

NO. 94084-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Court of Appeals applied the plain language of the Washington Model Toxics Control Act (“MTCA”), RCW 70.105D, to determine that the Washington Department of Natural Resources (“DNR”) is an “owner or operator” at the Port Gamble Bay and Mill Site. In doing so, the Court of Appeals confirmed the interpretation of MTCA applied by the Washington Department of Ecology (“Ecology”) to all parties—including DNR—for decades. The Legislature has acknowledged and implicitly ratified this interpretation, and even DNR has internally conceded its liability at the Site.

DNR seeks an extraordinary result in this appeal. DNR asks the Court to conclude that an entity who manages land by controlling its uses and profiting from its pollution is not a person with “any ownership interest or who exercises any control” over that land. In short, a decision in DNR’s favor requires ignoring: (1) the plain meaning of MTCA’s unambiguous “owner or operator” definition; (2) MTCA’s unmistakable intent to extend liability broader than its federal counterpart; (3) and the statutory directive to construe MTCA “liberally” to fulfill its main purpose of funding cleanups. Such a result is not logically or legally defensible.

The result urged by DNR not only contradicts the statute’s language and purpose but would create bad precedent. MTCA’s broad

remedial scheme is designed to incentivize action by those in a position to prevent pollution. But the standard proposed by DNR would strip the statute of its vitality by rewarding acquiescence. The Court should enforce MTCA as written and hold DNR as an “owner or operator.”

II. ISSUE PRESENTED FOR REVIEW

This case presents a single question of law, reviewed de novo: Whether DNR is an “owner or operator” under RCW 70.105D.020 of MTCA at the Port Gamble Bay and Mill Site. It does not require this Court to consider the extent of any liability DNR may have.

III. BACKGROUND

PR/OPG incorporates by reference the statement of the case and background in Appellants’ Opening Brief and PR/OPG’s Answer to DNR’s Petition for Review.

IV. ARGUMENT

The Court of Appeals’ opinion explains why DNR’s position cannot prevail. Additionally, PR/OPG’s prior briefing rebuts any argument DNR has made or will make in this appeal. In particular, PR/OPG respectfully refers the Court to: (1) PR/OPG’s Reply Brief at the Court of Appeals, and (2) PR/OPG’s Answer to DNR’s Petition for Review. With this supplemental brief, PR/OPG wishes to emphasize a

few key points relevant to the Court’s review and address issues raised by the majority and dissenting opinions at the Court of Appeals.

A. MTCA’s Broad Remedial Scheme

The citizens of Washington voted to enact MTCA as Initiative No. 97 in 1988 to “establish[] a mechanism to clean up hazardous waste sites.” *Asarco Inc. v. Dep’t of Ecology*, 145 Wash. 2d 750, 754, 43 P.3d 471, *amended on denial of reconsideration*, 49 P.3d 128 (Wash. 2002). MTCA’s “declaration of policy” begins by stating: “Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right.” RCW 70.105D.010(1). As a result, MTCA declares that its “main purpose . . . is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.” RCW 70.105D.010(2). “The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act.” RCW 70.105D.910.

MTCA achieves its broad remedial purpose by imposing liability and allowing for allocation of liability in a two-step process. First, the act imposes liability for the cost of cleaning up contamination broadly on five categories of “persons,” and the following two are relevant here:

- (a) The **owner or operator** of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

RCW 70.105D.040(1) (emphasis added). Importantly, each liable person “**strictly liable, jointly and severally**, for all remedial action costs” at a Site. RCW 70.105D.040(2) (emphasis added). MTCA imposes liability regardless of causation or culpability “because it is essential that sites be cleaned up well and expeditiously.” RCW 70.105D.010(5).

Separate and distinct from the “liability” phase of a MTCA action is the “allocation” phase. This second phase requires that a court allocate damages to liable parties based on equitable factors. RCW 70.105D.080 (“Recovery shall be based on such equitable factors as the court determines are appropriate.”). At the trial court, the parties cross moved for summary judgment on the legal issue of DNR’s status as a liable party, and the extent of either party’s liability is not an issue in this appeal.

