

NO. 94084-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner.

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**SUPPLEMENTAL BRIEF OF PETITIONER  
DEPARTMENT OF NATURAL RESOURCES**

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## I. INTRODUCTION

Industrial polluters using the State's aquatic lands should be held responsible for the pollution they cause, and a company that is created as the real-estate development arm of a polluter of those aquatic lands should not be allowed to profit off the State's taxpayers from that pollution. But this is the exact outcome that is possible here if the Court of Appeals' decision stands. At issue in this appeal is the correct interpretation of RCW 70.105D.020(22)(a) of the Model Toxics Control Act (MTCA), which defines the terms "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility," and whether the Washington State Department of Natural Resources (DNR) meets this definition at Port Gamble.

Petitioner DNR is the manager of 2.6 million acres of state-owned aquatic lands, including the state-owned aquatic lands at Port Gamble. Respondents Pope Resources and Olympic Property Group initiated this action against DNR seeking additional taxpayer money for cleanup costs at Port Gamble, the location of a former mill that Pope Resources' creator, Pope and Talbot, spent well over a hundred years polluting.

The trial court correctly concluded that DNR is not an "owner or operator" under RCW 70.105D.020(22)(a) at Port Gamble, and the Court of Appeals erred by reversing that decision. DNR does not have any

ownership interest in the state-owned aquatic lands at Port Gamble, and therefore cannot be liable as an “owner” of that facility. DNR’s authority as a land manager, and not an owner, of the State’s aquatic lands is based in the state constitution and defined by the Legislature. Examining DNR’s aquatic lands statutes, this Court should reach one inescapable conclusion: DNR does not have “any ownership interest” in state-owned aquatic lands, and therefore cannot be liable as an “owner” at Port Gamble.

In addition to not having any ownership interest in the aquatic lands at Port Gamble, DNR did not exercise sufficient control at Port Gamble to have liability as an “operator” of that facility. While MTCA’s definition of “owner or operator” differs from its federal counterpart, DNR is not urging this Court to rewrite MTCA, or to ignore statutory language. Instead, DNR asks this Court to apply long-standing Washington precedent interpreting MTCA’s definition of “owner or operator.” The federal test of *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), adopted in Washington under two Division I cases, requires that, before operator liability can attach, a person must “manage, direct, or conduct operations specifically related to pollution. . . .” This is the appropriate test under MTCA and helps ensure that polluters are held responsible for the contamination they cause.

Looking to existing precedent and applying that precedent to the undisputed facts of this case, the Court should conclude that DNR did not exercise sufficient control at Port Gamble to have operator liability under MTCA. Accordingly, the Court should reverse the Court of Appeals' decision and affirm the trial court's grant of summary judgment to DNR in its entirety.

## **II. ISSUE PRESENTED**

Whether the trial court correctly determined that DNR is not an "owner or operator" under RCW 70.105D.020 of the Model Toxics Control Act at Port Gamble and, accordingly, whether the Court of Appeals erred by reversing that decision.

## **III. STATEMENT OF THE CASE**

In 1853, the Puget Mill Company (Puget), predecessor to Pope and Talbot, started operating a sawmill at Port Gamble. CP at 266. Puget continued its mill operations until 1925, when the McCormick Lumber Company acquired its holdings in bankruptcy. CP at 267. McCormick went bankrupt in 1938, and its holdings were reacquired by Puget. *Id.* Puget became Pope and Talbot in 1940. *Id.*

Pope and Talbot continued to operate a mill at Port Gamble until 1995. *Id.* 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.<sup>1</sup> CP at 267. In 1998, Pope Resources formed Olympic Property Group to manage and develop its real estate holdings. CP at 267, 280. Pope and Talbot filed for bankruptcy in 2007. CP at 267.

Mill operations and associated log storage occurred at Port Gamble throughout the Site's history, and well before any authorization by the State. CP at 148-49, 267. 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.*

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. CP at 266. It was not until 1974 that DNR leased approximately 72 acres of state-owned aquatic lands in the southwestern portion of the Bay to Pope and Talbot for log storage, rafting, and booming. CP at 267-68, 103-06. These activities had been going on in that location for a significant period of time, likely decades, prior to any lease with the State. CP at 148-49. In total, DNR leased to Pope and Talbot from 1974 until 1996, when Pope and Talbot requested that DNR cancel its lease. CP at 268. The leases prohibited

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<sup>1</sup> In 1893 and again in 1913, the State of Washington sold the 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 97, 266-67, 272-79.

hazardous, toxic, or harmful substances, and the accumulation of debris. CP at 113, 119, 268.

