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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS
Plaintiffs-Appellants

v.

SHAMROCK PAVING, INC., A WASHINTON CORPORATION
Defendant-Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

APPELLANTS' OPENING BRIEF

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Attached to Douglass's Opening Brief are the following exhibits;

Exhibit 1. RCW 70.105D.020

Exhibit 2. RCW 70.105D.040

Exhibit 3. RCW 70.105D.080

Exhibit 4 WAC 173-340-200

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Exhibit 8. Testimony of Phil Leinart from RT 630

I.
INTRODUCTION

This appeal requires de novo interpretation of RCW 70.105D.080 and 70.105D.020(33) of the Model Toxics Control Act, ("MTCA")[1]. The main issue on this appeal is whether the trial court erred in concluding that Appellants failed to establish that they conducted a "*remedial action*". If they did, they were entitled to judgment, including attorney fees and costs, for the release of hazardous substances onto their property. The trial court's decision that Appellants failed to conduct a "remedial action" was based on an impermissibly narrow interpretation of "remedial action" with the trial court seemingly failing to even give consideration to the second part of the definition.

Plaintiffs/Appellants, Harlan and Maxine Douglass, ("Douglass") [2], are longtime Spokane real estate developers who own a parcel of undeveloped land located at 4800 West Nine Mile Road in Spokane County, ("The Property" or "Douglass' Property). Defendant/Respondent, Shamrock Paving, Inc., ("Shamrock"), is a paving contractor found to have released hazardous substances onto Douglass' Property during an 89 day trespass in the summer of 2013. Douglass incurred costs of $950.00

[1] RCW 70.105D.080 and 70.105D.020(33) are attached as Appendix Exhibits 3 & 1

[2] For ease of drafting, Harlan and Maxine Douglass are hereinafter referred to simply as "Douglass" which will be used in the singular.

in investigating the release and $12,236.99 in cleaning it up. RCW 70.105D.080 allowed Douglass to bring a private right of action to recover those costs and his attorney fees.

The trial court found Shamrock liable under section 70.105D.040 of the MTCA for releasing hazardous substances onto Douglass' Property [3]. Notwithstanding that Shamrock was found liable for the release of hazardous substances, the court denied Douglass compensation for the costs he incurred in investigating and remediating Shamrock's contamination. The denial was based on the trial court's determination that while the concentrations of heavy oil equaled the guideline threshold for cleanup---2,000 mg/kg---the concentrations failed to exceed it.

The principal issue on review is whether Douglass's investigation and/or his cleanup qualified as a "remedial action". The trial court determined that Douglass's efforts fell short of a remedial action seemingly overlooked the fact that Douglass' investigation alone qualified as a "remedial action" under a second prong of the definition of "remedial action".

In this brief, Douglass first explains that lube oil in the soil in concentrations of 2,000 mg/kg constitutes at least a *potential* threat to the environment. Douglass further points out that even if this reviewing Court

[3] RCW 70.105D.040 is attached as Appendix Exhibit 2

does not agree that there existed at least a potential threat, the investigation of the release of the hazardous substance alone satisfied the statutory definition of a "remedial action". Through this brief, Douglass makes clear that the trial court should have rendered judgment for him on his MTCA claim.

This reviewing Court is asked to reverse the trial court's judgment on the basis that the findings, when appropriately applied to the definition of a remedial action, required judgment in favor of Douglass. This Court is asked also to instruct the trial court to render judgment for Douglass for the cost of the investigation, $950.00, and for the cost of the cleanup, $12,226.99 and to award Douglass his fees and costs incurred during the litigation. Finally, this Court is asked to award Douglass his attorney fees and costs on appeal in accordance with R.A.P 18 (a) & (b).

II.

ASSIGNMENTS OF ERROR & LEGAL ISSUES

Assignments of Error

1. The Trial Court erred in entering finding of fact number 16 set forth below;

> Based upon the pre-cleanup testing levels, the lube oil, diesel, or gasoline did not create a threat or potential threat to human health or environment. (CP 730).

2. The Trial Court erred in finding that[4];

[4] This Finding of Fact was listed as a Conclusion of Law

> Phil Leinart, a hydro geologist with the Department of Ecology, opined that the subject property was not a site that implicated MTCA cleanup as conditions did not pose a threat to human health or the environment. (CP 733).

3. The Trial Court erred in refusing to include Douglass's requested conclusion number 3 which proposed;

> Plaintiff's cleanup effort was a "remedial action" (CP 636).

4. The Trial Court erred in concluding as a matter of law that;

> Plaintiffs, therefore, cannot prevail on a claim for a private action under MTCA because they did not make a threshold showing that the release of unknown amounts of hazardous substances (diesel, lube oil, and gasoline) was a threat to human health, or the environment that necessitated remedial action. Rather, the amount of hazardous substances found on the property did not exceed the reasonable maximum exposure limits of WAC 173-340-740(1)(a). (CP 734).

5. The Trial Court erred as a matter of law in concluding that Douglass could not prevail on his MTCA claim because the level of contamination did not exceed 2,000 mg/kg. (CP 730, 731).

6. The Court erred in concluding as a matter of law that;

> Plaintiffs failed to prove that the hazardous substance, which was released onto the subject property, was a threat or potential threat to human health or the environment, Defendant is entitled to reasonable attorney's fees under RCW 70.105D.080 (CP 734).

7. The Court erred in failing to consider that by hiring an environmentalist to investigate and monitor Shamrock's release of a hazardous substance, Douglass determined the risk or potential risk to human health and those actions alone constituted a "remedial action" under the statutory definition.

8. The Court erred in entering Judgment for Shamrock and against Douglass for attorney's fees and costs in the amount of $97,263.13 and awarding post judgment interest because it erred in determining that Shamrock was the prevailing party.

Legal Issues Pertaining to the Assignments of Error

1. Did Douglass's efforts in investigating and cleaning up his property qualify as a remedial action? (Errors #1, 2, 3, 4, 5, 6, 7)

2. Was the trial court's finding that the contamination on Douglass's Property did not constitute a potential threat to human health or the environment supported by substantial evidence? (Error #2)

3. Did Tetra Tech's investigation and subsequent monitoring of Douglass's Property constitute a "remedial action" whether or not the level of contamination constituted a potential threat to the environment? (Errors #3, 7)

4. Did the trial court err in awarding attorney fees and costs to Defendant and denying attorney fees and costs to Plaintiffs? (Error # 8)

5. Are Plaintiffs entitled to attorney's fees, both on appeal and in the trial court, if they prevail on this appeal? (Error # 8)

III.

STATEMENT OF THE CASE

Douglass, a longtime Spokane real estate investor and developer, owns a parcel of undeveloped land at 4800 West Nine Mile Road in

Spokane County. (FF #1; CP 729)[5]. The property consists of approximately 4.3 acres. (RT 242; 15-17), (Pl Ex 11)[6]. The trial court found that The Property was residential. (CP 732). Between June 1, 2013 and August 28, 2013, Shamrock, a paving contractor, used Douglass's Property as a staging area for approximately sixteen pieces of heavy equipment. (FF #5; CP 729). Shamrock's use of Douglass's Property constituted a trespass. (CP 732).

Upon discovering Shamrock's trespass, Douglass ordered Shamrock off The Property. (FF # 9; CP 729). Douglass then hired Tetra Tech, an environmental consultant, to investigate for hazardous substances on The Property. (FF #11; CP 730).

In Tetra Tech's initial investigation conducted on November 14, 2013 one sample was collected from surface soils from a 0 to 4 inch depth. Testing was performed by Jon Welge, an environmental scientist. Testing revealed a concentration of lube oil in the soil of 2,000 mg/kg. (FF #12; CP 730). In selecting that particular test location from a 4.3 acre site from which to take the sample small enough to fit into an 8-oz jar, Welge took a sample that "was representative of the area". In other words, "he wasn't

[5] FF stands for Finding of Fact; CP stands for clerk's papers.

[6] See P 11-1 "site location and description"

looking for the worst sample" he could have collected. (RT 273; 25- 274; 7).

Further investigation was conducted on January 24, 2014 when Welge took two additional samples. Testing of one of the samples revealed diesel at 600 mg/kg and lube oil at 800 mg/kg and the other revealed lube oil at 400 mg/kg. (Pl Ex 13)[7] (FF # 13; CP 730). Tetra Tech was paid $950.00 for its investigative work. (RT 205: 5- 206; 1). Douglass chose to remediate the contamination by removing and disposing of 68 tons of soil. (FF #14; CP 730). Tetra Teck was paid an additional $12,236.99 for excavating and hauling off the contaminated soil. (RT 215).

In early April of 2014, Tetra Tech provided monitoring of Douglass's Property by retesting to determine the effect of the removal of the contaminated soil. (Pl Ex 16-1). In its April 22, 2014 confirmatory report, Tetra Tech certified that the concentration of lube oil in the soil had been reduced from 2,000 mg/kg to 220 mg/kg. (Pl Ex 16-4). At 220 mg/kg Douglass's efforts to clean up his property was considered by Mr. Phil Leinart of the Department of Ecology as "successful". (RT 620; 15-20).

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[7] See P 13-1 "summary". Note that in this report Tetra Tech mistakenly inverted the diesel and lube oil findings from the Nov 14 test. This was explained by Jon Welge at RT 284; 3- 284-8.

Douglass filed suit against Shamrock on September 23, 2013 asserting a single cause of action for trespass. (CP 3-6). On January 24, 2014, Douglass filed a First Amended Complaint adding causes of action for nuisance and violation of the MTCA. (CP 11-14).

Between January 5 and January 8, 2015, Douglass's trespass and nuisance causes of action were tried to a Spokane jury which returned a verdict in his favor on both causes of action, awarding him $17,300 for Shamrock's unauthorized use of The Property. This appeal does not involve the jury trial or the trespass and nuisance claims.

The third cause of action, simultaneously tried to the court, sought investigative and cleanup costs under RCW 70.105D.080 of the MTCA. Errors related to the trial court's findings and conclusions on the MTCA cause of action are raised on this appeal.

Douglass filed his written closing argument on February 4, 2015. (CP 49-111). Shamrock filed its closing argument on February 13, 2015. (CP 350-383). Douglass then filed his reply on February 20, 2015. (CP 441-473).

On March 3, 2015, the trial court issued its Decision which included findings of fact and conclusions of law. (CP 474-480). The Trial Court concluded that Shamrock contributed to the release of hazardous substances on Douglass' Property and was therefore liable under the

Model Toxics Control Act. (CP 732, 733). On March 17, 2015, Douglass filed objections to the findings and conclusions and submitted proposed additional findings and conclusions. (CP 621-639). The next day, Douglass filed supplemental objections to the conclusions of law. (CP 706-709).

On March 27, 2015, the trial court issued its final findings and conclusions which addressed some, but not all, of Douglass's objections and proposals. (CP 728-735)[8]. The trial court found;

Shamrock trespassed on Douglass's Property. (CP 732).

FF #6--During its trespass, Shamrock's equipment was frequently fueled and the hoppers of the asphalt machines were cleaned by spraying them with diesel. (CP 729).

FF #08--Shamrock released gasoline, lube oil, and diesel onto Douglass's Property. (CP 729).

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[8] The findings, added after Douglass's objections and proposals include;

--FF 7 was changed to include the fact that the asphalt products which Shamrock stored on Douglass's Property contained petroleum.

--FF 8 was added. It states that Defendant contributed unknown amounts of gasoline, lube oil, and diesel oil on the subject property during the period of time the equipment was stationed on the subject property.

--FF 14; The following words were added; "The Plaintiff's cleanup was the substantial equivalent of a Department of Ecology supervised cleanup".

--CL at CP 478, in its original March 3 decision, the court stated that "Shamrock contributed to the release of hazardous substances, although in negligible amounts". In its final findings and conclusions, at CP 733, the court changed "negligible amounts" to "unknown amounts".

FF #07--Shamrock stored piles of asphalt grindings, cold mix, and paper joints on Douglass's Property, all of which contained petroleum. (CP 729).

FF #14--Douglass's cleanup was the substantial equivalent of a Department of Ecology supervised cleanup. (CP 730).

The trial court issued the following additional conclusions; Gasoline, diesel, lube oil, and petroleum products are hazardous substances. (CP 731). Shamrock contributed to the release of hazardous substances on Douglass's Property. (CP 732-733). Shamrock was "liable under the Model Toxic Control Act". (CP 732-733).

Notwithstanding the foregoing, the trial court ultimately denied any relief to Douglass, finding that the pre-cleanup testing levels of lube oil did not constitute a threat or potential threat to human health or the environment. (FF #16; CP 730). Relying on WAC 173-340-900 and Table 740-1[9] promulgated thereunder, the trial court noted that the MTCA only requires reporting of lube oil concentrations which exceed 2,000 mg/kg and that since the lube oil on Douglass's Property reached, but did not exceed 2,000 mg/kg, reporting to DOE was not required. The court concluded that since reporting was not required, contamination at 2,000 mg/kg did not constitute a potential threat to human health or the

[9] Table 740-1 is attached as Appendix Exhibit 7

environment and on that basis Douglass was precluded from prevailing on his MTCA claim. (CP 733, 734).

IV.

SUMMARY OF DOUGLASS'S ARGUMENT

The Model Toxics Control Act is found at RCW 70.105D. It governs liability for damages resulting from the release of hazardous substances. Implementing regulations are found in Chapter 173-340 of the Washington Administrative Code, ("WAC"). Douglass's appeal is based upon RCW 70.105D.020, 70.105D.040 and 70.105D.080 as well as WAC 173-340-200[11] (definitions), WAC 173-340-740[12], and WAC 173-340-900 which provides Table 740-1.

