



People. Partnership. Performance.

P.O. Box 1837  
Tacoma, WA 98401-1837  
www.portoftacoma.com

Sent Via Email

TO: Washington State Department of Ecology  
Southwest Regional Office  
Attention: Steve Teel, Cleanup Project Manager  
Attention: Nancy Davis, Public Involvement Coordinator  
PO Box 47775  
Olympia, WA 98504-7775

FROM: Port of Tacoma  
Jason Jordan, Director, Environmental and Planning Services

DATE: February 4, 2021

RE: Taylor Way & Alexander Avenue Fill Area Site (TWAafa)  
Enforcement Order No. DE 19410—Public Comment Period  
Submittal of Port Comments

---

The Port of Tacoma offers these public comments to the Washington State Department of Ecology for TWAafa Enforcement Order No. DE 19410.<sup>1</sup> The Port objects to Ecology's edict requiring the Port to clean up properties to which the Port has no reasonable connection. As set out further below, the Port reaffirms its position that it is not a Potentially Liable Party (PLP) for the TWAafa Site, and that Ecology exceeded its authority in issuing Enforcement Order No. DE 19410. Nonetheless, the Port intends to work cooperatively with the other PLPs involved at this Site to advance the cleanup effort and comply with the Order in good faith. The Port reserves all rights to pursue cost recovery and reimbursement from both Ecology and other PLPs in the future.

## **THE PORT IS NOT A PLP FOR THE TWAafa SITE**

### **I. The Port Is Not A PLP under MTCA for Port-Owned Parcels within the TWAafa Site.**

The common thread cited by Ecology for including a property into the TWAafa Order is the presence of lime solvent sludge, byproducts of auto scrapping (auto fluff), wood waste, and other lime wastes placed in the ground during the operation of Don Oline's unpermitted landfill from the late 1960s to early 1980s. Lime solvent sludge is known to contain MTCA Hazardous Substances (trichloroethylene (TCE), tetrachloroethylene

---

<sup>1</sup> The public comment period ran from December 7, 2020 to January 5, 2021. The Port requested an extension of the period to February 4, 2021. Via email communications on December 30, 2020, Ecology did not formally extend the comment period but rather agreed to accept and consider Port comments submitted by February 4, 2021, and place those comments on the Administrative Record for the TWAafa Site and Enforcement Order.

(PCE), and vinyl chloride). Auto Fluff is sometimes associated with other MTCA Hazardous Substances (arsenic, cadmium, chromium, copper, lead, zinc, petroleum hydrocarbons, and polychlorinated biphenyls (PCBs)).<sup>2</sup> The discussion below describes alleged TWAIFA impacts with respect to each Port Parcel named in the EO. If our facts are wrong, or this analysis is flawed, the Port requests that Ecology respond with a thorough technical and **legal** analysis clearly articulating as to why. The more complete Ecology's response, the better chance we can resolve this disagreement.

**A. Port Parcels Subject to the Enforcement Order:**

1. Prologis/1514 Taylor Way (f/k/a 2000 Taylor Way):

The basis for including Former Prologis Property (a/k/a 1514 Taylor Way (APNs 0321267005, 0321356008, 0321355007)) within the TWAIFA Site is described in the 2020 Enforcement Order as follows:

The southern portion of the property remained a tidal marsh, and as filling progressed, an enclosed pond formed that extended onto the CleanCare and former Philip Services Corporation (now BE) properties. The eventual filling of the large marsh pond is believed to have been associated with the Don Oline Landfill. As described above, the Landfill material likely included hazardous substances associated with auto fluff and lime wastes. This filling likely took place after 1969 when historical photographs indicate the pond was still unfilled.

EO, Section V, ¶AA.2, p. 9. Ecology confirmed that the Prologis property was not owned by Don Oline. See EO, Exhibit C. Nonetheless, Ecology suspected that materials associated with the landfill spilled over across the Oline property boundary onto the Prologis Parcel (i.e., Oline trespassed onto Prologis and disposed of hazardous substances). Oline's unauthorized access—according to Ecology's interpretation of MTCA—renders the Port jointly and severally liable for the entire TWAIFA Site. However, the findings of fact in the EO are not informed by the comprehensive data and reporting from both Prologis and Port remediation efforts. Auto fluff and lime solvent sludge are not present on this Parcel causing impacts to soils above MTCA cleanup levels.

In support of the Port's position, a detailed account of the investigation and remediation of the Prologis property, and Ecology's involvement in those efforts, is set out below.

