Tools for Managing Potential Liabilities Associated with Contaminated Port Land

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Managing Potential Liabilities

- Some Environmental Issues in Leasing
- Current Techniques for Contamination Liability Management
- Continuing Obligations Associated with Liability Management Defenses
Managing Contamination Liabilities

Port of Portland’s Challenges:

- All of our marine facilities are built on land filled with dredged materials
- 3 marine terminals operate within the 9-mile Portland Harbor Superfund Site
- Expansion is constrained by historically contaminated industrial lands surrounding Port
- As a port district w/o sovereign immunity we are exposed to contamination liability under both federal and state law
- In Oregon there are no available state-tax-funded cleanup programs
PHSS RI/FS Study Area

Initial Study Area

LWG Sampling Extent

River Mile 6-11

River Mile 2-6

Do Not Quote or Cite: Preliminary Data and Draft Interpretation, All Content Subject to Change
Eco Risk Conceptual Site Model
Managing Contamination Liabilities

- Environmental Liability Allocation in Leasing:
  - Insist on “As Is +”
  - Environmental Baselining
  - Liability Presumptions
  - Other protections:
    - SPAR Plans
    - Explicitly address NRD liability
    - Periodic audits & annual certifications of compliance
    - Compliance with voluntary BMPs
Managing Environmental Liabilities

“As Is +”:
- Prospects required to do their own EDD
- Prospects required to perform AAI to meet CERCLA, OPA & equivalent state criteria:
  - Port makes list of environmental documents & related resources available
  - Port retains r & c rights re finalization of AAI
  - Port retains right to supplement AAI
Managing Environmental Liabilities

- Insist on Environmental Baselining:
  - Last 10 years, most Port industrial property has undergone environmental audit
  - 3 PHSS marine terminals have undergone RIs or RI/FSs
  - Phase 2 work aggressively undertaken as part of tenant exits
  - Results in pretty good information for baselining
Managing Environmental Liabilities

- **Presumed Liable:**
  - Environmental conditions in baseline are allocated to appropriate person
  - Any future condition not identified and discussed in environmental audit is presumed tenant’s responsibility to resolve
    - unless rebut presumption by demonstrating historical problem
  - Problem of allocating onsite migrating contamination (the Contiguous Property situation discussed later)
Managing Environmental Liabilities

- **UST, AST and Mobiles SPAR Plans:**
  - Tenant commits to tank management and operation practices beyond SPCC requirements

- **Explicit coverage of HSR resulting in NRD, tenant will resolve the NRD to satisfaction of NRTs**
  - No issue of owner having NRD responsibilities
Managing Environmental Liabilities

- Periodic Audits & Annual certification of environmental compliance
  - Cert. supplements period, special and exit audit of compliance
- Contractual commitment to implement identified voluntary BMPs
  - Non-permit, negotiated or trade association BMPs
Port Green Leases

- Project arising out of an EPA Regional Leadership Forum
  - Document Port “Green leasing” strategies
  - Using Port contracts to leverage significant environmental improvement across media
  - Document and share BMPs
  - Kathleen Bailey 1/25/07 Memo
  - Bailey.Kathleen@epamail.epa.gov
  - POP’s “model” environmental language
Contaminated Site User Continuing Obligations

- Due diligence & precautions don’t end with AAI for:
  - Innocent purchasers who find contamination
  - Condemnors who have to deal with contamination
  - CERCLA BFPPs (42 USC 9707(r)) and innocent acquirers under state prospective purchaser agreements (e.g., ORS 465.327)
  - Contiguous property owners/operators (passive migration scenario)
Contaminated Site User Continuing Obligations

- **Innocent purchasers** who find contamination
  - Found no contamination after AAI
  - No disqualifying contractual relationship with PRP
  - Subsequently discovers contamination that predated acquisition
  - Have continuing obligations re the contamination
Contaminated Site User Continuing Obligations

- **Condemnors** who have to deal with contamination
  - Acquisition through exercise of eminent domain authority by purchase or condemnation
  - Statutorily deemed to have no disqualifying contractual relationship with third party PRP
  - Have continuing obligations re the contamination
Contaminated Site User Continuing Obligations

- **CERCLA BFPPs**
  - Contamination predates acquisition
  - Non-affiliation
  - AAI
  - Have continuing obligations re the contamination
Contaminated Site User Continuing Obligations

- **Contiguous property owners/operators**
  - Property is or may be contaminated by hazardous substance release or threatened release from non-owned/operated property
  - Did not cause, contribute to or consent to contamination
  - Non-affiliation
  - Conducted AAI at acquisition and did not know of contamination
  - Have continuing obligations re the contamination
Contaminated Site User Continuing Obligations

- Common Elements of Continuing Obligations (CERCLA 2002):
  - Threshold Criteria:
    - non affiliation w/ PRP & do AAI
  - 5 Continuing Obligations:
    - Comply with land use restrictions and institutional controls
    - Take reasonable steps re onsite contamination
    - Cooperate, assist and give access (for cleanup & restoration)
    - Comply with information requests & subpoenas
    - Report reportable releases
## EPA 2003 Memo Common Elements

### Summary: Common Element Among The Brownfields Amendments Landowner Provisions

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<tr>
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<th>Bona Fide Prospective Purchaser</th>
<th>Contiguous Property Owner</th>
<th>Section 101 (35)(A)(i) Innocent Landowner</th>
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<td>Taking Reasonable Steps</td>
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<td>Providing Legally Required Notices</td>
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Contaminated Site User Continuing Obligations

- Non-liable Innocent landowners & Condemnors
  - Unlike for BFPPs and Contiguous Owners, non-liability NOT conditioned on compliance with information requests or release reporting
Contaminated Site User Continuing Obligations

Nonetheless, if worried someone might come after you, all four categories of non-liable parties:

- Should have some form of Continuing Obligations planning (COP) & implementation
- And document compliance
Contaminated Site User Continuing Obligations

- Port deals with COP requirements under EMS
  - Procedure requiring a COP for known contamination sites
  - Work instruction on elements of COP
  - Individual COPs
    - Document what’s there, how it’s to be dealt with, & roles & responsibilities
    - Emphasize duty to take care & report internally immediately on issues & discoveries
  - PAD your protections – plan, act, document
  - Educate and train
  - Add to checking & corrective action EMS functions
Continuing Obligations

- ASTM is working up a standard
- Working draft Standard Practice for Contaminated Properties (WK 9354)
- http://backroom.terradex.com/share/ASTM/
- Last conferenced February 1
Portfields

- NOAA-led federal interagency effort focusing on redevelopment of brownfields in port and harbor areas
- emphasizing development of environmentally sound port facilities
- http://brownfields.noaa.gov/htmls/portfields/portfields.html
- Overcoming contamination impediments
Portfields

- Worked with 3 pilots Tampa, New Bedford, Bellingham
- Southern Louisiana Ports
- Need for sharing challenges, opportunities & creative solutions across nation
- Need AAPA Portfields Initiative
Tools

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