The *only* question in this appeal is whether DNR fits within a category of liable persons under RCW 70.105D.040 at the Port Gamble Bay and Mill Site. Holding DNR liable at this stage does not mean that DNR will ultimately be responsible for any remedial action costs. *See City of Seattle (Seattle City Light) v. Washington State Dep’t of Transp.*, 98 Wn. App. 165, 177-78 989 P.2d 1164 (1999) (holding that State Department of Transportation was liable under RCW 70.105D.040 but

was responsible for zero percent of remedial action costs). Thus, the vast majority of DNR's arguments throughout this appeal—which focus on the alleged inequity of holding DNR liable—are premature. DNR may argue on remand that its equitable share should be small, but such arguments are simply irrelevant to the issue of whether DNR is a liable person under the plain language of the statute.

B. The Court Should Apply MTCA as Written and Reject DNR's Attempts to Evade the Statute's Language.

The entire premise of DNR's argument is that the Court should interpret MTCA to mean something other than what it actually says, resulting in a narrower liability scheme as applied to the agency. But courts must construe MTCA's provisions "liberally" to achieve its broad remedial purpose. RCW 70.105D.910; *Union Elevator & Warehouse Co. v. Wash. Dep't. of Transp.*, 171 Wn.2d 54, 67, 248 P.3d 83 (2011) (relying on statute's policy statement to aid interpretation). "Once enacted, initiatives are interpreted according to the same rules of statutory construction as apply to the Legislature's enactments." *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002). In determining "intent from the language of an initiative measure, the court focuses on the language as the average well informed voter would understand it." *Id.*

The statute provides that certain categories of “persons” are liable for cleanup of a “facility.” DNR does not dispute that it is a “person”¹ or that the Site is a “facility”² under MTCA. DNR disputes only whether it is a current or former “owner or operator” at the Site as described in subsections (a) and (b) of RCW 70.105D.040(1). Thus, the key provision in this appeal is RCW 70.105D.020(22), which broadly defines “owner or operator” as follows:

“Owner or operator” means:

(a) Any person with any ownership interest in the facility or who exercises any control over the facility

RCW 70.105D.020(22).

1. The “Owner or Operator” Concept Must be Applied Holistically as it is Defined in the Statute.

DNR’s attempt to rewrite the statutory language begins with its insistence on separating the terms “owner” and “operator.” *See* DNR’s Pet. for Rev. at 14. DNR and the dissenting judge at the Court of Appeals fault the majority opinion for “not distinguish[ing] between the terms owner and operator.” *See id.* (quoting 197 Wn. App. at 426). That view simply contradicts the statute. MTCA creates the separate categories of

¹ MTCA defines “person” as any “individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, **state government agency**, unit of local government, federal government agency, or Indian tribe.” RCW 70.105D.020(24) (emphasis added).

² A “facility” includes “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).

arranger, transporter, and seller, but the statute uses the phrase “owner or operator” to describe a single category of liable person. *See* RCW 70.105D.040(1). Even more tellingly, the statute defines the phrase “owner or operator” jointly, and offers no separate definition for “owner” or “operator.” RCW 70.105D.020(22).

This definition is rooted in the law and in common sense. Washington courts have recognized that “[c]ontrol over the land is part of the bundle of sticks associated with land ownership and use.” *Lowe v. Rowe*, 173 Wn. App. 253, 261, 294 P.3d 6 (2012). The concepts of ownership and operation therefore both hinge on control. The statutory definition sensibly recognizes this overlap by establishing and defining “owner or operator” as a single category of liable person. The intent is clear: those who can control what happens at a site should bear responsibility for cleaning up contamination they permit.

The question in this appeal is therefore simply whether DNR is a person “with any ownership interest in the facility or who exercises any control over the facility.” *Id.* It should not be controversial that an “average well informed voter” would read this language to include a person who “exercised its right to manage at the Site by leasing the aquatic lands, excluding others from the aquatic lands, and controlling the allowed uses on the aquatic lands.” 197 Wn. App. at 420 (citing CP 217).

DNR fits within the definition of “owner or operator” as written and therefore attempts to splice or manipulate the language of the statute to evade its plain meaning.

While the Court of Appeals appropriately applied the phrase “owner or operator” as a single category of liability, the court also separately analyzed the nature of DNR’s “ownership interest” and its “exercise of control.” As explained below, the Court of Appeals correctly concluded DNR has both.