Based on pollution at the Site, Ecology sent letters to Pope and Talbot, Pope Resources and Olympic Property Group (Pope Resources) and DNR notifying them that Ecology considered them potentially liable persons at the Site under MTCA. CP at 75, 89, 335.

Pope Resources subsequently sued DNR in the Kitsap County Superior Court to recover cleanup costs for the pollution caused by Pope and Talbot. CP at 1-10. On cross motions for summary judgment, the trial court concluded that DNR was not an “owner or operator” under MTCA at Port Gamble, and dismissed this matter with prejudice. CP at 368-70.

The Court of Appeals, in a 2-1 decision, reversed the trial court. *Pope Resources*, slip op. at 1. In its opinion, the majority held that DNR’s statutory authority as a land manager makes it liable as an “owner or operator” under MTCA. *Id.* at 9. The dissent would have affirmed the trial court, concluding that DNR’s statutory management authority does not give it any ownership interest in state-owned aquatic lands, and that under applicable Division I precedent, DNR did not exercise sufficient control over the Port Gamble facility to have “operator” liability. *Id.* at 14-19.

DNR petitioned this Court for review, which was granted on May 3, 2017.

#### IV. ARGUMENT

##### A. DNR Is Not an “Owner or Operator” Under RCW 70.105D.020 at Port Gamble.

Under MTCA, “[a]ny person with any ownership interest in the facility or who exercises any control over the facility”<sup>2</sup> can be potentially liable. RCW 70.105D.020(22)(a). This definition of “owner or operator” is broken down into two parts: the first part of the definition establishes a person’s liability as an “owner” of a facility, and the latter establishes a person’s liability as an “operator.” While Pope Resources asserts that DNR’s statutory authority as an aquatics land manager gives it “any ownership interest” at Port Gamble, and that DNR also exercised sufficient control at Port Gamble to be liable under MTCA, this is not the case.<sup>3</sup> DNR does not meet either part of MTCA’s “owner or operator” definition at Port Gamble.

##### 1. It Is Undisputed That the State Itself Cannot Be a Liable “Person” Under MTCA.

While a state agency can be a liable “person” under MTCA, the State itself cannot. *See* RCW 70.105D.020(24). Although both Pope Resources and the Court of Appeals conclude that, based largely on common law

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<sup>2</sup> 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.

<sup>3</sup> *See* Answer to Petition for Review at 11-12.

principles of “ownership,” DNR has “any ownership interest” at Port Gamble, such a conclusion is contrary to the explicit statutory authority under which DNR operates.<sup>4</sup> 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 it is undisputed that the State itself cannot be a “person” for the purposes of liability under MTCA. *See* CP at 308 (Pope Resources conceded 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 . . .”).

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

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<sup>4</sup> *See* Answer to Petition for Review at 12. *See also* Pope Resources, slip op. at 8.

from a statute, it should be inferred that the omission was purposeful.<sup>5</sup> 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.

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.<sup>6</sup> MTCA and its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), unambiguously differ in their definitions of "person," in that CERCLA's definition explicitly includes the word "State." See 42 U.S.C. § 9601(21); see also RCW 70.105D.020(24). By defining the term "person" to include a "state agency" rather than the "State," MTCA focuses on the involvement of a state agency in a polluting activity.

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<sup>5</sup> MTCA was passed as an initiative, and 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).

<sup>6</sup> Pope Resources' reliance throughout this case on *Pacificorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App 627, 259 P.3d 1115 (2011), is misplaced. See Answer to Petition for Review at 12-13, n.6. *Pacificorp* was decided on the basis of an agency's "arranger" liability under MTCA, and the court explicitly declined to address the 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.

**2. DNR Does Not Have “Any Ownership Interest” in the State-Owned Aquatic Lands at Port Gamble. DNR’s Management Authority Over State-Owned Aquatic Lands Is Defined by the Legislature.**

DNR, as a statutorily defined land manager, does not have *any* ownership interest in the state-owned aquatic lands at Port Gamble. As a creature of statute, DNR “may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority.” *Northlake Marine Works, Inc. v. DNR*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006). DNR’s lack of any ownership interest in the State’s aquatic lands is emphasized repeatedly throughout the aquatic lands statutes. *See* RCW 79.105.060(20) (defining “state-owned aquatic lands” as “tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways *owned by the state and administered by the department . . . .* [and] does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department.”) (emphasis added). *See also* RCW 79.105.010 (Legislature “recognizes that the state owns these aquatic lands in fee and has *delegated to the department the responsibility to manage these lands for the benefit of the public*”) (emphasis added) and RCW 79.105.020 (directives in the aquatic lands statutes “articulate a management philosophy to guide the exercise of the *state’s ownership*

