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Brownfield Redevelopment: Private Side Funding Success Stories

Health & Environment Section Workshop

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Overview

- Historical Insurance Assets
- Cost Recovery and RCRA Citizen Suits
- Voluntary Cleanup Programs
- Case Studies

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HG Law Firm

- National practice in environmental and insurance coverage/bad faith litigation
- We represent parties in conflicts arising from soil, surface and groundwater contamination, and air pollution
- We help our clients (policyholders) pursue their insurance carriers in coverage disputes

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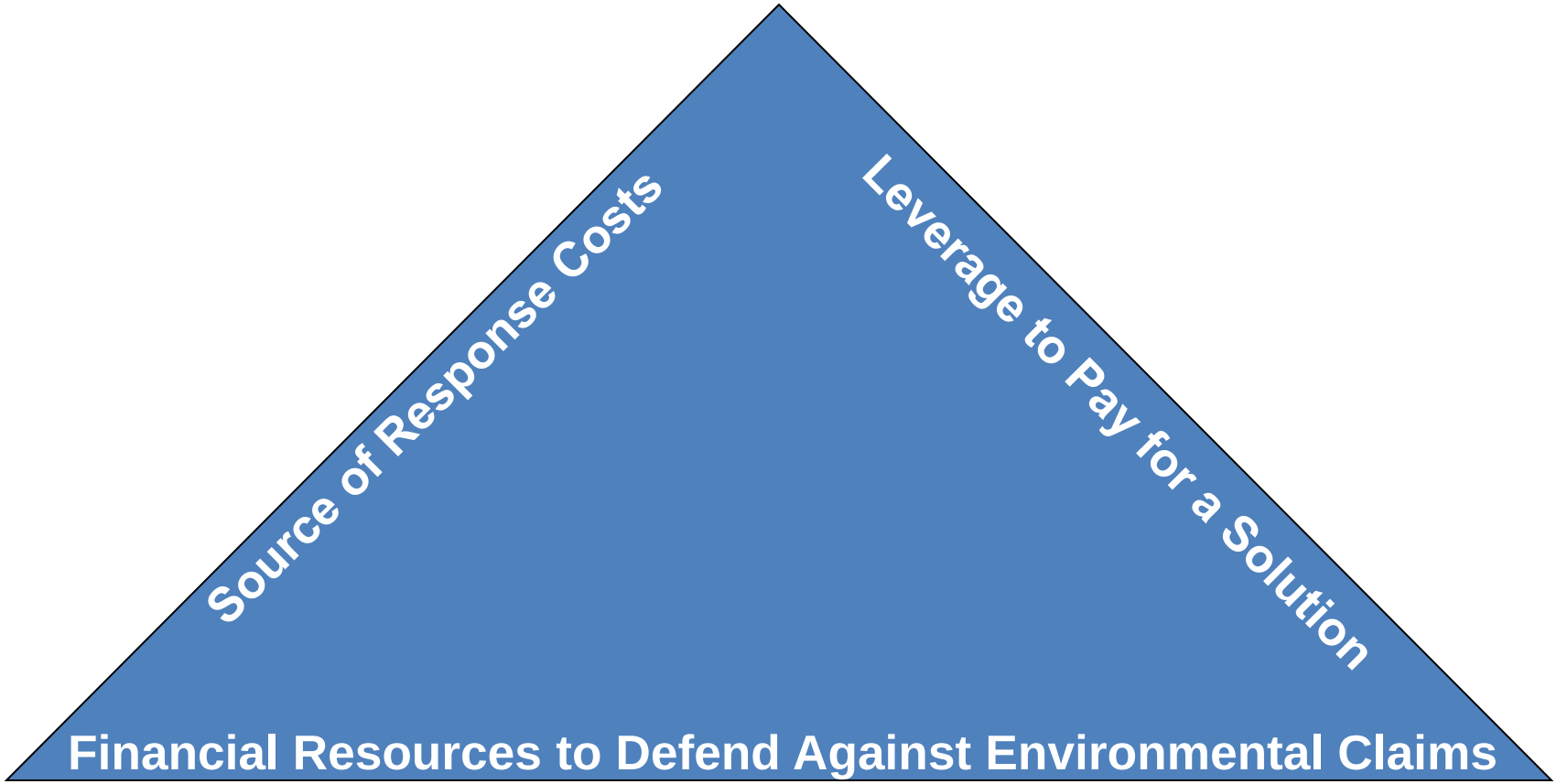
Researching Historical Insurance Assets

