

***Update: State Brownfield
Insurance Programs, 2005***

Northern Kentucky University

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1.0 Introduction

This document supplements *State Brownfield Insurance Programs, 2004*, a report that summarizes state-level programs designed to facilitate access to insurance products that assist in the remediation and redevelopment of brownfields. The 2004 document describes existing state programs, examines the efforts of other states to investigate and/or establish programs, and discusses states that considered a program but decided against creating one.

This addendum offers a brief update of state efforts since the 2004 data were collected. While short backgrounds on each state are provided, it is assumed that readers who want in-depth information will refer to the full 2004 report at http://www.epa.gov/brownfields/pubs/state_report_04_revised.pdf. A complete, revised edition of *State Brownfield Insurance Programs* is scheduled for 2006.

We begin the update by with an introductory outline of insurance products currently in use in state programs. We then present basic components of three existing programs – Massachusetts' Brownfields Redevelopment Access to Capital (MassBRAC) program, Wisconsin's Voluntary Party Liability Exemption (VPLE) program, and New York's Brownfield Cleanup Act tax credit program.

This is followed in Section 4.0 by a synopsis of a program currently on indefinite hold due to difficulties encountered establishing it – California's Financial Assurance and Insurance for Redevelopment (FAIR) program. Section 5.0 summarizes key elements of efforts on the part of three states to develop programs – Wisconsin's Brownfield Insurance Program (WBIP), Pennsylvania's pending legislation, and Colorado's technical assistance hotline.

Several states in the process of investigating the viability of a program are briefly discussed in Section 6.0. These include Idaho, New Jersey, Delaware, Ohio, Oregon, Vermont, Rhode Island, Virginia, Indiana, and Wyoming. The update ends by providing the Table of Contents for the complete 2004 report.

2.0 Insurance Products Used in Existing State Programs

2.1 Pollution Liability (PL) Policies

PL policies provide protections against claims for third party cleanup costs, bodily injury, and property damage arising out of pollution conditions at or migrating from an insured site; legal defense expenses arising from third party claims; and cleanup of pollution conditions discovered by the insured at the insured's site.

Third party claims arising from pollution conditions at or migrating from an insured site. Claims can come from government mandates and private parties (e.g., lawsuits). Coverages that may be provided, depending on the carrier and project include:

- Cleanup, required by a regulator, of previously *unknown* pollution at an insured site.
- Cleanup, required by a regulator, of *known*, previously remediated pollution at an insured site for which a regulatory agency issued a comfort document such as a No Further Action letter or Certificate of Completion (re-opener coverage).
- Bodily injury, property damage caused by pollution at an insured site to someone other than the insured (e.g., a tenant).
- Bodily injury, property damage, cleanup caused by:
 - pollution migrating from an insured site to a neighboring site;
 - pollution released during transportation;
 - pollution at or emanating from a non-owned disposal site.

Legal defense costs to defend against third party claims.

First party claims for cleanup of pollution conditions and business interruption losses. Coverages that may be provided, depending on the carrier and project include:

- Cleanup of previously unknown pre-existing pollution *discovered by the insured* at or migrating from an insured site.
- Business interruption losses incurred by the insured caused directly by previously unknown, pre-existing pollution at an insured site.
- Soft costs, such as loan interest, due to delays caused by pollution.

2.2 Cost Cap (CC) Policies

The policies protect against cost overruns arising in the performance of a remediation plan. The insurer pays the additional costs above a buffer or Self-Insured Retention (SIR). A policy may include a co-insurance provision under which claims that exceed the buffer are shared by the insurer and insured. Coverages that may be provided, depending on the carrier and the project include:

- Cleanup of greater volumes/higher concentrations of known pollutants than anticipated in remediation plan.
- Cleanup of newly discovered, pre-existing pollutants not noted in remediation plan.
- Site assessments needed after discovery of previously unknown, pre-existing pollutants.
- Costs due to regulatory changes during performance of a remediation plan.
- Remedy failure during the performance of a remediation plan.
- Soft costs, such as loan interest, due to delays caused by pollution.

3.0 Existing State Programs

3.1 Massachusetts' Brownfields Redevelopment Access to Capital (*MassBRAC*) Program¹

Overview

- The oldest state program, enabled by 1998 legislation and implemented in 1999.
- Administered by MassBusiness, a non-governmental economic development organization that reports to the state's Department of Economic Development (DED).
- Offers reduced-cost, pre-negotiated, state-subsidized insurance to those who borrow funds to clean up and redevelop brownfields and to their lenders.