RCW 70.105D.080 provides a private right of action for the recovery of remedial action costs against any liable person or party. 70.105D.040 provides the criteria for determining liability. RCW 70.105D.020 provides the definitions necessary to an understanding of .040 and .080. Ultimately, because the trial court resolved all other issues in Douglass's favor, this appeal can be decided based on 70.105D.020(33), the definition of a "remedial action" reprinted below;

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[11] WAC 173-340-200 is attached as Appendix Exhibit 4

[12] WAC 173-340-740 is attached as Appendix Exhibit 6

> **any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health affects studies conducted in order to determine the risk or potential risk to human health.**

Douglass's appeal is based on the following two principal contentions;

1. The trial court erred in determining that as a matter of law a petroleum release measured exactly at the 2,000 mg/kg guideline threshold did not constitute at <u>least a potential threat</u> to the environment. [12]

2. The trial court seemingly failed to recognize that even if, arguendo, cleaning up contamination at, but not exceeding, 2,000 mg/kg, did not qualify as a "remedial action", the initial investigation alone fell within the definition of "remedial action" because the definition allows for investigation of the release of <u>any hazardous substance</u> whether or not it was later determined to constitute a potential threat to human health or the

[12] A finding that concentrations reaching the 2,000 mg/kg threshold constituted *at least* a potential threat to the environment would have resulted in a judgment in favor of Douglass and an award of both his investigative and his cleanup costs. More importantly, Douglass, the aggrieved innocent party would have been awarded the attorney's fees that Shamrock, the trespasser who contaminated Douglass' Property was awarded.

environment. Accordingly, Douglass should have been, at the least, awarded his investigative costs of $950.

V.

ARGUMENT

LEGAL ISSUE NUMBER 1

Did Douglass's efforts in investigating and cleaning up his property qualify as a "remedial action"?

In this section, after noting the proper standard of review, Douglass explains why the trial court erred in concluding that his efforts in remediating the lube oil contamination did not constitute a "remedial action". The trial court found in favor of Douglass on all of the preliminary issues, including that Shamrock was liable under the MTCA. Douglass argues that a 2,000 mg/kg concentration of lube oil constitutes at least a potential threat to the environment and, even if it didn't, his efforts at investigating the release of a hazardous substance itself satisfied the definition of "remedial action".

1. Standard of Review

The standard of review on this first issue is de novo because it requires this reviewing Court to interpret a statute. Interpretation of a statute is a question of law that is reviewed de novo. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1278 (2003). *Port of Seattle v.*

Pollution Control Hearings Bd., 151 Wash.2d 568, 593, 90 P.3d 659 (2004).

Further, the trial court concluded as a matter of law that Douglass's efforts fell short of the statutory definition of a "remedial action". (CP 733). Conclusions of law are also reviewed de novo. *Hegwine. v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006). They are reviewed to determine whether findings are adequately supported by substantial evidence, and if so, whether those findings support the conclusions of law.

2. The trial court found that Shamrock was liable under the MTCA

Douglass prosecuted his MTCA claim against Shamrock under RCW 70.105D.080 which provides a private right of action for the recovery of "remedial action" costs against any "liable person". The trial court found that Shamrock was a liable person but that Douglass's efforts fell short of a "remedial action". (FF # 1, 5, 8, 11, 12, 13 and14; CP 729, 730). The trial court partially determined that Douglass's efforts fell short of a remedial action on the erroneous finding that the level of contamination did not constitute a potential threat to the environment. (FF # 16, CP 730). [14] Douglass contends that 2,000 mg/kg constitutes at least

[14] The other reason the trial court failed to find that Douglass' effort constituted a remedial action was its failure to consider that Douglass's investigation and monitoring alone satisfied the definition of remedial action

the "potential threat". Douglass's contention was supported by two experts, one of which has been making such determinations for the Department of Ecology for over 25 years.

Regardless, even if the trial court is upheld on the issue of whether 2,000 mg/kg of lube oil constitutes at least a potential threat, Douglass's investigative efforts alone constituted a remedial action because the second part of the definition of remedial action provides;

> including any investigative and monitoring activities with respect to ***any*** release or threatened release of a ***hazardous substance*** (emphasis added).

RCW 70.105D.020(33).

The trial court found that Douglass investigated and monitored the release of a hazardous substance, lube oil, diesel and gasoline. (FF ## 8, 11; CP 730). Douglass incurred $950.00 in costs in the investigation. (RT 205: 5- 206; 1).

a. Shamrock was a liable person because it released hazardous substances onto Douglass' Property

The first step in determining whether Douglass is entitled to recovery of his cleanup costs from Shamrock is to determine whether Shamrock was a person liable under RCW 70.105D.040. The trial court found that Shamrock was a liable party. (CP 732, 733). To the extent relevant to this appeal liability for cleanup costs is addressed at RCW

70.105D.040 (1) (a) and (b) and identifies as persons liable, an "operator" of a "facility" at the time of a "release" of a "hazardous substance". In determining whether a person is liable it is necessary to understand the definition assigned by the legislature to the words "facility", "operator", "release", and "remedial action".

RCW 70.105D.020(8)(b) defines a "facility" as any site or area where a hazardous substance comes to be located. RCW 70.105D.020(22)(a) defines an "operator" as any person who exercises any control over a "facility". RCW 70.105D.020(32) defines a "release" as any entry of a hazardous substance into the environment. It is also important to understand that RCW 70.105D.020(13) specifically defines petroleum and petroleum products as "hazardous substances".

The trial court found that Shamrock exerted total physical control over Douglass's Property between June 1 and August 28, 2013. (FF #5, CP 729). Accordingly, Shamrock was an *operator*. During Shamrock's trespass, *releases* of *hazardous substances* came to be located on Douglass's Property. (FF ## 7,8, CP 729). The Property was therefore, a *facility*. Douglass hired Tetra Tech to assess The Property for hazardous substances. (FF # 11, CP 730). Douglass remediated the contamination by removing and disposing of 68 tons of soil. (FF # 14, CP 730). Douglass paid Tetra Tech $950.00 for the investigation. (RT 205: 5- 206;

1). Douglass incurred costs of $12,236.99 for excavating and hauling off the contaminated soil. (RT 215). All that remained for Douglass to prevail was to establish was that his efforts constituted a "*remedial action*". The trial court erred in concluding that Douglass's efforts fell short of a remedial action. (CP 734).

3. Comparing the trial court's findings to the definition of remedial action" confirms that Douglass's efforts constituted a "remedial action" and that he should therefore have been the prevailing party

"Remedial action" is defined at RCW 70.105D.020(33) as:

> **any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.**

The definition of remedial action is in the disjunctive and therefore required the court to consider the following three questions in order to determine whether or not Douglass's efforts constituted a remedial action. First, were Douglass's efforts consistent with the purposes of the MTCA?

Second, Did the hazardous substances which Shamrock released constitute at least a potential threat to human health or the environment?

Third, did Douglass pay to investigate and monitor a release of ***a hazardous substance*** in order to determine the risk or potential risk to human health?[15]

Douglass was required to satisfy the First element and and either the Second or Third element in order that his efforts to be considered a remedial action. He actually satisfied each of these three elements but unquestionably satisfied the First and Third elements.

[First Element of Remedial Action]

The purpose of the MTCA

The purpose of the MTCA is to clean up contaminated land and preserve the environment. *Seattle City Light v. Washington State Department of Transportation*, 98 Wn.App. 165, 169, 989 P.2d 1164 (1999). Its purpose is also to hold parties (like Shamrock) accountable for "irresponsible use and disposal of hazardous substances." *PacifiCorp Environmental v. Washington State Department of Transportation,* 162 Wn.App. 627, 655-656, 259 P.3d 1115 (2011). In cleaning up the contaminated land, the "purposes" element of the definition of *remedial action* was satisfied.

///

[15] Note, this part of the definition only requires that Douglass investigated a release of a hazardous substance, not that the hazardous substance constituted a threat or potential threat to human health or to the environment

[Second Element of Remedial Action]

Douglass established that the hazardous substances released by Shamrock constituted at least a potential threat to the environment

The trial court concluded that Douglass was unable to establish this second element of a remedial action because the 8-oz sample taken from the 4.3 acre site showed a concentration of lube oil at, but not exceeding, 2,000 mg/kg and therefore the contamination did not constitute a potential threat to the environment. (CP 730). Douglass has assigned errors to this finding[16] and the clear testimony of Phil Leinart of the Department of Ecology makes clear that the trial court erred in concluding that contamination from lube oil in concentrations of 2,000 mg/kg is not at least a potential threat to the environment.

As the court properly noted at CP 731, there are three procedures for setting cleanup levels under Chapter 173-340 of the WAC: Method A, Method B and Method C. The court correctly noted that for Douglass's Property, Method A was the correct level and 2,000 mg/kg was the appropriate threshold guideline. Method A is found at Table 740-1 established at WAC 173-340-900. A "cleanup level" means the concentration of a hazardous substance that is determined to be

[16] see assignment of errors 1, 4-6

"protective" of human health and the environment under specified exposure conditions. (WAC 173-340-200), (WAC 173-340-700(2)[16].

One thing that the trial court may have overlooked is that WAC 173-340-740(2)(b)(i) requires that method A soil cleanup levels shall be *at least* as stringent as the concentrations in Table 740-1. This means that in cleaning a site like Douglass's which is contaminated with heavy oil, one is required to reduce the concentration to at least 2,000 mg/kg. That would seem to indicate that even when the concentration level of the hazardous substance equals the guideline threshold, a "potential" threat remains. The testimony of a Department of Ecology geologist as well as the environmental scientist retained as an expert by Douglass, actually drove home the point that the 2,000 mg/kg level is not some magic number at which the court may conclude, as a matter of law, that there is no further "potential" threat to the environment.

Phil Leinart's Testimony

Phil Leinart is a hydro geologist with 25 years of experience as an employee of the Washington State Department of Ecology. He works in the State's toxic cleanup program and conducts investigations under the MTCA. (RT 594; 20- 595; 7). His responsibilities include contamination by lube oil and diesel. (RT 595; 13-17). Mr. Leinart was accepted by the

[16] WAC 173-340-700 (2) is attached as Appendix Exhibit 5

trial court as a non-retained expert in the remediation of petroleum based contamination.

According to Mr. Leinart, the "2,000 mg/kg threshold" is only a guideline. (RT 598; 16- 599; 3). It actually falls to the discretion of the DOE whether to require cleanup of a site which tests at the threshold level of 2,000 mg/kg. (RT 619; 9- 22). Further, any one of the twelve DOE employees who enjoy the same position as Leinart could very well come to a different conclusion as to whether a site testing at 2,000 mg/kg is required to be cleaned up. (RT 619; 23- 620; 1).

Mr. Leinart's testimony left no doubt that the DOE does not blindly use the threshold guideline in making these decisions. In fact Leinart's actual words were that it is not "cut and dried" and he must consult with his supervisor and his colleagues in making those decisions. (RT 597; 22-598; 20). Accordingly, it was error for the trial court to conclude that contamination at 2,000 mg/kg could not constitute at least a potential threat to the environment.

Environmental scientist Jon Welge's testimony

Jon Welge is a senior environmental scientist with approximately 20 years of experience employed by Tetra Tech. (RT 242; 10- 243; 24). Tetra Tech is a multi-national environmental consulting firm employing about 14,000 people worldwide in about 350 offices. (RT 243; 16-18).

Mr. Welge was qualified by the trial court as a retained expert regarding environmental assessment for the presence of petroleum and hydrocarbons in soil. (RT 244; 22- 245; 3).

Mr. Welge testified that the MTCA cleanup level threshold for lube oil is 2,000 mg/kg. Whether or not one is required to clean up contaminated soil when concentrations are exactly 2,000 mg/kg depends on the regulatory agency, [DOE]. (RT 319; 5-9). He also testified that lube oil in soil testing at 2,000 mg/kg is required to be reported to the DOE within 90 days. (RT 316; 20-23).

Mr. Welge testified that at 2,000 mg/kg there might be one arm of the DOE or one of its inspectors that might consider that to be a level that needs to be cleaned up whereas another inspector might consider only concentrations exceeding 2,000 mg/kg to require cleanup. He knew this because he has had those kinds of arguments about thresholds with DOE representatives advising that cleanup needs to take place at, not over, 2,000 mg/kg or that additional testing has to be done to establish that the level is less than the 2,000 mg/kg threshold. (RT 342;7- 343; 5).

This is perhaps explained by the fact that the test results can fluctuate depending upon the moisture content of the soil or other interferences that can cause the practical quantitation level to change. (RT 322; 15-25). Further, and independent of Mr. Leinart's clear and

compelling testimony, we know that 2,000 mg/kg is not some magic bright line which absolutely separates potentially threatening substances from those that don't even have a potential to threaten the environment. This is illustrated, not only by the fact that WAC 173-340-740(2)(b)(i) requires that method A soil cleanup levels shall be *at least* as stringent as the concentrations in Table 740-1---2,000 mg/kg---but by the fact that until 2001, the threshold for lube oil, which is now 2,000 mg/kg, was only 200 mg/kg. (RT 369;13- 370;1). Mr. Welge's testimony regarding 2,000 mg/kg being only a guideline was forcefully confirmed by Leinart. (RT 598; 16-599; 3).

Accordingly, for the trial court to simply look at a chart and then determine as a matter of law that the lube oil on Douglass's Property, registering exactly at the guideline threshold, did not constitute at least a potential threat to the environment was clear error. Certainly, having established contamination at 2,000 mg/kg, Douglass did not fail to establish a potential threat to the environment.

In addition to simply applying the threshold guideline, the trial court seemingly accorded unusual weight to the conclusionary testimony of Shamrock's paid expert, Jeff Lambert. Completely ignoring WAC 173-

340-740(2)(b)(i)[18], Lambert boldly concluded, without basis, that concentrations of lube oil in soil of 2,000 mg/kg do not pose a threat or potential threat to human health or the environment. (RT 649; 2-5). Leinart's testimony proved Lambert's conclusion to be false.