Obtaining Insurance Resources

- Why do we want to use insurance resources?
  - Valuable asset for client
    - Insurance premiums have already been paid – really just using what is already theirs
    - Clients often do not realize the potential value of the old policies
    - Allows cleanup where not otherwise possible
  - Provides the initial resources to start the cleanup and can help set the other components (e.g., cost recovery and voluntary cleanup) in process

Obtaining Insurance Resources

Insurance Value



Obtaining Insurance Resources

- Historical Insurance documents we are looking for at the beginning of the case:
  - Comprehensive General Liability Policies
  - Issued Before 1986

Obtaining Insurance Resources

Overview of History of Pollution Exclusions:

- Pre-1971 – No exclusion
- 1973 to 1985 – “sudden & accidental” pollution exclusion
- 1986 to current – “absolute” pollution exclusion
- Post 2000 – Some insurers start using “Specific Pollution Exclusion”

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Use of Insurance Resources

- Any client who cannot or does not want to pay for investigation and cleanup out of its own pocket
- Any situation where insurance resources have not been fully investigated
- Fortune 500 companies to Mom & Pop operations to bankrupt entities and estates – any entity may be able to utilize historical insurance assets

Circumstances That May Make Coverage Easier

- Entity has been operating for many years (since 1999 in some states, since 1985 in others)
- At least one copy of each historical policy (issued before 1986) is found
- Depending on policy language and State law, there is a “claim” or a “suit” against client

Best Coverage Scenarios

- Environmental problems recently discovered
- Someone is making them clean it up (enforcement action or private party suit)
- Client has been in business for over two decades at site
- Client has at least one copy of a historical general liability insurance policy

Site Specific Analysis

- Each state has different case law on insurance issues which changes the analysis
- Each site must be considered separately and the specific facts of the site compared to relevant state law

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Using CERCLA and RCRA and Other Environmental Laws

CERCLA Cost Recovery

- CERCLA liability can be a source of risk, but also can be a source of funding
- CERCLA provides a private right of action for the recovery of response costs incurred
  - Investigation and cleanup costs
- CERCLA also provides declaratory relief for future response costs

RCRA Citizen Suits

- RCRA citizen suit provision provides a cause of action against any person that is violating a permit or creating an imminent and substantial endangerment
- Statute authorizes an award of litigation costs including attorney and expert fees
- Unlike CERCLA, there is no petroleum exclusion

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Voluntary Cleanup Programs

Voluntary Cleanup Programs

- Allows streamlined remediation approach with oversight from State, tax incentives.
- When the brownfield site rehabilitation agreement is executed, site receives a conditional liability release.
- Memoranda of Agreement between States and USEPA may extend the qualified liability release. *See* CERCLA § 128(b).

Voluntary Cleanup Programs

- Good tool to use in conjunction with a litigation/enforcement strategy
- Continued oversight and ultimately Site Rehabilitation Completion Letter or “No Further Action” Letter.
- Added layer of protection in the remedy
  - State will require the cleanup to be protective
  - State will maintain oversight
  - No further remediation can be required

Voluntary Cleanup Programs

- Economic Incentives:
  - Financial incentives: Tax increment financing, tax exemptions, etc.
  - Local grant programs
  - Low-Interest Revolving Loans
  - Regulatory incentives: Utility, zoning, parking, etc.
  - Technical Assistance: Site design, development applications, etc.

