

# Special Report

## State-by-State Survey of Brownfield and Voluntary Cleanup Programs

By LARRY SCHNAPF

**D**uring the past two decades, there has been an exodus of industrial jobs from the nation's urban areas. This industrial migration has left many cities with abandoned or underutilized manufacturing or commercial facilities. Many of these sites are contaminated with hazardous substances, but the risks posed by these sites usually are not serious enough to warrant inclusion on the National Priorities List<sup>1</sup> or comparable state lists of hazardous waste sites.

Nevertheless, the mere suspicion of contamination has hampered redevelopment of these sites, which are known as brownfields.<sup>2</sup> This is because developers have been reluctant to acquire these sites and lenders have been unwilling to provide funding out of concern that they will be held liable for the cleanup costs associated with these sites under the federal Comprehensive Environmental Response, Compensation and Liability Act<sup>3</sup> and its state counterparts. Moreover, many corporate owners of brownfields have refused to sell these properties because they fear that the environmental due diligence performed prior to the sale will draw attention to the contamination at these sites and initiate enforcement proceedings to remediate the property. As a result, many of these facilities remain dormant, which results in a loss of jobs and tax revenue for the local communities.

To address these concerns and encourage redevelopment of brownfields, approximately 40 states have created voluntary cleanup programs or brownfield programs. The types of sites and kinds of entities who may be eligible for these programs vary from state to state.

<sup>1</sup> The National Priorities List is the list of the nation's most seriously contaminated sites. The NPL contains approximately 1200 sites and is published as an appendix to the National Contingency Plan, 40 CFR 300.

<sup>2</sup> Superfund: Barriers to Brownfield Redevelopment (GAO/RCED-96-125 (June, 1996)); Community Development: Reuse of Urban Industrial Sites (GAO/RCED-95-172 (June, 1995))

<sup>3</sup> 42 USC 9601 et seq.

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However, there are some features that are common to the programs:

1. **Releases from Liability**—These programs usually limit the potential liability of prospective purchasers and developers by allowing parties (often known as volunteers) to enter into agreements with state environmental authorities to perform a cleanup in exchange for a covenant not to sue from the state. These covenants not to sue are usually transferable to the lenders and successors of the volunteers.

2. **Contribution Protection**—Some programs also allow the state to grant contribution protection to volunteers for response costs associated with pre-existing contamination at the site. Sometimes the protection extends to toxic tort and property damage liability as well.

3. **Streamlined Cleanup Procedures**—Many of these programs allow the volunteers to perform streamlined cleanup procedures and expedited agency reviews.

4. **Risk-Based Cleanup Standards**—Many also establish relaxed cleanup standards using risk-based cleanup standards rather than generic cleanup standards. Under a risk-based approach, a volunteer can design a remediation that will be based on the risk posed by the site after taking into account the proposed use of the property. In many cases, a risk-based cleanup may be less expensive than a traditional National Contingency Plan-type cleanup because the volunteer may be allowed to leave residual contamination in soil that would be above the generic cleanup level established by the state.

Similarly, in the case of ground water contamination, the state may take into account whether the ground water is likely to be used as or affect a drinking water supply. If not, the volunteer may be allowed to simply monitor the ground water rather than install a pump-and-treat system. Moreover, a streamlined cleanup approach dispenses with much of the state review and the delays that are often associated with remediations so that the cleanups usually can be performed more quickly.

One drawback to this approach is that a volunteer who chooses to use a streamlined cleanup is likely to perform a cleanup that is not consistent with the NCP. Thus, the volunteer may forfeit its right to seek reimbursement for its response costs either under CERCLA or a state counterpart. In addition, in exchange for being allowed to leave higher levels of contamination in the ground, a volunteer may have to implement institutional controls such as deed restrictions, which would limit the uses that may be allowed at the property. For example, if a state has established a risk-based cleanup level for industrial properties that is less stringent than the standard for residential properties, the volunteer who chooses to remediate to the industrial cleanup

standard would not be able to construct a residential development on the property unless further remediation is performed. By limiting the uses that may be allowed at a property, deed restrictions could limit the value of the property.

**5. Financial Assistance**—Some states have also established grant or loan programs as part of their brownfield programs that may be used to defray the costs of site investigation and remediation. Other states do not provide funding but instead create tax incentives such as tax abatements.

Following is a summary of the principal features of the voluntary cleanup programs that have been enacted by the various states. The survey was completed in January 1998.

**ALABAMA.** The voluntary cleanup program is administered by the state Department of Environmental Management. Any person may participate in the program. Eligible sites include inactive or abandoned hazardous waste sites except those that are included or proposed to be included on the federal NPL, permitted or interim status sites under the state Resource Conservation and Recovery Act program, sites undergoing RCRA corrective action, and sites where an enforcement proceeding has been initiated. The program allows for site-specific, risk-based cleanups. The state will issue a "Notice of Completion" once the required assessment and/or remediation work has been completed. No financial assistance is available at this time.

**ARIZONA.** The state voluntary cleanup program is administered by the Department of Environmental Quality under the state Water Quality Assurance Revolving Fund. The Arizona voluntary cleanup program essentially provides volunteers an opportunity to conduct a streamlined site investigation or cleanup and obtain a concurrence or closure letter from DEQ. If a volunteer wants to preserve its right to seek cost recovery from potentially responsible parties (PRPs), the volunteer will have to comply with the traditional revolving fund requirements. Any person may participate in the voluntary cleanup program. The only sites excluded from the program are those that are subject to a state or federal enforcement order. However, if a cleanup is likely to take more than six months, the remediation would probably be administered under one of the traditional remediation programs.

DEQ has established residential and non-residential cleanup standards, although a volunteer can propose an alternative cleanup standard. Volunteers performing a cleanup that would not comply with the residential standards have to agree to a voluntary environmental mitigation use restriction. No financial assistance is available at this time.

**ARKANSAS.** A prospective purchaser who did not cause or contribute to a release or threatened release of hazardous substances may participate in the state brownfield program provided (1) the property to be purchased is an abandoned industrial site for which there is no responsible person who may be reasonably pursued to perform a remediation and (2) the prospective purchaser intends to reuse the site for industrial purposes that will create employment. The volunteer must enter into a consent order with the state Department of Pollution Control and Ecology and perform a compre-

hensive site assessment. Remedial actions performed under the program must eliminate unacceptable risks and prevent degradation of ground water but may take site-specific conditions into account. When the remedial activity has been completed, DPCE will issue a covenant not to sue, which is transferable to successors of the volunteer. The volunteer will remain liable for any pre-existing contamination that was not discovered by the site assessment.

Legislation was recently enacted creating a remedial action account. The purpose of the account is to provide financial assistance to prospective and current owners of abandoned, industrial, commercial, and agricultural sites for performing site assessments and remedial actions.<sup>4</sup> The amount and terms of the financial assistance have not yet been determined.

**CALIFORNIA.** The California Department of Toxic Substance Control has established an administrative voluntary cleanup program using its general authority under the California Health and Safety Code.

Non-PRPs may participate in the voluntary cleanup program. Sites that are not eligible for the voluntary cleanup program are properties on the NPL or the Cal-Sites list of state superfund sites, and sites whose contamination is exclusively due to releases of petroleum from underground storage tanks. The voluntary cleanup program uses presumptive remedies and innovative technologies to streamline the cleanup. While the voluntary cleanup program uses the same cleanup standards as the state superfund program, land use restrictions may be used to develop site-specific remediation standards. When the site assessment/remediation is completed, the DTSC will issue a no further action letter or certification of completion. These documents indicate that the DTSC has determined that the site no longer poses a significant risk, but they do not constitute a release nor a covenant not to sue. Financial assistance is not directly available to participants in the voluntary cleanup program, although funding may be available from local governments through the Community Facilities District Act.<sup>5</sup> The local districts can issue bonds to capitalize a revolving loan fund that may be used to investigate and remediate contaminated property.

