

No. 94087-8

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IN THE SUPREME COURT  
STATE OF WASHINGTON

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SHAMROCK PAVING, INC, a Washington corporation,

Petitioner,

v.

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS,  
husband and wife,

Respondents.

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SHAMROCK PAVING, INC.'S ANSWER TO  
DEPARTMENT OF ECOLOGY'S AMICUS CURIAE BRIEF

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Petitioner Shamrock Paving, Inc. (“Shamrock”), through counsel, submits the following answer to the State of Washington, Department of Ecology’s (“DOE”) amicus curiae brief filed on September 1, 2017.

## I. INTRODUCTION

DOE casts its amicus brief as a response to arguments made by Shamrock about the significance of the “cleanup levels” established by DOE regulation. But DOE confuses the parties’ positions. Douglass—not Shamrock—is the party relying on the cleanup levels. Shamrock agrees with DOE’s position that the cleanup levels are not dispositive of whether a threat or potential threat exists.

DOE’s concerns about limitations on its enforcement authority are misplaced. DOE will continue to have the power to order investigations into releases and potential releases, regardless of how broadly or narrowly the term “remedial action” is construed. The Court should reject DOE’s premise that its enforcement authority hangs in the balance.

## II. ARGUMENT

### A. **Shamrock agrees that evaluating whether a release poses a threat or potential threat is a complex inquiry that cannot be reduced to whether a “cleanup level” has been exceeded.**

DOE suggests that Shamrock is relying on the “cleanup levels” in WAC 173-340-900 to make its case. DOE Brief at 1, 4, 7-8, 10-11. But DOE confuses the parties’ positions. Shamrock is not asking the Court to

look to the cleanup levels. *Douglass* is the party relying on the cleanup levels.

In particular, *Douglass* argues that the cleanup levels mark the line between “threats” and “potential threats” as those terms are used in RCW 70.105D.020(33), such that contamination in excess of a cleanup level is a “threat,” while contamination at or below a cleanup level is a “potential threat.” In a nutshell, *Douglass* is asking the Court to adopt a bright-line rule that a level of contamination at the precise cleanup level established by DOE (*e.g.*, 2,000 mg/kg for lube oil) is a “potential threat” as a matter of law. That rule, if adopted, would negate the trial court’s finding that no potential threat existed on the facts of this particular case.

*Shamrock*’s prior briefing merely explained some of the reasons why *Douglass*’s bright-line rule does not make sense. Chief among those reasons is that the cleanup levels are presumptively *protective* of human health and the environment. *See* WAC 173-340-700(2) (“A cleanup level is the concentration of a hazardous substance in soil, water, air or sediment that is determined to be *protective* of human health and the environment under specified exposure conditions.”) (emphasis added); WAC 173-340-702(5) (“Cleanup actions that achieve cleanup levels at the applicable point of compliance under Methods A, B, or C (as applicable) and comply

with applicable state and federal laws *shall be presumed to be protective of human health and the environment.*”) (emphasis added). Clearly a level of contamination that DOE considers “protective” of human health and the environment should not automatically qualify as a “potential threat.”

Contrary to DOE’s assertions, Shamrock has never argued that recovery of “remedial action” costs should be limited to cases in which a cleanup level is met or exceeded. Determining whether a release poses a threat or potential threat is a complicated, site-specific inquiry. As DOE quite rightly observes, “[i]t would be inappropriate to limit this determination to whether or not a hazardous substance concentration meets (or does not meet) a numeric cleanup level.” DOE Brief at 14.

To be clear, Shamrock’s position is that cleanup levels are merely one potential indicator of whether a release poses an actual or potential threat. Shamrock agrees with DOE that a variety of additional factors must be considered.

That is precisely what happened at trial. After weighing the testimony of several expert witnesses—including a career DOE scientist—the trial court found that the “negligible amount” of lube oil released onto Douglass’s property did not pose even a potential threat to human health and the environment. This Court should affirm that finding as supported

by substantial evidence.

**B. DOE's concerns about limitations on its enforcement authority are unfounded.**

DOE opposes Shamrock's interpretation of "remedial action," arguing that it would prohibit DOE from issuing administrative orders requiring investigations into releases and potential releases. DOE Brief at 7-11. In particular, DOE suggests that Shamrock's interpretation would result in a "conundrum" whereby DOE could only order an investigation if a site meets a specific contamination threshold, which DOE would have no way of knowing unless an investigation is conducted:

Under Shamrock's interpretation, an investigation would be remedial action only if the results of the investigation showed hazardous substances above cleanup levels. But the only way to tell if hazardous substances are above cleanup levels is to conduct an investigation. The only way to escape this conundrum and preserve the authority granted to Ecology in RCW 70.105D.050(1) is to interpret the scope of "remedial action" to include the act of investigation itself, regardless of whether it shows hazardous substances above cleanup levels.

DOE Brief at 8.

This concern is unfounded. First, DOE has mischaracterized Shamrock's interpretation of "remedial action." Shamrock has not offered an interpretation that hinges on a site being contaminated "above cleanup levels." As explained above, the cleanup levels are *Douglass's* bailiwick. Shamrock is not relying on them.

Second, DOE's authority to order investigations is not in doubt.

The statute that confers that authority is RCW 70.105D.030. It provides, in relevant part:

The department may exercise the following powers in addition to any other powers granted by law:

- (a) Investigate, provide for investigating, or *require potentially liable persons to investigate any releases or threatened releases of hazardous substances*, including but not limited to inspecting, sampling, or testing to *determine the nature or extent of any release or threatened release. . . .*
- (b) Conduct, provide for conducting, or require potentially liable persons to conduct remedial actions (*including investigations under (a) of this subsection*) to remedy releases or threatened releases of hazardous substances. . . . In conducting, providing for, or requiring remedial action, the department shall give preference to permanent solutions to the maximum extent practicable and shall provide for or require adequate monitoring to ensure the effectiveness of the remedial action;

RCW 70.105D.030(1) (emphasis added).

The statute cited by DOE, RCW 70.105D.050, simply directs DOE to exercise the authority conferred above when DOE determines that an investigation is "in the public interest" and when DOE has chosen not to undertake the investigation itself. RCW 70.105D.050(1). The fact that the statute references "remedial action" (specifically orders requiring a potentially liable party to "provide the remedial action"), does not create a

conundrum for DOE. In this context, “remedial action” simply refers to the actions DOE may order potentially liable parties to take under RCW 70.105D.030(1)—namely an investigation into the nature and extent of the release and/or a cleanup to remedy the release. It does not signify that the action being ordered must amount to “remedial action” as defined in RCW 70.015D.020(33). *See* RCW 70.105D.020 (“The definitions in this section apply throughout this chapter *unless the context clearly requires otherwise.*”) (emphasis added).

In short, DOE’s power to order investigations into the nature and extent of releases and potential releases under RCW 70.105D.030(1)(a) is absolute. It is not contingent upon DOE establishing that the investigation meets the statutory definition of “remedial action.” The Court should reject DOE’s premise that its enforcement authority hangs in the balance.

### III. CONCLUSION

Shamrock respectfully requests that the Court reverse the decision below and reinstate the trial court’s judgment.

DATED this 29th day of September, 2017.

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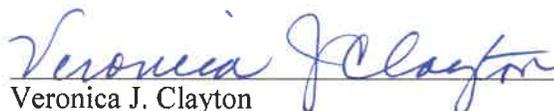
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