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POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONSE BRIEF OF RESPONDENT WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

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I. INTRODUCTION

This case involves an appeal from an order of the Kitsap County Superior Court which granted summary judgment to the Washington State Department of Natural Resources (DNR) under the Model Toxics Control Act (MTCA), RCW 70.105D, finding that DNR was not liable for cleanup costs relating to the Port Gamble MTCA Site. Appellants Pope Resources/Olympic Property Group ("Pope/OPG"), who are entities created as the real estate development arm of the Site's polluter, Pope and Talbot, seek additional taxpayer money for the damages caused by Pope and Talbot at Port Gamble. Pope/OPG want to significantly increase taxpayer liability for hazardous waste on the State's 2.6 million acres of aquatic lands so they can profit through the development of a site that their predecessor spent well over 100 years polluting.

At issue in the present appeal is whether DNR qualifies as an "owner" or "operator" under MTCA and, therefore, whether DNR is liable for a portion of the cleanup costs at the Port Gamble Site. Because DNR's role as a land manager, and not an owner, of the State's aquatic lands is defined by RCW 79.105.010, as well as other provisions of the aquatic-lands statutes and state constitution, and because DNR did not exercise sufficient control over the polluting activities of Pope and Talbot at Port Gamble to be an "operator," DNR is not liable as an "owner" or

"operator" under MTCA. Accordingly, DNR respectfully requests that the Court conclude DNR is not liable as an "owner" or "operator" at Port Gamble and affirm the trial court's order granting summary judgment to DNR in its entirety.

II. COUNTERSTATEMENT OF THE ISSUE

Was the superior court correct as a matter of law that DNR is not an "owner" or "operator" of the Port Gamble MTCA Site under RCW 70.105D.020?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

Port Gamble Bay is located in Kitsap County and encompasses more than two square miles of subtidal and shallow intertidal habitat just south of the Strait of Juan de Fuca. CP at 266. Port Gamble itself has an extensive history of mill use, going back to well before Washington became a state. *Id.* DNR, as the manager of the State's 2.6 million acres of aquatic lands, is the manager of the state-owned aquatic lands at Port Gamble. *Id.*

In 1853, the Puget Mill Co., which was the predecessor to Pope and Talbot, began operating its sawmill on Port Gamble Bay. *Id.* The mill itself was constructed on fill and pilings, and a long dock extended north of the mill over tidelands to deep water. *Id.*

In 1893, and again in 1913, the State of Washington sold tidelands around the mill site and south of the mill site along the western and eastern shores of Port Gamble Bay to the Puget Mill Co. CP at 266-67. A copy of the 1893 deed, which transferred tidelands from the State to the Puget Mill Co., is included in the record at CP at 272-79, and a copy of the 1913 deed is included in the record at CP at 97.

In 1925, the McCormick Lumber Co. acquired Puget Mill Co. holdings in bankruptcy and began to build a new mill. CP at 267. The State did not authorize the wharf or other facilities constructed over aquatic lands, and it is not clear from DNR records whether or not these facilities even extended onto state-owned aquatic lands. *Id.* In 1938, the McCormick Lumber Co. went bankrupt and its holdings were reacquired by Puget Mill Co. Puget Mill Co. became Pope and Talbot in 1940. *Id.*

The Pope and Talbot mill operated until its closure on November 30, 1995. *Id.* Throughout its history, the Site's uses included a sawmill, log transfer facilities, wood chip loading facilities, log rafting and storage areas, hog fuel boilers, and three landfills located along the western shoreline. *Id.* Pope and Talbot's activities on the Site resulted in the release of hazardous substances. CP at 78.

In 1985, Pope and Talbot spun off its timberland and development properties in Washington and created Pope Resources. CP at 267.

Ownership of the uplands and adjacent tidelands at Port Gamble were transferred to Pope Resources at that time. *Id.* In 1998, Pope Resources formed Olympic Property Group (OPG) to manage and develop its real estate holdings. CP at 267, 280.

Mill operations and associated log storage occurred at Port Gamble throughout the Site's history. *Id.* The vast majority of these operations did not occur on state-owned aquatic lands, and the bulk of those that did occur on these lands were done largely without DNR's approval. *Id.* It was not until July 16, 1974, that DNR entered into a bedlands[1] lease with Pope and Talbot covering approximately 72 acres of state-owned aquatic lands for log storage, rafting, and booming. CP at 267-68. A copy of this lease (Lease No. 10459) is included in the record at CP 103-06.

Lease No. 10459 was renewed in 1980, CP at 268, and a copy of this lease is included in the record at CP 111-14. In 1991, DNR and Pope and Talbot executed Lease No. 20-012795 for the same area previously covered by Lease No. 10459. CP at 268. A copy of Lease No. 20-012795 is included in the record at CP 116-21. In total, DNR leased the bedlands in the southwestern portion of Port Gamble bay to Pope and Talbot from 1974 until 1996, when Pope and Talbot requested that DNR cancel its

[1] Beds of navigable water are those lands lying waterward of and below the line of the extreme low tide mark in navigable tidal waters. *See* RCW 79.105.060(2) (defining beds of navigable water). "Bedlands" is used interchangeably with the term "beds of navigable water." WAC 332-30-106(9).

lease. CP at 268. DNR did not authorize Pope and Talbot or its predecessors to use any of the aquatic lands at this Site until 1974. *Id.* DNR's authorization to Pope and Talbot on the Site was limited to leasing 72 acres in the southwestern portion of the bay, and this authorization only allowed log storage, booming, and rafting, and not any other uses. *Id.* The leases prohibited hazardous, toxic, or harmful substances. *Id.*

In 1975, DNR entered into a sewer outfall lease (No. 9744) with Pope and Talbot. CP at 268. This outfall operates under a permit issued by the Department of Ecology (Ecology) and is not part of the Port Gamble cleanup site. *Id.* The outfall is located to the west of Port Gamble, and a map depicting the outfall's location is included in the record at CP 282.

