

Fitting the Solution to the Project— MTCRA and Brownfield Toolbox for Different Project Types

Presented by

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**Model Toxics Control Act Workshop
Law Seminars International**

Seattle, Wednesday, May 24, 2006

Finding the Best Way to Address Liability and Site Constraints...







To Facilitate a Transformation from Here....





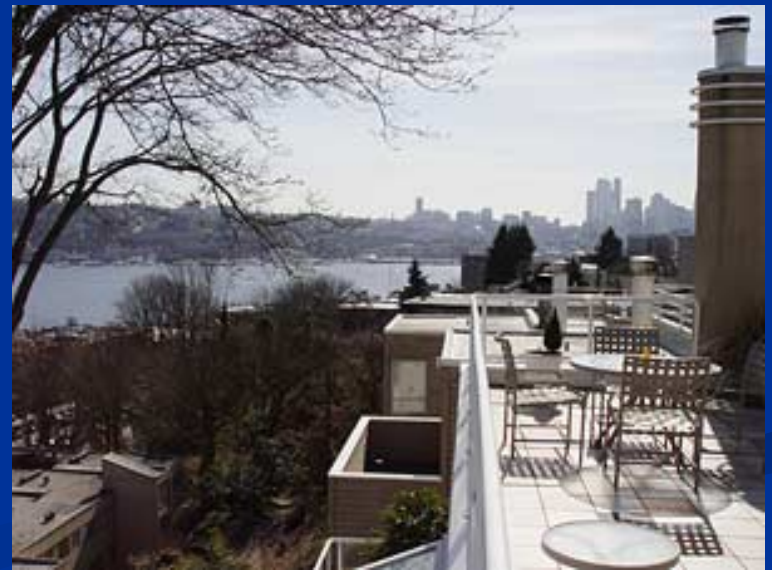




To Here...



”In less than six months, Triad Development transformed the former American Tar Co. site -- just north of Gas Works Park on Lake Union -- from a brownfield to prime property suitable for an upscale condominium complex. Triad removed decades-worth of paint thinners, solvents and creosote from the 1.3-acre site, in what Ecology officials say was one of the most rapid cleanups in the agency's history. “ (DJC, June 2000)





And There...



