

Washington Department of Ecology
Legacy Pesticides Small Group Virtual Meeting Summary
Small Group #1 – Buyer Notification, Mapping, and Soil Sampling
Thursday, September 24, 2020 | 1:00 p.m. – 3:00 p.m.

Welcome

Facilitator, Joy Juelson with Triangle Associates, welcomed the group (see list of attendees) and requested brief introductions. Jon Sitkin was introduced to the small group as a lawyer at Chmelik Sitkin & Davis. Jon was invited to speak and discuss legal questions the small group had regarding liability, notification, and other potential legal impacts. Jon Sitkin has several decades of experience as a lawyer with land use, zoning, the State Environmental Policy Act (SEPA) compliance, and real estate transactions. The facilitator reviewed the previous meeting's highlights and summary and provided a brief overview of the Legacy Pesticides Working Group (LPWG) timeline.

Demonstration: Draft Mapping Tool for Legacy Pesticide Orchards

Valerie Bound, Ecology (ECY), introduced the unpublished draft mapping tool for identifying potential historical legacy pesticide orchard lands. The mapping tool was developed by ECY utilizing USGS map layers in response to calls received by the general public with requests to identify if their property was a previous orchard. The intention of the mapping tool is to create awareness, provide a resource to the public, and share information. Valerie clarified that the mapping tool is an initial screening method and property owners would need to have the property sampled to confirm if the soil is contaminated. She also noted the mapping tool will not be released until spring 2021 and Ecology staff will be making improvements to the tool over time. Jeff Newschwander, ECY, led the small group through a demonstration of the mapping tool.

Group Discussion: Liability and Feedback with Attorney

Jon Sitkin, attorney with Chmelik Sitkin & Davis, led the discussion with the small group and answered the following questions:

1. *Can a notification, similar to the one used for lead paint, suffice for liability purposes?*
 - A federal notification like the lead paint notification was federally mandated and there was a penalty associated with the notice. The comparison between lead paint notification and legacy pesticides orchard are two different situations. The legacy pesticides orchards fall under Ecology's authority to order a cleanup.
 - Jon commented that Ecology does have authority to order a cleanup. Valerie added that Ecology's goal is not requiring cleanups unless there is an imminent threat. Lead and arsenic are chronic threats that can have impacts over a long period of time but does not typically pose an immediate threat.
2. *When is cleanup required under the law?*
 - Ecology has the authority to conduct a cleanup when levels exceed the law.
3. *If I sample on my own, do I have to report the results to Ecology?*
 - Once someone conducts site sampling, they are liable to disclose if the results show high levels of lead and/or arsenic. Failure to disclose could lead to fraudulent charges.

4. *Can this stay a business transaction between buyer and seller? For example, seller agrees to price reduction for not addressing contaminated soil. Or no sampling or cleanup is conducted if new property owner agrees.*
 - No. In order to know if the soil has a high level of lead and arsenic, the seller will need to conduct a site soil sample with Ecology and/or with a consultant. Typically, a consultant would have the duty to report that information.
 - It is possible to develop an indemnification agreement between the buyer and seller, however, that would not absolve the seller from being a potential liable party under MTCA.
5. *Who pays for the cleanup?*
 - Generally, it is the current property owners.
 - It is also potentially possible to have insurance by the landowner pay for the cleanup.
 - Jon noted there is no absolute responsibility that people check. People can only fill out Form 17 to the best of their knowledge.
6. *Who is liable? The landowner? Grower? Developer? Homebuilder? Homeowner?*
 - Under MTCA, once there is knowledge of the historical legacy pesticide land with high levels of lead and/or arsenic, there is liability to clean up. From the real estate contracting perspective, there is liability and a duty to disclose knowledge of the property. If an individual or organization did not disclose and concealed the knowledge, it can be considered as fraud under the Consumer Protection Act.
 - However, predictability is important when discussing liability, especially for developers. If the process is predictable, defined and planned well, then there is a high predictability for developers.
7. *If Ecology has maps showing contamination or potential contamination, what responsibility does anyone have to check those?*
 - Ecology's mapping tool is currently not a requirement for homeowners and developers. Rather, the mapping tool serves as a potential resource. The data on the map is based on historical imagery and it contains sampling information collected by Ecology. Until the site is sampled, there is no official confirmation regarding the actual levels of lead and arsenic at the site. Once a homeowner or developer takes site samples, then there is knowledge and liability under MTCA.
8. *How does this affect property transactions?*
 - The seller must disclose any knowledge of the property. If an individual or organization did not disclose and concealed the knowledge, it can be considered as fraud under the Consumer Protection Act.
 - In terms of property value, there are several cases where there are local disturbed properties, but the prices for the housing are increasing and houses are still being sold. For example, there was a neighborhood where there was a rock pit crusher that creates loud and frequent noises. The houses in this neighborhood are increasing in price and are still being bought. Similarly, in Lynden, WA where there are many dairy farms, the housing and prices are increasing. Jon commented, there are solutions for these legacy pesticides efforts that would not be an inhibitor to property transactions and price.
9. *Are current orchardists liable?*
 - A current orchardist is only liable if they have knowledge of their current land containing high levels of lead and/or arsenic.
10. *If a current property owner discovers they live on an old orchard and want to sell their property, what do they have to do?*