2. DNR Has an Ownership Interest in Aquatic Lands.

DNR argues it cannot have “any ownership interest” because “the State” owns aquatic lands in “fee” and “has delegated to [DNR] the responsibility to manage these lands for the benefit of the public.”

RCW 79.105.010. As an initial matter, “DNR’s argument is contrary to the position taken in its own documents where it acknowledges that it owns the Site.” 197 Wn. App. at 418 n.13. Further, DNR’s position is flawed because it rests on the premise that only fee owners may be liable under MTCA when the statute says just the opposite.

“The plain language of MTCA does not limit liability to persons with an ownership interest in fee simple. Rather, the plain language provides that a person legally having some of the ‘bundle of rights’ to use, manage, or possess the property is liable.” 197 Wn. App. at 419. As this

Court has recognized, property ownership “is best described as certain rights pertaining to a thing, not the thing itself. Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc.” *Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012). MTCA’s use of the phrase “any ownership interest” shows a clear intent to incorporate the “bundle of rights” concept into “owner or operator” liability and extend liability beyond fee owners.

The breadth of MTCA’s “owner or operator” definition is best understood by comparing it to CERCLA’s definition of the same term. As DNR points out, MTCA was heavily patterned after CERCLA, and when MTCA uses different language, courts consider the difference a clear indication of intent. *See* DNR’s Resp. Br. at 14-15 (citing *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992)). CERCLA defines an “owner or operator” as simply “any person owning or operating such facility.” 42 U.S.C. § 9601(20)(A)(ii).

Clearly, CERCLA’s definition includes a “fee” owner—even a fee owner with a small percentage of ownership.³ But MTCA uses more expansive language, which its drafters must have intended to accomplish more than what CERCLA accomplished. As a result, MTCA’s “owner or

³ *See United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3d Cir. 1993) *overruled on other grounds by United States v. E.I. DuPont De Nemours & Co. Inc.*, 432 F.3d 161 (3d Cir. 2005) (confirming that owners of minor portion of site are liable for entire site under CERCLA).

operator” definition must apply to those with something less than “fee” ownership. Here, DNR has every incident of ownership other than fee. As the Court of Appeals stated, “DNR repeatedly asserted its right to manage the aquatic lands within the Site, and it has extensively exercised its right to manage the aquatic lands within the Site by dictating what activities are allowed and not allowed,” in addition to “refer[ing] to itself as the owner of the Site.”⁴ 197 Wn. App. at 419, 414. As a result, if DNR is not liable as a person with “any ownership interest,” then liability would be limited to “fee” owners in contrast with MTCA’s intent.

Neither DNR nor the dissenting judge at the Court of Appeals have been capable of explaining how their view is consistent with the language of the statute. The dissent notes MTCA does not define “ownership interest,” and suggested the majority should have relied on the definition in RCW 2.48.180(1)(c). 197 Wn. App. at 426-27. But the statute cited by the dissent applies to non-lawyers unlawfully practicing law by “controlling the affairs of a business” engaged in the practice of law. RCW 2.48.180(2). In contrast, MTCA uses “ownership interest” in relation to a “facility,” which is “any site or area” where a hazardous substance has “come to be located.” RCW 70.105D.020(8), (22).

⁴ DNR touts its ownership when it wants to exercise power over land, such as by ejecting unauthorized users or mandating lease provisions, but DNR disclaims ownership and hides behind its public management role when ownership leads to liability.

Ownership interest in a “site or area” is not akin to ownership interest in a business, and the statutory schemes as a whole could hardly be more different. *See Retail Store Emp. Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 896, 558 P.2d 215 (1976) (“[R]egard must be had to the statutory object sought to be accomplished by the use of the word ‘ownership,’ and the context and subject matter in which it is used.”).

The phrase “any ownership interest” is not ambiguous. And if it were, the ambiguity must be resolved in favor of Ecology’s interpretation and in favor of the statutory directive to construe MTCA liberally.

3. DNR Exercises Control over the Aquatic Lands.

DNR stretches the statutory language even further by claiming that its “management” authority does not involve the exercise of “any control.” Despite DNR’s obfuscation, the analysis should be perfectly simple when DNR admits it controls use of land at the Site:

DNR has repeatedly admitted that it manages the aquatic lands within the Site, holds management authority over those aquatic lands, and acts [as] a land manager. . . . Therefore, based on DNR’s own characterization of its role as a land manager, **DNR controls the use of the aquatic lands within the Site and is, therefore, an operator under MTCA.**

Pope, 197 Wn. App. at 421 (emphasis added).

