



Navigating Washington's Cleanup Law for Brownfield Redevelopment Success

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Brownfield Redevelopment Success



A dark grey arrow points to the right from the left edge of the slide. Below it, several thin, curved lines in shades of blue and grey sweep across the left side of the slide.

The cleanup law can be challenging...

- ✓ Communities often struggle with the Model Toxics Control Act
- ✓ Brownfields add complexity
- ✓ Insights about MTCA cleanup process
- ✓ Suite of Brownfield funding resources
- ✓ Real-world case study
- ✓ ...then listen to you.

What's a brownfield?



What's a brownfield?

A property – the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

What does the Brownfields Program provide?

EPA & Washington State Department of Ecology's Brownfields Programs provide **grants and technical assistance** to communities, states, tribes and others to **assess, safely clean up and sustainably reuse** contaminated properties.

**What does the
Brownfields Program
provide?**

grants and technical assistance

Contaminants addressed with Brownfields funding...



Hazardous substances



Petroleum



Asbestos & lead paint



Controlled substances (e.g., Meth labs)



Mine-scarred lands



Other environmental contaminants

EPA Brownfield requirements

Recipients must comply with:


1. All applicable ***federal and state laws*** to ensure assessment and cleanup protect human health and the environment.
2. Program's technical requirements that include but aren't limited to:

Quality Assurance (QA) requirements	Historic properties or threatened and endangered species
All appropriate inquiries— Property purchase and liability	Environmental cleanup responsibilities
Sufficient progress	Collecting post-grant information
Protections of nearby and sensitive populations	

Brownfield due diligence

- **Landowner liability defense**
- Perform “all appropriate inquiry” (AAI) prior to purchase of property
 - Phase I Environmental Site Assessment
- **Demonstrate “no affiliation” with a liable party**
- Comply with land use restrictions and not impede the effectiveness of institutional controls
- Take “reasonable steps” to prevent release of hazardous substances
- Provide cooperation, assistance and access
- Comply with information requests and administrative subpoenas
- Provide legally required notices





Brownfields Funding Options

Funding Type	Who Is Eligible?	Planning	Assessment	Cleanup	Cost Share?	Offering
Ecology Integrated Planning Grant (IPG)	Local government	Yes	Yes		No	Continuous, based on available funding
Ecology State Response Program (SRP)	Local government; Tribes, Non-profit	Yes	Yes	Yes*	No	Continuous, based on available funding
Ecology Remedial Action Grant (RAG)	Local government		Yes	Yes	Yes, 10-50%	Biennial, in budget request
Ecology Affordable Housing Cleanup Grant Program	Anyone	Yes	Yes	Yes	Yes, 0-50%	Biennial, in budget request
EPA Cleanup Grant	Local government, Tribes, Non-profit			Yes	Yes, 20%	Competitive, annual solicitation in Fall
EPA Multipurpose Grant	Local government, Tribes, Non-profit	Yes	Yes	Yes	Yes, \$40K	Competitive, biennial solicitation in Fall
EPA Targeted Brownfields Assessment	Local government, Tribes, Non-profit		Yes		No	Continuous, based on available funding
EPA Assessment Grant	Local government, Tribes, Non-profit	Yes	Yes		No	Competitive, annual solicitation in Fall
Commerce Brownfields Revolving Loan Fund (BRLF) Program Loan	Local government, Non-profit, Tribes, Private Entity			Yes	No	Continuous, based on available funding
Commerce BRLF Program Grant	Local government, Non-profit, Tribes		Yes	Yes	No	Continuous, based on available funding



Here's the MTCA 101 portion of the presentation.

