

NO. 94084-3

SUPREME COURT OF THE STATE OF WASHINGTON

POPE RESOURCES, LP, and OPG PROPERTIES, LLC,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner.

**AMICUS CURIAE BRIEF OF STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The State of Washington, Department of Ecology (Ecology) submits this amicus curiae brief solely to provide the Court with its position on the proper standard for “operator liability” under the Model Toxics Control Act (MTCA), chapter 70.105D RCW. This brief does not argue that the Department of Natural Resources (DNR) is liable at the Port Gamble Bay and Mill Site, nor does it argue that the State’s ownership of land makes DNR liable as an “owner or operator” under MTCA. Rather, Ecology submits this brief to argue that the proper standard for determining “operator liability” under MTCA is dictated by the plain language of MTCA itself: the exercise of “any control over the facility.” RCW 70.105D.020(22)(a). Ecology thus disagrees with DNR when it asserts that to be an owner or operator, a person must “manage, direct, or conduct operations specifically related to pollution.” DNR Suppl. Br. 2. This proposed liability standard is inconsistent with the plain language and statutory purpose of MTCA and more than a quarter-century of application by Ecology, the agency charged with implementing MTCA.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

As MTCA’s administrator, Ecology has regulatory authority over nearly all environmental cleanup sites in Washington. *See* RCW 70.105D.020(5), .030, .040(4), .050. At present, there are

approximately 5,400 MTCA cleanup sites in Washington, including the Port Gamble Bay and Mill Site at issue in this case.¹ Ecology has designated each of the parties to this litigation as a “potentially liable person” under MTCA for cleanup of the Port Gamble Bay and Mill Site. As amicus curiae, Ecology intends to provide the Court directly with its view of the proper standard for “operator liability” under MTCA. Ecology has a direct interest in the Court’s construction of MTCA’s “owner or operator” definition, both as it applies specifically to the Port Gamble Bay and Mill Site and more broadly to the thousands of other cleanup sites in Washington.

III. ISSUE ADDRESSED BY AMICUS CURIAE

Whether liability as an “owner or operator” under MTCA arises from the exercise of “any control over the facility” as per the terms of RCW 70.105D.020(22)(a), or whether a narrower liability standard should be applied, under which “operator liability” only arises if a person “manages, directs, or conducts operations specifically related to pollution.”

¹ Data on file with the Department of Ecology Toxics Cleanup Program. This statistic includes sites that are confirmed or suspected by Ecology, where cleanup has already begun or where the site is still awaiting cleanup. This statistic is based on July 2013 Toxics Cleanup Program data.

IV. STATEMENT OF THE CASE

Ecology incorporates by reference the recitation of the case provided in the Court of Appeals' opinion. *Pope Res., LP v. Dep't of Nat. Res.*, 197 Wn. App. 409, 412–15, 389 P.3d 699 (2016).

V. ARGUMENT

A. **The Model Toxics Control Act Dictates Strict, Joint and Several Liability for “Owners or Operators” Who “Exercise[] Any Control Over the Facility”**

MTCA was adopted by Washington voters in 1988 with both a remedial and a preventative aim. It is intended to both “raise sufficient funds to clean up all hazardous waste sites” and “prevent the creation of future hazards due to improper disposal of toxic wastes into the state’s land and waters.” RCW 70.105D.010(2); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 426, 833 P.2d 375 (1992).

To effectuate these two goals, MTCA “explicitly creates a scheme of strict liability and joint and several liability for those caught in its sweep.” *City of Seattle (Seattle City Light) v. Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999); *see also* RCW 70.105D.040(2). This strict, joint and several liability scheme is broad by design, and it attaches regardless of fault or intent. *See, e.g., PacifiCorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 658, 259 P.3d 1115 (2011) (no minimum level of hazardous substances required to

