



FOLEY & LARDNER LLP



# Legal and Financial Issues in Converting Brownfield Sites for Biomass/Energy Projects

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# Overview

- Siting Logistics and Economics
- Convergence with Brownfields
- Brownfield hurdles
- Managing the development relationship
- Brownfield Financing Structures and Incentives



# Siting Logistics

## ■ Size:

- Industrial: 5 MW+
- Commercial: .5 to 4 MW
- Small: 100 to 499 kW
- Micro: 15 to 99 kW

## ■ Fuel Supply:

- Timber harvest residuals
- Forest fuels treatment residuals
- Urban wood waste
- Urban Waste Stream (Sewage, food related waste)
- Forest products manufacturing residuals
- Agricultural and Food byproducts



# Project Economics

- Sustainable and economical fuel supply
- Fuel supply typically represents the highest variable cost for a bio-power facility
- Existing incentives
  - Production Tax Credits
  - Business Energy Tax Credits
  - Markets for heat and power to justify capital investment
  - Non-core incentives/financing



# Siting Needs

- Co-locate with existing commercial or industrial project
  - Forest products
  - Food Industry
  - manufacturing facility that has on site demand for heat and power
- Adjacent to power transmission/distribution system



# Convergence with Brownfields (a/k/a fallow industrial sites)

- 8 acre rule of thumb
- Water readily available (10 + gpm minimum)
- Transportation
- Ash/Waste water disposal capacity
- Public concerns
  - Fugitive emissions
  - Noise
  - Odor



# Brownfields – Looks Can Be Deceiving

- What is a Brownfield –
  - Actual or perceived contamination







# What is a Brownfield

- Redevelopment with upside down economics
  - Environmental
  - Geotechnical
  - Waterfront
  - Demolition
    - Historic
    - Zoning
    - Etc.



# Budget – \$14M Project \$3.5M Extraordinary Costs

<b>Uses</b>	<b>Amount Sought</b>
1st Mortgage	7,500,000
Additional debt through WHEDA guarantee	
Brownfield Loan Fund	1,000,000
Brownfield Grant	600,000
Savings from Land Write Down (Current Price is \$1.1 MM)	600,000
Forgivable Loan (seller's grant to project)	200,000
New Market Tax Credit	2,000,000
Tax Increment Finance	
Site Assessment Grant	30,000
Net Benefit Commercial Revitalization Deduction	382,500
Owner's Equity	
Anticipated savings with design changes, value engineering	
<b>Total Sources</b>	<b>12,312,500</b>
<b>Gap</b>	<b>1,687,500</b>



# How to Identify Issues

- Process begins with ASTM 1527-05 Phase I investigation
  - New standard, effective 11/06
  - “All Appropriate Inquiry”
- Process of shifting responsibility begins with the hiring of a consultant
- May lead to the identification of “Recognized Environmental Conditions”



# Liability Issues in 2008

- Greater liability protection available than ever before, including protection for parties who caused contamination
- Cost of voluntary party liability exemptions today compares favorably with cost of obtaining closure letter in 1995
- Cheaper, but still not free
- Degree of cleanup required more rational than ever before - but still not free



# Cleanup in the context of development

- Soil cleanups can proceed on separate track from groundwater cleanup through natural attenuation, area-wide remedies and immunity for offsite migration



# Beware

- Other extraordinary costs
  - Geotechnical
  - Vapor Intrusion
  - Stormwater management
  - Dockwalls



# Reasons Why You Should Develop a Brownfield

- Infrastructure
- Existing economic incentives
- Workforce
- Historical commitment
- Location, location, location (campus needs, waterfronts, population, market niche)



# Managing the Development Relationship

- Allocating budget
- Controlling liability
- Making sure the project is built
- Profitability for developer
- Public purpose for municipality



# Public Cooperation

- Many developers feel a municipality will be more cooperative in processing applications, issuing permits, etc. if the municipality is a “partner” in the project.



# Environmental Cleanup – Common Issues

- How clean is clean? The developer may not be around in 10 years.
- The “Partner” (such as a municipality, an institution or an industrial corporation/former owner) will be around and may represent a deep pocket.



