

Contaminated Real Estate and Redevelopment 101

Model Toxics Control Act Chapter 70.105D RCW

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Introduction to MTCA

- Modeled after Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Adopted by Citizen's Initiative in 1989-1990
- NOT a Federally Delegated Program
 - But significant cooperation with EPA
 - EPA still has authority to “overfile”

Basic Legal Principles

- **Strict Liability = no analysis of intent**
- **Joint & Several Liability = once you're in, you're in for it all**
- **Retroactive**
- **Covers all “releases” of “hazardous substances”**
 - **No requirement of active conduct**
 - **But “passive migration” is not a “release”**
- **Resulting “Site” is anywhere the contamination comes to be located**
- **Limited Judicial Appeals**
 - **No Pre-Enforcement Review**
 - **Severe penalties for failure to comply**

Significant Differences

- Covers oil and petroleum products
- Corrects the “mistakes” of CERCLA
- Creates both State Toxics Control Account and Local Toxics Control Account
- Covers lots of sites
- Requires lots of public participation
- **OVERALL, VERY SUCCESSFUL**

Liability

- **Parties who are Potentially Liable Parties (PLPs)**
 - Current Owners/Operators of contaminated property
 - Prior Owners/Operators of contaminated property during time of release
 - Generators/Arrangers
 - Transporters of Hazardous Substances

- **Parties who are not PLPs**
 - Innocent purchasers
 - “Plume Cause” Candidates
 - Lenders/Mortgage holders
 - Victims of Act of God or Act of War
 - Victims of Acts of Third Parties (Sabotage/Trespasser)
 - Releases solely from Application of Pesticides
 - De Minimis (Liable, but for a finite amount)

Funding

- **State Toxics Control Account (STCA)**
 - Funded by Hazardous Substance Tax on petroleum products, pesticides and chemicals (8,000 products)
 - Also receives money from cost recovery, fines, penalties, fees, etc.
- **Local Toxics Control Account (LTCA)**
 - Supported in same way
 - For use by local municipal entities (including ports) to assist with cleanups
- **Remedial Action Grants**
 - Grants provided to local governments to facilitate the cleanup of public lands (See Chapter 173-322 WAC)

Cleanup Standards

- **Chapter 173-340 WAC**
- **Goal = protect human health and environment**
 - **Permanent Solutions to Maximum Extent Practicable**
 - **Some Cost / Benefit Analysis (Disproportionality Test)**
 - **Majority are Risk-Based**
- **Maintains compliance with “Applicable Relevant & Appropriate Requirements” (ARARs)**
 - **Meet all regulatory standards in other statutes**
- **Covers Underground Storage Tanks (USTs) and Leaking Underground Storage Tanks (LUSTs)**
 - **Separate program for Heating Oil USTs (PLIA)**
- **Subject to Rulemaking Revisions (Science Advisory Board)**

Cleanup Standards

- **“How Clean is Clean?”**
 - Acceptable threat to human health and the environment (risk-based)
 - Each medium receives a “Cleanup Level”
 - Achieve cleanup level at a “Point of Compliance”
 - Located throughout Property and Site
 - Can be Conditional for certain situations (i.e. Landfills and Groundwater)
- **Specific Substances**
 - Carcinogens must be cleaned to below a level that could cause an excess cancer risk in humans
 - Non-Carcinogens must be cleaned to below a level that could cause illness in humans

Cleanup Standards

- **Two Categories - Unrestricted (Residential / Commercial) and Industrial**
- **Method A – for the straightforward cleanup**
 - Provides numerical cleanup levels for 25-30 of the most common hazardous substances
 - Set by regulations
- **Method B – for the more complex cleanup**
 - Most common method for sites with unusual substances or combinations of substances
 - Sets human-health risk levels for particular substances
- **Method C – for every other kind of cleanup**
 - When Method A or B levels are not technically possible
 - Less stringent exposure assumptions – good for industrial sites

Usual Chain of Events

- **Initial Investigation + Site Hazard Assessment (1 to 5)**
- **Inclusion on State Site Hazard List (similar to NPL)**
- **Identification of PLPs**
- **Phase I & II Site Assessments (optional)**
 - **Determine contaminants and scope of contamination**
- **Remedial Investigation / Feasibility Study (RI/FS)**
 - **Determine where contamination has come to be located**
 - **Provide options on what to do about it**
- **Cleanup Action Plan / Interim Actions**
- **Long-Term Monitoring**
- **No Further Action**
- **Land Use Restrictions**
- **Legal Implementation**
 - **Agreed Order or Consent Decree**
 - **CD provides Covenant Not To Sue and Contribution Protection**
 - **Enforcement Orders (Last Resort or Emergency Situation)**

Redevelopment of Contaminated Property

- **Brownfields**
 - Abandoned or underused because of historic contamination.
- **Criteria for Brownfields Redevelopment**
 - Yields substantial new resources to facilitate cleanup
 - Expedites cleanup
 - Redevelopment will not further contribute to release of waste, impede remedial actions, or increase health risks
- **Prospective Purchaser Agreements (PPA)**
 - Settlement with a non-liable party who wishes to purchase contaminated property, clean it up, and redevelop it
- **Brownfields Funding**
 - \$\$ grants from EPA supervised by Office of Trade & Economic Development (OTED)