DNR did not control the finances of the facility at Port Gamble, manage the employees of the facility, manage the daily business operations of the facility, or have authority to operate or maintain environmental controls at the facility. CP at 269. DNR did not control Pope and Talbot's decisions regarding compliance with environmental laws or regulations, or Pope and Talbot's decisions regarding the presence of pollutants, and DNR did not authorize the release of any hazardous substances on the Site. *Id.* DNR also had no regulatory authority over the mill operations at the Site, as regulation of the pollution from the mill is

primarily under the jurisdiction of Ecology and its predecessor, the Pollution Control Commission. *Id.*

On May 9, 2007, Ecology sent letters to Pope and Talbot and DNR notifying them that Ecology considered them to be potentially liable persons under MTCA at Port Gamble. CP at 89, 335. Ecology has also named Pope Resources and Olympic Property Group as potentially liable persons at the Site. CP at 75. Pope and Talbot subsequently filed for bankruptcy in 2007. CP at 267.

In February 2012, a Draft Final Remedial Investigation Report was prepared for the Port Gamble Site. CP at 268, 281. This report contains a map which shows the five Sediment Management Areas on the Site, depicting the areas of contamination. CP at 268. These five Sediment Management Areas are: Mill Site North, Mill Site South, Central Bay, Former Lease Area, and the Carcinogenic Petroleum Hydrocarbons Sediment Management Area. *Id.* A copy of this map is included in the record at CP 281.

Out of the five Sediment Management Areas at Port Gamble, DNR leased to Pope and Talbot aquatic lands in the "Former Lease Area," depicted in the record at CP 281. CP at 268. All five Sediment Management Areas combined total approximately 317 acres. *Id.* Of this total, the Former Lease Area encompasses approximately 19 acres. *Id.*

B. Proceedings Below.

On December 5, 2014, Pope/OPG sued DNR in the Kitsap County Superior Court seeking to recover cleanup costs at the Port Gamble MTCA Site. CP at 1-10. Pope/OPG subsequently filed a motion for summary judgment seeking to establish DNR's liability at Port Gamble as an "owner" or "operator" under MTCA. CP at 33.

DNR responded on May 26, 2015, and filed a countermotion to Pope/OPG's summary judgment. CP at 229. DNR argued in its countermotion that it was not liable under MTCA as an "owner" or "operator" at Port Gamble because it does not have any ownership interest at the Port Gamble Site, and because it did not exercise sufficient control over Pope and Talbot's polluting operations to be liable as an "operator." *Id.*

On June 5, 2015, a hearing was held before the Honorable Anna M. Laurie of the Kitsap County Superior Court on the parties' motions. CP at 368. By order dated June 8, 2015, Judge Laurie granted DNR's motion in its entirety, concluding that DNR was not liable as an "owner" or "operator" at Port Gamble under RCW 70.105D.020, and dismissed Pope/OPG's suit against DNR with prejudice. CP at 368-70.

Pope/OPG subsequently filed a motion for reconsideration, which the trial court denied by order dated June 18, 2015. CP at 382. The present appeal followed. CP at 384.

IV. SUMMARY OF ARGUMENT

MTCA establishes liability based on several categories of "persons." As it relates to this appeal, RCW 70.105D.020(22)(a) defines "owner or operator" in relevant part as "[a]ny *person* with any ownership interest in the facility or who exercises any control over the facility." (Emphasis added.) The first part of this statute provides for liability for owners of a facility, and the latter provides liability for those who are operators.

The trial court properly concluded that DNR is neither an "owner" nor an "operator" at the Port Gamble MTCA Site. Contrary to Pope/OPG's assertions, DNR does not have *any* ownership interest in state-owned aquatic lands. The extent of DNR's authority over such lands is defined by RCW 79.105.010 and other provisions of the aquatic lands statutes, as well as the state constitution. These laws make it clear that it is the State, not DNR, that is the "person" with the ownership interest in the State's aquatic lands at Port Gamble. It is undisputed that the State itself cannot be a "person" for the purposes of liability under MTCA.

It is important for this Court to note that DNR is not requesting a determination of, nor need this Court address, whether a state agency can ever be considered an "owner" under MTCA. The only issue that this Court need decide regarding DNR's status as an "owner" is whether or not DNR, given its explicit statutory authority and MTCA's intent, has any ownership interest in the state-owned aquatic lands at Port Gamble. The trial court was correct that DNR does not have any such ownership interest, and this Court should affirm that decision.

For the purposes of "operator" liability under MTCA, DNR did not "manage, direct, or conduct" Pope and Talbot's polluting activities under the test of *United States v. Bestfoods,* 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), which has been adopted in this state under both *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006), and *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999). Accordingly, the trial court correctly concluded that DNR is not an "operator" at Port Gamble.

In addition to Washington precedent, the weight of the federal authority, both pre- and post- *United States v. Bestfoods*, has consistently determined that a governmental entity must be actively involved in the decisions regarding the polluting operations of a facility, typically on a

day-to-day basis, to be liable as an "operator." DNR had no such involvement at Port Gamble.

