

## Land Recycling & Brownfields Redevelopment Legal & Regulatory Framework

May 15, 2016 – Sunriver

Tiffany Johnson & Mary Camarata | Oregon Department of Environmental Quality



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## Strategies for Effective Land Recycling Projects & Programs

- Community: Obtain community leadership support, convene stakeholders, address concerns, incorporate plans
- Technical: Collect & analyze good information
- Regulatory: Coordinate with regulatory agencies; develop assessment, legal & acquisition strategies
- Financial: Obtain planning, site assessment & remediation funds – loans & grants
- Consider Federal & state programs for infrastructure & economic development

*Seed funding & assistance to local government & communities are available through various programs.*



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## Topics

- Brownfields and Land Recycling in Context
- Integrating Cleanup & Redevelopment
- Legal Framework
- Managing Risk in Property Transactions
- Due Diligence (Phase I & II Environmental Site Assessment)
- Cleanup Process
- Risk Management Strategy



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### Getting the record Straight: Definitions & Myths

- Brownfields  
*Real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant*
- Land recycling or reuse  
*The reuse of abandoned, vacant, or underused properties for redevelopment*
- Not all sites which use brownfields funds are contaminated
- Brownfields funds can be used for land recycling




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### Common Brownfields




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### Redevelopment Barriers

Description	Implication
Market Value Exceeds Cleanup Costs	Private Market Completes Cleanup & Redevelopment
Value Close to Covering Development & Cleanup Costs	Targeted Public Investment Can Make Project Feasible
Environmental Liability Far Exceeds Property Value	Requires Significant Public Investment or Market Change

- Cost, Liability & Timing Uncertainty




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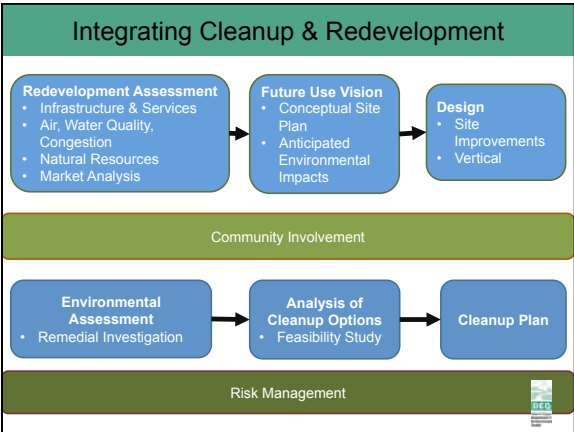
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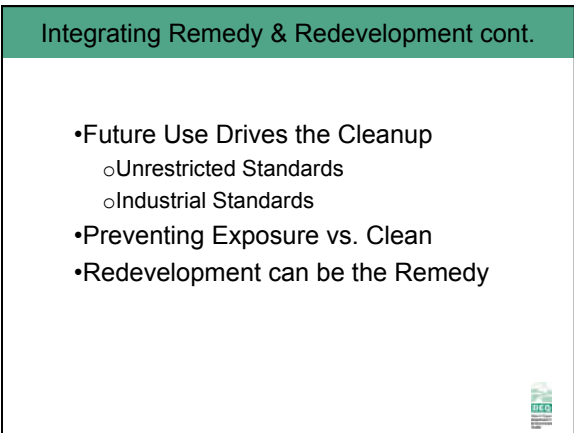
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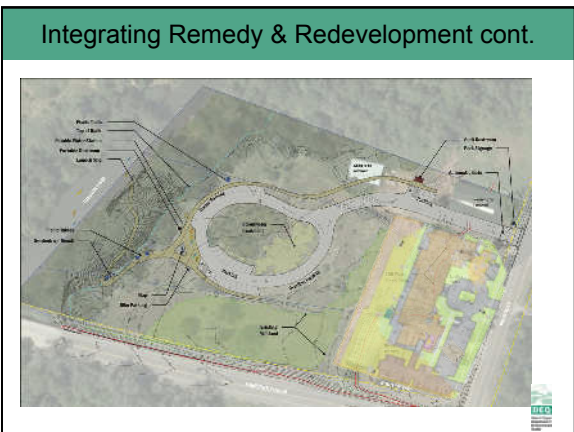
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**Legal Framework**

- **Superfund Law / CERCLA**  
(Comprehensive Environmental Response, Compensation, and Liability Act)
- **Oregon statutes and rules**  
(ORS Chapter 465 and OAR 340.122)



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**Legal Framework cont.**

- **Liability: Owners, Operator, Arranger, Transporter, Actors**
  - Referred to as "Responsible Parties" or "RPs"
- **Strict**
  - Regardless of fault
  - Lack of diligence or ignorance
- **Joint & Several**
  - All parties responsible for all costs
  - Contribution claims
- **Retroactive**