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Case Studies

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Case Study 1
Indiana Scrap Yard



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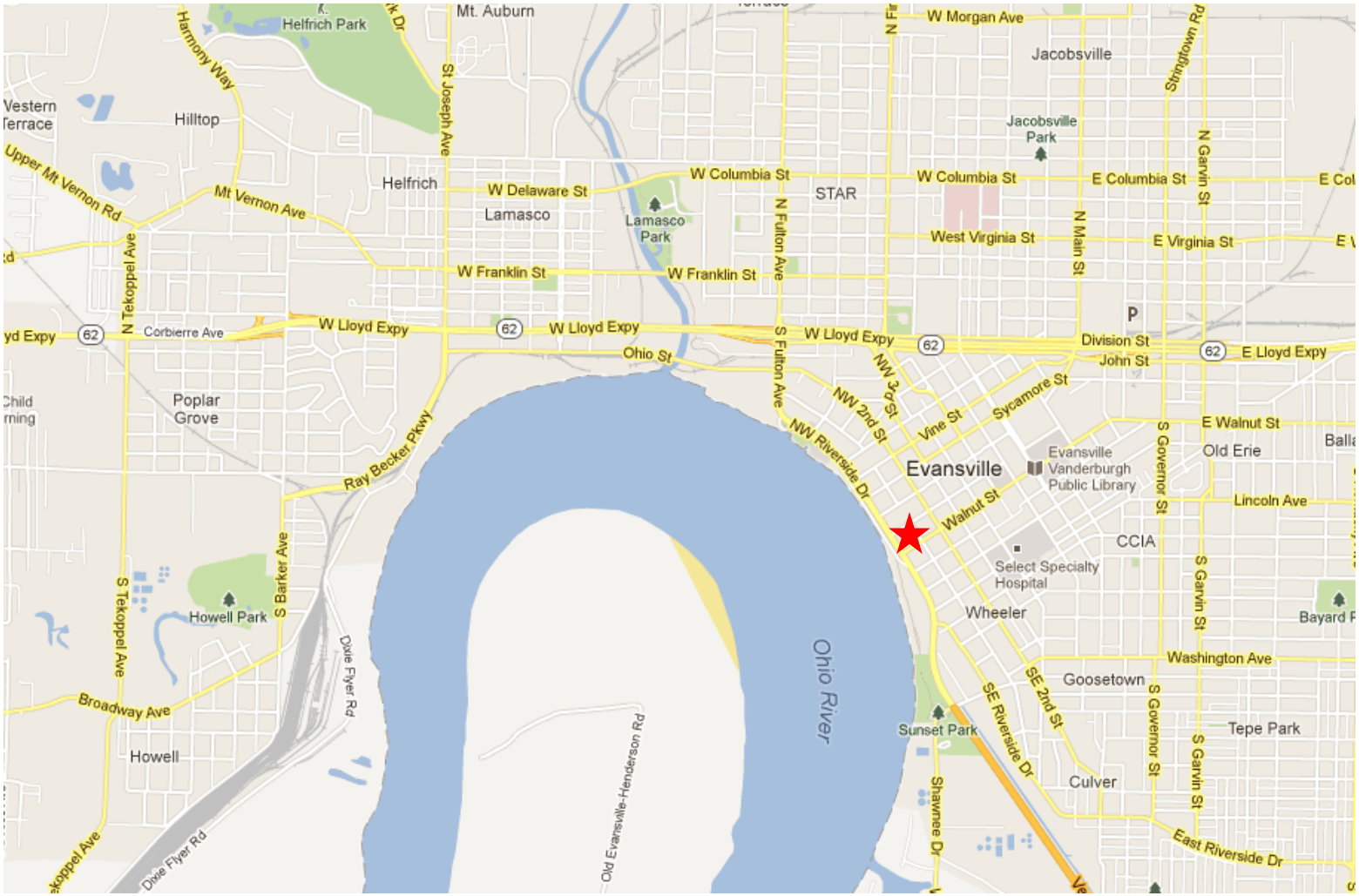
Case Study 1
Indiana Scrap Yard



Case Study 1
Indiana Scrap Yard

- Scrap Yard stopped operations after 60+ years of operation on two sites in Evansville, Indiana
- Extensive soil contamination discovered during attempt to purchase property
- Business and its owner thought it had no resources to address contamination