Pope/OPG's arguments in this appeal ignore the nature of the sovereign interest of the State's ownership of its aquatic lands; ignore binding precedent under MTCA, which requires active participation in the polluting operations at a facility to be an "operator"; and incorrectly rely on this Court's decision in *Pacificorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 259 P.3d 1115 (2011), which was decided on the basis of an agency's "arranger" liability under MTCA, and specifically declined to address that agency's "owner" and "operator" arguments.

Pope/OPG's erroneous view of MTCA would also subject Washington State taxpayers to an excessive amount of liability, as the State would be responsible for all hazardous waste on the 2.6 million acres of state-owned aquatic lands under DNR's management authority, regardless of any involvement by DNR in a polluter's operations. The trial court properly rejected Pope/OPG's "owner" and "operator" arguments under MTCA, and this Court should affirm that decision.

V. STANDARD OF REVIEW

The appellate court reviews an order of summary judgment de novo. *Western Telepage, Inc. v. City of Tacoma Dep't of Financing*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Summary judgment is

appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). A material fact is one that affects the outcome of the litigation under governing law, and "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Ruff v. King County*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995) (internal citations omitted). Additionally, statutory interpretation is a question of law, which the appellate court reviews de novo. *Western Telepage*, 140 Wn.2d at 607.

This matter comes before this Court on an appeal from cross-motions for summary judgment. There are no genuine issues of material fact in dispute, and this Court can proceed to rule on the parties' legal arguments.

VI. ARGUMENT

A. The Trial Court Properly Determined That DNR Is Not an "Owner" or "Operator" Under RCW 70.105D.020 at the Port Gamble Site.

Washington voters passed MTCA as Initiative 97 in 1988 and modeled it after its federal counterpart, the Comprehensive Environmental

Response, Compensation, and Liability Act (CERCLA).[2] One of the purposes of MTCA is to ensure that polluters pay the costs for cleaning up hazardous waste sites. *See* 1988 State General Election Voter's Pamphlet at 6-7. This purpose helps ensure that the taxpayers do not bear an undue burden for such cleanups.

Both MTCA and CERCLA establish several categories of liable "persons," and liability under MTCA for such "persons" is explicitly strict, joint, and several. *See* RCW 70.105D.040(2). Relevant to the present matter, both CERCLA and MTCA provide for liability for any "person" who is an "owner" or "operator" of a "facility" where hazardous substances are located. *See* RCW 70.105D.040. *See also* 42 U.S.C. § 9607. However, CERCLA, unlike MTCA, specifically includes a "state" in its definition of "person." *See* 42 U.S.C. § 9601(21). *See also* RCW 70.105D.020(24). As discussed further below, this difference is significant when examining the potential liability of a state agency under MTCA when the State itself is the owner of the facility and the state agency does not have "any ownership interest" in that facility.

[2] CERCLA is codified beginning at 42 U.S.C. § 9601.

1. DNR Is Not a "Person" With "Any Ownership Interest" in the Aquatic Lands at Port Gamble.

The trial court correctly applied MTCA and concluded that DNR does not have any ownership interest at Port Gamble. MTCA defines "owner or operator" in relevant part as "[a]ny *person* with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22)(a) (emphasis added).[3] The first part of this definition establishes a person's liability as an "owner" of a facility, and the latter establishes a person's liability as an "operator." As it relates to DNR's ownership liability at Port Gamble, DNR does not have any "ownership interest" in state-owned aquatic lands; it only has management authority over such lands, as defined by the Legislature. The State, not DNR, is the "person" with the ownership interest in the State's aquatic lands at Port Gamble, and the State cannot be a "person" for the purposes of liability under MTCA.

2. MTCA, Unlike CERCLA, Excludes the State From Its Definition of "Person." This Significant Difference Shows a Difference in Statutory Intent.

Before an entity can be an "owner or operator" under MTCA, the entity must first fall under MTCA's definition of "person." Under

[3] A "facility" is further defined as "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). The parties do not dispute that the Port Gamble Site meets this definition.

RCW 70.105D.020(24), a "person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, ***state government agency***, unit of local government, federal government agency, or Indian Tribe." (Emphasis added.) State government agencies (such as DNR) and units of local government (such as a Port) are specifically included. However, the State itself is noticeably absent from this definition. This is a key distinction when the State itself has the ownership interests in the facility.

MTCA's definition of "person" differs from that of CERCLA. Under CERCLA, a "person" is "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, ***State***, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). Unlike MTCA, CERCLA's definition explicitly includes the word "State." This is a significant difference, which shows a deliberate intent of MTCA's drafters to deviate from CERCLA in this regard. Since MTCA was heavily patterned on CERCLA, as well as CERCLA's subsequent reenactment under the Superfund Amendments and Reauthorization Act of 1986, when MTCA uses different language, courts take note and consider the variance a clear indication of statutory

intent. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992).

The Legislature knows how to include the State within the definition of the term "person" and has expressly done so numerous times. *See, e.g.,* RCW 70.38.025(10) (definition of "Person" includes "the state, or a political subdivision or instrumentality of the state"); RCW 79.105.060(13) (definition of "Person" includes "the state or any agency or political subdivision thereof"); RCW 81.88.010(11) (definition of "Person" includes "a state, a city, a town, a county, or any political subdivision or instrumentality of a state"). When the Legislature omits certain language from a statute, it should be inferred that the omission was purposeful. *See State v. Jackson*, 137 Wn.2d 712, 723, 976 P.2d 1229 (1999). The Legislature has had ample opportunities since 1989 to amend MTCA's definition of "person" to include the "state." It has not done so.

