Contaminated Site Remediation 101: Basics of Superfund

CERCLA
MTCA
Oregon Cleanup Law

Rachel Sinsheimer

Corvid Law PLLC

Anzie St. Clair

Port of Portland

Sara Frase

CSD | ATTORNEYS AT LAW

Purpose of Presentation

- Provide background of Superfund and industrial cleanups
- Help practitioners arriving at projects midstream to understand why they are working on the cleanup
- Where does the money for cleanups come from? How to best assist clients in funding cleanups
- Spark interest and give needed background for other presentations at the conference
- Practical tips

History of Superfund

- Resource Conservation and Recovery Act (RCRA) and Toxic Substances Control Act (TSCA) 1976
- Love Canal 1978
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 1980
  - Creates a “Superfund”
  - Authorizes taxes to create the fund
- Oregon Superfund Law 1987
- Model Toxics Control Act (MTCA) 1989 (Washington State)
- Oil Pollution Act (OPA) 1990

Children protest at Love Canal

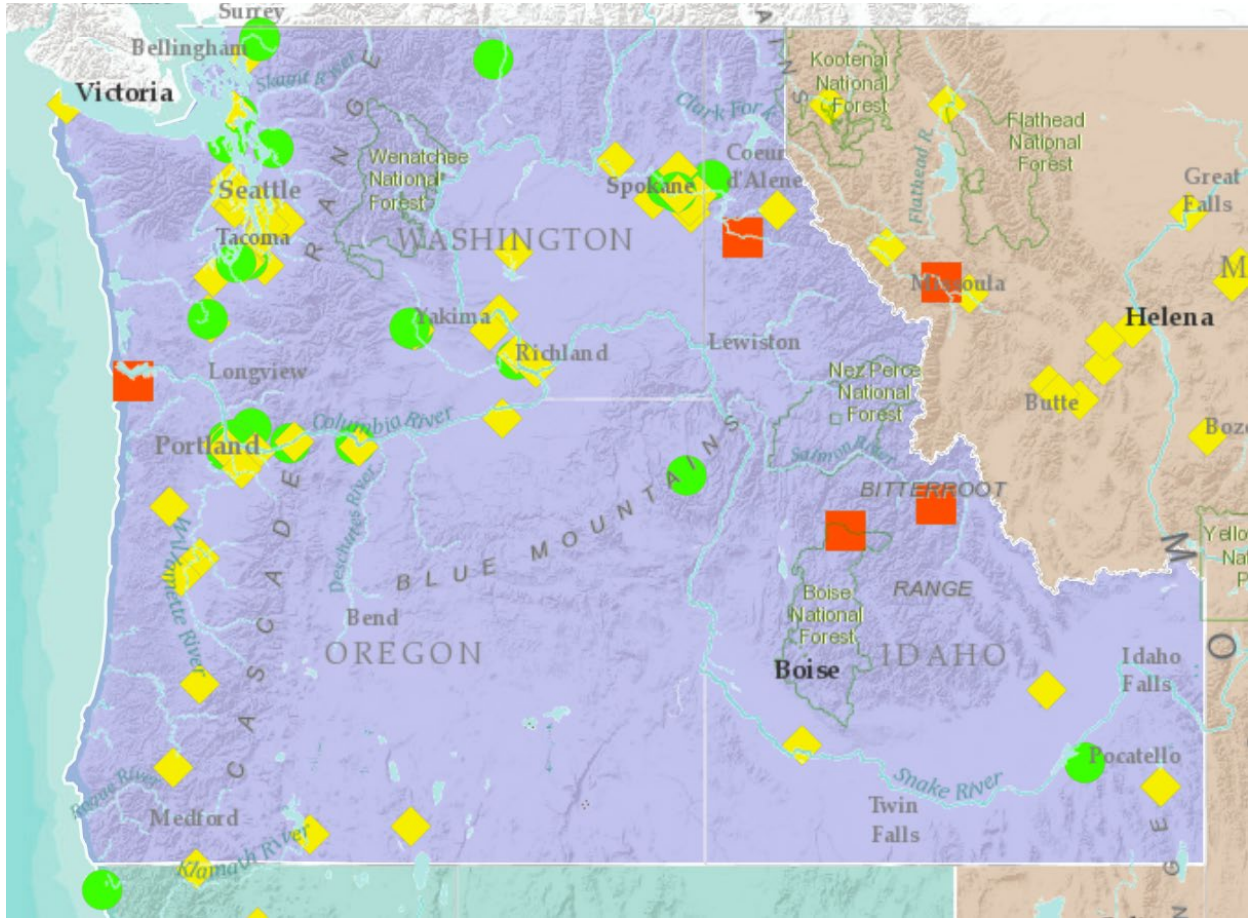
Environmental Justice and Superfund

Environmental Racism: the unequal access to a clean environmental and basic environmental resources based on race. Communities of color are disproportionately victimized by environmental hazards are far more likely to live in areas with heavy pollution. People of color are more likely to die of environmental causes, and more than half of the people who live close to hazardous waste are people of color.

Environmental Justice: is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Warren County,
North Carolina 1982

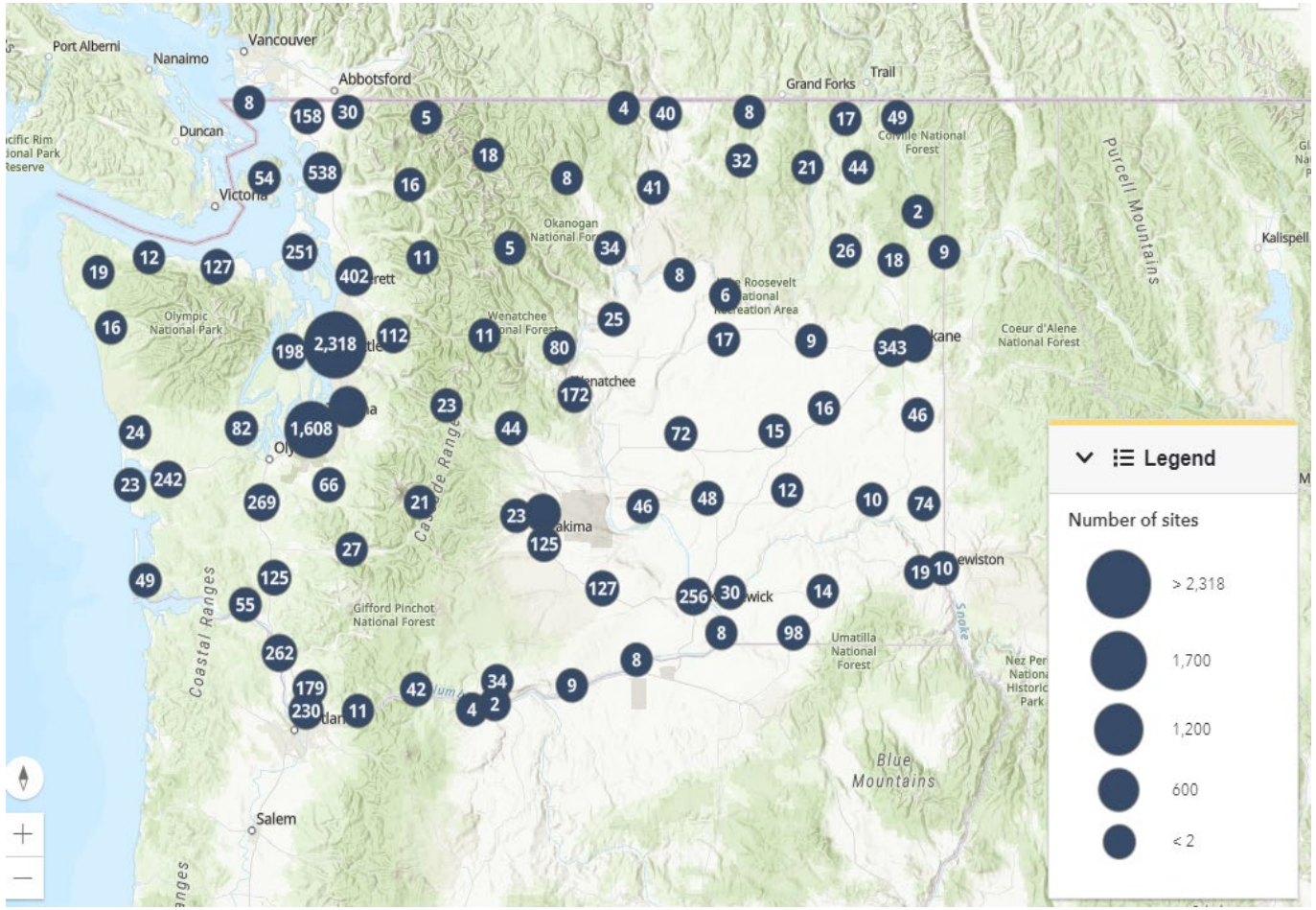
Where are Superfund Sites? The NPL.



