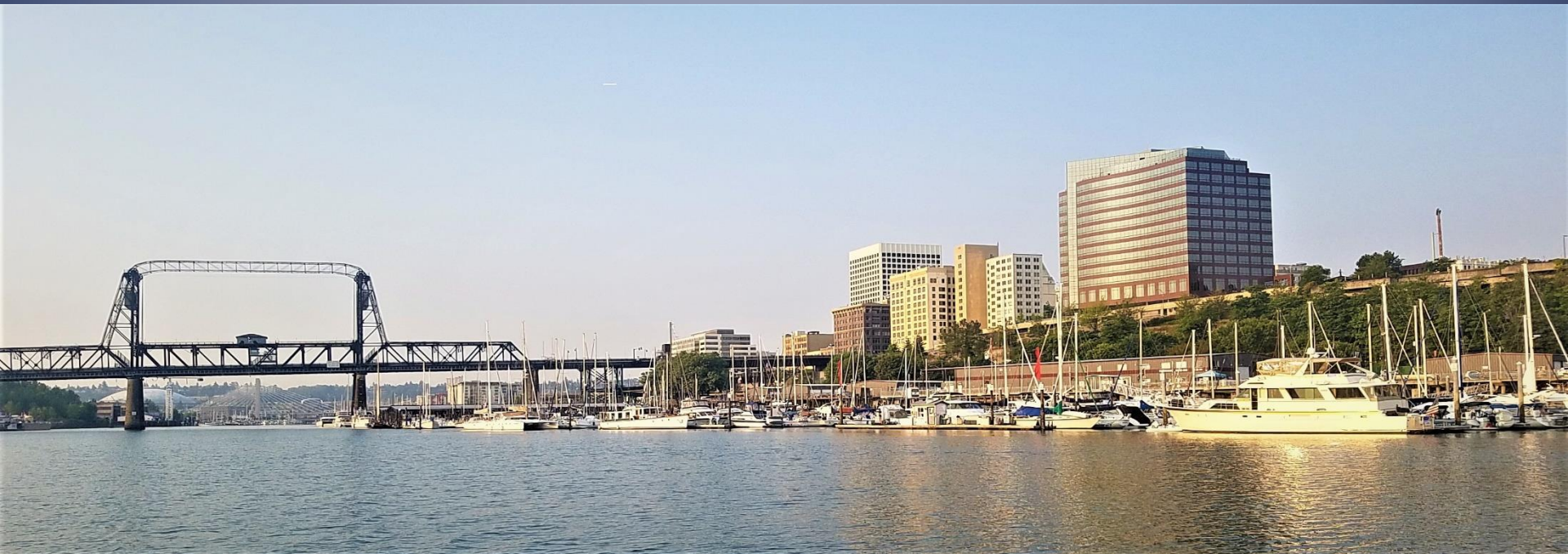




# VANDEBERG JOHNSON & GANDARA, LLP



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# When does property contamination become a problem?

- When hazardous materials are released

AND

- When it is discovered
- When other people learn about it
- When it needs to be cleaned up
- When property is changing hands

# Reporting Requirements

- Owners and operators are required to report
- Threat to human health or the environment
- People other than owner/operators are strongly encouraged to report

# Reporting Requirements

- Confirmed releases from underground storage tanks (UST) regulated under RCW 90.76: 24 hours
- Other hazardous substances: 90 days
- Exception for a small release where an independent remedial action will take care of the problem
- Ecology has 90 days to conduct initial investigation

# How do you know there's been a release?

- Rely on available physical evidence
- Visual observations, field instruments, and laboratory data
- Personal knowledge
- Phase 1 and Phase 2 environmental assessments

# Environmental conditions

- De minimis condition: Generally does not pose a threat to human health or the environment, and would probably not be subject to enforcement action
- Recognized Environmental Condition (REC): Presence or likely presence of hazardous substances or petroleum products under conditions that indicate an existing or past release, or threat of a release

# Environmental Conditions

- Historical Recognized Environmental Condition (HREC): Was a REC in the past and has undergone remediation that meets unrestricted (MTCA Method A) land use cleanup standards
- Controlled Recognized Environmental Condition (CREC): Was a REC in the past. Remediated with land use restrictions and/or is subject to controls.