California also has enacted a Community Redevelopment Law under which redevelopment agencies may perform a cleanup and are granted qualified immunity from future liability. This liability may extend to other persons entering into development projects for these sites.

**COLORADO.** Under the state Voluntary Cleanup and Redevelopment Act, owners of property contaminated with petroleum or hazardous substances as well as prospective purchasers with written authorization from the current landowner may participate in the program. Sites ineligible for the program include those on or proposed to be listed on the NPL, underground storage tank sites, properties subject to a RCRA corrective action, permitted or interim status RCRA facilities, and properties that are subject to an enforcement order. Cleanups will be based on the actual risks posed by the site. A volunteer may propose risk-based standards

<sup>4</sup> Ark. Code Ann. § 15-5-902(a)

<sup>5</sup> Cal. Gov. Code. § 53311 et seq.

adopted by other states. The Colorado Department of Public Health and Environment is required to approve a remedial action plan within 45 days of submission. The approval will contain a statement that upon completion of the remedial action plan, no further action will be required. If the remedial action plan is not approved, the DPHE must state the reasons for the disapproval. The DPHE approval is valid for one year. Upon the completion of the remedial action plan, the volunteer must submit a completion report. If the volunteer seeks a No Action Determination from the DPHE, the volunteer must file a No Action Determination and the DPHE must issue the No Action Determination within 45 days. The No Action Determination does not contain a covenant not to sue. No financial assistance is available.

**CONNECTICUT.** The Department of Environmental Protection is authorized to enter into covenants not to sue with any owner or prospective purchaser of contaminated property provided the applicant did not cause or is responsible for the contamination, DEP approves the remedial action plan, and the applicant will redevelop the property for productive use. The covenant not to sue may also be issued to lenders of current owners provided the lender did not create or contribute to the contamination as well as lenders of prospective purchasers. DEP also recently adopted risk-based standards for brownfield remediation. These standards include different soil cleanup levels for residential and industrial properties as well as ground water standards that differentiate between aquifers that may be used for drinking water purposes and ground water that may have been impacted by development.

Another brownfield program, the Urban Sites Remedial Action Program, applies to urban properties that the Department of Economic and Community Development (DECD) determines have potential for economic development. Sites may be eligible for the program even if the properties are subject to enforcement actions under other regulatory programs. The Department of Economic and Community Development may use funds from the Special Contaminated Property Remediation and Insurance Fund for loans to municipalities or persons.<sup>6</sup> The loans may be used to pay for Phase II or Phase III investigations under the state voluntary cleanup program and any costs of demolition to prepare the site for development. The loan shall be repayable upon the sale or lease of the property or upon the approval of a remedial action plan. However, no repayment other than interest will be required if completion of remediation or the sale or lease of the property is unfeasible.<sup>7</sup> The amount of the loan shall be a lien filed against the property until the loan is repaid.

There are three classes of sites that are covered by the program, and the procedures that must be followed depend on the site category. Type I sites involve properties where there is a private party who is willing to perform the cleanup. Cleanups under this category will receive expedited review from DEP. Once sufficient information has been generated, the volunteer submits a remedial action plan. When the remediation is completed, the volunteer will submit a final site report to obtain a no further action letter from DEP that the cleanup has been completed.

<sup>6</sup> C.G.S. § 22a-133u

<sup>7</sup> Id. at 22-133u(c)

A Type II site is an orphan urban site in a distressed community where the owner is either unwilling or unable to conduct a cleanup. DEP will conduct the site assessment and prepare the remedial action plan. Either a volunteer could then implement the remedial action plan or the DECD could retain contractors to implement the remedial action plan if the DECD determines that the site is economically significant.

The Type III site involves high-priority sites where there is a prospective developer of the site. The DECD will enter into an agreement with the developer to lease or sell the property. The developer must be willing to assume remediation costs in excess of \$15 million. The DECD will then acquire the property, perform the investigation and remediate the site.

The Urban Sites Remedial Action Program also established an Urban Site Remediation Fund to help pay for the costs of site investigation and remediation. Thus far, the state has expended \$22 million from the fund.

**DELAWARE.** The state Hazardous Substance Cleanup Act authorizes the Department of Natural Resources and Environmental Control to enter into a settlement agreement with any party who has knowledge of a release and is willing to remediate the contamination. Sites will not be eligible to participate in the voluntary cleanup program if: (1) there is soil or ground water contamination that poses a cancer risk greater than  $10^{-4}$  or a hazard index greater than 10; (2) the water supply well located on the site has contamination above the maximum contaminant level (MCL) under the Safe Drinking Water Act, or poses a cancer risk of  $10^{-5}$ ; or has a health hazard index equal to 1; (3) the site has soil or ground water contamination within 300 feet of a public drinking water well or 150 feet of a private well; (4) site contamination either impacts surface water used as a drinking source and the MCLs are exceeded or contaminants affect a non-drinking surface water and the water quality is impacted by an order of magnitude over ambient water quality standards; or (5) the property is subject to a corrective action order under RCRA. DNREC has established site-specific cleanup standards. Once the cleanup is satisfactorily completed, the agency will issue a no further action letter. Prospective purchasers may be granted contribution protection if they become signatories to the settlement agreement.

The state has established a number of brownfield financial assistance programs. The Department of Economic Development has a grant program that funds 50 percent of assessment and remediation costs up to \$25,000 if the redevelopment would result in the expansion, retention, or startup of a business. Tax credits of \$500 per new job created may also be available until the cleanup costs have been recouped. Finally, remediation loans may be available from the state superfund.

**FLORIDA.** Under the Brownfields Development Act, any person who has not caused or contributed to the contamination of a brownfield site after July 1, 1997, is eligible to participate in the program. Persons who become subject to a corrective action or other enforcement order after that date will still be eligible for the program as long as they are complying in good faith complying or responding in good faith to the enforcement proceeding, the site qualifies as an eligible brownfield site, and the resulting business activity following cleanup will result in increased economic opportunity,

including the creation of at least 10 new jobs. Sites that are not eligible for the program include facilities that are currently under federal or state enforcement action or subject to regulation under RCRA. Volunteers will have to enter into a site rehabilitation agreement. Upon successful completion of the cleanup, the state Department of Environmental Protection will issue either a site rehabilitation completion letter or a no further action letter, which will provide for a release of liability from DEP as well as for claims for reimbursement of response costs by third parties. However, the release will not apply to claims of third parties for personal injury or property damage. The DEP will develop risk-based cleanup standards by July 1, 1998, that are to take into account individual site characteristics such as current projected land use and use of the affected ground water, potential of contamination to degrade naturally, and mobility of the contaminants. The legislation directs state agencies to create financial incentives for brownfield redevelopment and establishes a \$2,500 job credit for certain qualifying businesses.

**GEORGIA.** PRPs may not participate in the Georgia voluntary cleanup program. Sites that are on the NPL or subject to enforcement proceedings are not eligible for the program. Volunteers must prepare a corrective action plan. When the plan is approved, the state Department of Natural Resources will enter into an administrative consent order with the volunteer. DNR has not established separate cleanup standards for the voluntary cleanup program. Upon completion of the cleanup, DNR will issue certificate of completion. However, covenants not to sue are not available, nor is financial assistance available.

**IDAHO.** Under the Idaho Land Remediation Act, any person may participate in the state voluntary cleanup program. However, sites that are subject to remediation under other regulatory programs or that pose a substantial and imminent endangerment may be ineligible for the program. The state Department of Environmental Quality is in the process of establishing cleanup standards for the voluntary cleanup program. Volunteers will probably have the option of using generic numeric standards or establishing site-specific risk-based standards. Upon satisfactory completion of the cleanup, DEQ will issue a Certificate of Completion along with a covenant not to sue.

A property owner who performs a voluntary cleanup may apply for a property tax exemption equal to 50 percent of the "remediated value" of the property for a period of up to seven years. The term "remediated value" refers to the incremental increase in assessed value of the property after remediation.<sup>8</sup> The exemption may only be allowed if the property remains in the possession of the owner and only so long as the covenant not to sue issued under the state voluntary cleanup program remains in effect.

