

No. 47861-7-II

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

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

**AMICUS CURIAE BRIEF SUBMITTED BY GEORGIA-PACIFIC
LLC**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. IDENTITY AND INTERESTS OF <i>AMICUS CURIAE</i>	3
III. STATEMENT OF THE CASE.....	5
IV. ARGUMENT.....	6
A. The Plain Language of MTCA Demonstrates That DNR Is the “Owner or Operator” of Aquatic Lands.....	6
B. MTCA Was Not Intended to Exclude the State from Liability.....	12
C. DNR’s Interpretation Is Inconsistent with the Primary Purpose of MTCA to Broadly Assign Liability for the Remediation of Contaminated Sites.....	14
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987).....	7
<i>City of Seattle v. Wash. State Dep't of Transp.</i> , 98 Wn. App. 165, 989 P.2d 1164 (1999).....	14
<i>Dash Point Vill. Assocs. v. Exxon Corp.</i> , 86 Wn. App. 596, 937 P.2d 1148 (1997).....	15
<i>Draper Mach. Works, Inc. v. Dep't of Nat. Res.</i> , 117 Wn.2d 306, 815 P.2d 770 (1991).....	9
<i>Goldmark v. McKenna</i> , 172 Wn.2d 568, 259 P.3d 1095 (2011).....	10
<i>Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res.</i> , 103 Wn. App. 186, 11 P.3d 847 (2000).....	9
<i>Oberg v. Department of Natural Resources</i> , 114 Wn.2d 278, 787 P.2d 918 (1990).....	8, 9, 10, 13
<i>PacifiCorp Env'tl. Remediation Co. v. Wash. State Dep't of Transp.</i> , 162 Wn. App. 627, 259 P.3d 1115 (2011).....	15
<i>Presbytery of Seattle v. King County</i> , 114 Wn.2d 320, 787 P.2d 907 (1990).....	8
<i>Pub. Util. Dist. No. 1 of Okanogan Cty. v. State</i> , 182 Wn.2d 519, 342 P.3d 308 (2015).....	10
<i>Sowa v. Nat'l Indem. Co.</i> , 102 Wn.2d 571, 688 P.2d 865 (1984).....	11
<i>In re Sundance Corp.</i> , 149 B.R. 641 (E.D. Wash. 1993).....	12

Washington State Department of Labor & Industries v. Mitchell Brothers Truck Line, Inc.,
113 Wn. App. 700, 54 P.3d 711 (2002).....10

Wasser & Winters Co. v. Jefferson County,
84 Wn.2d 597, 528 P.2d 471 (1974).....11

Statutes

42 U.S.C. § 9601, *et seq.*.....2, 11, 12

RCW 4.92.09013

RCW 70.105D.010(1).....14

RCW 70.105D.010(2).....17

RCW 70.105D.010(5).....14, 15, 17

RCW 70.105D.020(8).....6

RCW 70.105D.020(22)(a)7, 8

RCW 70.105D.020(24).....6, 17

RCW 70.105D.040.....6, 16

RCW 76.04.0058, 9

RCW 79.64.0408

RCW 79.105.2108

RCW 79.105.210(4).....7

RCW 79.105.2407, 8

RCW ch. 79.125.....7

RCW chs 79.105 - 79.140.....7

Regulations

WAC 332-30-127.....8

Other Authorities

69 Fed. Reg. 63,149, 63,149 (Oct. 29, 2004).....18

2003-2005 Omnibus Appropriations Act – Agency Detail18

Angeles Harbor, DNR Western Harbor PLP Notice (Sept.
18, 2012)4

Department of Ecology, Western Port Angeles Harbor,
Agreed Order 2013 (No. DE 9781), at 7 (May 28, 2013).....3, 4, 5

State of Washington Recreation and Conservation Office,
Washington Public Lands Inventory16

I. INTRODUCTION

Amicus Curiae Georgia-Pacific LLC (“Georgia-Pacific”) respectfully urges the Court to reverse the decision of the Kitsap County Superior Court holding that the Department of Natural Resources (“DNR”) is not an “owner or operator” of aquatic lands under the Model Toxics Control Act (“MTCA”), RCW chapter 70.105D. The decision below is contrary to the plain language of MTCA and its stated purpose, and fundamentally changes the landscape of MTCA liability by providing an unwritten exemption for the 2.5 million acres of aquatic lands managed by DNR.