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**Liability Defenses**

- **Innocent Purchaser**
  - Didn't cause or worsen contamination
  - Conducted due diligence
- **Third Party** (acts or omissions)
- **Adjacent property owner**
- **Local government** (acquired by eminent domain, bankruptcy, lien foreclosure)



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**Liability Defenses cont.**

- Lenders (security interest exemption)
- Fiduciary duties (trust company exemption)
- Inheritance
- Acts of God
- War




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**Oregon DEQ Cleanup Program**

**Evaluate risks to human health or the environment**

1. By identifying, investigating, and remediating sites contaminated with hazardous substances.
2. Objective is to improve sites to the point where no further cleanup action is necessary - as inexpensively and quickly as possible.
3. Risk based decision making




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**Oregon DEQ Cleanup Program cont.**

**Cleanup Pathways (sub-programs)**

- Brownfields Program
- Voluntary Cleanup Program (VCP)
  - Voluntary Cleanup Pathway
  - Independent Cleanup Pathway (ICP)
  - Prospective Purchaser Agreement (PPA)
- Enforceable order or decree
- Orphan sites
- Dry Cleaner Program
- Site Assessment
- Site Response
- Leaking Underground Storage Tank (LUST) Program




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### Managing Risk in Property Transactions

**STRUCTURE OF THE DEAL**

- Due Diligence – Phase I/II etc.
- Price Reduction
- Release & Indemnification
- Shared Risk / Cost Allocation
- Environmental Insurance

**ADMINISTRATIVE PATHWAY**

- Consent Decree
- Voluntary Cleanup
- Local government tools

**CLEANUP**

- Dig & Haul
- Pump & Treat
- In Situ Treatment
- Capping
- Monitored Natural Attenuation

**FUNDING**

- State & Federal Grants
- Cost recovery
- Tax increment tools
- Historic Insurance Recovery
- Low Interest Loans
- Contribution Claims

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### Cleanup Funding in Oregon

- DEQ's Cost Recovery and Orphan Sites Program
- Business Oregon
- Federal grants
- Oregon funding website:  
<http://www.cclr.org/state-resources/oregon#state>
- DEQ Brownfields website:  
<http://www.deq.state.or.us/lq/cu/brownfields/index.htm>

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### What Does Environmental Work Look Like?



- Phase 1 ESA
- Phase 2 ESA
- Site Assessment
- Cleanup Planning
- Cleanup
- CNFA
- NFA

Gas Tank Removal at Closed Gas Station in Mosier (future charter school expansion)

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### What is a Hazardous Substance? When is there a Release?

**Hazardous Substance** - Hazardous waste, CERCLA hazardous substances, petroleum, other substances designed by the Environmental Quality Commission. Examples include pesticides, asbestos, dry cleaner solvents, gasoline, diesel, metals (lead, arsenic, chromium), PCBs, dioxins etc.)



Hole in Underground Storage Tank found after removal

**Release** - Spilling, leaking, pumping, pouring emitting, emptying discharging, injecting, escaping, leaching, dumping or disposing hazardous substance into the environment.

Releases are most commonly associated with improper disposal, leaking pipes & tanks, past practices



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### Basic Steps

- Phase 1 Environmental Site Assessment ESA
- Phase 2 ESA
  - Nature, Extent, Migration (by sampling)
  - Risk Evaluation (compare results to standards)
- Cleanup Planning (Analysis of Brownfield Cleanup Alternatives (ABCA), Feasibility Study or Corrective Action Plan)
- Remedial Action (Cleanup)
- No Further Action (Regulatory Closure)



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### Phase 1 ESA

- "All Appropriate Inquiries" is a process of evaluating a property's environmental conditions and assessing the likelihood of any contamination.
- A Phase 1 ESA is the most common form of documentation. Must be performed to ASTM E1527-13.
- Must be performed by a qualified environmental professional.
- Sampling of soil, air, groundwater and/or building materials is typically not conducted during a Phase I ESA.
- Residential property purchasers need only conduct a site inspection and chain of title survey.



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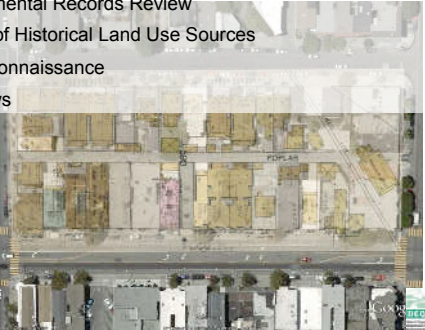
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### Elements of Phase 1 ESA

- Environmental Records Review
- Review of Historical Land Use Sources
- Site Reconnaissance
- Interviews
- Report



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### Phase 1 ESA Outcomes

- Recognized Environmental Conditions
- Controlled Recognized Environmental Conditions
- Historical Recognized Environmental Conditions