## Environmental Cleanup – Common Issues

- When does land transfer – minimizing liability. The private development is likely to be a form of “engineered barrier.”
  - Transfer before completion of environmental remedy; or
  - Grant license (access) to developer
  - Who bears future development/maintenance costs.



# Environmental Cleanup – Early Property Transfer

- Agreement recorded on title to:
  - assure completion by the developer
  - allocate costs in case of unforeseen conditions
  - address control in case of unforeseen conditions (right of reversion if remedy not complete)
  - provide for the release of encumbrance on title upon receipt of evidence of completion from state agency.



# Environmental Cleanup – Common Issues

- When does land transfer – maximizing contributions:
  - What entity can use tax credits?
  - Grant eligibility may depend upon lack of availability of a responsible party - reflected in foreclosure, bankruptcy, etc., but once property is acquired, new owner may be seen as RP.
  - Tax treatment and expensing of remediation costs.



# Environmental Cleanup – Common Issues

## ■ Budget

- Budget allocation – In multi-phase development, developer will want budget front loaded. Partner will want budget back loaded to assure performance.
- Maximizing contribution from historic property insurance.
- Municipal cost recovery authority may be broader than private party cause of action.



# Brownfield Incentives – the “But-For” test

- Market driven – intrinsic value is greater than impairments – redevelopment occurs with no additional intervention
- Marginal – environmental, geotechnical, site or ownership issues – market driven as costs reduced or values increased
- Brownfields – environmental and site problems are so great that property will not be redeveloped but for a major infusion of public or responsible party funds



# Financing – Tax considerations

- Allocation of costs
- Timing
- Capitalized or Expensed
  - Sec. 198 tax treatment (renewed last week);
  - Inherent in structure of transaction;
- Other financing/tax credit/enhancements may be more compelling in determining deal structure.



# Tax Increment Finance

## ■ Benefit

- About 45% of estimated cleanup cost can be recovered through TIF based solely upon increment generated by a reduction in value corresponding to cleanup cost
- Greater amount may be available if estimated future value of Property rises to reflect its redevelopment potential.



# Tax Increment Finance

- Timing for minimizing base value and quickly maximizing incremental increase
  - Reassess value early
    - Relies upon investigation data
    - Usually temporary revaluation
    - Assessors more kind if they understand why
  - Don't miss appeal deadline



# Tax Increment Finance

- Use of Funds
  - Investigation and remediation
  - Construction
  - Demolition
  - Financing
  - Professional services (including legal fees)



# Tax Increment Finance

- Criteria for Award
  - Must be able to demonstrate that project would not occur without the creation of TID
- Transferability of Benefit
  - Flexible, depending upon cooperation of municipality



# New Market Tax Credits

- Effectively a 25% capital contribution on projects > \$3 Million or 1.5% - 4% reduction on interest rates
- Can be “twinned” with other credits and folded in with Bond Financing
- Complex structures, but lots of opportunity for capital infusion, higher risk lending, tax benefits, etc.
- It has been a “seller’s market” – with obscene terms – but times, they are a changing?



# Brownfield Grants (Wisconsin, but also typical of other jurisdictions)

- Use of funds
  - Site investigation
  - Remediation
  - Monitoring
  - **Demolition**
  - Purchase
- Renovation
- Utility or transportation infrastructure



# Brownfield Grants

- Criteria for Award
  - Responsible party status (see below)
  - Project's potential to promote economic development
  - Positive effect on environment
  - Quality and amount of applicant's contribution to project
  - Innovativeness of applicant's proposal for remediation and redevelopment



# Brownfield Grants

- Transferability of Benefit
- Limitations on Use/Award
  - Scoring
    - Requires written pledge from end user of Property
    - Heavily weighted toward binding obligation to create new full-time jobs
  - Timing
    - Historically, reimbursement has only been available for costs incurred after date of award
    - Total project costs could include building renovation, for which remediation costs could constitute the match