Georgia-Pacific endorses and supports the arguments set forth by Appellants Pope Resources, LP and OPG Properties, LLC. Without repeating those arguments, Georgia-Pacific addresses three specific points below.

First, Georgia-Pacific demonstrates that DNR is an “owner” of aquatic lands under the plain language of MTCA. The term “owner or operator” is broadly defined by MTCA to include *any* ownership interest or *any* control. As demonstrated below, DNR exhibits all the essential attributes of ownership with respect to aquatic lands, including the right to lease (and in some cases sell) those properties, set the terms and conditions for the use of those properties, and eject trespassers. These

interests fall squarely within MTCA's broad definition of "owner or operator." Moreover, this result is fully consistent with (a) Washington Supreme Court precedent holding that DNR is the "landowner" for other lands held by the State of Washington; (b) Washington case law in other contexts finding a person to be an "owner" of property without holding title to the property; and (c) DNR's own practice of acting as the "owner" in quiet title and condemnation actions.

Second, Georgia-Pacific addresses DNR's argument that differences between the definitions of "person" in MTCA and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, evinces an intent to exempt the "state" from MTCA liability. As detailed below, there is no meaningful difference between defining "person" to include "state" (as in CERCLA) versus "state government agency" (as in MTCA) for the purposes of MTCA liability. CERCLA's use of the term "state" is intended to mean the state operating in an executive or proprietary capacity. DNR serves that role for the State of Washington. DNR's artificial distinction between "state" and "state agency" therefore must fail.

Third, Georgia-Pacific demonstrates that DNR's interpretation conflicts with the expressly stated policy of MTCA. As discussed below, MTCA casts a wide net of liability with the intent to capture all owners

and operators of contaminated sites, whether public or private, to ensure adequate funding and expeditious remediation of contamination. DNR's interpretation seriously undermines that policy by exempting one of the largest land owners (the State), thereby allowing it to escape any role in the remediation of aquatic lands. Such a result is plainly inconsistent with the intent of MTCA and should be rejected.

II. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Georgia-Pacific is a privately held company, headquartered in Atlanta, Georgia. Georgia-Pacific is one of the world's leading makers of tissue, pulp, paper, packaging, building products, and related chemicals. Georgia-Pacific currently operates a number of industrial facilities throughout the State of Washington.

In addition to its current operations in Washington, Georgia-Pacific, as the successor to the James River Corporation, formerly owned a paper mill in the western part of Port Angeles Harbor ("Western Port Angeles Harbor").¹ Operation of that paper mill included the use of state lands leased from DNR. The James River Corporation sold the paper mill to Daishowa America Co., Ltd. (which is now Nippon Paper Industries

¹ See Department of Ecology, Western Port Angeles Harbor, Agreed Order 2013 (No. DE 9781), at 7 (May 28, 2013) ("Agreed Order"), <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=11907>.

USA Co., Ltd. (“Nippon”) in the late 1980s. Agreed Order at 7. Nippon continues to operate that mill, and lease lands from DNR. *Id.*

The Western Port Angeles Harbor, much like Port Gamble Bay (at issue in this appeal), contains contaminated sediments on aquatic lands managed by Respondent DNR. *Id.* at 6-10. Significantly, the contamination in the Western Port Angeles Harbor is similarly attributable, in part, to activities conducted pursuant to aquatic leases issued by DNR (including log rafting). *Id.*²

As was the case with Port Gamble Bay, the Washington Department of Ecology (“Ecology”) has, under MTCA, identified potentially liable parties that will be responsible for cleaning up contamination in the Western Port Angeles Harbor. *Id.* at 12-13. Potentially liable parties for the Western Port Angeles Harbor cleanup include the City of Port Angeles, the Port of Port Angeles, Georgia-Pacific, Nippon, Merrill & Ring, and Owens Corning. *See id.* at 10-12. Ecology also specifically determined that DNR is a potentially liable party.³ A subset of potentially liable parties, not including DNR, has been

² As was the case in Port Gamble Bay, DNR collected lease payments for the use of these aquatic lands in Port Angeles Harbor.