- NPL Site
- Deleted NPL Site
- Proposed NPL Site

https://www.epa.gov/superfund/search-superfund-sites-where-you-live#map

Compare to Washington State MTCA Sites



- As of 11/17/23, this figure is a representation of the listed MTCA sites in WA.

https://apps.ecology.wa.gov/neighborhood/?tableId=7&lat=47.291765&lon=-119.582764&zoom=7&radius=false

Three Common Scenario

First Scenario

- Existing elderly client
  - Owns a service station, land, and business for 40 years
  - Wants to sell the property and retire
  - Buyer performs a Phase I Environmental Site Assessment (“Phase I ESA”)
  - Finds leaking Underground Storage Tanks (“USTs”)

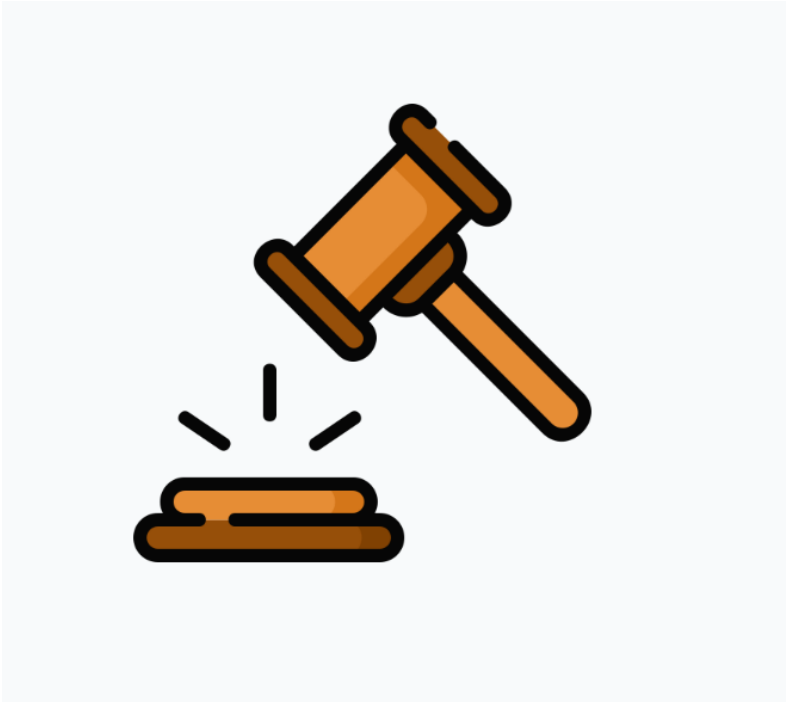
Second Scenario

- Client has a residence with a furnace that burns heating oil
  - The heating oil delivery company notices that the tank is running out of fuel quicker than it should
  - Client investigates and finds heating oil bubbling up in their backyard

On average, the Maine DEP responds to 1.5 spills every day from home heating oil tanks alone. Will your tank be one of them?

Third Scenario

- Client sold commercial property
  - Receives a letter from the current owner that contamination was found
  - New property owner intends to sue client for contribution to the remediation costs



Oh no! I found contamination!
What do I do?