It is quite simply nonsensical to say that one who admittedly controls the uses of aquatic lands within the Site does not “exercise[] any

control” over the Site. Realizing this, DNR does not attempt to rectify its position with the statutory language—nor could it. DNR instead insists that, irrespective of the language, Division One of the Court of Appeals has adopted the federal “operator” standard, and this Court should follow.

First, as PR/OPG has explained, the cases relied on by DNR⁵ did not “adopt” the federal standard as controlling law, but merely consulted federal law as persuasive based on unique facts.⁶ See Resp. to Pet. for Rev. at 17. And as the Court of Appeals noted, *Taliesen* and *Unigard* are distinguishable. 197 Wn. App. at 422. *Unigard* involved issues of piercing the corporate veil. See *id.* (citing *Unigard*, 97 Wn. App. at 428-29). And *Taliesen* involved a subcontractor who did not “exercise any control” because it had no authority over where to conduct drilling, and the drilling was the cause of the contamination (DNR, on the other hand, had authority over where to conduct log booming, which it knew caused pollution, and authorized log booming in areas it deemed “highly suitable”

⁵ *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006); *Unigard Insurance Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999).

⁶ Even if these cases had “adopted” federal law, the standard is not as narrow as DNR claims. DNR has relied on *Unigard* to claim Division One rejected the idea that parties with “authority to control” the cause of contamination may be liable. But years later in *Taliesen*, the same court relied on federal cases where liability “depend[ed] upon authority to control decisions about how to dispose of waste.” *Taliesen*, 135 Wn. App. at 127 (emphasis added). Additionally, the Ninth Circuit has confirmed it “expansively” applies “operator” liability to parties with “authority to control” the cause of contamination. See *Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 451 n.9 (9th Cir. 2011). It should be clear that a party with authority to control contaminating uses of property exercises that control by willfully ignoring and failing to prevent the use.

for that use). *See id.* at 420, 422 (citing *Taliesen*, 135 Wn. App. at 128).

In short, those cases did not adopt the federal standard and do not conflict with the Court of Appeals' decision here.

Moreover, *Taliesen* and *Unigard* are not binding on this Court, and the Court should not follow those cases to the extent they are inconsistent with the statutory language. As the Court of Appeals in this case recognized, the courts in *Taliesen* and *Unigard* “analyzed liability under CERCLA without discussing the definitional differences between CERCLA and MTCA. . . . Because the language of the provision in MTCA differs from the language in CERCLA, *Taliesen's* and *Unigard's* holdings relying on an interpretation of CERCLA liability are not persuasive.” 197 Wn. App. at 422. The Court should take this opportunity to clarify any confusion created by *Taliesen* and *Unigard* and confirm that MTCA means what it says.

DNR and the dissenting judge fail to offer a basis to depart from the language of the statute. The dissent states that, “[w]hile DNR manages the site on behalf of the state, it does not exercise control of the facility.” 197 Wn. App. at 427. These propositions are inherently inconsistent. To the extent the dissent suggests a distinction between “management” and the “exercise of control,” there is no legal or logical basis for such a distinction. As the majority cogently explained, to manage land is to

exercise control. *See id.* at 421 n.15 (“DNR repeatedly asserts that is a land manager But DNR does not reconcile that position with its claim that it is does [sic] not exercise any control over the Site.”). To the extent the dissent suggests a distinction between “the site” and “the facility,” the statute precludes such a distinction by defining “facility” to include “any site” or area with contamination. RCW 70.105D.020(8).⁷

C. The Court of Appeals’ Opinion Maintains the Status Quo Interpretation of MTCA as Recognized by Ecology and the Legislature.

