

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA,
INC., PHARMACIA, LLC, DOES 1 - 10,

Defendants.

Case No. 18CV00540

**OMNIBUS ORDER REGARDING
PLAINTIFF'S MOTIONS TO STRIKE
AND DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court for hearing on May 25, 2021 on the following

Motions:

1. Plaintiff's Motions to Strike Inadmissible Evidence Submitted with Defendants' Motions for Summary Judgment 1-12 ("Motions to Strike"). Plaintiff appeared through its attorney Steven Berman. Defendants appeared through their attorney James Pardo.
2. Defendants Monsanto Company Solutia, Inc.'s and Pharmacia LLC's Motion for Summary Judgment - Plaintiff Lacks Standing, or in the Alternative Motion for Partial Summary Judgment ("Motion for Summary Judgment 1"). Plaintiff appeared through its attorney Steven Berman. Defendants appeared through their attorney Jeffrey Eden.
3. Defendants Monsanto Company Solutia, Inc.'s and Pharmacia LLC's Motion for Partial Summary Judgment Based on Laches ("Motion for Summary Judgment 2"). Plaintiff appeared through its attorney Yoona Park. Defendants appeared through their attorney David Anderson.
4. Defendants Monsanto Company Solutia, Inc.'s and Pharmacia LLC's Motion for Partial Summary Judgment Statute of Repose ("Motion for Summary Judgment 3"). Plaintiff appeared through its attorney Yoona Park. Defendants appeared through

their attorney Jeffrey Eden.

5. Defendants Monsanto Company Solutia, Inc.’s and Pharmacia LLC’s Motion for Partial Summary Judgment – Plaintiff’s Trespass Claim (“Motion for Summary Judgment 4”). Plaintiff appeared through its attorney Jennifer Wagner. Defendants appeared through their attorney Kim Kocher.
6. Defendants Monsanto Company Solutia, Inc.’s and Pharmacia LLC’s Motion for Partial Summary Judgment as to Plaintiff’s Public Nuisance Claim (“Motion for Summary Judgment 5”). Plaintiff appeared through its attorney Keith Ketterling. Defendants appeared through their attorney Daniel Blakey.
7. Defendants Monsanto Company Solutia, Inc.’s and Pharmacia LLC’s Motion for Partial Summary Judgment on Plaintiff’s Fourth Claim for Relief Under ORS 468B.060 (“Motion for Summary Judgment 6”). Plaintiff appeared through its attorney Daniel Mensher. Defendants appeared through their attorney Daniel Blakey.
8. Defendants Monsanto Company Solutia, Inc.’s and Pharmacia LLC’s Motion for Partial Summary Judgment for Lack of Injury Due to PCBs (“Motion for Summary Judgment 7”). Plaintiff appeared through its attorney Jennifer Wagner. Defendants appeared through their attorney Anthony Upshaw.
9. Defendants Monsanto Company Solutia Inc.’s and Pharmacia LLC’s Motion for Partial Summary Judgment – Damages (“Motion for Summary Judgment 8”). Plaintiff appeared through its attorney Daniel Mensher. Defendants appeared through their attorney Kim Kocher.
10. Plaintiff’s Motion for Leave to Amend to Add Claim for Punitive Damages.¹ Plaintiff appeared through their attorney Alison Gaffney. Defendants appeared through their attorneys Jeff Eden and Anthony Upshaw.

The Court has reviewed all of the arguments and evidence submitted by the parties on these Motions and resolves the pending Motions as detailed below.

A. Plaintiff’s Motions to Strike

¹ Plaintiff’s Motion for Leave to Amend to Add Claim for Punitive Damages has been, and will be, the subject of separate Orders and is not addressed or resolved in this Omnibus Order.

Plaintiff brings twelve motions to strike documents and materials filed by Defendants in support of their Motions for Summary Judgment.

1. Plaintiff's Motions to Strike 1 and 2

Plaintiff's Motions to Strike 1 and 2 relate to Exhibits 65 and 73 of the Declaration of Lisa DeBord. Plaintiff describes these exhibits as comprising "Defense-drawn" maps, which Plaintiff argues should be stricken for lack of authentication and as inadmissible hearsay. Defendants respond that Exhibits 65 and 73 were submitted only for "illustrative purposes" in order to assist the Court in understanding Defendants' substantive arguments and "not * * * as substantive evidence."