Table 740-1, attached as Exh 3 to the Appendix, provides a guideline threshold number of 2,000 mg/kg. The trial court concluded that just because the concentration falls at the exact guideline threshold, rather than 1 part per million over (or presumably even a fraction of 1 part per million over) that there is no potential threat to the environment. There, the trial court attempts to split the hair too finely. Leinart's testimony that the "2,000 mg/kg threshold" is only a guideline and that the DOE does not simply by rote, use the threshold guideline in making these decisions and that such decisions are not that "cut and dried" is actually supported by WAC 173-340-740(2)(b)(i) which makes clear that the method A cleanup level must be "at least" 2,000 mg/kg.

Determination as to whether to require cleanup of a site which tests at the threshold level of 2,000 mg/kg falls to the discretion of the Department of Ecology. (RT 619; 9- 22).

[18] WAC 173-340-740(2)(b)(i) provides that Method A soil cleanup levels shall be at least as stringent as the concentrations in Table 740-1,[i.e. 2,000 mg/kg].

In considering whether there was substantial evidence, sufficient for the trial court to conclude that 2,000 mg/kg constitutes a magic number at and below which there is not even a potential of threat, the conclusionary testimony of Shamrock's paid expert pales in comparison to the unbiased testimony of the geologist who is a 25 year employee of the DOE and who actually decides which releases constitute such threats and then oversees the remediation. Further, Douglass's argument under Issue Number 2 below explains why the trial court mistakenly failed to give sufficient credit to the testimony of Mr. Leinart and significantly and materially misunderstood his testimony.

The trial court erred in refusing to remove finding number 16[19] and include Douglass's proposed new conclusion number 3[20] indicating that the cleanup effort <u>constituted a remedial action</u>

As proposed additional finding number 25, Douglass asked that the trial court add a finding to state:

> **Neither Phil Leinart nor the DOE determined that the MTCA did not require cleanup of oil contamination of 2,000 mg/kg.**

(CP 629).

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[19] Based upon the pre-cleanup testing levels, the lube oil, diesel, or gasoline did not create a threat or potential threat to human health or environment. (CP 730).

[20] Plaintiff's cleanup effort was a "remedial action" (CP 636).

[Third Element of Remedial Action]

Douglass's payment for the cost of investigation and monitoring a release of a hazardous substance in order to determine the risk or potential risk to human health, by itself, constituted a remedial action.

Under this part of the definition of a remedial action, since Douglass paid to investigate and monitor a release of a *hazardous substance* in order to determine the risk or potential risk to human health, he satisfied the definition of a remedial action whether or not the petroleum releases constituted a potential threat to the environment. It is important to note that this part of the definition of remedial action only requires that "a release of a hazardous substance" was investigated. It does not depend on a finding that the hazardous substance constituted a potential threat.

The trial court found that Douglass conducted an investigation. (FF # 11, CP 730). The investigation resulted in quantification of the concentrations so that a threat or potential threat could be determined. (Pl Ex 11 & 13). Remediation was followed by a monitoring test and analysis. (Pl Ex 16). Accordingly, Douglass was, at the very least, entitled to the $950.00 he incurred in testing and monitoring even if this Court agrees with the trial court that he was not entitled to the $12,226.99 incurred in the removal of the 68 tons of contaminated soil. Such a finding is extremely important because an award for the cost of

investigation would make Douglass, rather than Shamrock, the prevailing party. It would require that the $97,236.13 judgment against Douglass for attorney fees be reversed and require the trial court to find that Douglass was the prevailing party and entitled to attorney fees and costs.

After all, in determining whether Douglass's remediation was the substantial equivalent of a DOE supervised effort, the court is instructed to consider all equitable factors. (RCW 70.105D.080; *PacifiCorp* at 674). It would be most inequitable and grossly unjust should Shamrock, who during an 89 day trespass, released hazardous substances onto Douglass's Property be penalized only $17,300 for the trespass while being awarded nearly $100,000 in attorney's fees and costs against Douglass.

Neither the MTCA nor the WAC specify minimum concentrations below which there is no *potential* threat. Table 740-1 does not indicate that lube oil concentrations of 2,000 mg/kg do not constitute at least a potential threat. The Washington State Supreme Court instructs that MTCA is to be liberally construed to effectuate its policies and purposes. *Louisiana-Pacific Corporation v. Asarco Incorporated*, 131 Wn.2d 587, 602, 934 P.2d 685 (1997). To suggest an arbitrary bright line division between 2,000 mg/kg and, say 2001 mg/kg, fails to heed either the spirit or purpose of the MTCA or the legal dictates expressed by the Supreme Court in *Louisiana-Pacific*.

LEGAL ISSUE NUMBER 2

Was the trial court's finding that the contamination on Douglass's Property did not constitute a potential threat to human health or the environment supported by substantial evidence?

1. Standard of Review

Legal issue number 2 involves a finding not supported by the evidence. It also involves a misinterpretation of the law. Accordingly, the standard of review is mixed. In analyzing the trial court's finding, this reviewing Court will apply the substantial evidence test. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). A finding will not be overturned if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). In reviewing the law, the de novo test should be applied. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 471, 767 P.2d 812 (1989).

2. The trial court's finding that lube oil contamination in the soil at a concentration of 2,000 mg/kg did not pose any potential to be a threat to the environment was based on the trial court's misunderstanding of the expert testimony of Phil Leinart of the Department of Ecology

The trial court based its finding that Douglass's Property did not constitute a threat or potential threat to human health or the environment

in large part on a misunderstanding of Phil Leinart's testimony. That the trial court incorrectly remembered Leinart's testimony is evidenced by the following quote from the Statement of Decision;

> **During his testimony, Plaintiffs' own expert witness, Phil Leinart, a hydro geologist with the Department of Ecology, opined that the subject property <u>was not a site that implicated MTCA cleanup as the conditions did not pose a threat to human health or the environment</u>.**

(CP 733).

Phil Leinart clearly did not testify that in its <u>pre-cleaned</u> up state, The Property did not constitute a threat. On March 17, 2015, Douglass filed objections to the trial court's findings and conclusions and proposed additional findings and conclusions. There, Douglass specifically objected to the misstatement of the evidence noted above. (CP 634, line 20-28)[20].

The questions Shamrock's attorney asked Leinart inquired into the status of Douglass's Property <u>after</u> it had been cleaned up, not <u>before</u> it had been cleaned up. The trial court treated Leinart's testimony as if he were opining as to the condition of The Property <u>before</u> it was cleaned up. On this subject, Shamrock's attorney asked the following questions and received the following responses;

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[20] Douglass pointed the trial court to pages 6-8 of the objections (CP 626-628) which showed exactly how in its closing brief, Shamrock had taken Leinart's testimony and changed it from present tense to past tense to make it look like Leinart was testifying that The Property---before it had been cleaned up----did not constitute a threat. Douglass even provided that part of the transcript that detailed Leinart's entire testimony.

Question: ... is it your judgment that the conditions and Circumstances at that site *do not* constitute a Model Toxic Control Act release of a hazardous substance?

Answer: That was my interpretation of the data and information that I got from the report, my conversation with Joe Delay and that I generated...

(RT 630; 9- 19)[21]

It must also be noted that the only report Leinart testified to having ever read was the April 22, 2014 post-cleanup report[22]. (RT 606; 15- 606; 4). Shamrock's attorney then asked the following question which even more explicitly referred to The Property in its cleaned up state;

Question: I'll take it a step further. Is it, also, your judgment And your opinion that the conditions and circumstances of the site *do not* constitute a Model Toxic Control Act release of a hazardous substance *that is* a threat to human health and the environment?

Answer: That's correct

(RT 630; 20-25)[23]

In this second instance, Shamrock's attorney not only asked about the present condition of the site, ("the conditions and circumstances "do not" constitute...), but went on to further establish that the question was

[21] This exchange is attached as Appendix Exhibit 8

[22] Again, Leinart's entire testimony is at RT 592-631

[23] Attached as Appendix Exhibit 8

intended in the present tense by asking, "that is" a threat. If counsel had meant to ask about the site as it existed prior to the cleanup he would have stated the leading question as "the conditions and circumstances "did not" constitute... (instead of "do not" constitute) and "that was" (instead of "that is").

The difference is monumental. In asking the questions in the form phrased, Leinart was obligated to provide information pertaining to the site after it had been cleaned up. At that time, the concentration of lube oil in the soil had been reduced from 2,000 mg/kg to 220 Mg/kg. (Pl Ex 16-4). It obviously was no longer a potential threat.

The Trial Court's decision to deny Plaintiffs any recovery because of a finding that "Phil Leinart opined that the subject property "was not" a site that implicated MTCA cleanup as the conditions "did not" pose a threat to human health or the environment" constituted clear error since Leinart's testimony obviously does not support such finding. There is no evidence from Leinart or the DOE which supports the trial court's finding of lack of potential threat. A finding unsupported by the evidence constitutes error. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 573, 343 P.2d 183 (1959).

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3. Douglass timely filed objections to the trial court's findings and conclusions and made proposals for different and additional findings and conclusions.

On March 17, 2015, Douglass filed objections to the trial court's findings and conclusions and proposed additional findings and conclusions. Douglass objected to the trial court's finding number 16 which stated;

> **Based upon the pre-cleanup testing levels, the lube oil, diesel, or gasoline did not create a threat or potential threat to human health or the environment.**

(CP 625).

At CP 626, 627, Douglass explained how the trial court misinterpreted Phil Leinart's testimony. As proposed additional finding number 25, Douglass asked that the trial court add a finding to state:

> **Neither Phil Leinart nor the DOE determined That the MTCA did not require cleanup of oil contamination of 2,000 mg/kg.**

(CP 629).

4. The trial court also misinterpreted the law believing that it was forced by Table 740-1 to accept 2,000 mg/kg as a rule "set in stone" regarding "potential threat to the environment"

DOE's Leinart confirmed that 2,000 mg/kg is only a guideline. (RT 598; 16- 599; 3). The decisions on what level of contamination requires cleanup---and is therefore considered at least a potential threat to the environment--- are not that "cut and dried". (RT 597; 22- 598;20). WAC

173-340-740(2)(b)(i) makes clear that the method A cleanup level must be "at least" 2,000 mg/kg, granting leeway for variations and interpretation.

LEGAL ISSUE NUMBER 3

Did Tetra Tech's investigation and subsequent monitoring of Douglass's Property constitute a "remedial action" whether or not the level of contamination constituted a potential threat to the environment?

1. Standard of Review

The meaning of a statute is a question of law that is reviewed de novo. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1278 (2003). *Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wash.2d 568, 593, 90 P.3d 659 (2004).

2. RCW 70.105D.020(33) provides that any investigative and monitoring activities with respect to any release of a hazardous substance conducted in order to determine the potential risk to human health constitutes a remedial action

Even if this reviewing court determines that concentrations of lube oil in the soil of 2,000 mg/kg did not constitute a potential threat to the environment, under the definition provided by RCW 70.105D.020(33) Douglass's hiring of Tetra Tech to investigate and monitor the site constituted a "remedial action" because there is no requirement that the result of the investigation is the discovery of a hazardous substance which constitutes a potential threat. It is the investigation of "*any release of a hazardous substance*" that qualifies as the remedial action.

The trial court found that Douglass conducted such an investigation. (FF #11, 12; CP 730). That investigation provided analysis from which a threat, if any, could be determined. After the site was remediated, Tetra Tech followed up with a monitoring test and analysis. (Pl Ex 16). Accordingly, Douglass was at the very least, entitled to the $950.00 in costs expended in testing and monitoring even if it is determined that he was not entitled to recovery of the cost of the removal of the 68 tons of contaminated soil.

Although a $950 recovery might sound trivial, it would erase Shamrock's judgment of $97,000 against Douglass and in its place require judgment for attorney fees and costs in favor of the innocent party, Douglass. [Obviously, this section does not concede that the cleanup costs should not also be recovered. It is simply meant to point out that on a worst case basis, Douglass is clearly at least entitled to the lesser cost of testing]. Douglass was denied the "private right of action" afforded him by RCW 70.105D.080 on an erroneous interpretation of "remedial action".

3. Douglass timely filed objections to the trial court's findings and conclusions and made proposals for different and additional findings and conclusions.

On March 17, 2015, Douglass filed a set of Proposed Additional Findings and Conclusions. Proposed additional finding number 22 and

proposed additional conclusion number 16, neither of which were included by the trial court, stated;

> **Plaintiffs' cleanup effort constituted an action or expenditure to identify, eliminate, or minimize a potential threat to human health or the environment posed by hazardous substances.**

(CP 628).

LEGAL ISSUE NUMBER 4

Did the trial court err in awarding attorney fees and costs to Defendant and denying attorney fees and costs to Plaintiffs?

Shamrock was the wrongdoer and should not have been awarded attorney's fees. First, Shamrock was a trespasser. Secondly, Shamrock was the proximate cause of the release of the hazardous substance upon Douglass' property. Thirdly, Douglass, the innocent landowner, incurred costs and expenses in investigating and cleaning up his property. The MTCA private action statute RCW 70.105D.080 provides for recovery of remedial action costs based in equity. The trial court relied only on the first part of the statute which requires establishment of at least a potential threat to the environment. It seemingly failing to recognize the latter part the definition which allows recovery for investigation and monitoring activities with respect to "any release of a hazardous substance".