Case Study 1
Indiana Scrap Yard



Case Study 1
Indiana Scrap Yard



Case Study 1
Litigation Strategy

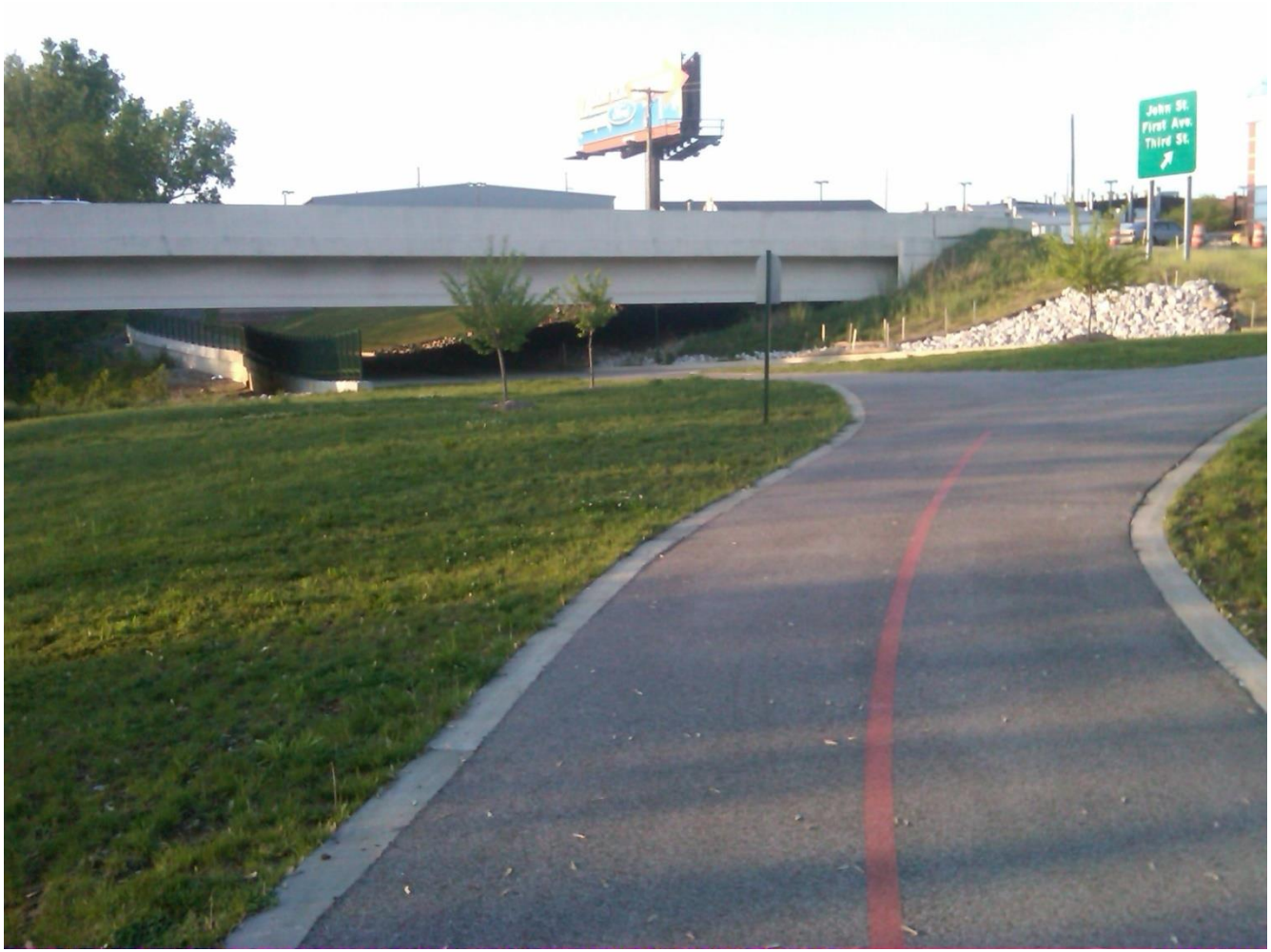
- Investigated historical insurance assets and found a policy that would provide coverage
- Litigation with the insurer over coverage resulting in settlement
- Creation of a trust charged with cleaning up site
- Cost recovery action filed against PRPs for past and future response costs
- Entry of site into state brownfields program