The Court accepts Defendants' position that Exhibits 65 and 73 to the DeBord Declaration have been submitted merely for illustrative purposes, and that they are not offered as substantive evidence on any point. To the extent those Exhibits are cited as an evidentiary basis for any allegations of fact asserted in Defendants' motions, they may not serve that purpose and will not be considered to provide any such basis. However, the Court may consider them to the extent they help the Court understand Defendants' submitted substantive arguments and evidence.

Because Exhibits 65 and 73 are not offered as substantive evidence, they are not subject to being stricken. Plaintiff's Motions to Strike 1 and 2 are therefore DENIED.

2. Plaintiff's Motion to Strike 3

Plaintiff's Motion to Strike 3 relates to DeBord Exhibit 68, a document entitled "Forest Ownership in Oregon." Plaintiff moves to strike Exhibit 68 for lack of authentication and as

inadmissible hearsay. Defendants respond that the Exhibit is self-authenticating and a non-hearsay statement against interest. The Court agrees with Defendants' positions. Plaintiff's arguments that there are insufficient indicia of reliability and that the document's disclaimer that it "may not be suitable for legal * * * purposes" go to weight, not to admissibility.

Plaintiff's Motion to Strike 3 is DENIED.

3. Plaintiff's Motion to Strike 4-12

Plaintiff's Motions to Strike 4-12 relate to, in order, DeBord Exhibits 1, 6, 11, 7, 24, 25, 44, 72, and "[t]hose paragraphs of Monsanto's statement of facts and portions of Monsanto's summary judgment motions that reference or rely on the inadmissible evidence." (Mot. 1-2.) Plaintiff moves to strike the referenced exhibits as inadmissible hearsay. Defendants respond that these exhibits are not offered for their truth, but rather as "helpful background information to assist the Court's understanding of the context of the dispute." (Resp. at 5).

The Court accepts Defendants' position that the Exhibits that are the subject of Motions 4-12 are not offered as substantive evidence. To the extent those Exhibits are cited as an evidentiary basis for any allegations of fact asserted in Defendants' motions, they may not serve that purpose and will not be considered to provide any such basis. However, the Court may consider them to the extent they help the Court understand Defendants' submitted substantive arguments and evidence.

Because Exhibits 1, 6, 11, 7, 24, 25, 44, and 72, are not offered as substantive evidence, they are not subject to being stricken.

Plaintiff's Motions to Strike 4-12 are DENIED.

B. Defendants' Motions for Summary Judgment

Defendants bring each of their motions for summary judgment pursuant to ORCP 47.

Summary judgment is appropriate on a claim if a review of the evidentiary record reveals that there exists no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. ORCP 47 C. "No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.*

1. Defendants' Motion for Summary Judgment No. 1 - Plaintiff Lacks Standing, or in the Alternative Motion for Partial Summary Judgment

Defendants argue in this motion that Plaintiff lacks standing to seek damages for alleged harm to lands and natural resources that Plaintiff does not own. In particular, Defendants' Motion asserts that Plaintiff cannot recover for alleged harms to lands and/or natural resources owned and/or controlled by the Federal government and/or by Native American tribes. Plaintiff agrees that it cannot seek, nor recover for, harms to lands and natural resources that it does not own. Indeed, in its Response, Plaintiff states that it "does not seek relief for resources that are owned and controlled by the Federal government or Native American tribes."² The parties' disagreement on this motion arises, then, on a difference of opinion as to what lands, waters, and natural resources Plaintiff owns.

² Plaintiff's averment on these issues is consistent with the Court's reading of the operative Complaint. To the extent that the operative Complaint was at all ambiguous with respect to federal and/or tribal reservation lands, that ambiguity is now resolved, and Plaintiff is obliged to live with the position it has taken on this Motion.

Having considered the caselaw proffered by the parties, the Court agrees with Plaintiff's positions regarding the resources in dispute on this motion. Plaintiff enjoys standing to seek relief for all the harms to lands and waters covered in the operative Complaint. Plaintiff owns all the waters located within Oregon. Plaintiff also owns all the submersible and submerged lands beneath all navigable waters within Oregon (even for those waters that are on federal or tribal lands). *Montana v. United States*, 450 US 544, 551-57, 101 SCt 1245 (1981). Plaintiff also holds in trust all wildlife within Oregon's borders, including those that interact (that is, cross borders) with federal and tribal lands. Plaintiff thus enjoys standing to seek to recover for the alleged harms covering these lands, waters, and natural resources.

