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DIVISION II

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STATE OF WASHINGTON

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

NO. 47861-7-II

POPE RESOURCES, LP and OPG PROPERTIES, LLC

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

AMICUS CURIAE BRIEF SUBMITTED BY JOLENE UNSOELD,
JANICE NIEMI AND DAVID BRICKLIN

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I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Model Toxics Control Act (MTCA) (chapter 70.105D RCW) was passed as Initiative 97 in 1988. The Voters' Pamphlet statement in support of the initiative was authored by then State Senator (and future King County Superior Court judge) Janice Niemi,¹ then State Representative (and future Congresswoman) Jolene Unsoeld,² and then Washington Environmental Council president, David Bricklin.³ Ms. Niemi, Ms. Unsoeld and Mr. Bricklin submit this *amicus curiae* brief because of their interest in assuring that the initiative is faithfully

¹ Ms. Niemi served in the Washington State Senate from 1987 through 1995. Previously, she received her undergraduate and law degrees from the University of Washington. She was the first woman ever elected to the King County Superior Court bench (in 1972) and served on that bench again from 1995 – 2000. Ms. Niemi was a founder of Washington Women Lawyers. Ms. Niemi also served in the Washington State House of Representatives from 1983 through 1987.

² Ms. Unsoeld was a member of the Washington State House of Representatives from 1984 through 1988. She was elected to Congress and served there from 1989 through 1995. She has been described as "the conscience of the state legislature" for her work on creating the Public Disclosure Law and other open public meeting and open government issues. See https://en.wikipedia.org/wiki/Jolene_Unsoeld.

³ Mr. Bricklin is a graduate of Michigan State University and Harvard Law School. He has been practicing environmental and land use law in Seattle since 1979 and has appeared frequently in the courts of appeal and Washington Supreme Court. He has served as president of the Washington Environmental Council, chair of Washington Conservation Voters, and a founding board member of Futurewise. He was a co-author of the Model Toxics Control Act (I-97) and co-chair of that initiative campaign. He is a frequent lecturer at CLEs on various environmental and land use law issues.

implemented by the State of Washington in accord with the intent as expressed in the initiative.

The initiative was the result of the legislature's unwillingness to adopt a hazardous waste cleanup law that did not compromise the public's right to a clean and healthful environment. The initiative was an attempt by the people to assure that hazardous waste sites were cleaned up quickly and that adequate funds were available for the cleanup. To ensure adequate funds, the initiative proposed a sweeping strict liability rule that, among other things, made owners of hazardous waste sites liable for clean-up costs without regard to fault. That principle became the law of the State of Washington when the initiative was approved by the people on November 8, 1988.

Amici Niemi, Unsoeld, and Bricklin file this brief to provide the Court with their insights into the legislation's intent as evidenced by the words of the initiative and other appropriate legislative history materials.

II. STATEMENT OF THE CASE

These *amici* adopt the statement of the case provided by the appellants.

III. ARGUMENT

The court should reject the legal principle advanced by Department of Natural Resources that a state agency that manages state land is never liable under MTCA simply because fee title is in the name of the State, not the name of state agency. The legislative intent of the statute as reflected in its words provides for no such distinction.

A. The Model Toxics Control Act was Adopted to Provide a Broad Base of Financial Support to Clean-up Hazardous Waste Sites Quickly

In 1988, citizens in Washington were confronted by a hazardous waste cleanup problem that seemed to be out of control. Decades of industrial activities taken with little regard or knowledge of environmental consequences had generated hundreds of hazardous waste sites around the State. As described in the Voters' Pamphlet that year:

Nearly every week brings news of new toxic catastrophes. *One out of six people who live in Washington could be affected by toxics.* Families around Puget Sound, in Spokane, and in Central Washington *cannot drink their water* because of chemical pollution. Washington is the second worst state west of the Mississippi for hazardous waste sites. Seeping landfills, pesticides, and petroleum products can cause cancer and birth defects. Seniors may be particularly vulnerable. The need for a tough toxics cleanup law is clear.

1988 Voters and Candidates Pamphlet, ed. 2, Washington Secretary of State (1988) (excerpts attached to Appellant's Reply Brief) (emphasis in original).

Raising revenues to clean up hazardous waste sites was a "main purpose" of the initiative:

A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. **The main purpose of chapter 2, Laws of 1989 is 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.

1989 Laws of Washington, ch. 2., §1(2) (hereinafter "Initiative 97") (codified at RCW 70.105D.010(2)) (emphasis supplied). The initiative accomplished this purpose by broadly defining those who would be liable

for cleanups;⁴ making those persons liable without regard to fault;⁵ making the liability joint and several,⁶ and, as discussed in the next section, by defining the term "owner and operator" in very broad terms.

