

NO. 47861-7-II

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

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POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

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**WASHINGTON STATE DEPARTMENT OF NATURAL  
RESOURCES' ANSWER TO OTHER AMICI**

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## I. INTRODUCTION

Several entities have filed amicus briefs in this matter. Most of the arguments that these Amici make are addressed in the Department of Natural Resources' (DNR) Answer to Amicus Department of Ecology and Answer to Amici Georgia-Pacific and Sierra Pacific. In order to avoid duplication, DNR incorporates those arguments herein and offers an additional response to the specific arguments of the remaining Amici that were not otherwise addressed by DNR. These remaining amici are: the Washington Environmental Council (WEC); the Cities of Seattle, Tacoma, Bellingham, and Washington Association of Municipal Attorneys (Seattle); the City of Port Angeles (Port Angeles); and David Bricklin, Jolene Unsoeld, and Janice Niemi (Bricklin).

Contrary to the arguments of Amici, DNR does not assert that it can never be liable under the Model Toxics Control Act (MTCA). DNR can be liable, but before any liability can attach, DNR must fall under one of MTCA's categories of liable "persons." *See* RCW 70.105D.040. In this case, DNR is not an "owner or operator" at Port Gamble under RCW 70.105D.020(22)(a), and therefore does not have liability at this site.

Amici's arguments rely on inapplicable case law and an incorrect reading of MTCA. The trial court correctly determined that DNR is not an

“owner or operator” at Port Gamble, and this Court should affirm that decision.

## II. ARGUMENT

### A. **DNR Does Not Dispute That as a State Agency, It Could Have Liability Under MTCA Under Some Circumstances. However, DNR Does Not Have Liability Under MTCA as an “Owner or Operator” at Port Gamble.**

Contrary to the arguments of Amicus WEC and Amicus Seattle, DNR does not assert that it could never be liable under MTCA. Br. of Amicus WEC at 1, 5. Br. of Seattle at 6. Indeed, DNR does not dispute that as a “state agency” “person” it could, under some circumstances, have liability under MTCA. *See* RCW 70.105D.020(24); RCW 70.105D.040(1). However, as DNR has argued throughout this case, it does not have any ownership interest in state-owned aquatic lands, and it did not exercise sufficient control at Port Gamble to be liable as an “operator” at that site. *See* DNR Response Br. at 11-39.

MTCA establishes liability based on several categories of liable “persons.” Those categories are listed under RCW 70.105D.040(1)(a)-(e) and include current or former owners or operators of a facility, arrangers, transporters, and certain sellers of hazardous substances. *Id.* As briefed extensively in this appeal, the term “owner or operator” is defined under RCW 70.105D.020(22)(a). If a state agency “person” does not fall under

one of these categories, it is not liable for cleanup costs at a facility. *See Seattle City Light v. Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999). DNR does not fall under the category of “owner or operator” at Port Gamble, and therefore is not liable at that site under MTCA.

**B. It Is Undisputed That the State Itself Cannot Be a Liable “Person” Under MTCA. Because Only Amici Raise This Issue, the Court Should Decline to Consider It.**

Several of the Amici in this case have argued that the “State” itself can be a “person” for the purposes of liability under MTCA.<sup>1</sup> DNR has fully addressed this argument in its response to Amicus Georgia-Pacific and will only briefly reiterate here that: (1) Pope/OPG do not dispute that the “State” itself cannot be a liable “person” under MTCA (CP at 308); (2) Ecology agrees with DNR’s interpretation on this point (Br. of Ecology at 5-6, n.3); and (3) it is well established that the Court need not consider arguments raised only by amici curiae. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988).

While the Court should decline to consider this issue, there are a few points that Amicus Port Angeles and Amicus Bricklin make that DNR would like to address below.

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<sup>1</sup> *See* Br. of Port Angeles at 1-4; Br. of WEC at 6; and Br. of Bricklin at 7-17.

**1. Federal Civil Rights Cases Under 42 U.S.C. § 1983 Are Inapplicable to the Issues in This Appeal.**

In making its arguments, Amicus Port Angeles cites several cases involving 42 U.S.C. § 1983. Br. of Port Angeles at 2-4. However, those cases involved the issue of a state's Eleventh Amendment immunity under federal civil rights statutes, and not the statutory liability scheme created under MTCA. See, e.g., *Edgar v. State*, 92 Wn.2d 217, 221-22, 595 P.2d 534 (1979), and *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986). Accordingly, these cases are inapplicable in this appeal.

For a state agency such as DNR, the Legislature defines the agency's ownership interest in real property. This point is illustrated by two of the other cases relied upon by Amicus Port Angeles: *State v. Culley*, 11 Wn. App. 695, 524 P.2d 437 (1974), and *Centralia College Education Association v. Board of Trustees*, 82 Wn.2d 128, 508 P.2d 1357 (1973).

**2. The Statute at Issue in *Centralia College* and in *Culley* Explicitly Vested Title in a State Agency. This Is Distinctly Different From DNR's Authority Under the Aquatic Lands Statutes.**

In *Centralia College*, the court examined the language of former RCW 28B.50.300 and the ownership interest that statute vested in the State Board for Community College Education. *Centralia College*, 82 Wn.2d at 132. The text of former RCW 28B.50.300 explicitly

provided that “[t]itle to or all interest in real estate . . . shall . . . vest in or be assigned to the state board for community college education.” Laws of 1969, 1st Ex. Sess., ch. 223, § 28B.50.300. Based on this unambiguous language, the *Centralia College* court recognized that “RCW 28B.50.300 vests title to community college property in the state board . . . .” *Centralia College*, 82 Wn.2d at 132. *See also Culley*, 11 Wn. App. at 438 (“title to real property may vest in the state board under RCW 28B.50.300.”)