Case Study 1
Indiana Scrap Yard

Results:

- Client recovered a total of over $8 million from insurers and PRPs
- Remediation of the Main Yard completed
- Remediation of River Yard completed
- **All For Client That Did Not Have Resources For Investigation Or Cleanup**

Case Study 1
Indiana Scrap Yard



Case Study 1
Indiana Scrap Yard



Case Study 1
Indiana Scrap Yard



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Case Study 2
New York Waste Oil Facility



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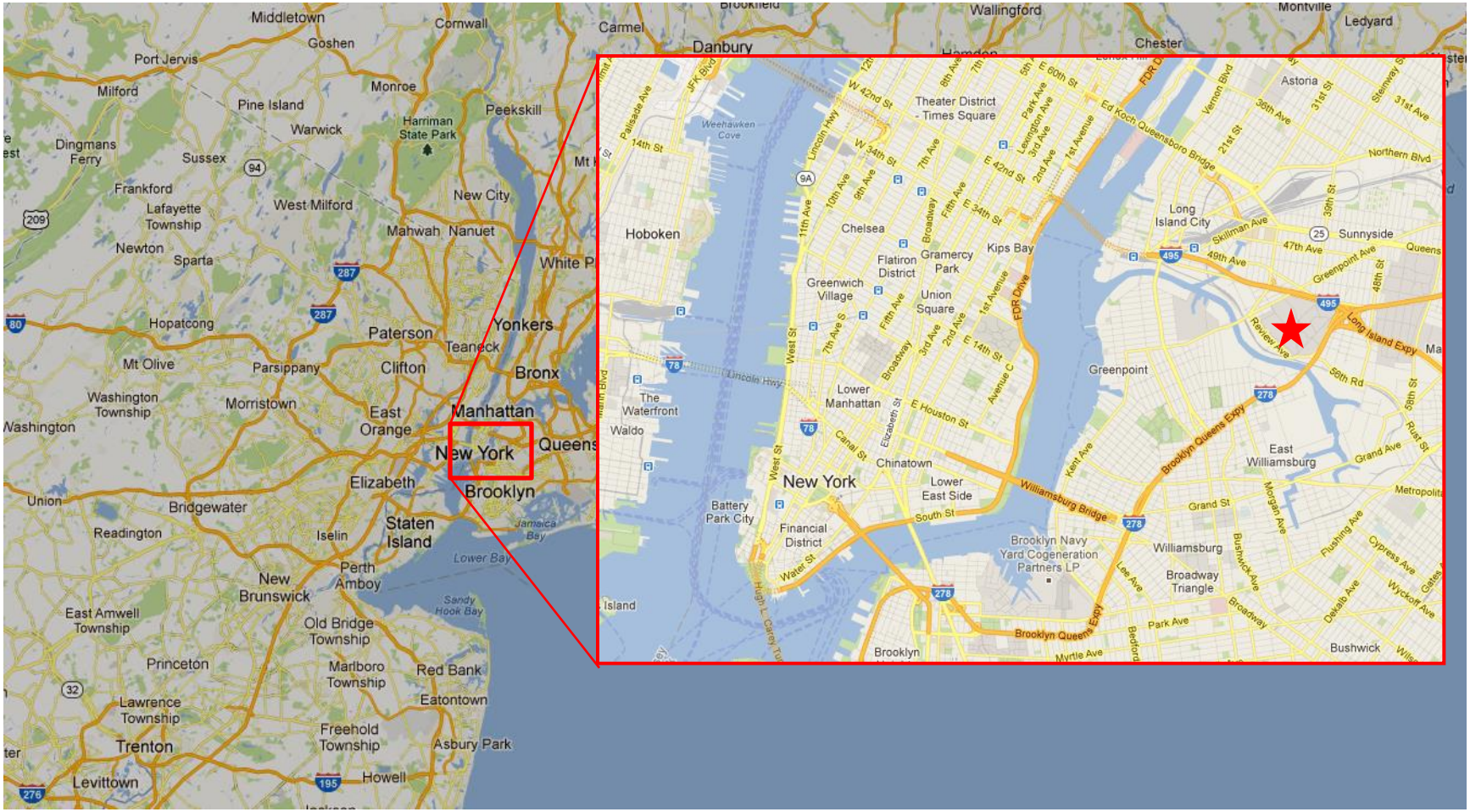
Case Study 2
New York Waste Oil Facility



