

NO. 47861-7-II

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

POPE RESOURCES, LP, and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

**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 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 take a position on the Department of Natural Resource’s (DNR’s) liability 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, “state law requires active involvement in . . . operational decisions specifically related to pollution at a facility.” DNR Brief at 29. 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. IDENTIFY 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. The parties have debated the significance of this designation—and how it reflects Ecology’s view of “owner or operator” liability under MTCA—in their briefing. *See* Pope Resources² Opening Brief at 42–50; DNR Brief at 22–24; Pope Resources Reply Brief at 20–22. 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.

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.

² Appellants Pope Resources, LP, and OPG Properties, LLC, filed joint briefs. For ease of reference, this brief uses “Pope Resources” to refer to the joint briefs.

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 there is “active involvement in the operational decisions specifically related to pollution at a facility.”

IV. STATEMENT OF THE CASE

Ecology incorporates by reference the Statements of the Case in the briefs submitted by Pope Resources, LP/OPG Properties, LLC, and DNR, to the extent they are consistent.

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’s voters in 1988 to “raise sufficient funds to clean up all hazardous waste sites” and 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); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 426, 833 P.2d 375 (1992). The statute “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. Wash.*

State Dep't of Trans., 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, and it attaches regardless of fault or intent. *See, e.g., PacifiCorp Env'tl. Remediation Co. v. Wash. 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. 2013). The scheme is intentionally geared to get contaminated sites cleaned up “well and expeditiously,” without delay by confounding litigation at the front end 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. Instead, MTCA provides for a private right of action that allows liable persons to pursue equitable apportionment of costs among themselves. *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 catch-all 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 “site or area” where a hazardous substance has “come to be located.”³

³ 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

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

DNR suggests that the Court apply a standard for “operators” that limits liability to only those who exercise “active involvement in the operational decisions specifically related to pollution at a facility.” DNR Brief at 29; *see also id.* at 30–39. 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 proposed standard is at odds with MTCA’s plain language. The plain language of the statute provides that an “owner or operator” is any person who “exercises *any control* over the *facility*”—i.e., any control over a *site or area* where a hazardous substance has come to be located. RCW 70.105D.020(22)(a), .020(8)(b) (emphasis added). In plain terms,

intent to not make the State strictly liable for polluting activity on all State 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 affirmatively undertaking active management of the property (e.g., in a proprietary role, such as through leasing), the agency is not liable as an “owner or operator” under MTCA.

affirmatively leasing land within a contaminated site or area *is* exercising “any control” over “the facility.” The lessor is exercising actual control by defining (or choosing to not define) the uses to which the leasehold can be put, and the terms of those uses. Further, the lessor is exercising (or choosing to not exercise) actual control by deciding whether, when, and to what extent to undertake policing of the lease. Based on MTCA’s plain language, a lessor of land within a facility is an “owner or operator” of that facility.⁴

DNR’s proposed standard, however, 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 control over the polluting activity.*” *See, e.g.,* DNR Brief at 9–10 (arguing that an operator must be

⁴ As acknowledged by the parties, *see* DNR Brief at 22–24; Pope Resources Reply Brief at 20–22, Ecology has designated DNR as a “potentially liable person” for the Port Gamble Bay and Mill Site. The parties debate the significance of this determination as it relates to Ecology’s position. *See* Pope Resources Opening Brief at 42–50; DNR Brief at 22–24; Pope Resources Reply Brief at 20–22. While Ecology agrees with DNR that Ecology only has authority to determine *potential* liability under MTCA, with the authority to issue judgments of liability reserved for courts of competent jurisdiction, *see* RCW 70.105D.020(26), .030, .040, Ecology nevertheless can only issue “potentially liable person” determinations to those persons 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.

“actively involved in the decisions regarding the polluting operations of a facility, typically on a day-to-day basis”). This is at odds with a plain language interpretation. The words of a statute are to be given meaningful effect, not rendered meaningless or superfluous. *City of Bellevue v. East Bellevue Cmty. Council*, 138 Wn.2d 937, 946, 938 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”). Further, nothing in MTCA’s legislative history supports reading out the plain words of the “owner or operator” definition in favor of other, different words. *See generally Washington 1988 Voters & Candidates Pamphlet* at 6.

The terms “owner” and “operator” are not separately defined in MTCA. Rather, they are captured together in the same phrase (“*owner or operator*”) and defined together in the same sentence, without clear distinction. *See RCW 70.105D.020(22)(a)*. The terms should thus be construed together and consistently. *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 one statutory section in tandem). Subject to

MTCA's statutory defenses,⁵ owners of contaminated property are strictly liable under MTCA *regardless* of whether they contributed to the polluting activity and regardless of whether the polluting activity predated their ownership. *See In re Chicago, Milwaukee, St. Paul & Pacific 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. Razore 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 contamination” as a basis for reversing trial court). With no basis in the plain language of the statute, however, DNR’s position would result in a different, more limited liability standard—and a different policy outcome—for a lessor who is exercising the same effective control over

⁵ 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).

property as an “owner.” Once again, this conflicts with the plain language of MTCA, which offers no hint of such a distinction.

