



ATTORNEYS
AT LAW

Resources for Port Clean-Up Projects

The WPPA

Holly M. Stafford

9/21/2023

Team Approach



Environmental Acronyms

Acronym	Term	Meaning
AO	Agreed Order	Negotiated agreement between PLP and Ecology
BTEX	Benzene, Toluene, Ethylbenzene, and Xylenes	A group of VOCs found in petroleum that, if present, can change the cleanup levels for NWTPH-GX
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act	Also known as Superfund. Federal cleanup law that went into effect in 1980. Does not apply to petroleum-only sites
CAP	Cleanup Action Plan	The plan that results from an FS that sets forth the planned cleanup that will occur at a site, with goal of regulatory closure
CD	Consent Decree	Negotiated agreement between PLP and Ecology that is entered into court
COC	Constituent of Concern or Contaminant of Concern	The hazardous substances at a site
DCA	Disproportionate Cost Analysis	Analysis conducted as part of a FS to determine the cleanup action that is the most permanent to the extent practicable, taking cost into consideration
DOE	Washington State Department of Ecology	State agency responsible for maintaining contaminated site lists and overseeing formal cleanups and voluntary cleanups for non-petroleum sites
EC	Environmental Covenant	A restrictive covenant recorded against title to the source property that limits or prohibits activities that could interfere with cleanup or cause exposure. For example, no placing a well on the property for drinking water use
FS	Feasibility Study	Study conducted to evaluate feasible alternatives for cleanup, often completed with RI
IA	Interim Action	Less than complete remediation
LUST	Leaking Underground Storage Tank	UST that is documented to have leaked
Method A	Method A Cleanup Level	Cleanup standards for common contaminants and routine cleanups for unrestricted land use
Method B	Method B Cleanup Level	A site specific cleanup level
Method C	Method C Cleanup Level	Cleanup standards for industrial property – statutory standard

MTCA	Model Toxics Control Act	State statute in effect in 1989 that governs cleanup standards and processes for certain sites, including those involving petroleum as a hazardous substance. Found at RCW 70A.305 et seq. and 173-340
NFA	No Further Action	Opinion issued by either DOE or PLIA, indicating that no further action is necessary at a site. Site is removed from contaminated sites list once this opinion is granted.
NWTPH-GX	Total Petroleum Hydrocarbons Gasoline	Analytical method to determine gasoline range-petroleum concentrations in soil and water
PLIA	Pollution Liability Insurance Agency	State agency responsible for overseeing petroleum-only environmental cleanup sites in Washington (home heating oil and regulated tanks), works with DOE
PLP	Potentially Liable Person	A person, company, government, etc. liable for remediation
POC	Point of Compliance	The place where cleanup levels must be met. MTCA defines standard POC for soil, groundwater, and air. For example, the standard POC for direct contact for soil is 15 feet below ground surface
RCW	Revised Code of Washington	Washington's statutory scheme
RI	Remedial Investigation	Investigation conducted to determine the nature and extent of contamination (i.e. sampling, phase II environmental site assessment)
TAP	Technical Assistance Program	PLIA's program that issues NFAs for petroleum sites
TPH	Total Petroleum Hydrocarbons	Family of chemical compounds that come from crude oil
UST	Underground Storage Tank	Underground fuel tanks are required to be registered with the State, unless they meet certain criteria, such as have capacity of 110 gallons or less or store heating oil for onsite use
VCP	Voluntary Cleanup Program	Ecology's program that issues NFAs for hazardous substance sites
VOCs	Volatile Organic Compounds	Organic compounds
WAC	Washington Administrative Code	The regulations drafted by Washington administrative agencies

Model Toxics Control Act

- PLPs
 - Current owners and operators
 - Former owners and operators at the time of a release
 - Arrangers
 - Generators
 - Transporters