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Remedial action costs are defined in the disjunctive because not only do

> **actions or expenditures to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment**

qualify as "remedial" but so do

> **any investigative and monitoring activities with respect to <u>any release</u> or threatened release of <u>a hazardous substance</u> and any health assessments or health effects studies conducted <u>in order to determine</u> the risk or potential risk to human health**

(RCW 70.105D.020(33) is in full reprinted below)[24]

Since there is no requirement that the release identified in the second portion of the definition pose a potential threat to human health or the environment and instead be only <u>*any release of a hazardous substance*</u>, Douglass should have been declared the prevailing party and entitled to fees and costs. The definition is sufficiently broad to have required the trial court to conclude that Douglass' efforts did, as a matter of law, meet the definition of "remedial action". The trial court concluded that

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[24] "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

establishing a remedial action was the only element that Douglass failed to prove. However, using the second portion of the definition, Douglass unquestionably did establish that his efforts satisfied the requirements of a remedial action. Accordingly, judgment should have been for Douglass who would then have been awarded his attorney's fees and costs.

The Trial Court erred in awarding attorney fees to Shamrock as the prevailing party at the conclusion of the Trial. In *PacifiCorp* at Page 669 the Court considered "recalcitrance" of the party contaminating the property. (Id at 669). Shamrock was a trespasser on Douglass' property from June 1, 2013, to August 28, 2013. (CP 729; FF 5). Thus, conduct by Shamrock was certainly recalcitrant and it should not have been rewarded with attorney's fees assessed against the totally innocent and damaged party. Doing so was inequitable.

Douglass contends that he was entitled to be awarded his attorney's fees, expert fees, costs of cleaning the property, plus interest on the amount expended and the judgment against him should be reversed.

LEGAL ISSUE NUMBER 5

Are Plaintiffs entitled to attorney fees, both on appeal and in the trial, if they prevail on this appeal ?

The prevailing party is entitled to attorney fees and costs on appeal if requested in the opening brief and if applicable law grants to a party the

right to recover. (RAP 18.1(a), (b)). Douglass requests attorney's fees and costs on appeal under RAP 18.1 (a) & (b) and the MTCA, (RCW 70.105D.080)[26].

Louisiana-PaciCorp v. Asarco, 131 Wn.2d 587, 934 P.2d 685 (1997) interpreted RCW 70.105D 080 as not limiting the attorney's fees and costs to a prevailing party. (Id at 694). The costs, as provided in the statute, include all reasonable expenses of litigation. *Dash Point Village Assoc. v. Exxon Corp.*, 86 Wn.App. 596, 609, 937 P.2d 1148 (1997). The aforesaid case also applies to a successful appeal wherein the prevailing party is entitled to attorney's fees and costs on appeal. (Id at 613).

VI.
CONCLUSION

This reviewing Court is asked to reverse the trial court's judgment on the basis that the findings, when appropriately applied to the definition of a remedial action, required judgment in favor of Douglass. This Court is asked also to instruct the trial court to render judgment for Douglass for the cost of the investigation, $950.00, and for the cost of the cleanup, $12,226.99 and to award Douglass his fees and costs incurred during the litigation. Finally, this Court is asked to award Douglass his attorney fees and costs on appeal in accordance with R.A.P 18 (a) & (b).

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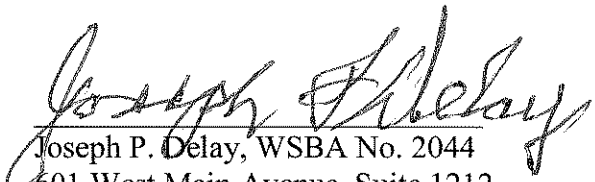
[26] "the prevailing party in such action shall recover its reasonable attorneys' fees and costs".

Shamrock was a trespasser. It released gasoline, diesel and lube oil onto Douglass's Property. Shamrock was found to be liable under the Model Toxics Control Act. The trial court failed to award Douglass his cost of investigation and cleanup due to an erroneous application of the 2,000 mg/kg "guideline". Phil Leinart of the DOE testified that 2,000 mg/kg is only a guideline and the determination of whether the release of a hazardous substance constitutes a potential threat to the environment is not to be applied as a cut and dried outside limit in determining potential threat.

The trial court erred in applying so strictly, the 2,000 mg/kg "guideline". But it also erred in failing to find that Douglass established that his efforts satisfied the definition of a remedial action simply by paying to investigate the release of a hazardous substance to determine whether or not it constituted a potential threat. An award of only the $950.00 Douglass spent in the investigation would have prevented Shamrock from prevailing and on that basis being awarded $97,000 in fees and costs. The trial court's errors resulted in a perversion of the law and the resulting judgment of $97,000 in favor of Shamrock, the trespasser and polluting party, constitutes an affront to justice and a failure by the trial court to equitably resolve this case in accordance with the stated purpose of the MTCA.

Respectfully submitted on the 29th day of December, 2015 by



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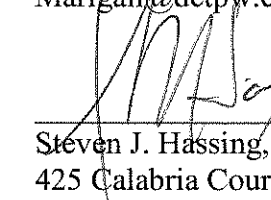

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APPENDIX

DOUGLASS'S OPENING BRIEF

EXHIBIT 1

RCW 70.105D.020

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agreed order" means an order issued by the department under this chapter with which the potentially liable person or prospective purchaser receiving the order agrees to comply. An agreed order may be used to require or approve any cleanup or other remedial actions but it is not a settlement under RCW **70.105D.040**(4) and shall not contain a covenant not to sue, or provide protection from claims for contribution, or provide eligibility for public funding of remedial actions under RCW **70.105D.070**(3) (k) and (q).

(2) "Area-wide groundwater contamination" means groundwater contamination on multiple adjacent properties with different ownerships consisting of hazardous substances from multiple sources that have resulted in commingled plumes of contaminated groundwater that are not practicable to address separately.

(3) "Brownfield property" means previously developed and currently abandoned or underutilized real property and adjacent surface waters and sediment where environmental, economic, or community reuse objectives are hindered by the release or threatened release of hazardous substances that the department has determined requires remedial action under this chapter or that the United States environmental protection agency has determined requires remedial action under the federal cleanup law.

(4) "City" means a city or town.

(5) "Department" means the department of ecology.

(6) "Director" means the director of ecology or the director's designee.

(7) "Environmental covenant" has the same meaning as defined in RCW **64.70.020**.

(8) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

(9) "Federal cleanup law" means the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

(10)(a) "Fiduciary" means a person acting for the benefit of another party as a bona fide trustee; executor; administrator; custodian; guardian of estates or guardian ad litem; receiver; conservator; committee of estates of incapacitated persons; trustee in bankruptcy; trustee, under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender. Except as provided in subsection (22)(b)(iii) of this section, the liability of a fiduciary under this chapter shall not exceed the assets held in the fiduciary capacity.

(b) "Fiduciary" does not mean:

(i) A person acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person;

(ii) A person who acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or any other person. It is prima facie evidence that the fiduciary

acquired ownership or control of the facility to avoid liability if the facility is the only substantial asset in the fiduciary estate at the time the facility became subject to the fiduciary estate;

(iii) A person who acts in a capacity other than that of a fiduciary or in a beneficiary capacity and in that capacity directly or indirectly benefits from a trust or fiduciary relationship;

(iv) A person who is a beneficiary and fiduciary with respect to the same fiduciary estate, and who while acting as a fiduciary receives benefits that exceed customary or reasonable compensation, and incidental benefits permitted under applicable law;

(v) A person who is a fiduciary and receives benefits that substantially exceed customary or reasonable compensation, and incidental benefits permitted under applicable law; or

(vi) A person who acts in the capacity of trustee of state or federal lands or resources.

(11) "Fiduciary capacity" means the capacity of a person holding title to a facility, or otherwise having control of an interest in the facility pursuant to the exercise of the responsibilities of the person as a fiduciary.

(12) "Foreclosure and its equivalents" means purchase at a foreclosure sale, acquisition, or assignment of title in lieu of foreclosure, termination of a lease, or other repossession, acquisition of a right to title or possession, an agreement in satisfaction of the obligation, or any other comparable formal or informal manner, whether pursuant to law or under warranties, covenants, conditions, representations, or promises from the borrower, by which the holder acquires title to or possession of a facility securing a loan or other obligation.

(13) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in RCW **70.105.010** (1) and (7), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter **70.105** RCW;

(b) Any hazardous substance as defined in RCW **70.105.010**(10) or any hazardous substance as defined by rule pursuant to chapter **70.105** RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

(14) "Holder" means a person who holds indicia of ownership primarily to protect a security interest. A holder includes the initial holder such as the loan originator, any subsequent holder such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market, a guarantor of an obligation, surety, or any other person who holds indicia of ownership primarily to protect a security interest, or a receiver, court-appointed trustee, or other person who acts on behalf or for the benefit of a holder. A holder can be a public or privately owned financial institution, receiver, conservator, loan guarantor, or other similar persons that loan money or guarantee repayment of a loan. Holders typically are banks or savings and loan institutions but may also include others such as insurance companies, pension funds, or private individuals that engage in loaning of money or credit.

(15) "Independent remedial actions" means remedial actions conducted without department oversight or approval, and not under an order, agreed order, or consent decree.

(16) "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in a facility securing a loan or other obligation, including any legal or equitable title to a facility acquired incident to foreclosure and its equivalents. Evidence

of such interests includes, mortgages, deeds of trust, sellers interest in a real estate contract, liens, surety bonds, and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased facility, or legal or equitable title obtained pursuant to foreclosure and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against the facility that are held primarily to protect a security interest.

(17) "Industrial properties" means properties that are or have been characterized by, or are to be committed to, traditional industrial uses such as processing or manufacturing of materials, marine terminal and transportation areas and facilities, fabrication, assembly, treatment, or distribution of manufactured products, or storage of bulk materials, that are either:

(a) Zoned for industrial use by a city or county conducting land use planning under chapter **36.70A** RCW; or

(b) For counties not planning under chapter **36.70A** RCW and the cities within them, zoned for industrial use and adjacent to properties currently used or designated for industrial purposes.

(18) "Institutional controls" means measures undertaken to limit or prohibit activities that may interfere with the integrity of a remedial action or result in exposure to or migration of hazardous substances at a site. "Institutional controls" include environmental covenants.

(19) "Local government" means any political subdivision of the state, including a town, city, county, special purpose district, or other municipal corporation, including brownfield renewal authority created under RCW **70.105D.160**.

(20) "Model remedy" or "model remedial action" means a set of technologies, procedures, and monitoring protocols identified by the department for use in routine types of clean-up projects at facilities that have common features and lower risk to human health and the environment.

(21) "Operating a facility primarily to protect a security interest" occurs when all of the following are met: (a) Operating the facility where the borrower has defaulted on the loan or otherwise breached the security agreement; (b) operating the facility to preserve the value of the facility as an ongoing business; (c) the operation is being done in anticipation of a sale, transfer, or assignment of the facility; and (d) the operation is being done primarily to protect a security interest. Operating a facility for longer than one year prior to foreclosure or its equivalents shall be presumed to be operating the facility for other than to protect a security interest.

(22) "Owner or operator" means:

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

(b) In the case of an abandoned facility, any person who had owned, or operated, or exercised control over the facility any time before its abandonment;

The term does not include:

(i) An agency of the state or unit of local government which acquired ownership or control through a drug forfeiture action under RCW **69.50.505**, or involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title. This exclusion does not apply to an agency of the state or unit of local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility;

(ii) A person who, without participating in the management of a facility, holds indicia of ownership primarily to protect the person's security interest in the facility. Holders after foreclosure and its equivalent and holders who engage in any of the activities identified in subsection (23)(e) through (g) of this section shall not lose this exemption provided the holder complies with all of the following:

(A) The holder properly maintains the environmental compliance measures already in place at

the facility;

(B) The holder complies with the reporting requirements in the rules adopted under this chapter;

(C) The holder complies with any order issued to the holder by the department to abate an imminent or substantial endangerment;

(D) The holder allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the holder are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The holder does not exacerbate an existing release. The exemption in this subsection (22)(b)(ii) does not apply to holders who cause or contribute to a new release or threatened release or who are otherwise liable under RCW **70.105D.040**(1) (b), (c), (d), and (e); provided, however, that a holder shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release;

(iii) A fiduciary in his, her, or its personal or individual capacity. This exemption does not preclude a claim against the assets of the estate or trust administered by the fiduciary or against a nonemployee agent or independent contractor retained by a fiduciary. This exemption also does not apply to the extent that a person is liable under this chapter independently of the person's ownership as a fiduciary or for actions taken in a fiduciary capacity which cause or contribute to a new release or exacerbate an existing release of hazardous substances. This exemption applies provided that, to the extent of the fiduciary's powers granted by law or by the applicable governing instrument granting fiduciary powers, the fiduciary complies with all of the following:

(A) The fiduciary properly maintains the environmental compliance measures already in place at the facility;

(B) The fiduciary complies with the reporting requirements in the rules adopted under this chapter;

(C) The fiduciary complies with any order issued to the fiduciary by the department to abate an imminent or substantial endangerment;

(D) The fiduciary allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the fiduciary are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The fiduciary does not exacerbate an existing release.

The exemption in this subsection (22)(b)(iii) does not apply to fiduciaries who cause or contribute to a new release or threatened release or who are otherwise liable under RCW **70.105D.040**(1) (b), (c), (d), and (e); provided however, that a fiduciary shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release. The exemption in this subsection (22)(b)(iii) also does not apply where the fiduciary's powers to comply with this subsection (22)(b)(iii) are limited by a governing instrument created with the objective purpose of avoiding liability under this chapter or of avoiding compliance with this chapter; or

(iv) Any person who has any ownership interest in, operates, or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property, if:

(A) The person can demonstrate that the hazardous substance has not been used, placed, managed, or otherwise handled on the property in a manner likely to cause or contribute to a release of the hazardous substance that has migrated onto the property;

(B) The person has not caused or contributed to the release of the hazardous substance;

(C) The person does not engage in activities that damage or interfere with the operation of remedial actions installed on the person's property or engage in activities that result in exposure of humans or the environment to the contaminated groundwater that has migrated onto the property;

(D) If requested, the person allows the department, potentially liable persons who are subject to an order, agreed order, or consent decree, and the authorized employees, agents, or contractors of each, access to the property to conduct remedial actions required by the department. The person may attempt to negotiate an access agreement before allowing access; and

(E) Legal withdrawal of groundwater does not disqualify a person from the exemption in this subsection (22)(b)(iv).

