

MARSH

Insured Fixed-Price Cleanups As A Tool Toward Property Re-Use

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Public Benefits

- Cleanups are started and finished sooner
 - *E.g.*, 2 years versus 10
- Preserves the Superfund
 - Uses only private funds
- Reduces government transactions costs
 - These costs can be 50% or more of the government's total site costs
 - EPA states that its indirect costs alone are 29-54% of direct
- EPA/State stays in charge.
 - It benefits by gaining a PRP; no non-De Minimis PRPs are lost
- Cleanup funds are identified and held by fiduciary throughout cleanup
 - Either insurer or escrow agent
- Improved future use: Property can be more easily converted to public beneficial use
 - *E.g.*, parks, open space, *etc.*

Benefits To PRPs

- Transactions costs are avoided; potential savings are typically >30%
 - Note: This is also an identified EPA goal
- Cleanup costs are certain, and in many cases lower
- Cleanup is managed by Contractor, who also purchases substantial insurance policy (naming the PRPs as insureds) and provides full indemnity in perpetuity
- Avoids reliance on continued solvency of other PRPs

Benefits To Cleanup Contractors

- Greater autonomy/efficiencies in executing the cleanup
- Greater predictability with which to plan, budget, *etc.*
- Risks can be largely mitigated through insurance



The Mechanics Of An IFC

- **Contractor Assumes All Environmental Regulatory Liabilities**
 - Assumption Is Contractual (To Clients)
 - Assumption Is Regulatory (To Regulators)
 - Assumption Remains *In Perpetuity*
- **Insurer's Role:**
 - Acts as **Fund Manager** via Finite Policy
 - Acts as **Insurer** via Finite or Cost Cap
- **EPA-Approved, And Promotes EPA Policies**
 - May 4, 2000 Memo identifying criteria for IFC at Region I Site, *Beede*
 - June 16, 2003 Consent Decree entered in Region II case, *U.S. v. Mattiace*
 - *See also* 2001 Region IX Decree entered by C.D. Calif in *U.S. v. Iron Mountain*.
- **Promotes EPA's Policies And Goals:** *See "A Tale Of Two Sites: How Insured Fixed-Price Cleanups Expedite Protections, Reduce Costs, And Help The EPA, The SEC, And The Public," 45 Chem. Waste Litig. Rptr. 907 (May 2003).*

Three Layers Of Protection Before Costs Return To PRPs; EPA May Look To All 3 Protections, And To The PRPs

Full Indemnity From Contractor

(amount of protection depends on assets)

Insurance Policy (\$20M)

**Commutation
Account
(\$10M)**

1st Superfund Example

State of Maine v. U.S. and Settling Nonfederal Defendants,



- Portland Bangor Waste Oil Site in Maine (2,900 PRPs).
- Each “exited” fully for 40% less in cleanup costs and with no transactions costs.
- Basic cleanup done in 19 months: Decree signed May 2000; cleanup essentially done by December 2001.
- Site provided to Town of Wells, Maine for productive public use (fields, open space): “Fall Fun Day” held in October 2002 (Boston Globe 10/26/02).

