Brownfields Financing Webinar Series
Digging for Clean-up Funds: Insurance Archeology

THE BROADCAST WILL BEGIN AT 2:00PM (Eastern)

- Submit your questions in advance using the GoToWebinar control panel
- View previous webcast recordings online at www.cdfabrownfields.org
Welcome & Overview

Using your telephone will give you better audio quality.

Submit your questions to the panelists here.

Join the Conversation

Technical Questions?
Contact CDFA at 614-705-1300
Panelists

**Don Snemis**
Environmental Law Partner
Ice Miller – Indianapolis, IN

**Jeff Carnahan**
President
EnviroForensics and PolicyFind

**Cheyenne Chapman**
Legal Policy Analyst
Land Quality Division
Oregon Department of Environmental Quality
Brownfields Financing Toolkit

Federal Financing Resources
Case Studies

Bond Resources
Case Studies

TIF Resources
Case Studies

Tax Credit Resources
Case Studies

Revolving Loan Fund Resources
Case Studies

EB-5 Resources
Case Studies

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org
Subscribe online to receive monthly news and event updates!

Brownfields Financing Update
May 1, 2018

Brownfields Finance UPDATE
This Month’s Highlights from the Brownfields Finance Industry

Features

Administrator Pruitt Announces $54.3M in Brownfield Grants to Assess and Clean Up Contaminated Properties and Promote Economic Redevelopment Nationwide
EPA has selected 144 communities for brownfields environmental Assessment, Revolving Loan Fund, and Cleanup grants. The 221 grants totaling $54.3 million will provide communities with funding to assess, clean up and redevelop underutilized properties while protecting public health.

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org
Brownfield Financing Webinar Series

Upcoming 2018 Webinars:

The Developer’s Perspective in Financing Brownfield Projects
September 6, 2018
2:00 – 3:30pm EST
REGISTER!

Previous Topics Include:

Reimaging Brownfields as Transit Oriented Developments
Hazardous to Healthy: Financing Solutions for Recovering Brownfields
Financing Brownfields with Private Activity Bonds
Reviving Economic Activity on Former Manufacturing Sites
Strategic TIF Structuring for Brownfield Redevelopment
Reaching Your Redevelopment Goals with Brownfields Revolving Loan Funds

And Much More...
Brownfields Project Marketplace

What is the Marketplace?
- Forum that connects communities looking to finance brownfield redevelopment projects with development financiers and brownfield project experts

Community Benefits:
- Discover financial resources
- Direct access to financial advisors and brownfield experts

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org
Project Response Teams
Opportunities available in 2018!

Previous Recipients:

- Texarkana, TX
- Tulsa, OK
- Kalispell, MT
- Josephine County, OR
- Longmont, CO
- New Bern, NC
- Englewood, IL
- Bedford Heights, OH
- Lee, MA
- New Orleans, LA
- Springfield, MO
- Burlington, VT
- Bend, OR
- Pueblo, CO
- Sheridan, CO
- Texarkana, AR
- Fresno, CA
- Ponce, PR
- Pensacola, FL
- Fresno, CA
- Dellwood, MO
- Duluth, MN
- St. Marys, GA
In-Person Project Marketplace – Dallas, TX
Nov 8, 2017
CDFA National Development Finance Summit
REGISTER!

CDFA will waive the CDFA National Summit registration fee for any community that is chosen to present a project at the Marketplace.

Now Scheduling Interviews for Project Response Teams!

Contact:
Blake Williams
Program Coordinator
614-705-1306
bwilliams@cdfa.net
What are you reading?

Your development finance toolbox isn’t complete without a set of CDFA reference guides. Members save 15% on every purchase.

Order today at www.cdfa.net.
Environmental Cost Recovery Claims

Donald M. Snemis
Ice Miller LLP

Presented to CDFA’s Brownfields Technical Assistance Program

June 28, 2018
What is a brownfield?