(23) "Participation in management" means exercising decision-making control over the borrower's operation of the facility, environmental compliance, or assuming or manifesting responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise.

The term does not include any of the following: (a) A holder with the mere capacity or ability to influence, or the unexercised right to control facility operations; (b) a holder who conducts or requires a borrower to conduct an environmental audit or an environmental site assessment at the facility for which indicia of ownership is held; (c) a holder who requires a borrower to come into compliance with any applicable laws or regulations at the facility for which indicia of ownership is held; (d) a holder who requires a borrower to conduct remedial actions including setting minimum requirements, but does not otherwise control or manage the borrower's remedial actions or the scope of the borrower's remedial actions except to prepare a facility for sale, transfer, or assignment; (e) a holder who engages in workout or policing activities primarily to protect the holder's security interest in the facility; (f) a holder who prepares a facility for sale, transfer, or assignment or requires a borrower to prepare a facility for sale, transfer, or assignment; (g) a holder who operates a facility primarily to protect a security interest, or requires a borrower to continue to operate, a facility primarily to protect a security interest; and (h) a prospective holder who, as a condition of becoming a holder, requires an owner or operator to conduct an environmental audit, conduct an environmental site assessment, come into compliance with any applicable laws or regulations, or conduct remedial actions prior to holding a security interest is not participating in the management of the facility.

(24) "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe.

(25) "Policing activities" means actions the holder takes to ensure that the borrower complies with the terms of the loan or security interest or actions the holder takes or requires the borrower to take to maintain the value of the security. Policing activities include: Requiring the borrower to conduct remedial actions at the facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, regulations, and permits during the term of the security interest; securing or exercising authority to monitor or inspect the facility including on-site inspections, or to monitor or

inspect the borrower's business or financial condition during the term of the security interest; or taking other actions necessary to adequately police the loan or security interest such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower.

(26) "Potentially liable person" means any person whom the department finds, based on credible evidence, to be liable under RCW **70.105D.040**. The department shall give notice to any such person and allow an opportunity for comment before making the finding, unless an emergency requires otherwise.

(27) "Prepare a facility for sale, transfer, or assignment" means to secure access to the facility; perform routine maintenance on the facility; remove inventory, equipment, or structures; properly maintain environmental compliance measures already in place at the facility; conduct remedial actions to cleanup releases at the facility; or to perform other similar activities intended to preserve the value of the facility where the borrower has defaulted on the loan or otherwise breached the security agreement or after foreclosure and its equivalents and in anticipation of a pending sale, transfer, or assignment, primarily to protect the holder's security interest in the facility. A holder can prepare a facility for sale, transfer, or assignment for up to one year prior to foreclosure and its equivalents and still stay within the security interest exemption in subsection (22)(b)(ii) of this section.

(28) "Primarily to protect a security interest" means the indicia of ownership is held primarily for the purpose of securing payment or performance of an obligation. The term does not include indicia of ownership held primarily for investment purposes nor indicia of ownership held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons, for maintaining indicia of ownership, but the primary reason must be for protection of a security interest. Holding indicia of ownership after foreclosure or its equivalents for longer than five years shall be considered to be holding the indicia of ownership for purposes other than primarily to protect a security interest. For facilities that have been acquired through foreclosure or its equivalents prior to July 23, 1995, this five-year period shall begin as of July 23, 1995.

(29) "Prospective purchaser" means a person who is not currently liable for remedial action at a facility and who proposes to purchase, redevelop, or reuse the facility.

(30) "Public notice" means, at a minimum, adequate notice mailed to all persons who have made timely request of the department and to persons residing in the potentially affected vicinity of the proposed action; mailed to appropriate news media; published in the newspaper of largest circulation in the city or county of the proposed action; and opportunity for interested persons to comment.

(31) "Redevelopment opportunity zone" means a geographic area designated under RCW **70.105D.150**.

(32) "Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

(33) "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

(34) "Security interest" means an interest in a facility created or established for the purpose of securing a loan or other obligation. Security interests include deeds of trusts, sellers interest in a real estate contract, liens, legal, or equitable title to a facility acquired incident to foreclosure and its

equivalents, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, easements, and consignments, if the transaction creates or establishes an interest in a facility for the purpose of securing a loan or other obligation.

(35) "Workout activities" means those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Workout activities include: Restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owed to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owed to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

[2013 2nd sp.s. c 1 § 2; 2007 c 104 § 18; 2005 c 191 § 1; 1998 c 6 § 1; 1997 c 406 § 2; 1995 c 70 § 1; 1994 c 254 § 2; 1989 c 2 § 2 (Initiative Measure No. 97, approved November 8, 1988).]

NOTES:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW **1.08.015**(2)(k).

Findings—Intent—2013 2nd sp.s. c 1: "The legislature finds that there are a large number of toxic waste sites that have been identified in the department of ecology's priority list as ready for immediate cleanup. The legislature further finds that addressing the cleanup of these toxic waste sites will provide needed jobs to citizens of Washington state. It is the intent of the legislature to prioritize the spending of revenues under chapter **70.105D** RCW, the model toxics control act, on cleaning up the most toxic sites, while also providing jobs in communities around the state." [2013 2nd sp.s. c 1 § 1.]

Effective date—2013 2nd sp.s. c 1: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2013." [2013 2nd sp.s. c 1 § 20.]

Application—Construction—Severability—2007 c 104: See RCW **64.70.015** and **64.70.900**.

EXHIBIT 2

RCW 70.105D.040

Standard of liability—Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(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;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter **70.105** RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (B) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. This defense only applies where the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (3)(b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (3)(b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if

uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (3)(b) is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (3)(b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with clean-up standards under RCW **70.105D.030**(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(c) A settlement agreement may contain a covenant not to sue only of a scope commensurate with the settlement agreement in favor of any person with whom the attorney general has settled under this section. Any covenant not to sue shall contain a reopener clause which requires the court to amend the covenant not to sue if factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment.

(d) A party who has resolved its liability to the state under this section shall not be liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other liable parties but it reduces the total potential liability of the others to the state by the amount of the settlement.

(e) If the state has entered into a consent decree with an owner or operator under this section, the state shall not enforce this chapter against any owner or operator who is a successor in interest to the settling party unless under the terms of the consent decree the state could enforce against the settling party, if:

(i) The successor owner or operator is liable with respect to the facility solely due to that person's ownership interest or operator status acquired as a successor in interest to the owner or operator with whom the state has entered into a consent decree; and

(ii) The stay of enforcement under this subsection does not apply if the consent decree was based on circumstances unique to the settling party that do not exist with regard to the successor in

interest, such as financial hardship. For consent decrees entered into before July 27, 1997, at the request of a settling party or a potential successor owner or operator, the attorney general shall issue a written opinion on whether a consent decree contains such unique circumstances. For all other consent decrees, such unique circumstances shall be specified in the consent decree.

(f) Any person who is not subject to enforcement by the state under (e) of this subsection is not liable for claims for contribution regarding matters addressed in the settlement.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a prospective purchaser, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action at the facility consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the facility, or increase health risks to persons at or in the vicinity of the facility.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of brownfield property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit in addition to cleanup.

(c) A settlement entered under this subsection is governed by subsection (4) of this section.

(6) As an alternative to a settlement under subsection (5) of this section, the department may enter into an agreed order with a prospective purchaser of a property within a designated redevelopment opportunity zone. The agreed order is subject to the limitations in RCW **70.105D.020**(1), but stays enforcement by the department under this chapter regarding remedial actions required by the agreed order as long as the prospective purchaser complies with the requirements of the agreed order.

(7) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

[2013 2nd sp.s. c 1 § 7; 1997 c 406 § 4; 1994 c 254 § 4; 1989 c 2 § 4 (Initiative Measure No. 97, approved November 8, 1988).]

NOTES:

Findings—Intent—Effective date—2013 2nd sp.s. c 1: See notes following RCW **70.105D.020**.

EXHIBIT 3

RCW 70.105D.080

Private right of action—Remedial action costs.

Except as provided in RCW **70.105D.040**(4) (d) and (f), a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW **70.105D.040** for the recovery of remedial action costs. In the action, natural resource damages paid to the state under this chapter may also be recovered. Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. An action under this section may be brought after remedial action costs are incurred but must be brought within three years from the date remedial action confirms cleanup standards are met or within one year of May 12, 1993, whichever is later. The prevailing party in such an action shall recover its reasonable attorneys' fees and costs. This section applies to all causes of action regardless of when the cause of action may have arisen. To the extent a cause of action has arisen prior to May 12, 1993, this section applies retroactively, but in all other respects it applies prospectively.

[1997 c 406 § 6; 1993 c 326 § 1.]

NOTES:

Effective date—1993 c 326: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 12, 1993]." [1993 c 326 § 2.]

Severability—1993 c 326: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 326 § 3.]

EXHIBIT 4

WAC 173-340-200

Definitions.

For the purpose of this chapter, the following definitions apply:

"Acute toxicity" means the ability of a hazardous substance to cause injury or death to an organism as a result of a short-term exposure to a hazardous substance.

"Agreed order" means an order issued by the department under WAC **173-340-530** with which the potentially liable person receiving the order agrees to comply. An agreed order may be used to require or approve any cleanup or other remedial actions but it is not a settlement under RCW **70.105D.040**(4) and shall not contain a covenant not to sue, or provide protection from claims for contribution, or provide eligibility for public funding of remedial actions under RCW **70.105D.070** (2)(d)(xi).

"Aliphatic hydrocarbons" or "aliphatics" means organic compounds that are characterized by a straight, branched, or cyclic (nonbenzene ring) arrangement of carbon atoms and that do not contain halogens (such as chlorine). See also "aromatic hydrocarbons."

"All practicable methods of treatment" means all technologies and/or methods currently available and demonstrated to work under similar site circumstances or through pilot studies, and applicable to the site at reasonable cost. These include "all known available and reasonable methods of treatment" (AKART) for discharges or potential discharges to waters of the state, and "best available control technologies" for releases of hazardous substances into the air resulting from cleanup actions.

"Applicable state and federal laws" means all legally applicable requirements and those requirements that the department determines, based on the criteria in WAC **173-340-710**(3), are relevant and appropriate requirements.

"Area background" means the concentrations of hazardous substances that are consistently present in the environment in the vicinity of a site which are the result of human activities unrelated to releases from that site.

"Aromatic hydrocarbons" or "aromatics" means organic compounds that are characterized by one or more benzene rings, with or without aliphatic hydrocarbon substitutions of hydrogen atoms on the rings, and that do not contain halogens (such as chlorine). See also "aliphatic hydrocarbons."

"Averaging time" means the time over which the exposure is averaged. For noncarcinogens, the averaging time typically equals the exposure duration. For carcinogens, the averaging time equals the life expectancy of a person.

"Bioconcentration factor" means the ratio of the concentration of a hazardous substance in the tissue of an aquatic organism divided by the hazardous substance concentration in the ambient water in which the organism resides.

"Carcinogen" means any substance or agent that produces or tends to produce cancer in humans. For implementation of this chapter, the term carcinogen applies to substances on the United States Environmental Protection Agency lists of A (known human) and B (probable human) carcinogens, and any substance that causes a significant increased incidence of benign or malignant tumors in a single, well conducted animal bioassay, consistent with the weight of evidence approach specified in the United States Environmental Protection Agency's Guidelines for Carcinogen Risk Assessment as set forth in 51 FR 33992 et seq.

"Carcinogenic potency factor" or "CPF" means the upper 95th percentile confidence limit of the slope of the dose-response curve and is expressed in units of (mg/kg-day)-1. When derived from human epidemiological data, the carcinogenic potency factor may be a maximum likelihood

estimate.

"Chronic reference dose" means an estimate (with an uncertainty spanning an order of magnitude or more) of a daily exposure level for the human population, including sensitive subpopulations, that is likely to be without an appreciable risk of adverse effects during a lifetime.

"Chronic toxicity" means the ability of a hazardous substance to cause injury or death to an organism resulting from repeated or constant exposure to the hazardous substance over an extended period of time.

"Cleanup" means the implementation of a cleanup action or interim action.

"Cleanup action" means any remedial action, except interim actions, taken at a site to eliminate, render less toxic, stabilize, contain, immobilize, isolate, treat, destroy, or remove a hazardous substance that complies with WAC **173-340-350** through **173-340-390**.

"Cleanup action alternative" means one or more treatment technology, containment action, removal action, engineered control, institutional control or other type of remedial action ("cleanup action components") that, individually or, in combination, achieves a cleanup action at a site.

"Cleanup action plan" means the document prepared by the department under WAC **173-340-380** that selects the cleanup action and specifies cleanup standards and other requirements for the cleanup action.

"Cleanup level" means 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.

"Cleanup standards" means the standards adopted under RCW **70.105D.030** (2)(d). Establishing cleanup standards requires specification of the following:

Hazardous substance concentrations that protect human health and the environment ("cleanup levels");

The location on the site where those cleanup levels must be attained ("points of compliance"); and

Additional regulatory requirements that apply to a cleanup action because of the type of action and/or the location of the site. These requirements are specified in applicable state and federal laws and are generally established in conjunction with the selection of a specific cleanup action.

