Managing Contaminated Site Liability
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Gus Winkes
Seattle, WA
206-315-4613
awinkes@bdlaw.com

The purpose of this presentation is to provide you with current information and it is not intended as, nor is it a substitute for, specific legal advice.
Topics

Intro to Liability Management Tools

• Defining Liability

• Managing Liability
  – Acquiring / Selling Contaminated Property
  – Holding Contaminated Property
Liability, In Brief

• CERCLA / MTCA - Statutory Liability
  – Regulatory Agency – EPA and Department of Ecology
  – Third Parties – Contribution for Site Cleanup

• Nuisance, Trespass, Negligence – Tort Liability

• Contractual Liability
Liability, In Brief

- Time
- Uncertainty
- Site Investigation and Cleanup
- Oversight Costs
- Legal Costs
- Compensatory Costs
- Asset Impairments
- Opportunity Costs
- Negative Externalities
- Residual Risks
Managing Liability

• Initial Questions
  – Liability Now or Anticipated?
  – Liability to Whom?
  – Defenses to Liability?
  – Risk Tolerance?

• Think Outside the Box: Every Site is Different
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• Scoping the Liability
  – Extent and Magnitude of Contamination
  – Key Risk Pathways
  – Estimated Costs

• Fundamental Principle:
  Contamination $\rightarrow$ Liability
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**Acquiring / Selling Contaminated Property**

- Due Diligence
- Contractual Allocation of Liability
  - Purchase Price
  - Release
  - Indemnity
  - Representations & Warranties
  - Holdback & Escrow
  - Cleanup Agreement
  - Environmental Liability Buyout
- Environmental Insurance
- Prospective Purchaser Agreements
- Defenses to Liability
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- Contractual Allocation of Liability Cont.
  - Flexibility
  - Efficiency

**R&W** – “Seller hereby represents and warrants ... that ... neither Seller nor, to the Seller’s knowledge, any previous owner of the Property ... has ever used, generated, processed, stored, disposed of, released or discharged any Hazardous Substance on, under, or about the Property or ....”

**Indemnification** – “In the event Seller has breached the representations and warranties ... **Seller shall indemnify and hold Purchaser, its successors and assigns, harmless from and against all fines and penalties and liabilities ... arising out of or attributable to Hazardous Substances existing beneath or on the surface of the Property on or prior to any Closing or the migration thereof within or from the Property at any time, whether before or after any Closing, including without limitation the cost of any remedial, removal, response, abatement, clean-up, investigative and monitoring costs, and any other related costs and expenses.”

**Limitation** – “The representations and warranties ... shall survive the Closing and the delivery of the Deed for a period of twelve (12) months from the Closing Date....”
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• Prospective Purchaser Agreements Cont.
  – Resolution of Potential Liability
  – Contribution Protection
  – Performance and/or Payment Obligations
  – Re-Openers

“[Defendant] will conduct an RI/FS at the Site in accordance with the Scope of Work and Schedule attached.... In consideration of [Defendant’s] compliance with ... this Decree, Ecology covenants not to institute legal or administrative actions against [Defendant] regarding the release or threatened release of hazardous substances covered by this Decree.... [T]he Parties agree that [Defendant] is entitled to protection against claims for contribution for matters addressed in this Decree as provided by RCW 70.105D.040(4)(d)”
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• Defenses to Liability Cont.
  – Pre- and Post-Acquisition Requirements?
  – Utility?
  – State v. Federal Liability?
  – Statutory v. Tort v. Contractual Liability?
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**Innocent Landowner** – “The following persons are **not liable**…. Any person who is an owner, past owner, or purchaser of a facility and **who can establish by a preponderance of the evidence** that **at the time the facility was acquired** by the person, the person had no knowledge or reason to know that any hazardous substance **... was released or disposed of on, in, or at the facility**…. [T]he person must have undertaken, at the time of acquisition, **all appropriate inquiry** into the previous ownership and uses of the property, **consistent with good commercial or customary practice** in an effort to minimize liability…. The defense **is not** available to any person who had **actual knowledge** of the release **... when the person owned the real property** and who subsequently transferred ownership of the property without **first disclosing such knowledge** to the transferee .... The defense **is not** available to any person **who, by any act or omission, caused or contributed to the release** or threatened release of a hazardous substance at the facility.” RCW 70.105D.040(3)(b).

**Involuntary Acquisition** – “An agency of the state or **unit of local government which acquired ownership or control** through a drug forfeiture action under RCW 69.50.505, or **involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title**. This exclusion does **not apply to an agency of the state or unit of local government which has caused or contributed to the release** or threatened release of a hazardous substance from the facility.” RCW 70.105D.020(22)(b)(i).
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**Holding Contaminated Property**

- Mitigate Risks / Clean up Contamination
- Defenses to Liability
- Resolution of Potential Liability
  - Consent Decree?
  - NFA?
  - Property Sale?
  - Phasing?
- Contractual Allocation of Liability
  - Lease Agreements
- Historical Insurance Policies
- Contribution Actions
Thank You!

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Extra Slides
Northern State Multi Service Center
2070 Northern State Rd, Sedro Woolley, WA 98284

Northern State Multi Service Center

- **Timeline**
  - *State Psychiatric Hospital (1912-1973)*
  - Underground Storage Tank Removals (1993)
  - Annexed by City of Sedro-Woolley (2015)
  - *State Transfers Ownership to Port of Skagit (2018)*
  - Analysis of Brownfields Cleanup Alternatives (2018)
  - Phase I and Phase II Environmental Site Assessments (2018)
  - Agreed Order between Port of Skagit and Ecology for RI/FS (2019)
  - Interim Remedial Actions (Summer 2019)
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• Contamination
  – Tetrachloroethylene-Impacted Groundwater, Soil, and Soil Vapor (Former Laundry Building)
  – Oil and cPAH-Impacted Soil (Power House Building)
  – Lead- and Arsenic-Impacted Soils and Groundwater (Various Potential Sources)
  – Benzene, Toluene, Ethylbenzene, Xylene, and Gasoline-Impacted Groundwater and Soil (Maintenance Building)
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