Moreover, the dissent and DNR ignore that the Legislature has acknowledged DNR’s liability under MTCA multiple times without making any effort to change the law. For instance, a recent budget update provided funds to DNR in the 2013-2015 fiscal biennium from the “environmental legacy stewardship account” to pay for “aquatic land investigation and cleanup activities.” RCW 70.105D.170(4)(d). The Legislature allocated these funds because “DNR has been identified as a potential liable party by [Ecology] under [MTCA] on three Puget Sound basin cleanup efforts. . . [and] DNR is required to pay for a portion of the

⁷ The dissent attempts to justify ignoring the language by stating the Legislature should be “presumed to know the existing state of the case law” and has therefore acquiesced to the federal standard. *See Pope*, 197 Wn. App. at 429. But as noted, Division One looked to federal case law as persuasive authority in fact-specific circumstances; it did not adopt the federal standard as universally applicable.

costs to complete remedial investigation work.”⁸ More than a decade earlier, the Legislature stated in a House Bill Analysis as part of reviewing funding options for sediment cleanup: “[DNR] is a potentially liable party . . . on behalf of the state because it owns or manages the contaminated sites on state-owned aquatic lands.” *Pope*, 197 Wn. App. at 419 n.14 (quoting House Analysis, HB 2623, at 2 (Jan. 28, 2000)).⁹ The Legislature has therefore not accepted the federal “owner or operator” standard, but instead has long accepted DNR’s liability as the status quo.

The Court of Appeals also recognized that “Ecology is tasked with administering MTCA and its regulations,” and the court appropriately deferred to Ecology’s interpretation of the statute. 197 Wn. App. at 422-23. Ecology interprets MTCA as written and disagrees with DNR’s attempt to narrow “owner or operator” liability.¹⁰ *See id.* This Court has long deferred to Ecology’s interpretation of statutes within the agency’s

⁸ S. WAYS AND MEANS COMM., 2013-15 OPERATING BUDGET STATEWIDE SUMMARY & AGENCY DETAIL: STRIKING AMENDMENT TO 2ESSB 5034, “Department of Natural Resources” cmt. 15, at 173 (Wash. June 27, 2013), http://leap.leg.wa.gov/leap/Budget/Detail/2013/soAgencyDetail_0627.pdf.

⁹ *See also* Laws of 2005, ch. 155, § 121 (appropriating funds to DNR for “settlement costs for aquatic lands cleanup”); Laws of 2005, ch. 518, § 1205 (appropriating funds to DNR to settle MTCA litigation brought against DNR by a private party).

¹⁰ Strangely, DNR and the dissent place significant weight on a 1992 Memorandum of Agreement (MOA) between Ecology and DNR to suggest that Ecology follows the federal “operator” standard and does not actually believe DNR is liable. *See* 197 Wn. App. at 427-28. As PR/OPG has explained, nothing in the MOA is inconsistent with DNR’s liability at this Site. *See* Apps.’ Op. Br. at 46 n.21; Apps.’ Reply at 22. And even if the MOA supported DNR’s position, DNR and the dissent do not explain why statements in the MOA—which expressly does not alter any law—deserve greater weight than Ecology’s statement in this case that it follows the plain language of the law. *See* 197 Wn. App. at 422-23 (citing Ecology’s amicus brief).

expertise “so long as that interpretation is not contrary to the plain language.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004).

D. DNR’s Policy Arguments are Misplaced, and its Position Would Create Perverse Incentives.

As the Court of Appeals recognized, the vast majority of DNR’s arguments in this appeal are policy arguments “better suited for the legislature’s consideration” and which “conflate[] the threshold determination of liability under MTCA with the final apportionment of the extent of liability.” 197 Wn. App. at 423. Most importantly, however, DNR’s policy concerns have no basis in reality, and the Court of Appeals’ plain language application of MTCA is in the public interest.

First, DNR’s overarching theme is that state agencies must be treated differently under MTCA. That premise plainly contradicts the statute, which defines a “state government agency” as a “person” who may be liable to the same extent as individuals and corporations. *See* RCW 70.105D.020(24). As this Court has recognized, MTCA cleanups rely in part on the state hazardous waste tax, “but for the most part, clean up is paid for and performed by those *public or* private entities identified by Ecology as ‘potentially liable persons.’” *Asarco*, 145 Wn.2d at 754 (emphasis added). MTCA draws no distinction between the liability of

private and public entities. No one would dispute that a private party is (and should be) liable under MTCA if it authorizes, ignores, and profits from contaminating activity on land under its control. Yet DNR believes it should not be liable for doing the same at this Site. DNR's position does not serve the public interest but is, in fact, an affront to the right of the people of this state to expect accountability in government.