"Cohen's method" means the maximum likelihood estimate of the mean and standard deviation accounting for data below the method detection limit or practical quantitation limit using the method described in the following publications:

- Cohen, A.C., 1959. "Simplified estimators for the normal distribution when samples are singly censored or truncated." *Technometrics*. Volume 1, pages 217-237.
- Cohen, A.C., 1961. "Tables for maximum likelihood estimates: Singly truncated and singly censored samples." *Technometrics*. Volume 3, pages 535-541.

"Compliance monitoring" means a remedial action that consists of monitoring as described in WAC **173-340-410**.

"Conceptual site model" means a conceptual understanding of a site that identifies potential or suspected sources of hazardous substances, types and concentrations of hazardous substances, potentially contaminated media, and actual and potential exposure pathways and receptors. This model is typically initially developed during the scoping of the remedial investigation and further refined as additional information is collected on the site. It is a tool used to assist in making decisions at a site.

"Conducting land use planning under chapter **36.70A** RCW" as used in the definition of "industrial properties," means having adopted a comprehensive plan and development regulations for the site under chapter **36.70A** RCW.

"Containment" means a container, vessel, barrier, or structure, whether natural or constructed,

that confines a hazardous substance within a defined boundary and prevents or minimizes its release into the environment.

"Contaminant" means any hazardous substance that does not occur naturally or occurs at greater than natural background levels.

"Curie" means the measure of radioactivity defined as that quantity of radioactive material which decays at the rate of 3.70×10^{10} transformations per second. This decay rate is nearly equivalent to that exhibited by 1 gram of radium in equilibrium with its disintegration products.

"Day" means calendar day; however, any document due on the weekend or a holiday may be submitted on the first working day after the weekend or holiday.

"Decree" means consent decree under WAC **173-340-520**. "Consent decree" is synonymous with decree.

"Degradation by-products" or "decomposition by-products" means the secondary product of biological or chemical processes that break down chemicals into other chemicals. The decomposition by-products may be more or less toxic than the parent compound.

"Department" means the department of ecology.

"Developmental reference dose" means an estimate (with an uncertainty of an order of magnitude or more) of an exposure level for the human population, including sensitive subgroups, that is likely to be without an appreciable risk of developmental effects.

"Direct contact" means exposure to hazardous substances through ingestion and/or dermal contact.

"Director" means the director of ecology or the director's designee.

"Drinking water fraction" means the fraction of drinking water that is obtained or has the potential to be obtained from the site.

"Engineered controls" means containment and/or treatment systems that are designed and constructed to prevent or limit the movement of, or the exposure to, hazardous substances. Examples of engineered controls include a layer of clean soil, asphalt or concrete paving or other materials placed over contaminated soils to limit contact with contamination; a groundwater flow barrier such as a bentonite slurry trench; groundwater gradient control systems such as French drains or pump and treat systems; and vapor control systems.

"Environment" means any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington.

"Equivalent carbon number" or "EC" means a value assigned to a fraction of a petroleum mixture, empirically derived from the boiling point of the fraction normalized to the boiling point of n-alkanes or the retention time of n-alkanes in a boiling point gas chromatography column.

"Exposure" means subjection of an organism to the action, influence, or effect of a hazardous substance (chemical agent) or physical agent.

"Exposure duration" means the period of exposure to a hazardous substance.

"Exposure frequency" means the portion of the exposure duration that an individual is exposed to a hazardous substance, expressed as a fraction. For example, if a person is exposed 260 days (five days per week for 52 weeks) over a year (365 days), the exposure frequency would be equal to: $(5 \times 50)/365 = 0.7$.

"Exposure parameters" means those parameters used to derive an estimate of the exposure to a hazardous substance.

"Exposure pathway" means the path a hazardous substance takes or could take from a source to an exposed organism. An exposure pathway describes the mechanism by which an individual or population is exposed or has the potential to be exposed to hazardous substances at or originating

from a site. Each exposure pathway includes an actual or potential source or release from a source, an exposure point, and an exposure route. If the exposure point differs from the source of the hazardous substance, the exposure pathway also includes a transport/exposure medium.

"Facility" means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft; or any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

"Federal cleanup law" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601 et seq.

"Fish diet fraction" means the percentage of the total fish and/or shellfish in an individual's diet that is obtained or has the potential to be obtained from the site.

"Food crop" means any domestic plant that is produced for the purpose of, or may be used in whole or in part for, consumption by people or livestock. This shall include nursery, root, or seedstock to be used for the production of food crops.

"Free product" means a nonaqueous phase liquid that is present in the soil, bedrock, groundwater or surface water as a district separate layer. Under the right conditions, if sufficient free product is present, free product is capable of migrating independent of the direction of flow of the groundwater or surface water.

"Gastrointestinal absorption fraction" means the fraction of a substance transported across the gastrointestinal lining and taken up systemically into the body.

"Groundwater" means water in a saturated zone or stratum beneath the surface of land or below a surface water.

"Hazard index" means the sum of two or more hazard quotients for multiple hazardous substances and/or multiple exposure pathways.

"Hazardous sites list" means the list of hazardous waste sites maintained under WAC **173-340-330**.

"Hazardous substance" means any dangerous or extremely hazardous waste as defined in RCW **70.105.010** (5) and (6), or any dangerous or extremely dangerous waste as designated by rule under chapter **70.105** RCW; any hazardous substance as defined in RCW **70.105.010**(14) or any hazardous substance as defined by rule under chapter **70.105** RCW; any substance that, on the effective date of this section, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C., Sec. 9601(14); petroleum or petroleum products; and any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

"Hazardous waste site" means any facility where there has been confirmation of a release or threatened release of a hazardous substance that requires remedial action.

"Hazard quotient" or "HQ" means the ratio of the dose of a single hazardous substance over a specified time period to a reference dose for that hazardous substance derived for a similar exposure period.

"Health effects assessment summary tables" or "HEAST" means a data base developed by the United States Environmental Protection Agency that provides a summary of information on the toxicity of hazardous substances.

"Henry's law constant" means the ratio of a hazardous substance's concentration in the air to

its concentration in water. Henry's law constant can vary significantly with temperature for some hazardous substances. The dimensionless form of this constant is used in the default equations in this chapter.

"Highest beneficial use" means the beneficial use of a resource generally requiring the highest quality in the resource. For example, for many hazardous substances, providing protection for the beneficial use of drinking water will generally also provide protection for a great variety of other existing and future beneficial uses of groundwater.

"Independent remedial actions" means remedial actions conducted without department oversight or approval and not under an order, agreed order, or consent decree.

"Indicator hazardous substances" means the subset of hazardous substances present at a site selected under WAC **173-340-708** for monitoring and analysis during any phase of remedial action for the purpose of characterizing the site or establishing cleanup requirements for that site.

"Industrial properties" means properties that are or have been characterized by, or are to be committed to, traditional industrial uses such as processing or manufacturing of materials, marine terminal and transportation areas and facilities, fabrication, assembly, treatment, or distribution of manufactured products, or storage of bulk materials, that are either:

- Zoned for industrial use by a city or county conducting land use planning under chapter **36.70A** RCW (Growth Management Act); or
- For counties not planning under chapter **36.70A** RCW (Growth Management Act) and the cities within them, zoned for industrial use and adjacent to properties currently used or designated for industrial purposes.

See WAC **173-340-745** for additional criteria to determine if a land use not specifically listed in this definition would meet the requirement of "traditional industrial use" and for evaluating if a land use zoning category meets the requirement of being "zoned for industrial use."

"Inhalation absorption fraction" means the percent of a hazardous substance (expressed as a fraction) that is absorbed through the respiratory system.

"Inhalation correction factor" means a multiplier that is used to adjust exposure estimates based on ingestion of drinking water to take into account exposure to hazardous substances that are volatilized and inhaled during use of the water.

"Initial investigation" means a remedial action that consists of an investigation under WAC **173-340-310**.

"Institutional controls" means measures undertaken to limit or prohibit activities that may interfere with the integrity of an interim action or a cleanup action or result in exposure to hazardous substances at the site. For examples of institutional controls see WAC **173-340-440**(1).

"Integrated risk information system" or "IRIS" means a data base developed by the United States Environmental Protection Agency that provides a summary of information on hazard identification and dose-response assessment for specific hazardous substances.

"Interim action" means a remedial action conducted under WAC **173-340-430**.

"Interspecies scaling factor" means the conversion factor used to take into account differences between animals and humans.

"Land's method" means the method for calculating an upper confidence limit for the mean of a lognormal distribution, described in the following publications:

- Land, C.E., 1971. "Confidence intervals for linear functions of the normal mean and variance." *Annals of Mathematics and Statistics*. Volume 42, pages 1187-1205.
- Land, C.E., 1975. "Tables of confidence limits for linear functions of the normal mean and variance." In: *Selected Tables in Mathematical Statistics*, Volume III, pages 385-419. American Mathematical Society, Providence, Rhode Island.

"Legally applicable requirements" means those cleanup standards, standards of control, and other human health and environmental protection requirements, criteria, or limitations adopted under state or federal law that specifically address a hazardous substance, cleanup action, location, or other circumstances at the site.

"Lowest observed adverse effect level" or "LOAEL" means the lowest concentration of a hazardous substance at which there is a statistically or biologically significant increase in the frequency or severity of an adverse effect between an exposed population and a control group.

"Mail" means delivery through the United States Postal Service or an equivalent method of delivery or transmittal, including private mail carriers, or personal delivery.

"Maximum contaminant level" or "MCL" means the maximum concentration of a contaminant established by either the Washington state board of health or the United States Environmental Protection Agency under the Federal Safe Drinking Water Act (42 U.S.C. 300f et seq.) and published in chapter **248-54** WAC or 40 C.F.R. 141.

"Maximum contaminant level goal" or "MCLG" means the maximum concentration of a contaminant established by either the Washington state board of health or the United States Environmental Protection Agency under the Federal Safe Drinking Water Act (42 U.S.C. 300f et seq.) and published in chapter **248-54** WAC or 40 C.F.R. 141 for which no known or anticipated adverse effects on human health occur, including an adequate margin of safety.

"Method detection limit" or "MDL" means the minimum concentration of a compound that can be measured and reported with ninety-nine percent (99%) confidence that the value is greater than zero.

"Millirem" or "mrem" means the measure of the dose of any radiation to body tissue in terms of its estimated biological effect relative to a dose received from an exposure to one roentgen (R) of X rays. One millirem equals 0.001 rem.

"Mixed funding" means any funding provided to potentially liable persons from the state toxics control account under WAC **173-340-560**.

"Model Toxics Control Act" or "act" means chapter **70.105D** RCW, first passed by the voters in the November 1988 general election as Initiative 97 and as since amended by the legislature.

"Natural attenuation" means a variety of physical, chemical or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, mobility, volume, or concentration of hazardous substances in the environment. These in situ processes include: Natural biodegradation; dispersion; dilution; sorption; volatilization; and, chemical or biological stabilization, transformation, or destruction of hazardous substances. See WAC **173-340-370**(7) for a description of the expected role of natural attenuation in site cleanup. A cleanup action that includes natural attenuation and conforms to the expectation in WAC **173-340-370**(7) can be considered an active remedial measure.

"Natural background" means the concentration of hazardous substance consistently present in the environment that has not been influenced by localized human activities. For example, several metals and radionuclides naturally occur in the bedrock, sediments, and soils of Washington state due solely to the geologic processes that formed these materials and the concentration of these hazardous substances would be considered natural background. Also, low concentrations of some particularly persistent organic compounds such as polychlorinated biphenyls (PCBs) can be found in surficial soils and sediment throughout much of the state due to global distribution of these hazardous substances. These low concentrations would be considered natural background. Similarly, concentrations of various radionuclides that are present at low concentrations throughout the state due to global distribution of fallout from bomb testing and nuclear accidents would be considered natural background.

"Natural biodegradation" means in-situ biological processes such as aerobic respiration,

anaerobic respiration, and cometabolism, that occur without human intervention and that break down hazardous substances into other compounds or elements. The process is typically a multiple step process and may or may not result in organic compounds being completely broken down or mineralized to carbon dioxide and water.

"Natural person" means any unincorporated individual or group of individuals. The term "individual" is synonymous with "natural person."

"Nonaqueous phase liquid" or "NAPL" means a hazardous substance that is present in the soil, bedrock, groundwater or surface water as a liquid not dissolved in water. The term includes both light nonaqueous phase liquid (LNAPL) and dense nonaqueous phase liquid (DNAPL).

"No observed adverse effect level" or "NOAEL" means the exposure level at which there are no statistically or biologically significant increases in frequency or severity of adverse effects between the exposed population and its appropriate control; some effects may be produced at this level, but they are not considered to be adverse, nor precursors to specific adverse effects.

"Nonpotable" means not a current or potential source of drinking water. See WAC **173-340-720** and **173-340-730** for criteria for determining if groundwater or surface water is a current or potential source of drinking water.

"Null hypothesis" means an assumption about hazardous substance concentrations at a site when evaluating compliance with cleanup levels established under this chapter. The null hypothesis is that the site is contaminated at concentrations that exceed cleanup levels. This shall not apply to cleanup levels based on background concentrations where other appropriate statistical methods supported by a power analysis would be more appropriate to use.

"Oral RFD conversion factor" means the conversion factor used to adjust an oral reference dose (which is typically based on an administered dose) to a dermal reference dose (which is based on an absorbed dose).

"Order" means an enforcement order issued under WAC **173-340-540** or an agreed order issued under WAC **173-340-530**.

"Owner or operator" means any person that meets the definition of this term in RCW **70.105D.020**(12).

"PAHs (carcinogenic)" or "cPAHs" means those polycyclic aromatic hydrocarbons substances, PAHs, identified as A (known human) or B (probable human) carcinogens by the United States Environmental Protection Agency. These include benzo(a)anthracene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, chrysene, dibenzo(a,h)anthracene, and indeno(1,2,3-cd)pyrene.