Step 1: Don’t Panic

Step 2: Call the paid paranoids (spoiler, that’s us) (we’ll tell you to report)

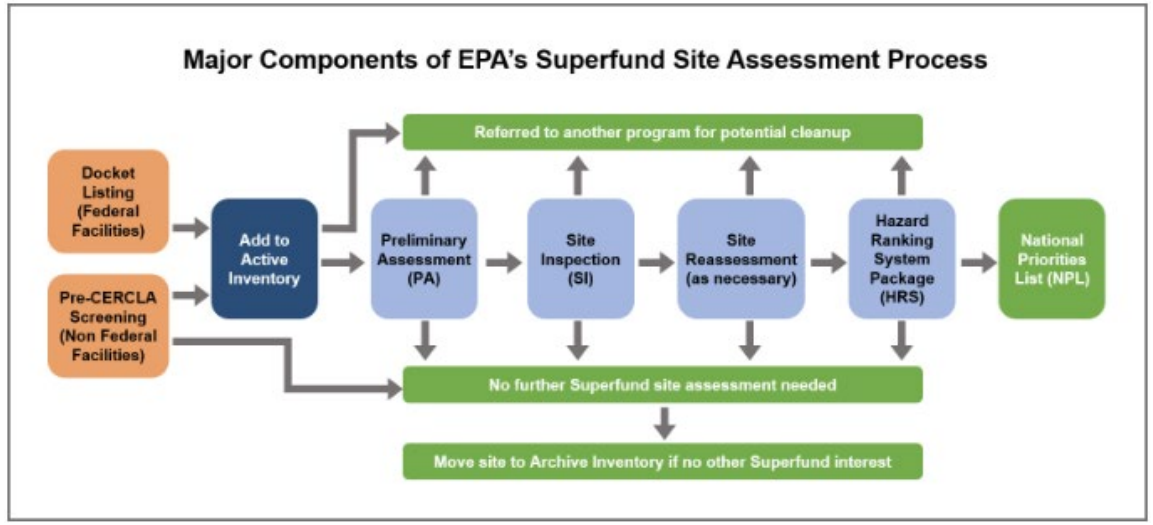
Step 3: Assemble your team

What Law Applies?

- Report the site to the appropriate local or federal authority, agencies will decide what law applies
- Under CERCLA, federal facilities are listed on the Federal Agency Hazardous Waste Compliance Docket. Non-federal facilities may be added to the Superfund Active site inventory for further assessment.
- CERCLA v. Relevant State Cleanup Law
  - Some state cleanup laws are broader than CERCLA
  - For example, MTCA includes petroleum and petroleum products as a "hazardous substance" (RCW 70A.305.020(13)(d))
  - CERCLA does not (42 U.S.C. § 9601(14))

Threat to Human Health and the Environment

- Environmental Site Assessments
  - Both federal and state cleanup laws will require some sort of “assessment” process.

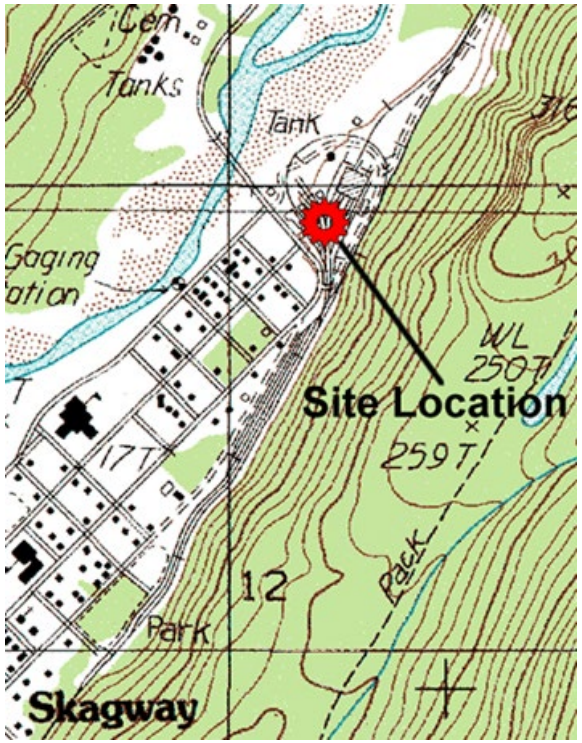


https://www.epa.gov/superfund/superfund-site-assessment-process

https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Cleanup-process

Determining What is the “Site”

- The site is not limited to property location where the contamination is found
- Defined by EPA (or the relevant State authority)
- Nature and Extent of Contamination
  - Remember that “contamination” may be broader under State law than under CERCLA.