Current or former commercial or industrial site

Underutilized or no longer in productive use

Unattractive for expansion, redevelopment or reuse due to the presence or potential presence of environmental contamination

EPA estimates that there are more than 450,000 brownfields in the United States
Job growth
Stimulation of economic development in the area
Preservation of undeveloped green spaces
Improve and protect the environment
Removal of dangerous and unsafe conditions
Remove an eyesore
Increased tax revenues
Reduce costs (upkeep, maintenance, insurance)
Manage past and future liabilities
Federal or state grants and loans

Brownfields Utilization, Investment, and Local Development (BUILD) Act of 2018

Tax increment financing (TIF) districts

Tax credits and abatements

City/County/State general funds

Private financing

Cost recovery from polluters and their historic insurers
Several federal and state laws provide that a person or entity responsible for the release of hazardous substances can be held responsible for the cost of an environmental cleanup. A “cost recovery claim” is a claim by a landowner or other entity who incurs cleanup costs against the responsible party. This could be in the form of an informal demand letter or an actual lawsuit.
The Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, CERCLA, as amended by the BUILD Act, provides a defense to government entities that gain ownership or control of land through seizures, abandonments, bankruptcies, foreclosures, or similar means. CERCLA also provides the “Bona Fide Prospective Purchaser” and “Innocent Landowner” Defenses through the Phase I “all appropriate inquiry” process.
CERCLA § 107 provides that a party responsible for a release of hazardous substances is liable for the cleanup costs incurred by any other person.

Four elements:
- The site is a “facility”
- A release or threatened release has occurred
- The release or threatened release caused the plaintiff to incur necessary response costs consistent with the National Contingency Plan
- Defendant is a “responsible party”
A “responsible party” includes:
- The current owner or operator of the facility
- The owner or operators at the time of the disposal of hazardous substances
- Those who arranged for the disposal
- Those who transported the hazardous substances

Each responsible party is jointly and severally liable for the entire cost of responding to the hazardous wastes
CERCLA § 113(f) provides for a contribution action that can be brought by a party who might also be a responsible party. In such cases, the plaintiff can obtain contribution from other responsible parties to offset their liability. This might be necessary if the governmental entity could be responsible for some of the contamination on site.
CERCLA’s definition of “hazardous substances” expressly excludes petroleum products, so a site involving **only** petroleum or petroleum products contamination is not appropriate for a CERCLA action.

Innocent purchasers - bona fide prospective purchasers
Some costs not recoverable
Exception for recyclables
Many states have statutes that provide private causes of action against polluters


“[a] person may, regardless of whether the person caused or contributed to the release of a hazardous substance or petroleum into the surface of subsurface soil or groundwater that poses a risk to human health and the environment, bring an environmental legal action against a person that caused or contributed to the release to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum.”
Common Law Theories

Trespass
Nuisance
Negligence
State and federal law on limitations periods is unclear and complicated – how long? When does it begin?

CERCLA § 107 removal action – 3 years from removal
CERCLA § 107 remedial action – 6 years after initiation of physical on-site construction
CERCLA § 113 – 3 years from the date of resolution

State statutes of limitations vary greatly

Always err on the side of asserting claims or obtaining a tolling agreement as soon as possible
Under CERCLA, recoverable costs must be “necessary” and consistent with the National Contingency Plan (a CERCLA-quality cleanup).
Costs are recoverable if there is a threat to human health or the environment and if the response action is addressed to that threat.
Site investigation
Preparation of a work plan
Removal of contamination and disposal of waste
Remediation activities
Engineered barriers and treatment equipment
Monitoring
Oversight
Demolition (if necessary for removal or remediation)
When local governments lack sufficient funds to complete a corrective action, how can a claimant establish the polluter’s liability for future costs?

A declaratory judgment establishing a polluter’s liability for future costs is often the answer. While some federal courts have cast doubt, many have held that declaratory judgments as to future costs are permissible under CERCLA. Refer to state DJ laws for state-based claims.