"Permanent solution" or "permanent cleanup action" means a cleanup action in which cleanup standards of WAC **173-340-700** through **173-340-760** can be met without further action being required at the site being cleaned up or any other site involved with the cleanup action, other than the approved disposal of any residue from the treatment of hazardous substances.

"Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe.

"Picocurie" or "pCi" means 10^{-12} curie.

"Point of compliance" means the point or points where cleanup levels established in accordance with WAC **173-340-720** through **173-340-760** shall be attained. This term includes both standard and conditional points of compliance. A conditional point of compliance for particular media is only available as provided in WAC **173-340-720** through **173-340-760**.

"Polychlorinated biphenyls" or "PCB mixtures" means those aromatic compounds containing two benzene nuclei with two or more substituted chlorine atoms. For the purposes of this chapter, PCB includes those congeners which are identified using the appropriate analytical methods as

specified in WAC **173-340-830**.

"Polycyclic aromatic hydrocarbons" or "PAH" means those hydrocarbon molecules composed of two or more fused benzene rings. For the purpose of this chapter, PAH includes those compounds which are identified and quantified using the appropriate analytical methods as specified in WAC **173-340-830**. The specific compounds generally included are acenaphthene, acenaphthylene, fluorene, naphthalene, anthracene, fluoranthene, phenanthrene, benzo[a]anthracene, benzo[b]fluoranthene, benzo[k]fluoranthene, pyrene, chrysene, benzo[a]pyrene, dibenzo[a,h]anthracene, indeno[1,2,3-cd]pyrene, and benzo[ghi]perylene.

"Potentially liable person" means any person who the department finds, based on credible evidence, to be liable under RCW **70.105D.040**.

"Practicable" means capable of being designed, constructed and implemented in a reliable and effective manner including consideration of cost. When considering cost under this analysis, an alternative shall not be considered practicable if the incremental costs of the alternative are disproportionate to the incremental degree of benefits provided by the alternative over other lower cost alternatives.

"Practical quantitation limit" or "PQL" means the lowest concentration that can be reliably measured within specified limits of precision, accuracy, representativeness, completeness, and comparability during routine laboratory operating conditions, using department approved methods.

"Probabilistic risk assessment" means a mathematical technique for assessing the variability and uncertainty in risk calculations. This is done by using distributions for model input parameters, rather than point values, where sufficient data exists to justify the distribution. These distributions are then used to compute various simulations using tools such as Monte Carlo analysis to examine the probability that a given outcome will result (such as a level of risk being exceeded). When using probabilistic techniques under this chapter for human health risk assessment, distributions shall not be used to represent dose response relationships (reference dose, reference concentration, cancer potency factor).

"Public notice" means, at a minimum, adequate notice mailed to all persons who have made a timely request of the department and to persons residing in the potentially affected vicinity of the proposed action; mailed to appropriate news media; published in the newspaper of largest circulation in the city or county of the proposed action; and opportunity for interested persons to comment.

"Public participation plan" means a plan prepared under WAC **173-340-600** to encourage coordinated and effective public involvement tailored to the public's needs at a particular site.

"Rad" means that quantity of ionizing radiation that results in the absorption of 100 ergs of energy per gram of irradiated material, regardless of the source of radiation.

"Radionuclide" means a type of atom that spontaneously undergoes radioactive decay. Radionuclides are hazardous substances under the act.

"Reasonable maximum exposure" means the highest exposure that can be reasonably expected to occur for a human or other living organisms at a site under current and potential future site use.

"Reference dose" or "RFD" means a benchmark dose, derived from the NOAEL or LOAEL for a hazardous substance by consistent application of uncertainty factors used to estimate acceptable daily intake doses and an additional modifying factor, which is based on professional judgment when considering all available data about a substance, expressed in units of milligrams per kilogram body weight per day. This includes chronic reference doses, subchronic reference doses, and developmental reference doses.

"Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous

substances.

"Relevant and appropriate requirements" means those cleanup standards, standards of control, and other human health and environmental requirements, criteria, or limitations established under state and federal law that, while not legally applicable to the hazardous substance, cleanup action, location, or other circumstance at a site, the department determines address problems or situations sufficiently similar to those encountered at the site that their use is well suited to the particular site. The criteria specified in WAC **173-340-710**(3) shall be used to determine if a requirement is relevant and appropriate.

"Rem" means the unit of radiation dose equivalent that is the dosage in rads multiplied by a factor representing the different biological effects of various types of radiation.

"Remedial investigation/feasibility study" means a remedial action that consists of activities conducted under WAC **173-340-350** to collect, develop, and evaluate sufficient information regarding a site to select a cleanup action under WAC **173-340-360** through **173-340-390**.

"Remediation level (REL)" means a concentration (or other method of identification) of a hazardous substance in soil, water, air, or sediment above which a particular cleanup action component will be required as part of a cleanup action at a site. Other methods of identification include physical appearance or location. A cleanup action selected in accordance with WAC **173-340-350** through **173-340-390** that includes remediation levels constitutes a cleanup action which is protective of human health and the environment. See WAC **173-340-355** for a description of the purpose of remediation levels and the requirements and procedures for developing a cleanup action alternative that includes remediation levels.

"Remedy" or "remedial action" means any action or expenditure consistent with the purposes of chapter **70.105D** RCW to identify, eliminate, or minimize any threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

"Restoration time frame" means the period of time needed to achieve the required cleanup levels at the points of compliance established for the site.

"Risk" means the probability that a hazardous substance, when released into the environment, will cause an adverse effect in exposed humans or other living organisms.

"Routine cleanup action" means a remedial action meeting all of the following criteria:

- Cleanup standards for each hazardous substance addressed by the cleanup are obvious and undisputed, and allow for an adequate margin of safety for protection of human health and the environment;
- It involves an obvious and limited choice among cleanup action alternatives and uses an alternative that is reliable, has proven capable of accomplishing cleanup standards, and with which the department has experience;
- The cleanup action does not require preparation of an environmental impact statement; and
- The site qualifies under WAC **173-340-7491** for an exclusion from conducting a simplified or site-specific terrestrial ecological evaluation, or if the site qualifies for a simplified ecological evaluation, the evaluation is ended under WAC **173-340-7492** (2) or the values in Table 749-2 are used.

Routine cleanup actions consist of, or are comparable to, one or more of the following remedial actions:

- Cleanup of above-ground structures;
- Cleanup of below-ground structures;

•Cleanup of contaminated soils where the action would restore the site to cleanup levels; or
•Cleanup of solid wastes, including containers.

"Safety and health plan" means a plan prepared under WAC **173-340-810**.

"Sampling and analysis plan" means a plan prepared under WAC **173-340-820**.

"Saturated zone" means the area below the water table in which all interstices are filled with water.

"Schools" means preschools, elementary schools, middle schools, high schools, and similar facilities, both public and private, used primarily for the instruction of minors.

"Science advisory board" means the advisory board established by the department under RCW **70.105D.030**(4).

"Secondary maximum contaminant level" means the maximum concentration of a secondary contaminant in water established by the United States Environmental Protection Agency under the Federal Safe Drinking Water Act (42 U.S.C. 300f et seq.) and published in 40 C.F.R. 143.

"Sensitive environment" means an area of particular environmental value, where a release could pose a greater threat than in other areas including: Wetlands; critical habitat for endangered or threatened species; national or state wildlife refuge; critical habitat, breeding or feeding area for fish or shellfish; wild or scenic river; rookery; riparian area; big game winter range.

"Site" means the same as "facility."

"Site hazard assessment" means a remedial action that consists of an investigation performed under WAC **173-340-320**.

"Soil" means a mixture of organic and inorganic solids, air, water, and biota that exists on the earth's surface above bedrock, including materials of anthropogenic sources such as slag, sludge, etc.

"Soil biota" means invertebrate multicellular animals that live in the soil or in close contact with the soil.

"Subchronic reference dose" means an estimate (with an uncertainty of an order of magnitude or more) of a daily exposure level for the human population, including sensitive subgroups, that is likely to be without appreciable risk of adverse effects during a portion of a lifetime.

"Surface water" means lakes, rivers, ponds, streams, inland waters, salt waters, and all other surface waters and water courses within the state of Washington or under the jurisdiction of the state of Washington.

"Technically possible" means capable of being designed, constructed and implemented in a reliable and effective manner, regardless of cost.

"Terrestrial ecological receptors" means plants and animals that live primarily or entirely on land.

"Threatened or endangered species" means species listed as threatened or endangered under the federal Endangered Species Act 16 U.S.C. Section 1533, or classified as threatened or endangered by the state fish and wildlife commission under WAC **232-12-011**(1) and **232-12-014**.

"Total excess cancer risk" means the upper bound on the estimated excess cancer risk associated with exposure to multiple hazardous substances and multiple exposure pathways.

"Total petroleum hydrocarbons" or "TPH" means any fraction of crude oil that is contained in plant condensate, crankcase motor oil, gasoline, aviation fuels, kerosene, diesel motor fuel, benzol, fuel oil, and other products derived from the refining of crude oil. For the purposes of this chapter, TPH will generally mean those fractions of the above products that are the total of all hydrocarbons quantified by analytical methods NWTPH-Gx; NWTPH-Dx; volatile petroleum hydrocarbons (VPH) for volatile aliphatic and volatile aromatic petroleum fractions; and extractable petroleum hydrocarbons (EPH) for nonvolatile aliphatic and nonvolatile aromatic petroleum fractions, as appropriate, or other test methods approved by the department.

"Type I error" means the error made when it is concluded that an area of a site is below cleanup levels when it actually exceeds cleanup levels. This is the rejection of a true null hypothesis.

"Underground storage tank" or "UST" means an underground storage tank and connected underground piping as defined in the rules adopted under chapter **90.76** RCW.

"Unrestricted site use conditions" means restrictions on the use of the site or natural resources affected by releases of hazardous substances from the site are not required to ensure continued protection of human health and the environment.

"Upper bound on the estimated excess cancer risk of one in one hundred thousand" means the upper ninety-fifth percent confidence limit on the estimated risk of one additional cancer above the background cancer rate per one hundred thousand individuals.

"Upper bound on the estimated excess cancer risk of one in one million" means the upper ninety-fifth percent confidence limit on the estimated risk of one additional cancer above the background cancer rate per one million individuals.

"Volatile organic compound" means those carbon-based compounds listed in EPA methods 502.2, 524.2, 551, 601, 602, 603, 624, 1624C, 1666, 1671, 8011, 8015B, 8021B, 8031, 8032A, 8033, 8260B, and those with similar vapor pressures or boiling points. See WAC **173-340-830**(3) for references describing these methods. For petroleum, volatile means aliphatic and aromatic constituents up to and including EC12, plus naphthalene, 1-methylnaphthalene and 2-methylnaphthalene.

"Wastewater facility" means all structures and equipment required to collect, transport, treat, reclaim, or dispose of domestic, industrial, or combined domestic/industrial wastewaters.

"Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For the purposes of this classification, wetlands must have one or more of the following attributes at least periodically, the land supports predominantly hydrophytes; the substrate is predominately undrained hydric soil; and the substrate is nonsoil and saturated with water or covered by shallow water at some time during the growing season each year.

"Wildlife" means any nonhuman vertebrate animal other than fish.

"Zoned for (a specified) use" means the use is allowed as a permitted or conditional use under the local jurisdiction's land use zoning ordinances. A land use that is inconsistent with the current zoning but allowed to continue as a nonconforming use or through a comparable designation is not considered to be zoned for that use.

[Statutory Authority: Chapter **70.105D** RCW. WSR 01-05-024 (Order 97-09A), § 173-340-200, filed 2/12/01, effective 8/15/01; WSR 96-04-010 (Order 94-37), § 173-340-200, filed 1/26/96, effective 2/26/96; WSR 91-04-019, § 173-340-200, filed 1/28/91, effective 2/28/91; WSR 90-08-086, § 173-340-200, filed 4/3/90, effective 5/4/90.]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency.

EXHIBIT 5

WAC 173-340-700

Overview of cleanup standards.

(1) **Purpose.** This section provides an overview of the methods for establishing cleanup standards that apply to a release or threatened release of a hazardous substance at a site. If there are any inconsistencies between this section and any specifically referenced section, the referenced section shall govern.

(2) **Explanation of term "cleanup level."** 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. Cleanup levels, in combination with points of compliance, typically define the area or volume of soil, water, air or sediment at a site that must be addressed by the cleanup action.

(3) **Explanation of term "cleanup standards."** Cleanup standards consist of the following:

(a) Cleanup levels for hazardous substances present at the site;

(b) The location where these cleanup levels must be met (point of compliance); and

(c) Other regulatory requirements that apply to the site because of the type of action and/or location of the site ("applicable state and federal laws").

(4) **Relationship between cleanup standards and cleanup actions.**

(a) Cleanup standards are identified for the particular hazardous substances at a site and the specific areas or pathways, such as land or water, where humans and the environment can become exposed to these substances. This part provides uniform methods statewide for identifying cleanup standards and requires that all cleanups under the act meet these standards. The actual degree of cleanup may vary from site to site and will be determined by the cleanup action alternative selected under WAC **173-340-350** through **173-340-390**.

(b) For most sites, there are several cleanup technologies or combinations of cleanup technologies ("cleanup action alternatives") that may be used to comply with cleanup standards at individual sites. Other parts of this rule govern the process for planning and deciding on the cleanup action to be taken at a site. This may include establishing "remediation levels," or the concentrations of hazardous substances above which a particular cleanup technology will be applied. See WAC **173-340-350** through **173-340-390**. WAC **173-340-355** contains detailed information on establishing remediation levels. WAC **173-340-410** specifies the monitoring required to ensure that the remedy is effective.