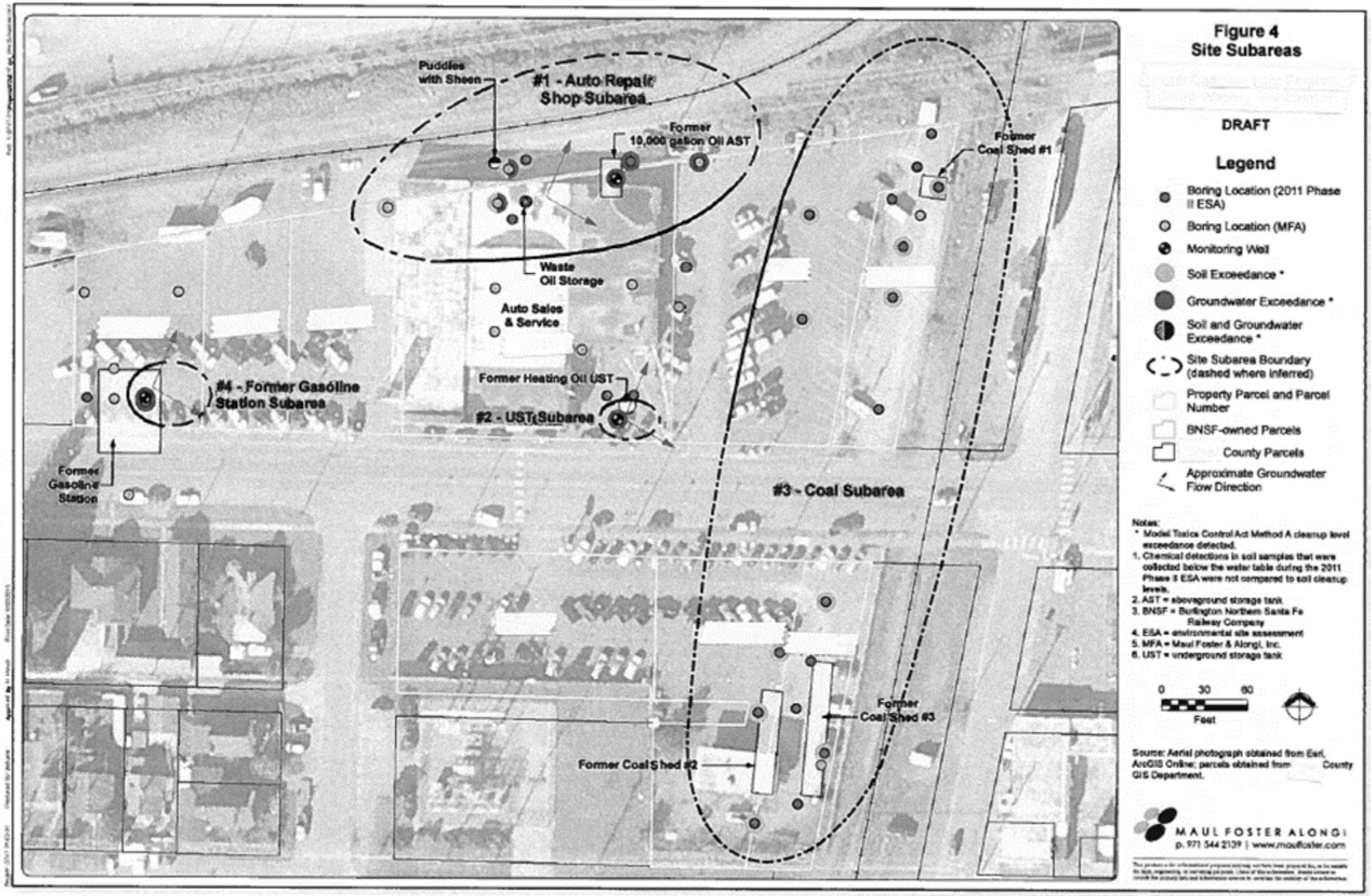


Figure 4
Site Subareas

DRAFT

Legend

- Boring Location (2011 Phase II ESA)
- Boring Location (MFA)
- Monitoring Well
- Soil Exceedance *
- Groundwater Exceedance *
- Soil and Groundwater Exceedance *
- Site Subarea Boundary (dashed where inferred)
- Property Parcel and Parcel Number
- BNSF-owned Parcels
- County Parcels
- Approximate Groundwater Flow Direction

Notes:
* Model Toxics Control Act Method A cleanup level exceedance detected.
1. Chemical detections in soil samples that were collected below the water table during the 2011 Phase II ESA were not compared to soil cleanup levels.
2. AST = aboveground storage tank
3. BNSF = Burlington Northern Santa Fe Railway Company
4. ESA = environmental site assessment
5. MFA = Maul Foster & Alongi, Inc.
6. UST = underground storage tank

0 30 60
Feet

Source: Aerial photograph obtained from Esri, ArcGIS Online; parcels obtained from County GIS Department.

