

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.

**WASHINGTON STATE DEPARTMENT OF NATURAL
RESOURCES' ANSWER TO AMICUS BRIEFS OF
GEORGIA-PACIFIC AND SIERRA PACIFIC**

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I. INTRODUCTION

Industrial polluters using the State's aquatic lands have a strong incentive to support Pope Resources and Olympic Property Group (Pope Resources) in this case: to maintain their ability to contaminate state-owned aquatic lands and then proceed to sue the State for cleanup costs related to the contamination that they and their predecessors caused.

Amici Georgia-Pacific and Sierra Pacific¹ join in Pope Resources' arguments that the Department of Natural Resources (DNR) should be liable as an "owner or operator" of state-owned aquatic lands at Port Gamble. As part of its argument, Georgia-Pacific, which is a wholly owned subsidiary of the second largest privately held corporation in the United States, asserts that if this Court rules in DNR's favor, it will seriously jeopardize its ability to clean up its own pollution at Port Angeles.

Georgia-Pacific's arguments fail for several reasons. First, DNR does not have any "ownership interest" in state-owned aquatic lands, as DNR's role as a land manager is defined by the aquatic lands statutes and is based in the state constitution. Second, the primary case relied upon by Georgia-Pacific, *Oberg v. DNR*, 114 Wn.2d 278, 787 P.2d 918 (1990), supports DNR's position. If the Legislature had intended to define DNR as

¹ Sierra Pacific did not file a separate brief, but rather filed a motion to join Georgia-Pacific's brief.

an owner of state-owned aquatic lands, it would have done so in the aquatic lands statutes, just as it expressly did in the uplands statutes at issue in *Oberg*. Finally, DNR's arguments are consistent with the Model Toxic Control Act's (MTCA) purpose as a polluter pays statute, making those polluters of the State's aquatic lands responsible for cleaning up the pollution that they cause.

II. ARGUMENT

A. This Court Should Disregard Facts Cited by Amici That Were Not Before the Trial Court.

This case is before the Court on appeal from an order granting summary judgment to DNR. Accordingly, under RAP 9.12, "the appellate court will consider only evidence and issues called to the attention of the trial court." The purpose of RAP 9.12 "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Green v. Normandy Park*, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007).

Amici raise multiple unsubstantiated claims throughout their motions and briefs regarding DNR and various MTCA sites across Western Washington.² This Court should appropriately disregard any evidence presented by Amici that was not considered by the trial court and

² Br. of Georgia-Pacific at 3-5; Motion of Georgia-Pacific for Leave to File Brief at 2-3; Motion of Sierra Pacific Industries for Leave to File Amicus Brief at 2.

that is not supported by a citation to the record in this appeal.

See RAP 9.12.

B. DNR Does Not Have Any Ownership Interest in State-Owned Aquatic Lands. DNR's Role as a Manager Is Defined by the Legislature and the State Constitution.

Similar to the arguments made by Pope Resources, Georgia-Pacific argues extensively that DNR has a sufficient ownership interest in state-owned aquatic lands to be liable as an owner under RCW 70.105D.020(22)(a). Br. of Georgia-Pacific at 6-12. However, as DNR discusses in its Supplemental Brief, the State's ownership of its aquatic lands is set forth in the state constitution, and DNR's role as a land manager, and not an owner, is defined by the Legislature. See DNR Suppl. Br. at 9-11.

Georgia-Pacific attempts to overcome DNR's arguments by relying primarily on *Oberg*. Br. of Georgia-Pacific at 7-10. However, despite Georgia-Pacific's assertions to the contrary, *Oberg* does not support its position because *Oberg* involved an uplands statute that *specifically defined* DNR as a landowner of forest land. *Oberg*, 114 Wn.2d at 282-83. This becomes clear upon closer examination of the *Oberg* case.

1. ***Oberg* Stands for the Proposition That Where a Statute Specifically Defines DNR as a “Landowner,” DNR May Be Considered a “Landowner” for the Purposes of That Statute.**

At issue in *Oberg* was whether or not DNR could be liable for damages caused by a fire that spread off of state forest land. *Oberg*, 114 Wn.2d at 281-82. In examining DNR’s potential liability as a “landowner” of state forest lands, the *Oberg* court looked at RCW 76.04.005, which defined the terms “owner of forest land,” “landowner,” and “owner,” as including the “owner” of public land, and RCW 76.04.610, which required DNR to pay the fire protection assessment for this land. *Id.* at 282-83.