2. The Case Law Supporting an Operator Liability Standard Requiring “Active Involvement in Operational Decisions Specifically Related to Pollution” Is Not Applicable

DNR’s proposed standard for operator liability is drawn from inapposite case law. 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 Brief at 9, 30–32. 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.

In both *Unigard* and *Taliesen*, the circumstances tested the margins of “owner or operator” liability under MTCA’s broad sweep. In *Unigard*, the question concerned whether a corporate officer and sole shareholder should also be held liable for the acts of a corporation that was an “owner or operator.” *Unigard*, 97 Wn. App. at 428–31. In *Taliesen*, the question concerned whether a subcontractor carrying out the orders of a prime contractor who was an “owner or operator” should also be held liable.

Taliesen, 135 Wn. App. at 124–28. In *Bestfoods*, the circumstances similarly tested the margins of “owner or operator” liability under MTCA’s federal analog, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In *Bestfoods*, the question concerned whether a corporate parent should also be held liable, either through derivative or direct liability, for the acts of its subsidiary, which was an owner or operator. *Bestfoods*, 524 U.S. at 55, 61–70.

None of these cases address whether exercising direct control over the physical facility itself, through leasing to others, gives rise to “owner or operator” liability. Instead, all three cases concern whether a sufficient degree of control over business operations or the activities leading directly to pollution had been shown. 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).

Further, all three cases rest heavily or exclusively on analysis under 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. CERCLA, however, is a different statutory framework than MTCA. While MTCA is patterned after CERCLA, and federal cases interpreting similar language in CERCLA are persuasive, those federal

cases are not controlling, particularly where MTCA differs from CERCLA. *Bird-Johnson*, 119 Wn.2d at 427. DNR itself recognizes that “when MTCA uses different language, courts take note and consider the variance a clear indication of statutory intent.” DNR Brief at 14–15 (citing *Bird-Johnson*, 119 Wn.2d at 427–28); *see also Seattle City Light*, 98 Wn. App. at 170 (unlike CERCLA, MTCA makes strict, joint and several liability express). Further, as this Court has said: “The United States Supreme Court’s interpretation of CERCLA does not trump our state courts’ interpretation of Washington’s comparable Act.” *PacifiCorp*, 162 Wn. App. at 663 (citing *Von Herberg v. City of Seattle*, 157 Wash. 141, 160, 288 P. 646 (1930) (“[O]ur interpretation of our statutes is binding on the federal courts, not theirs on us.”)).

Here, MTCA differs from CERCLA. Unlike CERCLA, MTCA defines an “owner or operator” explicitly in statute.

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).⁶ Because this definition is circular to the point of being “useless,” *Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992), the

⁶ 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).

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).

MTCA’s “owner or operator” definition, by contrast, 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 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 a physical area in which hazardous substances have come to be located. *See K.L.B.*, 180 Wn.2d at 742.

The statutory difference between CERCLA and MTCA 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 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 exercise “active involvement in the operational decisions specifically related to

pollution at a facility,” DNR Brief at 29, does not effectuate the plain language of MTCA, which attaches liability to “any control over the facility.” RCW 70.105D.020(22)(a).

3. An Operator Liability Standard Requiring “Active Involvement in Operational Decisions Specifically Related to Pollution” Conflicts With MTCA’s Statutory Purpose and Intent

Finally, MTCA’s terms are to be “liberally construed to effectuate the policies and purposes of [the] act.” RCW 70.105D.910; *Pacific Sound Resources 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 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.

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. Instead of furthering MTCA’s broad sweep of liability, 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 “actual control” as defined by DNR. This chips away at MTCA’s express strict, joint and several liability scheme, which, as argued above, is intended to promote expeditious cleanup 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 by MTCA triggers insurer’s duty to indemnify, even without overt threat of government suit).⁷

This is true 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

⁷ 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).

liable under MTCA's provisions.⁸ Ecology disagrees with the extension of an "active-involvement" test specifically for governmental entities, as suggested by DNR. *See* DNR Brief at 33–34 (citing *United States v. Twn. 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.⁹ *See, e.g., Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d

⁸ Ecology appreciates DNR's concern over potential liability for contaminated sites. *See* DNR Brief at 24–26. However, the issue before the Court solely concerns threshold liability under MTCA, as distinguished from the ultimate apportionment of liability among liable persons. It is possible for DNR to be liable for a site under MTCA and not bear any equitable portion of the cleanup costs for the site. *See Seattle City Light*, 98 Wn. App. at 174, 177.

⁹ 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

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, 2016.¹⁰ The Court should accord 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).

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

County); West Olympia Landfill (Thurston County); Cornwall Avenue Landfill (Whatcom County); and Terrace Heights Landfill (Yakima County).

¹⁰ Available at <http://www.theolympian.com/news/local/politics-government/article52734125.html>.

of MTCA: the exercise of “any control over the facility.”
RCW 70.105D.020(22)(a).

RESPECTFULLY SUBMITTED this 5th day of February 2016.

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Transmittal Letter

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Case Name: Pope Resources, LP and OPG Properties, LLC v. Wash. State Dep't of Natural Resources

Court of Appeals Case Number: 47861-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Amicus

Statement of Additional Authorities

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Comments:

Amicus Curiae Brief of State of Washington, Department of Ecology

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