Formal v. Informal

- VCP and NFA
- AO, CD, and PPCD

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29	HON. RICHARD A. JONES		
	UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON		
	PUGET SOUNDKEEPER ALLIANCE:) and RE SOURCES FOR SUSTAINABLE) No. C08-0749RAJ COMMUNITIES,)) CONSENT DECREE Plaintiffs,)) v.)) BORNSTEIN SEAFOODS, INC.,)) Defendant.)		
	<hr/>		
	The court has received the parties' joint motion for entry of a consent decree (Dkt. # 13), and has received the notice (Dkt. # 14) of the United States (pursuant to 33 U.S.C. § 1365(c)(3)) that it does not object to the entry of the consent decree. Having reviewed the parties' consent decree and balance of the record, the court GRANTS the joint motion, and enters the following consent decree as the judgment of the court in this matter.		
	WHEREAS, Plaintiffs Puget Soundkeeper Alliance and RE Sources for Sustainable Communities filed a Complaint against Defendant Bornstein Seafoods, Inc. on May 13, 2008, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 et seq., relating to discharges of stormwater from Defendant's facility located in Bellingham, Washington, seeking declaratory and injunctive relief, civil penalties and attorneys fees and costs;		
	<table border="0"> <tr> <td> CONSENT DECREE - 1 No. C08-0749RAJ </td> <td style="text-align: right; vertical-align: top;"> SMITH & LOWNEY, PLLC 2217 EAST JOHN STREET SEATTLE, WASHINGTON 98112 (206) 860-2883 </td> </tr> </table>	CONSENT DECREE - 1 No. C08-0749RAJ	SMITH & LOWNEY, PLLC 2217 EAST JOHN STREET SEATTLE, WASHINGTON 98112 (206) 860-2883
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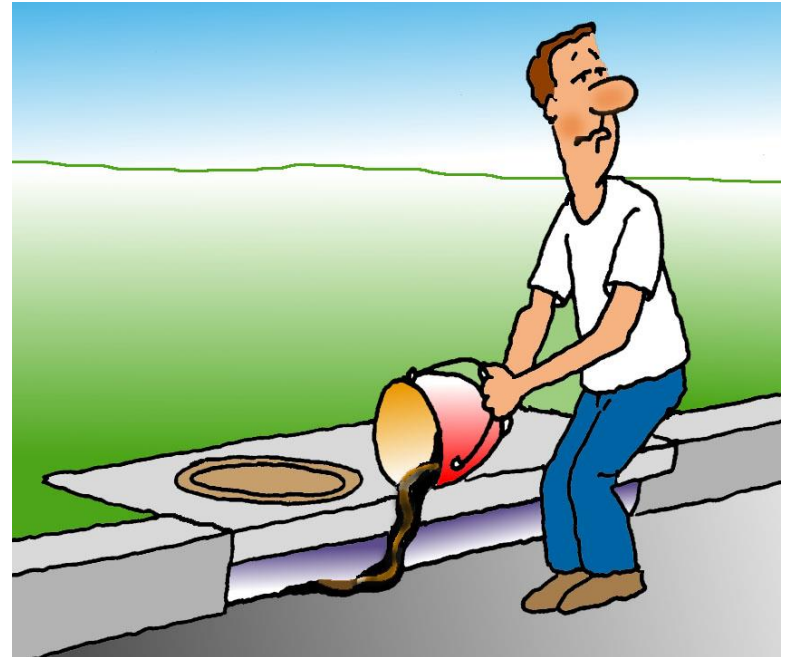
Model Toxics Control Act Cont'd

Three Points:

1. Retroactive
2. Joint and several liability
3. Strict liability

Pre-1986 CGL Insurance

- Qualified pollution exclusion
- “Sudden and accidental”



Five Elements:

1. Proof of Insurance
2. Solvent Insurer
3. Solvent Insured to make a claim
4. Occurrence during policy period
5. A “liability” – damage to a third party

