



Coastline Law Group PLLC

4015 Ruston Way, Suite 200
Tacoma, WA 98402
Phone: 253-203-6226

*Kimberly Seely
Attorney at Law*

July 31, 2020

Gabrielle Gurian
Assistant Attorney General
Ecology Division
gabrielle.gurian@atg.wa.gov

VIA EMAIL

RE: Taylor Way & Alexander Ave Fill Area (TWAAFA) Site
Ecology Proposed Agreed Order

Dear Gabrielle:

This letter responds to Washington Department of Ecology's directive to the Port of Tacoma. Ecology directs the Port to inform Ecology by August 3, 2020, of its intent to sign onto Ecology's proposed Agreed Order—in conjunction with Occidental Chemical, General Metals, and Burlington Environmental—to investigate and conduct remedial activities at the abandoned CleanCare TSD Facility¹ and the surrounding property impacted by its operations (i.e., the TWAAFA Site). Further, Ecology indicates it will issue an enforcement order to the parties if the parties refuse to sign onto the AO. While the Port takes Ecology's enforcement threat seriously, the Port must decline participation in the proposed AO at this time given the totality of the circumstances involving this Site. Significant to the Port's decision to decline to sign is the undisputed fact that the Port has no relationship with the CleanCare property to support an obligation for the Port to be responsible for clean-up of that property.

The Port assures Ecology that it continues to support Ecology efforts to clean up the TWAAFA Site. The Port has already conducted considerable work in furtherance of the cleanup effort on Port-owned properties adversely impacted by the pollution from the CleanCare Facility, and will continue to do so as necessary.² Nonetheless, the Port cannot sign onto the proposed Agreed Order given the injustice of the above-referenced parties' attempt to shift any allocation of CleanCare remedial action costs to the Port and its taxpayers. During negotiations regarding

¹ The CleanCare property housed a failing TSD Facility for decades. Prior to that operation, the property's owners used the property like a landfill, depositing hazardous waste on the CleanCare property as well as on other properties nearby.

² Thus far, the Port has incurred a total of \$436,045.06 through June 2020, with respect to investigation and/or remediation of the Prologis and Hylebos Marsh Properties.

participation in and funding of the proposed AO remedial activities, the other parties (primarily General Metals and Occidental) insisted that the Port pay 25% of all remedial action costs to be incurred under the AO, even as this percentage includes costs which pertain to the CleanCare property. Because the Port is not a Potentially Liable Party (PLP) under RCW 70.105D.040(1)³ for the CleanCare property—the source of the impacts within the TWAFA Site—the Port is not liable for these costs. The Port is merely a PLP at the TWAFA Site due to Ecology’s inclusion of adjacent properties which have been adversely impacted by the CleanCare property and which the Port currently owns within this “Site’s” boundaries.⁴ The Port has no other relationship with the polluting source property. None of the operations conducted on Port-owned properties within the TWAFA Site—to the extent operations ever occurred—are linked to hazardous substances releases at or emanating from the CleanCare property.⁵

On the other hand, the other three parties involved in the proposed AO are PLPs directly liable for polluting the CleanCare property. General Metals and Occidental together are responsible for a substantial share of the deleterious waste materials associated with former operators at the CleanCare property. The two significant hazardous materials of concern identified by Ecology to define the lateral extent of soil impacts within the TWAFA Site are **auto fluff** (linked directly to General Metals’ car crushing operations), and **lime solvent sludge** (linked directly to Occidental operations). These wastes released VOCs, SVOCs, PCBs and metals contamination to soils and groundwater on and around the CleanCare property. Burlington Environmental (Stericycle) is involved because it owns and operates a permitted TSD facility on property adjacent to CleanCare and releases at these properties are potentially commingled. In sharp contrast, these three parties are PLPs directly linked to pollution at the CleanCare property while it is undisputed the Port is not.

The Port cannot and should not be forced by the other PLPs (or Ecology) to investigate and remediate the polluting CleanCare property to which the Port has no connection. The Port’s position is further delineated below.

The Port is not liable under MTCA to remediate the CleanCare Facility:

In 2007, Ecology renamed the CleanCare Facility “the TWAFA Site” (i.e., the Facility)⁶ to comprise not only the CleanCare property but also all nearby properties where hazardous substances associated with CleanCare operations came to be located. See definition of “facility” at RCW 70.105D.020(8). Ecology artificially defined the Site to include all nearby properties that could potentially be impacted by the CleanCare Facility creating a large site encompassing

³ RCW 70.105D.040(1) sets out the strict liability scheme under MTCA.