trigger liability provisions under MTCA); *see also* 24 Timothy Butler & Matthew King, *Washington Practice: Environmental Law & Practice* § 15.2 (2d ed. 2017). The liability scheme is intentionally geared to get contaminated sites cleaned up “well and expeditiously” at the front end, as directed by Ecology, without delay from confounding litigation over who should ultimately bear the costs. RCW 70.105D.010(5); RCW 70.105D.060 (timing of review provision); Office of the Secretary of State, *Washington 1988 Voters & Candidates Pamphlet* 6 (1st ed. 1988) (“*Cleanups, not lawsuits. I-97 makes cleanups happen now—not later.*”). Indeed, other than limited authority to expedite settlement with persons whose “contribution is insignificant in amount and toxicity,” RCW 70.105D.040(4)(a), the Department of Ecology does not allocate liability under the statute. *See generally* RCW 70.105D.030, .040. MTCA instead provides for a separate, private right of action to allow liable persons to pursue an equitable apportionment of costs among themselves, independent from any Ecology action directing persons with liability to perform cleanup. *See* RCW 70.105D.080; *Seattle City Light*, 98 Wn. App. at 174, 177 (in a contribution action brought by another liable person, state agency held liable under MTCA, but not responsible for any portion of cleanup costs).

Liability under MTCA “extends broadly” to, among others, any “person” who is an “owner or operator” of a “facility.” RCW 70.105D.040(1); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 661, 15 P.3d 115 (2000). MTCA explicitly defines “person” to include a “state government agency.” RCW 70.105D.020(24). A “facility,” in turn, is defined largely by a catchall within the definition: “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)(b) (emphasis added). Finally, an “owner or operator” is defined in relevant part as:

(a) *Any person with any ownership interest in the facility or who exercises any control over the facility*

RCW 70.105D.020(22)(a) (emphasis added). Summarizing, an “owner or operator” under MTCA includes “any person” (including a state agency) who “exercises any control” over a geographic “site or area” where a hazardous substance has “come to be located.”²

² The State of Washington (as distinguished from a state agency) is not defined as a “person” under MTCA. *See* RCW 70.105D.020(24). Ecology presumes that this omission is intentional and reflects a statutory intent to not make the State strictly liable for polluting activity on *all* State-owned lands. *See Ellensburg Cement Products, Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (specific inclusion in a statute infers all things omitted are intentionally excluded). Based on this, Ecology takes the position that where a state agency merely holds the statutory authority to manage land under State title, without undertaking active management of the property (e.g., through leasing or affirmatively acquiescing to polluting activity on the property), the agency is not liable as an “owner or operator” under MTCA. This position is unique to state

In plain terms, affirmatively leasing real property that is located within a contaminated site or area *is* exercising “any control” over “the facility.” A lessor exercises actual control over the facility by affirmatively controlling and transferring a possessory interest in the facility, together with defining the terms of that interest. A lessor exercises actual control by limiting (or choosing to not limit) the uses to which the leasehold (facility) can be put. And a lessor exercises (or chooses to not exercise) actual control by deciding whether, when, and to what extent to police a lease. Based on MTCA’s plain language, a lessor of land within a facility is an “owner or operator” of that facility.

B. “Active Involvement in Operational Decisions Specifically Related to Pollution” Is Not the Proper Standard for Operator Liability Under MTCA

DNR argues that a narrower standard should be applied to determine “operator” liability: one that would effectively replace the existing words of the statute—an owner or operator is one who exercises “*any control over the facility,*” RCW 70.105D.020(22)(a) (emphasis added)—with a materially different and narrower set of words: an owner or operator is one who exercises “*actual authority over the pollution on a site.*” *See, e.g.,* DNR Suppl. Br. 15 (arguing that an operator must “manage, direct, or conduct operations specifically related to pollution”);

agencies with the statutory authority to manage property held in fee by the State, based on MTCA’s definition of “person.”

Pope Res., 197 Wn. App. at 423. Ecology disagrees with this standard because it conflicts with the plain language of MTCA, is based on inapplicable case law, and conflicts with, rather than furthers, MTCA's policies and purposes.