Defendants argue that there is no evidence in the record of any harm to the lands, waters, and natural resources identified in the operative Complaint. Having reviewed the evidentiary record on this Motion, the Court concludes that there is sufficient evidence in the record to establish a genuine issue of material fact on this issue.

Defendants' Motion for Summary Judgment No. 1 is DENIED.

2. Defendants' Motion for Summary Judgment No. 2 – Motion for Partial Summary Judgment Pursuant to the Doctrine of Laches

Defendants move for an award of summary judgment on Plaintiff's claims for nuisance and unjust enrichment on the grounds that these claims are barred by the doctrine of laches. Defendants urge that: (1) these claims are equitable in nature; (2) these claims are brought as proprietary (as opposed to sovereign) claims; (3) Plaintiff delayed unreasonably in bringing these claims; and (4) this delay has caused Defendants to suffer unfair prejudice.

Plaintiff responds by arguing that: (1) the doctrine of laches does not apply to claims for public nuisance; (2) laches do not apply to Plaintiff's nuisance claim because it seeks primarily monetary damages; (3) laches do not apply to either of these claims because Plaintiff brings them in its sovereign (rather than proprietary) capacity; and (4) there is no evidence in the record that Defendants have suffered any prejudice because of any delay in Plaintiff's bringing these claims.

a. *Public Nuisance Claim*

The doctrine of laches does not apply to Plaintiff's public nuisance claim for two independent reasons. First, the Oregon Supreme Court's opinion in *Lowell v. Pendleton Auto Co.*, 123 Or 383 (1927) forecloses the application of laches against a claim for public nuisance. In *Lowell*, the Oregon Supreme Court explained that "[i]t is well established that the doctrine of laches is inapplicable to public rights." *Id.* at 403. The *Lowell* Court noted further that "[n]o lapse of time can legalize a public nuisance." *Id.* (quoting *Strong v. Sullivan*, 180 Cal 331, 334, 181 P59 (1919)). Defendants' attempt to distinguish *Lowell* in their Reply is unpersuasive.

Second, the doctrine of laches does not apply against Plaintiff's public nuisance claim because it is an equitable claim for relief brought by Plaintiff in its sovereign capacity, rather than in its proprietary capacity as an owner.³ Plaintiff is acting in this case not in the capacity of a private landowner, but in its governmental capacity to enforce a public right and/or to protect a public interest. The doctrine of laches therefore does not apply to Plaintiff's public nuisance claim. *Corvallis Sand & Gravel Co. v. State Land Bd.*, 250 Or 319, 338 (1968).

³ The parties disagree about whether Plaintiff's public nuisance claim sounds in equity or in law. Having examined the nature of the relief sought on this claim in the operative complaint, *Thompson v. Coughlin*, 329 Or 630, 637–38 (2000), the Court agrees with Defendants that Plaintiff's public nuisance claim is equitable in nature.

b. *Plaintiff's Unjust Enrichment Claim*

The doctrine of laches does not apply against Plaintiff's public nuisance claim because – for the same reasons described above with respect to Plaintiff's public nuisance claim – it is an equitable claim for relief brought by Plaintiff in its sovereign capacity, rather than in its proprietary capacity as an owner.

Defendants' Motion for Summary Judgment No. 2 is DENIED.

3. Defendants' Motion for Summary Judgment No. 3 – Motion for Partial Summary Judgment Pursuant to the Oregon Product Liability Statute's Statute of Ultimate Repose

Defendants move for summary judgment on Plaintiff's common law claims on the grounds that those claims are governed by the Oregon Products Liability Statute ("OPLS"), ORS 30.900 *et. seq.*, and that the OPLS's statute of ultimate repose has run for those claims. Plaintiff responds that the Court has already determined that Plaintiff's common law claims are *not* subject to the OPLS, and thus not subject to that statute of ultimate repose.

Defendants presented this same argument in their ORCP 21 Motions to Dismiss and to Strike Plaintiff State of Oregon's First Amended Complaint. In its January 9, 2019 Order resolving the Rule 21 Motions ("January 2019 Order"), the Court rejected this argument. In so doing, the Court identified the following rule:

[I]f a product that is defectively dangerous to a consumer or a user injures a non-user/consumer as a result of the defect, then that "injured party's" claim is covered by the OPLS. If a product harms a non-user/non-consumer in a way not arising out of the defective condition that render[s] the product dangerous to users and consumers, a claim by such non-user/non-consumer for such harm is *not* covered by the OPLS."

