

No. 47861-7-II

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

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POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

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**BRIEF OF *AMICUS CURIAE*  
WASHINGTON ENVIRONMENTAL COUNCIL**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. INTERESTS OF *AMICUS CURIAE* ..... 2

III. ARGUMENT..... 3

    A. DNR Is Not Exempt From Liability Under  
        the MTCA..... 3

IV. CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Asarco, Inc. v. Dep't. of Ecology</i> , 145 Wn.2d 750, 43 P.3d 471 (2002).....	3
<i>Automotive United Trades Organization et.al v. State of Washington</i> , 175 Wn.2d 537, 286 P.3d 377 (2012).....	3
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	3
<i>City of Seattle v. Washington Dep't of Transp.</i> , 98 Wn. App. 165, 989 P.2d 1164 (1999).....	4
<i>Dash Point Vill. Assocs. v. Exxon Corp.</i> , 86 Wn. App. 596, 937 P.2d 1148 (1997).....	8
<i>Oberg v. Department of Natural Resources</i> , 114 Wn.2d 278, 787 P.2d 918 (1990).....	6
<i>PacifiCorp Evtl. Remediation Co. v. WSDOT</i> , 162 Wn. App. 627, 259 P.3d 1115 (2011).....	7
<i>Pakootas et.al v. Teck Cominco Ltd.</i> , 452 F.3d 1066 (9th Cir. 2006).....	3
<i>Stahl v. Delicor of Puget Sound</i> , 109 Wn. App. 98, 34 P.3d 259 (2001).....	4
<i>Tiger Oil Corp. v. Dep't. of Ecology et.al</i> , 166 Wn. App. 720, 271 P.3d 331 (2012).....	3
<b>STATUTES</b>	
Comprehensive Environmental Response, Compensation, and Liability Act.....	2

RCW 70.105D .....	1
RCW 70.105D.010 .....	4
RCW 70.105D.020(8).....	4
RCW 70.105D.020(22)(a) .....	5
RCW 70.105D.020(24).....	4
RCW 70.105D.080 .....	8
RCW 70.105D.910 .....	4
RCW 79.105.210.....	5

Comes now the Washington Environmental Council (“WEC”), who respectfully submits this brief as *amicus curiae*. WEC has submitted this *amicus curiae* brief in order to ensure the proper interpretation and application of the Model Toxics Control Act, Chapter 70.105D RCW (“MTCA”).

## I. INTRODUCTION

No person, party or entity should be exempt from liability under the MTCA, unless such immunity is explicitly provided by the statute itself. Yet in its briefing, the Washington Department of Natural Resources (“DNR”) argues that it can never qualify as an “owner or operator” under the MTCA, and is therefore exempt from any liability for contamination that has been released or may have come to be located on or beneath the aquatic lands owned, operated and managed by DNR.

WEC respectfully submits this *amicus curiae* brief in order to request that the Court reject any argument from DNR that it is exempt from liability under the MTCA for remedial action costs associated with contamination on or beneath aquatic lands. On this purely legal issue, DNR can be liable for remedial action costs under the MTCA because it has an “ownership interest” and exercises “control” over aquatic lands that must be remediated in order to protect human health and environment. DNR may have little or no monetary responsibility at the Port Gamble site

at issue in this case – that can only be determined through a full analysis in the allocation phase of the underlying litigation. However, the lower trial court was wrong when it found that DNR could not be liable for remedial action costs under the MTCA.

## II. INTERESTS OF *AMICUS CURIAE*

WEC is one of the most senior and most credible public interest organizations in the state, having started its work to protect the State’s environment in 1969. WEC now has over 3,500 member households and over 60 organizational members in the State.

One of WEC’s signature accomplishments was the passage of Initiative 97 in the November 1988 election. WEC was the author, principal sponsor, and organizer of the public interest groups that secured the adoption of Initiative 97, which created the MTCA as the state-lead version of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), also known as the Superfund. WEC led the drafting of the initiative, chaired the initiative campaign, and participated in all of the rulemakings that implemented the initiative after it was adopted by the voters.