*interest and the exercise of the department's management authority.*")  
(emphasis added).<sup>7</sup>

In contrast to the aquatic lands statutes, the Legislature has elsewhere defined DNR as a landowner for specific statutory purposes. In *Oberg v. DNR*, 114 Wn.2d 278, 787 P.2d 918 (1990), this Court looked at DNR's potential liability as a "landowner" of state forest lands. Examining the forest protection statutes, the *Oberg* court concluded that "[b]y definition in the statute, RCW 76.04.005, DNR is a landowner, and has a duty *as a landowner* to provide adequate protection against the spread of fire from its land." *Id.* at 283 (emphasis in original). In reaching this conclusion, the court also recognized that "[t]he legislature itself has imposed upon DNR this peculiar set of duties by *specifically defining* "forest landowner," "owner of forest land," "landowner," or "owner" to

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<sup>7</sup> The Legislature's emphasis on DNR's non-ownership role under these statutes makes sense given the fundamentally sovereign nature of the State's ownership of its aquatic lands. The State's ownership of its aquatic lands is asserted under article XVII, section 1 of the state constitution, and originates in the Equal Footing Doctrine. This Doctrine holds that 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." *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)).

include DNR.” *Id.* at 285 (emphasis added). The Legislature has not similarly defined DNR as a landowner under the aquatic lands statutes.<sup>8</sup>

It is a basic rule of statutory construction that “[w]here the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.” *Dep’t of Rev. v. Fed. Deposit Ins. Corp.*, 190 Wn. App. 150, 162, 359 P.3d 913 (2015) (internal citations omitted). Had the Legislature intended to define DNR as having any ownership interest in state-owned aquatic lands, it would have done so in the aquatic lands statutes.<sup>9</sup> The fact that it did not is significant and, accordingly, this Court should apply the plain language of the aquatic lands statutes and conclude that DNR does not have any ownership interest in the state-owned aquatic lands at Port Gamble.

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<sup>8</sup> The Court of Appeals noted that DNR staff occasionally refer to state-owned aquatic land as DNR land, and that this supports its conclusion that DNR is an owner of such lands. *Pope Resources*, slip op. at 3. However, 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 (emphasis added). Similarly, DNR, on behalf of the State, will sometimes enter into settlement agreements to help facilitate cleanup and limit taxpayer liability. CP at 269. Negotiating settlements on behalf of the State, including evaluating the State’s potential financial exposure, is not a concession of liability; it is a function of good government.

<sup>9</sup> *Pope Resources* and the Court of Appeals also cite to a house bill report as persuasive authority regarding DNR’s potential liability. *See Answer to Petition for Review* at 8. *See also Pope Resources*, slip op. at 8, n.3. However, the bill associated with this report, HB 2623, was not an amendment to either MTCA or DNR’s aquatic lands statutes, and was never passed by the Legislature. *See HB 2623*, 56th Leg., Reg. Sess. (Wash. 2000). Accordingly, its utility as applicable legislative history is questionable at best.

**B. *Taliesen and Unigard* Set the Correct Standard for Operator Liability Under MTCA by Adopting the Federal Test of *U.S. v. Bestfoods*. This Is an Appropriate Standard That Helps Ensure Those Responsible for Pollution Also Bear the Costs.**

Both Pope Resources and the Court of Appeals discount Washington precedent interpreting MTCA's "owner or operator" provisions as inapplicable to the facts at Port Gamble, arguing that such precedent is confined to the facts of those previous cases.<sup>10</sup> However, it is clear that Division I explicitly examined the "operator" language of RCW 70.105D.020(22)(a), and adopted the federal test of *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), in each case. See *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 128, 144 P.3d 1185 (2006). See also *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 429, 983 P.2d 1155 (1999). The *Bestfoods* test, which requires an operator to "manage, direct, or conduct operations specifically related to pollution" before incurring liability, is an appropriate test under MTCA and provides meaning to the terms "exercise" and "control," neither of which are defined anywhere in the statute.