# Brownfield Grants

- Limitations on Use/Award (continued)
  - Match amount
  - Ineligible costs
    - New construction
    - Legal fees
    - Accounting fees
    - Commitment fees



# Brownfield Grants

- Limitations on Use/Award (continued)
  - Causation
    - Must be able to show “clean hands” with respect to “portion of environmental contamination that is the basis for the grant request”
    - That is, any person who possessed or controlled the environmental contaminant before the contaminant was released or any person who caused the release is unknown, cannot be located or is financially unable to pay



# Federal Brownfields Assessment Grants U.S. Environmental Protection Agency

- These grants are administered by the U.S. Environmental Protection Agency (EPA) and are for assessment of Brownfield sites. An assessment grant application does not need to designate specific properties.
  
- **WHO IS ELIGIBLE?**
- Eligible applicants include tribes, local governments, regional planning commissions, redevelopment authorities, and some other governmental organizations.
  
- **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**
  - Planning (e.g. inventorying Brownfields)
  - Phase I and Phase II environmental site assessment
  - Environmental investigation
  - Removal of some petroleum tanks (for petroleum assessment grants)
  - Remediation planning and design
- Assessment grants cannot be used for demolition or for environmental cleanup.
  
- **HOW MUCH FUNDING IS AVAILABLE?**
- There is no local match required for EPA's Brownfield Assessment Grants. They provide up to \$200,000 per grant (although applicants may request a waiver for up to \$350,000). An applicant may request a total of \$400,000 per year. Tank removal costs can not be a major component of an assessment grant.



# Federal Brownfields Site Cleanup Grants U.S. Environmental Protection Agency

- These grants are administered by the U.S. Environmental Protection Agency (EPA) for the cleanup of a specific Brownfield site that is identified in the application.
  
- **WHO IS ELIGIBLE?**
- Eligible applicants include tribes, local governments, regional planning commissions, nonprofits, redevelopment authorities and some other governmental organizations.
  
- **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**
  - Environmental cleanup
  - Demolition, including asbestos abatement, if demolition is essential to the environmental cleanup
  - Removal of some abandoned containers and underground petroleum tanks
  
- **HOW MUCH FUNDING IS AVAILABLE?**
- These grants provide up to \$200,000 per site for cleanup. A 20% cost share is required in the form of money or in kind services (may be waived in the case of hardship). Removal of tanks and asbestos may not be major components of the grant expenses.



# Federal Brownfields Revolving Loan Fund (RLF) Grants - U.S. Environmental Protection Agency

- These grants are administered by the U.S. Environmental Protection Agency (EPA) for establishment of revolving loan fund and grant programs to address brownfield areas. A Revolving Loan Fund (RLF) may provide funds through both grants and low or no-interest loans – 40% of a RLF grant may be sub-granted in amounts of up to \$200,000 per grant. The rest of the RLF grant award must be loaned.
  
- **WHO IS ELIGIBLE?**
- Eligible applicants include tribes, local governments, regional planning commissions, redevelopment authorities and some other organizations that have completed investigation and are ready to clean up contaminated property.
  
- **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**
  - Environmental cleanup
  - Removal of underground tanks and abandoned containers
  - Demolition, including asbestos abatement, if essential to complete the cleanup
  
- This program does not fund site assessment or site investigation.
  
- **HOW MUCH FUNDING IS AVAILABLE?**
- The maximum size of a RLF grant to an individual grantee is \$1 million (coalitions may apply for \$1 million each). One-quarter of the grant amount must be applied toward cleanup of petroleum contamination. A 20% cost share is required in the form of money or in-kind services. The grant recipient sets the interest rate on the loans, which may be no-interest loans. Removal of tanks and asbestos may not be major components of the grant expenses.



# Brownfield Economic Development Initiative (BEDI)

The Brownfield Economic Development Initiative (BEDI) provides eligible communities with grants to clean up and redevelop Brownfields. The BEDI funds are used to support and enhance the financial viability of projects assisted with Section 108 Loan Guarantee funds.