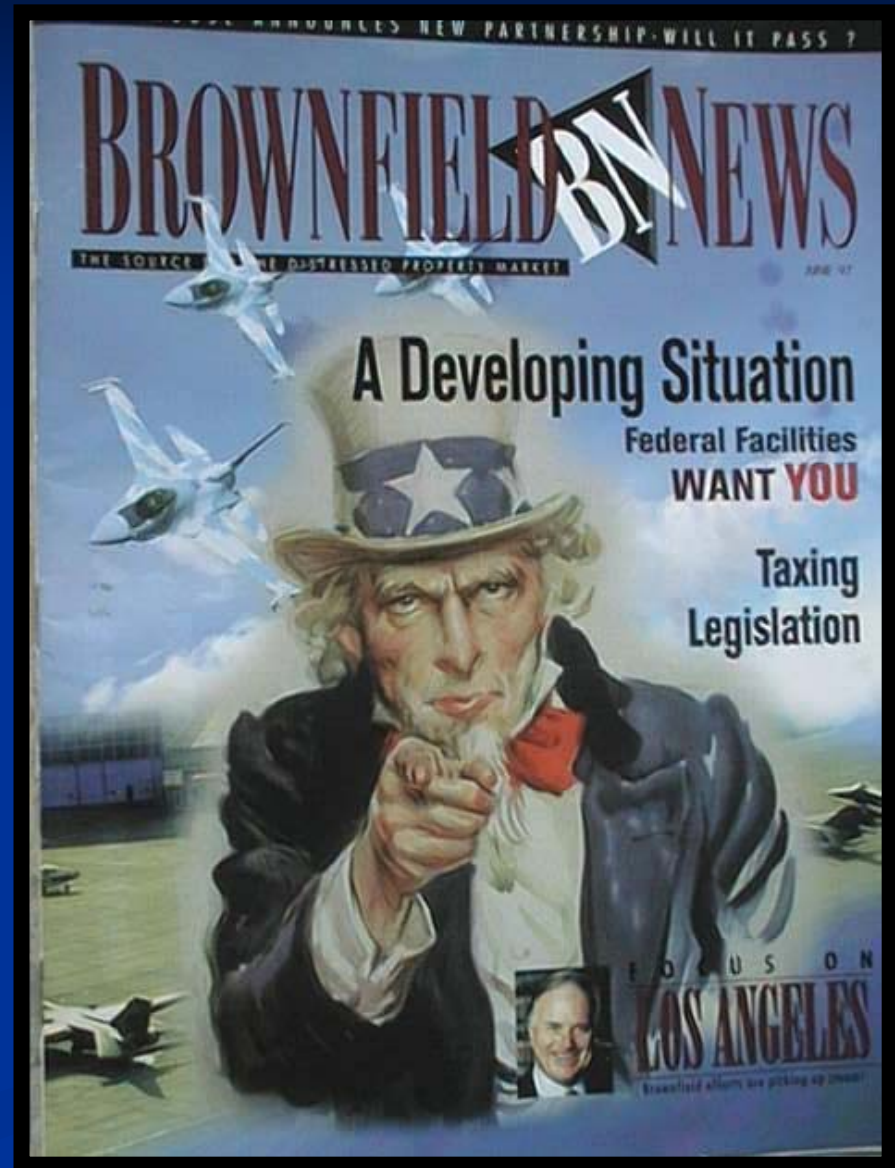


**“A major milestone was reached recently. After Asarco removed the most highly contaminated soils from the site, the Everett Housing Authority took over the former smelter property and the cleanup, with help from Ecology and the City. The housing authority sold the cleaned up property to Barclays North, Inc. New townhouses are planned on the site of the former smelter.”
(City of Everett Website, May 2006)**

The Backdrop

Contamination and Brownfields

- The “Marketplace” Driver v. “permanence to the maximum degree practicable”
- Assurance v. enforcement
- Forms of assurance
- Staff, grant availability
- Recent Developments
 - State (*e.g. Pending VCP Changes, Lien Bill*)
 - Federal (*AAI/Aviall*)
- Cutting Edge Issues (*e.g. Stakeholders, Residential Redevelopment*)



Brownfields and Future Land Use

- Softening of “Command and Control”
- Evolution of the toolbox: technology, regulatory practice, marketplace sensitivity and insurance/risk transfer products
- Increasing attention to protection of future land use and “no further action”
- “What was Love Canal but a massive failure of institutional controls?”

MTCA Reform Examples

- **Less Stringent Industrial Cleanup Standards, Site Specificity and Remediation Levels**
- **Prospective Purchaser Agreements**
- **Lender Liability Exemption**
- **Permit Exemptions**
- **“Plume Clause”**
- **IRAP (VCP), NFA’s and Opinion Letters**

The VCP and Pending Changes

- Initial New Form Letters 8/05, New Form Guidance 2006?
- “NFA” Means NFA!
- Alternatives to Interim NFA’s and Conditional NFA’s: The Technical Opinion Letter
 - Media and Area-Specific “Interim” NFA’s: No Longer
 - Conditional NFA’s (removing from Confirmed and Suspected Site List upon monitoring and/or Restrictive Covenant recording): No Longer

The New World of the Technical Opinion Letter

- Does Not Contain the Words “No Further Action”
- Not a Formal Settlement, But Neither is NFA Letter
- Can Legitimize Practical Solutions, e.g. Design Solutions Which Achieve Containment and/or “Protectiveness”
- Marketplace Significance?

Key Concepts for Formal, Complex Sites

■ Agreed Orders

- Often used for interim actions
- “Four corners” protection

■ Prospective Purchaser Consent Decrees

- Consent Decree protection prior to purchase
- Requirements
 - Potential priority if proposal to provide substantial public benefit
 - Yield substantial new resources to facilitate site cleanup
 - Expedite cleanup

**Assuring Success and the Right Fit:
Complexity, Staffing, Stakeholder
Needs, Timing and All That!**

Understanding Development: Liability Resolution and the Overall Project

- Resolution within pro forma
- Balancing funds between other requirements such as affordable housing/transportation and design/constructability on complex sites
 - Constrained sites/demolition
 - Quality of materials
 - Remediation expenses, cost of ongoing risk and assuring future income stream while protecting future stakeholders