Insurance Provided

- Borrowers can purchase three types of coverages:
 1. *PL* pays for:
 - cleanup of on-site, preexisting pollution conditions outside of a Remedial Action Plan area;
 - legal defense, bodily injury/property damage claims related to preexisting on-site pollution conditions;
 - third party claims for cleanup of off-site, pre-existing pollution conditions;
 - legal defense and off-site bodily injury and property damage claims by third parties related to preexisting pollution conditions;
 2. *Business Interruption*, a type of PL coverage, pays for actual loss, or loss of rental income and extra expense for business interruption related to pollution conditions.
 3. *CC* pays for cleanup of preexisting known and unknown pollution conditions within a Remedial Action Plan area exceeding estimated cost of cleanup as determined by the insurer.
- Lenders are protected by a 'mortgagee/insured assignment' endorsement to a borrower's PL policy that converts the policy to the lender should foreclosure be necessary. The provision provides funding for cleanup and protects the lender against bodily injury and property damage claims and legal expenses.

¹ See <<http://www.mass-business.com/site/site-massbiz/content/brownfields/>>

Benefits to Users

- Transfer of environmental risks to insurer.
- State provides 50% subsidy of insurance premiums to a maximum of \$50,000 for private parties and \$150,000 for public, quasi-public, and non-profit parties.
- Premiums are 10% to 30% below-market rates before subsidy. Cost savings stem from pre-negotiated policies and volume discount offered by insurer.
- Pre-negotiated policy saves users legal expenses and time manuscripting the policy.
- Premium pricing schedules help developers with smaller projects assess project feasibility.
- Insurer provides second opinion of Remedial Action Plan and liability exposures.

Eligibility/Participation Requirements

- Any business or governmental subdivision that obtains loan for brownfield project is eligible for discounted insurance and subsidy (although loan requirement may be waived for public, quasi-public, and non-profit parties). A developer not financing a project is eligible for discounted insurance only.
- To participate, a borrower submits an application, subsidy questionnaire, evidence of financing. For PL, a Phase II assessment is required. For CC, a Remedial Action Plan and cost estimates are required.

Insurer Negotiations, 2004

- Contract with insurer ended and MassBusiness issued request for expressions of interest in becoming the program carrier. Three firms submitted, but one withdrew during negotiations. Ultimately, the original insurer was selected. Pricing between two remaining insurers was quite similar. Factors favoring the selected insurer included willingness to use BRAC's policy form and an assessment on the part of BRAC staff that the insurer was less adverse to risk.

Insurance Costs

Examples of Pollution Liability Premiums for Five-Year Policy <i>Before Subsidy</i>				
Policy Dollar Limit	\$10,000 Deductible	\$25,000 Deductible	\$50,000 Deductible	\$100,000 Deductible
\$1,000,000	\$19,303	\$18,338	\$17,422	\$16,550
\$3,000,000	\$31,464	\$29,891	\$28,397	\$26,977
\$10,000,000	90% Std Cost*	90% Std Cost	90% Std Cost	90% Std Cost

* Std Cost is insurer's Standard Cost. Further discounts apply with CC purchase.

Examples of Cost Cap Premiums <i>Before Subsidy</i>		
Estimated Cleanup Cost	Policy Dollar Limits	Premium
\$200,000 to \$500,000	100% of the SIR	\$60,000
	200% of the SIR	\$75,000
Over \$500,000	100% of the SIR	90% Std Cost
	200% of the SIR	90% Std Cost

* SIR means Self-Insured Retention, an amount for which the insured is responsible.

- ➔ The figures for PL represent price increases over the previous year. The increases vary with each policy limit/deductible cell. To provide an example, however, when the consumer price index is controlled for, there was a 40% increase for a five-year, \$5 million policy with a \$50,000 deductible for a PL policy. Changes in CC premiums are not possible to calculate, due to modifications in the way in which the insurer calculates SIRs.

Program Administration and Costs

- ➔ MassBusiness qualifies applicants, issues subsidy payments, maintains program database, publicizes program, negotiates with insurers every two years.
- ➔ Cost to state, 2004: \$345,400/year on fixed-price contract for 2.5 FTEs, marketing, overhead.