## ■ **WHO IS ELIGIBLE?**

- Local governments that are federal entitlement communities (receive Community Development Block Grants (CDBG)) funds directly from the federal government) may apply for BEDI grants. Non-entitlement communities may also be able to receive BEDI grants if they work with the Wisconsin Department of Commerce on their BEDI and Section 108 Loan Guarantee applications.

## ■ **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**

- Activities funded with BEDI grants must meet one of the three national objectives:
  - benefit low-to-moderate income people;
  - prevent or eliminate slum or blight; or
  - address imminent threats and urgent needs.
- These grants may be used for:
  - planning;
  - property acquisition;
  - Phase I and II environmental site assessments;
  - environmental investigation;
  - removal of underground storage tanks and abandoned containers;
  - environmental cleanup;
  - demolition, including asbestos abatement;
  - rehabilitation of buildings, including asbestos abatement;
  - redevelopment and marketing; and
  - public facility and infrastructure improvements.

## ■ **HOW MUCH FUNDING IS AVAILABLE?**

- The maximum grant award is \$2 million.



# Local Transportation Enhancements (TE) Program

- Federal funding that may be used for transportation enhancement projects that go “above and beyond” what is normally done on a highway project. These grants may be applicable to some Brownfield redevelopment projects.
- **WHO IS ELIGIBLE?**
- Local and state governments, tribes and agencies with taxing authority are eligible to apply.
- **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**
  - Acquisition of scenic sites and easements, and acquisition of historic sites, if total costs exceed \$100,000
  - Mitigation of water pollution from highway runoff
  - Preservation of historic sites, including rehabilitating and operating historic transportation buildings and structures
  - Providing facilities for pedestrians and bicycles and preserving abandoned rail corridors
  - Creation of transportation museums and welcome centers
  - Transportation area landscaping
- **HOW MUCH FUNDING IS AVAILABLE?**
- Applicants may receive up to 80% of project costs, with a local sponsor paying at least 20%. Construction projects should total at least \$100,000 and non-construction projects at least \$25,000, in order to be eligible.



# Transportation Economic Assistance (TEA) Grants

Transportation Economic Assistance (TEA) Grants help communities pay for rail, road, harbor and airport facilities that will help attract and retain employers. TEA grants may bypass normal state scheduling to promote economic development projects that are dependent on transportation improvements. These funds may be applied to environmental contamination problems.

## ■ **WHO IS ELIGIBLE?**

- Local governments may apply. Private businesses may also be eligible if their project is endorsed by a local government.

## ■ **WHAT ACTIVITIES DOES THIS PROGRAM FUND?**

- Property acquisition (the portion under the right-of-way)
- Design engineering
- Phase I and Phase II environmental site assessment in the right-of-way
- Environmental investigation in the right-of-way
- Removal of underground tanks and abandoned containers in the right-of-way
- Environmental cleanup in the right-of-way
- Demolition of unsalvageable structures, including asbestos abatement, if they are obstacles to business redevelopment
- Relocation of residences and businesses needed for business redevelopment
- Construction, reconstruction and utility relocation to enhance business redevelopment

## ■ **HOW MUCH FUNDING IS AVAILABLE?**

- The maximum grant award is \$1 million per project. The TEA grants may fund up to 50% of project costs, and the local match may come from any combination of local, federal or private funds or in-kind services. Grant awards depend on the level of private investment, the number and type of jobs created, the financial soundness of the business and whether the project is complementary to other transportation facilities.



# Waterfront Revitalization Programs Aquatic Ecosystem Restoration and Protection Projects U.S. Army Corp of Engineers

- The Aquatic Ecosystem Restoration and Protection Projects (Section 206 of Water Resources Development Act (WRDA) 1996 as amended) can be used for the purpose of improving the environment. Eligible entities include local governments and non-profits. There is \$25 million in funding available nationwide with up to \$5 million federal dollars per project. Total project cost is shared 65% federal; 35% non-federal. Non-federal cost share can consist of credit for real estate contribution, and in-kind services.
- For more information contact Gary O'Keefe (313) 226- 7762 (Detroit District), Charles Spitzack (651) 290-5307 (St. Paul District) or email [Planning@LRE02.usace.army.mil](mailto:Planning@LRE02.usace.army.mil).

