

# Redeveloping Brownfields in the Shadow of Superfund

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## Portland Harbor Superfund Site



- Approx RM 2- RM 11.6 of Willamette River
- Boundaries of “Site” to be determined at time of Record of Decision
- Will include much of river, although possibly not all of navigational channel
- Whether “Site” will include upland properties, and which ones, is to be determined at time of Record of Decision
- Currently over 250 potentially responsible parties identified



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## Portland Harbor Superfund Site



- Buy company?
- Lend?
- Lease?
- Invest?
- Buy property?
- Take easement?


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## Advantages to Buying/Leasing/ Investing in Portland Harbor

- Existing Infrastructure
- Transit corridors
  - Rail
  - Freight
  - Shipping
- Tax incentives for some projects
- Labor pool concentration

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## Hurdles to Buying/Leasing/Investing in Portland Harbor

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Liability for historic contamination

- Federal Superfund—remedial and NRD
- State Superfund



Necessary Upland Cleanup



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## Hurdles to Buying/Leasing/ Investing in Portland Harbor (cont.)

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Heightened constraints on development:



Uncertainty of required stormwater controls



Possible stricter scrutiny on process water discharges



Constraints on riverbank development

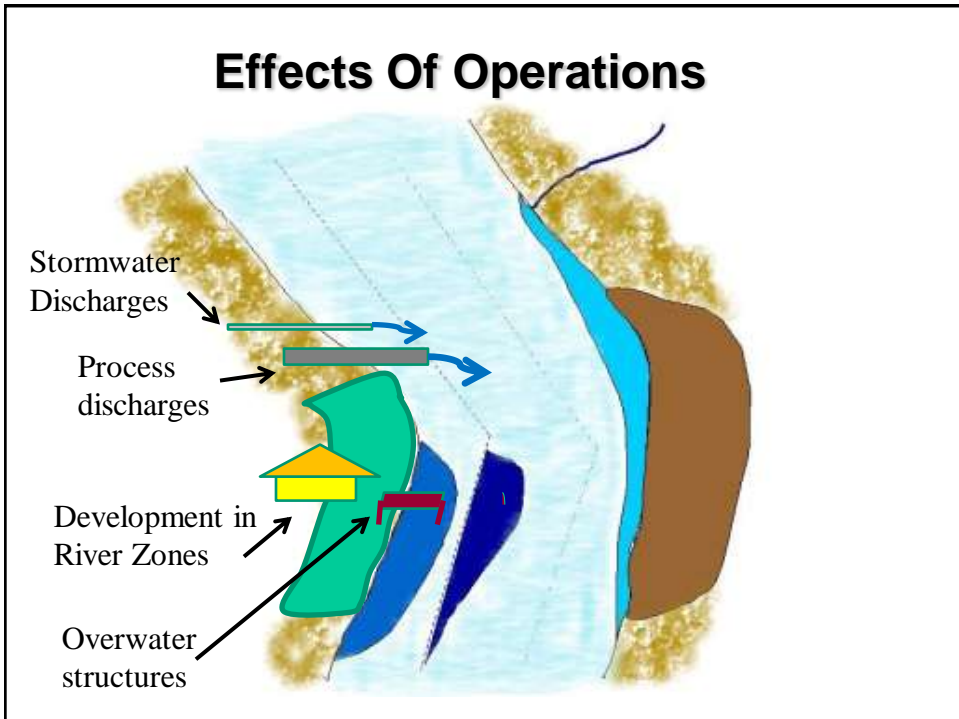
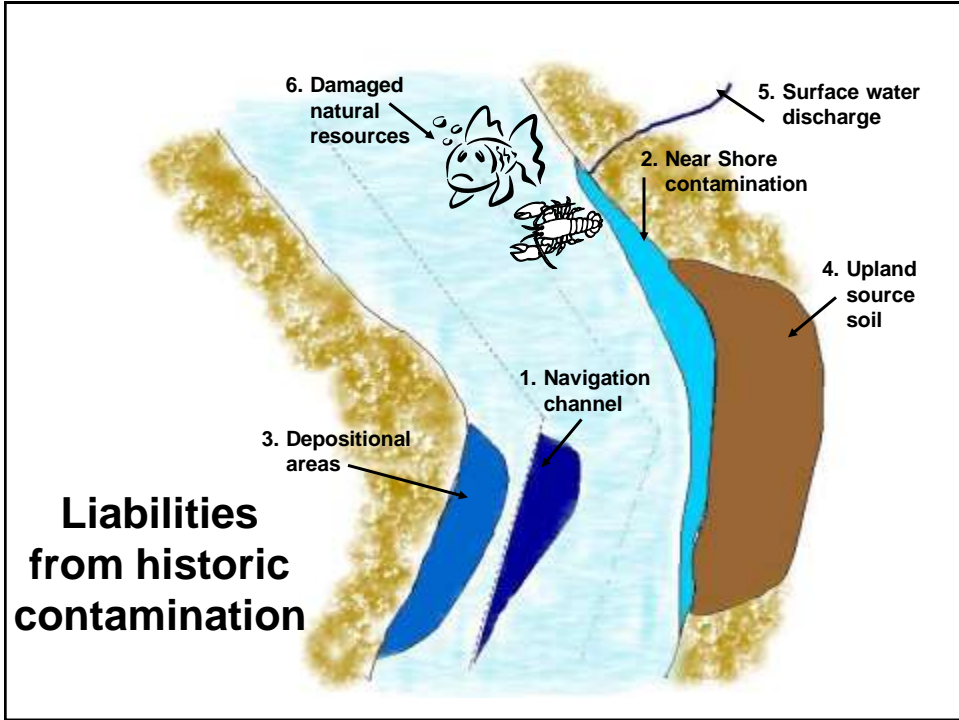