Ordinarily, the plaintiff must first establish liability for past costs, such as investigation costs.
Current landowner
The entity that incurred remediation and/or removal costs
Dry Cleaners Sites

Heavy Manufacturing

- Degreasers
- Petroleum
- USTs
- Users of metals (lead, etc.)
- Waste generators
- Users of regulated substances

Petroleum distribution and service stations
Solvent Defendants

Polluters that are still viable, solvent entities

The dead – properly dissolved companies

Articles of dissolution, notice to creditors, etc.
See state law provisions

The undead - zombie companies

Insolvent companies that were not properly dissolved
Bankrupt companies
What’s the difference between a dead company and a zombie company?

- Zombie companies are amenable to suit
- Zombie companies may still have insurance coverage
- Even bankrupt companies can sometimes be pursued, but only to the extent of their insurance coverage

Serving process on the zombie company

- Find a (former?) officer
- Have a trustee appointed
Without coverage, zombie companies cannot pay for a cleanup

Policies, or evidence of policies, must be located

State law controls coverage issues and varies greatly from state to state
Common Insurance Issues

Notice and cooperation
Owned property exclusion
What is an occurrence?
Sudden and accidental
What is a claim or suit?
“All sums” v. “those sums”
Allocation issues – orphan shares
Pollution exclusion

- Pre-1986 Qualified Pollution Exclusion
- Post-1986 Absolute Pollution Exclusion

Some states’ courts have struck down these exclusions as unenforceable
The duty to defend v. the duty to indemnify

The duty to defend is triggered by a lawsuit that might be covered, and is broader than the duty to indemnify

Covers attorney’s fees and litigation costs

The duty to indemnify is driven by the language of the policy, and is narrower than the duty to defend

Covers any judgment entered against the insured
Attorney’s fees for cost recovery actions can be significant. Some firms will take such cases on a contingency basis. CERCLA allows recovery of some fees. Example: fees incurred in locating other potentially responsible parties (PRPs). State statutes may allow recovery of all fees and litigation costs.
Is the amount at issue sufficient to justify the claim?
If the site were not a brownfield, would it be attractive to developers or otherwise useful?
Would redevelopment spur additional investments?
Who are the target defendant(s), and are they living, dead, or zombie companies?
Can you locate their insurance policies?
Who currently owns the site, and did they contribute to the contamination?

What is the regulatory status of the site?

What are the political issues?

What are the sentiments of the local community?

What are the local economic development issues?

What is the plaintiff’s tolerance for litigation?
Questions and Answers
Thank you!

Donald M. Snemis
Ice Miller LLP
ph. 317-236-2341
Donald.Snemis@icemiller.com
Brownfields Financing Webinar Series
Digging for Clean-up Funds: Insurance Archeology

Jeff Carnahan, LPG
President
EnviroForensics and PolicyFind
Indianapolis, IN

What are you reading?
Your development finance toolbox isn’t complete without a set of CDFA reference guides. Members save 15% on every purchase.
Order today at www.cdfa.net.

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org
Digging for Clean-up Funds: Insurance Archeology

Jeff Carnahan, President
EnviroForensics & PolicyFind

June 28th, 2018
Traditional Development Funding Sources Rely on Grants

- Traditional Brownfields development has relied on EPA and State grants…
- … but, grants can only go so far, and many times can only identify the problem
…*But* There are Successful Alternatives to Traditional Brownfields Funding

1. Look for other responsible parties
2. Find their historical insurance assets
3. Work with secured creditors
4. Leverage Tax liens
5. Conduct Cleanups Through Self Funding and Cost Recovery
EnviroForensics works with PolicyFind to locate historical insurance policies that can be used to pay for the cleanup of environmental contamination.
Historical Insurance Facts

- Historical Insurance Assets are buried treasure! They can bring millions of dollars to pay for cleanup!
- Occurrence based insurance policies never expire!
- Insurance companies are likely to deny coverage, including the duty to defend, until the insured can provide proof of an insurance policy.
- The only ones that benefit from lost or destroyed insurance policies are the insurance companies.
- Evidence regarding historical insurance is disappearing!
What is Insurance Archeology?

The practice of locating and retrieving proofs of the existence, terms, conditions and limits of lost or destroyed insurance policies.
We have uncovered more than $3 billion dollars in usable insurance assets for our clients.