**ILLINOIS.** Any person may participate in the Illinois Pre-Notice Site Cleanup Program. Sites that are not eligible for the program include sites on the NPL, sites subject to regulation under RCRA or the state underground storage tank program, and facilities where an investigation or remediation has been ordered by a fed-

eral court or EPA. Volunteers are required to perform a site assessment and then submit a remedial action plan to the Illinois Environmental Protection Agency, which may adopt risk-based cleanup standards that take future land use into account. Upon completion of a cleanup, the IEPA will issue a "no further remediation" letter. Volunteers may also receive a release from liability, and contribution protection may be available to prospective purchasers.

Under the Environmental Remediation Tax Credit Program, individuals incurring remediation costs for sites in the state brownfield program may claim income tax credits of 25 percent of unreimbursed remedial costs in excess of \$100,000 for income taxes paid between Dec. 31, 1997, to Dec. 31, 2001. In addition, a Brownfields Redevelopment Grant Program was established to provide municipalities with \$6 million over five years to identify brownfield sites, perform site assessments and develop remedial action plans.

The state Legislature recently created a Environmental Remediation Tax Credit of up to 25 percent of eligible remediation costs incurred pursuant to the Site Remediation Program. To participate in the program, an applicant cannot be a responsible party and must have received a "No Further Remediation" letter from the state EPA. The total eligible remediation costs may not exceed \$700,000, and a \$100,000 deductible will apply. However, for sites located in a designated Enterprise Zone, the \$100,000 deductible will not apply. The maximum allowable Environmental Remediation Tax Credit shall not exceed \$40,000 per year for the first three years, nor may it exceed \$150,000 in the aggregate. Any unused tax credits may be carried over for the succeeding five years. In no event, though, shall the Environmental Remediation Tax Credit reduce a taxpayer's liability to less than zero. The credit shall be transferable with the property.<sup>9</sup>

**INDIANA.** Any interested party including prospective or current property owners may participate in the Indiana voluntary cleanup program. The Indiana Department of Environmental Management may prohibit certain sites from enrolling in the voluntary cleanup program. These sites include those posing an imminent and substantial endangerment, sites that are already subject to enforcement under CERCLA or RCRA, and high-priority underground storage tank sites where federal grant money requires IDEM to pursue enforcement actions. Volunteers must enter into a voluntary remediation agreement and perform assessment and remediation pursuant to an approved workplan. IDEM has established three tiers of cleanup standards which range from generic numeric cleanup standards to risk-based standards using site-specific factors. Upon completion of the approved cleanup plan, the volunteer will be issued a certificate of completion and a covenant not to sue that is transferable to future owners and operators of the site. However, the covenant not to sue may only release the volunteer from liability from claims filed under state environmental statutes and may not apply to claims based on federal or common law.

The state Legislature enacted legislation in 1997 that established a number of financial incentives to encourage the redevelopment of brownfields.<sup>10</sup>

<sup>8</sup> Idaho Code § 63-602BB

<sup>9</sup> 35 Ill. Comp. Stat. § 5/201(L) (1997 Ill. S.B. 939)

<sup>10</sup> Senate Enrolled Act. No. 360

**Environmental Remediation Revolving Loan Program.** The Indiana Development Finance Authority administers a revolving loan fund that may be used to provide a wide variety of financial assistance such as loans, grants, interest subsidies, loan guarantees, loan leverage programs, bonds, and loan pledges to local governments.<sup>11</sup> The funds may be used to identify, assess and remediate brownfields. Private entities may not apply for financial assistance.

**Property Tax Abatements.** This program offers real and personal property tax abatements to qualifying entities who redevelop properties located in brownfield revitalization zones.<sup>12</sup> In order to participate in the program, the property must be designated as a revitalization zone and the owner must have received a certificate of completion indicating that a remediation was successfully completed under the state voluntary remediation program. The tax abatements may be for three, six, or 10 years.

**KANSAS.** The state has a limited pilot voluntary cleanup program that has been used at only a handful of sites. Any party may participate in the program. Sites that are not a high cleanup priority or do not pose a risk of imminent and substantial endangerment are eligible to enroll. Upon conclusion of the cleanup, the Kansas Department of Health and the Environment will issue a letter of completion.

**LOUISIANA.** Under the state Voluntary Investigation and Remedial Action Act, non-PRPs who satisfactorily perform a remedial action plan approved by the state Department of Environmental Quality will be exempt from liability for any contamination not required to be remediated under the remedial action plan. The DEQ may approve a partial remediation that leaves residual contamination at the site in exchange for use restrictions. Upon satisfactory completion of the remedial action plan, the DEQ will issue a certification of completion that will also apply to any successor owners or lenders provided that they do not aggravate or contribute to a release or disposal of hazardous substances at the site. No financial assistance is available.

**MAINE.** Any party interested in performing a cleanup may participate in the state voluntary cleanup program although the scope of the release offered to the volunteer will vary depending if the volunteer is a PRP or an innocent party. Sites that are subject to the jurisdiction of another state or federal program such as RCRA or the state superfund program are not eligible for the voluntary cleanup program. A volunteer must perform a site assessment and submit a remedial action plan for approval to the state Department of Environmental Protection. DEP may approve a partial remediation that allows residual contamination to remain at a site after taking into account the future use of the property. Upon successful completion of the remedial action plan, DEP will issue a certificate of completion and a no further action determination, which serves like a covenant not to sue. If the volunteer performs a partial remediation, the liability protection will not extend to conditions that were not addressed by the remedial action plan. If the volunteer was a PRP, the liability protection will be lim-

ited to future cleanup requirements and will not include past liability for fines, penalties, and natural resource damages unless specifically addressed by the no action determination. No financial assistance is available at this time.

**MARYLAND.** Any person may participate in the Maryland voluntary cleanup program, including PRPs, provided they did not knowingly or willfully violate any environmental laws or regulations governing hazardous substances. Sites that are currently subject to an enforcement action, listed on the NPL, or are permitted or have interim status under RCRA are not eligible for the program. Volunteers must perform a site assessment, submit a remedial action plan for approval by the Maryland Department of the Environment, and post a performance bond until the certifies that the cleanup has been completed. MDE is in the process of developing risk-based cleanup standards. Upon successful completion of the remedial action plan, the volunteer will receive a release from liability and contribution protection.

A person who is not a PRP may be eligible for the following financial assistance once a cleanup plan has been approved under the state voluntary cleanup program.

**Remediation Loans and Grants.** The Department of Business and Economic Development is authorized to extend low-interest loans and grants that may be used to remediate brownfields.

**Tax Abatements.** Owners of "qualified brownfield sites" may be eligible for a five-year property tax credit of up to 50 percent of the property tax attributable to increased assessment of the property after cleanup, although the local tax authority may grant an additional 20 percent tax credit. A portion of the taxes resulting from the increased value of the brownfield must be placed back into the Brownfield Revitalization Incentive Fund to help finance the cost of the remediation loans and grants. Properties that fall within the definition of "qualified brownfield sites" include properties located in urban areas that are underutilized or that are industrial or commercial sites that pose a risk to human health and the environment. In approving an application for financial assistance, the state must evaluate a number of factors including the benefits that may result from site development, the likelihood that the project will attract new employers, the extent that the redevelopment will eliminate the risk posed by the contamination, and the support of the local community.<sup>13</sup>

Owners of brownfields may be eligible for a five-year property tax credit of up to 50 percent of the property tax attributable to increased assessment of the property after cleanup. The tax credit is only available for urban properties. Moreover, the Department of Business and Economic Development is authorized to create low-interest loans and grants that may be used to remediate brownfields.