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### Phase 2 ESA

**Nature** – Hazardous substance(s) released  
**Extent** – Where is it?  
**Migration** – Where is it going?



Sampling sub-slab soil in Salem

Sampling with Power Probe in Fort Rock

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### Phase 2 ESA Outcomes

- Sampling and data analysis to evaluate Recommended Environmental Conditions
- Assess exposure pathways and cleanup scenarios

Diagram of exposure pathways

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### “Typical” Remediation Process

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graph TD; A[Remedial Investigation - Define extent of impacts] --> B[Feasibility Study - Evaluate cleanup options]; B --> C[Cleanup Action Plan - Memorialize preferred option]; C --> D[Remedial Design - Plans and specifications]; D --> E[Implementation - Construction];
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### Remedial Investigation

- Purpose—To characterize the nature and extent of contamination sufficiently to develop and evaluating cleanup action alternatives
- Iterative process of sampling and data gap analysis

U.S. DEPARTMENT OF ENERGY  
OFFICE OF ENVIRONMENTAL REMEDIATION  
WASHINGTON, DC 20545

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### Risk-Based Evaluation

- Based on concentration of chemical, receptors and pathways
- Allows for cleanup options
- Identification of acceptable risk levels and move to risk-based remedial actions
- Use of institutional and engineering controls in remedies (e.g., leaving contamination in place) for protection




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### Feasibility Study

- Purpose: To develop and evaluate cleanup action alternatives to enable a cleanup action to be selected for the site
- Threshold Requirements
- Protect human health & environment
- Comply with cleanup standards & laws
- Other Evaluation Criteria
- Protectiveness
- Permanence
- Public Concerns
- Disproportionate cost analysis




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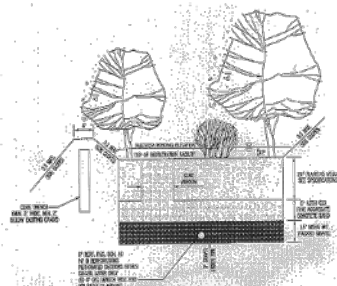
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### Cleanup Action Plan

- Purpose—To outline the preferred cleanup approach
- Engineering Design Report
- Plan Set & Specifications




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### Cleanup Planning

- Different documentation may be needed depending on the DEQ's Programs – tanks, cleanup, brownfield.
- Protective of current & future human health & the environment.
- Cleanups must achieve:
  - Acceptable risk level (OAR 340-122-115),
  - Numeric Soil Cleanup Levels (OAR 340-122-045),
  - Numeric cleanup levels set by DEQ-approved generic remedy, or
  - Background levels for naturally-occurring metals.
- Cleanups must prevent or minimize future releases & migration of contaminants in the environment.




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### Possible Cleanup Remedies

- Dig and haul
- Pump and treat
- In situ treatment
- Capping
- Monitoring natural attenuation
- Bioremediation-phytoremediation
- Soil vapor extraction




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### Cleanup Implementation



Spray



Yamhill



Christmas Valley



**Klamath Falls**

2012-005629  
Remediation Cleanup, Oregon

DEPARTMENT AND REGULABLE ENTITY:

This permit is issued and acceptance of Regulatory Service is made by the DEQ, 2012 between the North Ridge Detention Basin, LLC, represented by "Klamath Falls Cleanup" and the State of Oregon, acting by and through the Oregon Department of Environmental Quality ("ODEQ" or "Oregon").



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### No Further Action

- States that DEQ has evaluated information available on the site and that, to the best of DEQ's knowledge, no further cleanup actions are required.
- Does not remove liability – but does help assuage fears of unanticipated costly environmental cleanups.



- Provides some certainty to banks and investors who typically dislike risk.

Closed Gas Station  
La Grande




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### Conditional No Further Action

DEQ issues a Conditional NFA letter when the remedy is completed to DEQ's satisfaction, but the remedy includes on-going risk management elements.

- Institutional Controls**
- Engineering Controls**



Deed Restriction in Klamath Falls



Asphalt Cap over soil contamination  
in Prineville




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### You can recycle properties!




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### What can DEQ do for you?



- Help with finding funding. Get sites on our radar!
- Help you navigate funding programs.
- Help with addressing liability.
- Increases certainty for bankers and investors.
- Assist counties in getting foreclosed properties sold and back on the tax rolls.
- Help reduce assessment, cleanup, and site redevelopment costs.



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### DEQ Brownfield Contacts

**Northwest Oregon**  
Rebecca Wells-Albers  
(503) 229-5585  
wells-albers.rebecca@  
deq.state.or.us

**Western Oregon**  
Mary Camarata  
(541) 687-7435  
camarata.mary@  
deq.state.or.us



**Eastern Oregon**  
Katie Robertson  
(541) 278-4620  
robertson.katie@  
deq.state.or.us



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