³ *See* Department of Ecology, Document Repository for Western Port Angeles Harbor, DNR Western Harbor PLP Notice (Sept. 18, 2012), <https://fortress.wa.gov/ecy/gsp/CleanupSiteDocuments.aspx?csid=11907>.

working cooperatively with Ecology pursuant to an Agreed Order to develop a plan to address the contamination in the Western Port Angeles Harbor. *Id.* at 4.

Georgia-Pacific files this *amicus curiae* brief because, as the above facts demonstrate, the Court's decision will significantly impact circumstances beyond the present appeal and will directly and materially affect the ongoing remediation efforts in the Western Port Angeles Harbor, as well as every other MTCA cleanup effort state-wide involving lands managed by DNR. DNR's arguments, if accepted, would not only exempt DNR from liability under MTCA, but would allow DNR to refuse to participate in any remediation effort. This is particularly concerning at sites where DNR is the only remaining viable potentially liable party. As detailed below, DNR's arguments are contrary to the language, purpose, and intent of MTCA, and should be rejected.

III. STATEMENT OF THE CASE

Georgia-Pacific adopts the Statement of the Case set forth in Appellants' Opening Brief.

IV. ARGUMENT

A. The Plain Language of MTCA Demonstrates That DNR Is the “Owner or Operator” of Aquatic Lands.

MTCA imposes strict liability for cleaning up a contaminated “facility” on a broad category of “persons,” including the current “owner or operator” of that facility. RCW 70.105D.040. There is no credible dispute in this case that DNR is a “person” under MTCA, as “person” is broadly defined to include all manner of entities from individuals and corporations, to governmental bodies including a “state government agency, unit of local government, federal government agency, or Indian tribe.” RCW 70.105D.020(24). It is also undisputed that the contaminated aquatic lands leased by DNR for commercial and industrial uses are part of a “facility” under MTCA, as that term is also broadly defined to include “any site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located.” RCW 70.105D.020(8).

Instead, DNR contends that it is not the “owner” of those aquatic lands because the State of Washington holds the title to those lands, not DNR. DNR goes on to argue that it is not the “operator” because it did not “make the relevant decisions regarding the disposal of hazardous wastes.” DNR Brief at 35. According to DNR, it is simply the “manager”

of the land and has no ownership or operational interest. *Id.* These arguments fails for a number of reasons.

MTCA defines “owner or operator” as “[a]ny person with any ownership interest in the facility or who exercises any control over the facility.” RCW 70.105D.020(22)(a). By its plain terms, the definition of “owner or operator” is not limited to the entity holding *title* to the property. “Owner or operator” also includes persons with “*any* ownership interest” or “*any* control over the facility.” *Id.* (emphases added).

DNR’s “interest” and “control” over state aquatic lands squarely fits within this broad definition of “owner or operator.” DNR has the authority to dispose of certain aquatic lands (*see* RCW chapter 79.125), and, in fact more than 60 percent of the State’s tidelands and 30 percent of the State’s shorelands have been sold. *See Caminiti v. Boyle*, 107 Wn.2d 662, 672 n.25, 732 P.2d 989 (1987). DNR has the authority to lease aquatic lands, cancel those leases, set the lease rates, and impose terms and conditions upon those leases. *See* RCW 79.105.210(4) (“The power to lease state-owned aquatic lands is vested in the department, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.105 through 79.140 RCW.”); RCW 79.105.240 (authority to set lease rates). A percentage of the proceeds (potentially as great as 50 percent) from the

sale or lease of those lands is placed in an account specifically dedicated to funding DNR's management activities. RCW 79.64.040. Additionally, DNR has the right to eject trespassers. WAC 332-30-127.

It is well settled that "the fundamental attributes of ownership" include "the right to possess, to exclude others and to dispose of property." *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990). DNR possesses these fundamental rights. DNR may dispose of aquatic lands (by sale or lease), may impose conditions on the use of aquatic lands, and has the right to exclude trespassers. *See, e.g.*, RCW 79.105.210; RCW 79.105.240; RCW 79.64.040; WAC 332-30-127. Such attributes are more than sufficient to demonstrate that DNR has "any ownership interest" in aquatic lands or "exercises any control" over such lands. RCW 70.105D.020(22)(a).