# How do you know if it poses a threat?

- Use “best professional judgment”
- There are guidance documents and criteria set out in regulations
- Environmental consultants can help to answer this question



# Presumptive Threats

- Releases to potable ground or surface water
- Releases into air that can cause an inhalation hazard (vapor)
- Releases to surface water exceeding natural background or ambient water quality levels

# Presumptive Threats

- Sites where hazardous material has been dumped on the ground
- Releases resulting in the formation of free product
- Releases from USTs
- Industrial dump sites
- “Site-specific circumstances”

# Who's Responsible for Cleanup?

- Current owner and operator with any ownership interest or exercises control
- For abandoned facilities, who owned, operated, or exercised control before abandonment
- Owner/operator at time of release
- Arrangers

# Nature of Liability

- Joint and several liability: One or all potentially liable parties (PLPs) may be liable for the entire cleanup
- Strict liability: PLPs are liable regardless of who's at fault
- Ecology generally must issue PLPs a notice and solicit comments before ordering cleanup action at a Site

# Cleanup: An Overview

- Discovery and Initial investigation
- Hazard ranking and site hazard assessment
- Site investigation and characterization
- Identification of remedy
- Remedial action
- Site closure
- “Closure”: The intersection of MTCA and buying and selling property
- Predictability and certainty are issues

# Site Assessment and Cleanup

- Environmental consultant performs remedial investigation (RI) to characterize the Site
- What are the contaminants of concern?
- Is contamination limited to soil, or is groundwater also impacted?
- Is there vapor intrusion?
- Environmental consultant prepares FS

# Site Assessment and Cleanup

- Evaluate methods that could be used to clean a Site
  - What are the cleanup levels for that particular Site
  - Are there different cleanup levels for different parts of the Site
- Ongoing compliance monitoring

# Selecting a cleanup action

- Compliance with cleanup standards
- Compliance with state and federal laws
- Provide for compliance monitoring
- Use permanent solutions to maximum extent possible
  - Disproportionate cost analysis to find “most practicable”
- Reasonable time frame



# Closure

- Industrial areas present unique problems
  - Are there several contaminated properties?
  - Are there intermingling plumes?
  - How do you characterize the contamination to close the transaction?
  - This is hard to resolve within the 60-90 days of “due diligence” prior to closing
- As we’ll see later, might request and opinion letter from Ecology

# Closure

- Financial assurance might be required for sites using engineered containment
- Confirmational monitoring must be conducted to confirm long-term effectiveness of the cleanup action
- Where there are institutional controls or financial assurances, Ecology conducts review every five years

# Ecology-Supervised Cleanups

- Agreed Order
- Consent Decree
- Prospective Purchaser Consent Decree

# Agreed Order

- Legal agreement between the Washington Department of Ecology and PLP
- State determines when cleanup is complete
- State supervises cleanup
- Subject to public comment
- Does not settle liability
- WAC 173-340-530

# Consent Decree

- Legal document approved/issued by a court
- Subject to public comment
- State supervises cleanup and determines when cleanup is complete
- Settlement of liability and protection from contribution claims
- WAC 173-340-520

# Prospective Purchaser Consent Decree

- A particular type of CD entered into with a party not currently liable for remedial activity at a Site
- Prospective purchaser proposes to purchase, develop, or re-use the Site
- Usually there's a “public benefit” requirement
- Pretty uncommon

# UW Tacoma



# UW Tacoma

- 50 acres in downtown Tacoma
- History of industrial activity in the area
- 1980s: Arrcom, Inc. stored and managed dangerous wastes at the Site
- 1990s: Arrcom closed; State and neighboring property owner took over the Site



# UW Tacoma

- 1997: UWT and Ecology enter into Agreed Order
- UWT accepted responsibility as a PLP to clean up soil and groundwater
- Schedule of deliverables includes ongoing monitoring