MTCA includes a "liberal construction" clause to assure that its goals and objectives are achieved. RCW 70.105D.910. Consequently, any proposed construction which would limit liability must be interpreted narrowly so as not to defeat the broad remedial objectives. *See, e.g., Tift v. Professional Nursing Services, Inc.*, 76 Wn. App. 577, 582, 886 P.2d 1158 (1995) (exclusions to coverage under Minimum Wage Act must be "construed strictly" so as not to defeat the statute's broad objectives).

B. The Initiative Defined "Owner and Operator" in Very Broad Terms

An "owner" of a site was defined to include not only the owner at the time the site became contaminated, but also any subsequent owner (unless the subsequent owner could establish that they had no knowledge

⁴ Initiative 97, §4 (codified at RCW 70.105D.040) (liable parties include owners and operators of a facility containing a hazardous substance, transporters and owners of hazardous substances, and others, with limited exceptions).

⁵ Initiative 97, §4(2) (codified at RCW 70.105D.040(2)).

⁶ *Id.*

of the contamination and no reason to know about the contamination, following a good faith investigation).⁷

A broad reach was assured by defining “owner or operator” not simply by reference to fee title ownership, but rather to capture two sets of persons and entities:

(1) A person “with *any* ownership interest in the facility,” and

(2) A person who “exercises *any* control over the facility.”

Initiative 97, §2(6)(a) (emphases supplied) (codified at RCW 70.105D.020(22)).

Likewise, the term “person” was defined expansively to include any “individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe.” Initiative 97, §(2)(7) (codified at RCW 70.105D.020(24)).

C. DNR's Reading of the Statute Violates and Mis-Appplies Several Rules of Statutory Construction

Against this background of an expansively drafted initiative, the Department of Natural Resources makes the hyper-technical argument that it cannot be liable as a person exercising “any control over the facility,”

⁷ Initiative 97, §4(3)(b) (codified at RCW 70.105D.040(3)(b)).

even though it concedes that it manages the property on behalf of the State and, as manager, that it has entered into leases to allow others to use the property (which leases provide DNR with various elements of oversight and control). It also argues that it does not have “any ownership interest in the facility,” even though courts have regularly construed an “ownership interest” to require less than fee title. *See Amicus Curiae* Brief of Georgia-Pacific LLC at 10 -11.

Legislation is to be read as a whole. *See, e.g., State v. Lilyblad*, 163 Wn.2d 1, 6, 9, 177 P.3d 686 (2008). Given the broad reach of Initiative 97, it is difficult to fathom any rational basis for the drafters to have intended to exclude state-owned land from the reach of the measure, when they included within its scope (1) land owned in fee by state agencies and (2) land owned in fee by "the State" if a state agency “controls” it or if the agency state has “any ownership interest” in it.

DNR’s argument overlooks that “the State” as a distinct entity does not manage the lands owned in fee by “the State.” Most of the State’s lands are managed by DNR. This includes bedlands, like those at issue here. “The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these

lands.” RCW 79.105.010.⁸ Other State lands are managed by other agencies, like the Department of Fish and Wildlife, the Washington State Parks and Recreation Commission, the University of Washington and Washington State University.⁹ The initiative drafters assured coverage of these State-owned land by focusing on the state agencies that manage the land, instead of “the State” which may hold fee title. By defining “owner” expansively to include persons (*e.g.*, state agencies) that “control” management of property, it was unnecessary to call out “the State” separately from the “state agencies” in the definition of “persons.”

Simply put, because the State delegates “control” of land it owns in fee to various state agencies, there was no need to call out “the State” separately (and in addition to “state agencies”) when identifying “persons” who could be liable.

⁸ Demonstrating the Legislature’s intent that these lands be managed and controlled by DNR, the Legislature has specified that when DNR acquires land pursuant to a real estate contract, the contract is “to be signed by the [lands] commissioner on behalf of the state.” RCW 79.11.200.

⁹ See RCW 77.12.210 (Department of Fish and Wildlife authority to “maintain and manage” real property “owned, leased or held by the department”); WAC 232-13-030(9) (defining WDFW land to include any land “under the ownership, management, lease, or control of the department, excluding private lands”); RCW 79A.05.030(1) (State Parks and Recreation Commission authority to “have the care, charge, control and supervision of all parks and parkways acquired or set aside by the state for park or parkway purposes”); RCW 28B.20.395 (University of Washington has “full control” of the university tract and powers conferred “under the original deeds of conveyance to the state of Washington”); RCW 28B.30.095 (management, care and preservation of all Washington State University property vested in board of regents).