How Does It Cover Environmental Work?

Comprehensive General Liability Policies (CGL)

• These are the same policies that cover a business’ everyday operation.
• These policies insure business owners against claims made by parties damaged by the conduct of their employees, products or waste products.

We have uncovered more than $3 billion dollars in usable insurance assets for our clients.
Insurance Archeology Clients

County or Municipal Governments

- Seeking historical information regarding brownfields
- Identifying insurers of former owners or operators of brownfields
- Documenting general liability policies of past owners, operators and transporters to contaminated sites

Insurance Company Claims Managers

- Claims in “all sums” states
- Seeking to identify other insurers to share the risk
- Need general liability insurance policies issued by other insurers
- Must not have absolute exclusions
- Seeking their own lost or destroyed policies
- Need sample GL policies from undocumented years
Insurance Archeology Clients

Corporations

• Responding to an environmental property damage claim
• Responding to asbestos bodily injury claim
• Seeking tenant’s or former tenant’s insurance policies
• Assessing corporate assets pursuant to sale
• Proactively marshalling corporate assets
• Completing pro forma on acquisition target company
• Engaged in policy buy back effort with insurance carrier

Small Businesses

• Responding to environmental property damage claim
• Responding to asbestos bodily injury claim
• Seeking tenant’s or former tenant’s insurance policies
• Assessing company assets pursuant to sale (usually to family member)
Why Do We Want To Find Lost Policies To Begin With?

Comprehensive General Liability Policies (CGL), written prior to 1985-86, many times still did not contain pollution exclusions.
Who Has CGL Insurance?

- Past and Present Property Owners
- Past and Present Business Owners
- Individuals (Alive and Deceased)
- Municipalities
A Policy Is A Contract

1. An Agreement between Insured and Insurer
2. A Contract of Adhesion
   Comprised of Several Parts
   • Declarations
   • Forms
   • Endorsements
Subject to Change or Modification
   • By Parties
   • By Law
Laws, Exclusions And Modifications To Insurance Policies

Exclusions:
• Pollution Exclusion (1971-1972)
• Absolute Pollution Exclusion (1985-1986)

Laws that vary by state:
• Interpretation of Sudden and Accidental
• Interpretation of Claim or Suit
• Definition of “Pollution” and “Pollutant”
• Definition of “Damages”
• “All Sums” vs. “Those Sums”
The Artifacts

- You’d be surprised by what information might be hiding in old business records!
- We tell prospects to not throw anything out, let us evaluate old records to search for new leads which could assist in locating valuable business assets!
Lost or Destroyed?

How Do you Prove that Policies Were Lost or Destroyed?

1. Must first prove that policies existed
   • Documentary evidence
   • Testamentary evidence

2. Policyholder’s duly diligent search for policies
   • Hiring an insurance archeology firm is best way

3. Present lost policy evidence to known insurers
   • Insurer’s diligent search part of good faith
Existence and Content

Policy’s Existence to Prove Duty to Defend

• Records That Document That A Policy Was Issued
• Records That Show Type Of Policy Issued
• Records That Define Policy’s Duration
• Records That Acknowledge Policy’s Existence
• Records That “But For” Policy’s Existence Would Not Exist

Policy’s Contents to Prove Up Coverage

• Records that identify Policy Period
• Records that identify Policy Type
• Records that identify Insurer
• Records that document Policy Number
• Records that identify Forms that Comprise the Policy
We turn over every rock to find proof of insurance:

- Personal interviews
- Review of public records
- Review of business owner records to look for new leads
- Other proprietary efforts employed by PolicyFind
We’ve helped hundreds of businesses and property owners, municipalities, and even insurance carriers find old insurance policies!
Example Insurance Coverage Chart
Many times just one policy can be enough to begin environmental work.
What Historical General Liability Insurance Policies Will Fund

Insurance Coverage

Defense
  - Defense Against Claims
  - Site Investigation
  - Responsible Party Search
  - Interim Remedial Measures
  - Build Legal Case
  - Interfacing with Agencies
  - Legal Fees
  - Cost Recovery

Indemnity
  - Clean Up/Remediation
  - Settlements
Difficulties Dealing With Insurance Carriers

- Carriers will deny coverage if they can
- Carriers want to control the work
- Carriers slow walk cleanups because they want to hold on to their money and invest it elsewhere
- Carriers want to clean up as little as possible and leave as much as they legally can in place
- Carriers hire lawyers to represent the policyholders, but those attorneys are beholden to the carriers for future work
The Missing Links to a Stronger Source of Brownfields Money?