**MASSACHUSETTS.** There are two kinds of voluntary cleanup program in Massachusetts. The state has an administrative brownfield pilot program known as the Clean Sites Initiative. The CSI program is available to prospective purchasers or tenants of contaminated property that will be reused or redeveloped for commercial or industrial activities. To be eligible for the

<sup>11</sup> Ind. § 13-19-5

<sup>12</sup> Id. at § 13-11-2-19.3

<sup>13</sup> 1997 MD 409

CSI, the contaminated property must be located in a designated Economic Target Area or must be determined by the Secretary of Economic Affairs to have economic development potential. Cleanups must conform to the Massachusetts Contingency Plan, which takes site-specific factors into account and allows for land use restrictions. Upon completion of the cleanup, DEP will issue a certificate of completion and a covenant not to sue to the volunteer. However, the release will not apply to third party claims for personal injury or property damage.

Financial assistance includes a 5 percent Investment Tax Credit, 10 percent Abandoned Building Tax Deduction, and municipal tax assessment benefits.

PRPs and sites that have substandard development potential may be voluntarily remediated under the Waste Site Cleanup Program. This program provides for streamlined assessments and cleanups of contaminated sites. Cleanups may be performed by licensed site professionals without oversight by the DEP except for the most seriously contaminated sites. Upon completion of a cleanup, the licensed professionals will prepare a response action outcome. However, the DEP will not issue a covenant not to sue and is required to audit 20 percent of the response action outcomes per year.

**MICHIGAN.** The Michigan Environmental Response Act provides that any person who becomes an owner or operator of a facility after June 5, 1995, shall not be liable for site contamination provided the prospective owner or operator is not responsible for the release, performs an baseline environmental assessment at least 45 days prior to ownership or occupancy and discloses the results of the baseline assessment to any subsequent owner or occupier of the site. Within six months of the completion of the baseline assessment, the new owner or operator may seek a written determination of no liability from the state Department of Natural Resources, which will shield the party from statutory and common law liability for response costs. In addition, lessees who use property for retail, office, or commercial purposes and are not responsible for the activity causing the release are exempt from liability.

The DNR is also authorized to issue covenants not to sue to persons who propose to redevelop or reuse a brownfield property such as a vacant manufacturing or abandoned industrial site. The prospective redeveloper may not be a PRP or affiliated with a PRP and must demonstrate that it has the financial resources to develop the site. The potential developer must also demonstrate that the site has economic development potential. The covenant not to sue may not be issued to the prospective redeveloper until DNR certifies that the remediation has been satisfactorily completed. DNR may take site-specific factors into account when establishing the appropriate cleanup standard for a site.

Michigan has enacted a number of financial incentives to encourage the reuse and redevelopment of brownfields.

**Site Reclamation Grants.** This program provides funding to local governments to investigate and remediate contamination at brownfield sites that are slated for redevelopment. The grants are funded out of a \$35 million environmental bond fund, and may be up to \$2 million per project. Approximately \$20 million has been expended to date. The funds may be used to perform interim and long-term remediation measures but may not

be used to replace drinking water supplies, remove asbestos, or cover operation and maintenance costs. Any site that is developed using a reclamation grant may not be sold, disposed, or converted to another use without the express approval of the state Department of Environmental Quality.<sup>14</sup>

**Site Assessment Grants.** This program was also funded from an environmental bond act and has been used to assess the environmental conditions of brownfields. Unlike the Site Reclamation Grant program, this program provides funding for sites where no specific redevelopment has been proposed but which have redevelopment potential. The assessment grants have often been used to pay for the Phase I and Phase II baseline environmental assessments, which are used to satisfy the innocent purchaser's defense under the Michigan Environmental Response Act.<sup>15</sup>

**Revitalization Revolving Loan Fund and Program.** This program provides loans to local governments that may be used to perform site evaluation and demolition activities as well as interim response actions that must be conducted prior to the evaluation and demolition activities. The activities must be conducted pursuant to an approved remedial action plan. However, the loans may not be used for activities that are necessary to design or complete a remedial action plan. Borrowers do not have to begin loan repayment until the expiration of a five-year grace period, and then they have 15 years to repay the loan. The interest rate charged on the loans is 50 percent below the prime rate.<sup>16</sup> This program is popular with local governments because they can continue to collect taxes during the five-year grace period and then use those taxes to begin paying back the loan.

**Tax Increment Financing.** Under the Brownfields Redevelopment Financing Act, local governments may create brownfield redevelopment authorities.<sup>17</sup> These authorities may identify eligible brownfield sites and establish a local site remediation revolving fund to pay for the cleanup of the sites. The fund may be used to pay for all response costs that are necessary to address a release at the brownfield site to be redeveloped as well as other properties affected by the release.<sup>18</sup> The funds may be financed from loans obtained under the Revitalization Revolving Loan Fund or may issue tax increment financing bonds or notes. The authorities will then capture all additional state and local taxes, including additional school operating taxes, that come from the increased value of the remediated property. These captured taxes may then be used to pay off prior loans or bonds or to finance additional remedial activities at other sites located within the brownfield authority's jurisdiction.<sup>19</sup> The authorities may also file a cost recovery action against PRPs for reimbursement of response actions paid with increment tax financing as well as reasonable attorneys fees. All sums that are recovered must be returned to the local site remediation fund.<sup>20</sup> Some developers have opted to advance loans to the brownfield authorities to pay for response action at a brownfield site that will be developed.

<sup>14</sup> Mich. Admin. Code § 299.5053

<sup>15</sup> Id. at § 324.201

<sup>16</sup> Id. at § 324.20108(b)

<sup>17</sup> Id. at § 125.2651-2672.

<sup>18</sup> Id. at § 125.2663(7)

<sup>19</sup> Id. at § 125.2658

<sup>20</sup> Id. at § 125.2663(8)



**Business Tax Credit.**<sup>21</sup> Persons who own or lease brownfields and who are not otherwise liable as PRPs under MERA may be eligible for a 10 percent business tax credit for unreimbursed development costs associated with the brownfield site. The costs that may be eligible for the tax credit include expenses incurred for demolition, construction, alteration, renovation, building improvements, machinery, equipment, and fixtures. The tax credit may be claimed for the tax liability beginning Jan. 1, 1997, and ending Dec. 31, 1999. The maximum tax credit that may be claimed in any one year is \$1 million. If the amount of the tax credit exceeds the taxpayer's tax liability for any one year, the taxpayer will not receive a tax refund. Instead, the portion of the credit that exceeds the tax liability may be carried forward for up to 10 years.<sup>22</sup>

**MINNESOTA.** The state voluntary investigation and cleanup program is administered by the Minnesota Pollution Control Agency pursuant to its authority under the voluntary cleanup program of the Minnesota Environmental Response and Liability Act (MERLA).

Any person including PRPs may participate in the program, although the scope of the cleanup and the nature of the release will depend on the volunteer's status. However, it is important to note that the definition of a "owner" under MERLA differs from the CERCLA definition. The state law requires that the owner take some actions that "associate" it with the release. Sites that are not eligible for the voluntary cleanup program are sites where there is an imminent and substantial endangerment, a federal or state enforcement proceeding has been initiated, or the state underground storage tank law applies.

MPCA has established risk-based cleanup standards that take into account the future use of the property and the anticipated use of the ground water. A PRP volunteer will be required to address all contamination at a site and to remediate contamination that has migrated beyond the site. MPCA may authorize a partial cleanup for a non-PRP and will not require the non-PRP to investigate or remediate beyond the property line.

Upon satisfactory completion of the response action, MPCA may issue a variety of closure documents. A volunteer may receive a "no association" letter, which may be used for development or past response actions; a "no further action" letter where the MPCA will agree to refrain from further administrative or enforcement actions; an "off-site determination" letter indicating that the contamination is from an off-site source; and a certificate of completion, which will contain a covenant not to sue without reopeners for past contamination. Non-PRP volunteers, lenders, and successors to existing owners may obtain any of these documents. However, PRPs are only eligible for a no further action letter, although they may be able to obtain a covenant not to sue for future releases under certain circumstances.