Under RCW 76.04.005, the *Oberg* court found that “the Legislature’s *express inclusion* of DNR within the landowner category indicates that the sections governing landowner liability apply to DNR.” *Oberg*, 114 Wn.2d at 282 (emphasis added). The court went on to conclude 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.” *Id.* at 283 (emphasis in original). In reaching this conclusion, the *Oberg* court also recognized that “[t]he legislature itself has imposed upon DNR this peculiar set of duties by *specifically defining* “forest landowner,” “owner of forest land,” “landowner,” or “owner” to include DNR.” *Id.* at 285 (emphasis added).

This type of “express inclusion” of DNR in the definition of landowner is noticeably absent under the aquatic lands statutes, particularly RCW 79.105.010, RCW 79.105.060(20), and RCW 79.105.020.

While Georgia-Pacific argues that DNR should be an owner of state-owned aquatic lands for the same reasons that it was found to be an owner of the forest lands at issue in *Oberg*,³ this argument ignores the fact that the State’s ownership of its aquatic lands is *fundamentally different* from its ownership of other types of public lands in that the State’s ownership of its aquatic lands is uniquely tied to State sovereignty. See DNR Suppl. Br. at 10 n.7. This point was emphasized by the United States Supreme Court in *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 286, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), when it recognized that “the perceived public character of submerged lands . . . underlies and informs the principle that *these lands are tied in a unique way to sovereignty*.” (emphasis added). Justice O’Conner, in her concurring opinion, further explained that “[w]e have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State’s ability to regulate use of its navigable waters.” *Coeur d’Alene Tribe*, 521 U.S. at 289 (O’Connor, J., concurring). Even when a right in such lands is conveyed, the public still generally maintains “the right to go

³ Br. of Georgia-Pacific at 8.

where the navigable waters go.” *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969).

2. Unlike the Statutes at Issue in *Oberg*, the Aquatic Lands Statutes Do Not Give DNR Any Ownership Interest in State-Owned Aquatic Lands.

Although Georgia-Pacific would like to discount this Court’s unambiguous language in *Oberg*, the Legislature did *specifically define* DNR as a “landowner” of state forest lands for the purposes of the forest protection statutes at issue in that case. *See Oberg*, 114 Wn.2d at 282-85.⁴ Unlike those statutes, the aquatic lands statutes do not define DNR as having any ownership interest in state-owned aquatic lands. *See* RCW 79.105.060(20) (defining “state-owned aquatic lands” as “tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways *owned by the state and administered by the department* [and] does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department.”) (emphasis added). *See also* RCW 79.105.010 (Legislature “recognizes that the state owns these aquatic lands in fee and has *delegated to the department the responsibility to manage these lands for the benefit of the public*”) (emphasis added) and RCW 79.105.020 (directives in the aquatic lands statutes “articulate a

⁴ This was also recognized by Judge Melnick in his dissent below, when he stated that the statutes at issue in *Oberg* “specifically defined DNR as an owner of forest land.” *Pope Res., LP v. DNR*, 197 Wn. App. 409, 427 n.16, 389 P.3d 699 (2016) (Melnick, J. dissenting).

management philosophy to guide the exercise of the *state's ownership interest and the exercise of the department's management authority.*") (emphasis added).

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 fact that the Legislature defined DNR as a landowner under the forest protection statutes at issue in *Oberg*, but declined to do so under the aquatic lands statutes, indicates a clear intent to exclude DNR from having any ownership interest in state-owned aquatic lands.⁵

For these reasons, the other "ownership" cases cited by Georgia-Pacific are also inapplicable. *See* Br. of Georgia-Pacific at 7-11. The cases cited by Georgia-Pacific in support of its "ownership" arguments are also called into question by *Unigard Insurance Company v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), where the Court of Appeals stated in a footnote that the reason why Ecology named Mr. Leven as an "operator," and not as an "owner," of the facility in question under MTCA

⁵ As Judge Melnick correctly concluded in his dissent, "DNR, a state agency, is in fact the manager of the aquatic land but does not have an ownership interest in the facility." *Pope Res., LP v. DNR*, 197 Wn. App. at 427 (Melnick, J., dissenting).

was “because Leven did not personally hold title to the LIDCO site or to the Bayside equipment, DOE *could not* have premised its PLP designation of him on Leven’s status as an owner.” *Unigard*, 97 Wn. App. at 428 n.27 (emphasis added). This statement, while *dicta*, indicates that the *Unigard* court also considered fee ownership of a facility to be important for the purposes of “owner” liability under MTCA.