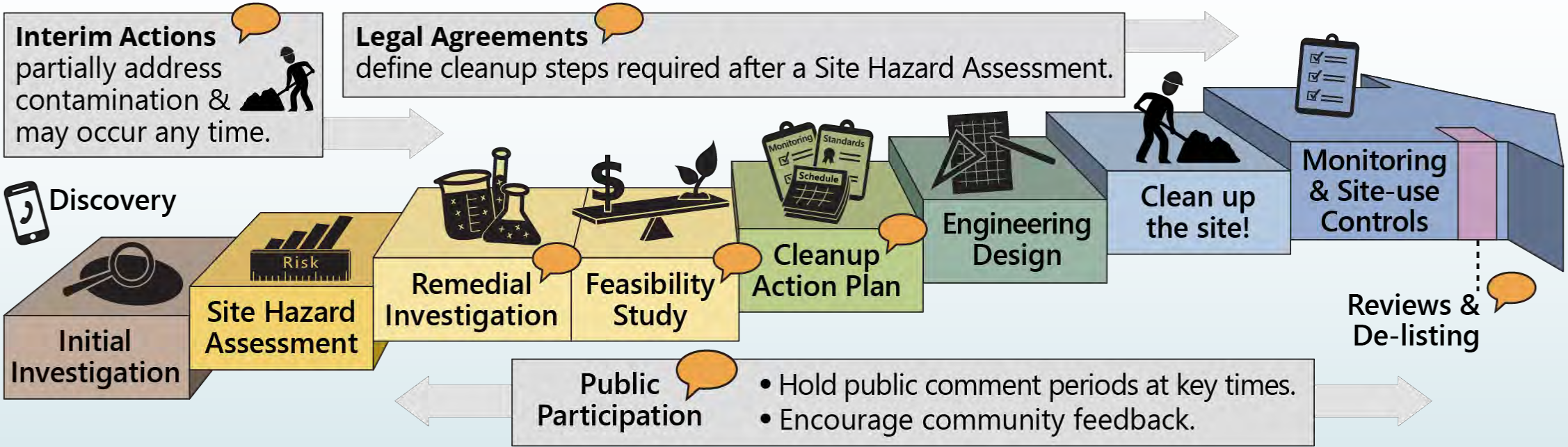


Here's the MTCA 101 portion of the presentation.

Ready... set....



Cleanup process in Washington



Cleanup process in Washington



Ecology-supervised cleanups: “Formal” process under order/decre

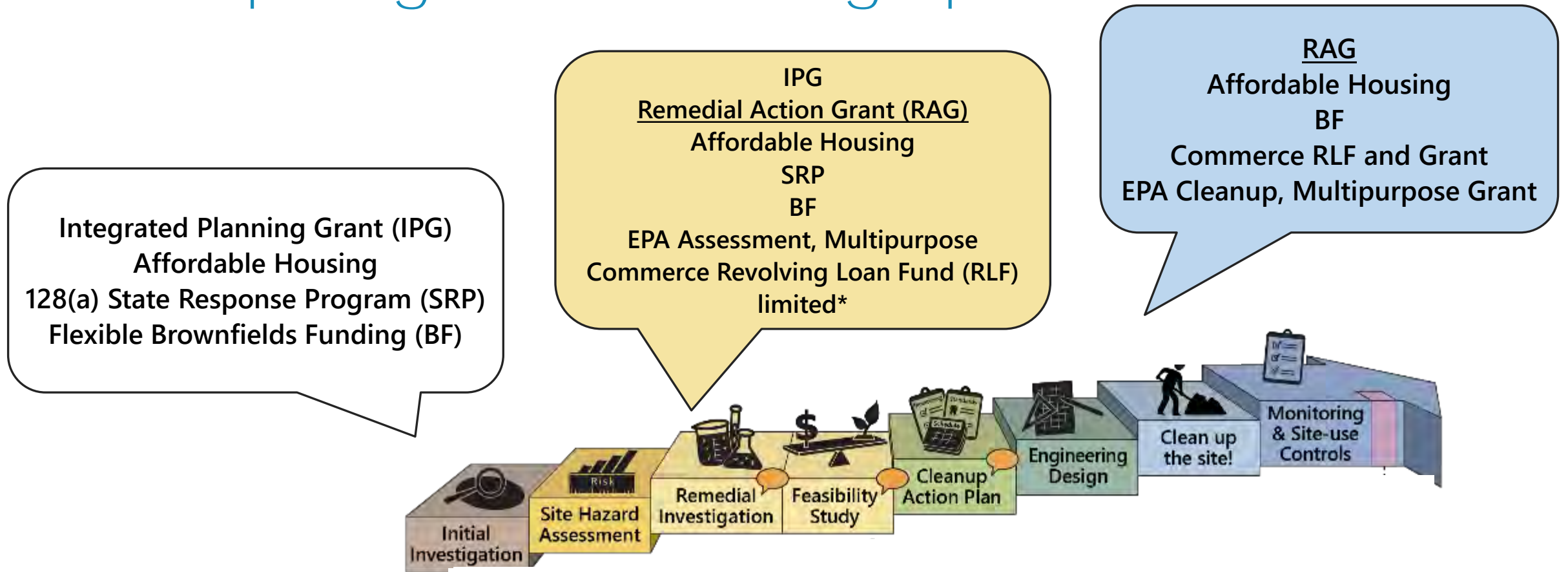
Independent cleanups: Voluntary Cleanup Program (VCP) & Pollution Liability Insurance Agency (PLIA) Technical Assistance Program