DNR argues that there must be reason the drafters of Initiative 97 referred to “state agencies” instead of “the state.” DNR Resp. Br. at 14 - 15. Presumably so, but that reason clearly was not to eliminate liability for land owned by the State and managed by a state agency. While focusing on this difference between CERCLA and MTCA, DNR conveniently ignores another difference that directly answers the question whether this change was intended to shield “the State” from liability for lands it owns in fee. As quoted above, the initiative defined an “owner or operator” to include a person who “exercises *any* control over the facility.” Initiative 97, §2(6)(a) (emphasis supplied) (codified at RCW 70.105D.020(22)). This phrase is not included in CERCLA’s definition. *See* 42 U.S.C. §9601(20)(A). Likewise, the initiative drafters modified CERCLA’s definition to include not just the person “owning” the facility, but also anyone “with any ownership interest” in the facility. *Compare* Initiative 97, §2(6)(a) *with* 42 U.S.C. §9601(20)(A).

In sum, the change from “state” to “state agencies” cannot be viewed in isolation. *State v. Lilyblad, supra*. The initiative drafters combined that change with changes to the definition of “owner” that assured that “the State” would be liable for property it owns, whether

managed by (or owned directly by¹⁰) the various “state agencies.” By considering these multiple changes together instead of isolation, it is evident that the drafters of the initiative had no intent to exclude state agency liability simply because fee title was held by “the State.”

D. DNR's Postulated Reason for the Initiative to Exclude State-Owned Land from Potential Liability is Illogical and Unpersuasive

We are struck by the shallowness of DNR’s efforts to provide a rationale for the supposed intent of the drafters of the initiative to make every other unit of government potentially liable, including state agencies, but to provide an absolute defense in situations where the State owns the land in fee. DNR divines the following rationale for the drafters’ supposed intent to eliminate the State liability where the property is owned by the State, but to not preclude liability if the property is owned by or managed by a state agency:

¹⁰ While most land owned by the State apparently is owned in fee by “the State,” the Legislature has authorized various agencies, including DNR, to acquire property in their own name. *See, e.g.*, RCW 79.22.010 (DNR authorized to accept real property “made in its own name, or made in the name of the state”); RCW 77.12.037 (authority of Fish and Wildlife Commission to acquire real property); RCW 28B.20.130(7) (authority of University of Washington to acquire real property); RCW 28B.20.350 (conveying certain land to the University of Washington); RCW 28B.30.150(20) (authority of Washington State University to acquire real property); RCW 79A.05.095 (authority of Washington State Parks and Recreation Commission to acquire real property). But the Legislature has not done so in any consistent or coherent manner.

One of the main purposes of MTCA is to facilitate the cleanup of hazardous waste sites and to ensure that polluters pay such costs. *See* 1988 State General Election Voter's Pamphlet at 6 – 7. This purpose helps ensure that the taxpayers do not shoulder an excessive burden for cleaning up such sites. As discussed above, this is likely why MTCA, unlike CERCLA, focuses on the conduct of a state agency and its involvement in polluting activities, rather than making the State liable based solely on an alleged "ownership" interest.

DNR Resp. Br at 24-25.

This supposed rationale for DNR's reading of the statute makes no sense on several levels. First and foremost, DNR's construction leaves state agencies exposed, if they own the property in the name of the agency. (Various statutes allow agencies to take land in their own name. *See* note 10, *supra*.) It makes no sense to expose the State to liability if the property is owned by an agency, but to shield the State from liability if the property is owned by the State, but managed by an agency. Yet, according to DNR, that was the intent of the drafters — to expose the State to liability if a state agency owns the property, but not if the State owns the property. DNR's illogical reading produces "unlikely" or "strained" results, which should be rejected. *Fraternal Order of Eagles, Tenion Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148

Wn.2d 224, 239, 242, 59 P.3d 655 (2002) (rejecting a "strained" construction which "does not seem logical").

Next, DNR's rationale is built on the premise that exposing the State to liability for hazardous waste sites exposes taxpayers to an "excessive" burden. But this premise is invalid for multiple reasons. First, the basic structure of the initiative was to make landowners liable (unless they were a truly innocent purchaser after-the-fact). Making DNR liable for its share as a landowner does not expose taxpayers to an "excessive" burden. The burden is the same as that imposed on all other public and private entities.

Second, "excessive" burdens are unlikely because the determination of liability is distinct from the determination of a party's share of liability. As DNR explains, there may be equitable factors weighing in its favor when the time comes to assign proportionate shares. *See* DNR Resp. at 4-5; 25-26. Likewise, the appellants claim equitable factors weigh in their favor. Appellants' Opening Br. at 12-13. The damage apportionment phase is the proper context for balancing these competing claims.

Third, the burden is not "excessive" because, just like any other public or private landowner, DNR could have (and presumably did) use

indemnity agreements and insurance to protect itself from liability resulting from lessees' activities and can continue to protect itself going forward by using similar measures. Further, DNR, like any other land manager or lessor, can minimize its risks by precluding or limiting dangerous activities on lands it leases; imposing reporting requirements; and exercising oversight.