1. An operator liability standard requiring “active involvement in operational decisions specifically related to pollution” conflicts with MTCA’s plain language

DNR's standard conflicts with the plain language of RCW 70.105D.020(22). While DNR argues that the Court of Appeals' decision improperly eliminates a distinction between “owner” and “operator” in the plain language of RCW 70.105D.020(22), Pet. for Review 14, there is no such distinction in the statute's language. The terms “owner” and “operator” are not separately defined. *See* RCW 70.105D.020(22)(a). Rather, they are defined together in a common phrase (“owner or operator”) and in a common sentence (“Any person with any ownership interest in the facility or who exercises any control over the facility . . .”), without clear distinction. *See* RCW 70.105D.020(22)(a). Indeed, as grammatically structured, the phrase “or who exercises any control over the facility” modifies the word “owner” just as much as it does the word “operator.” *Id.* Contrary to DNR's urging, there is no “either part” of MTCA's “owner or operator” definition. *See* DNR Suppl. Br. 6. Given this, the words of the definition should be construed together and in

harmony. *See State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (“a single word in a statute should not be read in isolation”) (citing *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)); *Washington v. Chu*, 558 F.3d 1036, 1044–45 (9th Cir. 2009) (construing the subparts of a single statutory section in tandem).

DNR’s standard, however, would create markedly different liability standards for “owners” and “operators.” Subject to MTCA’s statutory defenses,³ owners of contaminated property are strictly liable under MTCA *regardless* of whether they have contributed to the polluting activity and regardless of whether the polluting activity predated their ownership. *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 78 F.3d 285, 290 (7th Cir. 1996) (“With narrow exceptions, [MTCA] imposes strict liability on an owner of property *based merely on ownership* without regard to what actions the owner took on the property to cause pollution.”) (emphasis added); *see also Taliesen Corp. v. Razole Land Co.*, 135 Wn. App. 106, 140, 144 P.3d 1185 (2006) (rejecting current owner’s argument that it “played no part in generating the

³ These defenses include a “third-party defense” when the release of hazardous substances was caused solely by the “act or omission of a third party” with whom the owner is not connected, among other criteria, *see* RCW 70.105D.040(3)(a)(iii), and an “innocent-purchaser” defense for any owner 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.” RCW 70.105D.040(3)(b).

contamination” as a basis for reversing trial court). With no basis in the language of the statute, however, DNR’s position would result in a different, more limited liability standard—and a different liability outcome—for a person who, through leasing property, exercises the same effective “control” over a “facility” as an “owner.”

The words of a statute should be given meaningful effect. *City of Bellevue v. East Bellevue Cmty. Council*, 138 Wn.2d 937, 946, 983 P.2d 602 (1999). Here, the plain words of the statute are not ambiguous, and applying the plain words does not lead to strained or absurd results. *See State v. Huffman*, 185 Wn. App. 98, 105–06, 340 P.3d 903 (2014) (“[w]e are not at liberty to add language to a statute”). Furthermore, nothing in MTCA’s legislative history supports reading out the plain words of the “owner or operator” definition in favor of other, different words, or construing the words to suggest a “distinction” be applied to create materially different liability standards for owners versus operators. *See generally Washington 1988 Voters & Candidates Pamphlet* 6–7, 16.

DNR’s standard is at odds with MTCA’s plain language.

2. The case law supporting an operator liability standard requiring “active involvement in operational decisions specifically related to pollution” is not applicable

DNR’s standard is also drawn from case law that is faulty and inapplicable. DNR relies principally on two cases decided by the Court of

Appeals, Division I, *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999) and *Taliesen*, 135 Wn. App. 106, and a United States Supreme Court opinion relied upon in those Court of Appeals opinions, *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). See DNR Suppl. Br. 12–15. None of these cases, however, are applicable to the question of whether a lessor of real property within a facility is an “owner or operator” under MTCA.

a. The *Unigard* and *Taliesen* cases adopt an operator liability standard announced in federal cases construing CERCLA, without analyzing different definitional language in MTCA

First, all three cases rest heavily or exclusively on analysis under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). See *Unigard*, 97 Wn. App. at 428–29; *Taliesen*, 135 Wn. App. at 127–28; see generally *Bestfoods*, 524 U.S. at 55–72. Because MTCA is heavily patterned after CERCLA, federal cases construing CERCLA are generally persuasive authority in construing MTCA. *Bird-Johnson*, 119 Wn.2d at 427. Where MTCA uses different language, however, the difference is presumed to be intentional and reflect a different statutory intent. *Id.* at 427–28; see also *Seattle City Light*, 98 Wn. App. at 170 (unlike CERCLA, MTCA makes strict, joint and several liability express); *PacifiCorp*, 162 Wn. App. at 663 (“The United States

Supreme Court’s interpretation of CERCLA does not trump our state courts’ interpretation of Washington’s comparable Act.”).