Minnesota has enacted a tax incremental financing law that may be used to help finance cleanup of contaminated properties. The state has also established contamination cleanup grants, which are available for qualifying development authorities.

<sup>21</sup> Id. at § 208.38(d)

<sup>22</sup> Id. at § 208.38(d)(4)

**MISSOURI.** Any person including PRPs may participate in the Missouri voluntary cleanup program. The state Department of Natural Resources may deny applications for properties that the agency determines warrant action under CERCLA or RCRA. Volunteers must conduct a site assessment and submit the information to DNR. The agency must determine within six months if remedial action is required. If DNR concludes that there is contamination that must be remediated, the volunteer must prepare and submit for review a remedial action plan within 90 days. Upon successful completion of the remedial action plan, DNR will issue a no further action letter.

Purchasers who perform Phase I and Phase II site assessment at brownfield sites that qualify as "eligible projects" will be issued a no further action letter if the site assessments indicate that no further remediation is required. If remediation is required, the DNR will issue a no further action letter and covenant not to sue to the purchaser following satisfactory completion of the remedial work and a public comment period. The release will apply to the contamination addressed by the voluntary remediation and will also provide contribution protection from third party actions.

The state has established financial incentives under its Brownfield Redevelopment Program to developers of qualifying properties. These financial incentives may be in the form of direct loans, guarantees, grants, or tax credits.<sup>23</sup>

To be eligible for financial assistance, a property must have been abandoned for at least three years, must be owned by a governmental agency at the time of the application, must be contaminated with hazardous substances or be perceived to have been contaminated with hazardous substances, and an eligible business must occupy the site upon completion of the project.

**Brownfield Tax Benefit.** Operators or lessees may be eligible for a variety of tax benefits if the property is located in certain economically distressed areas. Businesses that operate or lease eligible projects may obtain income tax credits of between \$400 to \$1,300 for each new job, investment tax credits ranging from 2.1 percent to 10 percent of the new qualified investment, exemption of 50 percent of taxable income attributable to the project and a local property tax exemption of 100 percent for real property improvements for up to 15 years. The brownfield tax credits may be claimed for four to 10 consecutive years. In the event that a taxpayer cannot use the entire amount of the tax credits in the first two years, a refund of up to \$50,000 for the first year and \$25,000 for the second year.

**Remediation Tax Credits.** The Department of Economic Development may grant remediation tax credits to operators or lessees of eligible project that create 10 new jobs or retain 25 existing jobs. The Remediation Tax Credits may be for up to 100 percent of all capital and operating costs including materials, supplies, equipment, labor, professional engineering, consulting and architectural fees, permitting fees and expenses and direct utility charges for performing voluntary remediation. Operation and maintenance costs associated with post-remedial activities may also be eligible for the tax credit. However, costs associated with ongoing environmental compliance or releases associated with the business operations are not covered. The tax credits

<sup>23</sup> Id. at § 447.710-718.

may not be used until after the state DNR issues a no further action letter or covenant not to sue and the requisite number of jobs have been created or retained. The taxpayer has the option of taking the credit in the year the costs were incurred or up to 20 years.

The amount of the tax credits is limited to the lesser of the amount necessary to induce the owner to proceed with the project, the "net state economic impact," the eligible remediation costs and certain income limits from the business. The owner can assign, transfer, or sell the tax credits.

**Loan Guarantees.** If at least three qualified lenders are unwilling to finance the total amount of an eligible project, DED may provide a partial loan guarantee to a lender. The maximum loan guarantee may be 70 percent or \$1 million, whichever is less. The loan guarantee also may not exceed the "net state economic impact" and must be less than the appraised value of the collateral. Any other grants or loans received by the applicant shall be applied toward the \$1 million limitation. The lender issuing the loan to be guaranteed may not charge an interest rate that exceeds the prime rate plus 2 percent, and the terms of the guarantee may not exceed 120 months. The borrower shall pay a fee of 2 percent of the guarantee loan amount at the closing and shall pay the DED an annual fee of 0.5 percent of the outstanding guarantee principal.

A lender who foreclosed on abandoned property that qualified as an eligible brownfield development project and has held title for at least two years may request that the Department of Economic Development use the loan guarantee money from the Reuse Fund to pay the unpaid balance of the defaulted loan. The lender will have to detail its efforts to sell the property and why those efforts were unsuccessful. Upon approval by the DED, title shall revert to the local government.<sup>24</sup>

**Direct Loans.** If at least three qualified lenders are unwilling to finance the total amount of an eligible project and will also not accept the loan guarantee described above, DED can make direct loans. The maximum loan amount will be 50 percent of the project cost or \$1 million per eligible project, whichever is less. However, the loan may not exceed the "net state economic impact" and must be less than the appraised value of the collateral. The loan interest rate may not exceed the prime rate plus 2 percent or be more than 1 percent above the interest rate charged by the senior lender, whichever is greater. The term of the loan may not exceed 10 years and may not exceed the term of the loan provided by the senior lender. The borrower shall pay a fee of 2 percent of the loan amount at the closing.

**Due Diligence Matching Grants.** To provide incentives to prospective purchasers of brownfield properties, DED may provide a grant equal to 50 percent of the costs to investigate the environmental conditions at an eligible site up to \$100,000. The remaining 50 percent of the costs may come from private sources or other government agencies so long as DED retains ownership over the work product generated by the due diligence.

The state has established an Abandoned Property Reuse Fund, which may be used to issue direct loans, guarantees, and grants to developers of qualifying properties to help fund cleanup activities at those sites. Remediation tax credits may also be available. A lender who foreclosed on abandoned property that qualified as

an eligible brownfield development project and has held title for at least two years may request that the Department of Economic Development use the loan guarantee money from the Reuse Fund to pay the unpaid balance of the defaulted loan. The lender will have to detail its efforts to sell the property and why those efforts were unsuccessful. Upon approval by DED, title shall revert to the local government.

**MONTANA.** The state Voluntary Cleanup and Redevelopment Act allows any person, including a PRP, to participate in the state voluntary cleanup program. Sites that are not eligible for the program include those that are listed or are proposed to be listed on the NPL, facilities that are subject to administrative or judicial proceedings, and properties subject to the state underground storage tank program. However, the Department of Environmental Quality may accept sites into the voluntary cleanup program that are otherwise excluded from the program.

Volunteers are required to submit a voluntary cleanup plan to DEQ that must contain a site assessment and a remediation proposal. The volunteer may use generic cleanup standards or propose site-specific cleanup standards based on a risk assessment prepared for the site. DEQ must complete its review of the voluntary cleanup plan within 60 days unless a certain number of applications are pending, in which case the time for responding may be extended or the agency may cease to accept new applications. A cleanup plan may not be approved if the cleanup will take more than two years. If DEQ rejects an application, the volunteer has the right to request a hearing within 30 days of the DEQ disapproval.

The volunteer must submit a certification of completion to DEQ within 60 days of completion of the approved remediation proposal. The volunteer may also file a petition for closure with DEQ. The agency then has 60 days to review the request. If the cleanup is approved, DEQ will issue a no further action letter. No financial assistance is available.

**NEBRASKA.** The Nebraska Remedial Action Plan Monitoring Program does not contain any restrictions on the persons or sites that may participate in the program. All contaminated sites including those on the NPL are eligible for the program. Applicants will usually meet with representative of the state Department of Environmental Quality to review site issues and possible remedial alternatives. The program encourages use of innovative technologies. The applicant will then propose a remedial action plan and implement the cleanup following approval of the plan. Upon satisfactory completion of the cleanup, DEQ will issue a no further action letter. No financial assistance is available.