Proof of Insurance

- Primary evidence
 - Policy
 - Certificate of Insurance

ACORD CERTIFICATE OF INSURANCE		ISSUE DATE (MM/DD/YY)					
PRODUCER ARMASON INSURANCE AGENCY, INC. P.O. BOX 129 BELLINGHAM, WASHINGTON 98227		11/20/84					
THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.							
COMPANIES AFFORDING COVERAGE							
COMPANY LETTER	A	GREAT AMERICAN INSURANCE COMPANY					
COMPANY LETTER	B						
COMPANY LETTER	C						
COMPANY LETTER	D						
COMPANY LETTER	E						
INSURED SEA K FISH COMPANY, INC. P.O. BOX 2040 BLAINE, WASHINGTON 98230							
COVERAGES							
THIS IS TO CERTIFY THAT POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS, AND CONDITIONS OF SUCH POLICIES.							
CO. OR LN.	TYPE OF INSURANCE	POLICY NUMBER	POLY. EFFECTIVE DATE (MM/DD/YY)	POLY. EXPIRATION DATE (MM/DD/YY)	LIABILITY LIMITS IN THOUSANDS	EXCESS COVERAGE	AGGREGATE
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMPREHENSIVE FORM <input checked="" type="checkbox"/> PREMISES OPERATIONS <input checked="" type="checkbox"/> EXPLOSION & COLLISION HAZARD <input checked="" type="checkbox"/> PRODUCTS-COMPLETED OPERATIONS <input type="checkbox"/> CONTRACTUAL <input type="checkbox"/> INDEPENDENT CONTRACTORS <input checked="" type="checkbox"/> BROAD FORM PROPERTY DAMAGE <input checked="" type="checkbox"/> PERSONAL INJURY	BP 6 22 52 35	3/27/84	3/27/85	BODY INJURY \$ 300 PROPERTY DAMAGE \$ 200 B & P COMBINED \$ \$ PERSONAL INJURY \$		
A	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS (PREV. PASS.) <input type="checkbox"/> ALL OWNED AUTOS (OTHER THAN) <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> GARAGE LIABILITY	BA 6 21 59 92	3/27/84	3/27/85	BODY INJURY \$ PROPERTY DAMAGE \$ B & P COMBINED \$ 500		
A	EXCESS LIABILITY <input checked="" type="checkbox"/> UMBRELLA FORM <input type="checkbox"/> OTHER THAN UMBRELLA FORM	PRO 6 11 52 15	3/27/84	3/27/85	B & P COMBINED \$ 2,000	\$ 2,000	
	WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY				STATUTORY \$ (EACH ACCIDENT) EXCESS POLICY LIMIT \$ DISEASE EACH EMPLOYED \$		
	OTHER						
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS							
C-4-C-00275							
CERTIFICATE HOLDER PORT OF BELLINGHAM 625 CORNWALL AVENUE BELLINGHAM, WASHINGTON 98225				CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL () DATE WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE			
ACORD 25 (2/84)				© 1984 ACORD CORPORATION 1984			

Proof of Insurance Cont'd

- Secondary evidence
 - Checks
 - Declaration

STATE OF WASHINGTON)
COUNTY OF SKAGIT) DECLARATION OF [REDACTED]

I, [REDACTED], under penalty of perjury under the laws of the State of Washington, state and allege as follows:

1. I was an insurance broker at in Sedro Woolley, Washington during the 1970s and 1980s. I became semi-retired in 1990 when I was involved with a limited number of accounts and I fully retired in 1994.

2. I was the insurance broker for [REDACTED] during the 1970s and 1980s, when it purchased comprehensive general liability policies from me.

3. During this time period, although I would shop the insurance around to various carriers, [REDACTED] would generally be insured by one company for a number of years and then would switch carriers to another company for a number of years.

4. One of the two companies that I primarily sold insurance for during the period that [REDACTED] purchased insurance from me was Insurance Company of North America ("INA").

5. INA would have been inclined to write the type of comprehensive general liability insurance policy that [REDACTED] purchased.

6. [REDACTED] might have been insured by INA in the 1970s and 1980s.

DATED this 26th day of March, 2012, at Sedro Woolley, Washington.

[REDACTED]

Insurance Contract + Laws + Public Policy

- WAC 284-30-900 et seq. - Environmental Claims
 - Lost policies
 - Carrier obligations
- WAC 284-30– Insurance Fair Conduct Act
- Bad Faith
 - Additional Insured must be treated as named insured
 - Coverage by estoppel

Received ROR, Now What?