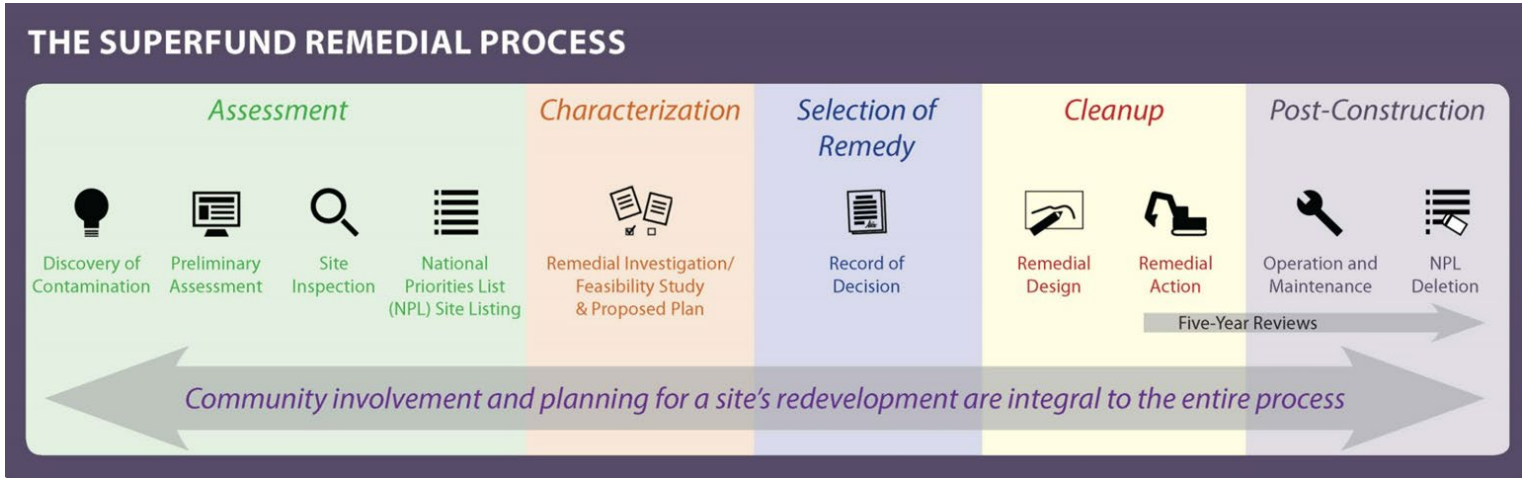
MAUL FOSTER ALONGI
p. 971 544 2139 | www.maulfoster.com

The Search for Who Is Liable

- Potentially Responsible Parties ("PRPs")
  - Owners and operators (current and former at time of release)
  - Arrangers
  - Generators
  - Transporters
- CERCLA is retroactive
  - pre 1980 contamination

Cleanups

- Implementing a remedy
  - Listing on the NPL
  - “RI/FS”
  - “Record of Decision”
  - Remedial Design and Remedial Action
  - Long term operation and maintenance



Settling with the Government

- Administrative settlement, administrative agreement, consent decree
- Contribution action § 113
- CERCLA consent decrees include reopeners in case there is contamination discovered in the future. 42 U.S.C. § 9622(f)(6)(a).

Informal State Actions

- Voluntary Cleanup Programs (“VCP”)
- Application
  - Directed by applicant
- No Further Action (“NFA”) Letter
  - Property v. Site
  - Considerations?
    - Migration of contamination
    - Work to be done
    - Potential legacy liability
    - Deed restriction & institutional controls

Cost Allocation

- Joint and several, strict liability (“Polluter Pays”)
  - Allocating costs amongst two or more parties
  - Proposed Gore Amendment to CERCLA

- For costs to be recoverable they must be **necessary** and **consistent** with the National Contingency Plan.