(The State of Wisconsin is serviced by four Corps Districts: Chicago, Detroit, Rock Island and St. Paul. Detroit and St. Paul cover most of the state, so points of contact are provided for those two Districts. Detroit covers the Great Lakes drainage basin and St. Paul covers the Mississippi River drainage basin).



# Emergency Streambank & Shoreline Protection U.S. Army Corp of Engineers

- The Emergency Streambank & Shoreline Protection Projects (Section 14 of the 1946 Flood Control Act, as amended) are intended to prevent erosion damages to highways, bridge approaches, public works and other non-profit public facilities by the emergency construction or repair of streambank and shoreline protection works. The projects are available to non-federal governments. Funding of the federal share may not exceed \$1 million and any costs exceeding \$1 million are the responsibility of the non-federal sponsor. Additionally, for each \$1 million in funding, a 50% match is required. For more information, please contact Gary O'Keefe (313) 226-7762 (Detroit District), Charles Spitzack (651) 290-5307 (St. Paul District) or email [Planning@LRE02.usace.army.mil](mailto:Planning@LRE02.usace.army.mil). (The State of Wisconsin is serviced by four Corps Districts: Chicago, Detroit, Rock Island and St. Paul. Detroit and St. Paul cover most of the state, so points of contact are provided for those two Districts. Detroit covers the Great Lakes drainage basin and St. Paul covers the Mississippi River drainage basin).



## Environmental Dredging U.S. Army Corp of Engineers

- The Environmental Dredging Program (Section 312 of WRDA 1990, as amended) provides funds to evaluate projects to remove and remediate contaminated sediments from areas outside of the navigation channel for two purposes: to reduce the costs of future operation and to maintain the adjacent navigation project; and ecosystem restoration benefits. Local governments and non-profit organizations are eligible. There is no limit on the federal per-project funding. However, non-federal sponsors are responsible for 50% of the cost of the feasibility study and 35% of the design and construction. For more information, contact Gary O'Keefe (313) 226- 7762 (Detroit District), Charles Spitzack (651) 290-5307 (St. Paul District) or email [Planning@LRE02.usace.army.mil](mailto:Planning@LRE02.usace.army.mil). (The State of Wisconsin is serviced by four Corps Districts: Chicago, Detroit, Rock Island and St. Paul. Detroit and St. Paul cover most of the state, so points of contact are provided for those two Districts. Detroit covers the Great Lakes drainage basin and St. Paul covers the Mississippi River drainage basin).



## Great Lakes Legacy Act U.S. Environmental Protection Agency

The Great Lakes Legacy Act uses funds to clean up contaminated sediments at the bottom of the Great Lakes. One of the three major components of the Act focuses on projects involving site remediation, characterization, monitoring and more. Eligible project must take place in one of the 31 U.S. Areas of Concern (see web site). The project component of the Great Lakes Legacy Act provides up to \$50 million per year beginning 2004 (through 2008). Additionally a nonfederal match of at least a 35% of total project costs and 100% non-federal match of operation and maintenance costs are required. For more information call Marc Tuchman, (312) 353-1369 or see the U.S. Environmental Protection Agency web site at <http://www.epa.gov/glla>.



# USDA Rural Development Loans

- Eligible areas are rural.
- *Guaranteed percentage* of the loan is negotiated with the agency. The maximum generally is 80% for loans up to \$5 million; 70% for loans between \$5 and \$10 million; and 60% for loans above \$10 million.
- *Rates and terms.* Rates may be fixed or variable. Maximum term for working capital is 7 years, for machinery and equipment, 15 years and for real estate, 30 years. Balloons are not allowed.
- *Minimum equity* of 20% is required in a new business and 10% in an existing business.
- *Eligible purposes* include buildings, equipment, and permanent working capital.

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For more information see:

[www.Foley.com/Brownfields](http://www.Foley.com/Brownfields)