

Financing Your Brownfield Cost Recovery Efforts



Gregory J. DeGulis | Partner
gdegulis@mdllp.net | 216.367.1403

Lauryn G. Kitchen | Paralegal
lkitchen@mdllp.net | 216.367.1422

Initial Considerations

- If evaluating a brownfield:
 - Hiring a qualified environmental consultant certified professional
 - Possibly hiring an attorney to evaluate risks
 - Phase I
 - Public Records Search to determine ownership/operation

Liability Concerns if Owner

- CERCLA is a strict liability statute that automatically attaches liability to current landowners.
- But... there are defenses from liability that can protect you
 - Innocent Landowner Defense
 - Bona Fide Prospective Purchaser
 - Contiguous Property Owner
- **Governmental Immunity**
 - Response to emergencies
 - Involuntary acquisition of property

Innocent Landowner Defense

Purchaser of property **does not know** and has no reason to suspect that contamination exists at the time of purchase.

Elements:

- Contamination occurred before landowner acquired the property.
- Landowner conducted all appropriate inquiries into previous ownership and uses of the facility.
- Exercised due care and complied with all continuing obligations.

Bona Fide Prospective Purchaser

Purchaser of property knows contamination exists at the time of purchase but who acts appropriately in light of the contamination.

Elements:

- Contamination occurred before landowner acquired the property.
- Landowner conducted all appropriate inquiries into previous ownership and uses of the facility.
- Complied with all continuing obligations.
- Is not affiliated with any PRP.

Contiguous Property Owner

Where the **only source of contamination is a contiguous property** and the landowner did not know the property was contaminated.

Elements:

- Landowner did not cause, contribute to, or consent to the release or threatened release of hazardous substances.
- Landowner made all appropriate inquiries into the previous ownership and uses of facility.
- Landowner did not know and had no reason to know that the property was contaminated.
- Complied with continuing obligations.
- No affiliation with any PRP.

Elements Common to all Landowner Liability Defenses

1. All Appropriate Inquiry

- Based on ASTM Standard EJ1527-13 (10/5/2015) 40 CFR 312.20
- Phase I Assessment

2. Continuing Obligations

- Exercise appropriate care including reasonable steps to stop release.
- Fully cooperate with authorities.
- Comply with land use restrictions.
- Cooperate with information requests.
- Provide legal notices as required.

3. No Affiliation with a PRP

Governmental Immunity

Involuntary Acquisition

- Includes obtaining property through Sheriff's sale and deeds in lieu of foreclosure
- Must comply with Ohio Revised Code procedures
- Must not cause or contribute to the contamination

Emergency Response

- Must be undertaken in response to or to prevent release of hazardous constituents
- Applies to Health, Fire, Building and Housing alike
- Actions may not be grossly negligent or the result of intentional misconduct
- Includes obtaining property through Sheriff's sale and deeds in lieu of foreclosure
- Must comply with Ohio Revised Code procedures
- Must not cause or contribute to the contamination

How to Fund Your Clean Up

- State and federal brownfield funding
- Creative uses of other grants, loans, and incentives
- Tax incentives
- Cost recovery litigation
- Insurance recovery litigation

Why Consider?

- Let's view contaminated sites as opportunities for economic recovery
- Public entities in great position – liability protection
- Role of Land Banks
- Role of General Liability and Pollution Insurance

Various Options



CERCLA



CERCLA §107(a)

- Any party can recover “necessary costs of response”
 - Current Owner
 - Former Owner/Operator
 - Generator
 - Transporter
- Not Necessarily Owner

VAP



VAP: Volunteer Recovery

ORC 3746.23(A)

“A person who, at the time when any of the hazardous substances identified and addressed by Voluntary Action conducted under this chapter and the rules adopted under it, were released at or upon the property...is liable to the person who conducted the Voluntary Action for the costs of conducting the Voluntary Action”