Cleanup History of Prologis Property:

---

<sup>2</sup> Wood waste and other lime wastes are solid wastes but are not considered hazardous substances.

February 4, 2021

TWAAFA Enforcement Order No. DE 19410

Page 3

Prior to Ecology allegations that the Prologis property is part of the Oline landfill, the only known release of hazardous substances on Prologis was a petroleum release documented in 1990. The release was remediated, and Ecology made a finding for “No Further Action” during June 2000. Shortly after Ecology made its NFA determination for the petroleum release, the property owner (Prologis) began planning for the redevelopment of the property. Prompted by a 2001 preconstruction meeting with the owner, City of Tacoma representatives contacted Ecology to discuss concerns associated with aerial photographs suggesting historical filling. Ecology raised concerns with the City about the planning for new development without the proponent undertaking additional investigation for subsurface contamination. (Prol-1, p 351). Following Prologis’ inquiry, Ecology provided a sketch in 2001—roughly inferred from aerial photographs—purporting to show the extent of filling on Prologis property. (Prol-1, p 344-43). Ecology alleged that the depicted area and neighboring parcels were used as a historic industrial landfill as follows: “A variety of wastes were deposited as fill in these areas, including lime solvent sludge and wood waste. Also found in some areas are auto fluff from demolished cars, and slag deposits from the Asarco operation in Tacoma. The pattern of contamination, spanning multiple parcels, is referred to as the “Oline Landfill”. (Prol-1, 342).

Ecology issued a March 22, 2004 Notice of Potential Liability to Prologis because the Prologis property “may have been part of the old Don Oline Landfill (boundaries of the landfill are unknown)”<sup>3</sup> and because “contaminated groundwater is being migrated [sic] onto the Prologis property from CleanCare site.” (Prol-1, 280). Prologis promptly responded on March 29, 2004, noting that contaminated groundwater migrated onto the property from CleanCare, an off-site source. (Prol-1, p 283). Consequently, Prologis asserted that it should not be liable under MTCA by virtue of the “plume clause” in RCW 70.105D.020(12)(b)(iv).<sup>4</sup> Nevertheless, Prologis accepted designation as a PLP for purposes of entering discussions with Ecology for an agreed order (AO) to investigate its property.

For purposes of the AO, Prologis developed a workplan for the completion of a Remedial Investigation and Feasibility Study for the property, incorporating extensive comments by Ecology. (Prol-1, p 247; Prol-1, p 234). Ecology indicated during its public outreach for the AO, e.g., Fact Sheets, that the purpose of the workplan was to determine if petroleum hydrocarbons, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), and metals resulting from operations at the adjacent Don Oline landfill were present at Prologis. Ecology asserted that Oline’s property was filled

---

<sup>3</sup> To clarify, when Ecology refers to landfill boundaries, the reference in this case must be the extent of where landfilled materials came to be located, not the actual boundaries of Oline’s landfill properties.

<sup>4</sup> Note that this provision is set out in MTCA under the definition of “owner” which is currently cited as 70.105D.020(22)(b)(iv) due to the addition of statutory definitions to this section since 2004, the date of the letter.

with lime solvent sludge wastes from Hooker Chemical, auto fluff from General Metals, and other wastes; and this filling activity may extend onto the adjacent Prologis site. Ecology also speculated that groundwater contamination from CleanCare (a former treatment storage and disposal (TSD) facility) could potentially extend onto the Prologis site. (Prol-1, p243; Prol-1, p192; Prol-1, p182).

Prologis entered Agreed Order DE 04-TCPSRO1160 to implement the workplan on January 19, 2005 (Prol-1, p213). During the AO public comment process, Ecology announced its approach to area-wide groundwater impacts. (Prol-1, p 175). Ecology recognized that other contaminated sites are present in this area (CleanCare Corporation, Phillip Services, and Emerald Services<sup>5</sup>) and widespread groundwater contamination exists because of past land uses, backfill materials and industrial activities. Consequently, Ecology planned to address the groundwater contamination as an area-wide issue collectively involving multiple properties—rather than properties individually—because of the intermingled groundwater plumes. See also Prologis Agreed Order (Prol-3, Scope of Work, last paragraph). Ecology noted that it would bring all PLPs under one agreed order and was in the process of identifying PLPs for the CleanCare Corporation site. After completing this effort, Ecology planned to negotiate a single agreed order with multiple PLPs to address area-wide groundwater contamination (Prol-1, p176-177).