Second, DNR's claims of an "expansion" of "taxpayer" liability are unfounded. For one, the Legislature, Ecology, and even DNR itself have recognized for decades that DNR is liable under MTCA at certain sites, and the alleged "expansion" of liability is therefore illusory. Further, it is disingenuous for DNR to suggest its liability falls to the "taxpayers" when DNR operates like a private commercial landlord. "DNR generates revenue by selling the rights to harvest renewable resources like wild geoducks and other shellfish and from leasing and licensing state-owned aquatic lands."¹¹ In 2015, DNR produced more than \$313 million in revenue, including more than \$30 million from aquatic lands leases, while receiving approximately \$20 million total from the state general fund.¹² And like any other landlord, DNR uses lease terms to shift responsibility to its tenants. For instance, DNR required P&T to indemnify it for

¹¹ Washington State Department of Natural Resources, *Aquatics*, available at <http://www.dnr.wa.gov/programs-and-services/aquatics> (last visited June 2, 2017).

¹² See DNR 2015 Annual Report, at 8, 11, available at <http://www.dnr.wa.gov/about/fiscal-reports/dnr-annual-reports> (last visited June 2, 2017).

environmental harm for log-booming leases (*see* CP 120), and DNR required P&T to compensate it for lost income from reduced geoduck production associated with a separate sewer outfall lease dating back to 1975 (*see* CP 126-131). DNR knows how to protect itself from its tenants' actions and cannot escape responsibility under MTCA for the pollution it permitted simply because one tenant went bankrupt.

Third, the Court of Appeals' decision incentivizes pollution prevention, while DNR's position rewards acquiescence. DNR argues that it can be liable only if it is actively involved in environmental decision-making at the facility (which it was in any event), but that it cannot be liable for simply standing by and allowing the pollution. For instance, DNR has emphasized that it did not lease any land within the Site to the sawmill operator until after decades of polluting activity. *See* DNR's Pet. for Rev. at 13. Yet DNR does not deny that it was aware of the activities before entering the lease, or that it continued to allow polluting activity within and beyond the lease area thereafter. *See* Apps.' Op. Br. at 8-10. Under DNR's position, a land manager could simply refuse to enter a lease but knowingly permit polluting activity without facing liability. Or the land manager could enter a lease and collect rent payments but avoid liability by minimally supervising the tenant. Perversely, under DNR's view, only the Good Samaritan landlord who intervenes in the tenant's

environmental decision-making to prevent contaminating activity would risk liability. But by imposing liability on *any* entity with an ownership interest or who exercises control, as MTCA requires, the Court of Appeals' decision incentivizes action by those who can prevent pollution.

Fourth, DNR's apparent concern that MTCA as written imposes boundless liability is unfounded. In fact, an owner or operator is not liable if contamination "was caused solely by . . . [a]n act or omission of a third party (including but not limited to a trespasser)" and if the owner or operator "has exercised the utmost care with respect to the hazardous substance [and] the foreseeable acts or omissions of the third party." RCW 70.105D.040(3)(a)(iii). Here, DNR cannot claim this defense because it knew P&T operated on its land, knew P&T's operations caused pollution, and in fact, authorized and profited from the polluting activity. But if DNR stewards aquatic lands as its statutes require and as the public expects of any landowner, then the agency will not be liable.

Additionally, MTCA's drafters carefully considered the breadth of "owner or operator" liability by excluding certain parties from the definition of "owner or operator," including: (1) a government agency which acquires "ownership or control" through a bankruptcy or otherwise involuntarily; (2) a person who "holds indicia of ownership primarily to protect the person's security interest"; (3) a fiduciary such as a trustee; and

(4) victims of contamination that migrated from an adjacent property. RCW 70.105D.020(22)(b)(i)-(iv). Notably, the statute appears to presume that security interest holders, who do not hold fee ownership, would be liable under the “owner or operator” definition without an express exemption. With these exemptions, MTCA’s drafters considered the breadth of the “owner or operator” definition and took precise measures to alleviate its impact accordingly. DNR asks this Court to do the job of the Legislature and rewrite MTCA to include a new exemption for state agencies managing land on behalf of the State.

V. CONCLUSION

For the above reasons, PR/OPG respectfully requests that the Court affirm the Court of Appeals and hold that DNR is liable as an “owner or operator” at the Port Gamble Bay and Mill Site as a matter of law.

RESPECTFULLY SUBMITTED this 2nd day of June, 2017 .

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PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

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