- Also recoverable are attorneys fees and costs (3746.23(A)(7))

VAP: Volunteer Recovery

- *Paxton v. Wal-Mart Stores, Inc.* 176 Ohio App. 3rd 364 (6th Dist. 2008)
 - A “no further action” letter is a “prerequisite to filing a claim” under ORC 3746.23(C)
 - Concern this misreads 3746.23(C) which states “The person conducting the Voluntary Action may commence the civil action *at any time* after the person has commenced the conduct of the Voluntary Action.”
- Lack of Case Law Guidance
 - Apportionment of liability ORC 3746.23 (B).
 - Liability may be “apportioned among each such person on the basis of his respective degree of responsibility for the costs.”



RCRA

LANDFILL

TEMPORARILY

CLOSED

NO DUMPING

CALL BOGDEN

216.214.4061

RCRA Citizen Suit

- Allows injunctive relief that requires responsible parties to perform certain clean-up activities despite absence of governmental action
- Standing



RCRA Citizen Suit

- Requirements:
 - (a)(1)(A) – violation of a permit or standard
 - (a)(1)(B) – imminent and substantial endangerment
- Gas Station- Petroleum contaminated soil is solid waste
- Previous landowner option

RCRA Citizen Suit- Relief

- Recovery
 - Claim is for injunction, not for monetary recovery
 - Can recover attorneys fees if prevailing party
- *Litgo New Jersey v. Martin*, 2012 WL 13-9370 (D. N. J., April 16, 2012)(\$4M in fees requested).

RCRA Notice Requirement

- The notice must be provided 60 days for suits pursuant to (a)(1)(A) and 90 days for suits pursuant to (a)(1)(B). *Hallstrom v. Tillamook County*, 493 U.S. 20 (1988)
- Notice to potential defendants and the government (the state and U.S. Environmental Protection Agency)
- Diligent Prosecution Defense -“Please Sue Me Now”

RCRA Case Law

- *City of Evanston v. Northern Illinois Gas Company*, Case No. 14cv9227 (N.D. Ill, 2/10/16) (methane gas not solid waste)
- *Community Assn for Restoration of Env v. Cow Palace LLC*, 2015 WL 199345 (E.D. Wash, 1/14/15)(manure)



CLEAN WATER ACT





Clean Water Act Citizen Suit

- Requirements:
 - By any citizen against a person alleged to be in violation of effluent standard or limitation or an order issued by EPA Administrator or State concerning a standard or limitation
 - Notice:
 - Give notice to EPA Administrator, State where the violation occurred, and any alleged violator.
 - Must wait 60 days following notification before bringing action
 - » If the federal or state government takes action, then the citizen may not bring suit; however, he has a right to intervene.
 - Exception: may proceed immediately following notification if the suit is in regard to sections 1316 or 1317(a)
 - Particularized harm [in present or future (rather than past).]
 - *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

Clean Water Act Citizen Suit

- Relief:
 - Injunctive Relief
 - Civil Penalties (payable to U.S. Treasury)
 - Court may award costs of litigation
 - Includes reasonable attorney and expert witness fees
 - To any prevailing or substantially prevailing party
 - *Friends of the Earth v. Gaston Copper Recycling*, 629 F. 3d 387 (4th Cir. 2011)

Recovery Summary

Claim	Relief	Attorneys Fees
CERCLA §107	Costs incurred (Joint and Several with possibility of apportionment)	Not recoverable
CERCLA §113	Contribution recovery	Probably not recoverable
RCRA	Injunctive Relief	Court's discretion to prevailing party
CWA	Injunctive Relief and Civil Penalties (payable to the U.S. Treasury)	Court's discretion to prevailing party
Common Law Nuisance	Injunctive Relief and Monetary Damages	Ordinarily not recoverable
VAP	Can recover costs of voluntary action	Recoverable

Case Studies

- Standex Site, Cleveland
- Former Foundry, Dayton
- Flats East Bank, Cleveland
- Ashtabula River, Ashtabula

INSURANCE RECOVERY

A close-up, low-angle shot of a steel bridge structure. The focus is on several blue-painted steel beams that intersect. The beams are secured with numerous dark, rounded rivets. The background shows a complex network of steel trusses and beams, suggesting a large-scale construction or industrial setting. The lighting is bright, creating strong highlights and shadows on the metal surfaces.