Program Results, October 1999 - June 15, 2005

Number of projects in program	258
Insurance dollar limits provided	\$937,886,500
Insurance premiums charged	\$11,862,984
Subsidies paid	\$4,824,934
Cleanup costs expended on projects	\$145,035,947
Permanent jobs created or retained by projects	25,932
Total development expenditures - loans and investments leveraged	\$2,187,558,988

3.2 Wisconsin's Voluntary Party Liability Exemption (VPLE) Insurance Program ²

- Wisconsin's VPLE insurance program, established in 2001, allows the state to issue timely liability relief to developers using natural attenuation of groundwater as a remedy. VPLE participants may be granted a transferable Certificate of Completion (COC) by the Department of Natural Resources (DNR) that assures them they are not responsible for further cleanup. To receive a COC before a site has reached the state's groundwater standards, a participant pays a one-time fee that contributes to the cost of an insurance policy that protects the state if the attenuation fails. In this case, the state would pay a deductible and the insurer would pay the remaining amount up to the policy limit for site assessment and onsite/offsite cleanup. The party that conducted the original remediation would incur no further expense. At present, eleven participants are using the program.
- The policy is a portfolio policy with an aggregate limit of \$10 million and sub-limits for each site of \$1 million with a policy term of ten years. Participant fees are based on the previous uses and the size of the property:

VPLE Fee Structure, March 2005 - March 2006			
Previous Property Use	Deductible per Incident	Total Property Acreage	
		0 to 4.99 acres	5 acres plus
Residential	\$5,000	\$5,276	\$6,271
Agricultural	\$10,000	\$9,474	\$11,271
Commercial	\$15,000	\$10,060	\$11,932
Light Industrial	\$20,000	\$12,298	\$14,578
Heavy Industrial	\$25,000	\$16,144	\$19,153

3.3 New York's Environmental Insurance Tax Credit

- New York's 2003 Brownfield Cleanup Act created three tax credits, one of which is for premiums paid for certain CC and PL coverages noted in the Act. The amount of the credit is the lesser of \$30,000 or 50% of the premiums paid. To be eligible, a party must have executed a Brownfield Cleanup Agreement (BCA) with New York's Department of Environmental Conservation (DEC). The credit is taken the year a Certificate of Completion is issued by DEC. The tax credits are available beginning April 1, 2005 or 2006 for calendar-year taxpayers. A sunset provision applies; eligible BCAs must be executed prior to March 15, 2015.

² See <<http://www.dnr.state.wi.us/Org/aw/rr/archives/pubs/RR661.pdf>>

4.0 Program on Hold: California's Financial Assurance and Insurance for Redevelopment (FAIR) Program

Overview

- FAIR is modeled after MassBRAC. Coverages to be provided include PL, CC, and Secured Lender coverages that protect lenders if borrowers should default. Funds for subsidies currently are unavailable, but were authorized by legislation.
- Development initiated and led by California Environmental Protection Agency (Cal/EPA).
- Current status: program development is on indefinite hold.

Program Development Process and Costs

- 1999: Impetus to initiate program came from Cal/EPA when state had budget surplus.
- 2001: Enabling legislation, SB 468, approved.
- 2002: Consultant assisted with preparation of Request for Proposals from insurers.
- 2003: Insurer provisionally selected. Negotiations over policy, pricing, etc. began.
- 2004: Negotiations suspended.
- Costs to state: Four years Cal/EPA staff time and substantial state and federal funds spent, primarily for consultant fees.

Implementation Issues/Problems

- Development of strategy, mandated by SB 468, to select insurer(s) through competitive bidding process and to encourage participation of multiple insurers in the program.
- Difficulties stemming from language in SB 468. Bill contained variety of specific mandates, including policy provisions (e.g., 25% SIR for CC policies), and definitions that proved problematic to the insurer (e.g., a pollution condition is defined as a release or *threatened* release of hazardous material).
- Change in California administration and resulting re-assessment of brownfields program.
- Concerns about FAIR including:
 - verifying 10% premium discounts offered by insurer;
 - the attractiveness of the program to users without subsidies;
 - the fact that SL policies, mandated in SB468 are no longer offered by the insurer;
 - the cost-effectiveness CC policies for small-scale projects; and
 - the costs of monitoring and evaluating the program.
- ***Determination that priority should be given to other critical issues in the California brownfields arena, particularly coordination among multiple state and regional programs that oversee cleanups.***