Case Study 2
New York Waste Oil Facility

- Site in Long Island City, NY
- Property had been used as a waste oil treatment, storage and disposal facility
- Site leaked, overflowed and spilled
  - Contamination remained unabated for years
- Substantial soil and groundwater contamination
  - LNAPL detected in 24 of 29 monitoring wells

Case Study 2
New York Waste Oil Facility



Case Study 2
New York Waste Oil Facility







Case Study 2
Litigation Strategy

- Historic research into prior owner/operator, generators
- Strategic litigation approach on behalf of secured creditor: CERCLA, RCRA, and New York State common law claims
- Coordination of enforcement strategy with State
- Acceptance Into State's brownfields program

Case Study 2
Litigation Strategy

- Investigation allowed plaintiff to pursue a case against multiple generator defendants and owner/operator entities
- Discovery allowed plaintiff to add an allegation of direct operator liability
- Used RCRA and New York common law to supplement CERCLA cost recovery case

Case Study 2
New York Waste Oil Facility

Results:

- Lawsuit resolved in a confidential settlement
- Defendants agreed to cleanup the properties and paid over $7 million to plaintiffs
- NYDEC Record of Decision requires an approximate $15,560,000 remedy
  - Includes LNAPL vacuum recovery system
- Properties enrolled in brownfield program and remediation being implemented

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Case Study 3
Pennsylvania Waste Oil Facility