In this case, MTCA's exclusion of the "state" from its definition of "person" is plain and unambiguous and evidences a clear intent to limit the taxpayers' liability for hazardous waste sites when the State itself is the "owner" of a facility. Applying the general rules of statutory construction demonstrates that omitting the State from MTCA's definition of person was deliberate. Once enacted, initiatives are interpreted according to the same rules of statutory construction that apply to legislative enactments.

McGowan v. State, 148 Wn.2d 278, 288, 60 P.3d 67 (2002). If the words of the measure are plain and unambiguous, then the language controls. *Id.* Moreover, a definition provided in an enactment controls, and a court must use this definition to apply the statute. *North Pac. Coast Freight Bureau v. State*, 12 Wn.2d 563, 571, 122 P.2d 467 (1942). Accordingly, this unambiguous definition must guide the Court's analysis in evaluating DNR's potential liability as an "owner" or "operator" under MTCA.

3. DNR's Role as a Land Manager Is Based in the Constitution and Defined by the Legislature. It Does Not Have "Any Ownership Interest" in the Aquatic Lands at Port Gamble.

The State's ownership of its aquatic lands is a fundamental sovereign interest and, in that regard, is distinctly different from the facts of the "ownership" cases relied upon by Pope/OPG. *See* Br. of Appellant at 24-26. Upon entry into the Union, the State of Washington obtained title to the beds of its navigable waters under the Equal Footing Doctrine.[4] The states, upon entry into the Union, "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

[4] The Equal Footing Doctrine means that "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'" *Coeur d'Alene Tribe*, 521 U.S. at 283 (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228-29, 3 How. 212, 11 L. Ed. 565 (1845)).

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (quoting *Martin v. Waddell's Lessee*, 41 U.S. 367, 16 Pet. 367, 10 L. Ed. 997 (1842)). The State's ownership right is declared in the state constitution, wherein Washington "asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." Const. art. XVII, § 1.

Pope/OPG assert that DNR is an "owner" at Port Gamble because DNR allegedly possesses a "bundle of rights" at Port Gamble that amounts to "any ownership interest." Br. of Appellant at 24-26. However, DNR, as a creature of statute, "has only those powers either expressly granted or necessarily implied by the legislature." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). Accordingly, it "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).

Here, the Legislature has granted DNR "authority to *manage* state aquatic lands. . . ." *Id.* at 287 (emphasis added). Indeed, the State of Washington, and not DNR, "claims absolute fee simple ownership of the

land underlying its waters." *Id.* at 278 (citing *Draper Machine Works, Inc. v. DNR*, 117 Wn.2d 306, 313, 815 P.2d 770 (1991)). *See also Caminiti v. Boyle,* 107 Wn.2d 662, 668 732 P.2d 989 (1987) ("[a]s owner, *the state* holds *full proprietary rights* in tidelands and shorelands and has fee simple title to such lands.") (emphasis added).

Contrary to Pope/OPG's assertions, DNR does not have *any* ownership interest in state-owned aquatic lands; it is merely a land manager as authorized by the Legislature and can only carry out those functions directed by the Legislature. Under RCW 79.105.010, the 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.) Under RCW 79.105.010, the Legislature only granted to DNR land management authority over state-owned aquatic lands; it did not grant any ownership interest in these lands to DNR.

DNR's management role over state-owned aquatic lands is further emphasized throughout the aquatic lands statutes. For example, under RCW 79.105.060(20), "State-owned aquatic lands" is defined 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.) Moreover, under RCW 79.105.020, the directives established by the Legislature throughout the aquatic lands statutes, "articulate a management philosophy to guide the exercise of the *state's ownership interest and the exercise of the department's management authority . . .*" Based on this unambiguous statutory language, DNR does not have any ownership interest in the State's aquatic lands; it only manages them.[5]

4. DNR Never Had the Authority to Sell Port Gamble Tidelands at Will, as DNR's Authority Over the State's Aquatic Lands Is Specifically Prescribed by the Legislature.

While Pope/OPG argue that DNR could dispose of the tidelands at Port Gamble at "will," this was never the case. Br. of Appellant at 25. DNR's authority at Port Gamble was, and is, specifically prescribed by the Legislature. 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 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

[5] Because the State owns the aquatic lands in question, and because the State itself is specifically excluded from MTCA's definition of "person," any CERCLA cases interpreting ownership liability are of limited applicability under MTCA when the State is the owner of the "facility."

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.

Pope/OPG argued before the trial court that "(1) the State of Washington owns the aquatic lands at the Port Gamble Bay and Mill Site . . . in fee and (2) the State of Washington cannot be liable under MTCA . . . But [Pope/OPG] sued DNR, not the State." CP at 308. Pope/OPG cannot get around MTCA's prohibition against suing the State by claiming to sue DNR as an "owner," when it is the State itself and not DNR that has the ownership interest in the State's aquatic lands at Port Gamble. The trial court was correct that DNR does not have any

ownership interest in the aquatic lands at Port Gamble, and this Court should affirm that decision.

5. DNR Staff Comments Do Not Change the Authority Under Which DNR Operates as a Manager, and Not an Owner, of State-Owned Aquatic Land.

Pope/OPG also contend that because DNR staff occasionally refer to state-owned aquatic land as "DNR land" that this somehow changes the legal reality of DNR's role as a land manager and not an owner. Br. of Appellant at 12, 29. These statements by DNR staff do not change the legal framework under which DNR functions. As Kristin Swenddal, DNR Aquatic Resources Division Manager, stated in her declaration before the trial court, "DNR staff will sometimes refer to state-owned aquatic land under DNR's management authority as DNR land. This shorthand reference does not change the legal authority DNR operates under as a manager of state-owned aquatic lands." CP at 269.[6] DNR only carries out those functions that are directed by the Legislature, and the Legislature has only given DNR management authority over, and not an ownership interest in, state-owned aquatic land.