Fourth, the burden on taxpayers is not “excessive” because DNR, the largest land managing agency in the State, derives large portions of its revenues not from taxpayers, but from its proprietary activities – leasing lands and selling products (like timber and shellfish) taken off those lands. For instance, in its most recent annual report available on line, DNR reports that revenues from its proprietary operations totaled \$338 million, while the agency received taxpayer support of less than \$20 million. *DNR Highlights 2014*, at 10, 13 (<http://www.dnr.wa.gov/about/fiscal-reports/dnr-annual-reports>; accessed on February 3, 2016). DNR can fund cleanups on lands it leases from the revenues it receives from its proprietary lessees, not from taxpayers. Moreover, given the magnitude of its proprietary operations, DNR can readily spread the costs and risks of cleanup expenses among its various proprietary activities and thereby mitigate the risk that any single lessee will be unable to pay its fair share.

E. DNR Liability Exposure is Consistent with the "Make the Polluter" Pay Message that Animated the Initiative 97 Campaign.

DNR argues that making the State liable is inconsistent with the “Make the Polluters” mantra that accompanied the initiative effort. DNR Resp. at 12, 24 (citing Voters Pamphlet). This ignores two items. One, the initiative treated “owners” of contaminated property as part of the class of “polluters” who would be liable for cleanups. That DNR (or the State) is an “owner” and, therefore, liable for cleanup expenses is totally consistent with the initiative’s efforts to “make polluters – including landowners — pay.”

Second, even if the “polluters” who were made to pay is viewed as limited to those actively involved in the release of hazardous materials, nowhere in the initiative or its legislative history is there a hint that “owners” would not pay *also*. Indeed, the plain language of the initiative says just the opposite, defining “owner” and “operator” conjunctively with the very same words. Initiative 97, §2(6)(a) (codified at RCW 70.105D.020(22)). It may be that when shares of cleanup expenses are divvied up, the active polluters pay more than passive owners, but that, again, is an issue addressed in the damages phase, not in determining liability.

F. DNR Liability for its Proprietary Actions is Consistent with General Principles of Property, Tort and Government Agency Law.

We disagree that our focus on state agencies' "control" of land they manage would make regulatory agencies liable for lands under their regulatory jurisdiction. *See* DNR Resp. at 19. In addition to the federal and state hazardous waste law cases discussed by the appellants, the Court may also find illuminating *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). In that case involving damage from stormwater generated by a new housing development, the county had acted not only as a permitting agency, but also had authorized the developers to use county owned land for part of the stormwater system. While acknowledging that the county would not be liable merely for its permitting activities, *id.* at 960-965, our Supreme Court held the county could be liable for its role as a landowner which had allowed its land to be used for the stormwater disposal system: "If it is proven at trial that the County participated in creation of the problem, it may participate in the solution." *Id.* at 968. The same could be said here.

Exposing DNR to potential liability for lands it owns or controls is also consistent with bedrock environmental principles incorporated into federal and state superfund laws that seek to internalize costs to create

incentives for proper management of land and facilities, whether owned publicly or privately. *See, e.g.,* S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1 Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980* 320 (1983) (“those who benefit financially from a commercial activity [should] internalize the health and environmental costs of that activity into the costs of doing business”). Much of the effort to manage hazardous wastes has been an effort to assure that entities that profit from manufacturing, distributing, and using hazardous materials cover the costs associated with the disposal of waste materials (whether intended or accidental). Here, DNR was paid for the lease of these publicly-owned bedlands. Recognizing DNR as a potentially liable party is consistent with the internalization of these environmental costs.

Indeed, our Supreme Court has recognized that these principles apply to public agencies, too. With the repeal of sovereign immunity, public entities became liable to the same cost internalization implications of tort law as private entities. *See, e.g., Oberg v. Department of Natural Resources*, 144 Wn.2d. 278, 787 P.2d 918 (1990) (DNR liable as would be any private landowner for negligently failing to control fire on DNR land

that spread to neighboring property). Liability in *Oberg* created incentives for DNR to do a better job of controlling fires on land it controls. Likewise, liability here will create incentives for DNR to do a better job of assuring that lessees do not create toxic waste sites on public lands. This is entirely consistent with Initiative 97's stated purpose of internalizing costs (making the polluter pay) and would help "prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters." Initiative 97, §1(1). Let it be so.

IV. CONCLUSION

The Court should determine that if land owned by the State in fee is managed by a state agency, the state agency is an "owner or operator" for purposes of RCW 70.105D.020(22).

We emphasize that we offer no opinion here as to DNR's relative share of potential liability. The percentage of state agency liability will vary greatly from case to case. The important point for these *amici* is that when a state agency manages property held in fee by the State that its liability is assessed as it would be for any other lessor of real estate.

Dated this 11th day of February, 2016.

Respectfully submitted,

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