Similar to the arguments made by Pope Resources, Georgia-Pacific also asserts that DNR’s management activities make it liable as an “owner” under MTCA. Br. of Appellant at 7, 9-10. However, as discussed above and in DNR’s Supplemental Brief at 9-11, DNR’s management authority over stated-owned aquatic lands is prescribed by the Legislature, and because of this, DNR “may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority.” *Northlake Marine Works, Inc. v. DNR*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006).

Indeed, contrary to Georgia-Pacific’s statements, DNR does not currently have the authority to sell the State’s aquatic lands, and when it did have the authority, it was mandated to do so by the Legislature.⁶ For example, in 1889, and again in 1891 and 1911, the Legislature directed that the Commissioner of Public Lands “shall” sell tidelands owned by the

⁶ Br. of Georgia-Pacific at 7.

State when certain conditions were met by an applicant. *See* Laws of 1889-90, § 8, 433-37; Laws of 1891, ch. CLVIII, § 1, 403-04; and Laws of 1911, ch. 36, §§ 1-2. CP at 249-59. When those tidelands were sold, the deeds were clear that it was the “State of Washington” making the transfer, and it was not the Commissioner of Public Lands signing the deeds, it was the governor. CP at 272-79, CP at 97. The mandatory directive to sell the State’s tidelands was not removed by the Legislature until 1971. *See* Laws of 1971, 1st Ex. Sess., ch. 217, §§ 1-2. CP at 260-62.

Similarly, DNR was not given statutory authority to negotiate bedlands leases on behalf of the State for log booming until 1953. *See* Laws of 1953, ch. 164, § 1, which was codified as former RCW 79.16.530. CP at 263-64. For those leases negotiated by DNR at Port Gamble, it is clear on the face of the documents that the owner of the bedlands is the “State of Washington” and not DNR. CP at 103-06, 111-21. DNR has never been given the amount of discretion over the State’s aquatic lands that a private landowner would have over privately-owned lands, and as such, it does not have any ownership interest in those lands.

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C. It Is Undisputed in This Appeal That the State Itself Cannot Be a “Person” for the Purposes of Liability Under MTCA. Only Amici Raise the Issue of “State” Liability Under MTCA, and Accordingly, This Court Should Disregard That Issue.

While Georgia-Pacific contends that the issue of the State’s liability under MTCA is “far from uncontested,” Georgia Pacific is merely an amicus, not a party to this case, and only amici have raised this argument. Br. of Georgia Pacific at 13. Indeed, Pope Resources conceded before the trial court that “the State of Washington cannot be liable under MTCA.” CP at 308. Moreover, the Department of Ecology also agrees that:

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.

Br. of Ecology at 5-6 n.2. (emphasis in original).

Because the issue of the State’s exclusion from liability under MTCA is not in dispute and is only raised by amici, it is uncontested, and this Court should properly decline to consider it. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered). However, should this Court decide to consider the issue, it is worth emphasizing that MTCA and the Comprehensive Environmental Response, Compensation, and Liability

Act (CERCLA) unambiguously differ in their definitions of “person,” and that CERCLA’s definition explicitly includes the word “State.” *See* 42 U.S.C. § 9601(21); *see also* RCW 70.105D.020(24). This difference indicates a clear statutory intent for MTCA to differ from CERCLA in this regard. *See Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992) (when MTCA uses different language, courts take note and consider the variance a clear indication of statutory intent).

While Georgia-Pacific asserts that MTCA was not intended to exclude the State from liability,⁷ it does not address the fact there are numerous statutes where the Legislature has defined the term “person” to include both the State itself, as well as a state agency or other instrumentality of the State. *See, e.g.*, RCW 70.38.025(10); RCW 79.105.060(13); and RCW 81.88.010(11). The Legislature’s failure to similarly define “person” to include the “State” under RCW 70.105D.020(24) is indicative of a different statutory intent. *See State v. Jackson*, 137 Wn.2d 712, 723, 976 P.2d 1229 (1999) (when the Legislature omits certain language from a statute, it should be inferred that the omission was purposeful). This difference can only be interpreted as an intent to limit the State’s liability under MTCA.

⁷ Br. of Georgia-Pacific at 13.

It should be clear that DNR is not arguing that a state agency can never be liable under MTCA, as RCW 70.105D.020(24) specifically includes a “state government agency” in its definition of “person.” However, as DNR has argued, MTCA’s definition of “owner or operator” focuses on the conduct of a state agency “person” in connection with pollution at a “facility.” *See* RCW 70.105D.020(22)(a). DNR Suppl. Br. at 8.