(January 2019 Order at 10). Because the PCBs at issue in this case did not present the same risk to the users/consumers of PCB-related products that they allegedly pose to Oregon’s environment, the Court concluded that Plaintiff’s common law claims “do not ‘arise out of’ a defect that rendered the PCBs dangerous to their users and consumers,” and thus did not sound in product liability. (*Id.* at 12).

Defendants argue in the present motion that the Court’s determination that the OPLS applies to a bystander’s claim only if the bystander is injured by the same product defect that threatens a consumer/user of the product is wrong as a matter of law. In support of this view, Defendants point to and rely on the Oregon Court of Appeal’s decision in *Purdy v. Deere & Co.*, 281 Or App 407, 413–14, 386 P3d 2, 8 (2016).

Having considered *Purdy*, and having considered once again all of the factors and caselaw discussed in the January 2019 Order, the Court concludes that the rule identified in the January 2019 Order is correct, and the Court adheres to that rule for the reasons stated in that Order. That is, a bystander’s claim is subject to the OPLS only if that bystander is injured by the same defect that threatens a user/consumer of the same defective product. Because Plaintiff claims harms in this case that were not caused by risks presented by the relevant PCB-containing products to the users and consumers of those products, Plaintiff’s claims are not subject to the OPLS.

Notwithstanding Defendants’ arguments, *Purdy* does not suggest any contrary rule. The Court of Appeals had no occasion to address this issue in *Purdy* and did not so do. Defendants infer their preferred rule from the facts in *Purdy*, and because the Court of Appeals applied the OPLS to the claims presenting those facts. But those facts do not stand for the proposition that Defendants claim.

In *Purdy*, the plaintiff was a child who was seriously injured when her father accidentally backed a tractor mower over her while the mower blades were engaged. *Id.* at 413. The Court of Appeals applied the OPLS to the plaintiff's claims. *Id.*, *passim*. Defendants note that only a bystander could be injured by being backed over by the tractor while the mower blades were engaged. Defendants reason that *Purdy* therefore stands for the proposition that the claims of a bystander injured by a defect that *only* puts bystanders at risk come within the ambit of the OPLS.

The flaw in Defendants' reasoning is that it conflates the manner of injury with the product's defect. It is true that under the facts of *Purdy*, the user of the tractor mower was not at risk of having the tractor mower back over him or her, because the user was on top of the tractor mower. The only person who could be injured in the manner of the plaintiff in *Purdy* was indeed a bystander. But the same *defect* that posed that risk to that bystander also presented significant risk to the user/consumer of the tractor mower. The Court of Appeals identified the *Purdy* defect this way:

[P]laintiff's theory was that Deere's L120D lawnmower was defective and unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer, because not only (1) did the *existence* of the [button that allowed the tractor to back up with the mower blades engaged] allow the mowing blades to be engaged and rotating while driven in reverse, but also (2) the *placement* of that button on the dashboard permitted the operator to mow in reverse with the blades engaged without turning around fully to ensure that the path of reverse travel was clear. Plaintiff characterized this second alleged defect as a "visibility defect," and presented evidence at trial—in the form of testimony from * * * an engineer—that an ordinary user of the mower would not understand how large the mower's blind spot was, and would not understand that turning to one side or the other to check behind the mower was not sufficient to see behind the mower.

Id. at 413-14.

The claimed defect in *Purdy*, then, was that the tractor mower could be driven in reverse with the blades engaged while the driver was subject to – and unaware of – a significant “blind spot” that would not allow the driver to see sufficiently behind the mower. That this circumstance created a risk of injury to a bystander in the path of the reversing tractor mower is obvious. It is equally obvious that driving a tractor mower in reverse without being able to see properly what is behind the mower *also* poses a risk to the user of the tractor mower. It is a matter of common experience for anyone who has driven a car that driving in reverse without being able to see behind the car is dangerous for both the driver *and* for those behind the car. Little imagination is required to conjure the danger presented to the blithely reversing tractor mower user who proceeds – with mower blades engaged - toward an unseen low retaining wall, or a ditch, or a swimming pool, or a parked midsize sedan. While the type of injury that the user might suffer from running into/onto/through such obstacles (being jolted, being thrown from the tractor, being hit with flying debris, etc.) differs from the bystander’s risk (being run over by the mower blades), the same “visibility defect” presented by the blind spot created the risk of injury to tractor mower users and bystanders alike.