**McMahon
DeGulis** llp
Cleveland | Columbus | Cincinnati

ATTORNEYS

Environmental | Toxic Tort | Litigation

Strategy

- Pre-1972 General Liability policies
- Secondary Evidence
 - *Sharonville v. American Employers*, 109 Ohio St. 3d 186 (2006)
- Notice/Prejudice Rule to defeat Late Notice
- Archeologist – mining for policies?
- Pollution Legal Liability Case law
- *City of Cleveland v. Chartis*, No. 1:11CV02637 (ND Ohio, Judge Nugent)

Default Judgment

- Strategy: Default under FRCP 55(b)(2). If judgment unsatisfied after 30 days, ORC Section 3926.06 allows Direct Action
- Coverage Issues remain
- Recent success for railroad for pre-72 GL policies
- *R&M Materials Handling v. Cincinnati Insurance*, 2013CA-40 (2nd Dist. Ohio, March 14, 2014).

Defunct Company?

- No Problem
- Obtain Default Judgment and sue insurer directly under §3926.06
 - *McKean v. Hartford*, 2005 WL 419712 (Ohio App. 5 Dist. 2/18/2005)
- Underutilized?
- Can insurer challenge underlying liability or apportionment?

Insurance Case Studies

- National Railroad – Scrap Yard Defunct
- Cleveland – AIG Pollution Policy
- Foundry – AIG Pollution Policy
- Yellow Springs – CGL Policies, GW Contamination

FINANCING



**Do your
research!**



Most Grants and Loans Cover...

- Assessment Costs, Sampling, Professional Fees
- Remediation, Asbestos and Lead Paint Abatement
- Removal and Disposal of Wastes

Ohio State Funding

Abandoned Gas Station Cleanup Grant

Ohio Water Development Authority Brownfield Loan Program

JobsOhio Phase II Assessment Fund

Ohio Brownfield Loan Fund

JobsOhio Revitalization Fund Grant

JobsOhio Revitalization Loan Fund

Ohio EPA Targeted Brownfield Assessment Program and Technical Assistance

Federal Funding

EPA Assessment Grant

EPA Cleanup Revolving Loan Fund

HUD Brownfield Economic Development Initiative

EPA Cleanup Grant

JobsOhio Revitalization Available Funds

1. Site Improvement Loans

Amount – Up to 75percent of eligible costs up to a maximum of \$5 million

Term – Up to 15 years

Interest Rate – fixed rate to be determined at closing, plus .25 percent loan servicing fee

Security – To be negotiated

Payment deferral – Principle and interest will be deferred during site revitalization, with repayment beginning upon occupancy or after five years, whichever occurs first

Principal reduction -Outstanding loan principle may be reduced annually on a negotiated basis based on performance.

2. Site Improvement Gap Grants

Eligibility –To be coupled with Site Improvement Loans and provided to fill funding gaps where remediation costs exceed the anticipated net gain in land and improvement value, making successful redevelopment unfeasible. Funds are available only to projects where a confirmed end user will create jobs within a negotiated period not to exceed five years.

Amount – Up to \$1 million

3. Asbestos and Lead Paint Abatement Grants

JobsOhio may provide grants for asbestos and lead abatement to projects where an end user has committed to immediate rehabilitation or demolition of structures impacted by asbestos for reuse as industrial, commercial or mixed use, or other economic development initiative. A commitment for reuse can be evidenced by agreements such as options, leases or purchase agreements, along with detailed development and business plans and project financing.