MTCA vs Brownfields EPA requirements



Brownfields CERCLA Requirements	Ecology MTCA Equivalent	MTCA additional needs
AAI Due diligence – Phase I ESA	Initial investigation	Site Hazard Assessment (SHARP) – Completed by Ecology or local health district with authority
Phase II ESA	Focused RI	May need additional data – Grant insufficient to complete or completed within property boundaries but contamination travelled beyond.
ABCA	RI and FS	Need additional steps – Need to perform disproportionate cost analysis (i.e. DCA)
ROD	CAP	

Cleanup stages with funding options



Planning	Assessment			Cleanup
Planning	Initial Investigation/ Phase I & II ESA	RI/FS	CAP	EDR/Cleanup

MTCA Regulatory Authority

Rules (1988)

- WAC 173-340 (Model Toxics Control Act - Cleanup)
- WAC 173-204 (Sediment management standards)
- **WAC 173-322A (Remedial Action Grants)**

SB 5296 MTCA Changes (2012)

- Introduced the concept of “brownfield properties” into MTCA.
- **Ecology must consider both site risks and land reuse potential when allocating resources**
- Grant changes and updates

Model Toxics Control Act

- Rules intended to streamline process for setting cleanup levels
- Judgment involved in setting point of compliance & selecting remedies
- Community involvement in site cleanup decisions is key to success
- Ecology continues to look for ways to improve the cleanup process and regulations

Hazardous substance definition

- Any substance that is a hazardous substance under federal superfund law
- Dangerous or extremely dangerous hazardous waste under state dangerous waste law
- Petroleum and petroleum products
- Other substances determined by Ecology by rule (none to date)





Definition of Facility

Any site or area where a hazardous substance has been disposed of or otherwise come to be located.

Physical structures including:

Buildings	Pipelines
Landfills	Ponds
Wells	Vehicles

Who's responsible for cleanup?

Potentially Liable Persons (PLPs)

- Current owner and operator with any ownership interest or exercises any control
- For abandoned facilities, owned, operated or exercised control before its abandonment
- Owner and operator at the time of release
- Persons who acquired/owned the hazardous substance and arranged for disposal, treatment or transport (i.e. generators)

Who's responsible for cleanup (continued)

Potentially Liable Persons (PLPs)



- ✓ Persons who transported the hazardous substance (i.e. transporters)
- ✓ Manufacturers of hazardous substances that cause pollution when used according to their instructions (e.g. pesticides)

Nature of Liability

- **Joint and Several:** One or all PLPs may be liable for entire cleanup
- **Strict liability:** PLPs are liable based on status regardless of fault

Except in emergencies, Ecology must issue PLPs a notice and solicit comments on status before ordering action at a site

Defenses to Liability

- Act of God or Act of war
- Act or omission of a third party (e.g. trespasser), provided utmost care was used
- **Innocent purchaser, provided used “all appropriate inquiry” into previous ownership and uses of property**
- Substance lawfully used for domestic purposes

Defenses to Liability

Farmers: Substances were applied to food crops without negligence and in accordance with all applicable laws and regulations

Lenders: Provided didn't participate in the management of the facility

Plume Clause: Substance came to be located on the property solely as a result of migration through the ground water from an off-property source