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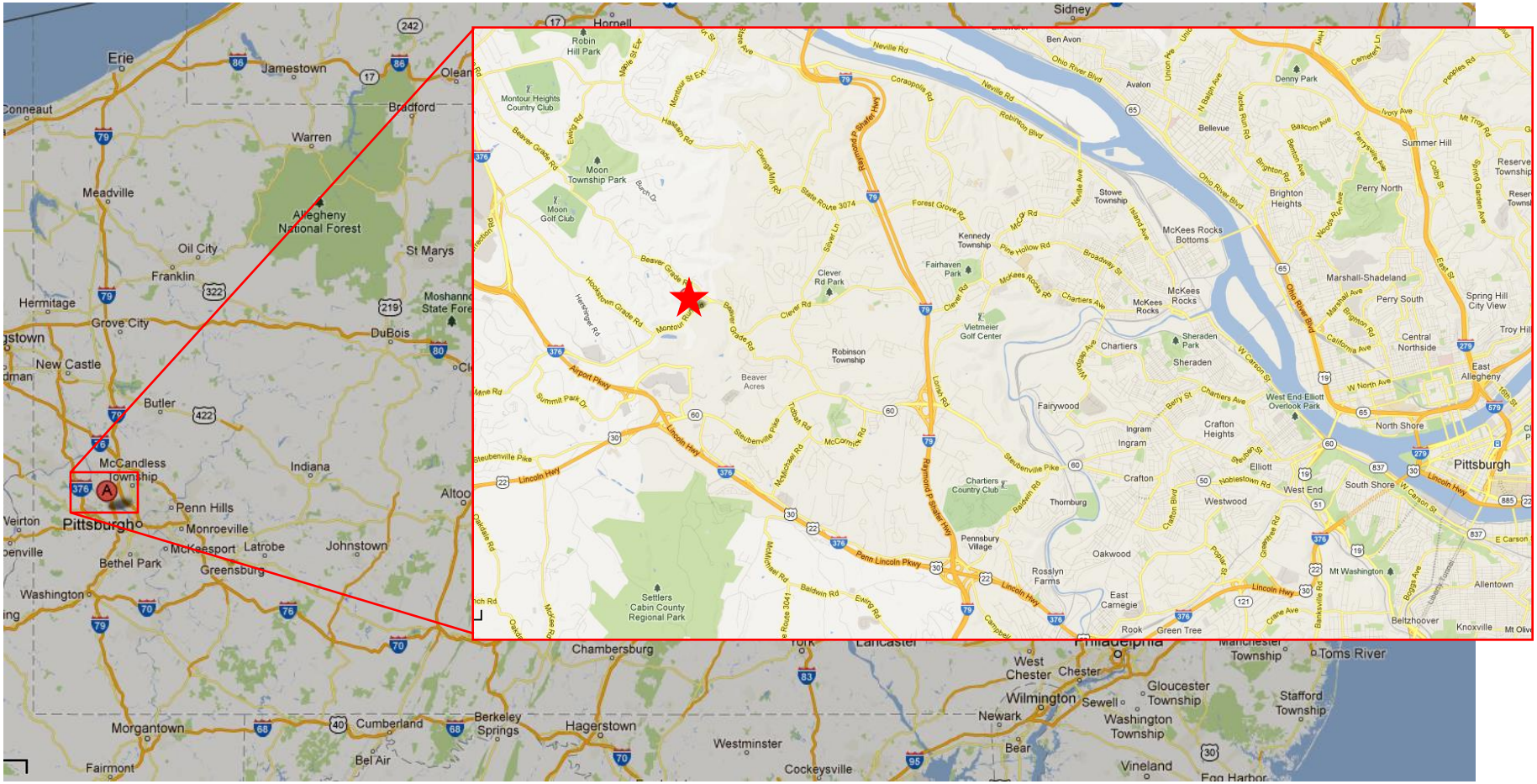
Case Study 3
Pennsylvania Waste Oil Facility



Case Study 3
Pennsylvania Waste Oil Facility

- Breslube-Penn Site in Allegheny County, PA
- Waste oil reprocessing facility owned by Wiseman family until 1973 and then sold to Breslube-Penn
- Wiseman Estates were sued by the U.S. EPA and performing parties for costs of investigation and cleanup
- Wiseman Oil Co. was bankrupt and the Estates had fixed assets available