Indeed, there are no cases under MTCA in which a state agency was found liable for contamination at a facility based solely on an alleged “ownership” interest in the facility. In the cases that have involved a state agency’s liability, that agency was directly involved with the activity that caused the contamination. *See PacifiCorp Envtl. Remediation Co. v. Dep’t of Transp.*, 162 Wn. App. 627, 634-39, 259 P.3d 1115 (2011) (state agency constructed and operated a drainage system that disposed of a hazardous substance in Commencement Bay). *See also Seattle City Light v. Dep’t of Transp.*, 98 Wn. App. 165, 172, 989 P.2d 1164 (1999) (state agency arranged for the disposal of a hazardous substance when it sold a contaminated tank car for scrap).

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D. DNR's Interpretation of MTCA Is Consistent With Making Polluters Pay for the Contamination They Cause.

Georgia-Pacific's arguments, if adopted by this Court, would potentially subject DNR to liability for hazardous waste on the State's 2.6 million acres of aquatic lands under DNR's management authority, regardless of whether or not DNR actually engaged in any management activities on such lands. This would shift a huge burden back onto the taxpayers of this state, and would not serve one of MTCA's purposes to "raise sufficient funds to clean up all hazardous waste sites" RCW 70.105D.010(2). Instead, such a holding in this case would serve to help subsidize those entities actually responsible for contaminating state-owned aquatic lands.⁸

Although the facts of Port Angeles as argued by amici are not properly before the Court in this appeal under RAP 9.12, the statements made by Georgia-Pacific in its brief are illustrative of the larger problem of industrial polluters contaminating state-owned aquatic lands, and then seeking to recover costs from the State. Georgia-Pacific is a subsidiary of

⁸ The Voters Pamphlet for Initiative 97 raised a particular concern that "big corporate polluters" would escape liability, and emphasized that under MTCA "[p]olluters are forced to clean up their wastes." Office of the Secretary of State, *Washington 1988 Voters and Candidates Pamphlet* 6 (1st ed. 1988) (emphasis in original). This Court should reject Georgia-Pacific's arguments and decline to allow such industrial polluters to shift responsibility for their pollution onto the State.

the second largest privately held company in America.⁹ Despite this fact, and despite the fact that Georgia-Pacific is a successor to one of the companies that polluted Port Angeles Harbor,¹⁰ it makes the rather astonishing claim that a ruling in DNR's favor would "directly and materially affect[]" the cleanup at Port Angeles, and implies that DNR is "the only remaining viable potentially liable party."¹¹ This Court should not interpret MTCA in such a way as to reward the industrial polluters that are directly responsible for contaminating a site.

While Georgia-Pacific also asserts that DNR's arguments should be considered in the allocation, and not the liability, phase of this case,¹² this argument ignores MTCA's liability scheme, and is akin to arguing that a plaintiff in a negligence action should never have to prove liability, and should instead be allowed to go directly to the damages phase. Simply put, this is not how MTCA works.

The first step in determining liability under MTCA is to apply the "statutory criteria (enumerated in RCW 70.105D.040) to the facts."

⁹ Georgia-Pacific is a wholly owned subsidiary of Koch Industries, Inc. <http://www.gp.com/Company/Company-Overview> (last accessed August 28, 2017). Koch Industries is the second largest privately held company in America, with an approximate \$100 billion in revenue for 2016. <http://www.forbes.com/companies/koch-industries/> (last accessed August 28, 2017).

¹⁰ Br. of Georgia-Pacific at 3-4.

¹¹ Br. of Georgia-Pacific at 4-5.

¹² Br. of Georgia-Pacific at 15-16.

Seattle City Light, 98 Wn. App. at 170. If the criteria of the statute applies, the court proceeds to the allocation phase. *Id.* If not, the court's inquiry ends. As all of DNR's arguments in this appeal go to its potential liability as an "owner or operator" under RCW 70.105D.040 and RCW 70.105D.020(22)(a), the trial court appropriately considered them in the liability phase of this case, and this Court should consider them as well.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

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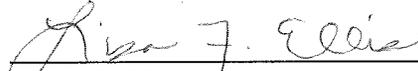
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<p>Michael L. Dunning Perkins Coie LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101 mdunning@perkinscoie.com</p> <p><i>Attorney for Amicus Curiae Sierra Pacific Industries</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
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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 8th day of September, 2017, at Olympia, Washington.

A handwritten signature in cursive script, reading "Lisa F. Ellis", written over a horizontal line.

LISA F. ELLIS
Legal Assistant
Natural Resources Division

ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

September 08, 2017 - 8:37 AM

Transmittal Information

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