Cleanup Level Concentration

Method A. Intended for simple sites
(Tables, ARARs, & Procedures)

Method B. Based on child exposure
(ARARs, Formulas, & Procedures)

HQ < 1, HI < 1*; 1×10^{-6} , 1×10^{-5} *

Method C. Based on adult worker
(ARARs, Formulas, & Procedures)

HQ < 1, HI < 1*; 1×10^{-5} , 1×10^{-5} *

* Total Risk



Remedy Selection Requirements (FS)

Seven criteria

- ✓ Protect Human Health & Environment
- ✓ Comply with Cleanup Standards
- ✓ Provide for Compliance Monitoring
- ✓ Use Permanent Solutions to the Maximum Extent Practicable
- ✓ Provide for a Reasonable Restoration Timeframe
- ✓ Consider Public Concerns

...plus Remedy-Specific Requirements

Remedy Decisions under MTCA

- Ecology prepares “cleanup action plan” (CAP) for cleanups conducted by Ecology or under an order or decree (VCPs can prepare an equivalent document)
- Similar to Superfund “record of decision” (ROD)
- Ecology can use federal ROD or order/decreed in place of a CAP if Ecology has concurred and document meets MTCA remedy selection requirements

Once issued, the CAP locks in cleanup standards (formal)

vs.

Cleanup standards for VCP sites lock in when final cleanup action begins or at time of VCP review

When can sites “go formal”?

- Someone sees the potential of a languishing property...concerns only
- Due diligence/All Appropriate Inquiries/Phase I ESA (**Initial Investigation**)
 - ✓ Document review and site visit.
- Phase II ESA –Focused/Limited (**RI**).
 - ✓ Sample collection and data interpretation to confirm contamination present and investigate initial nature and extent.
- Analysis of Brownfields Cleanup Alternatives (**FS**)
- **Complex site**



Formal site administrative process

Agreed order

Enforcement order

Consent decree

- Standard settlement
- De minimis settlement
- Prospective purchaser agreement

Satisfaction letter of order/decreed under formal cleanup

vs.

“No Further Action” letter under VCP

Public participation in cleanup decisions...



Public participation in cleanup decisions... the key to community acceptance

- ✓ Ecology-led
- ✓ Transparency
- ✓ Public Participation Plan
- ✓ Public notices/meetings & formal hearings
- ✓ Public Participation Grants available for Community Groups



And now for something completely different...