Key Points Regarding Redevelopment

- **Applications of the Brownfields Toolbox With Emphasis on Protectiveness and Future Controls and Obligations**
- **Project Design and Integration with Cleanup: Regulatory Closure and a Financeable Project**
- **How to Manage Future Obligations: Who Will Mind the Ship?**

Voluntary v. Formal: Project Design and Integration with Cleanup

- Early Roadmapping: Roads to Protectiveness/Stakeholder Satisfaction
- Interface with Liability Solutions and Other Tools: What is Acceptable Risk?
 - Indemnities, Set Asides, Trust Funds, Insurance
- Removal versus Containment
- Protective Development Features
- Restrictive Covenants

Voluntary v. Formal: How to Manage Future Obligations

- **Interface with Project Design**
- **Operations and Maintenance; Long Term Monitoring**
- **Tools: Closure Specifics, e.g. Certificates of Completion, No Further Action and Opinion Letters**
- **Disclosure Obligations to Future Residents and Developer Role**

Voluntary Program Examples and Why

- Qwest Field (1998-2002)
- Ballard and the Drycleaner Across the Street (2004)
- Westlake, South Lake Union and the Inaccessible Contained Contaminant (2000, 2005)
- Eddon Boatyard, Gig Harbor (2005-)
- Various Technical Opinions in King, Kitsap and Pierce Counties for Site Resolution or in Support of Cost Recovery/Insurance

Formal Program Examples and Why

- Manhole 34/Sunnyside (1990-2004)*
- Nortar/Regatta Condominiums (1999-2000)
- J.H. Baxter Properties (Seahawks) (2000-)
- Thea Foss Site 5 (2005-2006)
- Everett Housing Authority/ASARCO (2004-2006)
- City of Bainbridge Island/Pritchard Park (2005-)
- Seattle Goodwill/Dearborn Campus (2005-)

Stakeholder Perspectives and Case Study of “The Perfect Storm”

- **Special Issues and Risk Avoidance**
 - Legalities, the Marketplace and Practicalities
 - Governmental Tools and Perspectives
 - The Developer’s Perspective

- **Example: EHA/ASARCO**
 - Housing Authority, City and Private Parties
 - Multiple Consent Decrees
 - Grant Resources
 - Facilitating Cleanup, Housing and Property Reuse

Step 1

Asarco

- EHA buys 15 Asarco Houses for \$2+M
- Asarco uses the \$ to remove soil above 3000 ppm in the Fenced Area in 2004

Everett Housing Authority



Step 2

Asarco

- EHA buys Fenced Area for \$1+ M after Ecology cert (8/04)
- Asarco uses the \$ to: (a) remove soil in Fenced Area & (b) clean rest of R-2 zone to residential standards at all 15 Asarco Houses and 22 non-Asarco Houses

Everett Housing Authority



Step 3

Asarco

- Asarco caps Fenced Area with 2+ feet of topsoil; Ecology certifies cleanup to residential standards to EHA
- EHA rehabs & sells 8-15 Asarco Houses (\$150K+ ea) for \$1-2 M
- EHA sells Fenced Area lots (\$30K ea) for \$3M