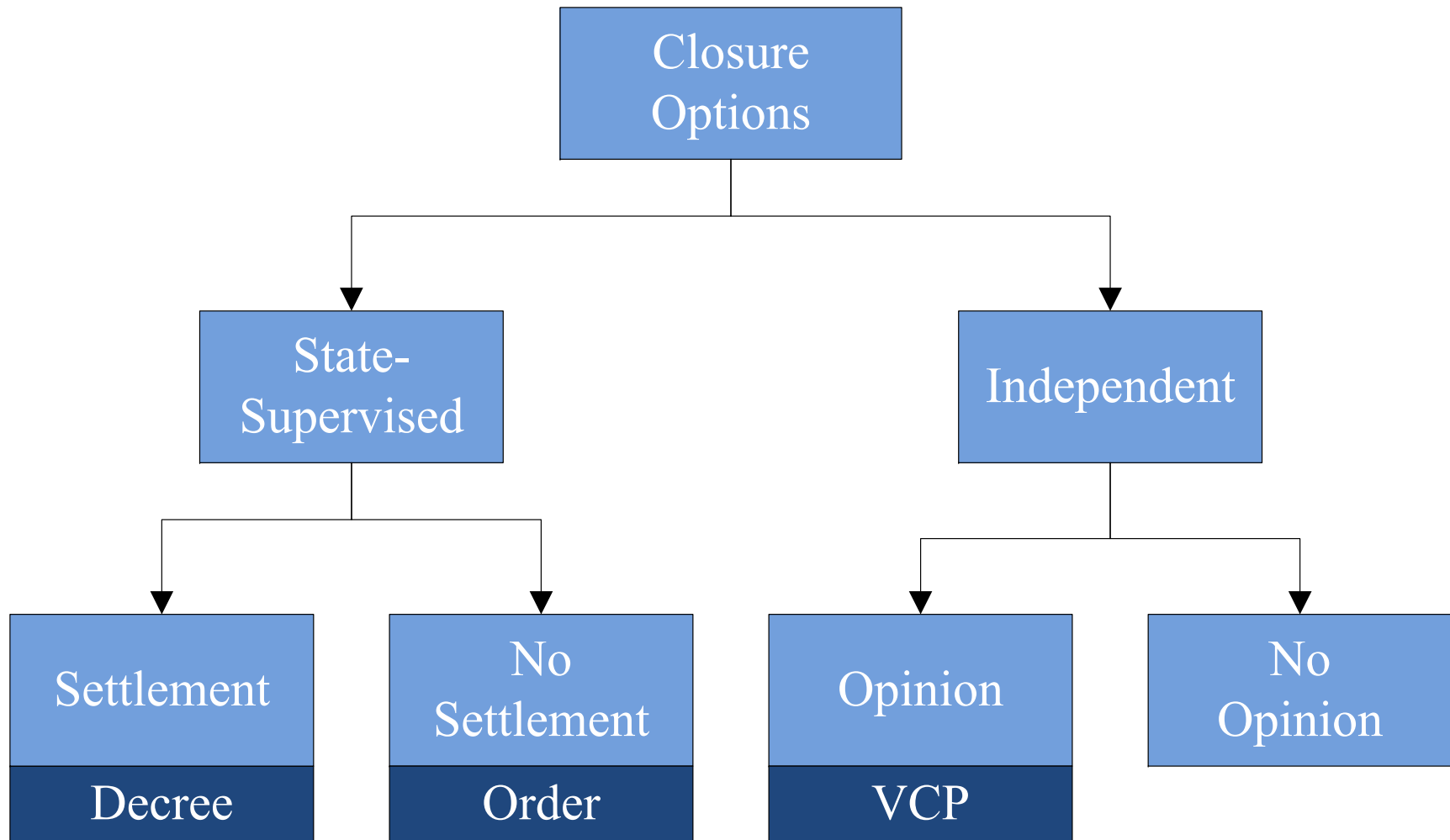
2013 MTCA Amendments (SSB 5296)

- **Brownfields Defined, Not Required**
- **Model Remedies (2016)**
- **Brownfields Trust for Redevelopment Opportunity Zones**
 - **Brownfields Renewal Authority option for local governments**
- **Environmental Legacy Stewardship Account (ELSA)**
 - **MTCA process improvements + stormwater pollution prevention**
- **Prospective Purchaser Agreed Orders**
- **RULEMAKING??**
- **Impact on Private Party Development?**

Voluntary Cleanup Program vs. Formal Cleanup

- **VCP**
 - For “simple sites” (gas stations, single releases, etc...)
 - Independent cleanup with limited Ecology oversight
 - Must obtain Ecology approval at end of process to ensure that the cleanup performed is the “substantial equivalent” of an Ecology-supervised cleanup
 - Can be More Cost-Effective
 - No Further Action Determination (Property-Specific or Site-Wide)
- **Ecology-Lead**
 - Ecology review and approval of all steps of process
 - Preliminary steps governed through Agreed Orders
 - Final cleanup generally implemented through a Consent Decree
 - Contribution Protection + Covenant Not to Sue