[6] While Pope/OPG assert that Ms. Swenddal's declaration before the trial court is inconsistent with other documents in the record, this is not the case. First, this fact is not material because it does not change the legal authority under which DNR operates as a land manager. Second, Pope/OPG in its brief inserts the word "DNR" into an e-mail written by Ms. Swenddal where it did not exist in the original document, and then attributes that statement to her. *Compare* Br. of Appellant at 29 to CP at 360. Given the context of the e-mail, along with Ms. Swenddal's Declaration, it seems clear that the "we" to which Ms. Swenddal was referring in the document at CP 360 is the State of Washington.

Pope/OPG also continue to assert, as they did before the trial court, that DNR negotiating settlements to clean up contaminated aquatic lands in the state shows that DNR "owns" those lands. Br. of Appellant at 47-48. This assertion is simply incorrect. In negotiating these settlements, DNR, as the manager of 2.6 million acres of state-owned aquatic land, will sometimes enter into consent decrees and other agreements on behalf of the State to help facilitate cleanup on the State's aquatic lands and to mitigate the burden the taxpayers will incur for cleaning up these sites.[7] Moreover, at least two of the agreements cited by Pope/OPG specifically list the State of Washington, not DNR, as the landowner. CP 202-12.[8]

6. Ecology Naming DNR as a Potentially Liable Person Does Not Legally Establish That DNR Actually Is an "Owner or Operator" at Port Gamble.

Both in the present matter and before the trial court, Pope/OPG place a heavy emphasis on the Department of Ecology naming DNR as a potentially liable person for the Site. However, the Department of Ecology's role under MTCA is not to allocate liability among parties; it is to facilitate the expeditious cleanup of hazardous waste sites in a manner that protects human health and the environment. *See* WAC 173-340-100.

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[7] DNR has entered into these agreements under MTCA and its federal counterpart, CERCLA. Under CERCLA, the Environmental Protection Agency (EPA) considers the State of Washington the "owner" of the State's aquatic lands, and DNR will negotiate on behalf of the State. CP at 269.

[8] In addition, the agreement contained at CP 193-95 lists DNR as the "manager" of state-owned aquatic lands.

Indeed, a party can only challenge its potentially liable person status under MTCA under limited circumstances, such as where it is subject to an enforcement action by Ecology, or where it is in a cost recovery lawsuit. *See* RCW 70.105D.060. Simply put, Ecology naming DNR as a "potentially" liable person does not resolve the issue of whether DNR *actually* is an "owner or operator" at the Site. Both Ecology and DNR appear to recognize this fact in a 1992 Memorandum of Agreement between the agencies.

a. The 1992 Memorandum of Agreement Between Ecology and DNR Recognizes That It Is Up to the Courts, Not Ecology, to Ultimately Determine DNR's "Owner" or "Operator" Status for a Given Site.

In 1992, DNR and Ecology entered into a "Memorandum of Agreement Concerning Contaminated Sediment Source Control, Cleanup, and Disposal." A copy of this agreement is contained in the record at CP 283-307. This agreement outlines the understanding between the Department of Ecology and DNR regarding contamination from hazardous substances on state-owned aquatic lands. *Id.* CP at 269. Among other things, the agreement recognizes that aquatic lands in this state are "*owned by the people of the State* and administered by the Washington Department of Natural Resources . . . As the public's custodian of those lands, DNR

has a vital interest in ensuring that they are free of contamination." CP at 283.

The 1992 agreement, which is still in effect, further acknowledges that DNR may have certain reasonable defenses to MTCA liability which "may apply to situations where DNR did not: control the finances of the facility, manage the employees of the facility, manage the daily business operations of the facility, or have authority to daily operate/maintain environmental controls at the facility." CP at 289. As discussed in more detail below, this standard aligns with the legal requirements to be an "operator" at a facility. Far from establishing that DNR is a liable party at the Site, Ecology naming DNR as a "potentially" liable person simply recognizes that it will be up to the courts, and not Ecology, to ultimately determine whether DNR actually is an "owner or operator" for a given site.

7. Pope/OPG's Arguments Are Inconsistent With MTCA's Purposes and Would Subject the Taxpayers in This State to Excessive Liability for Hazardous Waste Sites.

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.

Pope Resources was created by Pope and Talbot in 1985 when Pope and Talbot spun off its real estate and development properties. CP at 266. Though not a material fact for the purposes of summary judgment, it is still worth noting that Pope Resources "paid no consideration for the Washington Properties" it received from Pope and Talbot. *Pope & Talbot, Inc. v. Comm'r of Internal Rev.*, 162 F.3d 1236, 1237 (9th Cir. 1999). While Pope/OPG assert in their brief that "Pope Resources assumed a $22.5 million mortgage. . ."[9] for the property, the Ninth Circuit in *Pope & Talbot, Inc.* recognized that "the valuation range for the combined Properties [that Pope Resources received] was between $46.7 million and 59.7 million." *Id.* at 1238.

As Pope Resources' website acknowledges, "Pope Resources, Olympic Resource Management (ORM), and Olympic Property Group (OPG) benefit from a 150-year heritage of land and resource stewardship in the Pacific Northwest, stemming from our past linkage to Pope & Talbot, Inc." CP at 280. Created as the real estate development entities of

[9] Br. of Appellant at 5.