As noted by the Court of Appeals in this case, *Unigard and Taliesen* adopted an “operator” liability standard announced in federal cases construing CERCLA without addressing the significance of different definitional language in MTCA. *Pope Res.*, 197 Wn. App. at 422. CERCLA defines the phrase “owner or operator” “only by tautology . . . as ‘any person owning or operating’ a facility.” *Bestfoods*, 524 U.S. at 56; *see* 42 U.S.C. § 9601(20).⁴ Because this definition is circular to the point of being “useless,” *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992), federal courts have resorted wholly to common law interpretations of the words “owner” and “operator” to define the terms. *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 443 (9th Cir. 2011).

Whereas federal courts have developed the parameters of operator “control” through case law, however, MTCA’s “owner or operator” definition is specific: an “owner or operator” is one with “*any ownership interest in the facility or who exercises any control over the facility.*” RCW 70.105D.020(22)(a) (emphasis added). While the terms “ownership interest” and “control” are themselves undefined (and therefore must be

⁴ Beyond this affirmative statement, CERCLA defines “owner or operator” by what an owner or operator is *not*. *See generally* 42 U.S.C. § 9601(20).

given a judicial interpretation), such an interpretation must give effect to the other words used in the definition: “any” as a term of inclusivity, and “facility” as a term describing the physical area in which hazardous substances have come to be located. *See K.L.B.*, 180 Wn.2d at 742.

This statutory difference was not addressed in either *Unigard* or *Taliesen*. *See Unigard*, 97 Wn. App. at 428; *Taliesen*, 135 Wn. App. at 127. While, given the unique circumstances of *Unigard* and *Taliesen*, the difference between the statutes may not have changed the result in either case, the difference should be considered by this Court before applying the standard in those cases more broadly to a completely different set of facts. In the case of land leasing within a facility, a standard that limits liability to only those who “‘make the relevant decisions’ regarding the disposal of hazardous wastes ‘on a frequent, typically day-to-day basis,’” DNR Suppl. Br. 17 (quoting *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 121 (D.D.C. 2014)), does not effectuate the plain language of MTCA, which attaches liability to “any control over the facility.” RCW 70.105D.020(22)(a).

b. The *Unigard* and *Taliesen* cases are distinguishable

Second, both *Unigard* and *Taliesen* are distinguishable. In both cases, the parameters of operator “control” were addressed in the context

of facts that test the margins of “owner or operator” liability under MTCA’s broad sweep. Both cases addressed whether a sufficient degree of control over operational decisions was held by individuals within, or the agents of, entities that were themselves indisputably “owners or operators.” In *Unigard*, the question concerned whether a corporate officer and sole shareholder should be held liable for the acts of a corporate owner or operator. *Unigard*, 97 Wn. App. at 428–31. In *Taliesen*, the question concerned whether a subcontractor should be held liable for the acts of a prime contractor who was an owner or operator, when the subcontractor was simply carrying out the directives of the prime contractor. *Taliesen*, 135 Wn. App. at 124–28.⁵

Neither case addresses the different question of whether exercising direct control over the physical facility itself, through leasing to others, gives rise to “owner or operator” liability under MTCA’s language. As argued above, however, under the plain terms of MTCA, “owner or operator” liability is not restricted to control over “business operations” or “polluting activity”; instead, the statute specifies control over “the facility.” RCW 70.105D.020(22)(a). As further noted above, a lessor

⁵ Further, the principal federal case relied on in *Unigard* and *Taliesen* as persuasive authority—*United States v. Bestfoods*—similarly tested the margins of “owner or operator” liability under CERCLA. In *Bestfoods*, the question concerned whether a corporate parent should be held liable, either through derivative or direct liability, for the acts of its subsidiary, which was indisputably an owner or operator. *Bestfoods*, 524 U.S. at 55, 61–70.

exercises control over a facility through the act of leasing itself, regardless of whether the lessor is itself an owner, or is a non-owner imbued with the authority to lease on behalf of the owner.

