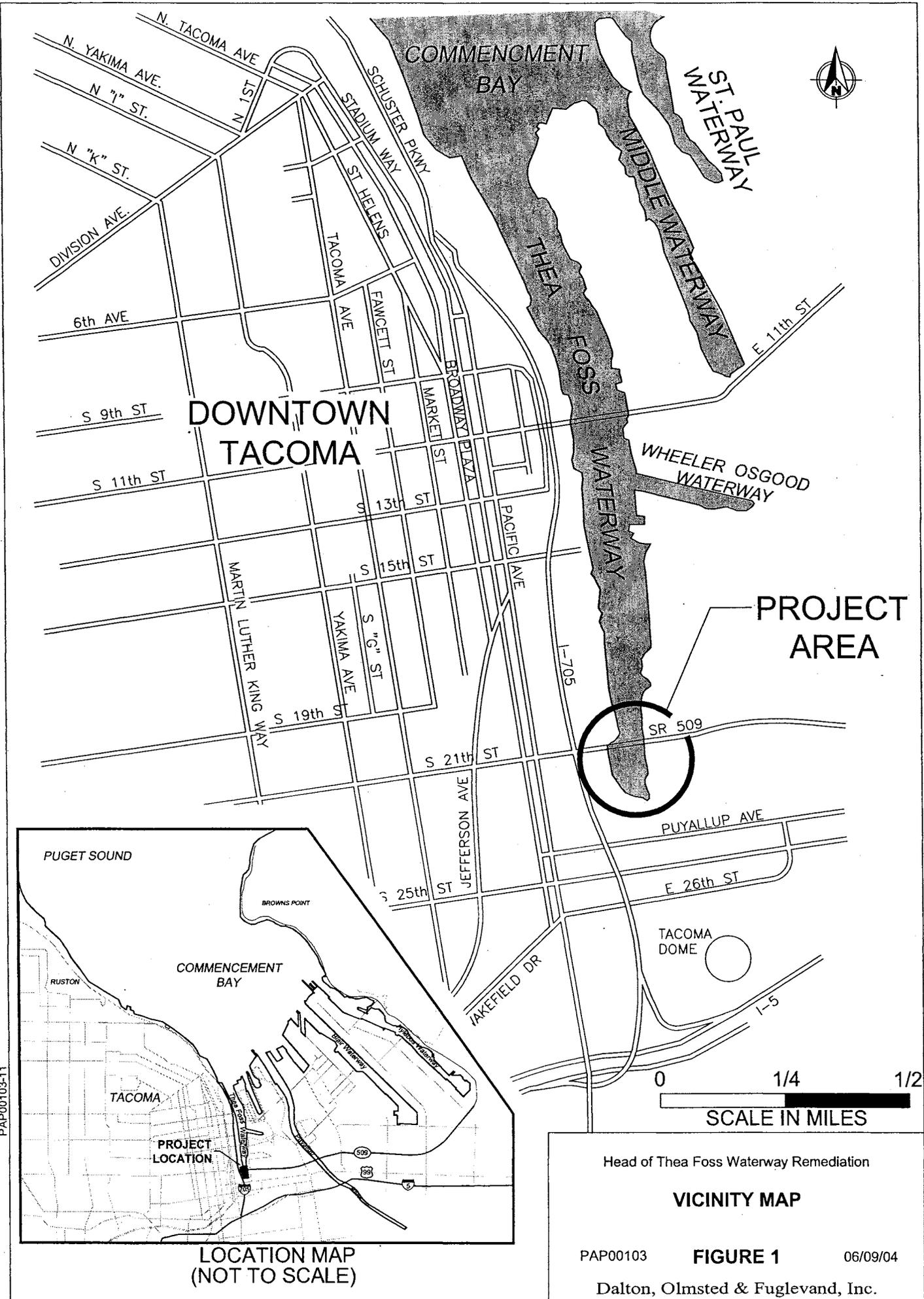


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Head of Thea Foss Waterway Remediation

VICINITY MAP

PAP00103

FIGURE 1

06/09/04

Dalton, Olmsted & Fuglevand, Inc.

TF-PSE
82000508

Appendix A (Ex 837 p. 82900508)

RCW 70.105D.040

Standard of liability — Settlement.

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

(a) The owner or operator of the facility;

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

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

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

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

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

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

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

(i) An act of God;

(ii) An act of war; or

Appendix B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a person not currently liable for remedial action at a facility who proposes to purchase, redevelop, or reuse the facility, provided that:

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

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

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

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of vacant or abandoned commercial or industrial contaminated property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit, including, but not limited to the reuse of a vacant or abandoned manufacturing or industrial facility, or the development of a facility by a governmental entity to address an important public purpose.

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

[1997 c 406 § 4; 1994 c 254 § 4; 1989 c 2 § 4 (Initiative Measure No. 97, approved November 8, 1988).]

RCW 70.105D.080

Private right of action — Remedial action costs.

Except as provided in RCW 70.105D.040(4) (d) and (f), a person may 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. In the action, natural resource damages paid to the state under this chapter may also be recovered. Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. An action under this section may be brought after remedial action costs are incurred but must be brought within three years from the date remedial action confirms cleanup standards are met or within one year of May 12, 1993, whichever is later. The prevailing party in such an action shall recover its reasonable attorneys' fees and costs. This section applies to all causes of action regardless of when the cause of action may have arisen. To the extent a cause of action has arisen prior to May 12, 1993, this section applies retroactively, but in all other respects it applies prospectively.

[1997 c 406 § 6; 1993 c 326 § 1.]

Notes:

Effective date -- 1993 c 326: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 12, 1993]." [1993 c 326 § 2.]

Severability -- 1993 c 326: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 326 § 3.]

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DIVISION II

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STATE OF WASHINGTON

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NO. 39699-8-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

PACIFICORP ENVIRONMENTAL
REMEDATION COMPANY, a
Delaware corporation; and PUGET
SOUND ENERGY, a Washington
corporation,

Plaintiffs/Respondents,

v.

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION, a Department of
the State of Washington,

Defendant/Appellant.

PROOF OF SERVICE

I, Tiffany R. Horton, hereby certify that I am a citizen of the United States of America, over 18 years of age, and am competent to be a witness herein.

On May 11, 2010, I transmitted a true and correct copy of Appellant WSDOT's Motion to Substitute Opening Brief With Non-Substantive Changes, Declaration of Deborah L. Cade in Support of WSDOT's Motion to Substitute Opening Brief With Non-Substantive Changes, Appellant Washington State Department of Transportation's Amended Opening Brief, and this Proof of Service via electronic mail to each of the following:

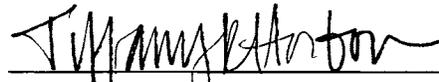
ORIGINAL

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of May, 2010 at Tumwater, Washington.



TIFFANY R. HORTON, Legal Assistant