



Oregon Department of Environmental Quality

Liability Management & Prospective Purchaser Program



Portland





Brownfield Redevelopment Challenges

- Unknown cleanup costs & length of cleanup
- Lack of money for investigation/cleanup
- Community concerns with abandoned or blighted property, environmental hazards, cleanup and redevelopment
- Reluctance of lenders
- Holding costs and return on investment
- Liability



WHOLE FOODS - PORTLAND





What Does “Liability” Mean?

- Legally responsible under state and federal laws to investigate and clean up contamination.
- May be subject to orders from DEQ or EPA to investigate and perform cleanup
- May be subject to legal action by DEQ or EPA to recover cleanup costs
- May be subject to contribution claims by other liable parties
- May be subject to third party claims for contamination that extends off the property.
- May be subject to natural resource damage claims by state and/or federal trustees.



Defenses to Liability

- Innocent purchaser
- Inheritance
- Eminent domain (condemnation)
- Security interest holder
- Key Concept: even if you have a successful defense, you will still own a contaminated property. A defense doesn't mean someone else will clean it up



What About EPA?

- Oregon and federal environmental laws (CERCLA) are independent basis for liability. With some exceptions, both apply to most contaminated properties
- However, EPA is concerned with the worst sites. The vast majority are left for DEQ to manage.
- Qualifying for CERCLA BFPP defense always a good idea to manage possible private liability actions .



Former Astoria Plywood





Former Astoria Plywood



When Liability Matters

Liability matters if a property will need cleanup after you purchase it. “Clean is the best defense to liability.”

Liability matters if you intend to buy a property without knowing the nature and extent of contamination, or the entire cost to clean up the property.

Liability matters if you are unsure that the seller, or other liable party, will complete cleanup after you purchase the property.



Liability in Context

- The degree to which liability is a significant issue in a transaction depends upon:
 - The extent to which the site has been investigated
 - The nature of the contamination
 - The extent of the contamination
 - The cost to cleanup the contamination
 - Uncertainty about any of the above



North Bend





North Bend



Liability and Risk Management

- Liability adds additional risk to the transaction and development
- **KEY CONCEPT:** Understanding sources of environmental risk, removing uncertainties, and managing remaining risk.
- Private (contractual) and governmental risk management tools



DEQ's Tools for Managing Risk at Brownfields



- Voluntary Cleanup Program & Independent Cleanup Pathway
- LUST Program
- Site Specific Assessments
(Federal funding for Site Assessment)
- Prospective Purchaser Agreements (PPAs)
- Security Interest Exemption Rules



Bend -Historic Millsite





Bend Millsite - Voluntary Cleanup Program



Bend Millsite 2002 Phoenix Award Winner





Rossman Landfill – Oregon City



Rossman Landfill- Home Depot SW Program





Prospective Purchaser Agreement

The Problem: potential liability for existing contamination – and associated uncertainties - are a significant obstacle to sale AND the parties cannot manage the risk contractually.

The PPA solution: an Agreement between DEQ and the purchaser that limits the purchaser's environmental liability to the state of Oregon, in exchange for "substantial public benefits."

- **KEY: PPA provides certainty for the buyer**
- Over 100 PPAs since 1995



Astoria





Millpond Village Former Astoria Plywood Facility Phoenix Award 2001



PPA's and Risk Management

- PPA can help manage risk of liability for preexisting contamination
- Especially useful when contamination affects other properties
- KEY: Complete, thorough, comprehensive site investigation



North Bend



North Bend Boat Ramp Former Chambers Oil Facility





Former Prineville Texaco



Prineville City Hall





What PPAs Do Not Do

- PPAs are not an “indemnity” from the state. The state will not defend you if you get sued by a third party.
- PPAs are not a promise that the state will clean up an unknown contamination that may be found in the future.
- KEY: Complete, thorough, comprehensive site investigation



Portland – Plating Facility County Ownership Through Tax Foreclosure





Portland – Plating Facility



Sellwood Lofts, Portland Former Rose City Plating Facility





PPAs As Organizational Tools

- At many sites, buyers and sellers both want complete cleanup and an NFA
- However, for reasons of timing or finances, cleanup cannot be completed before transaction closes
- PPAs can provide framework for linked agreements regarding responsibilities, allocation of costs, participation of govt funding partners, etc



Eugene – McVay Highway site Intergovernmental Cooperation





Eugene – McVay Highway site



Sequential Biofuels Retail Station





Sequential Biofuels Retail Station



Sequential Biofuels Retail Station Phoenix Award - 2008





PPA Process

1. Initial meeting between DEQ and purchaser - is this the right program? Does project fit PPA guidelines?
2. PPA Application and \$2500 deposit
3. Negotiate key terms with assistance of DEQ technical staff and purchaser's consultant and attorney
4. DEQ drafts PPA; purchaser reviews; finalized and executed
5. Purchaser takes title and records PPA
6. Cleanup occurs under appropriate program - usually either VCP or Tanks



The Best Laid Plans





Killingsworth Landfill Portland City Park



DEQ PPA Information

- DEQ Web Site: www.deq.state.or.us
- PPA Program Coordinator -
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