3. An operator liability standard requiring “active involvement in operational decisions specifically related to pollution” conflicts with MTCA’s statutory purpose and intent

MTCA’s terms are to be “liberally construed to effectuate the policies and purposes of [the] act.” RCW 70.105D.910; *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wn. App. 926, 935, 125 P.3d 981 (2005). The liability standard advanced by DNR does not further MTCA’s policies and purposes.

One of MTCA’s primary purposes is to “prevent the creation of future hazards due to improper disposal of toxic wastes into the state’s land and waters.” RCW 70.105D.010(2). Limiting “operator” liability as argued by DNR, however, works directly against, rather than effectuating, this purpose. It would give non-owner lessors who have the ability to dictate and police the terms of a lease an incentive to distance themselves from regulating the uses to which their leasehold is put, rather than exercising the control available to them. Further, by effectively creating a new category of persons to whom MTCA liability will not attach (non-owner lessors who repudiate “control”), DNR’s standard would create an

incentive to exploit this new category through creative corporate structuring and ownership arrangements.

MTCA is also aimed at “rais[ing] sufficient funds to clean up all hazardous waste sites.” RCW 70.105D.010(2). Here too, limiting “operator” liability does not further MTCA’s purpose. It would create a complicating, threshold factual issue as to whether a lessor (or any other potential “operator” exercising “any control” over the “facility”) is engaged in “control” as defined by DNR. This is directly contrary to the simple, broad sweep of MTCA’s strict, joint and several liability scheme, which, as argued above, is intended to promote expeditious cleanup at Ecology’s direction *ahead* of lawsuits and squabbles over liability allocation. Indeed, the current bright-line clarity of MTCA’s scheme often leads to cleanups occurring on a “voluntary” basis without Ecology’s formal oversight, as noted by the Washington Supreme Court.

Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 908–13, 874 P.2d 142 (1994) (strict liability under MTCA triggers insurer’s duty to indemnify, even without overt threat of government suit).⁶ As noted by the Court of Appeals, DNR’s policy arguments—which raise the specter of potential liability for pollution on 2.6 million acres of aquatic lands

⁶ Further, making the liability standard under MTCA less clear and more fact-dependent increases the potential for reimbursement suits against Ecology, which may be brought by persons who expend funds on cleanup under order by Ecology, but later claim they are not “liable persons.” *See* RCW 70.105D.050(2).

“regardless of any DNR involvement in any polluting activities,” DNR Suppl. Br. 19—conflate threshold liability under MTCA with the ultimate apportionment of liability among liable persons. *Pope Res.*, 197 Wn. App. at 423–24 (citing *Seattle City Light*, 98 Wn. App. at 174, 177).

MTCA’s liability scheme applies regardless of whether a governmental entity is involved. While MTCA aims to lessen the burden of cleaning up environmental contamination on the public fisc, *see* RCW 70.105D.010(2), this does not mean that governmental entities cannot be liable under MTCA’s provisions. Ecology thus disagrees with the extension of an “active-involvement” test specifically for governmental entities, as argued by DNR before the Court of Appeals. *See* DNR Resp. Br. 33–34, *Pope Res.*, 197 Wn. App. 409 (No. 47861-7-II) (citing *United States v. Twp. of Brighton*, 153 F.3d 307 (6th Cir. 1998)).

Once again, an “active-involvement” test is contrary to MTCA’s plain terms. It is also contrary to more than 25 years of Ecology’s application of MTCA, which has been implicitly ratified by the Legislature. Since MTCA’s inception, Ecology has consistently designated municipal governments as potentially liable persons for waste sites such as landfills “operated” by those governments, regardless of whether or not the municipal government meets any “active-involvement”

test.⁷ *See, e.g., Aetna Cas. & Sur. Co.*, 123 Wn.2d at 912 (recognizing the specter of MTCA liability associated with “waste disposal sites” operated by cities and counties). Over the same period, the Legislature has appropriated millions of dollars to Ecology to distribute to other governmental entities in the form of “remedial action grants” to assist with cleanup costs. *See* RCW 70.105D.030(5) (directing Ecology with respect to assistance planning for local and state cleanup responsibilities); chapter 173-322A WAC (Remedial Action Grants and Loans); Jordan Schrader, *Lower Oil Prices Are Bad News for Pollution Cleanup*, *The Olympian*, Jan. 5, 2016.⁸ The Court should give great weight to the construction placed on MTCA by Ecology, especially where, as here, the Legislature has affirmatively acquiesced to that construction over a long period. *See, e.g., Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 103 Wn. App. 169, 175, 11 P.3d 839 (2000).

