Role of Prospective Purchaser Agreements in Managing Environmental Risks in Transactions

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Business & the Environment Conference

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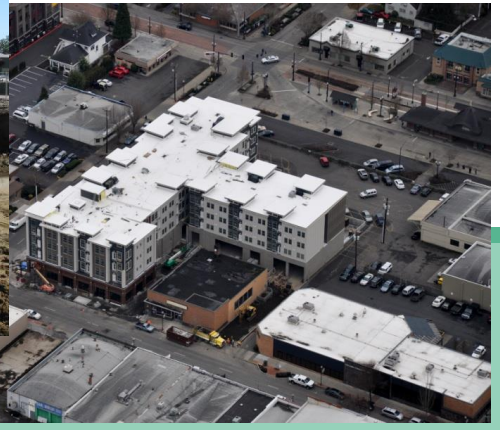
Oregon DEQ's
Prospective Purchaser Agreement Program

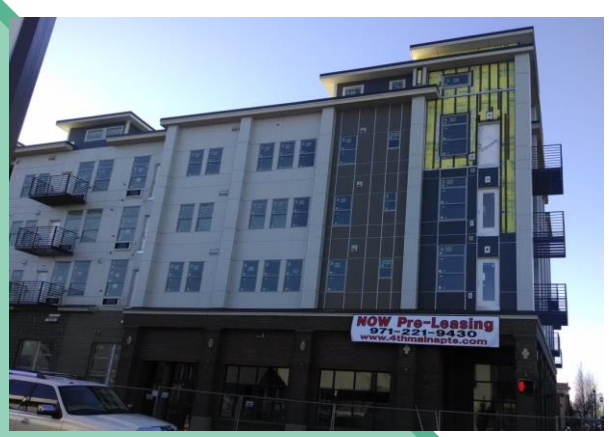
Oregon DEQ PPA Program "101": What is a PPA?

Entering a PPA

Implementing a PPA

Completing a PPA





DEQ
State of Oregon
Department of
Environmental
Quality

DEQ

PPA Requirements

- Some removal or remedial action needed
- Purchaser is not already an owner or operator (RP)
- Purchaser plans for property will not worsen contamination
- Project provides substantial public benefit

Substantial public benefit examples given in statute:

Cleanup

Funds for cleanup

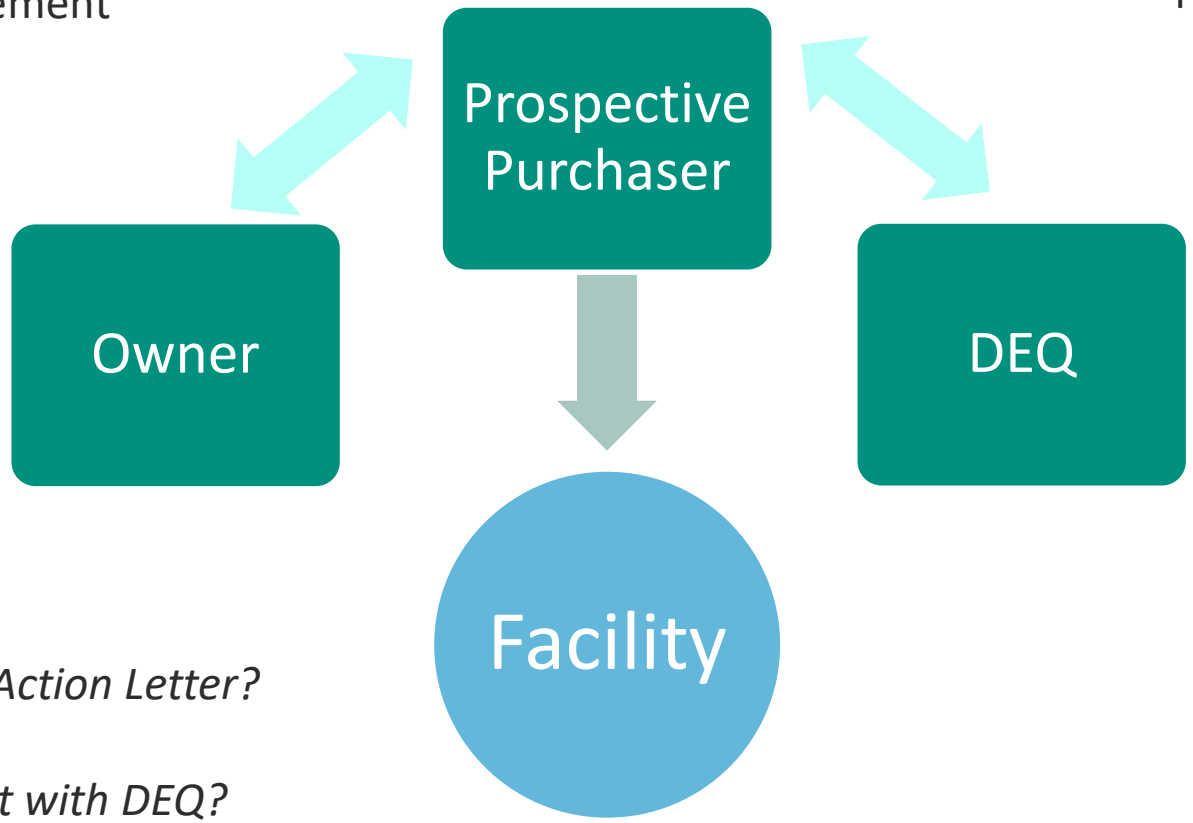
Redevelopment

Important public purpose

Oregon PPAs: Who's Negotiating What?

Purchase & Sale Agreement

Prospective Purchaser Agreement



No Further Action Letter?

Settlement with DEQ?

Liability Release

Certification of Completion

PPA Pre-application meetings

Who attends PPA pre-apps?

Purchaser decides on their attendees:

- Usually: Purchasing entity reps, environmental consultant, legal counsel
- Sometimes: Current owner/seller, lender, partner

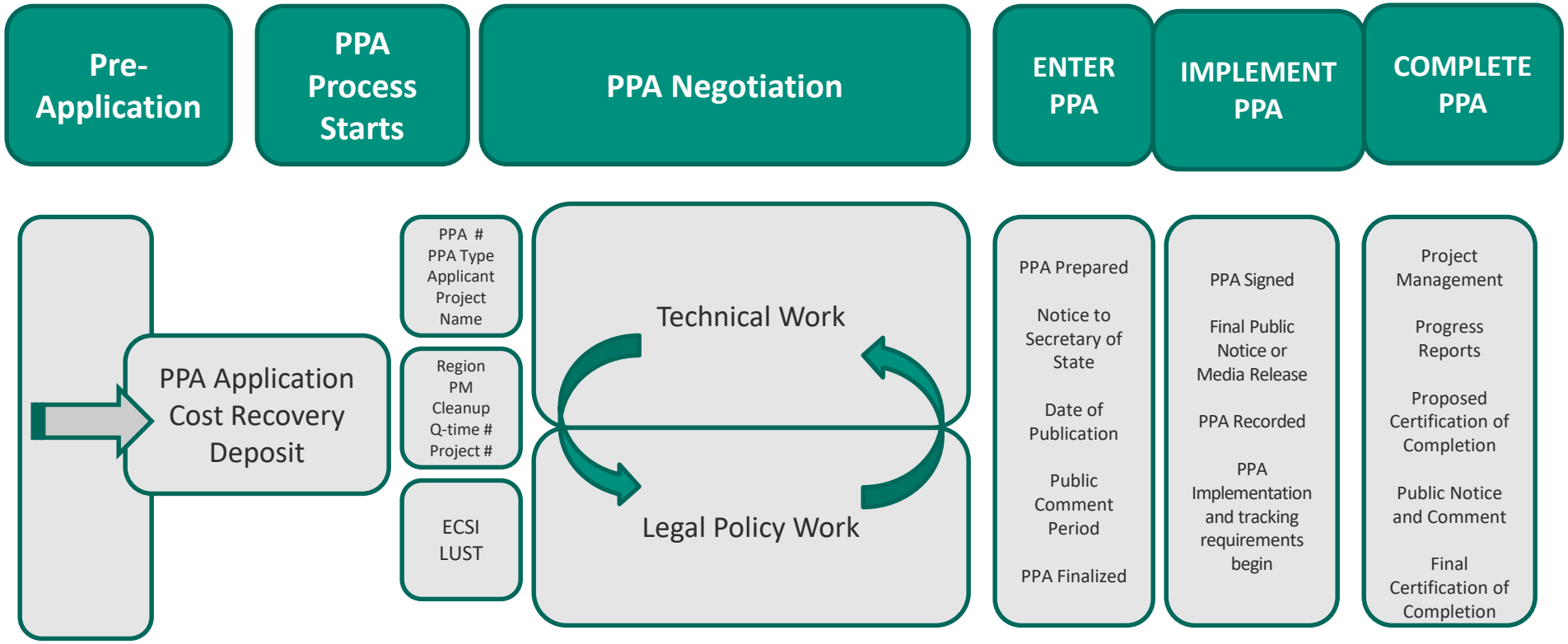
DEQ attendees include:

- Usually: PPA Coordinator, Regional Cleanup Manager, Lead Worker &/or Project Manager (core DEQ “team”)
- Sometimes: HQ Cleanup Manager, Regional Solutions Team, DOJ Attorney, DEQ specialist

What do we talk about?

- Purchaser’s Vision
- Site Information
- Scope of Work concepts
- PPA Program requirements, types, timelines, costs
- Special issues or questions
- Wrap up and next steps

PPA Process Overview



Entering a PPA

From Prospective Purchaser to Proud New Owner

DEQ and Purchaser Sign PPA (Court also if CJ)

Purchaser Takes Title to Property

Purchaser Records the PPA with County Recorder

PPAs may include timeline requirements:
PPA becomes void if the property is not acquired by a specified date.
PPA is to be recorded within a specified time period after acquisition.

Track these dates. If there is an unanticipated delay,
Get in touch with DEQ!
It is much better to modify or amend in advance of the deadline.

Implementing a PPA

Consider your PPA a process, not an event.

- Know your PPA
- Map out your obligations and deliverables
- Stay in touch with DEQ
- Keep your Project Manager designation current
- Institutionalize knowledge about the PPA
- Consider modifications, amendments, extensions to accommodate changes
- Review PPA dispute resolution provisions in case disputes arise
- Entering a PPA is completely voluntary; once entered, it is enforceable
- If ownership changes provide Notice of Transfer to DEQ

Completing a PPA

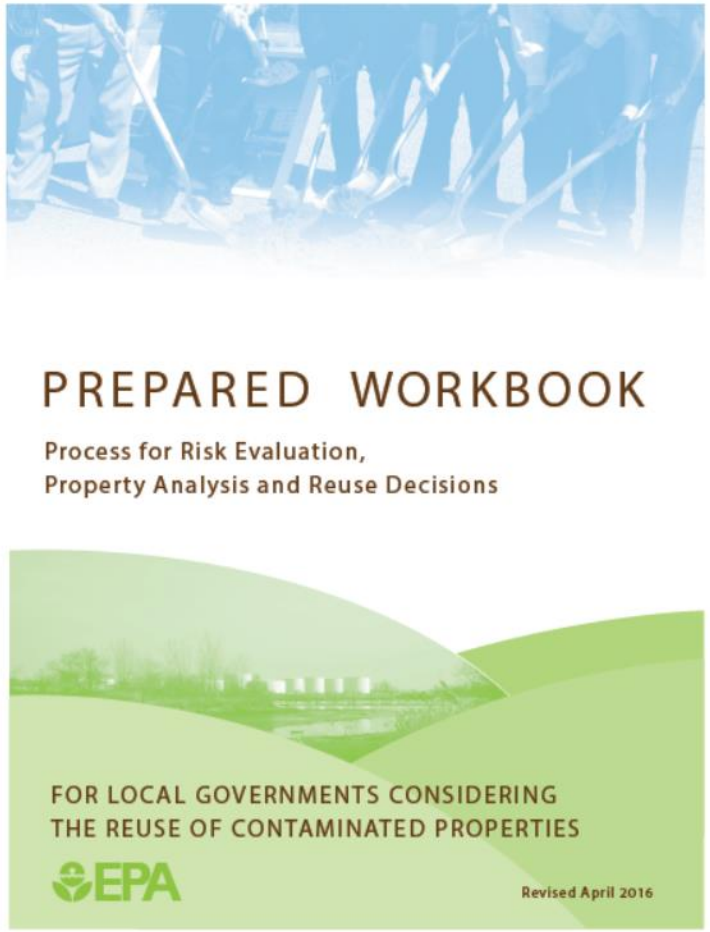
Obtaining a PPA Certification of Completion