The Prologis Remedial Investigation was submitted to Ecology on June 6, 2006 (Prol-1, p 77). After Ecology comments were discussed and incorporated, Ecology approved the RI/FS on December 19, 2006, confirming the scope of work associated with AO was complete. (Prol-1, p 63) (Prol-1, p 37). **The results of the investigation and exchange of comments showed—with Ecology concurrence—that neither auto fluff nor lime solvent sludge were encountered on the Prologis property.**

Just prior to its approval of the RI/FS, Ecology issued an Early Notice Letter of Potential Liability to Prologis for the CleanCare site on October 6, 2006, under its area-wide enforcement plan. (Prol-5) Prologis' December 12, 2006 response (Prol-1, p 42) explains why the property should not be included in the current AO and EO for the TWAAFA Site. Pertinent sections follow:

Prologis disputes its status as a PLP for the regional groundwater “facility” identified in your letter. Specifically, it does not appear that there are any hazardous substances present in soils at the Prologis facility that could account for the groundwater contamination observed at the CleanCare facility and other properties which are allegedly part of the area-wide groundwater facility referenced in your letter. Thus, under the “plume clause” of MTCA, Prologis

---

<sup>5</sup> Ecology provided an electronic copy of a March 1, 2006 Early Notice Letter to Emerald Services, citing the same reports Ecology cited in early notice letters to Ecology and the Port for conditions beyond the boundaries of the Prologis property (Prol-2). No follow-up response or liability determination has been located.

does not believe there is credible evidence to support designation as a PLP. Furthermore, Prologis has and continues to cooperate with Ecology in connection with ongoing remedial activities concerning contaminated groundwater and has addressed its responsibility for soils through performance of the terms of Agreed Order No. DE 04TCPSR-1160.

Ecology's designation of Prologis as a PLP is based upon a number of factual allegations contained in your October 6, 2006 letter. Set forth below are the relevant Ecology allegations together with Prologis' response.

**Page 1:** Ecology believes that a portion of the Prologis property was part of the old Don Oline Landfill and/or Landfill activities were extended (spilled over) onto Prologis property.

**Response:** *Recent investigations by Prologis established that only a small portion of the filling that occurred at the Don Oline landfill extended onto the Prologis site. The RI for the Prologis site indicated that the affected area was very minor, on the order of ½ acre or less, and limited to the upper foot of surface soils. Furthermore, the levels of contamination were relatively low and would not support a conclusion that groundwater impacts above applicable regulatory limits resulted from any disposal activities on Prologis's property.*

**Page 2:** The boundary of the old Don Oline landfill may extend onto Prologis property (on the eastern side of CleanCare). Boring and well logs on CleanCare property show the presence of auto fluff and lime solvent sludge. The approximate extent of auto fluff and lime solvent sludge is shown on figure 11-1. In addition, test pit TP-4 excavated on Prologis property showed the presence of white paste-like waste, indicating that the old Don Oline landfill boundary may extend onto the Prologis property (Enclosure 1).

**Response:** *While it appears that a minor amount of filling activities at the Don Oline landfill may have extended onto Prologis property in the area of TP-4, **neither autofluff nor lime solvent sludge was observed at the Prologis site** (emphasis added). The material in TP-4, while a waste, is free of solvents and was tested to be a non-hazardous waste. Ecology does not have credible evidence that hazardous substances (i.e., not solid waste) from the Don Oline landfill are present at the Prologis property. This is substantiated by information we reviewed in Ecology's PLP files. Hart-Crowser's 1986 report entitled "Preliminary Assessment of Past Practices in the Vicinity of the Poligen Facility, Port of Tacoma, Washington, contains a figure (Figure 1) that delineates the approximate extent of areas at CleanCare suspected to include Hooker (Occidental) Sludge Pond Wastes, Oily Wastes and Lime Wastes. A copy is included. Note that the area of these wastes, as well as the estimated boundary of General Metal's Auto Fluff, did not extend onto the Prologis property. Instead, what did extend onto Prologis property was fill containing woodwaste and*

*concrete, i.e. solid wastes and not hazardous wastes. Extensive sampling during the RI supports this conclusion.*

**Page 2:** Ecology believes that the groundwater contamination is an area wide issue that involves intermingled plumes with properties adjacent to CleanCare (Enclosure 3).

