

No. 94084-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents.

BRIEF OF *AMICUS CURIAE*
WASHINGTON ENVIRONMENTAL COUNCIL

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTERESTS OF *AMICUS CURIAE* 2

III. ARGUMENT 3

 A. The Plain Language of the MTCA
 Demonstrates Broad Remedial Intent 3

 B. DNR Is Not Exempt Under the MTCA 4

 C. An Exemption for DNR Contradicts the
 Purpose of the MTCA..... 7

IV. CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Asarco, Inc. v. Dep't. of Ecology</i> , 145 Wn.2d 750, 43 P.3d 471 (2002).....	3
<i>Automotive United Trades Org. et. al. v. State of Washington</i> , 175 Wn.2d 537, 286 P.3d 377 (2012).....	3
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	2
<i>Dash Point Vill. Assocs. v. Exxon Corp.</i> , 86 Wn. App. 596, 937 P.2d 1148 (1997).....	6
<i>Drinkwitz v. Alliant Techsystems</i> , 140 Wn.2d 291, 996 P.2d 582 (2000).....	4
<i>Oberg v. Dep't of Nat. Ress.</i> , 114 Wn.2d 278, 787 P.2d 918 (1990).....	7
<i>PacifiCorp Envtl. Remediation Co. v. WSDOT</i> , 162 Wn. App 627, 259 P.3d 1115 (2011).....	5
<i>Pakootas v. Teck Cominco Ltd.</i> , 452 F.3d 1066 (9th Cir. 2006)	3
<i>Tiger Oil Corp. v. Dep't of Ecology</i> , 166 Wn. App. 720, 271 P.3d 331 (2012).....	3
STATUTES	
42 U.S.C. § 9601(20)(a).....	5
Comprehensive Environmental Response, Compensation, and Liability Act	2
RCW 70.105D.....	1

RCW 70.105D.010.....	3, 4, 7
RCW 70.105D.020(8).....	4
RCW 70.105D.020(22).....	4
RCW 70.105D.020(24).....	4
RCW 70.105D.020(32).....	4
RCW 70.105D.040.....	4
RCW 70.105D.080.....	6
RCW 70.105D.910.....	4
RCW 79.105.210	7

Comes now the Washington Environmental Council (“WEC”), who respectfully submits this brief as *amicus curiae*. WEC has submitted this *amicus curiae* brief in order to ensure the proper interpretation and application of the Model Toxics Control Act, Chapter 70.105D RCW (“MTCA”).

I. INTRODUCTION

No person, party, or entity should be exempt from liability under the MTCA, unless such immunity is explicitly provided by the statute. Yet the Washington Department of Natural Resources (“DNR”) effectively argues that it can never qualify as an “owner or operator” under the MTCA, and is therefore exempt from any liability for contamination that has been released or may have come to be located on or beneath the aquatic lands owned, operated, and managed by DNR.

WEC respectfully submits this *amicus curiae* brief and requests that the Court reject any argument that DNR is exempt from liability under the MTCA for remedial action costs associated with contamination on or beneath aquatic lands. WEC requests that this Court hold that the Division II Court of Appeals was correct in its determination that DNR may be held liable for remedial action costs under the MTCA.

II. INTERESTS OF *AMICUS CURIAE*

WEC is one of the most senior and most credible public interest organizations in the state, having started its work to protect the State's environment in 1967. WEC now has over 3,500 member households and over 60 organizational members in the State.

One of WEC's signature accomplishments was the passage of Initiative 97 in the November 1988 election. WEC was the author, principal sponsor, and organizer of the public interest groups that secured the adoption of Initiative 97, which created the MTCA as the state-led and improved version of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), also known as the Superfund. WEC led the drafting of the initiative, chaired the initiative campaign, and participated in all of the rulemakings that implemented the initiative after it was adopted by the voters.

For the past two decades, WEC has participated in the oversight and development of the MTCA program. WEC has assisted in the development of implementing regulations, the creation of multi-agency advisory committees, and the pursuit of legal action to interpret and enforce the provisions of these statutes. WEC has regularly appeared as *amicus* in cases involving state and federal cleanup laws and regulations, including *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 833 P.2d

375 (1992), *Asarco, Inc. v. Dep't. of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2002), *Pakootas v. Teck Cominco Ltd.*, 452 F.3d 1066 (9th Cir. 2006), *Tiger Oil Corp. v. Dep't of Ecology*, 166 Wn. App. 720, 271 P.3d 331 (2012), and *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 286 P.3d 377 (2012).

WEC members live and recreate in the vicinity of numerous toxic waste sites throughout Washington, and depend on the MTCA program to ensure that those sites are remediated to appropriate standards of protection for human health and the environment. WEC members will be directly and adversely impacted if the cleanup of contaminated sites throughout Washington are delayed or otherwise undermined as a result of an adverse ruling by this Court.

III. ARGUMENT

A. The Plain Language of the MTCA Demonstrates Broad Remedial Intent

The MTCA is a broad remedial statute dedicated to preserving and protecting people and natural resources from the impacts of hazardous substances that have been released into the environment. RCW 70.105D.010. The primary purpose of the MTCA is to protect each person's fundamental and inalienable right to a healthful environment, and ensure that each person (including state agencies) fulfill their responsibility to preserve and enhance that right. *Id.* The MTCA must be

“liberally construed to effectuate the policies and purposes of this act.”