Documents “satisfactory completion of obligations” of PPA
Ongoing obligations may be carried by Easement and Equitable Servitude (EES)
May want to discuss timing of Certification and relation to EES in advance

No Further Action determinations may or may not be a part of a PPA completion

Certification confirms protection from liability
May be recorded on title to property
PPA continues to “run with the land” as a property interest, transfers to new owners

Resources: PREPARED Workbook



Managing Project Risk
10.1 General
10.2 Risk Management Tools and Approaches
10.2.1 Types of Tools and Approaches
10.2.2 Selected Risk Management Tools
10.2.2.1 Property Activities
10.2.2.1.1 Meeting with Federal and State Regulators
10.2.2.1.2 Due Diligence and All Appropriate Inquiries
10.2.2.1.3 Environmental Investigation
10.2.2.1.4 Cleanup Action Planning
10.2.2.1.5 Reasonable Worse Case Scenario Planning
10.2.2.1.6 Engaging Stakeholders
10.2.2.1.7 Financial Analysis
10.2.2.1.8 Timing Municipal Involvement
10.2.2.1.9 Interim Cleanup Action
10.2.2.1.10 Cleanup Action
10.2.2.1.11 Voluntary Corrective Action
10.2.2.1.12 Maintenance and Monitoring of Remedial Systems
10.2.2.1.13 Institutional Controls
10.2.2.1.14 Oversight of the Environmental Contractors
10.2.2.1.15 Following Accepted, Good Commercial Practices
10.2.2.2 Statutory/Regulatory Protections
10.2.2.2.1 Statutory Exemptions and Defenses
10.2.2.2.2 Prospective Purchaser Agreements
10.2.2.2.3 No Action/ No Further Action Letters and Comfort Letters
10.2.2.2.4 Other Determinations of Completion
10.2.2.3 Transactional Activities
10.2.2.3.1 Escrow Accounts
10.2.2.3.2 Purchase Price Adjustments
10.2.2.3.3 Grants
10.2.2.3.4 Tax Benefits and Credits
10.2.2.3.5 Private Investors
10.2.2.3.6 Specialized Loans
10.2.2.3.7 Redevelopment Authorities
10.2.2.3.8 Land Banks
10.2.2.3.9 Contractual Provisions
10.2.2.3.9.1 Indemnification
10.2.2.3.9.2 Representations and Warranties
10.2.2.3.9.3 "As is" Provisions
10.2.2.3.9.4 Environmental Covenants
10.2.2.3.9.5 Assumption, Retention, and Release Provisions
10.2.2.3.9.6 Schedule of Included or Excluded Liabilities
10.2.2.3.9.7 Post-Signing and Pre-Closing Conditions
10.2.2.3.9.8 Fixed Price or Performance-Based Contracts
10.2.2.4 Insurance
10.2.2.4.1 Comprehensive General Liability Insurance
10.2.2.4.2 Pollution Liability Insurance
10.2.2.4.3 Errors and Omissions Insurance
10.2.2.4.4 Cost Cap Insurance
10.2.2.4.5 Secured Lender Insurance
10.2.2.4.6 Finite Risk Insurance
10.2.2.4.7 Institutional Controls and Post Remedial Care Insurance
10.3 Cooperating vs. Non-Cooperating or Defunct Owners – Some Risk Management Considerations

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DEQ Prospective Purchaser Agreement Program
http://www.deq.state.or.us/lq/cu/ppa.htm

Thank You!

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