



Brownfields: Should I be scared? No—you shouldn't be, but...

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**2023 Oregon Infrastructure Summit
CH2M Hill Alumni Center, Oregon State University
September 27, 2023**

Agenda

- What is a “Brownfield”?
- General owner liability standards
- Phase I and Phase II evaluations – do them
- How to mitigate the risk
- Use experienced professionals with the regulators

What is a “Brownfield”?

- Generally – any property with some environmental contamination that impedes development.
- Per ORS 285A.185: “Real property where expansion or redevelopment is complicated by actual or perceived environmental contamination.”
- Can be anything from a former dry cleaner site to a large-scale industrial setting such as the former Blue Heron site In Oregon City.

Are there brownfield properties in Oregon?

- They exist statewide;
- There are approximately 13,500 throughout the state;
- They exist in both urban and rural settings;
- Extent of cleanup required will vary.

General liability standard under CERCLA

- CERCLA (and Oregon law) is A “Strict Liability Statute” – status as an owner of real property imposes liability.
- Buying contaminated property generally includes buying the cleanup liability, even though the result of prior conduct.
- There are limited but important ways to mitigate this liability that starts with performing “all appropriate inquiry.”

Phase I and Phase II investigations

To understand what you are buying:

- You must do Phase I and Phase II investigations as warranted;
- Standards are set forth in ATSM E 1527-13 and 1527-21; and codified at Section 101(35)(B) of CERCLA and the regulations at 40 CFR Part 312;
- Failure to do Phase I and Phase II precludes ability for pre-purchase protection and may preclude financing options.

Understand your permitting needs

- Once you understand the extent of potential contamination, focus of what permits may be required
- These can include wetlands permits, fill permits, and mitigation permits
- These can be costly to obtain and timely to get – figuring what is needed is critical to project completion

How to mitigate risks: pre-purchase protection

- Negotiate a Prospective Purchaser Agreement (PPA) and Scope Of Work (SOW) with the regulators ahead;
- Negotiate a no-further action letter; or
- Evaluate the best means to facilitate risk transfer (e.g., indemnity agreements).

Negotiate a PPA and SOW ahead

- PPAs are unique in that you can negotiate the extent of cleanup in advance with DEQ or EPA;
- The SOW is the document that most likely has the greatest flexibility;
- Most PPAs are “orders” and are presented as “take it or leave it” deals by the DEQ and EPA;
- DEQ and EPA likely only willing to negotiate the terms of a PPA at highly complicated sites.

Remediate for your site use

- Remedies under cleanup statutes are risk-based;
- The cleanup levels will vary depending on future use;
- Do the amount of cleanup needed;
- Have a solid development plan in hand before engaging regulators.

What tools exist to facilitate risk transfer?

- Define what the “risk” is, then evaluate tools;
- Buyer to seller indemnity;
- Prospective Purchaser Agreements with DEQ/EPA;
- Purchase of environmental insurance.

Use appropriate professionals

- Brownfields are not “typical” real estate deals;
- They are complex and have unique issues, including:
 1. Doing an environmental cleanup;
 2. Working with regulatory agencies; and
 3. Dealing with a different set of risks
- Qualified technical and legal professionals will help navigate these issues and will be well received by the regulators.

Conclusion

- Brownfields do not have to be scary;
- They come with different issues and risk than typical land purchases;
- There are several way to mitigate or shift liability risk;
- Brownfields can be great development opportunities.

Any Questions?



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