The Gore Factors

- The ability of the parties to demonstrate that **their contribution to a discharge,** release, or disposal of a hazardous waste can be **distinguished**
- The **amount o**f the hazardous waste involved
- The **degree of toxicity** of the hazardous waste involved
- The **degree of involvement** by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste
- The **degree of care** exercised by the parties with regard to the hazardous waste concerned, taking into account its characteristics
- The **degree of cooperation** by the parties with federal, state, or local officials to prevent any harm to public health or to the environment

Natural Resource Damages

- “A “trustee” is a federal, state, or Indian Tribe, who, in accordance with 42 U.S.C. § 9607(f)(2), is designated to ‘act on behalf of the public as [a] trustee[] for natural resources.” Nat’l Assn of Mfrs. V. U.S. Dep’t of the Interior, 134 F.3d 1095, 1098 n.1 (D.C. Cir. 1998)(internal citations omitted).
- CERCLA defines “Natural Resources” broadly.

Deepwater Horizon Spill 2010. BP paid $8.1 billion for NRD damages. *Cf* $5.5 billion for CWA damages.

Defenses to CERCLA or MTCA Liability

- Strict liability - not many defenses
- Best defense: manage contamination on the front end
- Divisibility
- Innocent purchaser
- Innocent intervening landowner
- Bankruptcy

So, Who Is Going to Pay for All of This?

CERCLA Funding - “The Superfund” Recent Federal Legislation

- Superfund Tax is back!
  - Superfund provides up-front funding to EPA, and in certain situations, funds to reimburse private party expenses.
  - Infrastructure Investment and Jobs Act (Bipartisan Infrastructure Deal): reinstated Superfund tax on hazardous chemicals (not petroleum)
  - Inflation Reduction Act: reinstated Superfund tax on petroleum
- Unlocked access to funds for projects benefiting environmental justice communities.
  - Bipartisan Infrastructure Deal
  - Implemented Justice 40 initiative – 40% of overall benefits of certain Federal investments (climate change, clean energy, affordable housing, clean transportation, etc…) to EJ communities.
  - $21 billion to clean up Superfund sites.

State Funding - Washington Example

- MTCA program at Department of Ecology funded by 0.7% tax on wholesale value of hazardous substances coming into the State
  - Petroleum refined at 6 refineries in Washington
  - First $50 million per biennium deposited into the State Motor Vehicle Fund
  - 60% of tax is dedicated for local remediation and prevention
  - 25% of the tax is for State remediation activities
  - 15% of the tax is for the stormwater pollution control
  - Higher value of a barrel of crude more money into MTCA fund

Other Ways to Fund a Cleanup

- Insurance:
  - Pre-1986
  - CGL = “Comprehensive General Liability” Insurance - instead of Commercial General Liability
  - Qualified Pollution exclusion. “Sudden and accidental.”
  - The “Duty to defend”
  - Occurrence Policies
- Contract: PRPs can contract around statutes.
  - This doesn’t eliminate liability to the government
  - Release and/or indemnity

MTCA Success Story Maddux Apartments

- Dry cleaner and gas station caused contamination
- MTCA Cleanup - 13,000 tons of TCE and other contamination
- Partnership between Ecology and Mount Baker Housing Authority
- Maddux Apartments - ~166 low income housing units in Mt. Baker neighborhood

Conclusion

- The best way to avoid cleanup costs? Environmental stewardship.
- But, contamination happens.
- When there is a spill or you find contamination, don’t freak out.
- But do call your lawyer.
- It is important to track your costs and be specific in your billing - why is this a required cost?
- Opportunities exist to make lemonade out of a lemon.

Questions?
Panel questions with Anzie St. Clair, Port of Portland

rachel@corvidlaw.com

sfrase@csdlaw.com

Questions for Anzie

- How do you track down PRPs?
- How does insurance play in?
- What are some updates?
- Climate dangers?
- I want to buy a property but I know there is contamination. What are my options?
- Let’s talk about PFAS.
- What sort of enforcement trends are you seeing? - Citizen suits by NGOS continue to be a hot topic, EPD,
- Whats the deal with voluntary cleanups? - were seeing more/ more reopeners.