E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

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For further information about prospective purchaser considerations under CERCLA, make sure to attend the upcoming **FREE CLE on October 17, 2012** from 12-1:00 pm at Davis Wright Tremaine, or by telephone. For information and to RSVP, contact Anzie Nelson at Anzie.Nelson@portofportland.com.

Maximizing the Benefit of Appropriate Inquiry: CERCLA & Prospective Purchaser Considerations

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As mentioned in Ms. Chapman's E-Outlook article earlier this year (2012, Issue No. 3), Prospective Purchaser Agreements ("PPAs") are an innovative approach to address barriers to the cleanup and redevelopment of contaminated sites. As discussed in the prior related brownbag CLE presentation, clean is the best defense to liability. But as a practical matter, other considerations lead buyers to consider contaminated properties. The Department of Environmental Quality's ("DEQ's") Prospective Purchaser Agreement ("PPA") Program offers an important tool for buyers to proceed with transactions despite the presence of contamination. Not all sites qualify for participation. What if a site is not a candidate for the PPA process? What if the schedule for a transaction cannot accommodate the PPA process? A follow-up brownbag CLE will be held on October 17, 2012 to discuss a range of details that may be considered when purchasers pursue the route of purchasing industrial or commercial properties with environmental liabilities and tools to minimize these liabilities instead of (and sometimes in addition to) having state or federal liability protections as a component.

At the heart of such an analysis is figuring out how to identify the liabilities that may be associated with a purchase, and then allocating the associated risks accordingly. When the dollar went further there was a saying that anyone can win a lawsuit if they spend a million dollars on it, but that doesn't help your client if the case is worth $500,000. In transactions, the focus needs to be on all appropriate inquiry. This is a combined technical and legal problem, because the American Society for Testing and Materials ("ASTM") standard and definition of "All Appropriate Inquiry" is limited to consideration of hazardous substances. There are many other considerations that go into a property acquisition, such as regulatory compliance, building materials, and natural hazards, that go beyond the identification of Recognized Environmental Conditions ('RECs"). So, it is critical that the attorney and

consultants work together to identify the information needed to assess liability and continuing obligations with the purchase, and the corresponding level of inquiry that is needed to characterize and quantify these considerations.

The current ASTM standards establish the floor in exercising due diligence for environmental site assessments. There are risks in publishing reports with incorrect, inadequate or poorly interpreted data, or performing testing that is either disproportionate to the amount of liability or provides little marginal clarification of liabilities. Inadequate or poorly interpreted data can result in a failed transaction and a "stain" on a property that is difficult to remove and diminishes value, which becomes a technical and legal issue no one wants. These are recurring considerations for consultants, because Phase I Environmental Site Assessments ("ESAs") are frequently commodity activities where cost is the primary basis for selection. As a result, many Phase I ESAs are completed that may meet the minimum ASTM standard, but may not have asked and addressed key considerations, such as environmental business risk, natural hazards, hazardous building materials, former agricultural chemicals, and many others. Even worse results can occur if the consultant is selected based on price alone. In 1994, owners of more than 30 contaminated sites learned that their consultant had submitted false or forged documentation. Choosing the lowest cost consultant turned out to be quite expensive.

Once environmental liability is identified, responsibility for the liability and future risk needs to be allocated. The answer may be allocation or indemnifications involving the parties, insurance coverage, and other potentially responsible parties. The State can be a participant in this negotiation through the PPA process. However, there are risks associated with participating in the Bona Fide Prospective Purchaser ("BFPP") process. Violation of the purchaser's obligations can result in significant liability. Further, buildings and continuing business on the contaminated property present issues that may create separate problems for the buyer. Buyers need to be sure that the allocation of all liability is addressed prior to completing the purchase. An effective purchase and sale agreement can clearly identify the liabilities, continuing obligations, and responsibilities moving forward. This may involve allocation and indemnifications. These considerations and tools can be used to understand risks and get parties to see past fear and blame, and, instead, forge agreements to implement solutions that often involve multiple parties or multiple issues.

Purchasers are placing money on the table. There are many things that can go wrong and many of those things involve environmental liability. There is no magic bullet, but the best advice is to consider all the potential risks and develop an appropriate strategy before the deal is done, and then keep re-thinking all of the risks as new data become available. It is a dirty world so it is best to be careful!

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If you would like to contribute to E-Outlook or have any comments, please contact the E-Outlook Editor, Sarah Liljefelt, at s.liljefelt@water-law.com or (503) 281-4100.