

# Managing Contaminated Site Liability

## Washington State Brownfields Conference - Spokane

**May 30, 2019**

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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

# Managing Liability

- Scoping the Liability
  - Extent and Magnitude of Contamination
  - Key Risk Pathways
  - Estimated Costs
- Fundamental Principle:  
Contamination → Liability

# Managing Liability

## 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

# Managing Liability

- **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....”

# Managing Liability

- **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)”

# Managing Liability

- **Defenses to Liability Cont.**
  - Pre- and Post-Acquisition Requirements?
  - Utility?
  - State v. Federal Liability?
  - Statutory v. Tort v. Contractual Liability?

# Managing Liability

**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).

# Managing Liability

## 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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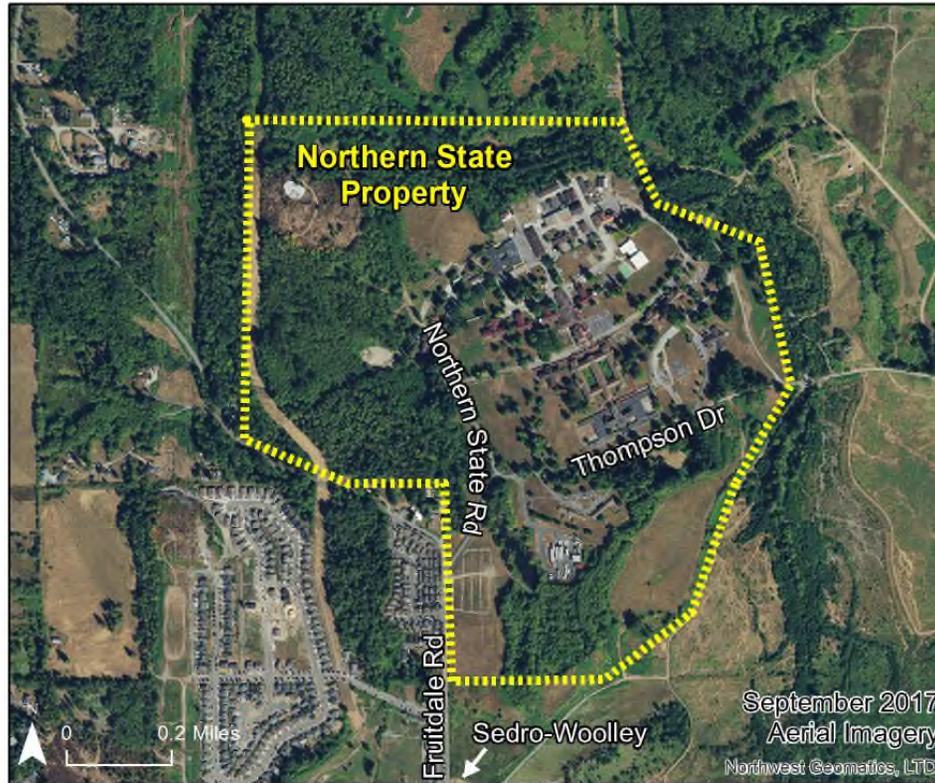
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# Extra Slides

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



<https://apps.ecology.wa.gov/gsp/Sitepage.aspx?csid=10048>

# Northern State Multi Service Center

- Timeline
  - **State Psychiatric Hospital (1912-1973)**
  - Underground Storage Tank Removals (1993)
  - Focused Site Assessment Report & Preliminary RI/FS (2015)
  - 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)

# Northern State Multi Service Center

- 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)

# Northern State Multi Service Center



Source: Aerial photograph obtained from Esri ArcGIS Online; parcels, roads, and stream datasets obtained from Skagit County; city limits dataset obtained from the City of Sedro-Woolley.

Note:  
AOC = area of concern.

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- Legend**
- Property Parcel and Parcel Number
  - Sedro-Woolley City Limits (Post Annexation)
  - Northern State Recreational Area
  - Road
  - Stream

**Figure 1-1**  
**Property Vicinity**  
Former Northern State Hospital  
Port of Skagit County  
Sedro-Woolley, Washington