- A partner who knows how to find old RPs;
- A partner who knows how to revive old assets;
- A partner who is as vested in the success of the project as you are
What Does A Private/Public Partnership Look Like?

- Private partners that will put their money where their mouth is and not be dependent on getting money from local government
- Private partners that will agree to take on liability
- Private partners that will guarantee cleanups
- Private partners that will bring developers to the project
- Municipality that will support the Private partners, provide information, provide logistical help and assist the team in obtaining meaningful tax credits for developments
Resources

For More Information Visit:

• **Brownfields Development:**
  https://www.enviroforensics.com/environmental-services/brownfields-development/

• **Insurance Archeology:**
  https://www.enviroforensics.com/confidential-insurance-archeology/

• **The Missing Key to Financing Brownfields Development:**
  https://www.enviroforensics.com/blog/financing-brownfields-development/

• **How Does it Work: Insurance Archeology and CGL Policies**
  https://www.enviroforensics.com/blog/how-does-it-work-insurance-archeology-and-cgl-policies/
What are you reading?

Your development finance toolbox isn’t complete without a set of CDFA reference guides. Members save 15% on every purchase.

Order today at www.cdfa.net.

Brownfields Financing Webinar Series
Digging for Clean-up Funds: Insurance Archeology

Cheyenne Chapman
Legal Policy Analyst
Land Quality Division
Oregon Department of Environmental Quality

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org
Digging for Clean-up Funds: Insurance Archeology

Case Studies: Insurance Contributions to Clean-up and Reuse of Property

June 28, 2018

Council of Development Finance Agencies

Cheyenne Chapman, JD, LLM, Land Quality Division | Oregon Department of Environmental Quality
Candidate Sites for Insurance Archeology

Oregon Removal and Remedial Action
ORS 465.200 – 465.455

Oregon Environmental Cleanup Assistance
ORS 465.475 – 465.484
#1: Strong’s Market, Days Creek, Oregon

http://www.deq.state.or.us/Webdocs/Forms/Output/FPCcontroller.ashx?SourcId=10-88-0006&SourcIdType=12
Strong’s Market

- Rural area, unincorporated community in Douglas County, about one acre
- Family run convenience store and gas station plus residences
- Legacy contamination - petroleum product leaks, plume
- Media - groundwater, nearby drinking wells
- Public funds spent on cleanup about totaled about $470,000 (LUST and ARRA funds)*
- ATP (Ability to Pay) determination requested, submittal included insurance bill
- Search for insurance by Department of Justice law clerks (found policies, statements, checks)
- Assignment of claim to Oregon DEQ under Oregon Revised Statutes ORS 465.481
- Used Oregon Environmental Insurance Mediation Program, agreed to $298,000
- Recovery of significant portion of past costs, replenish LUST funds to support future tank cleanups
- Property may transact if there is a prospective purchaser

* LUST = Leaking Underground Storage Tank; ARRA = American Recovery and Reinvestment Act of 2009)
#2: McAyeal’s Cleaners, Eugene, Oregon

http://www.deq.state.or.us/Webdocs/Forms/Output/FPController.ashx?Sourceld=2490&SourceldType=11
McAyeal’s Cleaners