⁴ RCW 70.105D.040(1)(a) places strict liability on current owners of impacted properties to clean up their own properties.

⁵ Ecology already concedes that the only reason the Port is being compelled to sign onto the AO is due to its status as current owner of adjacent impacted property. See Exhibit D—prepared by Ecology and attached to the draft AO—confirming that the Port’s properties (Prologis, Potter, and Hylebos Marsh) are included in the TWAFA Site solely because they are potentially impacted by the CleanCare Facility—not because the properties are sources of the impacts.

⁶ Under MTCA, “facility” and “site” are used interchangeably.

multiple properties with differing ownerships and relationships. While this expansion of the Site boundaries may allow Ecology flexibility to administer the Site and require owners of adjacent properties to clean up their own properties to address CleanCare impacts, it does not automatically extend joint and several liability for the entire TWAAFA Site to these owners. Such an interpretation of MTCA is misplaced, circumvents the requisite finding of liability for the source property under RCW 70.105D.040(1), and obviously runs afoul of procedural due process.

Under MTCA, the PLPs for the **CleanCare** property are jointly and severally liable for the remediation of hazardous substances released at that property as well as any adjacent property impacted by those releases within the TWAAFA Site. See RCW 70.105D.040(2). The Port, however, is not a PLP for the CleanCare property under RCW 70.105D.040(1) and Ecology does not even attempt to make that case. Rather, Ecology apparently is asserting that it is not required to make a determination that the Port is a PLP under RCW 70.105D.040(1) for the CleanCare property as long as the Port is otherwise liable as a current owner of property somewhere within the larger TWAAFA Site. However, such a position is not supported by MTCA and is inconsistent with relevant case law. Ecology is required to determine that the Port is liable for the CleanCare property in order to extend joint and several liability for that property to the Port.⁷ While the Port understands it is strictly, and jointly and severally liable under MTCA to clean up properties it currently owns, the Port's joint and several liability in this case ends at the Port's property boundaries.

Ecology's insistence on employing an expansive facility definition to sweep nearby property owners into the scope of joint and several liability is an *ultra vires* act that plainly violates procedural due process under the law.⁸ Such an interpretation of MTCA taken to its logical end leads to a ridiculous result. For instance, consider the case of the Asarco Smelter Plume Site with air emission impacts to soils covering 1000 square miles. Applying Ecology's notion of joint and several liability to the entire Asarco Site makes each and every property owner within the Site not only liable for the emission impacts to the owner's property but also jointly and severally liable to clean up the entire Asarco Plume Site—with a cleanup price tag in the \$100s of millions. Such an interpretation runs afoul of any reasonable person's notion of due process.

⁷ This letter will not go into a complete legal analysis but suffice it to say, Ecology has failed to make the requisite showing of Port liability for the CleanCare property under RCW 70.105D.040(1) and thus is unable to hold the Port jointly and severally liable for the entire TWAAFA Site as a result. Ecology's sidestepping of its obligation to make such a PLP determination is arbitrary and capricious and not supportable by MTCA. Further, to the extent the Port is issued an enforcement order and incurs costs as a result, the Port intend to seek reimbursement directly from Ecology under RCW 70.105D.050(2).

⁸ An *ultra vires* action by an agency is one that is beyond the scope of its authority. While a full analysis of this issue and due process in this matter are beyond the scope of this letter, please review the opinion by Judge Bryan, Federal District Judge for the Western District of Washington. In *United States v. Wash. State DOT*, 2010 U.S. Dist. LEXIS 68100, *14-17, 40 ELR 20174 (W.D. Wash. 2010), the court rejected a similar attempt by EPA to overly expand joint and several liability through its definition of the CB/NT Superfund Site in the CERCLA context.

July 31, 2020
Letter to Ms. Gurian

Ecology is attempting to place responsibility to investigate and remediate the abandoned CleanCare Facility on the backs of the Port and the public it supports rather than the polluting PLPs directly liable. The Port would be abdicating its responsibility to the public if it agreed to accept such liability.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kimberly Seely', with a long horizontal flourish extending to the right.

Kimberly Seely
Attorney for the Port of Tacoma

cc: Eric Johnson, Port Executive Director
Jason Jordan, Port Director, Environmental Programs
Carolyn Lake, Port General Legal Counsel
Rob Healy, Port Senior Manager/Environmental and Planning Services
Scott Hooton, Port Environmental Project Manager