Indeed, the issue of DNR's "ownership" of state lands has already been conclusively decided by the Washington Supreme Court in *Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 787 P.2d 918 (1990). That case involved DNR's management of state forest lands that, like aquatic lands, are owned in fee by the State of Washington. In *Oberg*, the Court addressed whether DNR was an "owner of forest land" under RCW 76.04.005, and therefore liable for fire damages from a fire escaping state lands. The relevant statute defined "owner" or "landowner" as "the owner

or the person in possession of any public or private forest land.” RCW 76.04.005(12). The Court squarely concluded that “[b]y definition in the statute, RCW 76.04.005, DNR is a landowner, and has a duty *as a landowner* to provide adequate protection against the spread of fire from its land.” *Oberg*, 114 Wn.2d at 283. The Court went further and concluded that DNR also had “common law duties as a landowner” to prevent the spread of fire. *Id.* at 284.

There is no reason why the holding in *Oberg* would not apply with equal force to aquatic lands managed by DNR. The definition of “owner or operator” under MTCA as “any ownership interest” or “any control” over the property is significantly *broader* than the definition of “owner” considered by the Court in *Oberg* (“the owner or person in possession”). Under *Oberg*, DNR is the “owner or person in possession” of the lands it manages for the state. *At the very least*, DNR must have “any ownership interest” in the aquatic lands it manages for the state under MTCA’s broader definition of owner.

DNR’s ownership interest in state lands is fully confirmed by its history of acting as the landowner in court cases. DNR defends quiet title actions as the owner of the property. *See, e.g., Draper Mach. Works, Inc. v. Dep’t of Nat. Res.*, 117 Wn.2d 306, 310, 815 P.2d 770 (1991) (quiet title action against DNR for section of waterway); *Granite Beach Holdings*,

LLC v. State ex rel. Dep't of Nat. Res., 103 Wn. App. 186, 194, 11 P.3d 847 (2000) (quiet title action for prescriptive easement over state forest lands). DNR also defends against condemnation actions as the owner of the property. *See, e.g., Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 528, 342 P.3d 308 (2015) (DNR petition challenging utility's authority to condemn state trust lands). Indeed, DNR's administrator, the Commissioner of Public Lands, has gone so far in defending against a condemnation action as to sue the State Attorney General when the Attorney General refused to appeal an adverse condemnation decision. *Goldmark v. McKenna*, 172 Wn.2d 568, 570, 259 P.3d 1095 (2011). Thus, DNR has not only been found to be the "owner" of public lands by the Washington Supreme Court in *Oberg*, it also operates in court as the owner of those properties.

Equally important, Washington courts have found that a person was the "owner" of property (a standard much higher than "any ownership interest") under circumstances where the person asserted far fewer indicia of ownership than DNR asserts over public lands. For example, this Court in *Washington State Department of Labor & Industries v. Mitchell Brothers Truck Line, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002), determined that a company that leased trucks was the "owner" of those trucks even though the company did not hold title to those trucks, could

not “sell or . . . dispose of the trucks,” and “[could] not even borrow against a truck’s value.” *Id.* at 707-08. Similarly, Washington courts have found that individuals were the owner of property, even when they lacked title to such property. *See Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 600, 528 P.2d 471 (1974) (contract to purchase uncut timber provided sufficient “indicia of ownership” in that timber to warrant taxation; “issue is not whether [a person has] absolute control over all aspects of the timber but whether there is an interest sufficiently distinct from the fee interest of the State of Washington to come within the statutory definition of the terms ‘held’ or ‘owned’”); *Sowa v. Nat’l Indem. Co.*, 102 Wn.2d 571, 576, 688 P.2d 865 (1984) (seller, who “had surrendered all indicia of ownership except the legal title,” held not to have ownership interest).

Simply put, the plain language of MTCA imposes liability on a “state government agency” with “any ownership interest” or who “excises any control” over a contaminated facility. DNR leases aquatic lands (and DNR signs those leases), sets the terms and conditions of those leases, and uses the proceeds from the leases to fund its operations. This is more than enough to demonstrate that DNR has “any ownership interest” *and* “any control” over state aquatic lands, and therefore to establish liability under MTCA.

B. MTCA Was Not Intended to Exclude the State from Liability.

In addition to arguing that it has no liability because it is not the “owner” of aquatic lands, DNR also argues that the State can never be liable under MTCA, because the State is not a “person.” Specifically, DNR points out that the federal definition of “person” in CERCLA includes the “state” on its list of liable parties, whereas MTCA only includes “state government agency.” DNR Brief at 13-15. DNR argues that this “is a significant difference,” showing a “deliberative intent to deviate from CERCLA” and to “limit the taxpayers’ liability for hazardous waste sites when the State itself is the owner.” *Id.* at 14-15.