Brownfield case study: Quiet Cove, Anacortes



Brownfield case study: Quiet Cove, Anacortes

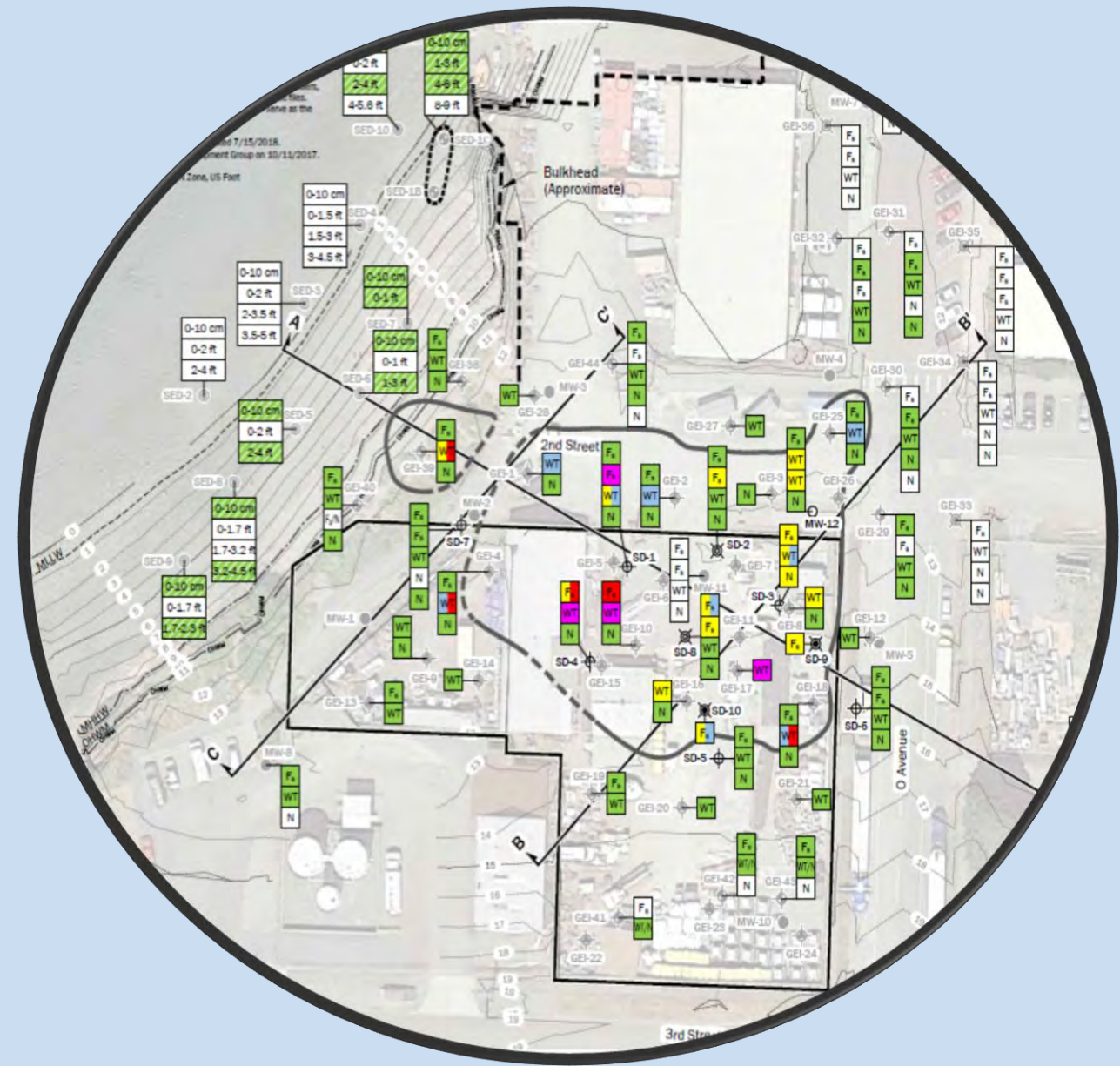
- ✓ Received \$200,000 IPG to conduct Phase II ESA/focused remedial investigation
- ✓ Over \$2M RAG used far...
- ✓ Port of Anacortes leading cleanup under AO
- ✓ Formal cleanup process entered after IPG focused investigation
- ✓ Joint and several liability (historical insurance)

Lay of the land

Interim Action to clean up
source of petroleum and
other contaminants within
property boundaries

AND

provide additional
information to complete RIFs.



0.75 acres of fill along Guemes Channel waterfront

Pre-construction planning:

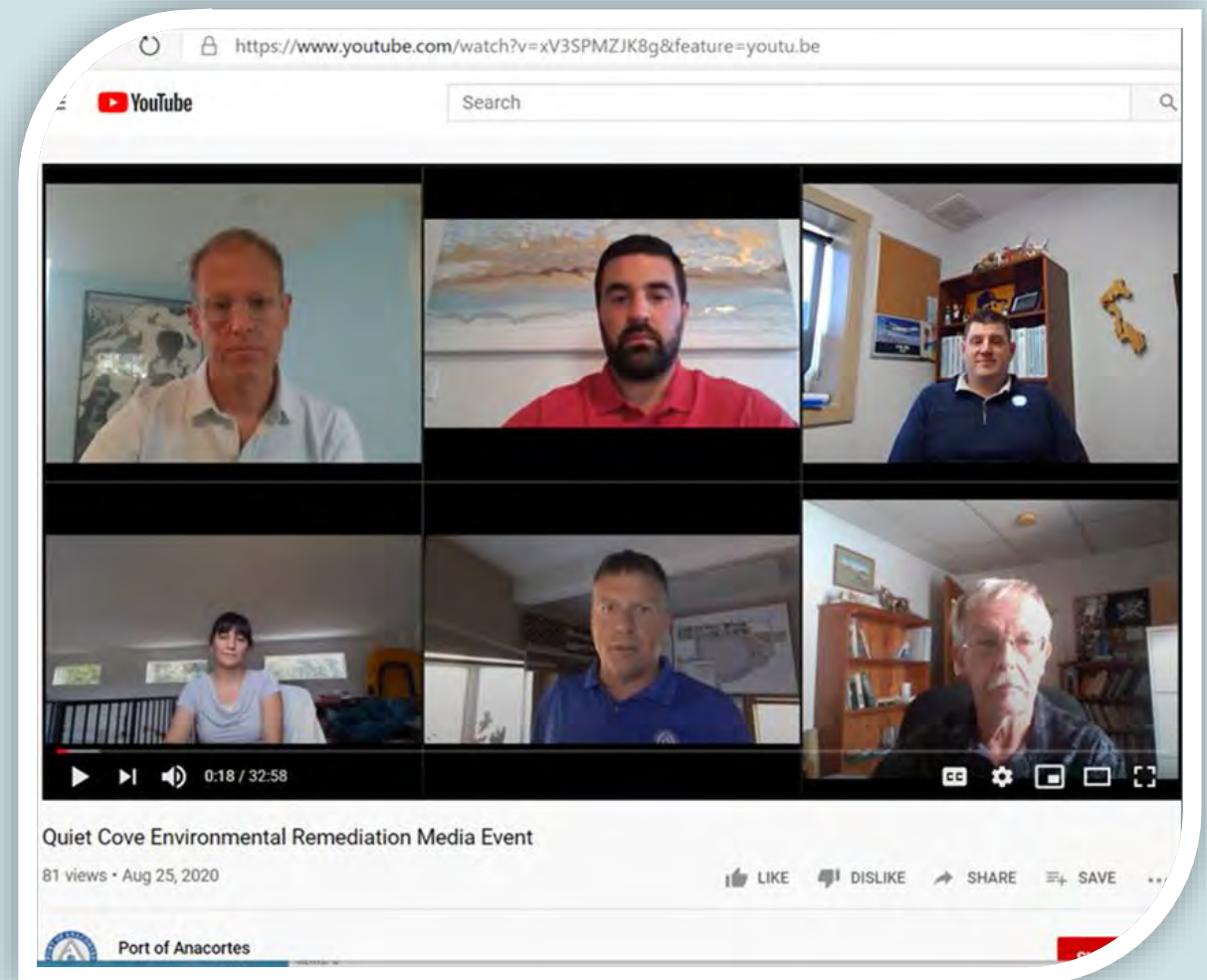
Regulation and Construction

- ✓ Stay within dry season window
- ✓ Time is money

Port Mission

- ✓ Keep and create jobs during crisis
- ✓ Environmental stewardship and economic growth are not mutually exclusive
- ✓ Keep a very interested community “in the know”

Know what matters to them



**Golden shovel ceremony under COVID:
Acknowledgment and gratitude**



During construction (August – October)

Discoveries include:

- ✓ Cut fuel pipes heading offsite and through vegetative strip
- ✓ Cultural resources
- ✓ Southwest and south boundary contamination from potential cross-gradient GW flow and heading offsite
- ✓ Underground heating oil tank
- ✓ Native layer chromium and mercury contamination

PLP's perspective...

- The project benefitted from the long-standing relationship between the Port and Ecology. Over the years, Port staff and their consultants had worked together with Ecology through challenging issues.
- As the pandemic set in and it was understood Ecology oversight would be remote, Ecology and the Port developed a list of potential “what-ifs” and how to approach/document foreseeable construction challenges.
- Everyone was committed to being on-call for the duration of the project. Consistent availability for phone consultations and diligent follow-up were critical to real-time decision making and therefore project success.
- The Port understood that Ecology has an internal review process and therefore crafted our documentation to facilitate Ecology’s internal conversations resulting in timely response and efficient work flow.





Your turn! I'm listening...

What would make it easier for you to enter into a formal agreement?





**What roadblocks
might keep you from
applying?**

**How can we be of
greatest help when
you're redeveloping
your brownfield?**





Thank you!

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