- Urban downtown area adjacent public library and across from public transit hub, about
- Family business registered with Oregon Drycleaner Program, closed when owner passed away
- Legacy contamination – petroleum products and dry cleaning solvent*
- Media – soil and groundwater
- Drycleaner program funding for water treatment system and monitorin
- Clean-up costs estimated at up to $600,000 including ongoing groundwater treatment
- County foreclosure for non-payment of property taxes
- Search for insurance policies required as part of Oregon Drycleaner Program
- Family business representatives pursued insurance; insurance settlement for $410,000
- Recover past costs, cleanup costs, and future operation & maintenance costs if needed
- Intergovernmental Agreement (IGA) between Lane County, Oregon DEQ, Business Oregon
- Brownfield grant of $200,000 from Oregon Business Development Department to Lane County

* Tetrachloroethylene, also called PCE or perc
#3: Linnton Plywood Association, Portland, Oregon

http://www.deq.state.or.us/Webdocs/Forms/Output/FPController.ashx?SourceId=2373&SourceIdType=11
Linnton Plywood Association to Linnton Water Credits, LLC

- Portland Harbor Superfund Site (PHSS), about 25 acres on Willamette River
- PHSS Upland Source Control by DEQ; In-water Sediment Removal & Remediation by EPA
- Lumber and plywood mill owned and operated by LPA (co-operative), 1894 – 2001
- Legacy contamination – petroleum products, metals, PCBs, VOCs, other
- Estimated cleanup costs and Natural Resource Damages for LPA site $_____?
- LPA-EPA Consent Decree –
  - LPA admitted liability, assigned insurance rights to EPA in exchange for covenant not to execute
- Used Oregon Environmental Insurance Mediation Program
- Created Portland Harbor Superfund Site Insurance Recovery Trust
- Cost recovery under Consent Decree – most of sale proceeds plus insurance funds $_____?
- Linnton Water Credits, LLC entered DEQ Prospective Purchaser Program, acquired property 2014
- Vision is restoring site to create natural habitat credits, sell to PRPs in PHSS
#4: Schmidt Farm, Tigard, Oregon

http://www.deq.state.or.us/Webdocs/Forms/Output/FPController.ashx?SourceId=34-07-0326&SourceldType=12
Schmidt Farm to Bonventure of Tigard Senior Living

- Portland Metropolitan Area, formerly agricultural now in urban growth boundary, about 6 acres
- Residences, farming operations, sanitary service businesses on property
- Contamination from tanks installed in 1980s, decommissioned in 1990s, release found in 2007
- Media – gasoline in groundwater, onsite and offsite impacts drinking water and vapor intrusion
- Corrective Action Plan (CAP) selected excavation of soil and removal of groundwater
- DEQ issued a Conditional No Further Action (CNFA) determination
- Owners tendered claim to insurance company, proceeds funded CAP to CNFA
- Bonventure entered DEQ Prospective Purchaser Program 2013, acquired property same year
- Vision achieved – redevelopment of property as senior living facility
Summary: Insurance Contributions to Cleanup and Reuse
Digging for Clean-up Funds: Insurance Archeology

Thank you!

Cheyenne Chapman, JD, LLM
Land Quality Division
Oregon Department of Environmental Quality
Cheyenne.cheyenne@deq.state.or.us
503-229-6461
Submit your questions to the panel now by using the GoToWebinar control panel.

Intro Brownfields Finance WebCourse - September 26-27, 2018
Daily: 12:00 – 5:00pm EST - REGISTER!

CDFA National Development Finance Summit - Nov 7-9, 2017
Dallas, TX - REGISTER!
The Developer’s Perspective in Financing Brownfield Projects  
September 6, 2018  
2:00 – 3:30pm EST  
REGISTER!

In-Person Project Marketplace – Dallas, TX  
Nov 8, 2017  
CDFA National Development Finance Summit  
REGISTER!
Thank you for Attending the Webinar

CDFA BROWNFIELDS
TECHNICAL ASSISTANCE
PROGRAM

Brownfields Financing
Webinar Series

Contact:

Emily Moser
Program Manager
614-705-1305
emoser@cdfa.net

Blake Williams
Program Coordinator
614-705-1306
bwilliams@cdfa.net

CDFA Brownfields Technical Assistance Program — www.cdfabrownfields.org