




**Brownfields Transactions**  
**Tools for Dealing with the Risks and Uncertainties in Brownfields Redevelopment**

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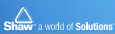
**Overview of Presentation**

- Context of a Brownfields Transaction
- Define Participants, Risks, & Risk Management Tools
- More Detail on Certain Tools
  - Contractual
  - Environmental Insurance
  - Structural

**I hope you get out of this..**

- Terminology
- Introduction to Brownfields Transactions
- Aware of the tools that are available
- Perspective on what's involved, often behind the scenes




**My Perspective..**

- Louisiana Brownfields Association
  - Education & Outreach
  - Sharing Best Practices
- Consultant /Project Manager
  - Public, Private, & Non-Profits
  - Grants, due diligence, reserves, investigation & remediation
- Shaw Environmental Liability Solutions
  - Transactional Consulting, including Environmental Liability Trusts
  - Creative Environmental Contracting, including Liability Transfers
- Landbank, Inc.
  - Brownfields Developer, Owner, & Seller



**Brownfield Transactions could be..**

- A lease, no title transfer
- A purchase with no cleanup
  - Continuing Obligations & Indemnities
- A purchase with cleanup before closing
- A purchase with cleanup after closing



**Participants / Perspectives**

- Regulatory Agencies
- Investors/Lenders
- Buyer/Seller & Attorneys
- Consultants/Contractors
- Insurers
- Developers
- Tenants / Residents



### Risks

- Cost of known cleanup
- Schedule of known cleanup
- Unknown cleanup surprises
- Future Tort
- Regulatory re-openers
- Other regulatory liability
- Residual RP & boomerang liability
- Transactional exposure (ostrich)



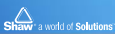

### Transactions = Risk Management

- Share
- Split
- Mitigate / protect
- Assume
- Ignore...but don't let the other parties know




### Who can assume risks?

	Seller	Buyer / Developer	Regulatory Agencies	Investors/Lenders	Consultants/Contractors	Insurers	Tenants / Residents
Cost/Schedule of known cleanup		●					
Unknown cleanup surprises	○	●		○	○	○	○
Future Tort	○	●			○	○	○
Regulatory reopeners & certainty			○	○	○	○	○
Other regulatory liability (NODS, NRDs)	●	●		○	○	○	○
Residual RP liability & boomerang	●	●	○	○			
Transactional exposure	●		○				




### Risk Protections

- Regulatory
- Financial (escrows)
- Surety & Insurance
- Contractual & Structural




### Application of Risk Protection

	Regulatory	Financial (escrows)	Surety & Insurance	Contractual & Structural
Cost/Schedule of known cleanup	○	○	○	○
Unknown cleanup surprises	○	○	●	●
Future Tort		-	○	-
Regulatory reopeners & certainty	●	-	○	-
Other regulatory liability (NODS, NRDs)	●	-	○	-
Residual RP liability & boomerang	●	-	○	-
Transactional exposure	●	-		-



### Other Thoughts on Risk

- Balance the multiple perspectives
  - Who's in the best position to assume the risk
  - Different parties assess risk differently
    - (someone gives you an apple)
- Find the right level of risk protection
  - What's the best tool to use
  - Multiple layers
- Its easy to feel like...
  - the risk outweighs the rewards
  - the transactional effort outweighs the potential for reward


### Ultimately it's all about money

- A transaction is..
  - Exchange of money for real estate and risk (both have value)
- Most all risk can be monetized
  - (occurrence x probability) + protection + management
  - All effective risk protection has a cost
    - You just might not like the price
  - Lots of upside down transactions
- The hard part comes when the seller has not monetized their risk



### Other Thoughts on Risk

- Balancing multiple perspectives (give you an apple)
  - Who's in the best position to assume the risk
- Find the right level of risk protection
  - What's the best tool to use
  - Multiple layers
- Ultimately it's all about money
  - all risk must be monetized
  - selling real estate and risk (both have value)
  - lots of upside down transactions
  - the hard part comes when the seller has not monetized their risk



### Categories of Risk Protection Tools

- Regulatory
- Financial (escrows)
- Surety & **Insurance**
- **Contractual** & Structural



### Regulatory

- Prescriptive Cleanup Regulations
- Other Laws & Statutes
- Voluntary Cleanup Programs
- Comfort Instruments
- Transaction Specific Agreements




### Financial Tools

- Escrow agreements
- Seller's reserves
- Mortgages & loans



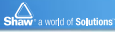

### Surety & Insurance

- Performance Bond
- **Lender Liability**
- **Cleanup Cost Cap**
- **Pollution Legal Liability**