**NEW HAMPSHIRE.** Prospective purchasers, lenders, and owners who are liable under the state superfund law solely because of their status as a current landowner may participate in the state voluntary cleanup program. Any contaminated site is eligible to participate in the program except for a site that is subject to a cleanup order under the state or federal superfund programs and cannot be brought into substantial compliance under the voluntary cleanup program. Sites that are eligible for substantial reimbursement under the state oil spill fund program may not participate in the

<sup>24</sup> Id. at § 447.704



voluntary cleanup program. Prospective volunteers must file an application with the Department of Environmental Services, which then will notify the applicant within 30 days if it is eligible for the voluntary cleanup program. Eligible applicants must then submit a remedial action plan that must be approved by DES. Upon completion of the cleanup, a volunteer will receive a covenant not to sue. Parties who are not eligible for the voluntary cleanup program may obtain a no further action letter, certificate of partial completion or certification of completion from DES.

**NEW JERSEY.** Under the voluntary cleanup program established by the Department of Environmental Protection, any person is eligible to participate in the program including PRPs and municipalities. Sites that are not eligible for the program include those that are subject to an existing enforcement action or have been identified as a high priority site. A person proposing to conduct a voluntary cleanup will enter into a memorandum of agreement with DEP that will establish the scope and schedule of remediation activities. DEP has established site-specific cleanup standards that take into account future use, ground water classification, and implementation of deed or use restrictions. Upon satisfactory completion of the cleanup, the DEP will issue a no further action letter. Under the recent "Brownfield and Contaminated Site Remediation Act," DEP must issue a covenant not to sue whenever it issues a no further action letter. The covenant not to sue will apply for any area of concern that was addressed by the no further action letter. The covenant not to sue may also extend to the entire site if the remediation included a preliminary assessment and, if necessary, a site investigation of the entire site.

Each covenant not to sue will release the person who undertook the cleanup as well as subsequent owners and lessees operating at the site from all civil liability to the state to perform additional remedial activities. However, the covenant will not provide liability relief to any person who is liable under the Spill Act and who cannot assert a defense to such liability. Moreover, the covenant shall not apply to any discharge that occurs after the issuance of the covenant, nor will it relieve any party from future compliance with environmental laws.

The new legislation imposes certain conditions on the covenant not to sue when a remediation involves the use of engineering or institutional controls. When a remediation does use such controls, the covenant not to sue will require the person performing the cleanup and any subsequent owner or lessee to maintain the controls, conduct periodic monitoring of those controls, and submit a certification to the DEP on a biannual basis that the controls are properly maintained and continuing to be protective of human health and the environment. The covenant not to sue will be revoked if the controls are not properly maintained.

If the remediation involved the use of engineering controls, the covenant not to sue will bar any person who benefits from the covenant from seeking reimbursement of their remedial costs from the Spill Fund or the Sanitary Landfill Contingency Fund. However, persons who performed a remediation involving institutional controls will not be barred from filing claims against these funds if DEP subsequently orders additional remediation. If DEP ordered the additional remediation to remove the institutional controls, the person

performing the additional work will be barred from filing a claim against these funds.

For brownfield remediation, DEP is precluded from disapproving a remedy using engineering or institutional controls so long as the selected remedial action meets the health-based standards established by the agency. Moreover, the new legislation specifically states that the choice of remedial action to be implemented shall be made by the person performing the remediation and that DEP must approve the proposed remedial action if it meets agency criteria. DEP cannot require the person to compare or investigate alternative remedial actions. Thus, the party does not have to waste time and money exploring the feasibility of other remedial measures.

**Remediation Grants.** Persons who are required to remediate sites in New Jersey must establish a remediation funding source in the amount equal to the estimated remediation costs for a site which is used to pay for remedial activities. The state Hazardous Discharge Site Remediation Fund,<sup>25</sup> which is administered by the state Economic Development Authority, has been established to provide financial assistance to parties who cannot establish the required remediation funding source. The financial assistance may be available only for the amount of the remediation costs for which a funding source cannot be obtained.<sup>26</sup> However, this restriction does not apply to grants issued to municipalities or innocent parties.<sup>27</sup>

Municipalities that hold a tax sale certificate on contaminated property or have acquired title to contaminated property through foreclosure may apply for grants to perform site assessments. If remedial actions are required at a site, a municipality may apply for a loan. The maximum amount of loans and grants that a municipality may receive in any year may not exceed \$2 million per site.

An owner of contaminated property who qualifies as an "innocent party" may receive a grant for up to 50 percent of the remediation costs, not to exceed \$1 million.<sup>28</sup>

"Qualifying persons" may also be eligible for matching grants of up to 25 percent of "project costs" not to exceed \$100,000 when those remedial actions involve the use of an innovative technology. Similar grants are available for cleanups that do not use engineering controls (e.g., caps, fences, signs, leachate collection systems) to achieve cleanup standards. A qualifying person is someone who has a net worth that does not exceed \$2 million. The term "project costs" refers to the portion of the remediation costs that is associated with the innovative technology or the incremental costs incurred to implement a cleanup that does not involve the use of engineering controls.

**Remediation Loans.** Financial assistance in the form of loans or loan guarantees may also be available to owners or operators of industrial establishments that are being closed or transferred and must be remediated

<sup>25</sup> N.J.S.A. § 58:10-B et seq.

<sup>26</sup> Id. at § 58:10-B-5.

<sup>27</sup> N.J.A.C. § 19:31-8.3(f).

<sup>28</sup> Id. at § 19:31-8.5. Innocent parties are defined as owners who acquire property prior to Dec. 31, 1983, that any hazardous substances that were discharged at a site were not used by the person or any person who had permission to use the site. N.J.S.A. § 58:10-B-6(6).

under the state Industrial Site Recovery Act.<sup>29</sup> Other private parties who qualify for financial assistance include persons who remediate a site under the voluntary cleanup program, and anyone who is responsible for a discharge at a site.<sup>30</sup> Innocent landowners who receive a grant to finance 50 percent of the remediation costs can finance the balance of the costs through a loan from the state site remediation fund. The loans may be used to pay for up to 100 percent of the estimated remediation costs but shall not exceed \$1 million for private parties. The loans may have terms of up to 10 years, but the unpaid balance shall be immediately payable if the property is sold or transferred.<sup>31</sup>

**Tax Abatements.** Owners of "qualified real property" may be eligible for a partial ten year abatement. To be eligible as a "qualified real property," a site must be vacant or underutilized, must appear on the state Department of Environmental Protection's list of contaminated sites, and must be located in an Environmental Opportunity Zone. The site owner must enter into a memorandum of agreement or consent decree with DEP to perform a voluntary cleanup and execute a financial agreement with the local taxing authority, which is recorded in the local land records. The property owner must make quarterly property tax payments to a designated environmental restoration fund, which will be based on the assessed value of the property at the time the application is approved. The required payments are based on a graduated sliding scale which increases by 10 percent each year until the tenth year, when the full amount of the property taxes based on the remediated value of the land must begin to be paid. The right to the partial tax exemption may be assigned to subsequent property owners.<sup>32</sup>

Municipalities may extend the property tax abatement to up to 15 years if the qualified real property is remediated without using engineering controls. However, the tax abatement shall end when the difference between the real property taxes otherwise due and the payments made in lieu of those taxes equals the total remediation costs for the qualified property.

**Redevelopment Remediation Reimbursements (New).** Developers may be eligible for reimbursement of up to 75 percent of their cleanup costs associated with a redevelopment project. A redevelopment project is defined as any "specific work or improvement, including lands, buildings, improvements, real and personal property or any interest therein, including lands under water, riparian rights, space rights and air rights, acquired, owned, developed or redeveloped, constructed, reconstructed, rehabilitated or improved, undertaken by a developer within an area of land whereon a contaminated site is located."

To be eligible for reimbursement, a developer must enter into two agreements. First, the developer must enter into a memorandum of agreement with the state Department of Environmental Protection to perform a remediation that is acceptable to DEP. Second, the developer must enter into a redevelopment agreement with the commissioner of the Department of Commerce and Economic Development and the State Treasurer. These two officials may only enter into a redevelopment

agreement when the state tax revenues to be realized from the redevelopment project will exceed the amount of the reimbursement to the developer. They are barred from entering into an redevelopment agreement with any party who is responsible for the contamination at a site.