Administrative Pathways Under MTCA



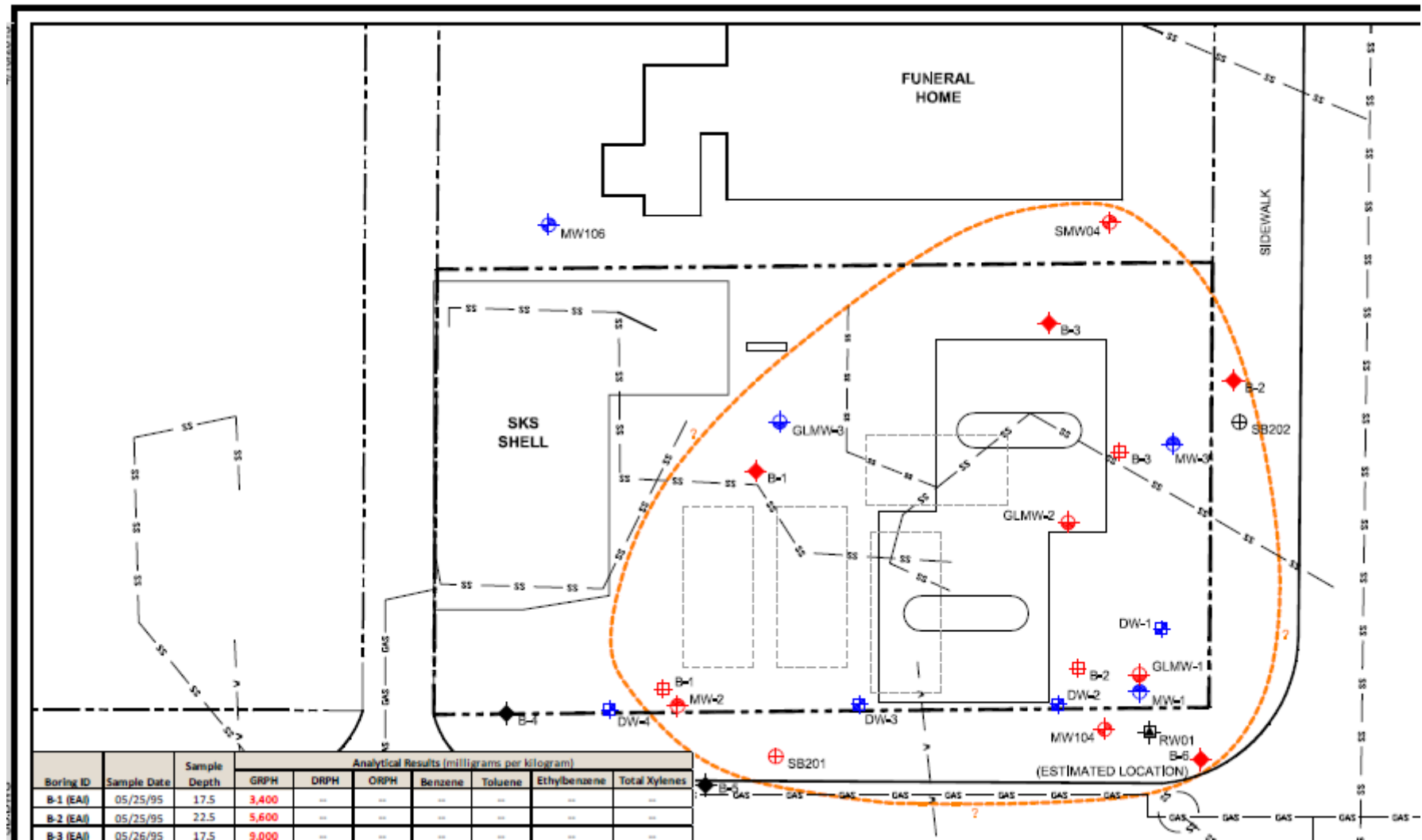
Options at a glance...

	Opinion on Cleanup from Ecology	Supervision of Cleanup by Ecology	Public Participation	Settlement of Liability with State	Contribution Protection + Covenant Not To Sue
Independent without consultation	NO	NO	NO	NO	NO
Voluntary Cleanup Program	YES	NO	NO	NO	NO
State-Supervised without legal settlement [Agreed Order]	NO	YES	YES	NO	NO
State-supervised with legal settlement [Consent Decree]	NO	YES	YES	YES	YES

Example for Discussion – VCP Site



Example for Discussion – Formal Order Site



Risk Reduction and Risk Transfer

- **Contractual Indemnities and Releases (“As-Is”)**
- **Representations and Warranties**
- **Pollution Insurance**
- **Guaranteed Fixed Price Remediation Contracts**
- **Prospective Purchaser Agreements**
- **Risk Assessments**
- **Activity and Use Limitations**
- **Effective Performance of Remedial Activities**