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Editor's Note: We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website at: <http://www.osbenviro.homestead.com/>.

For further information about the Prospective Purchaser Program, make sure to attend the upcoming FREE Brownbag CLE presented by Cheyenne Chapman on August 20, 2012 from 12-1:00 pm at Miller Nash LLP, or by telephone. For Brownbag CLE information and to RSVP, contact Anzie Nelson at Anzie.Nelson@portofportland.com.

Oregon's Prospective Purchaser Agreement Program: A Tool to Manage Liability When Acquiring or Leasing Contaminated Properties

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More than three decades after passage of the Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA"), the Superfund law designed to ensure cleanup of contaminated properties by responsible parties, lingering effects of pollution continue to threaten public health and environmental quality at numerous sites around the country and across the State of Oregon. In some cases, holding all past and present site owners and operators jointly and severally liable functions as a barrier to cleanup and redevelopment, while intended to ensure cleanup. When there are no longer any identifiable responsible parties, or when responsible parties have no ability to pay, contaminated properties can remain in limbo – especially because any new party coming on the scene as a prospective purchaser is unlikely to take on the liability and uncertainty associated with a contaminated property.

Prospective Purchaser Agreements ("PPAs") provide an innovative approach to address this issue. In 1995, Oregon passed a new law to encourage cleanup and productive reuse of contaminated property by allowing innocent purchasers or lessees to invest while limiting liability. Oregon Revised Statute ("ORS") § 465.327. Between 1996 and 2011 more than 120 PPAs were successfully negotiated in support of innovative projects around the state. In 2011, the Oregon law was amended to extend the scope of liability protection and to allow a greater range of choices between administrative and judicial procedures. As of August, 2012, the Oregon Department of Environmental Quality ("DEQ") completed four new PPAs, nine other PPAs

applications are in process, and several others are in preliminary discussions. Collectively, these projects involving PPAs have contributed to cleanup of numerous properties, reduction of threats to public and ecological health, and realization of significant public benefits ranging from returning properties to productive commercial uses to protecting, and even creating, valuable natural areas and habitat.

To qualify for a PPA, the prospective purchaser cannot be responsible for contamination on the property and also cannot engage in any activity that worsens the situation. In addition, contamination must exist on the property (some removal or remediation being required to protect public health and the environment), and the prospective purchaser must prove that a substantial public benefit will result from the PPA. DEQ has discretion in determining the benefit connected to each PPA, and it can be shown by cleanup activities, funding for cleanup, redevelopment of the property for productive reuse, or development by a governmental entity or nonprofit for an important public purpose. There are three types of PPAs (Administrative Agreement, Administrative Consent Order, and Judicial Consent Judgment) which provide a liability shield for prospective purchasers from the State of Oregon and/or third parties for environmental cleanup related to contamination that occurred prior to acquisition. Further information about PPAs is located on the DEQ webpage at: <http://www.deq.state.or.us/lq/cu/ppa.htm>, and the PPA Coordinator may be reached at 503-229-6461.

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