Eligible Costs –

- Demolition
- Disposal of universal waste
- Abatement of asbestos
- Site preparation
- Lead based paint abatement only if coupled with asbestos abatement

Amount – Up to \$500,000

Case Study



22 Million in Remediation and Demolition Expenses
7 Million received through State and Federal Funding
35% of expenses funded through State and Federal Funding

Common Brownfield Funding Sources in Ohio

Last Updated: March 2015

Funding Program → ↓ FAQ's	Targeted Brownfield Assessments (TBA)	JobsOhio Revitalization Fund Program		Ohio Brownfield Fund		BUSTR
		Assessment	Cleanup	OWDA Loan Program	Revolving Loan Fund (RLF)	Revolving Loan Fund
Administrator	Ohio EPA Central Office	JobsOhio Managing Directors		OWDA Board with ODSA Recommendation	ODSA Director	BUSTR Chief
Funding Cycle	Rolling Cycle					
Eligible Applicants	Local government entities	Local government entities, "non-profit" and "for-profit" entities				Political Subdivisions
Eligible Properties	All brownfields	All brownfields and under-utilized real estate		All brownfields	All brownfields & BUSTR sites	BUSTR regulated tanks and sites
Eligible Activities	Phase I assessment, Asbestos Survey, Supplemental Sampling	Phase II Assessment	Asbestos and Lead Based Paint abatement, Cleanup, Demolition, Revitalization	Phase II assessment or Cleanup & Demolition	Cleanup only	Assessment, Tank Closure, Corrective Action
Funding Limits	Project Specific	\$200,000	\$5 million loan \$1 million cleanup gap grant	\$500,000 loan (Phase II) \$5 million loan (Cleanup/Demolition)	\$1million Loan (hazardous substances) \$300,000 Loan (petroleum cleanup)	Project Specific
Funding Type	OEPA in-kind services No match required	Reimbursable grant No match required	Reimbursable loan Max. 75% of eligible costs Gap grant must be coupled with a loan	Low interest loan No match required	Low interest loan Forgivable portion available for petroleum cleanup projects No match required	Zero interest loan 5% match requirement
End User Required	No	High likelihood for jobs required	Yes	No	No	No
Prerequisite Docs	None	Phase I, Scope of Work, Cost Estimate	For Cleanup: Phase I, Phase II, Scope of Work, Cost Estimates	Assessments (VAP), Remedial Action Plan & Cost Estimates	Assessments (VAP, ASTM or BUSTR), Remedial Action Plan & Cost Estimates	None
Final Deliverable	Assessment Report (ASTM/AAI/VAP); Sampling Results	Phase II assessment report	Applicable completion report (e.g. VAP compliant NFA letter)	VAP compliant NFA letter	Applicable completion report (e.g. VAP or BUSTR compliant NFA letter)	BUSTR NFA

PUBLIC RECORDS

A large, abandoned industrial building with brick walls, multiple windows, and a large puddle on the floor. The building is in a state of significant disrepair, with peeling paint and debris on the floor. The title 'PUBLIC RECORDS' is overlaid in large white letters at the top.



Freedom of Information Act

- City Departments
- County Departments
- State Departments
- The Ohio EPA
- The US EPA
- The United States Government

Case Study 1 Public Records Requests



Secretary of State Business Records
Historical Society Library
County Real Estate Records
Department of Development Records
Ohio EPA Records

Case Study 2 Public Records Requests



Secretary of State Business Records
County Real Estate Records
Ohio EPA Records
Ohio Department of Health Records

Case Study 3 Public Records Requests



13 States
30 + Public Records Requests
City Public Records
State Environmental Agency Records
State Engineering Board Records

Lessons Learned...

- Look for City/State databases online.
- Identify the Public Records Manager.
- Locate all publically available IDs and Addresses.
- Provide a date range.
- Offer a phone conversation.

Questions?

Comments?

Thank you!

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