**Response:** *Ecology is correct that the predominant source of groundwater contamination in the area emanates from CleanCare and that Prologis is downgradient of CleanCare. However, the Prologis RI demonstrated that the COCs at CleanCare have not migrated onto the Prologis property. Ecology has no credible evidence of an “area wide groundwater problem” that involves migration onto Prologis property.*

As you know, RCW 70.105D.20(12)(F)(iv) defines “Owner or Operator” and excludes from its definition “any person who has 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.” This is precisely what occurred at the Prologis property. Thus, Prologis should not be considered a PLP for regional groundwater contamination. “

Ecology apparently did not respond to the specifics raised in Prologis’ letter, but did acknowledge on October 8, 2007 that Ecology no longer considered Prologis to be a PLP for the release at the TWAIFA Site—now that the Port has acquired the property—and Prologis no longer possesses an ownership interest. The letter mentions that the December 12, 2006 letter was received and evaluated by Ecology but provides no information on the specifics of Ecology’s evaluation. (Prol-6), (Prol-1, p 42). The Port respectfully requests that Ecology provide its evaluation in the responsiveness summary to this Enforcement Order.

The Port purchased the property from Prologis on January 10, 2007. The Port subsequently received two very different Notice and PLP determinations from Ecology. The first Notice of Potential Liability dated May 23, 2007 (Prol-1, p24) and Determination of Potentially Liable Person Status dated July 9, 2007 (Prol-1, p21) refer only to the Prologis property. The only credible evidence cited to support this determination is the October 3, 2006 Remedial Investigation, Prologis Taylor Way Property by Floyd Snider. Ecology does not mention a “regional groundwater facility” or “Don Oline Landfill” in its liability determination -- in stark contrast to the October 6, 2006 notice to Prologis. (Prol-5). The Port logically assumed that Ecology correctly found the plume clause exemption discussion in Prologis’ December 12, 2006 letter (Prol-1, p 42) persuasive.

Ecology subsequently issued an August 8, 2007 Notice of Potential Liability (Prol-7) expanding the Port’s purported liability for the Prologis property also includes its newly

christened Taylor Way and Alexander Avenue Fill Area (TWAAFA) Site. Ecology cited the same list of reports included in the October 6, (Prol-5) 2006 liability determination to Prologis in support of its position, but did not mention or otherwise address Prologis' contrary assertions (Prol-1, p 42, Prol-1, p 65 [Comments 11 and 12]; Prol-1 p115-118). The Port did not respond within the requested time frame and Ecology named the Port to be a PLP for the TWAAFA Site.

Since that time, the Port—through Agreed Order DE 13921 (July 31, 2017)—remediated the former Prologis property to address relatively minor impacts associated with former operations on the property unrelated to the Oline landfill and CleanCare. The continuity (rather the lack thereof) of lime solvent sludge and auto fluff present at the former Oline landfill and the Prologis property remains unchanged. The Port responsibly engaged in corrective action at the Prologis property and returned it to productive use. Data collected during the cleanup process confirm that the only link to TWAAFA could potentially be groundwater contamination migrating onto the property (although existing data show that is unlikely). Nonetheless, Ecology broadly casts its TWAAFA liability net over the Port based on the inferred presence of lime solvent sludge and auto fluff containing hazardous substance above MTCA cleanup levels based entirely on historical aerial photography. The credible evidence showing the absence of lime solvent sludge and auto fluff in more recent data apparently received little consideration in Ecology's TWAAFA liability determinations.

There are no soil impacts associated with the Oline Landfill at the Prologis property that renders the Port a PLP for the TWAAFA Site. Any area-wide contaminated groundwater migrating onto Prologis, requires Ecology and liable PLPs to address that problem, not the Port. Application of the "plume clause" exemption should absolve the Port from being named a PLP for such impacts.

2. Potter Property/1801 Alexander Avenue

The basis for including 1801 Alexander Avenue (APN 0321352063) is described in the 2020 Enforcement Order as follows:

[B]oring logs confirm that auto fluff and lime wastes were present. Unlined waste oil storage and treatment ponds from the now BE Tacoma property extended onto the Potter property. In November 2000, BE constructed a 104-foot long trench on the parcel to recover light non-aqueous phase liquid (LNAPL) petroleum hydrocarbon contamination on the groundwater surface. This contamination originated from the historic waste oil pond on the adjacent BE Tacoma Property.