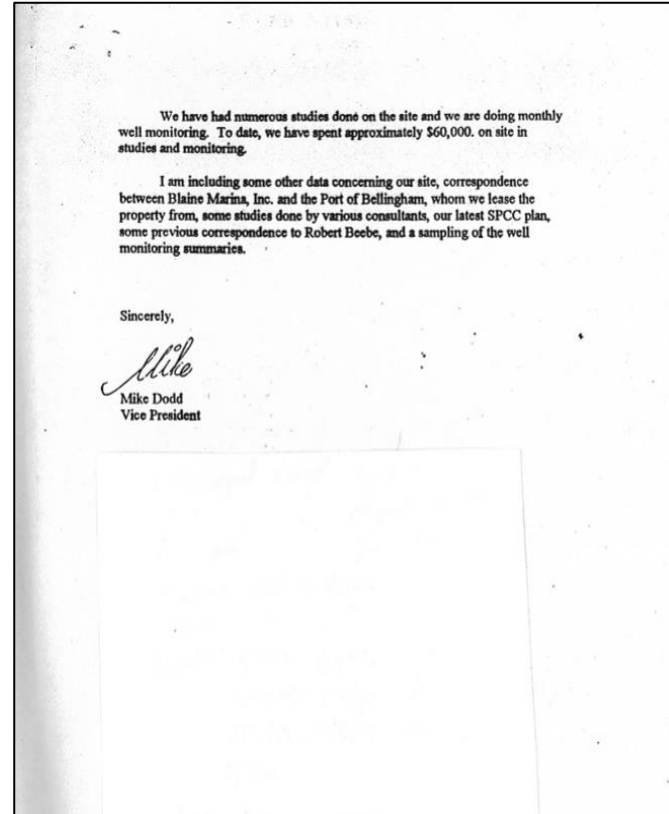
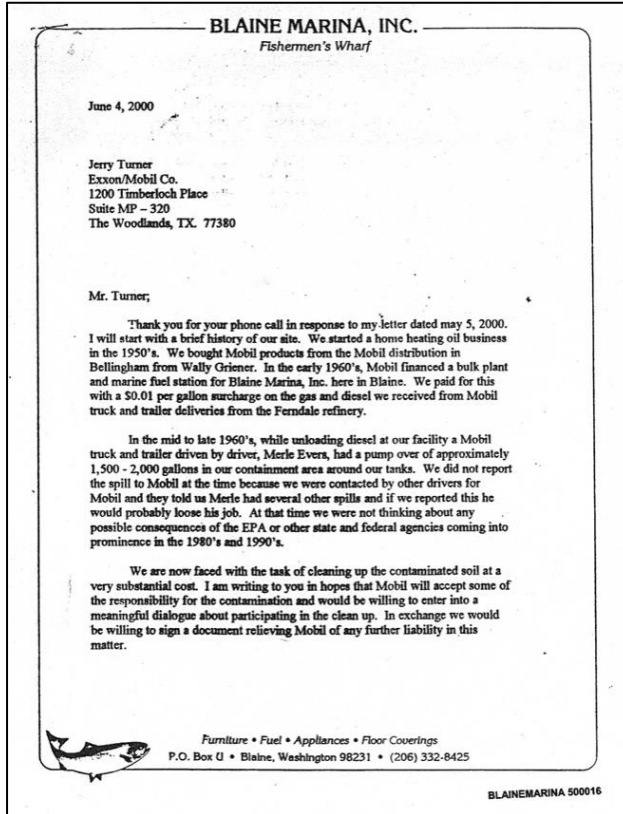
- Defense v. Indemnity
 - Tipping point
 - Defense from time PLP receives claim not from time of notification
 - AO/remedy selection
- Engagement
 - Requests for info
 - Common coverage defenses
 - Pollution exclusion
 - Occurrence
 - Owned property – groundwater
 - Failure to timely notify carrier

Other Sources of OPM

- Contractual Indemnification
- Other PLPs



Other Sources of OPM Cont'd



Additional Considerations

- Ambiguity generally resolved in favor of insured
 - After acquired property – *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, Washington State Supreme Court, 2001
- Scope of release
 - *Hulbert v. Port of Everett*
- Time

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