Pope and Talbot, Pope/OPG's role at Port Gamble is to develop the Site that their predecessor spent well over 100 years polluting.

Considering that DNR has management authority over 2.6 million acres of state-owned aquatic lands,[10] many of which have been contaminated by hazardous substances from a variety of urban and industrial sources over the last 100 or more years,[11] Pope/OPG's interpretation of MTCA would put the taxpayers on the hook for an unacceptable amount of liability and goes directly against the plain language of MTCA.

Should this Court adopt Pope/OPG's arguments, it is easy to conceive that the State's potential liability could be extensive for contamination on the State's 2.6 million acres of aquatic lands that DNR manages. This liability would attach regardless of any DNR involvement with the activities that led to the pollution. While Pope/OPG argue that MTCA's purpose is to "raise sufficient funds to cleanup all hazardous waste sites . . .,"[12] it is difficult to see how placing such significant liability onto the shoulders of the taxpayers would accomplish this goal.

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[10] CP at 266.

[11] CP at243n.55 citing http://seattlepi.nwsource.com/local/95872_sound18.shtml (last accessed December 20, 2015).

[12] Br. of Appellant at 48.

The taxpayers are already contributing $7 million to various projects related to the restoration of Port Gamble Bay. CP at 87, 182-83. Indeed, DNR itself has contributed significant staff time and other resources to Port Gamble, including conducting cleanup activities under a nearly $1 million interagency agreement with Ecology. CP at 270. Pope/OPG's interpretation of MTCA's "owner or operator" provisions would subject the taxpayers to even greater liability at this site and is simply not consistent with MTCA's intent. This Court should accordingly reject Pope/OPG's arguments and affirm the trial court's decision in favor of DNR.

8. This Court's Decision in *Pacificorp v. DOT* Is Inapplicable Here Because the *Pacificorp* Court Specifically Declined to Rule on the Department of Transportation's "Owner" and "Operator" Arguments.

Pope/OPG's reliance on *Pacificorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App 627, 259 P.3d 1115 (2011), is misplaced because *Pacificorp* was decided on the basis of an agency's "arranger" liability under MTCA, and the Court explicitly declined to address that agency's arguments that it was not an "owner" or "operator." *See Pacificorp*, 162 Wn. App. at 662. Moreover, *Pacificorp* did not in any way address the State's unique and fundamental sovereign interest in the

ownership of its aquatic lands. The inapplicability of *Pacificorp* to the present matter becomes clear upon a closer examination of that decision.

In *Pacificorp*, the Department of Transportation (DOT) constructed and operated a French drain system that drained coal tar extract, a hazardous substance, into Commencement Bay. *Id.* at 634-39. DOT knew that its system was putting a hazardous substance directly into Commencement Bay, and still continued to operate the system for years after being notified by Ecology that it was releasing a known hazardous substance. *Id.* In a contribution action brought by another Potentially Liable Person, the Court of Appeals upheld the trial court's decision that DOT was liable. In its decision, the court of appeals specifically held that it was affirming "the trial court's partial summary judgment ruling that DOT is liable . . . as an 'arrang[er]' under RCW 70.105D.040(1)(c)." *Id.* at 662. The *Pacificorp* court then explicitly declined to address DOT's additional arguments that it was not an "owner" or "operator" at the Site, stating that "[i]n light of this holding, we need not address the Utilities' definition of 'facility' and their related alternative theories of DOT liability." *Id* at 662 n.113.

Because the *Pacificorp* decision only addressed DOT's liability as an "arranger" under MTCA, Pope/OPG's assertion that *Pacificorp* "specifically held that WSDOT's argument that it was not an 'owner'

failed . . ." is incorrect. Br. of Appellant at 28. In *Pacificorp*, the court held that DOT was liable as an "arranger" because it constructed the drainage system at issue, knew of the contamination that its system was causing, and continued to operate its system long after it became aware of the problem. *See Pacificorp*, 162 Wn. App. at 634-39. These facts are distinctly different from the facts in the present matter, where it is undisputed that it was Pope and Talbot and its predecessors, and not DNR, that conducted the mill operations that led to the contamination at Port Gamble. CP at 266-68.

B. The Trial Court Properly Concluded That DNR Does Not Have Liability as an "Operator" at Port Gamble Because DNR Did Not "Manage, Direct, or Conduct" Pope and Talbot's Polluting Operations.

As discussed above, DNR does not have liability as an "owner" at Port Gamble. The only other question in this appeal is whether DNR's leasing activities at Port Gamble make it liable as an "operator" at the Site. Because state law requires active involvement in the operational decisions specifically related to pollution at a facility, and because DNR did not have such involvement at Port Gamble, the trial court was correct in concluding that DNR is not liable as an "operator" at the Site. This becomes clear when examining MTCA's "operator" language and Washington state case law interpreting this language.

Taken together, MTCA's definitions provide that a state agency can be liable as an "owner or operator" of a facility where that agency either has "any ownership interest in the facility" *or* where that state agency "*exercises* any *control* over the facility." RCW 70.105D.020(22)(a) (emphasis added). The latter language in this statute establishes the standard for "operator" liability at a site and focuses on a state agency's involvement in the polluting activity.

1. The Court of Appeals in This State Has Adopted the U.S. Supreme Court's Test in *United States v. Bestfoods* to Determine Operator Liability Under MTCA.