# UW Tacoma

- Historic contamination
  - Chemical degreasers, oil, and fuel
  - Soil and groundwater impacts
- Early stages up cleanup
  - Initial investigation
  - Site characterization
  - Soil borings, monitoring well installation, soil and groundwater sampling

# UW Tacoma

- Under AO, UWT started interim action at Howe parcel
- Conduct RI to determine nature and extent
- Conduct feasibility study (FS) to evaluate cleanup options
- Submit draft cleanup action plan (CAP)

# UW Tacoma

- What does RI look like?
  - Soil borings around the perimeter of a Site
  - Soil sampling
  - Installation of groundwater monitoring wells
  - Groundwater sampling on a quarterly basis
- Goal is to find the edges of the Site
- The Site is not defined by property boundaries

# UW Tacoma

- RI also includes sub-slab sampling to check for vapor intrusion
- RI work can be extremely time-consuming
- Requires access agreements and indemnities for property damage, scheduling contractors, &c., and contract negotiations can add a lot of time to a transaction

# UW Tacoma

- Draft an Agency Review RI Work Plan, to be implemented after Ecology approval
- Draft an Agency Review Draft RI Report
- Draft an Agency Review Draft FS Report
- After approval, draft a Draft CAP
- Final CAP will be drafted by Ecology and implemented in order or Consent Decree

# UW Tacoma

- If UWT fails to make sufficient progress, Ecology will take over the cleanup at UWT's expense
- The AO is not a settlement agreement, but Ecology won't sue UWT to recovery costs
- Ecology won't take additional enforcement action if UWT complies with AO

# UW Tacoma

- UWT may not transfer the property, or an easement, leasehold, or other interest, without providing for continued implementation of the AO
- UWT has to provide any prospective purchaser or lessee with copy of the AO
- UWT has to notify Ecology



# Cleanup without Ecology supervision

- Independent Remedial Action
  - WAC 173-340-515
- Voluntary Cleanup Program

# Voluntary Cleanup Program

- PLP applies to enroll the Site into the VCP
- Upon acceptance, Site owner works with Ecology
  - Overwhelming interest led to long wait lists
  - Petroleum sites now go to Pollution Liability Reinsurance Agency (PLIA)
- Site owners can seek opinions from Ecology on cleanup
- The No Further Action Opinion Letter

# How to proceed with cleanup?

- VCP or PLIA?
- PLIA limited to petroleum contamination
- VCP not limited by contaminant, but there's a wait list
- Both now provide for an opinion letter

# VCP

- Submit application to enroll Site into the VCP
  - Request an opinion with the application
  - Need to submit remedial action plan or report with request, or
- Conduct an investigation and request opinion on remedial action plan, or
- Conduct a cleanup and request opinion
  - Submit remedial action report

# VCP

- Once a request for opinion is submitted, expect 90 days at a minimum
- “Further action” means further action is necessary for the remedial action to be the substantial equivalent of a cleanup overseen by Ecology
- “No further action” means the cleanup is the substantial equivalent of one performed by Ecology and no further action is anticipated

# VCP

- Cleanup levels for industrial properties different than for residential
- At petroleum impacted sites, 87% used soil removal for all or most of the remedy
- Other common remedies include soil vapor extraction and groundwater extraction

# NFA – The Holy Grail

- NFAs signal that the Site meets State cleanup requirements
- NFAs provide some amount of assurance that liability has been addressed
- Ecology has 5-year reopeners
- NFAs are not binding or permanent
- NFA may require environmental covenant

# Environmental Covenants

- Procedure 440A, Establishing Environmental Covenants Under MTCA
- Includes instructions on how to complete an Environmental Covenant
- Samples letters for local government consultation and boilerplate Environmental Covenant



# Environmental Covenants

- Restrict future development by requiring remediation in the event of future development
- May prevent future development depending on contaminants
- Tacoma Tideflats: “In perpetuity”

# Other Agreements

- In addition to regulatory agreements, there are agreements with other PLPs
- Sometimes, the only thing that will make a deal go is an affirmation from an oil company that it will do the cleanup
- Separate contractual agreements allocate liability, and may affect value
- Assignment of insurance claims