For the past two decades, WEC has participated in the oversight and development of the MTCA program. WEC has assisted in the development of implementing regulations, the creation of multi-agency

advisory committees, and the pursuit of legal action to interpret and enforce the provisions of these statutes. WEC has regularly appeared as *amicus* in cases involving state and federal cleanup laws and regulations, including *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 833 P.2d 375 (1992), *Asarco, Inc. v. Dep't. of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2002), *Pakootas et.al v. Teck Cominco Ltd.*, 452 F.3d 1066 (9<sup>th</sup> Cir. 2006), *Tiger Oil Corp. v. Dep't. of Ecology et.al*, 166 Wn. App. 720, 271 P.3d 331 (2012), and *Automotive United Trades Organization et.al v. State of Washington*, 175 Wn.2d 537, 286 P.3d 377 (2012).

WEC members live and recreate in the vicinity of numerous toxic waste sites throughout Washington, and depend on the MTCA program to ensure that those sites are remediated to appropriate standards of protection for human health and the environment. WEC members will be directly and adversely impacted if the cleanup of contaminated sites throughout Washington are delayed or otherwise undermined as a result of an adverse ruling by this Court.

### **III. ARGUMENT**

#### **A. DNR Is Not Exempt From Liability Under the MTCA**

The primary purpose of the MTCA is to protect each person's fundamental and inalienable right to a healthful environment, and ensure that each person (including state agencies) fulfill their responsibility to

preserve and enhance that right. RCW 70.105D.010. MTCA is a broad remedial statute dedicated to preserving and protecting people and natural resources from the impacts of hazardous substances that have been released into the environment. *Id.*

To fulfill its goals, MTCA employs a strict, joint & several liability system which ensures not only that the “polluter pays,” but also that parties allocate responsibility among themselves rather than imposing those costs on local governments or ratepayers. *Id.* As a broad remedial statute, MTCA must be liberally construed to effectuate its goals and objectives. RCW 70.105D.910. And consequently, any proposed exemption to liability must be interpreted narrowly so as not to defeat the broad remedial objectives. *See Stahl v. Delicor of Puget Sound*, 109 Wn. App. 98, 108-109, 34 P.3d 259 (2001).

MTCA liability extends to a broad range of “persons,” including state government agencies such as DNR. RCW 70.105D.020(24). Aquatic lands that are owned, operated and managed by DNR can be (and often are) part of a “facility” where hazardous substances have been “released” or otherwise come to be located. RCW 70.105D.020(8); .020(32). As such, DNR can qualify as a “potentially liable party” for a contaminated site, as DNR can (based on the facts and circumstances of each case) meet the prima facie elements of MTCA liability. *See City of*

*Seattle v. Washington Dep't of Transp.*, 98 Wn. App. 165, 170-71, 989 P.2d 1164 (1999) (prima facie elements of a MTCA claim involve proof that a person was an “owner or operator” of a “facility” where “hazardous substances” were “released” into the environment resulting in “remedial action costs.”)

In its briefing, DNR argues that it can never be an “owner or operator” because only the State of Washington owns aquatic lands, and because DNR did not participate or control the relevant decisions regarding the handling, management or disposal of hazardous substances at the facility in question. *See* Brief of Respondent at 35. DNR’s legal arguments ignore the plain and unambiguous language of the statute – DNR may qualify for liability so long as it maintains “any ownership interest” or “any control” over the facility. RCW 70.105D.020(22)(a) (emphasis added). DNR cannot simply determine unilaterally that it is not liable as a matter of law – the facts and circumstances of each case must be analyzed carefully in order to reach a determination as to DNR’s potential liability.