The *Taliesen* and *Unigard* courts recognized that "[b]ecause [MTCA] was heavily patterned after its federal counterpart [CERCLA], federal cases interpreting similar "owner or operator" language in the

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<sup>10</sup> See Answer to Petition for Review at 17-18. See also *Pope Resources*, slip op. at 11.

federal Act are persuasive authority in determining operator liability.” *Taliesen*, 135 Wn. App. at 127 (citing *Unigard*, 97 Wn. App. at 428). Both MTCA’s and CERCLA’s definition of “owner or operator” focus on “control.” Compare RCW 70.105D.020(22)(a) to 42 U.S.C. § 9601(20)(A), which defines “owner or operator” under CERCLA in relevant part, as “any person who owned, operated, or otherwise *controlled activities* at such facility immediately beforehand.” (emphasis added).

Looking to federal case law for guidance in defining “control,” the *Taliesen* court found that “[t]he federal standard focuses on participation in, and the *exercise of control* over the operations of a facility.” *Taliesen Corp.*, 135 Wn. App. at 127 (emphasis added). *Taliesen* and *Unigard* both recognize that “[w]ith few exceptions, courts have been unwilling to impose CERCLA liability upon a non-owner of property if the party did not participate in, or actually exercise control over, the operations of the facility.” *Taliesen*, 135 Wn. App. at 128 (citing *Unigard*, 97 Wn. App. at 428-29). Applying the reasoning of *Bestfoods* to the “exercises any control”

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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.<sup>11</sup>

Both *Unigard* and *Taliesen* give effect to MTCA by focusing on a person’s exercise of “control” over the operation to establish operator liability. This is the correct standard, as it meets one of MTCA’s purposes as a polluter-pays statute. In using the words “exercise” and “control” in the statute, MTCA ensures that those actually responsible and in a position to make the relevant decisions regarding pollution bear the responsibility. This is exactly why the *Unigard* court, looking to federal precedent, 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. 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.*

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<sup>11</sup> Although the Court of Appeals below looked to a dictionary definition to define “control” under MTCA, this Court should instead look to existing Washington precedent. Indeed, “[t]his court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). *See also State v. Otton*, 185 Wn.2d 673, 685, 374 P.3d 1108 (2016). The Legislature’s failure to amend MTCA’s “operator” definition in the significant period of time since both *Taliesen* and *Unigard* were decided can be viewed as acquiescence in those decisions.

Adopting the *Bestfoods* standard in this State does not mean that polluters will escape responsibility; on the contrary, the *Bestfoods* standard ensures that those with the *actual authority* over the pollution on a site, *i.e.*, those that “manage, direct, or conduct operations specifically related to pollution” are held responsible. This test casts the correct net under MTCA by going after those who actually exercise control of the polluting activities on a given site, and should accordingly be adopted by this Court.

**1. DNR Did Not Exercise Sufficient Control at Port Gamble Under Applicable Washington Precedent to Have Operator Liability at That Site.**

While the Court of Appeals asserts that DNR’s arguments would be better suited in the allocation phase of this lawsuit, it is necessary for the Court to first examine the specific facts of the case in the *liability* phase to determine whether or not DNR exercised sufficient control at Port Gamble to have operator liability under MTCA. The *Taliesen* court emphasized this point when it stated that the analysis of whether a potentially liable person “exerted sufficient control” over a facility to become liable under MTCA “requires a fact specific inquiry.” *Taliesen*, 135 Wn. App. at 429.

Indeed, before a court proceeds to trial on an equitable allocation under MTCA, the court must first apply the “statutory criteria (enumerated in RCW 70.105D.040) to the facts.” *Seattle City Light v. Dep’t of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999). If the criteria of the statute

do not apply, i.e., if a party does not fall under one of MTCA's categories of liable "persons," the court's inquiry ends.<sup>12</sup> Here, the Court of Appeals failed to correctly apply MTCA's "owner or operator" definition to the liability phase of this case, and this Court should correct that error.

The only question for the Court in analyzing DNR's potential "operator" liability at Port Gamble is whether or not the leases with Pope and Talbot constitute the exercise of sufficient control to make DNR liable under MTCA for pollution at that site. Based on applicable precedent that this Court should adopt here, 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 and Talbot operated for nearly a century on state-owned aquatic land without any approval from DNR. CP at 266-69. Moreover, log booming, storage, and rafting took place in the location of the eventual lease area for decades before DNR's lease with Pope and Talbot. CP at 149. The eventual lease terms prohibited the release of hazardous substances and the accumulation of debris. CP at 103-06, 111-14, 116-21. Additionally, DNR "did not authorize the wharf or other facilities constructed over aquatic lands." CP at 267.