Purdy, then, does not carry the meaning Defendants assign to it. Rather, *Purdy* presents a set of facts where a product defect posed a risk to both the product’s users/consumers *and* to bystanders. *Purdy* does not stand for the legal proposition that claims arising from a product defect that presents a risk *only* to non-users/non-consumers are subject to the OPLS. As explained in the Court’s January 9, 2019 Order, the operative rule is that such claims do not fall within the OPLS’ ambit.

Defendants’ Motion for Summary Judgment No. 3 is DENIED.

4. Defendants' Motion for Summary Judgment No. 4 – Motion for Partial Summary Judgment on Plaintiff's Trespass Claim

Defendants move for an award of summary judgment on Plaintiff's claim for trespass on several bases: (1) that Plaintiff failed to "establish the validity of its novel trespass theory"; (2) that Plaintiff failed to meet its burden to prove that [Defendants] knew or should have known that its lawful out-of-state manufacture and sale of its product[s]" would cause a trespass in Oregon decades after the manufacture of those products; (3) that as to Plaintiff's claim for an intentional trespass, Plaintiff failed to establish that Defendants intentionally caused the alleged trespass; (4) that as to Plaintiff's claim for negligent trespass, Plaintiff failed to establish that Defendants were negligent; and (5) that as to Plaintiff's claim for trespass as a result of ultrahazardous activity, Plaintiff failed to establish that the "lawful manufacture and distribution of PCBs" was an ultrahazardous activity.

In response, Plaintiff points the Court to its ruling on Defendants' "novel trespass theory" argument at the motion to dismiss stage, and to various portions of the evidentiary record that it believes supports its claim for trespass.

As to Defendants' first basis for this motion, the Court has already determined that Plaintiff has stated a cognizable claim for trespass. (January 9, 2019 Order at 17-18.) As to Defendants' remaining bases for this motion, the evidentiary record reveals sufficient evidence to create a genuine issue of material fact as to each of the theories on which Plaintiff's trespass claim is based (intentional, negligent, ultrahazardous/abnormally dangerous activity).

Defendants' Motion for Summary Judgment No. 4 is DENIED.

5. Defendants' Motion for Summary Judgment No. 5 – Motion for Partial Summary Judgment on Plaintiff's Public Nuisance Claim

Defendants move for an award of summary judgment on Plaintiff's claim for public nuisance on the grounds that: (1) Plaintiff cannot establish that Defendants engaged in culpable conduct that created a public nuisance in Oregon; (2) Plaintiff cannot establish a causal connection between Defendants' allegedly culpable conduct and the claimed public nuisance at any geographic location; and (3) Plaintiff cannot demonstrate substantial or unreasonable interference with the public's rights due to PCBs.

In response, Plaintiff identifies various portions of the evidentiary record that it believes supports its claim for public nuisance.

The Court finds that there is sufficient evidence in the record to create a genuine issue of material fact on each of the elements of Plaintiff's claim for public nuisance.

Defendants' Motion for Summary Judgment No. 5 is DENIED.

6. Defendants' Motion for Summary Judgment No. 6 – Defendants' Motion for Partial Summary Judgment on Plaintiff's Fourth Claim for Relief Under ORS 468B.060

Defendants move for an award of summary judgment on Plaintiff's claim for natural resource damages pursuant to ORS 468B.060 on the grounds that Plaintiff failed to: (1) conduct a prompt investigation as Defendants argue is required by ORS 468.060 and OAR 635-410-0005; (2) calculate natural resource damages losses for harm to fish or wildlife that it attributes to PCBs as Defendants argue is required by ORS 468.060 and OAR 635-410-0030; and (3) comply with applicable demand requirements as Defendants argue is required by ORS 468B.060 and OAR 635-410-0035. Defendants also argue that they are entitled to summary judgment on this claim because ORS 468.060 was not intended to apply to the decades-long conditions

alleged by Plaintiff in this case, but rather to “fish kills” and other “acute injuries” due to chemical spills from an identifiable discharger.