February 4, 2021

TWAAFA Enforcement Order No. DE 19410

Page 8

EO, Section V. ¶ BB, p.11. The former owner disputed its proposed status as PLP for a regional groundwater “facility” in Ecology’s October 6, 2006 letter in a response dated November 17, 2006. (Pott-1) (Pott-2). The response noted that data indicate no hazardous substances in excess of applicable limits in the soils that originate at the Potter Property could cause or contribute to the groundwater contamination observed in the area, and any groundwater impacts migrated onto the Potter property. Thus, under the “plume clause” of MTCA, credible evidence supporting its designation as a PLP is lacking.

Ecology’s October 9, 2007 Determination of Potentially Liable Person Status acknowledged widespread and significant contamination on Potter caused by an off-site source originating at BE Tacoma. (Pott-3). Ecology noted that TPH contamination from the former waste oil pond on Parcel A is often present as an LNAPL in wells and soil borings on the Potter Property. However, Ecology disagreed that the plume clause exemption applied to Potter because Ecology personnel observed auto fluff and lime waste during the installation of soil borings GP-31 and GP-17. The boring logs also recorded petroleum odors in the auto fluff. Ecology further noted that “(s)ince auto fluff and/or lime waste were prominent fill materials in the Taylor Way and Alexander Avenue Fill Area Site, the presence of these hazardous substances in boring logs on the Potter Property shows that the Taylor Way and Alexander Avenue Fill Area Site includes the Potter Property. These hazardous substances did not migrate to the Potter Property via groundwater migration from an off-property source, a required element for the Plume Clause.”

The Port believes Ecology’s analysis flawed by conflating the presence of autofluff and lime wastes (that are admittedly solid wastes), with the presence of hazardous substances at concentrations exceeding applicable limits. Drafts of Ecology’s October 9, 2007 Determination of Potentially Liable Person Status provided in response to the Port’s public record request show some internal debate around whether the plume clause applies as follows:

[Steve and Kaia—do they have a point here? Is there evidence to show that TPH migrated from off-property via gw? Are we sure that TPH at this property comes from the auto fluff deposited there?] [The TPH contamination from the former waste oil pond on Parcel A is often present as an LNAPL in wells and soil borings on the Potter Property. But oily soils that are part of the auto fluff deposits **also** have TPH contamination that appears to be separate from the LNAPL plume from Parcel A. Auto fluff samples from all over the fill area have these oily soils (as well as wires, bits of upholstery, rubber foam, and pieces of taillights). kp]



February 4, 2021

TWAAFA Enforcement Order No. DE 19410

Page 9

(Pott-4). A close examination of the GP-31 and GP-17 concentration data shows why some within Ecology may have been reluctant to dismiss the plume clause exemption at Potter. Only one of the two borings indicating autofluff (GP-17) contained sample results with petroleum concentrations exceeding Ecology's most stringent Method "A" soil cleanup criteria (i.e. TPH as gasoline) (Pott-5, p76, Table 13). Detectable concentrations of volatile organic chemicals characteristic of gasoline (benzene, toluene, ethylbenzene and xylenes) were not present. Testing for aliphatic petroleum hydrocarbons was not performed, and so comparison to other applicable MTCA criteria (Method B and C) was not performed. The samples from GP-31 and GP-17 do not support the presence of lime solvent sludge from Hooker/Occidental Chemical because chlorinated solvents were not detected. These data show that the presence of solid waste (i.e. lime waste and autofluff) are not in of themselves reliable and credible evidence that hazardous substances are present at concentrations exceeding MTCA cleanup criteria. The laboratory-reported concentration data shows that autofluff containing petroleum above MTCA cleanup criteria at Potter is -- at best-- a *de minimis* isolated occurrence.

In contrast, the MTCA requirement for the removal of LNAPL that has migrated onto the Potter property from BE Tacoma — and unrelated to the Don Oline Landfill — is absolute (WAC 173-340-360(2)(A)). BE is already addressing this plume through its separate on-going TSD facility corrective action obligations — BE has a separate AO for that purpose. Moreover, BE already has an access agreement in place with the Port to allow BE consultants entry onto the Potter Property for continued monitoring of the petroleum plume. Given the situation, Ecology should 1) allow BE's corrective action already underway to address the Potter Property impacts, and 2) exclude the property from the TWAAFA Site entirely, or at the very least recognize that the Port is not a TWAAFA PLP for the Potter Property. As discussed supra, the Port should not be named a PLP for the groundwater contamination at this property due to the "plume clause" exemption.

