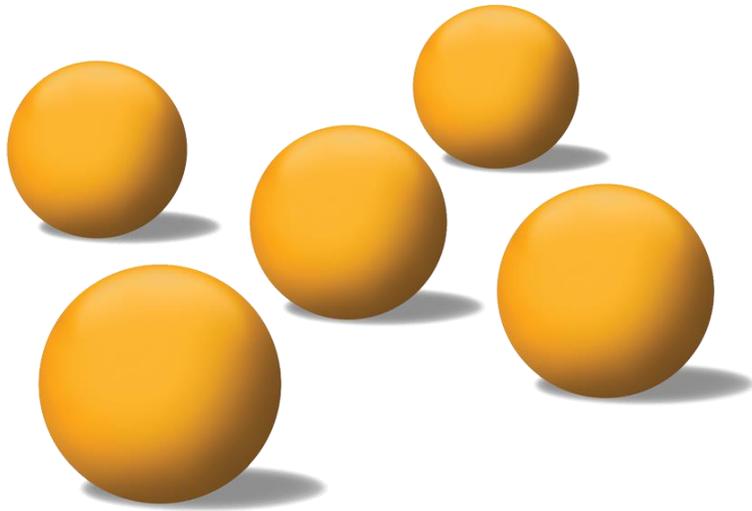


# Practical Guide to Tennessee Brownfield Projects Best Practices



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- Voluntary Agreement
  - Did not cause or contribute to the contamination
- Consent Order
  - Caused or contributed to the contamination
- Liability protection can be the same though Commissioner has discretion on Consent Order



# Potential Liability Hooks

## EPA action

- Unilateral Order under CERCLA Sec. 106-Could impose joint and several liability

## State Action

- TDEC can issue orders requiring compliance.

## Private party recovery

- Where private parties clean up the site they will seek contribution



# Liability Relief for BVA or CO

- Limited Liability-- quantify and know precisely the extent of the liability for the site by defining it in the agreement or order;
- Apportionment of Liability--liability to TDEC apportioned consistent with § 68-212-207(b);
- Contribution protection-- contribution protection Order or Agreement is an approved administrative settlement under 42 U.S.C. § 9613(f);
- Release--exemption from any further liability under any statute administered by TDEC relative to the contamination on the property; and,



- Continuity of Protection--The liability protections described in the statute are automatically extended to successors in interest or in title, contractors conducting the response actions at the site, developers, future owners, tenants and lenders, fiduciaries, or insurers; provided, these persons were not involved prior to the agreement or order.



# Tennessee Defenses

- Innocent purchaser
- Fiduciary
- Federal Defenses Not Available under Tenn. Law
  - Prospective Purchaser
  - Contiguous Landowner
- VOAP allows protection for prospective purchasers and could be used by contiguous landowners



# Steps for Consideration

- Environmental Due Diligence
  - Phase I and II
  - Must be timely and complete
  - Reliance Letters-
    - Will still be required to comply with ASTM E 1527-13
- Preliminary Considerations
  - Planned Redevelopment or Use for Property
  - Responsibility for contamination?
    - Voluntary Agreement
    - Consent Order



- Engineering and other Technical Review of Proposal
  - Extent of remediation or excavation necessary
  - Ability to cost effectively minimize risk
- Preliminary Meeting with Remediation Staff to determine feasibility
- Decide whether project will work



# What Protection do you want?

- No Additional Action
  - Letter from DoR acknowledging that no additional action is required
  - TDEC oversight without a voluntary agreement or consent order
  - No statutory protections
- No Further Action
  - Used only for BVA
  - Entitled to all statutory Defenses
- Letter of Completion
  - Used for Consent Order
  - Entitled to all statutory defenses



# Timing Issues

- Signed and effective BVA by Closing?
  - Best Practices-Be realistic
    - It will take time to develop the documents
    - It will take time to develop the soil management plan
    - TDEC must approve the documents prior to public notice
    - The agreement cannot be effective until 30 days after notice.
  - Interim Status Letters
- What should you get during the Due Diligence Period?
  - Best Practices—If possible get the Soil Management Plan approved—Timing is an issue as well as sequencing. Some may do a phase 2



- BVA effective *After* Closing-Just as effective
  - If you submit application and due diligence prior to closing then ownership not a deciding factor.
  - If excavation is expected have soil management plan approved and a comfort letter that the BVA will apply.
  - Everything else is the same



- All documents in place before public notice. 95 % negotiated by all parties.
- Signature up to timing of the deal.
  - Flexibility to signature
  - Decide not to do constructive notice?
- Interaction between CERCLA and State levels and how they interact.

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# DoR Staff Processing

- Application to Evan Spann
- Project Manager is assigned
- Evan Spann is responsible for reviewing all legal documents ( BVA/Consent Order/LUR). This is done in coordination with the project manager
- Technical documents—Project Manager is primarily responsible for review and approval of:
  - Soil Management Plant
  - Analytical reports



# Issues that become clouded

- Timing issues.
- Field office/Central office and developer coordinator.
- Investigation--What is enough investigation?
- Some sites soil investigation is enough. Some require groundwater and soil gas.
  - Driven by history of site and generated.
- Other side of coin-If groundwater is not investigated it will not included in BVA and liability protection may be less.



- Is the Site a cut or fill site.
  - If going to excavate don't need more information. If during construction more contamination, then must handle as you come across it.
- For newly discovered contamination, can do addendum or add to if still unsigned or add contingency in Soil management plan.
- Soil Management Plan-Include summary of what was found, current and future uses of property. Whether engineered control, how to handle soils, capped on site.



# Contents of SMP

- Introduction & Purpose
- Site Description
- Summary of Previous Investigations – including list of reports/documents
- Site Remediation – discussion of how contaminated soil will be handled and managed
- Remedial Measures – discussion of measures to be implemented during construction, including contingency for unanticipated conditions
- Engineering & Institutional Controls – vapor barrier, soil cap, impervious surface cap (concrete, asphalt)
- Future Land Disturbance
- Survey or Site Plan Attached



# Land Use Restrictions

- Fall into a couple of buckets
  - Property use-commercial only
  - Activity uses
    - No dig, no GW use
  - Operation and maintenance systems.
    - Vapor issues.
- Should LUR be detailed in the BVA?
- Amending LUR to make it less stringent.
- Commissioner sends out the notices-proposing to allow for new change. New one can be filed.

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