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<sup>12</sup> These categories are listed under RCW 70.105D.040(1)(a)-(e) and include current or former owners or operators of a facility, arrangers, transporters, and certain sellers of hazardous substances.

At Port Gamble, 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.

Federal cases interpreting the *Bestfoods* test have determined that “*Bestfoods* requires that an operator ‘make the relevant decisions’ regarding the disposal of hazardous wastes ‘on a frequent, typically day-to-day basis.’” *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 121 (D.D.C. 2014) (citing *City of Wichita v. Trustees of APCO Oil Corp.*, 306 F. Supp. 2d 1040, 1055 (D. Kansas 2003) (collecting cases)).<sup>13</sup> 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

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<sup>13</sup> For a pre-*Bestfoods* case discussing operator liability under CERCLA, see *Long Beach Unified School Dist. v. Dorothy B. Godwin Cal. 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.”).

Site. This Court should apply existing Washington precedent adopting the *Bestfoods* standard and conclude, as did the trial court, that DNR does not have “operator” liability at Port Gamble.

**2. DNR’s Arguments Are Consistent With the 1992 Memorandum of Agreement With the Department of Ecology.**

In 1992, DNR and Ecology entered into a Memorandum of Agreement Concerning Contaminated Sediment Source Control, Cleanup, and Disposal (Agreement). CP at 283-307. Among other things, the Agreement sets forth the understanding between DNR and Ecology regarding DNR’s potential defenses for contamination on state-owned aquatic lands. CP at 269. The Agreement, which is still in effect, provides that:

DNR may have reasonable defenses based on not being an ‘owner-operator’. . . . These reasonable defenses 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.<sup>14</sup>

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<sup>14</sup> The Agreement’s language comes almost verbatim from the pre-*Bestfoods* federal standard of *United States v. New Castle Cty.*, 727 F. Supp. 854, 869 (D. Del. 1989). See also *FMC Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833, 843 (3rd Cir. 1994) (applying this criteria in evaluating whether the United States government could be liable as an “operator” under CERCLA of a facility that manufactured textile rayon during World War II).

As Judge Melnick stated in his dissent below, “[t]his language in the MOU evinces Ecology’s recognition that DNR’s role as a manager was to act as the public’s custodian of land, and that it would not be liable under MTCA unless it played an active role in controlling the operation of the facility.” *Pope Resources*, slip op. at 17. DNR played no such role at Port Gamble, but Pope and Talbot did. The definition of “owner or operator” under RCW 70.105D.020(22)(a) has remained unchanged since its enactment. *See* Laws of 1989, ch. 2, § 2.

**C. The Court of Appeals’ Decision Significantly Increases Taxpayer Liability for Contamination Caused by Third Parties on State-Owned Property.**

Holding DNR liable at the Port Gamble Site will result in a significant increase in the State’s liability for contamination caused by third-parties on State property. As the Court of Appeals held, “the statutory rights conferred by DNR by the legislature amount to ‘any ownership interest’ in the Site.” *Pope Resources*, slip op. at 9. Accordingly, DNR, solely because of its statutory authority as a land manager of state-owned aquatic lands, will have potential liability for pollution on the State’s 2.6 million acres of aquatic lands, regardless of any DNR involvement in any polluting activities. This fails to meet MTCA’s intent to exempt the State itself from liability, and it fails to meet one of MTCA’s primary purposes to “raise sufficient funds to clean up all hazardous waste sites . . . .”

RCW 70.105D.010(2). It also puts DNR into an impossible catch-22: either it does nothing to prevent a polluter's activities, in which case it has "owner" liability based on its statutory authority; or alternatively, it attempts to get compliance on a site by issuing a lease or easement prohibiting operating in a manner that leads to pollution, in which case it has exercised control over the site and has "operator" liability. This outcome is untenable, goes against established Washington state precedent interpreting MTCA's "owner or operator" liability provisions, and should be soundly rejected by this Court.

#### V. CONCLUSION

DNR is not an "owner or operator" under RCW 70.105D.020 at Port Gamble. For the foregoing reasons, DNR respectfully requests that this Court reverse the Court of Appeals' decision and affirm the trial court's order granting summary judgment to DNR in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of June, 2017.

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**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 June 2, 2017, 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 2nd day of June, 2017, at Olympia, Washington.

  
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LISA F. ELLIS  
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**ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION**

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