In deciding whether to enter into a redevelopment agreement, the commissioner of Commerce and Economic Development must consider the following factors:

- Economic feasibility of the redevelopment project;
- Extent of economic and related social distress in the area in which the redevelopment project is proposed;
- The extent that the project will advance local, regional, and state development and planning strategies;
- The relationship of the project to a comprehensive local redevelopment strategy;
- The extent that the project will enhance and promote job creation and economic development;
- The need of the agreement to the viability of the project; and
- The likelihood that the project shall be capable of generating tax revenue greater than that which must be reimbursed.

The redevelopment agreement will provide that the developer shall be entitled to periodic reimbursement payments. The amounts, frequency, and length of time for payment are to be negotiated and set forth in the redevelopment agreement. However, the state will not be obligated to reimburse the developer until the State Treasurer is satisfied that the anticipated tax revenue to be realized from the redevelopment project will exceed the reimbursement amounts. The redevelopment agreements must specify that payments shall be made in the same percentage of the occupancy rate. However, when the occupancy rate reaches 90 percent, the developer shall be entitled to the entire amount of each payment. The director of the Division of Taxation in the Department of Treasury shall be responsible for make a finding of the occupancy rate of the property.

In calculating the total amount of the reimbursement, the state will also take into account any tax abatements granted to the developer and any payments in lieu of taxes or any other local, state, or federal tax incentives or grants. In no event shall the total reimbursement exceed 75 percent of the remediation costs.

Developers shall be eligible for reimbursement upon the commencement of business operations at the site. Once operations commence, the developer must submit an application to the director that shall include a certification of remediation costs incurred at a site as well as any information regarding the occupancy rate of the property that the director deems necessary.

In certifying that the developer is eligible for reimbursement, the director must make the following findings:

- A place of business is located in the redevelopment project and is generating tax revenues;
- The developer entered into a memorandum of agreement with the state DEP and has complied with the terms of the MOA; and
- The remediation costs were actually and reasonably incurred.

<sup>29</sup> N.J.S.A. § 13: 1K-6 et seq

<sup>30</sup> Id. at § 58:10-B-5.

<sup>31</sup> N.J.A.C. 19:31-8.4

<sup>32</sup> N.J.S.A. 54:4-3.150 to 158

**NEW YORK.** The New York Department of Environmental Conservation has established an administrative voluntary cleanup program. The program is available to non-PRPs and property owners who would be PRPs simply because of their status as current landowners. PRPs may also be eligible for the program if the site is not listed as a Class 1 or 2 sites on the state Registry of Inactive Hazardous Waste Sites, is not subject to RCRA corrective action or closure requirements, is not an interim status treatment, storage, or disposal facility subject to a current enforcement proceeding. Interim status facilities that have gone through closure or are about to undergo closure may participate if they are not otherwise subject to an enforcement proceeding.

The volunteer must enter into a voluntary cleanup agreement and develop a workplan either to investigate or remediate the property. DEC will take future use into account in approving cleanup standards for the site. Upon successful completion of the tasks identified in the workplan, DEC will issue a no further action letter. When the volunteer has performed a remediation, DEC will issue a covenant not to sue and provide contribution protection unless the contamination involves a petroleum release in which case contribution protection is not available. The release is from DEC and is not binding on the Attorney General's Office, which has jurisdiction over releases of hazardous substances and petroleum. While DEC will not generally require volunteers to "chase" plumes of oil contamination migrating off-site, the state Oil Spill Fund is strictly responsible for responding to all oil spills. Therefore, volunteers with property that has a petroleum plume migrating off-site would be well advised to seek concurrence or a release from the Attorney General's Office.

While no financial assistance is available under the state voluntary cleanup program, the Clean Water/Clean Air Bond Act of 1996 established funding for brownfields that are owned by municipal governments.<sup>33</sup> To obtain financial assistance, a local government must enter into a state assistance contract. Under this program, a local government may receive up to 75 percent of the funds necessary to remediate a site but will be required to supply the remaining 25 percent. Costs associated with demolition of structures and disposal or abatement of asbestos will only be eligible for 50 percent reimbursement. However, if the costs are almost exclusively for demolition, indoor asbestos abatement, or lead-paint abatement, those costs will not be eligible for reimbursement. In addition, costs incurred prior to the approval of the state assistance contract are also not reimbursable. Legal services that are necessary to implement the project are reimbursable for up to 5 percent of the investigation costs.

Generally, sites that are identified as Class 1 or 2 sites on the state Registry of Inactive Hazardous Waste Sites are not eligible for the program. In addition, the municipality cannot be a PRP, although this exclusion may not apply when the government's liability is based solely on its status as an owner of the property if it did not operate the site.

The municipality does not have to own the property at the time of the application but must hold title. However, funds cannot be disbursed until the local government provides evidence of ownership. Thus, private developers who would not ordinarily be able to obtain fi-

nancing for remediating the site could enter into an agreement with a local government where the local government performs the cleanup and then sells the property to the developer who would reimburse the local government for its share of the cleanup costs. Moreover, while a property can be subdivided prior to the completion of remediation, contaminated parcels may not be used either by the municipality or a successor until the DEC-approved cleanup has been completed for that parcel.

A municipality may not be eligible for funding if it indemnifies other PRPs for remediation of the site. Indeed, the local government is required to assist the state in seeking reimbursement of response costs.

If a municipality receives proceeds from the sale of property remediated under a state assistance contract a cost recovery action or the federal government, the shares of the state and the municipality shall be recalculated and any excess payments received by the municipality from the state shall be repaid. Similarly, if the property is leased, the benefits to the municipality will be calculated using the higher of the present worth of the stream of rent over a thirty-year period or the present worth of the fair market value of the property. Once those state assistance contract expenses have been paid, the municipality's expenses may be paid. Any additional revenue must be equally shared by the state and municipality.<sup>34</sup> Any sale by a municipality to a PRP must be at least equal to the costs associated with the state assistance contract as well as transaction expenses and interest.<sup>35</sup>

In addition, the local government will receive a release for any common law or statutory liability and indemnity from the NYDEC for all claims filed by third parties as a result of the contamination. The rights of this indemnification are assignable to a subsequent landowner.<sup>36</sup>

**NORTH CAROLINA.** Any person including a PRP may enter into a voluntary cleanup agreement with the Department of Environment, Health and Natural Resources. Volunteers cannot be required to spend more than \$3 million on any individual hazardous waste site. Properties that are undergoing a voluntary cleanup will not be placed on the state list of inactive hazardous waste sites. The DEHNR will use the same cleanup standards for voluntary cleanup program cleanups that are used for cleanups performed under the traditional program.

**OHIO.** Under the Ohio Voluntary Action Program, any person may enter into an agreement with the Ohio Environmental Protection Agency to perform a voluntary cleanup using a certified environmental professional. Sites that are subject to other regulatory programs as well as sites that are subject to an enforcement proceeding are not eligible for the program. However, if OEPA has issued an enforcement letter order to a party, the ordered party may request to be included within the Voluntary Action Program if it can show within 30 days of receipt of the enforcement letter, voluntary cleanup activities in the form of a Phase I site assessment was

<sup>34</sup> Id. at § 56.0503

<sup>35</sup> Id. at § 56.0505

<sup>36</sup> Id. at § 56.0509

<sup>33</sup> ECL 56.0101 et seq.

been performed prior to the issuance of the enforcement letter.

Prospective volunteers must submit an application to OEPA, which will then notify the applicant if it is eligible for the Voluntary Action Program. The volunteer must then perform a Phase I site assessment and a Phase II site assessment if contamination is detected. OEPA has issued standards for what constitutes a Phase I and Phase II site assessment and has established risk-based cleanup standards. Upon completion of the response work, the certified environmental professional must prepare and submit a no further action letter to OEPA indicating either that the site is not contaminated or that the site has been remediated in accordance with the applicable cleanup standards. OEPA will then issue a covenant not to sue. OEPA also plans to audit a certain number of sites per year.