Plaintiff argues that none of the Oregon Administrative Rules cited by Defendants apply in this action because they were promulgated by the Oregon Department of Fish and Wildlife (“ODFW”) while this lawsuit was filed by the Oregon Attorney General. Plaintiff argues that ODFW cannot, by promulgating its own regulations, bind the coequal executive branch office of the Attorney General. As to Defendants’ arguments that Plaintiff failed to satisfy its statutory obligations pursuant to ORS 468B.060 as delineated above, Defendants argue that: (1) the statute contains no deadline or requirement for a “prompt” investigation; (2) the statute does not require that Plaintiff utilize any particular formula for calculating damages; and (3) Plaintiff satisfied its statutory obligation to mail a written demand to the person responsible for the natural resource damages pursuant to ORS 468B.060(2). As to Defendants’ arguments regarding the scope of ORS 468B.060, Plaintiff argues that Defendants’ position is not supported by the statute.

The Court agrees with Plaintiff’s argument that the ODFW regulations cited in Defendants’ motion are without legal consequence in this litigation. The cited ODFW regulations by their own language apply only to ODFW itself. (*See* OAR 635-410-001(3)) (defining “Department” for the relevant regulations as the Oregon Department of Fish and Wildlife). Moreover, the Court can find no authority granted to ODFW by the Oregon Legislature to promulgate any regulations that may bind the Oregon Attorney General.

The Court likewise agrees with Plaintiff that ORS 468B.060 contains no requirements that Plaintiff conduct a “prompt” investigation of the environmental harms claimed in this case, or that Plaintiff calculate the damages from those alleged harms using any particular methodology.

The Court concludes that Plaintiff complied with the obligations imposed by ORS 468B.060(2). That statute, in relevant part, authorizes Plaintiff to file a suit for damages “if the person responsible under subsection (1) of this section fails or refuses to pay for the value of the fish or wildlife so destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration, within a period of 60 days from the date of mailing by registered or certified mail of written demand therefor.” Defendants argue that Plaintiff’s written demand in this case was defective for two reasons: (1) it failed to include a “specific amount of damages,” and (2) it was untimely, because it was filed thirteen days after the filing of this lawsuit (which did not upon filing include a claim for relief based on ORS 468B.060).

The Court can find no support for Defendants’ argument that the statute requires that the written demand include a “specific amount of damages.” Plaintiff’s written demand in this case demanded “compensation to the State of Oregon for the value of the fish and wildlife injured or destroyed and the cost of restoring production in affected areas.” This was sufficient to meet the statutory requirement that the “written demand” require the putative defendant to “pay for the value of the fish or wildlife so destroyed and for all costs of restoring fish and wildlife production in the affected areas.”⁴

As to the timing of Plaintiff’s written demand, the statute states that Plaintiff “may seek recovery” for the contemplated damages if the putative defendant fails or refuses to pay “within a period of 60 days from the date of mailing” of the written demand. ORS 468B.060(2). The evidentiary record reveals that it is undisputed that Plaintiff did not file its ORS 468B.060 claim

⁴ The evidentiary record reveals that it is undisputed that Defendants never responded to Plaintiff’s demand letter.

until after 60 days from the date of the mailing of its written demand. Plaintiff therefore complied with the time requirements of the statute.

Finally, the Court respectfully disagrees with Defendants' view of the scope of ORS 468B.060. In considering the scope of the statute, the Court has applied the well-understood statutory interpretation rules applied by Oregon's courts and considered the text, context, and legislative history of the statute. *See Zweizig v. Rote*, 368 Or 79, 83, 486 P3d 763, 766 (2021) ("As with other cases involving statutory interpretation, our methodology is to start by reviewing the text of the statute, in context, and considering any relevant legislative history.") (citing *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009)).

The Court can find nothing in the text of the statute to support the notion that the statute's scope extends only to "acute" environmental injuries. The statute's text defines its scope (as relevant here) as including circumstances "[w]here the injury, death, contamination or destruction of fish or other wildlife or injury or destruction of fish or wildlife habitat results from pollution[.]" ORS 468B.060(1). There is nothing in that text that suggests that the statute is intended to apply only to "acute" – as opposed to decades-long – incidents of environmental harm. Similarly, the Court can find nothing in the context or legislative history of ORS 468B.060 that would establish that the Oregon Legislature intended the statute to apply only to "acute events." Defendants do not purport to cite to such context or legislative history, but rather cite ODFW regulations and state training manuals that it maintains support its position. None of those cited materials are evidence of what Legislature intended and/or what ORS 468B.060 means.

Defendants' Motion for Summary Judgment No. 6 is DENIED.