### 3. Hylebos Marsh

The basis for including Hylebos Marsh (APNs 0321263045, 0321352064) is described in the 2020 Enforcement Order as follows:

These parcels comprise a wetlands/marsh and other undeveloped land that the Port purchased from the City of Tacoma in 2008. Historical observations indicate the parcels were used for periodic dumping and filling from approximately 1946 until at least 1991. Lime waste was observed in 1991 in surficial materials in the eastern portion of this area, and auto fluff is suspected to be locally present based on observations of rubber material in a 1991 boring log. A 1967 aerial photo shows a heavily used road running NE-SW across the parcels

from Alexander Avenue, which was likely used for transporting lime waste and other materials to the Don Oline Landfill areas.

EO, Section V. ¶ CC, p. 12.

It is critical to note that Ecology has never issued a Determination of Potentially Liable Person Status for the Hylebos Marsh property to the Port, or to any other party. The 2007 PLP determination letter issued to the Port by Ecology in November 2007, and cited in the EO, implicates the Port only by virtue of its current ownership of the Prologis property. **It does not include any reference to the Hylebos Marsh property.** EO, Section VI, Par. H, p. 15. Ecology decided sometime after 2007 to include the Hylebos Marsh property in the TWAafa Site.

Without a separate determination of the Port's PLP status specific to the Hylebos Marsh property, Ecology — by issuing this EO — is in direct violation of its own regulation — that expressly states that Ecology “shall issue its determination [of potentially liable person status] before an enforcement order can become effective.” WAC 173-340-540. Determination of liable person status requires Ecology to go through the process set out at WAC-340-500 allowing for a party's opportunity to comment prior to Ecology's issuing a determination of potentially liable status. In sidestepping this requirement, Ecology is violating the Port's due process right under the regulations to be heard. Moreover, existing clear and convincing evidence, i.e., Hylebos Marsh data described *infra*, demonstrates that Ecology has no basis, no supportable credible evidence, to justify such a determination. Consequently, it is the Port's position that the EO is not enforceable against the Port, at least with respect to the Hylebos Marsh property, until and unless Ecology issues a PLP determination.

Notwithstanding the legal consequences of Ecology's actions (or lack thereof), the Port has already implemented provisions of the Data Gap Work Plan (Exhibit B of Enforcement Order DE 19410) relevant to the Hylebos Marsh and provided reports of findings to Ecology (as well as to the other PLPs) in March and April 2020 (Hyle-1, Hyle-2). This investigation did not identify any hazardous substances in shallow soil at concentrations exceeding Ecology's most stringent Method “A” soil cleanup criteria. The data confirm that neither auto fluff nor lime solvent sludge are impacting the soils on the Hylebos Marsh property. Hazardous substances measured in the groundwater during this investigation are not associated with shallow fill soils located on the Hylebos Marsh Property; rather impacts result from migration through the groundwater from an upgradient source off the Hylebos Marsh Property.<sup>6</sup> Given this evidence, the Port cannot be a TWAafa PLP since there are no TWAafa related impact to soils (i.e., no auto fluff containing hazardous substances or solvent sludge is present) and the plume clause should absolve the Port from liability for migrating groundwater.

---

<sup>6</sup> Note that BE's adjacent TSD facility is immediately upgradient from the Marsh property.

**B. The Port Is Not a PLP for the Three Port Parcels Subject to the EO.**

Contrary to Ecology's assertions otherwise, the Port is not a PLP under MTCA by virtue of its current ownership of the three Port Parcels. None of the soil impacts at the three properties justify,<sup>7</sup> to the extent groundwater is impacted, the statutory definition of "Owner or Operator" at RCW 70.105D.20(22)(b)(iv). Excluded from this definition is "any person who has 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." The "plume clause" exemption applies to each of the Port's properties. To the extent groundwater contamination is migrating onto the Marsh Property (or any other Port property) and the impacted portions of the properties are deemed part of the TWAFA Site as a result, it should be up to Ecology and the responsible PLPs to further investigate and remediate as warranted. The Port's primary MTCA obligation in this regard should be to allow access as needed to accomplish remedial action as a non-PLP landowner of property within the Site. See RCW 70.105D.20(22)(b)(iv)(D).