5.0 Programs Under Development

5.1 Wisconsin's Brownfield Insurance Program (WBIP)

Overview

- WBIP will provide a pre-negotiated PL policy at a discounted price for participants in the state's voluntary cleanup program and those receiving a closure letter under the traditional cleanup program. The selected insurer will provide 10% premium discounts, but no pricing schedule. No state-funded subsidies will be offered.
- Current status: insurer has been selected and a contract is anticipated in early 2006.
- Program creation led by Department of Natural Resources (DNR) working with the Wisconsin Brownfields Study Group. Program design and insurer negotiations led by state environmental broker and state risk manager in the Department of Administration (DOA).
- Costs to date of program development to state: DNR and DOA staff time.

Program Development Process

- 2003: State broker, selected through competitive bid, met with insurers, DNR, BSG, and DOA to discuss program concept and submitted specifications to insurers.
- 2004: Insurers met with DNR and submitted proposals. DNR/broker submitted questions and insurers submitted revised proposals. Governor signed SB 472 authorizing DNR working with DOA, to undertake activities to make private brownfields insurance available.
- 2005: Insurer has been selected, but no contract will be signed until completion of final negotiations. These involve policy language and endorsements, program evaluation data insurer will collect, and program marketing plans by insurer, broker, and state.

5.2 Pennsylvania's Pending Legislation

- 2003: Pennsylvania's Department of Environmental Protection and Department of Community and Economic Development worked to have House Bill 1565 introduced to create a program. The bill was referred to the Committee on Insurance, but no further action was taken. The legislation calls for premium subsidies and EPA 128a State and Tribal Response Funds have been set aside for them. The bill is based on California's FAIR legislation and contains elements that proved problematic in California (e.g., designations of PL, CC, and SL coverages by one insurer and specific CC self-insured retentions).
- 2005: DEP personnel were involved in re-introducing the legislation as House Bill 687 and are planning to meet with insurers to discuss the bill. Dates for further legislative action have not yet been scheduled.

5.3 Colorado's Hotline

- 2004: The Colorado Brownfields Foundation (CBF), a non-profit organization working with the Colorado Department of Public Health and the Environment (CDPHE) investigated a program by holding community discussions and separate discussions with insurers. Concerns about a program included lack of availability of CC for small sites, doubts that the state had enough brownfields for program, budget constraints precluding subsidies, and the need to use EPA funds for site assessments. CBF/CDHE decided not to develop a program that would utilize substantial resources.

- 2005: Decision was made to create a hotline administered by CBF to provide free insurance advice. Users will be able to contact the hotline through a Web page, by telephone, or by mail. CBF personnel will forward inquiries to environmental brokers, insurance consultants, and attorneys who will be pre-qualified and will staff the hotline on a volunteer basis.

6.0 States Investigating Programs

6.1 Idaho

- 2005: In August, Idaho's Department of Environmental Quality (DEQ) issued a Request for Proposals for brokerage services for a \$25,000 EPA-funded contract. Contract tasks included discussing Voluntary Cleanup Program needs with DEQ staff and preparing a report recommending possible insurance options for meeting those needs given the state's funding situation. Risk management issues identified included limiting liabilities for prospective purchasers considering buying a brownfield and/or conducting a voluntary cleanup, limiting liabilities of current owners in order to gain access to perform site assessments, and protecting DEQ to allow earlier/stronger closure letters. The report is intended to position DEQ to enter into a second contract with a broker to implement the recommendations.

6.2 New Jersey

- 2004: Discussions about the potential merits of a program were initiated by New Jersey's Department of Environmental Protection and the Brownfields Redevelopment Task Force, an entity created by state statute whose members include public stakeholders appointed by the Governor with the consent of the Senate, and specific state departments and agencies. Two presentations were given, one by a brownfields consultant and the other by an insurer.
- 2005: A symposium is being planned for the spring of 2006 to bring public and private stakeholders together to receive an overview of state programs, hear from states that have programs, and identify concerns that might be rectified by a state program. The symposium will facilitate decisions regarding whether or not a program is needed in New Jersey and, if so, what structure it should have.