- If the current property owners test and receive a positive test for high levels of lead and arsenic, then they have the duty to disclose the information to the property buyers.
 - The current property owners will likely go through a process that will be an outcome determined by the LPWG to address the property.
11. *If it is required on new development and not on existing residential properties, is there potential for a private citizen to bring a suit? What about an environmental group?*
- A private citizen can only bring a lawsuit if there is proof of injury. There is always potential for a lawsuit.
 - As for environmental groups, they may try to bring lawsuits if there was an injured party due to the contamination of the soil and bring right-of-action against liable parties. Ecology may be subject to the lawsuit to enforce the regulation.
 - Jon recommended a process or solution be predictable, assist in the understanding of liability, and limit the potential for a lawsuit.
12. General Notes:
- Recommendations regarding solutions & costs: Jon commented that based on a variety of scenarios, the best and likely low-cost scenario, is to collaborate and develop a programmatic solution with Ecology. Typically, a check-the-box remedy is significantly less expensive than hiring a lawyer and navigating the system. Similarly, liability should be resolved if a site is cleaned up.
 - Ecology enforcement: Valerie commented that Ecology does have authority to order a cleanup. However, Ecology will not typically require cleanups for existing residential property owners, unless there is an imminent threat. Lead and arsenic are chronic threats that can make impacts over a long period of time, and do not typically pose an immediate threat.
 - Loans on Legacy Pesticides Orchard Property: A small group member who is familiar with banking, commented that for loans on the residential side, the loan type would fall into a "health and safety bucket." Whereas for the commercial side, the developer would need to show how they would address the problem. Having a clear process for developers would be helpful from a banking perspective to develop a process to work between banks and developers. This is still an uncertain situation given that the process and information regarding former orchard and health risk are still developing for the bankers. The concern from a banking perspective includes risk. However, lead and arsenic are not an imminent risk compared to groundwater related issues.
 - Part of Ecology's goals and efforts regarding the Legacy Pesticides Working Group is to ensure that homeowners and developers who sample are not penalized compared to those who do not sample.
 - Notification Process: Small group members requested a simple and predictable notification process.
 - Inconsistencies: Small group members commented on seeing inconsistencies regarding processes and local governments are struggling to be consistent and set expectations.

Jim Maul, MFA, and the small group thanked Jon for joining the session and providing insights. Joy Juelson provided next steps that included MFA working on the Final Report and a large Legacy Pesticides Working Group meeting in late October or early November. The meeting was adjourned at 3:00.

Small Group Attendance (in alphabetical order by last name)

- Stephen Bishop, Realtor for Premier 1 Properties
- Jim Blair, Title/Escrow for North Meridian Title & Escrow
- Dean Emanuels, Banker for Washington Trust Bank

Ecology Staff/Consultants/Facilitation Team:

- Joy Juelson, Triangle Associates
- Katrina Radach, Triangle Associates
- Valerie Bound, Ecology
- Jill Scheffer, Ecology
- Jeff Newschwander, Ecology
- Jim Maul, MFA
- Kate Elliot, MFA
- Lisa Parks, MFA
- Phil Wiescher, MFA
- Jon Sitkin, Attorney at Chmelik, Sitkin, & Davis