Everett Housing Authority



Agreements & Approvals Needed

City Actions/Agreements

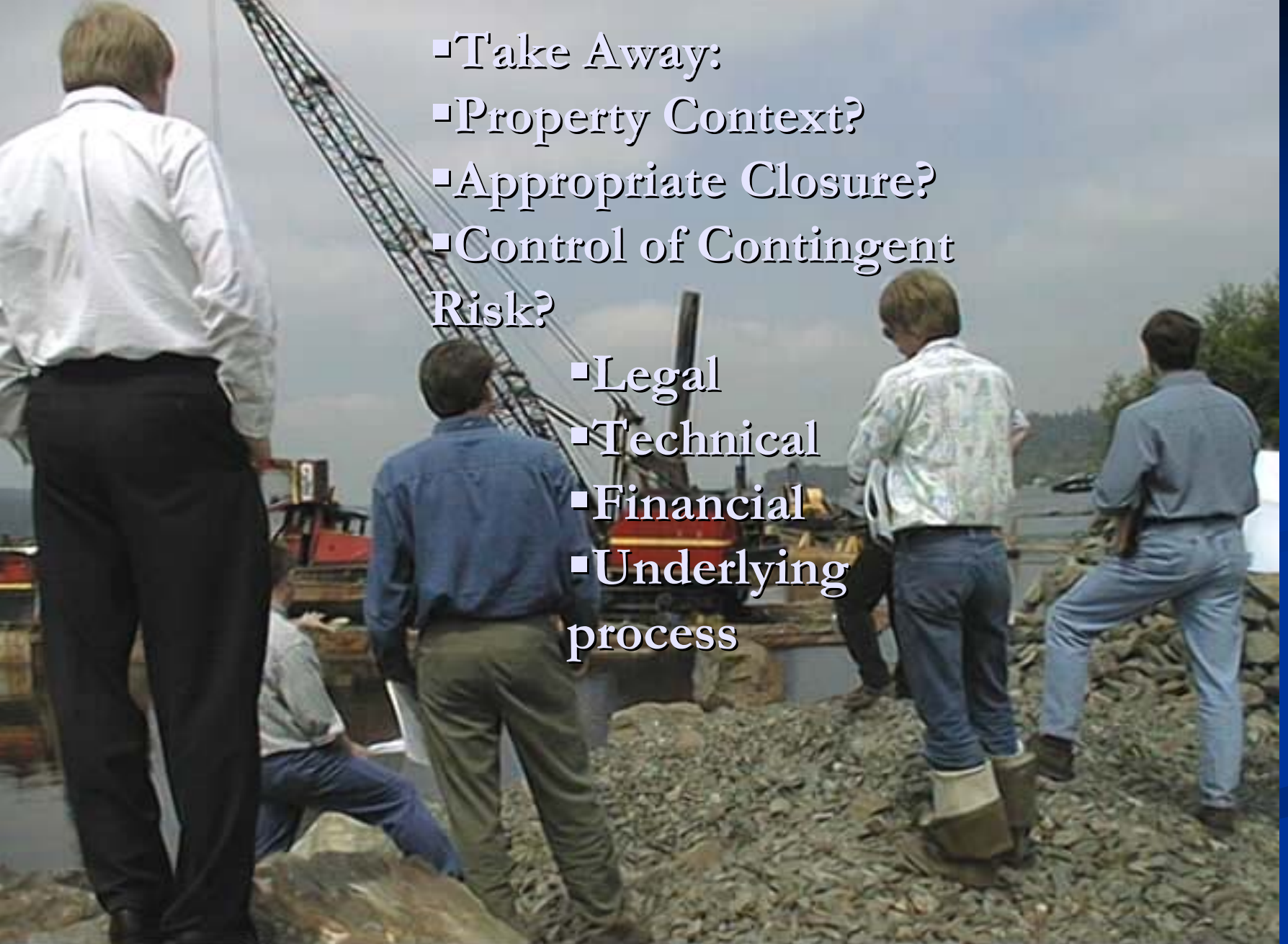
- EHA/City agreement & contingent loan agreement for repayment of line of credit
- City designations of blight, community renewal area, and EHA as community renewal agency (so EHA can sell the cleaned up property)
- *Later:* City approval of community renewal plan/project & processing of R-1A rezone, subdivision applications, etc.

Key EHA Approvals Needed

- Purchase & Sale and Remediation Agreements with Asarco (for Asarco to sell the property & do the cleanup)
- Prospective Purchaser Agreements with Ecology (to limit liability); deed restrictions
- EPA and Ecology grant and trust fund approvals
- EPA approval order for disposal of all soils at Asarco Tacoma

Choice of Tools: Practice Pointers

- **Market Perception of Nature and Extent**
 - Extent of liability
 - Complexity of negotiations
 - Likely land use restrictions
 - Marketplace knowledge and stigma
 - Investment of income stream
 - Third party funding/grants
- **Countervailing Concerns: Protectiveness, Staffing and Precedent**

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- Take Away:
 - Property Context?
 - Appropriate Closure?
 - Control of Contingent Risk?

- Legal
- Technical
- Financial
- Underlying process