In interpreting what it means to "exercise any control" over a facility, the courts in this state have looked to the U.S. Supreme Court's decision in *United States v. Bestfoods,* 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), for guidance. In *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006), the court of appeals addressed the issue of a subcontractor's liability as an "operator" under MTCA. The *Taliesen* court adopted the reasoning of the U.S. Supreme Court in *Bestfoods*, which had concluded under CERCLA that "an operator *must manage, direct, or conduct operations specifically related to pollution*, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *See Taliesen Corp*, 135 Wn. App. at 128 (quoting *Bestfoods*, 524 U.S. at

66-67) (emphasis added). Applying this reasoning to the "exercises any control" standard of MTCA, the *Taliesen* court went on to conclude that "the key word in our state statute is 'control', not 'any.'" *Id.* at 128. Based on a lack of control over the decision making which caused the contamination, the court determined that the subcontractor did not have "operator" liability under MTCA. *Id.*

While Pope/OPG assert that DNR's alleged "authority" to exercise control over state-owned aquatic lands is sufficient to qualify DNR as an operator under MTCA,[13] this interpretation is not consistent with the plain language of the statute and was *specifically rejected* by the court of appeals in *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999). MTCA, unlike CERCLA, explicitly requires that a person "exercises" control over a facility in order to meet the second prong of its definition of "owner or operator." *Compare* RCW 70.105D.020(22)(a) to 42 U.S.C. § 9601(20)(A). In examining CERCLA cases interpreting operator liability, the *Unigard* court recognized that "[s]ome courts have adopted a 'prevention test' and held that authority to control, whether or not it was actually exercised, is the relevant issue." *Unigard,* 97 Wn. App.

[13] Br. of Appellant at 38. However, despite Pope/OPG's assertions to the contrary, it has long been recognized that environmental agencies do not become "owners or operators" of hazardous waste sites simply by issuing permits or failing to regulate polluting activities. *United States v. Dart Indus., Inc.*, 847 F.2d 144 (4th Cir. 1988); *United States v. Western Processing Co.*, 761 F. Supp. 725, 731 (W.D. Wash. 1991).

at 429 n.28. However, the court went on to *reject* this "authority to control test" under MTCA, stating that "[w]e decline to adopt this standard because it may be used to impose liability on those who had no knowledge of or ability to control activities at the site." *Id.* In reaching this conclusion, the *Unigard* court recognized that "[t]he weight of authority strongly favors application of the actual participation/exercise of control standard." *Id.* at 428. The rejection of the authority to control test in this context is consistent with MTCA's purpose of holding polluters responsible for the contamination they cause.

Both the *Taliesen* and *Unigard* decisions are binding precedent under MTCA. Our courts have made this point clear, stating that the federal courts' "interpretation of CERCLA does not trump our state courts' interpretation of Washington's comparable Act. Our interpretation of our statutes is binding on the federal courts, not theirs on ours." *Pacificorp,* 162 Wn. App. at 663 (internal citations omitted). Accordingly, under *Taliesen* and *Unigard*, DNR does not have "operator" liability at Port Gamble because it never managed, directed, or conducted Pope and Talbot's polluting activities on the Site.

2. Federal Case Law Supports That DNR Did Not Exercise Sufficient Control at Port Gamble to Be Liable as an "Operator."

While federal case law under CERCLA may not be binding precedent under MTCA, as the *Taliesen* court recognized in adopting the operator standard of *Bestfoods*, "federal cases interpreting similar "owner or operator" language in the federal Act are persuasive authority in determining operator liability." *Taliesen*, 135 Wn. App. at 127 (citing *Unigard,* 97 Wn. App. at 428). In the present matter, it is particularly helpful to examine those operator cases under federal law that involve a governmental entity, since both *Taliesen* and *Unigard* adopted the federal standard for operator liability under *United States v. Bestfoods.*

The weight of the federal authority, both pre- and post- *United States v. Bestfoods*, has consistently determined that a governmental entity must be actively involved in the decisions regarding the polluting operations of a facility, typically on a day-to-day basis, to be liable as an "operator." In *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998) the Sixth Circuit applied the *Bestfoods* test in examining whether or not a municipality could be considered an "operator" under CERCLA for its role in operating a municipal dump where the release of hazardous substances occurred. In that case, the township operated a municipal dump through a contract with a landowner, routinely

appropriating money for the dump's operation, and directing the kind of waste that could be disposed there, including both commercial and residential waste. *Id.* at 310-311. The Sixth Circuit adopted the *Bestfoods* test to determine the Township's potential "operator" liability, stating:

> We hold, therefore, that an 'actual control' test applies not just in the corporate context, but in the present one as well. Before one can be considered an 'operator'. . . one must perform affirmative acts. The failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator.

Id. at 314.

The concurrence in *Township of Brighton* succinctly stated why the "actual control" test of *Bestfoods* is an appropriate standard, particularly in the governmental context. As the concurrence notes, "[b]roadly speaking any governmental entity has the 'authority' to exert control over a facility . . . requiring only the 'authority to control' could lead to the rather sweeping result that all governmental entities are operators over hazardous waste facilities located within their jurisdiction." *Township of Brighton*, 153 F.3d at 325 (Moore, J. concurring).