### Lender Liability

- Coverage for lender only
- Coverage includes:
  - Lesser of cleanup costs or outstanding balance on loan if there is both default and pollution condition
  - Claims for 3rd party bodily injury or property damage
  - Defense costs with both types of above coverage
- Usually little, if any, manuscripting
  - Insurers may start writing in specific exclusions for environmental conditions
- Policy forms differ between carriers
- Available for individual loans or portfolios
- Possible to get coverage with no retention/deductible



### Lender Liability – When and Why?

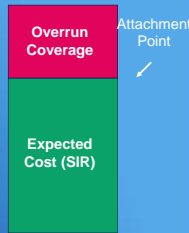

- Individual transactions
  - Used in lieu of borrower providing financial guarantee or escrow
  - When short turn-around time needed
  - When environmental concerns (e.g., from adjacent site or residual contamination, but no "burning buildings")
- Portfolios
  - Alternative risk management tool
- Lender policies less expensive than pollution liability policies
  - Premiums range from about 15% - 40% less than pollution liability premiums
- Get coverage for loan balance



### Remediation Stop Loss or Cost Cap Policy

**Cost overruns on the known Remedial Plan Required by Law**

- Additional Contamination
- Discovery of Unknown Pre-existing Conditions
- Changed Regulatory Requirements
- Material Costs, Productivity

### Remediation Stop Loss or Cost Cap Policy

- 4 weeks to underwrite minimum
- Typically >\$5M - <\$25M
- 3-5, sometimes 10 years
- Coverage = 2 x SIR, sometimes co-insurance
- SIR = reasonable cost + buffer (<100%)
- Premiums high and variable, may include SIR
- Dig and haul vs. oxidation or engineered solution (may be more likely to be insured)
- View by many insurance companies as bad business



### Pollution Liability Policy

- Third Party Liability for Bodily Injury and Property Damage
- First party cleanup & Property Damage of new (future) conditions
- Legal Defense
- Coverage also available
  - Pre-existing unknown, unrelated to CCC
  - Re-opener Coverage
  - Natural Resource Damages
  - Non-owned Disposal Sites



### Pollution Liability Policy

- Covers gaps in traditional CGL insurance
- Market Capacity \$50m
- 5 years new – 10 years pre-existing
- Manuscripting available
- No guarantee for insolvent carriers
- Variable Premiums, 2 weeks to underwrite
- Exclusions
  - Known conditions unless scheduled
  - Contracts (including indemnities) unless scheduled
  - Underground storage tanks unless scheduled
  - Mold – available if mold O&M plan in place
  - Asbestos – certain coverage available
    - soil, groundwater, 3rd party BI



### Creative Contracts & Structures



- Legal Structures
  - LPs & LLCs
  - Seller Mortgages & Loans
- Guaranteed Performance Contracts
  - Investigation and/or Cleanup
  - Target Price & Incentives or Fixed Price
- Liability Transfer Contracts
  - SELS assumes RP role
  - Backed by Environmental Insurance
- Environmental Management Trusts
  - Common in bankruptcy



### Conventional Cost Cap Limitations (Overcome by Guaranteed Contract)

- Predicated on a Remedial Action Plan (RAP)
  - What if RAP doesn't exist?
  - Regulatory closure?
  - Will over-run occur within policy term?
  - What if you want to change the remedy?
- Not designed to deliver cost savings

Coverage	Risk Factors
↑ Not Necessarily Covered	<ul style="list-style-type: none"> <li>Policy Collection Risk</li> <li>O&amp;M Extends Beyond Policy</li> <li>RAP Technology Doesn't Work</li> </ul>
↓ Covered	<ul style="list-style-type: none"> <li>New Contamination Discovered</li> <li>Regulations change</li> <li>RAP Scope of Work</li> </ul>

### Features of Liability Transfers

- True Fixed Price (No Change Orders)
- Consultant Assumes Full Responsibility for Project Completion
- SELS Guarantee Covers:
  - Known and Unknown Conditions
  - Undiscovered Contamination
  - Unidentified Site Conditions
  - Regulatory Re-openers
  - Third Party Liability Protection
- Guarantee Can Be Fully Assignable




### Environmental Management Trusts

- Potential current year deduction of future investigation & cleanup costs
- Created in the early 1990s from provisions in §468B of the Internal Revenue Code, aka QSFs
  - It must be established by order of a government entity and remain subject to the continuing jurisdiction of that entity
  - It must be established to resolve one or more claims including specifically CERCLA, see 26CFR1.468B-1(c)(2)(i)
  - It must be kept in a segregated account
- May have applicability to LDEQ settlements if properly structured