Possible constraints on in-water development



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## Historic Liabilities—State



Prospective Purchaser Agreements



Consent Decrees



May need to confirm that

- Resolution with State of Oregon bars third-party claims
- DEQ has administrative authority to resolve claims (without requiring court approved consent decree)
- DEQ can specify (to establish statutory defense) that development will not contribute to or exacerbate contamination



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## Historic Liabilities—State (cont.)



State can resolve liability for upland, but needs EPA approval of determination that site is not source to river



Would be helpful to have more presumptive remedies, with broader applicability



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## Historic Liabilities—Federal



- Small Business Liability Relief and Brownfields Revitalization Act of 2001

--Bona fide purchaser defense if “all appropriate inquiry,” **but** possible windfall lien, §222

--Innocent purchaser defense if “all appropriate inquiry” **but** requires access, institutional controls and reasonable steps to prevent continuing release

--No liability for migrating contamination, **but** can’t know or have reason to know at time of purchase



- *Burlington Northern v. US*—loosens reins on “divisibility” arguments



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## Historic Liabilities—Federal (cont.)



Cold comfort letters, but rarely given, and even rarer to private parties



Boundaries of site are unknown



Whether upland properties included in site unknown



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## Historic Liabilities—State & Federal

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Environmental Insurance



Contractual Indemnities



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## Heightened Constraints on Development

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Uncertainty of required stormwater controls

- Developer needs to be able to estimate stormwater capital costs and ongoing expenses
- Should be BMP-based, rather than numeric effluent limits, so cost is predictable



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## Heightened Constraints on Development (cont.)



Possible stricter scrutiny on process water discharges

- For development with process water discharge needs, need to know what discharge permit limits will apply and how they will be applied



## Heightened Constraints on Development (cont.)



Constraints on riverbank development

- Need certainty on constraints imposed because of riverbank contamination, including what levels will trigger concern (which will depend on cleanup standards for cleanup and recontamination analysis)
- Need to know requirements and be able to cost out compliance with City of Portland River Plan (setbacks, vegetation, resource enhancement standards in Environmental Zone, River Review)



## Heightened Constraints on Development (cont.)

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Possible constraints on in-water development or increased costs

- Based on Record of Decision



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## Questions??

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