(c) Where a cleanup action involves containment of soils with hazardous substances above cleanup levels, the cleanup action may be determined to comply with cleanup standards, provided the compliance monitoring program is designed to ensure the long-term integrity of the containment system, and the other requirements for containment in this chapter are met.

(5) **Methods for setting cleanup levels.** The first step in setting cleanup levels is to identify the nature of the contamination, the potentially contaminated media, the current and potential pathways of exposure, the current and potential receptors, and the current and potential land and resource uses. A conceptual site model may be developed as part of this scoping process. Cleanup levels may then be established for each media. Both the conceptual site model and cleanup levels may be refined as additional information is collected during the remedial investigation/feasibility study. See WAC **173-340-708**(3) for additional information on how to determine current and potential future land and resource uses for the conceptual site model. These rules provide three approaches for establishing cleanup levels:

(a) **Method A: ARARs and Tables.** On some sites, the cleanup action may be routine (WAC **173-340-200**) or may involve relatively few hazardous substances. Under Method A, cleanup levels

EXHIBIT 6

WAC 173-340-740

Unrestricted land use soil cleanup standards.

(1) **General considerations.**

(a) Presumed exposure scenario soil cleanup levels shall be based on estimates of the reasonable maximum exposure expected to occur under both current and future site use conditions. The department has determined that residential land use is generally the site use requiring the most protective cleanup levels and that exposure to hazardous substances under residential land use conditions represents the reasonable maximum exposure scenario. Unless a site qualifies for use of an industrial soil cleanup level under WAC **173-340-745**, soil cleanup levels shall use this presumed exposure scenario and be established in accordance with this section.

(b) In the event of a release of a hazardous substance to the soil at a site, a cleanup action complying with this chapter shall be conducted to address all areas where the concentration of hazardous substances in the soil exceeds cleanup levels at the relevant point of compliance.

(c) The department may require more stringent soil cleanup standards than required by this section where, based on a site-specific evaluation, the department determines that this is necessary to protect human health and the environment. Any imposition of more stringent requirements under this provision shall comply with WAC **173-340-702** and **173-340-708**. The following are examples of situations that may require more stringent cleanup levels.

(i) Concentrations that eliminate or substantially reduce the potential for food chain contamination;

(ii) Concentrations that eliminate or substantially reduce the potential for damage to soils or biota in the soils which could impair the use of soils for agricultural or silvicultural purposes;

(iii) Concentrations necessary to address the potential health risk posed by dust at a site;

(iv) Concentrations necessary to protect the groundwater at a particular site;

(v) Concentrations necessary to protect nearby surface waters from hazardous substances in runoff from the site; and

(vi) Concentrations that eliminate or minimize the potential for the accumulation of vapors in buildings or other structures.

(d) Relationship between soil cleanup levels and other cleanup standards. Soil cleanup levels shall be established at concentrations that do not directly or indirectly cause violations of groundwater, surface water, sediment, or air cleanup standards established under this chapter or applicable state and federal laws. A property that qualifies for a Method C soil cleanup level under WAC **173-340-745** does not necessarily qualify for a Method C cleanup level in other media. Each medium must be evaluated separately using the criteria applicable to that medium.

(2) **Method A soil cleanup levels for unrestricted land use.**

(a) **Applicability.** Method A soil cleanup levels may only be used at sites qualifying under WAC **173-340-704**(1).

(b) **General requirements.** Method A soil cleanup levels shall be at least as stringent as all of the following:

(i) Concentrations in Table 740-1 and compliance with the corresponding footnotes;

(ii) Concentrations established under applicable state and federal laws;

(iii) Concentrations that result in no significant adverse effects on the protection and propagation of terrestrial ecological receptors using the procedures specified in WAC **173-340-7490** through **173-340-7493**, unless it is demonstrated under those sections that establishing a soil concentration is unnecessary; and

(iv) For a hazardous substance that is deemed an indicator hazardous substance under WAC

EXHIBIT 7

Table 740-1 Method A Soil Cleanup Levels for Unrestricted Land Uses[a] From Model Toxics Control Act Cleanup Regulation Chapter 173-340 WAC

Hazardous Substance	CAS Number	Cleanup Level
Arsenic	7440-38-2	20 mg/kg[b]
Benzene	71-43-2	0.03 mg/kg[c]
Benzo(a)pyrene	50-32-8	0.1 mg/kg[d]
Cadmium	7440-43-9	2 mg/kg[e]
Chromium		
Chromium VI	18540-29-9	19 mg/kg[f1]
Chromium III	16065-83-1	2,000 mg/kg[f2]
DDT	50-29-3	3 mg/kg[g]
Ethylbenzene	100-41-4	6 mg/kg[h]
Ethylene dibromide (EDB)	106-93-4	0.005 mg/kg[i]
Lead	7439-92-1	250 mg/kg[j]
Lindane	58-89-9	0.01 mg/kg[k]
Methylene chloride	75-09-2	0.02 mg/kg[l]
Mercury (inorganic)	7439-97-6	2 mg/kg[m]
MTBE	1634-04-4	0.1 mg/kg[n]
Naphthalenes	91-20-3	5 mg/kg[o]
PAHs (carcinogenic)		See benzo(a)pyrene[d]
PCB Mixtures		1 mg/kg[p]
Tetrachloroethylene	127-18-4	0.05 mg/kg[q]
Toluene	108-88-3	7 mg/kg[r]
Total Petroleum Hydrocarbons[s]		
[Note: Must also test for and meet cleanup levels for other petroleum components--see footnotes!]		
Gasoline Range Organics		
Gasoline mixtures without benzene and the total of ethyl benzene, toluene and xylene are less than 1% of the gasoline mixture		100 mg/kg
All other gasoline mixtures		30 mg/kg
Diesel Range Organics		2,000 mg/kg
Heavy Oils		2,000 mg/kg
Mineral Oil		4,000 mg/kg
1,1,1 Trichloroethane	71-55-6	2 mg/kg[t]
Trichloroethylene	79-01-6	0.03 mg/kg[u]
Xylenes	1330-20-7	9 mg/kg[v]

Footnotes:

a **Caution on misusing this table.** This table has been developed for specific purposes. It is intended to provide conservative cleanup levels for sites undergoing routine cleanup actions or for sites with relatively few hazardous substances, and the site qualifies under WAC 173-340-7491 for an exclusion from conducting a simplified or site-specific terrestrial ecological evaluation, or it can be demonstrated using a terrestrial ecological evaluation under WAC 173-340-7492 or 173-340-7493 that the values in this table are ecologically protective for the site. This table may not be appropriate for defining cleanup levels at other sites. For these reasons, the values in this table should not automatically be used to define cleanup levels that must be met for financial, real estate, insurance coverage or placement, or similar transactions or purposes. Exceedances of the values in this table do not necessarily mean the soil must be restored to these levels at a site. The level of restoration depends on the remedy selected under WAC 173-340-350 through 173-340-390.

b **Arsenic.** Cleanup level based on direct contact using Equation 740-2 and protection of ground water for drinking water use using the procedures in WAC 173-340-747(4), adjusted for natural background for soil.

c **Benzene.** Cleanup level based on protection of ground water for drinking water use, using the procedures in WAC 173-340-747(4) and (6).

d **Benzo(a)pyrene.** Cleanup level based on direct contact using Equation 740-2. If other carcinogenic PAHs are suspected of being present at the site, test for them and use this value as the total concentration that all carginogenic PAHs must meet using the toxicity equivalency methodology in WAC 173-340-708(8).

e **Cadmium.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4), adjusted for the practical quantitation limit for soil.

f1 **Chromium VI.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

f2 **Chromium III.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4). Chromium VI must also be tested for and the cleanup level met when present at a site.

g **DDT (dichlorodiphenyltrichloroethane).** Cleanup level based on direct contact using Equation 740-2.

h **Ethylbenzene.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

i **Ethylene dibromide (1,2 dibromoethane or EDB).** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4) and adjusted for the practical quantitation limit for soil.

j **Lead.** Cleanup level based on preventing unacceptable blood lead levels.

k **Lindane.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4), adjusted for the practical quantitation limit.

l **Methylene chloride (dichloromethane).** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

m **Mercury.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

n **Methyl tertiary-butyl ether (MTBE).** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

o **Naphthalenes.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4). This is a total value for naphthalene, 1-methyl naphthalene and 2-methyl naphthalene.

p **PCB Mixtures.** Cleanup level based on applicable federal law (40 C.F.R. 761.61). This is a total value for all PCBs.

q **Tetrachloroethylene.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

r **Toluene.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

s **Total Petroleum Hydrocarbons (TPH).**
TPH cleanup values have been provided for the most common petroleum products encountered at contaminated sites. Where there is a mixture of products or the product composition is unknown, samples must be tested using both the NWTPH-Gx and NWTPH-Dx methods and the lowest applicable TPH cleanup level must be met.

- **Gasoline range organics** means organic compounds measured using method NWTPH-Gx. Examples are aviation and automotive gasoline. The cleanup level is based on protection of ground water for noncarcinogenic effects during drinking water use using the procedures described in WAC 173-340-747(6). Two cleanup levels are provided. The lower value of 30 mg/kg can be used at any site. When using this lower value, the soil must also be tested for and meet the benzene soil cleanup level. The higher value of 100 mg/kg can only be used if the soil is tested and found to contain no benzene and the total of ethyl benzene, toluene and xylene are less than 1% of the gasoline mixture. No interpolation between these cleanup levels is allowed. In both cases, the soil cleanup level for any other carcinogenic components of the petroleum [such as EDB and EDC], if present at the site, must also be met. Also, in both cases, soil cleanup levels for any noncarcinogenic components [such as toluene, ethylbenzene, xylenes, naphthalene, and MTBE], also must be met if these substances are found to exceed ground water cleanup levels at the site. See Table 830-1 for the minimum testing requirements for gasoline releases.
- **Diesel range organics** means organic compounds measured using method NWTPH-Dx. Examples are diesel, kerosene, and #1 and #2 heating oil. The cleanup level is based on preventing the accumulation of free product on the ground water, as described in WAC 173-340-747(10). The soil cleanup level for any carcinogenic components of the petroleum [such as benzene and PAHs], if present at the site, must also be met. Soil cleanup levels for any noncarcinogenic components [such as toluene, ethylbenzene, xylenes and naphthalenes], also must be met if these substances are found to exceed the ground water cleanup levels at the site. See Table 830-1 for the minimum testing requirements for diesel releases.
- **Heavy oils means** organic compounds measured using NWTPH-Dx. Examples are #6 fuel oil, bunker C oil, hydraulic oil and waste oil. The cleanup level is based on preventing the accumulation of free product on the ground water, as described in WAC 173-340-747(10) and assuming a product composition similar to diesel fuel. The soil cleanup level for any carcinogenic components of the petroleum [such as benzene, PAHs and PCBs], if present at the site, must also be met. Soil cleanup levels for any noncarcinogenic components [such as toluene, ethylbenzene, xylenes and naphthalenes], also must be met if found to exceed the ground water cleanup levels at the site. See Table 830-1 for the minimum testing requirements for heavy oil releases.
- **Mineral oil** means non-PCB mineral oil, typically used as an insulator and coolant in electrical devices such as transformers and capacitors, measured using NWTPH-Dx. The cleanup level is based on preventing the accumulation of free product on the ground water, as described in WAC 173-340-747(10). Sites using this cleanup level must also analyze soil samples and meet the soil cleanup level for PCBs, unless it can be demonstrated that: (1) The release originated from an electrical device that was manufactured after July 1, 1979; or (2) oil containing PCBs was never used in the equipment suspected as the source of the release; or (3) it can be documented that the oil released was recently tested and did not contain PCBs. Method B must be used for releases of oils containing greater than 50 ppm PCBs. See Table 830-1 for the minimum testing requirements for mineral oil releases.

t **1,1,1 Trichloroethane.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

u **Trichloroethylene.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4).

v **Xylenes.** Cleanup level based on protection of ground water for drinking water use, using the procedures described in WAC 173-340-747(4). This is a total value for all xylenes.

EXHIBIT 8

1 A Yes.
2 Q You've reviewed the Tetra Tech report at P16 from April
3 22, 2014, correct?
4 A Yes.
5 Q Okay. And you had mentioned you had spoken to Joe Delay?
6 A Yes.
7 Q You mentioned that you'd, also, spoken with Mr. Welge?
8 A Yes.
9 Q Okay. Based upon the information that you received and
10 the data that was contained in the report and your
11 telephone conversations with Mr. Delay and your telephone
12 conversations with Mr. Welge, is it your judgment that the
13 conditions and circumstances at that site do not
14 constitute a Model Toxic Control Act release of a
15 hazardous substance?
16 A That was my interpretation of the data and information
17 that I got from the report, my conversation with Joe Delay
18 and that I generated. I looked at aerial photographs and
19 topographic maps, yes.
20 Q I'll take it a step further. Is it, also, your judgment
21 and your opinion that the conditions and circumstances of
22 the site do not constitute a Model Toxic Control Act
23 release of a hazardous substance that is a threat to human
24 health and the environment?
25 A That's correct.

FILED

DEC 29 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 336158

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS
Plaintiffs-Appellants

v.

SHAMROCK PAVING, INC., A WASHINTON CORPORATION
Defendant-Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

CERTIFICATE OF SERVICE
APPELLANT'S OPENING BRIEF

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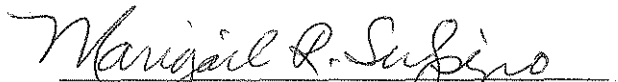
CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the APPELLANTS' OPENING BRIEF, by personally serving the following:

James McPhee
Workland Witherspoon
Attorneys at Law
601 West Main Avenue, Suite 714
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the State of California that the foregoing is true and correct.

Signed at Spokane, Washington, this 29th day of December, 2015.



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