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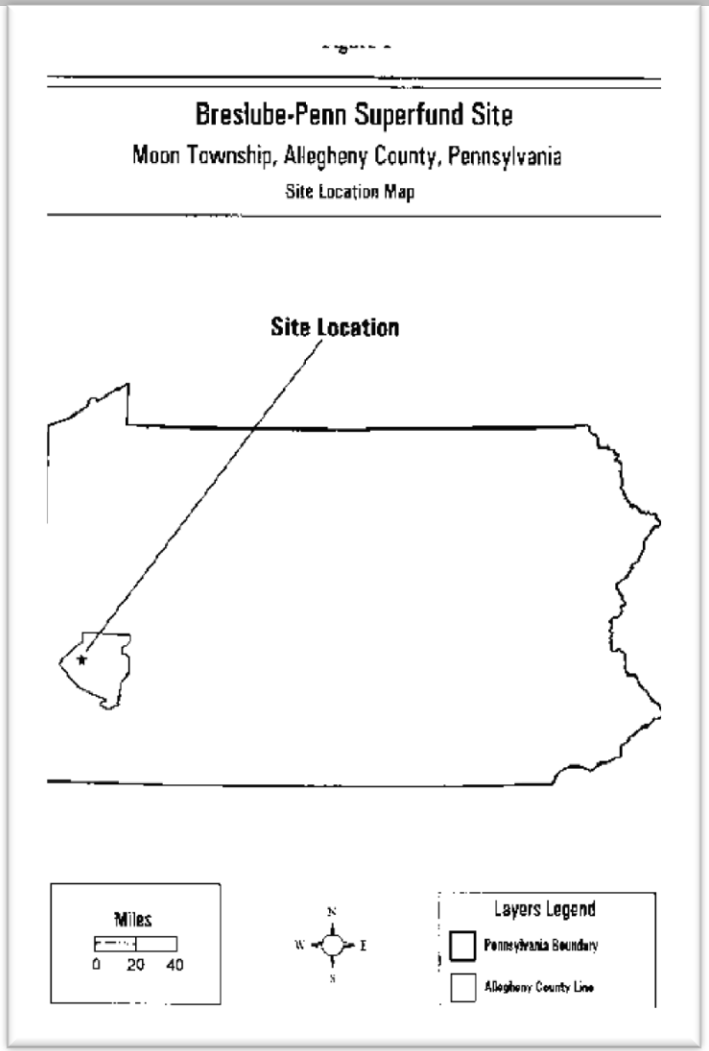
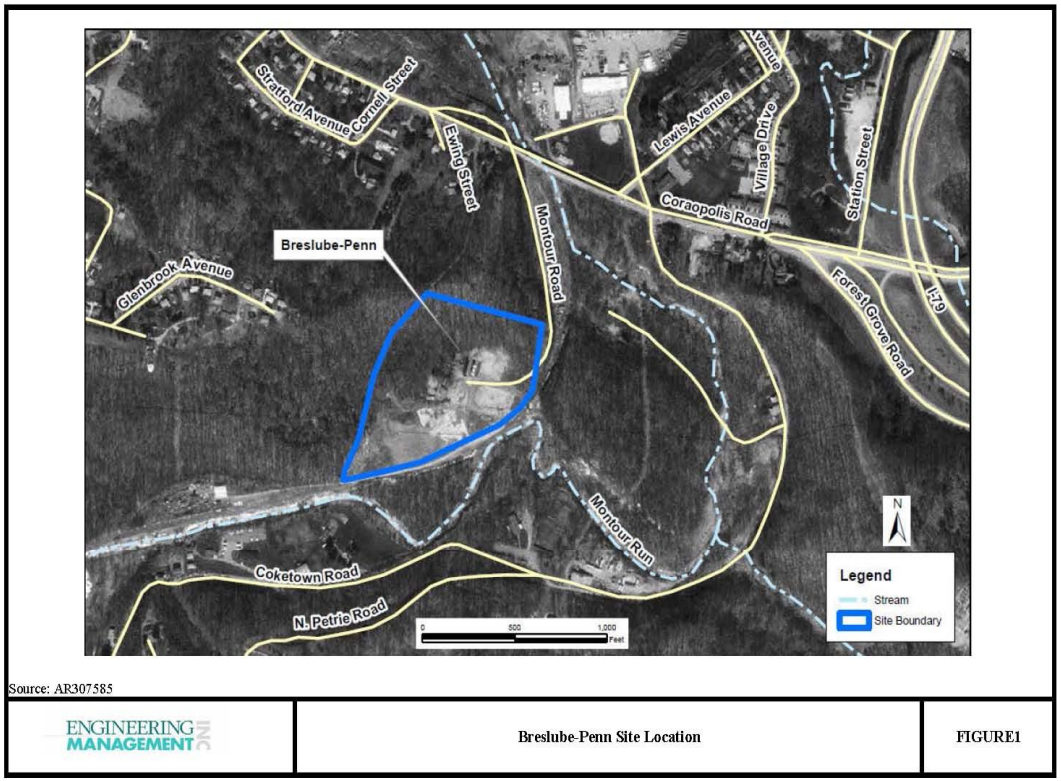
Case Study 3
Pennsylvania Waste Oil Facility





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ENGINEERING MANAGEMENT INC	Breslube-Penn Site Location	FIGURE1

Case Study 3
Litigation Strategy

- Successfully settled underlying environmental enforcement claims against the Estates and Wiseman family members
- Simultaneously pursued insurance assets
- Prevailed against insurance company on statute of limitations arguments
- Summary judgment awarded to policyholder on duty to defend and potential coverage, followed by confidential settlement

QUESTIONS AND ANSWERS