RCW 70.105D.910.

To fulfill these goals, the MTCA employs a strict, joint and several liability system which ensures not only that the “polluter pays,” but also that parties allocate responsibility among themselves rather than imposing those costs on local governments or ratepayers. RCW 70.105D.010. Consequently, any proposed exemption to liability under the MTCA must be interpreted narrowly so as not to defeat the broad remedial objectives. *See Drinkwitz v. Alliant Techsystems*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000) (stating exemptions from remedial legislation “are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation”).

B. DNR Is Not Exempt Under the MTCA

MTCA liability extends to all “persons” who are an “owner or operator” of a “facility.” RCW 70.105D.040. As a state government agency, DNR is a “person” under the MTCA. RCW 70.105D.020(24).

An “owner or operator” is “any person with any ownership interest in the facility or who exercises any control over the facility.”¹ RCW 70.105D.020(22) (emphasis added). The federal statute that MTCA

¹ Aquatic lands that are owned, operated and managed by DNR can be part of a “facility” where hazardous substances have been “released” or otherwise come to be located. RCW 70.105D.020(8); .020(32).

intended to improve, CERCLA, does not have such a broad definition of an “owner or operator.” 42 U.S.C. § 9601(20)(a). DNR appropriately states the importance of this difference in their Response: “Since MTCA was heavily patterned on CERCLA . . . when MTCA uses different language, courts take note and consider the variance a clear indication of statutory intent.” R. at 237. We agree.

MTCA’s expansive definition of “owner or operator” shows a clear statutory intent for the broadest possible application of liability to the widest variety of persons with extremely narrow exemptions. A “state government agency” can be a liable person under the MTCA depending on the specific facts and circumstances of each case - a point confirmed by the Court of Appeals, Division II regarding WSDOT’s responsibility for contamination in the Thea Foss Waterway. *See PacifiCorp Envtl. Remediation Co. v. WSDOT*, 162 Wn. App 627, 259 P.3d 1115 (2011).

If the drafters of MTCA (including WEC) or the Washington State Legislature wished to exempt DNR from MTCA liability related to contamination located on or beneath state aquatic lands, then the language of the MTCA would express that position or would have been amended to add such an exemption. No such language exists, so DNR must be treated the same as everyone other “person” who may be liable for the

remediation of hazardous substances that have been released into the environment.

Without any express statutory language, DNR cannot simply determine unilaterally that it is exempt from MTCA liability – the facts and circumstances of each case must be analyzed in order to determine DNR’s potential liability. And in being treated the same as everyone else, DNR maintains the ability to argue the same “equitable factors” as any other party with regard to the extent of their financial responsibility. *See Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997). But those potential equitable arguments do not apply to the separate threshold determination of DNR’s liability.

WEC takes no specific position on the potential scope or extent of DNR’s liability – that must be decided after a full fact-finding and an allocation utilizing appropriate equitable factors. RCW 70.105D.080. DNR may have minimal liability, or perhaps even no liability, for the Port Gamble site because the facts may demonstrate that other parties caused or contributed to the majority of contamination at issue. But DNR should not be permitted to assert a blanket exemption from liability in this case or in any case where it is asserted that DNR has exerted ownership or operational control over property or aquatic lands that have become contaminated by the release of hazardous substances.

C. An Exemption for DNR Contradicts the Purpose of the MTCA

MTCA was passed to ensure hazardous substances would be “cleaned up well and expeditiously.” RCW 70.105D.010. If this court establishes an unstated exemption under the MTCA, other private and public entities will be incentivized to challenge their liability in court, causing the exact delay meant to be avoided by MTCA’s strict joint and several liability system. *Id.* New unwritten exemptions and increased litigation would significantly undercut efforts to remediate hazardous contamination sites throughout Washington, including those contaminated sites located on over five million acres of property owned and operated by DNR.

DNR has direct ownership, direct interest, and direct control over aquatic lands, including the ability to lease, sell, manage, collect rents, and control activities on aquatic lands - including the Port Gamble site. *See* CP 103–129, 134–140, 161, 224; *see also* RCW 79.105.210, .240. As a landowner with legal duties and responsibilities,² it is inequitable for DNR to claim the benefits of the fundamental tenets of property ownership, but then disclaim ownership and control when faced with potential liabilities. DNR should not be exonerated from liability under MTCA’s broad

² *Oberg v. Dep’t of Nat. Res.*, 114 Wn.2d 278, 283–284, 787 P.2d 918 (1990).

remedial scheme for contaminated aquatic lands under DNR's ownership or operational control without a full factual and legal analysis in each case.

IV. CONCLUSION

Washington Environmental Council appreciates the opportunity to submit this brief as *amicus curiae*, and hopes that this information has been helpful to the Court's analysis. Based on the arguments presented herein, the Washington Environmental Council respectfully requests that the Court affirm the Division II Court of Appeals' determination that DNR can be held liable for remedial action costs under the MTCA.

RESPECTFULLY SUBMITTED this 11th day of August, 2017.

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CERTIFICATE OF SERVICE

I, Christi Bass, certify as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Foster Pepper PLLC.

2. I certify that on this 11th day of August, 2017, I caused a copy of the foregoing document, **BRIEF OF *AMICUS CURIAE* WASHINGTON ENVIRONMENTAL COUNCIL**, to be served via email on the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on August 11, 2017, at Seattle, Washington.



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