⁷ A partial listing of such sites includes (with county of location): Asotin County Landfill (Asotin County); Manson Landfill (Chelan County); Leichner Brothers Landfill (Clark County); Old Kalama Landfill (Cowlitz County); Pasco Landfill NPL Site (Franklin County); Grant County Ephrata Landfill 1 (Grant County); Hoquiam Municipal Landfill (Grays Harbor County); Oak Harbor Landfill (Island County); South Park Landfill (King County); Bainbridge Island Landfill (Kitsap County); Centralia Landfill (Lewis County); Tacoma Landfill (Pierce County); March Point Landfill (Skagit County); Northside Landfill (Spokane County); West Olympia Landfill (Thurston County); Cornwall Avenue Landfill (Whatcom County); and Terrace Heights Landfill (Yakima County).

⁸ *Available at* <http://www.theolympian.com/news/local/politics-government/article52734125.html> (last visited Aug. 9, 2017).

C. DNR’s 1992 Memorandum of Agreement with Ecology Does Not Represent Ecology’s Agreement with an “Active Involvement” Operator Test

Finally, DNR relies on a statement in the dissenting opinion at the Court of Appeals to suggest that Ecology agrees with its interpretation that an owner or operator must have an “active role” in the pollution in order to be liable. DNR Suppl. Br. 19 (quoting *Pope Res.*, 197 Wn. App. at 428 (Melnick, J., dissenting)). The dissent’s reliance on a 1992 Memorandum of Agreement is misplaced.

The dissenting statement is based upon language in the 1992 Memorandum recognizing that DNR “*may* have reasonable defenses based on not being an ‘owner-operator’” DNR Suppl. Br. 18 (emphasis added). Contrary to the dissent’s understanding, however, the statement does not represent Ecology’s agreement with, or assent to, DNR’s argument in this case. The statement recognizes DNR’s *position* that such an argument may lie, in the context of an agreement negotiated co-equally between sister state agencies. To be clear, Ecology has designated DNR as a “potentially liable person” for the Port Gamble Bay and Mill Site. Ecology issues such determinations to persons whom it “finds, based on credible evidence, *to be liable* under RCW 70.105D.040.”

RCW 70.105D.020(26) (emphasis added); *see also* WAC 173-340-500.⁹

This determination, and not the statement in the 1992 Memorandum, is the best indication of Ecology's position.

VI. CONCLUSION

Ecology urges the Court to reject a standard that limits "operator liability" under MTCA to only those who exercise active involvement in operational decisions specifically related to pollution at a facility. The Court should instead apply a standard matching the plain language of MTCA: the exercise of "any control over the facility." RCW 70.105D.020(22)(a).

RESPECTFULLY SUBMITTED this 10th day of August 2017.

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⁹ The dissent found significance in the fact that Ecology "only named DNR as a *potentially* liable person." *Pope Res.*, 197 Wn. App. at 428 (Melnick, J., dissenting) (emphasis added). Under MTCA, however, Ecology may *only* issues determinations of "potential" liability; the authority to adjudge liability lies solely with courts of competent jurisdiction. *See* RCW 70.105D.020(26), .030, .040. Ecology exercises its enforcement authorities under MTCA based upon such determinations of "potential" liability. *See, e.g.*, RCW 70.105D.030(1)(b) (authorizing Ecology to "require potentially liable persons to conduct remedial actions").

CERTIFICATE OF SERVICE

I certify that on August 10, 2017, I caused to be served the Amicus Curiae Brief of State of Washington, Department of Ecology in the above-captioned matter upon the parties herein via U.S. Mail and using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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