Unlike former RCW 28B.50.300, the aquatic lands statutes do not vest title to state-owned aquatic lands in DNR. *See* RCW 79.105.060(20); RCW 79.105.010; and RCW 79.105.020. It is a basic rule of statutory construction that “[w]here the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.” *Dep’t of Rev. v. Fed. Deposit Ins. Corp.*, 190 Wn. App. 150, 162, 359 P.3d 913 (2015) (internal citations omitted). The Legislature’s decision to vest title in certain property to an agency in one statute, and its decision not to do so in the aquatic lands statutes, supports

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the argument that the Legislature did not intend to grant DNR any ownership interest in state-owned aquatic lands.<sup>2</sup>

**3. *Phillips v. King County* Involved an Agency That Intentionally Damaged Property and Is Therefore Inapplicable.**

In *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998), which is cited by Amicus Bricklin,<sup>3</sup> adjoining landowners brought an inverse condemnation action against King County for damage caused by the County's redirection of surface water onto their property. *Phillips*, 136 Wn.2d at 955. The County intentionally damaged neighboring property by allowing a developer to place drainage devices that were "intended to drain water onto the Phillips' property." *Id.* at 967. These facts are markedly different from the facts of this appeal, where DNR never authorized the release of any hazardous substances at Port Gamble. CP at 103-06, 111-21, 268. Accordingly, *Phillips* is not applicable.

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<sup>2</sup> Amicus Bricklin also points out several statutes where the Legislature has authorized various agencies to acquire property in their own name. See Br. of Bricklin at 10, n.10. This also supports DNR's argument, as "[a] difference in legislative intent is presumed where the legislature uses certain language in one instance but different language in another." *Woodbury v. City of Seattle*, 172 Wn. App. 747, 753, 292 P.3d 134 (2013).

<sup>3</sup> Br. of Bricklin at 15.

**C. State-Owned Aquatic Lands Can Be Contaminated From Unauthorized Uses. DNR Did Not Authorize the Release of Hazardous Substances at Port Gamble and Is Not Liable as an “Owner or Operator” at That Site.**

Amicus Bricklin argues that DNR can limit pollution, and accordingly the State’s liability, on state-owned aquatic lands through lease terms with the users of such lands. Br. of Bricklin at 13.<sup>4</sup> However, the facts of the present appeal illustrate the flaws in this argument. Pope and Talbot spent well over 100 years polluting Port Gamble from operations that were not authorized by DNR. CP at 266-69. Moreover, the majority of the contamination on the site came from Pope and Talbot’s mill operations in the north part of the bay over which DNR had no authority or control. CP at 268-69, 281. Contrary to the assertions of Amicus Seattle, DNR does not always get to “choose its tenants.” Br. of Seattle at 5.

The State’s 2.6 million acres of aquatic lands have become contaminated from a myriad of urban industrial sources throughout the State’s history. DNR Response Br. at 26. In addition, the public has a right to use the State’s aquatic lands for “navigation, together with its

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<sup>4</sup> Amicus Bricklin also argues that DNR can fund cleanups through “the revenues it receives from its proprietary leases, not from taxpayers.” Br. of Bricklin at 13. However, the state constitution prohibits an agency from expending funds without an appropriation from the Legislature. *See* Const. art. VIII, § 4. Moreover, all moneys received daily by DNR must be deposited into a defined account or into the State general fund. *See* RCW 43.30.325.

incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes . . . .” *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969). Indeed, the public “has the right to go where the navigable waters go.” *Id.* The public’s use of state-owned aquatic lands can also result in the release of hazardous substances. To subject the State to strict liability for contamination on 2.6 million acres of aquatic lands, regardless of any involvement of a state agency in that contamination, is not supported by MTCA.<sup>5</sup>

Amicus Bricklin recognizes that the drafters of MTCA “presumably” had a reason to refer to “state agencies” rather than the “State” in drafting MTCA’s definition of “person” under RCW 70.105D.020(24). Br. of Bricklin at 9. However, Amicus Bricklin does not provide this reason. The only logical reading of RCW 70.105D.020(24) is that the State itself was not intended to be held liable under MTCA. In this case, it is the State, not DNR, that has the ownership interest in the State’s aquatic lands at Port Gamble, and accordingly, DNR cannot be liable as an “owner” under RCW 70.105D.020(22)(a).

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<sup>5</sup> Amicus City of Seattle argues that local governments will be left to pay the costs of cleanup if the Court rules in DNR’s favor. Br. of Seattle at 5. However, MTCA specifically provides funding for local governments through such mechanisms as remedial action grants to cover the costs of cleanup. See RCW 70.105D.030(5) and WAC 173-322A.

### III. CONCLUSION

For the foregoing reasons, DNR respectfully requests that this Court reject the arguments of Amici, and affirm the trial court's decision that DNR is not an "owner or operator" under MTCA at Port Gamble.

RESPECTFULLY SUBMITTED this 30th day of March, 2016.

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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 30th day of March, 2016, at Olympia, Washington.

  


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**WASHINGTON STATE ATTORNEY GENERAL**

**March 30, 2016 - 10:29 AM**

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