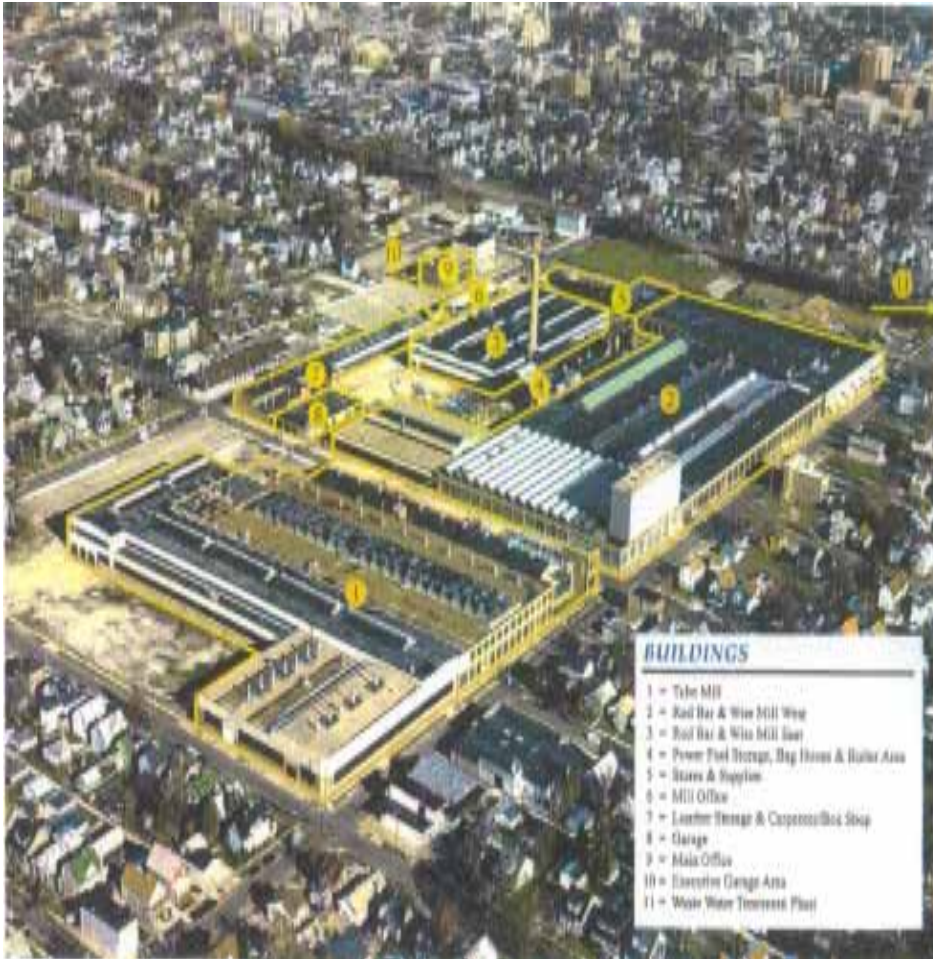


2nd Superfund Example

U.S. v. Mattiace Industries, Inc. et al.
(E.D.N.Y. June 16, 2003)

- Lead agency = EPA. Note: The State of New York is also a plaintiff.
- Contractor signed the Decree as a “Work Settling Party” and, as such, is “jointly and severally obligated” under the Decree. Insurance provides protection up to \$25M.
- EPA agrees to “initially seek correctively measures, in its enforcement discretion, only from TRC [the Contractor].”

Private-To-Public Brownfield Example



- 31 acres; 115-yr.-old plant; site inactive for years
- \$10.1M demolition & cleanup (v. estimate of \$15M+)
- “PRPs” paid only half (\$5.1M) yet received full benefits of entire cleanup account plus insurance, bond, and full release/indemnity from contractor.
- City paid its half completely with Brownfield grants (\$2M) and Tax Incremental Financing (\$3M).
- Bottom Line: City received 31 acres, ready for commercial development, essentially for free. PRPs exited \$15M potentially liability for \$5.1M

Private-to-Private Brownfield Example

- Largest “Brownfield” In The U.S.
 - \$103M Cleanup
 - \$700MM Land Price
 - \$2B Development
- Buyer And Seller Each Wanted To Avoid Environmental And Schedule Risk
- Regulated Under New York’s Voluntary Cleanup Program



Policies That Would Promote IFCs And Thus

- (1) Expedite Cleanups;
- (2) Reduce Public and Private Costs;
- (3) Promote Beneficial Reuse; and
- (4) Promote SEC Policies

- Set A Numeric Goal: Set a numeric goal of 1 IFC per Region over the next 18 months (or by the end of 2004).
 - Similar to 1995 goal of 50 Brownfield cleanups in 2 years
- Create Guidance. Aim to draft and implement guidance within 12 months.
 - Again, similar to EPA's 1995 identified goal of Brownfield guidance
- Create A Rebuttable Presumption. Create a rebuttable presumption that IFCs will at least be considered at Superfund Sites.
 - Similar to EPA's 1993 policy presumption that Superfund settlements will require PRPs to pay 50% premiums with re-openers and 100% premiums with no re-openers