6.3 Delaware

- 2003-2004: Delaware's Department of Natural Resources and Environmental Control (DNREC) began researching the potential of a state program, but progress was delayed by changes in key brownfield program personnel.
- 2005: DNREC personnel attended an EPA-sponsored environmental insurance workshop and spoke with insurers. The structure of a program is undecided, but DNREC is considering one that offers PL coverages with discounted premiums. CC is not viewed as useful because it is not cost-effective for small sites.

6.4 Ohio

- 2005: Discussions held by the state's Voluntary Action Program (VAP) multi-stakeholder Advisory Board led to the recommendation to pursue insurance as a possible means of increasing VAP participation. Options are being pursued by VAP personnel and a broker who serves on the Ohio chapter of the National Brownfields Association. The structure of the program is unclear at this point, but they are considering one without subsidies modeled after Wisconsin's WBIP or a pilot program that provides subsidies using EPA funds. If the pilot is successful, the state legislature may be approached for long-term program funding.

6.5 Oregon

- 2005: Oregon's Economic & Community Development Department (OECDD) began researching the possibility of a state program to assist with cleanup cost and liability risk concerns on the part of developers. MassBRAC personnel were contacted for input. OECDD currently is researching the level of demand for a state program through conversations with public and private brownfield property owners and individual developers in the state.

6.6 Vermont

- 2004: State legislation directed the Agency of Commerce and Community Development (ACCD) to provide a report on the applicability of insurance to brownfield projects.
- 2005: The report, submitted in January, very briefly describes PL and CC policies and insurance programs in other states. The Department of Environmental Conservation (DEC) has taken the initiative to investigate insurance further. In August, a meeting was held with MassBRAC personnel and Vermont ACCD, Policy Research and Planning, and the Risk Management Division. DEC staff plan to organize meetings with insurers in the near future, but no specific program structure or time-line has been established.

6.7 Rhode Island

- 2002: State legislation was passed requiring a report to the General Assembly recommending methods of ensuring the availability of brownfields insurance at reasonable costs. The report was submitted in November by the state Economic Development Corporation (EDC)
- 2003-2005: EDC held meetings with an insurer, a national brokerage firm, and MassBRAC personnel. A program without subsidies modeled after MassBRAC is under consideration. Progress is anticipated in 2006, but no time-line for program development has been established.

6.8 Virginia

- 2002: State legislation directed Virginia's Department of Environmental Quality (DEQ) to evaluate options for providing low-cost insurance. The report, submitted in November, concluded that insurance is valuable, but DEQ chose not to pursue a program believing that an effective program needed to provide a subsidy, an option precluded by the state's fiscal constraints.
- 2004-2005: DEQ discussed program possibilities with insurers at Brownfields 2004. While interest in a program still exists, the investigation was put on hold due to other program priorities.

6.9 Indiana

- 2004: The Indiana Development Finance Authority (IDFA) began collecting information on insurance by speaking with brokers, insurers, and state program personnel; reading EPA Website reports; and consulting with the report authors. A program providing premium subsidies was envisioned. IDFA hoped to introduce 2005 legislation to permit the Authority to offer the subsidies to private parties.
- 2005: One IDFA staff member taking the lead in the investigation left IDFA and 2005 legislation resulted in a major restructuring of the brownfields program that consolidated the program under the new Indiana Finance Authority (IFA). IFA efforts have been focused on managing the transition and evaluating existing brownfield incentives. Insurance is still under discussion, but whether or not a state program will be pursued or what form it might take is uncertain at this time.

6.10 Wyoming

- 2004: Wyoming's Department of Environmental Quality (DEQ) commissioned assistance in developing the state's Voluntary Remediation Program (VRP) that included a task to make recommendations on the potential of state-facilitated insurance.
- 2005: A report was submitted in March that described PL and CC policies, discussed the benefits of insurance, and provided a very brief table noting characteristics of programs in other states. It concluded on a cautionary tone, emphasizing that the success of a state-led program depends on factors including the level of participation by property owners and provision of adequate incentives to them. A final decision on insurance has not been made. However, DEQ personnel have determined that their VRP does not include a sufficient number of projects for a state program and that insurance subsidies are not a possibility at this time. They are planning to develop a fact sheet that would guide VRP participants in obtaining their own insurance.

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