More recently, other federal courts have applied the *Bestfoods* test in evaluating an entity's "operator" liability and what it means to affirmatively act to "manage, direct, or conduct" operations directly related to pollution. For example, in *Lockheed Martin Corp. v. United*

States, 35 F. Supp. 3d 92 (D.D.C. 2014), the United States government contracted with Lockheed to manufacture solid rocket propellant and new rocket technologies, and sites became contaminated as a result. The government had directed the production in accordance with government specifications, had inspectors on site on a regular basis, and the "production process could not proceed beyond a dedicated inspection point until a [government] official had inspected and 'stamped off' the process." *Id.* at 103-104. The district court concluded that the government was not an "operator." *Id.* at 147. In reaching this conclusion, the district court stated that "*Bestfoods* requires that an operator 'make the relevant decisions' regarding the disposal of hazardous wastes 'on a frequent, typically day-to-day basis.'" *Id.* at 121 (citing *City of Wichita v. Trustees of APCO Oil Corp.*, 306 F. Supp. 2d. 1040, 1055 (D. Kansas 2003) (collecting cases)). The sporadic nature of the government's inspections in *Lockheed Martin Corp.*, combined with their limited focus on waste disposal, "fail[ed] to demonstrate the level of frequent control over hazardous waste disposal activities required for operator liability under *Bestfoods*." *Lockheed Martin Corp.,* 35 F. Supp. 3d. at 147.

Cases decided prior to *Bestfoods* are also instructive in determining the level of involvement an entity must have at a facility to be liable as an

"operator." Prior to the *Bestfoods* decision, the Third Circuit in *FMC Corp. v. U.S. Dep't of Commerce,* 29 F.3d 833 (3rd Cir. 1994), looked at whether the government's involvement in textile rayon production prior to and during World War II made it liable as an "operator." In holding the government liable, the *FMC Corp.* court found it significant that the government determined "what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." *FMC Corp.,* 29 F.3d 833, 843. The factors that the *FMC* court applied to its analysis were:

> [W]hether the person or entity controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes.

Id. at 843. *See also Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust,* 32 F.3d 1364, 1367 (9th Cir. 1994) ("[t]o be an operator of a hazardous waste facility, a party must do more than stand by and fail to prevent the contamination. It must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management."). DNR never had this level of involvement at Port Gamble, and accordingly the trial court correctly determined that DNR is not liable as an "operator" at this site.

3. The Trial Court Was Correct as a Matter of Law That DNR's Leasing Activities Do Not Make It Liable as an "Operator" at Port Gamble.

It is undisputed that DNR's involvement at the Port Gamble MTCA Site was limited to leasing approximately 72 acres in the southwestern portion of the bay solely for the purpose of log booming, storage, and rafting. CP at 267-68, 103-06, 111-21. The leases were in effect from July 16, 1974, until 1996, when Pope and Talbot requested that DNR cancel its lease. CP at 268. These leases did not allow the release of hazardous substances on the Site. CP at 268. As shown at CP 281, the "Former Lease Area" Sediment Management Area encompasses a small portion of the former lease area itself, approximately 19 acres. CP at 268. The majority of the contamination at the Site occurred as a result of Pope and Talbot's mill operations at the north part of the bay and not under DNR's jurisdiction. CP at 268-69, 281.

While Pope/OPG also cite to an outfall lease that Pope and Talbot had, Br. of Appellant at 10, the outfall associated with this lease, which currently operates under a permit issued by Ecology, is not part of the Site and is therefore not relevant to an analysis of DNR's potential "operator" liability on the Site. CP at 268-69, 282. The only question for this Court in analyzing DNR's potential "operator" liability is whether or not the leases with Pope and Talbot in the southwestern portion of the bay make

DNR liable as an "operator" under MTCA. The trial court was correct that they do not.

It is undisputed that the DNR leases *prohibited* the release of hazardous, toxic, or harmful substances, as well as the accumulation of debris, including wood waste. CP at 103-06, 111-21, 268. Pope/OPG provide no support for their assertions that contamination from DNR's leases with Pope and Talbot was inevitable, or that DNR permitted thousands of pilings in Port Gamble Bay. Br. of Appellant at 37. Pope and Talbot operated for nearly a century on state-owned aquatic land without any approval from DNR. CP at 266-69. Indeed, DNR "did not authorize the wharf or other facilities constructed over aquatic lands." CP at 267. Pope/OPG's assertions that DNR has operator liability at Port Gamble is not supported by law or the undisputed facts of this case.

At the Port Gamble site, DNR did not control the finances of the facility, manage the employees of the facility, manage the daily business operations of the facility, or have authority to operate or maintain environmental controls at the facility. CP at 269. DNR did not control any of Pope and Talbot's decisions regarding compliance with environmental laws or regulations or Pope and Talbot's decisions regarding the presence of pollutants. *Id.* Moreover, DNR did not authorize the release of any hazardous substances on the Site, and

specifically prohibited the accumulation of debris, including wood waste. CP at 103-06, 111-21, 268. There simply is no way to conclude that DNR was actively involved with the management decisions of Pope and Talbot, much less those day-to-day decisions relating to Pope and Talbot's polluting activities. In the terms of *Unigard* and *Taliesen*, DNR did not "manage, direct, or conduct . . ."[14] Pope and Talbot's polluting operations. Accordingly, the trial court properly concluded that DNR does not have "operator" liability at Port Gamble.

VII. CONCLUSION

For the foregoing reasons, DNR respectfully requests that this Court affirm the trial court's order granting summary judgment to DNR in its entirety.

RESPECTFULLY SUBMITTED this 24th day of December, 2015.

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[14] *Taliesen*, 135 Wn. App. at 128.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on December 24, 2015, as follows:

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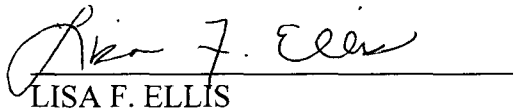
I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 24th day of December, 2015, at Olympia, Washington.



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