7. Defendants' Motion for Summary Judgment No. 7 – Defendants' Motion for Partial Summary Judgment For Lack of Injury Due to PCBs

Defendants move for an award of summary judgment on Plaintiff's claims for public nuisance, trespass, and natural resource damages pursuant to ORS 468B.060 on the grounds that the evidentiary record "conclusively establish[es]" (with the exception of two geographic locations) that there is no evidence that satisfies the elements of injury required for each of those claims for relief. Defendants move, further, for summary judgment on Plaintiff's unjust enrichment claim, because that claim is dependent on Plaintiff's proving its claims for nuisance, trespass, and/or natural resource damages.

Plaintiff responds by pointing to portions of the evidentiary record that it argues present sufficient evidence of injury on its claims for nuisance, trespass, and natural resource damages. Plaintiff has also submitted an expert affidavit that it avers is sufficient to create an issue of fact regarding whether Plaintiff has been injured by the presence of PCBs in the environment.

The evidentiary record reveals sufficient evidence to create a genuine issue of material fact on the question of injury for each of Plaintiff's claims for public nuisance, trespass, natural resource damages, and unjust enrichment.

Defendants' Motion for Partial Summary Judgment No. 7 is DENIED.

8. Defendants' Motion for Summary Judgment No. 8 – Defendants' Motion for Partial Summary Judgment – Damages

Defendants move for an award of summary judgment on three different theories of recovery presented by the operative Complaint. First, Defendants move for summary judgment

as to Plaintiff's claimed past remediation costs, on the grounds that Plaintiff cannot identify any such costs that were incurred because of PCBs, and because Plaintiff may not "double recover" for past costs for which it has already been reimbursed. Second, Defendants move against the costs Plaintiff has incurred under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") on the grounds that those costs were apportioned to Plaintiff as a potentially responsible party and were later fully reimbursed by insurance. Third, Defendants move against Plaintiff's claim for future remediation costs on the grounds that any such costs are entirely speculative and thus incapable of reasonable calculation.

As to the portion of Defendants' motion relating to past remediation costs, Plaintiff argues that there is sufficient evidence in the record (including an ORCP 47 E affidavit it has filed on this point) to create a genuine issue of material fact as to whether Oregon has suffered past remediation costs related to PCBs. As to the portion of Defendants' motion directed toward CERCLA "double recovery," Plaintiff asserts that CERCLA does not preempt any recovery and asserts that it does not seek to recover costs related to the Oregon Department of Environmental Quality's oversight at Oregon Superfund sites. As to the portion of Defendants' motion directed toward future remediation costs, Plaintiff avers that the alleged harm is not speculative, and that the record contains sufficient evidence from which a jury could appropriately award damages.

The Court finds that there is sufficient evidence in the record to create a genuine issue of material fact as to whether Oregon has suffered past remediation costs related to PCBs. As to the "double recovery" issue, the record neither demonstrates nor disproves whether Plaintiff is seeking any improper "double recovery" that may be proscribed by CERCLA. Defendants' motion to prevent such recovery relating to one or more geographic sites is therefore premature. To the extent that Plaintiff at trial seeks (through presentation of evidence and/or argument) to

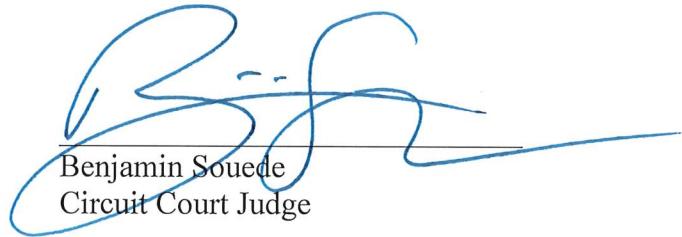
recover damages that Plaintiff believes are proscribed by CERCLA, Defendant may move at that time against such a recovery. As to future remediation costs, the Court finds that the record provides a sufficient evidentiary basis from which a jury could – if it so elected – determine and award non-speculative damages for some or all of Plaintiff's claimed future remediation costs.

Defendants' Motion for Summary Judgment No. 8 is DENIED. Defendant may renew its CERCLA preclusion motion at any time that Plaintiff presents argument or evidence in support of an award of damages that Defendants believe are precluded by CERCLA.

CONCLUSION

Plaintiff's Motions to Strike 1-12 are each DENIED in their entirety. Defendants' Motions for Summary Judgment 1-8 are each DENIED in their entirety.

DATED: July 8, 2021.



Benjamin Souede
Circuit Court Judge