Land Banks and Brownfields:
Funding sources & community partners for remediation and redevelopment
Cleveland, Ohio
Wednesday, Oct. 26, 2016
Brownfield: A property whose reuse may be complicated by the presence (or perception) of a hazardous substance, pollutant or contaminant.
The Brownfield Process

- Planning
- Assessment
- Remediation
- Redevelopment
Property Identification & Planning

- Inventory and prioritization of properties
- How should properties be prioritized for cleanup?
- What are the resources available for investigation and cleanup?
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Geneva, OH
Pop: 6,000
- historic downtown
- winery destination
- less than two miles from Lake Erie
True Temper operated an electroplating facility on the site from 1950 to 1980, using a complex system of underground piping for chemical processes.
True Temper Planning

• 1990s – City of Geneva makes payments to OEPA for cleanup costs (allowed True Temper to dump contamination in city dump)

• 2004 – Arthur Louis Steel wants to buy True Temper.. hires environmental consultant to examine the property... bad news and purchase stalled

• 2007 – City adopts Smart Growth principles in Comprehensive Plan; decides to pursue its first Brownfield remediation.

• 2007 – Assistant city manager recruits property sellers, buyers, holds meetings with OEPA

• 2008 – Comprehensive Plan adopted; brownfield remediation prioritized
The Brownfield Process for True Temper

**Planning**
2008: Ohio EPA VAP Phase I grant obtained. Results show Phase IIs needed. $5-7,000

**Assessment**
2010: Clean Ohio Assistance Fund: $232,116

**Remediation**
2013: Clean Ohio Assistance Fund: $388,455

**Redevelopment**
2013: Arthur Louis Steel purchases the land, plans 24,000 ft expansion on site in 2017
Benson’s
Gas and service station abandoned in 2012
“Mom and Pop”
Private Liens
Tax Foreclosure
Abandoned Gas Station Cleanup Grant

- Sites with Class C BUSTR tanks
- Class C: a release of petroleum subject to BUSTR laws, where the responsible person (RP) for the release is specifically determined by BUSTR to not be a viable person capable of undertaking or completing the required assessment and cleanup.
- Check with BUSTR to see if your site is already Class C. If not, the RP must fill out a FITP, or another entity
The Brownfield Process for Benson Gas Station

**Planning**
- 2015: USEPA VAP Phase I grant ($5,800).
- 2016: USEPA Limited Phase II ($7,000).

**Assessment**
- 2017: ODSA Abandoned Gas Station Fund – Assessment, up to $100,000.

**Remediation**
- 2017-18: ODSA Abandoned Gas Station Fund – Remediation, up to $500,000.

**Redevelopment**
- Community Use
Grow Geneva & Geneva Community Improvement Corporation
Rena’s plan submitted to Geneva Architectural Review Board in June 2016

112 E. Main in October – a work in progress.
Long-term Community Plan
- on planned bike route
The Brownfield Process for True Temper

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2013: Arthur Louis Steel purchases the land, plans 24,000 ft expansion on site planned for 2017
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<th>Possible contaminant source</th>
<th>Pollutant</th>
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<tr>
<td>Gas Stations</td>
<td>Gasoline</td>
<td>Hydrocarbons, benzene, toluene, xylene (BTX)</td>
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<tr>
<td>Dry Cleaners</td>
<td>Cleaning Solvents</td>
<td>Tetrachloroethylene, trichloroethylene, trichloroethylene</td>
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<tr>
<td>Machine Shops</td>
<td>Cleaning Solvents, metal debris</td>
<td>Tetrachloroethylene, trichloroethylene, trichloroethylene</td>
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<tr>
<td>Plating Shops</td>
<td>Plating solutions, cleaning solvents, acids and bases</td>
<td>Heavy metals, acids and bases, solvents</td>
</tr>
<tr>
<td>Landfills</td>
<td>Solvents, paints, batteries, metal parts</td>
<td>Almost anything</td>
</tr>
<tr>
<td>Commercial Buildings, Schools, Private Residences</td>
<td>Heating oil</td>
<td>Hydrocarbons, benzene, toluene, xylene (BTX)</td>
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Phase I ESA

- Paper Study
- Due Diligence – Environmental Liability Protection
- Understanding Historic Operations/Environmental Issues
  - Database Search
  - Historic Documents
    - Aerial Photos
    - Fire Insurance Maps
    - City Directories
  - Interviews with Key People
  - Site Walkover
- Report
  - Recognized Environmental Conditions (RECs)
  - Identified Areas (IAs)
Phase II
True Temper
Boring and
Well Location
Map
A good day to drill...
A bad day for drilling...
An even worse day to drill...
Good samples
Not-so-good samples
The Brownfield Process for Benson Gas Station

Planning

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Assessment

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<td><strong>4.</strong> COMPETITIVE!</td>
<td><strong>4.</strong> Community wide</td>
<td><strong>4.</strong> Technical Assistance</td>
<td><strong>4.</strong> $5,000,000 infrastructure, loan</td>
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<td><strong>6.</strong> No Match</td>
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<td><strong>6.</strong> Investment Needed</td>
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<td><strong>7.</strong> <a href="https://development.ohio.gov/cs/cs_agsc.htm">https://development.ohio.gov/cs/cs_agsc.htm</a></td>
<td><strong>7.</strong> VERY COMPETITIVE</td>
<td><strong>7.</strong> <a href="http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx">http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx</a></td>
<td><strong>7.</strong> Need to show Jobs</td>
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<td><strong>8.</strong></td>
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<td><strong>8.</strong> <a href="https://www.epa.gov/brownfields/types-brownfields-grant-funding">https://www.epa.gov/brownfields/types-brownfields-grant-funding</a></td>
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Abandoned Gas Station Fund Criteria

- BUSTR Class C
- VAP Phase 1
- Confirmed Release
- Community Plan
Benson Gas Station

Boring and Well Location Map
Financing Your Brownfield Cost Recovery Efforts

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

- Includes obtaining property through Sheriff’s sale and deeds in lieu of foreclosure; CERCLA Section 101(20)(D); VAP Section 3746.23(G)(3)
- Land Bank Immunity - - ORC 5722.22
- Must not cause or contribute to the contamination
Various Options

- CERCLA Cost Recovery
- VAP Private Cause of Action
- RCRA Citizen Suit
- CWA Citizen Suit
- Nuisance
- Insurance Claim
CERCLA
CERCLA §107(a)

Any party can recover “necessary costs of response”

Current Owner
Former Owner/Operator
Generator
Transporter

Not Necessarily Current Owner of Site
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

**SAMPLING AND INVESTIGATION COSTS**

**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.”
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 to Sue
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

Cleveland Suburban City Property
RCRA Citizen Suit - Relief

Recovery

Claim is for injunction, not for monetary recovery
Can recover attorneys fees if prevailing party

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

• Pre-1972 General Liability policies

• Secondary Evidence
  

• 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 ORCP 55. 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

Defunct Company?

No Problem

Obtain Default Judgment and sue insurer directly under §3926.06


Underutilized?

Can insurer challenge underlying liability or apportionment?