**II. Ecology's Interpretation of MTCA Violates the Port's Right to Due Process.**

Under Ecology's expansive interpretation of MTCA, Ecology believes it can pick and choose among persons it determines are PLPs—no matter how tenuous the relationship to the Site—and require that PLP to clean up the entire TWAFA Site through under its concept of joint and several liability. In this case, the Port relationship to Don Oline's former properties—which collectively includes CleanCare and BE properties—is less than tenuous, its non-existent. The Port has never owned or operated these Oline properties previously used for his landfill activities. Furthermore, empirical data show that the TWAFA hazardous wastes of concern i.e., auto fluff and solvent sludge, were not disposed by Oline on Port properties at levels resulting in soil impacts above MTCA clean up levels. Ecology disregards this data—without sufficiently explaining its justification in doing so—and continues to point to outdated and speculative evidence (e.g., inferences from aerial photographs) not supported by actual data collected from these properties. (Prol-8, Prol-9, Prol-10, Prol-11) To the extent any of the Port properties are impacted by contaminated groundwater migrating onto Port properties from upgradient TWAFA properties, as discussed *supra*, the plume clause exempts the Port from liability. Given these facts, Ecology issuance of the EO is not defensible.

In correspondence to Ecology, dated July 31, 2020 and October 21, 2020, the Port presented several lines of evidence as well as legal defenses with respect to Port

---

<sup>7</sup> An isolated incidence of remnant solid waste, i.e., at Potter, does not suffice.

Parcels establishing that the Port is not joint and severally liable with the other PLPs to clean up the TWAFA Site, and that Ecology actions in this matter violate the Port's due process rights.<sup>8</sup> The Port will not reiterate all the points made in those letters but is compelled to present the following highlights:

- Ecology misconstrues the phrase “otherwise come to be located” in the MTCA statutory definition of “facility”. Ecology asserts that because contamination originating from the highly contaminated Oline/CleanCare property potentially “came to be located” on Port-owned properties, the Port is jointly and severally liability for all investigation and remediation costs involving that property. The phrase “otherwise come to be located” was inserted in the rule to prevent polluters from using a property line as a shield to evade liability for contamination that migrates off the property from which it originated. It was not intended to provide Ecology with a sword to compel a PLP to investigate a polluting property to which it has no connection, other than suffering the effects of a release originating from a neighboring property. See October 21, 2020 letter to Ecology, p.2.
- Ecology has no reasonable basis to issue the EO to the Port, especially given that there are three major polluting PLPs already signing onto an Agreed Order to perform the work at the TWAFA Site. The Port has offered access to its properties as needed to accomplish work under their AO. Ecology's insistence that the Port be a part of the cleanup effort at CleanCare is unreasonable and comes at significant cost to the public. See July 31, 2020 letter to Ecology, p.2.
- Ecology points to the Port's ability to seek cost recovery from the other PLPs as justification for inequitably forcing the Port to subsidize the other PLPs' remedial action costs incurred under the AO. The Port recognizes that it has cost recovery claims against the other PLPs — the MTCA's private right of action is a valuable tool for cost recovery — but that does not suffice to make the Port whole, especially in this case. If forced to incur costs associated with the former CleanCare property, any action to recover those costs will be extremely complex due to CleanCare's past use as a TSD facility where numerous generators sent significant quantities of hazardous wastes (including Ecology) for disposal. Cost recovery involving cleanup of the CleanCare TSD facility is a legal quagmire that should not be foisted onto the Port's shoulders.

### **III. MTCA's Third-Party Trespass Defense Shields the Port from Liability.**

---

<sup>8</sup> Letters sent to Ecology dated July 31, 2020 and October 21, 2020, are incorporated by reference into the Port's submittal to the Administrative Record.

MTCA provides that any person that “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: . . . (iii) An act or omission of a third party **(including but not limited to a trespasser)**” is exempt from liability under MTCA. RCW 70.105.105D).040(3)(a)(iii)(emphasis added). Any wastes from the Oline Landfill that spilled over onto the Port’s parcels constitutes a “trespass” by Don Oline. The Port satisfies the requisite statutory criteria — the Port has no connection or contractual relationship with Oline, and the Port has acted with the utmost care with respect to these wastes (e.g., the Port has investigated and remediated its Parcels as warranted to satisfy MTCA) — to qualify for the defense.

The fact the Port knew Oline’s wastes could potentially impact Port Parcels at the time of their acquisition is immaterial to the trespass defense. In contrast to CERCLA (and its case law re third-party claims), the third-party trespass defense is not linked to whether the party has knowledge.<sup>9</sup> MTCA has no such criteria applicable to the trespass defense. Rather, MTCA sets out the so-called innocent purchaser defense separately—see RCW 70.105D.040(3)(b)—where knowledge of the contamination at the time of acquisition is material to that defense. If a purchaser knew that contamination was present on the property at the time of purchase, that defense is not typically available. However, the MTCA third-party trespass defense does not include this factor among the qualifying criteria set out in the statute. See RCW 70.105.105D).040(3)(a)(iii). Thus, the Port is entitled to this defense which shields the Port entirely from MTCA liability related to the TWAafa Site.