DNR’s argument is based on a fundamental misreading of the word “state” in CERCLA. As one court in Washington explained, the word “state” in CERCLA’s definition of person can be interpreted in one of two ways:

either that all instrumentalities through which a state acts, whether executive, legislative or judicial, are covered within the definition of “person,” or that a state falls within the definition of “person” *only when it is acting in [an] executive or proprietary capacity.*

In re Sundance Corp., 149 B.R. 641, 658 (E.D. Wash. 1993) (emphasis added). The court found that only the more narrow definition of “state” as “acting in [an] executive or proprietary capacity” was tenable as there was

no intent in CERCLA to subject other branches of state government (namely the judiciary) to liability under CERCLA. *Id.*

Taken in this context there is no material difference between CERCLA's use of the word "state" and MTCA's use of the phrase "state government agency." The State of Washington can only act in "an executive or proprietary capacity" through its agents. In the context of aquatic lands, that agent is DNR. There is no "significant difference" here.

Moreover, DNR's interpretation ignores settled canons of interpretation governing state claims of immunity. As a general rule, the State of Washington has provided broad waivers of sovereign immunity for all manner of tortious acts. *See* RCW 4.92.090 (the "state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."). As the Court explained in *Oberg*, in light of this "all-encompassing waiver of sovereign immunity" the court views other statutory schemes "with the premise that DNR, whether acting in its governmental or proprietary capacity, is liable for its tortious conduct," and that there are only "rare instances" where no liability attaches. *Oberg*, 114 Wn.2d at 281-82. There is nothing in MTCA that suggests the drafters intended to depart from the general

principle that the state (and its agencies) are liable just as any other private person or corporation.

C. DNR's Interpretation Is Inconsistent with the Primary Purpose of MTCA to Broadly Assign Liability for the Remediation of Contaminated Sites.

DNR claims that Appellants' interpretation would "put the tax payers on the hook for an unacceptable amount of risk" because DNR manages 2.6 million acres of public lands. DNR Brief at 26. DNR further argues that other parties (like Appellants) are more responsible for the contamination "and it is difficult to see how placing such significant liability onto the shoulders of the taxpayers would accomplish [MTCA's] goals." *Id.* These arguments fundamentally misunderstand how MTCA operates.

MTCA, chapter 70.105D RCW, was enacted in 1988 to protect each citizen's fundamental and inalienable right to a healthful environment. RCW 70.105D.010(1). To further that goal, MTCA imposes strict liability, jointly and severally, on all statutorily responsible parties that are "caught in its sweep." *City of Seattle v. Wash. State Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999); *see* RCW 70.105D.010(5). This aggressive liability scheme is necessary "[b]ecause it is often difficult or impossible to allocate responsibility among persons

liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously.” RCW 70.105D.010(5).

DNR’s concerns about who is the *most responsible* party, or whether it is *fair* to impose costs on a particular owner or operator, are relevant only *after* determining the full universe of potentially liable parties. Under the statute’s private right of actions provision, MTCA authorizes trial courts to allocate financial responsibility between responsible parties based on “equitable factors it deem[s] appropriate.” *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997) (brackets in original; citation omitted). At this stage in the remediation process, courts commonly consider “the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste,” “the degree of care exercised by the parties with respect to the hazardous waste,” and any “additional factors” the court deems relevant. *PacifiCorp Env’tl. Remediation Co. v. Wash. State Dep’t of Transp.*, 162 Wn. App. 627, 665-66, 259 P.3d 1115 (2011). If DNR wants to argue that the extent of its financial responsibility should be limited because of its special role as the manager of state lands, the place to make that argument is at the allocation stage, not the liability stage.