DNR has direct ownership, direct interest and direct control over aquatic lands, including the ability to lease, sell, manage, collect rents, and control activities on aquatic lands such as the Port Gamble site. *See* CP 103-129, 134-140, 161, 224; *see also* RCW 79.105.210 and .240. As a

landowner with legal duties and responsibilities,<sup>1</sup> it is inequitable for DNR to claim the benefits of the fundamental tenets of property ownership, but then disclaim ownership and control when faced with potential liabilities. DNR should not be exonerated from liability under MTCA's broad remedial scheme for contaminated aquatic lands under DNR's ownership or operational control without a full factual and legal analysis in each case.

Yet despite the clear and unambiguous statutory language, DNR extends its erroneous interpretation of the law by arguing that the State of Washington can never be liable under the MTCA. *See* Brief of Respondents at 13-15. DNR argues that the State of Washington does not qualify as a "person" even though a "state government agency" is listed as a "person", and therefore that the State of Washington cannot be liable for the activities of state government agencies who perform activities on behalf of the State of Washington. This circular and non-sensical argument would create a tremendous hole in MTCA's liability system that would significantly undercut efforts to remediate hazardous contamination sites throughout Washington, including those contaminated sites located on over five million acres of property owned and operated by DNR.

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<sup>1</sup> *Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 283-284, 787 P.2d 918 (1990).

The State of Washington acts through state agencies such as DNR, the Washington State Department of Transportation (“WSDOT”), and many others. A “state government agency” can be a liable person under the MTCA depending on the specific facts and circumstances of each case - a point confirmed by this Court regarding WSDOT’s responsibility for contamination in the Thea Foss Waterway. *See PacifiCorp Envtl. Remediation Co. v. WSDOT*, 162 Wn. App 627, 259 P.3d 1115 (2011). The nature and extent of DNR’s activities for the Port Gamble site, including leasing, rent collection and direct oversight & management, provide ample support for the assertion of liability in this particular case. *See* CP 103-129, 134-140, 161, 224.

If the drafters of MTCA (including WEC) or the Washington State Legislature wished to exempt DNR from MTCA liability related to contamination located on or beneath state aquatic lands or DNR lands, then the language of the MTCA would express that position or would have been amended to add such an exemption. As no such language exists, DNR must be treated the same as everyone other person, party or entity who may be liable for the remediation of hazardous substances that have been released into the environment. And in being treated the same as everyone else, DNR maintains the ability to argue the same “equitable factors” as any other party with regard to the extent of their financial

responsibility. *See Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997). But those potential equitable arguments do not apply to the threshold determination of DNR's liability.

WEC takes no position on the scope or extent of DNR's liability in this case – that must be decided after a full fact-finding and allocation utilizing appropriate equitable factors. RCW 70.105D.080. DNR and the State of Washington may have minimal financial liability, or perhaps even no financial liability, for the Port Gamble site because the facts may demonstrate that other parties caused and contributed to the majority of contamination at issue. But neither DNR nor the State of Washington should be permitted to assert a blanket exemption from liability in this case or in any case where DNR has exerted ownership or operational control over property or aquatic lands that have become contaminated by the release of hazardous substances.

#### IV. CONCLUSION

Washington Environmental Council appreciates the opportunity to submit this brief as *amicus curiae*, and hopes that this information has been helpful to the Court's analysis. Based on the arguments presented herein, the Washington Environmental Council respectfully requests that the Court reject the argument of DNR that it cannot qualify as an "owner

or operator” of state owned aquatic lands, and therefore cannot be held liable for remedial action costs under the MTCA.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of February, 2016.

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**CERTIFICATE OF SERVICE**

I, Christi Bass, certify as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Foster Pepper PLLC.

2. I certify that on this 11<sup>th</sup> day of February, 2016, I caused a copy of the foregoing document, **BRIEF OF *AMICUS CURIAE* WASHINGTON ENVIRONMENTAL COUNCIL**, to be served via the method(s) listed below on the following parties:

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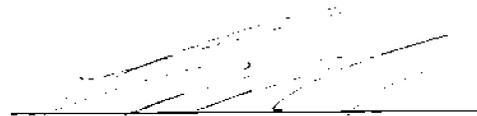
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on February 11, 2016, at Seattle, Washington.

  
Christi Bass

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