#### **IV. Ecology’s Insistence that the Don Oline Landfill PLPs Clean up the CleanCare Property is Inequitable.**

For decades since the 1970s, Ecology has regulated hazardous waste management activities at CleanCare. Ecology’s long delay in taking enforcement action against CleanCare owners and operators (and any other party associated with known releases originating at CleanCare) has allowed those parties to avoid liability for the consequence of their actions and the cleanup of the property. Ecology has pursued a selective and limited Site enforcement strategy, despite the PLPs requests that Ecology pursue more parties among the many, many targets known to Ecology. Indeed, Ecology’s long history of Site investigations and enforcement activities (particularly involving the CleanCare and BE Parcels described in the AO/EO at Section V) show Site activities and hazardous substance releases for specific owners, operators, generators, and transporters known to Ecology. As the regulator of the facility, Ecology should have required CleanCare to address the conditions giving rise to Ecology’s past costs while CleanCare was operating its facility. If Ecology does not expand its enforcement strategy in the context of the AO/EO, Ecology should begin to do so immediately to prepare for the next phase

---

<sup>9</sup> Under CERCLA the third party defense does not expressly include “trespass”. See CERCLA §107(b).

of Site activities (implementation of a Cleanup Action Plan). And, it is particularly appropriate for Ecology to pursue other parties as soon as possible for recovery of Ecology's \$352,302.05 in past remedial costs (described as "deferred" by Ecology in Section VIII of the AO/EO "until the negotiation of the next formal agreement for the Site"). As the AO/EO Parties have previously demonstrated to Ecology, nearly all of Ecology's past costs relate to hazardous waste and material abandoned by CleanCare, stormwater management at the facility, and management of above-ground structures that were solely related to the former CleanCare operations. These remedial action costs arose from historical operations completely unrelated to alleged liabilities attributed to the AO/EO Parties.

Ecology's actions with respect to naming TWAIFA PLPs has been irregular at best. In 2007, the Port considered acquisition of CleanCare. At that time, Ecology considered the CleanCare Site property, portions of the BE facility, the Prologis Site, and the Potter Property parcel to comprise the TWAIFA Site. (Clean-2). In preparation for an ambitious terminal and infrastructure development project, the Port pursued the acquisition of numerous properties, on the Blair/Hylebos Peninsula, many of which were contaminated, including the CleanCare Site. (Clean-1, p871). After learning of the Port's plans, Ecology notified the Port that it would be named a PLP for CleanCare if the Port acquired the property. (Clean-1, p869). From 2007 through 2009, the Port and Ecology began planning for the acquisition, remediation, and redevelopment of CleanCare and other contaminated properties. (Clean-1, p820, 808, 805, 802, 797, 792, 792, 790, 789, 782, 780, 779). In March 2009, however, the Port informed Ecology that the terminal redevelopment project would be much smaller than initially planned. (Clean-1, p770), and that the Port no longer intended to acquire CleanCare. (Clean-1, p765).

Ecology did not mention at that time its intent to impose liability onto the Port to clean up CleanCare property regardless of whether the Port acquired the property. It wasn't until 2016 that Ecology decided to compel the Port to clean up the CleanCare property as well as the entire TWAIFA Site through its expansive interpretation of joint and several liability. It is not clear when or why Ecology changed its position. The Port requests a thorough explanation from Ecology with respect to its decision making in this regard.

**V. The Port Reserves the Right to Seek Recourse Against Ecology and other PLPs.**

Notwithstanding the above comments, the Port reserves the right to assert all claims and defenses against Ecology allowable under MTCA, including the right to seek reimbursement of its costs under RCW 70.105D.050(2). Additionally, the Port reserves all rights to seek cost recovery from the three PLPs that signed onto the AO. The Port currently has a prima facie case against each of the three PLPs under RCW 70.105D.080—MTCA's private right of action provision—to recover remedial action

February 4, 2021  
TWAAFA Enforcement Order No. DE 19410  
Page 15

costs and attorney fees the Port has already incurred, and will incur in the future, with respect to Port Parcels.