Equally important, DNR's interpretation would punch a large hole in MTCA's comprehensive liability scheme. One of MTCA's primary mechanisms for ensuring the expeditious remediation of contaminated properties is to impose liability on current and former owners and operators. DNR manages 2.5 million acres of aquatic lands and 3.1 million acres of uplands.⁴ Under DNR's view of MTCA, the State of Washington itself would never be liable under MTCA because (in DNR's view) the State is the sole "owner or operator," but is not a "person" and so can never be liable under MTCA. *See* RCW 70.105D.040. Similarly, DNR would never be liable under MTCA because (in DNR's view) its comprehensive ability to sell or lease such lands, or make management decision regarding the use of those lands, does not constitute "any ownership interest" or "control" of those properties.

The consequence of DNR's interpretation is that more than five and a half million acres of land in the state will be left without an "owner" that is liable under MTCA. This result would apply to both past contamination on state lands (including contamination where other potentially responsible parties are no longer solvent) as well as any

⁴ State of Washington Recreation and Conservation Office, Washington Public Lands Inventory, <http://publiclandsinventory.wa.gov/#Map> (last visited Jan. 13, 2016).

contamination on state lands that might occur in the future. DNR's interpretation would leave no current owner responsible for ensuring remediation of these state lands, thereby frustrating the intent of MTCA to force prompt remediation.

Furthermore, the statute offers no support for DNR's claims that the drafters of MTCA wanted to "limit the taxpayers' liability." In fact, a simple reading of MTCA makes clear the intent to hold every conceivable form of public entity liable. In addition to state agencies, MTCA makes a "unit of local government" as well as a "federal government agency" liable as owners and/or operators. RCW 70.105D.020(24). Ports, cities, and counties are often named as potentially liable parties, even when they simply own property in their proprietary capacity. *See supra* page 4 (Port of Port Angeles named as potentially responsible party). If the intent of MTCA was to limit taxpayer liability, it assuredly would have exempted these entities as well.

To the contrary, MTCA expressly recognizes that "[t]he costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers." RCW 70.105D.010(2). Accordingly, MTCA also states that "each responsible person should be liable jointly and severally" to ensure that sites are cleaned up "expeditiously." RCW 70.105D.010(5). Except in narrowly defined

circumstances, every owner or operator, former owner or operator, arranger, or transporter is on the hook for remedial action, and every such entity is therefore incentivized to cooperate fully in the remediation process.

DNR's interpretation of MTCA runs afoul of this purpose as well. DNR controls activity on aquatic lands, and has the authority to limit, control, or outright deny remediation actions on aquatic lands. Yet under its interpretation, unlike every other current property owner in the state, DNR would have no obligation at all to cooperate in the remediation, and no incentive (in the form of joint and several liability) to ensure that the remediation occurs in an expeditious manner. This is flatly inconsistent with the purpose of MTCA.

Lastly, DNR's current claims of immunity from MTCA liability are inconsistent with its own past practice. In 2002, the Port of Seattle and Pacific Sound Resources sued DNR for response costs under MTCA based on DNR's ownership of "2.3 acres of filled . . . aquatic lands" that DNR had leased to Pacific Sound Resources. *See* 69 Fed. Reg. 63,149, 63,149 (Oct. 29, 2004) (federal register notice describing state court actions under MTCA). DNR agreed to pay its share of the response costs, and the Washington State legislature appropriated the funds to pay that settlement. *Id.*; *see also* 2003-2005 Omnibus Appropriations Act – Agency Detail, at

68, 133 (describing lawsuit and appropriation of \$4.75 million to settle DNR's liability).⁵

In short, DNR's narrow reading of MTCA to exclude itself from liability cannot be reconciled with the language or purpose of the statute. MTCA was intended to cast a wide net of liability to capture all owners and operators, whether individuals, corporations, or public entities, to ensure the funding necessary for prompt and efficient remediation of contaminated sites. DNR's self-created and novel exception is antithetical to that purpose and therefore must fail.

V. CONCLUSION

For the foregoing reasons, this Court should rule that DNR is the "owner or operator" of state owned aquatic lands.

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⁵ Available at: <http://leap.leg.wa.gov/leap/budget/lbns/2004partv.pdf> (last visited Jan. 13, 2016).

DATED this 29th day of January, 2016.

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CERTIFICATE OF SERVICE

I, Sharman D. Loomis, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On January 29, 2016, I served true and correct copies of the foregoing **AMICUS CURIAE BRIEF SUBMITTED BY GEORGIA-PACIFIC LLC** via overnight delivery on the following persons:

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

DATED: Friday, January 29, 2016 at Seattle, WA.

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