Financial assistance is available for remediation of brownfields in distressed areas, labor surplus areas, inner city stressed areas, and situational distressed areas. Eligible brownfield sites may qualify for low interest loans and 10 year tax abatements on the increased value of the property.

**OKLAHOMA.** The Oklahoma Brownfields Voluntary Redevelopment Act authorizes owners, prospective owners, and tenants of brownfield sites to perform voluntary remediation. However, persons who are under an obligation to take corrective action pursuant to an order or agreement with the EPA, who are not in substantial compliance with a state administrative or judicial order, or who have demonstrated a pattern of non-compliance, are not eligible for the program.

Volunteers may either seek a "certificate of no action necessary" from the state Department of Environmental Quality if the site is not contaminated or if the levels of contamination would not pose an unreasonable risk after taking into account the use of the property. If remediation is required, the volunteer will enter into a consent order with DEQ to perform a risk-based remediation. When the remediation is successfully completed, DEQ will issue a certificate of completion, which will release the volunteer and its assignees or successors from liability for the contamination addressed by the consent decree so long as those parties comply with any post-remediation requirements. However, there is no release for third party actions.

Businesses that locate their principal operations on certain contaminated properties shall qualify for the incentive payments allowed under the state Quality Jobs Act.<sup>37</sup> To qualify for the incentive payments, the business must be located on property that is at least 10 acres in size. In addition, the property must be either on the NPL, have been formally deferred to the state in lieu of being placed on the NPL, or have been subject to a CERCLA removal action. To establish that the eligible property is its principal place of business, the company must show that 80 percent of its total annual gross sales are derived from the site. Businesses that meet these requirements will be able to participate in the incentive payment program without having to comply with the minimum gross payroll and new job creation requirements of the Job Quality Act.

<sup>37</sup> Enrolled Senate Bill No. 668, amending 68 O.S. Supp 1996 § 3604

These incentive payments may consist of quarterly payments for a 10-year period from the Oklahoma Tax Commission in amounts equal to the net benefit rate multiplied by the actual gross payroll of new direct jobs created in a calendar quarter by that business.

**OREGON.** Any person including a PRP may enter into a voluntary cleanup agreement with the state Department of Environmental Quality. Sites that are listed on the NPL, subject to RCRA corrective action, regulated under an underground storage tank program, or have been issued a permit such as a landfill, generally may not participate in the state voluntary cleanup program.

A prospective volunteer must file an "intent to participate" and provide information known about the site to DEQ. Following a review of the materials, DEQ will determine if additional information is required. If not, the volunteer will enter into either a letter of agreement or a voluntary cleanup agreement for more complex sites. If the volunteer is a PRP, the agreements will be lodged as a consent decree with the appropriate state court.

Generic cleanup standards that take into account the future use of the property may be used for moderately polluted sites that do not have ground water contamination. Sites that are more seriously contaminated will have to undergo a site-specific risk assessment to determine the appropriate cleanup level. When the cleanup is successfully completed, DEQ will issue a no further action letter, which may also contain a covenant not to sue.

Oregon recently enacted legislation that established loan and grant programs to encourage the redevelopment of brownfields.<sup>38</sup>

**Brownfield Redevelopment Fund.** The Department of Economic Development may issue loans to finance environmental assessments. While PRPs may be eligible for the loans, no more than 40 percent of the fund may be disbursed to PRPs. Moreover, DED may not approve loans to persons who knowingly violate environmental laws or fail to comply with orders issued by the state DEQ if such actions or inactions by the person contribute to or exacerbates existing contamination, causes a release, or interferes with a necessary investigation or remedial action. Additional factors that DED must consider include the extent that the actual or perceived contamination has kept the property from being fully utilized, inability to obtain private financing, the extent that the redevelopment will reduce or eliminate contamination, probability that the remediation will be successfully implemented after taking into account the future land use, and endorsement of local government.

**Special Public Works Fund.** This fund allows municipalities to receive loans and grants to finance environmental evaluations associated with infrastructure projects. However, financing may not be used for purchases of off-site project-related purposes such as creation of a wetlands mitigation bank.

**Credit Enhancement Fund.** This fund may be used to provide loans and credit guarantees to small businesses and companies in the value-added wood products and value-added agricultural industries. This financial assistance may be used to help pay for environmental evaluations.

<sup>38</sup> 1997 H.B. 3724

**PENNSYLVANIA.** The Land Recycling and Environmental Remediation Standards Act established the state voluntary cleanup program known as the Land Recycling Program. Any person may participate in the program. Sites that are listed on the NPL or are subject to enforcement under RCRA or underground storage tank programs are not eligible. Volunteers may remediate a site to one of three cleanup standards: background standard, statewide health standard, or site-specific standard.

If the volunteer selects the background or statewide health standard, the volunteer must file a notice of intent to remediate with the Department of Environmental Resources and with the local government. Approval of the remedial action plan by DER is not required, although the local government can request public participation within 30 days of the submission of the notice of intent to remediate. Upon completion of the remedial action, the volunteer sends a final report to DER, and if a response is not received within 60 days, the cleanup will be deemed to have been approved.

If a site-specific remediation is proposed, the volunteer must perform a risk assessment to determine the appropriate cleanup level and then develop a remedial action plan based on the results of the risk assessment. DER and the local government must be given the opportunity to review the risk assessment, and DER must approve the proposed remedial action plan. Upon completion of the remedial action, the volunteer must submit a final report to the DER. If the agency fails to provide a deficiency notice within 90 days of receipt of the final report, the cleanup will be deemed to have been approved.

DER does not issue no further action letters or covenants not to sue. Instead, volunteers who have performed cleanups that are approved or deemed to be approved by DER will be automatically relieved of liability by operation of law.

The Land Recycling Act also contains provisions to encourage redevelopment of brownfields, which are referred to as Special Industrial Areas. These are defined as industrial sites where there is no financially responsible party, or land is located within an Enterprise Zone designated by the state Department of Community Affairs. The Special Industrial Areas program is only available to non-PRPs. A volunteer must perform a baseline remediation investigation, which identifies existing contamination, proposes remedial measures, and specifies the public benefits that will result from the proposed reuse or redevelopment of the site.

The volunteer will only be required to remediate contamination that poses an immediate, direct, or imminent threat to public health. The volunteer will then submit a notice of intent to remediate to DER and the local government. After a 30-day public comment period, DER will have 90 days to determine if the investigation report adequately identifies the risks posed by the site. If DER does not notify the volunteer of a deficiency within the 90-day period, the volunteer can then enter into a remediation agreement with DER. Upon completion of the approved cleanup, the volunteer will submit a final report to DER. If the agency does not notify the volunteer of any deficiency within 90 days, the cleanup will be deemed approved. The volunteer will not only be released from liability by operation of law but will also receive contribution protection as well.

Financial assistance is also available to volunteers performing a cleanup under the Special Industrial Area program. Volunteers may receive funding for 75 percent or \$200,000, whichever is less, for site assessment costs and the lesser of 75 percent or \$1 million in any single year for remediation costs. The financial assistance will be in the form of low interest loans to private parties and grants to municipalities or local economic development agencies.

**RHODE ISLAND.** The Industrial Property Remediation and Reuse Act allows any person to participate in the state voluntary cleanup program. However, the status of the party will determine and influence the nature of the remediation that has to be performed as well as the scope of liability protection. Sites that are listed on the NPL or subject to the jurisdiction of state superfund, RCRA, or underground storage tank programs are not eligible. The Department of Environmental Management has established risk-based cleanup standards that take into account the current and future land use as well as the ground water classification.

PRPs who wish to perform a voluntary cleanup must conduct site investigations and remediations in accordance with the requirements of the state superfund program. The PRPs will receive a letter of responsibility from DEM. Upon completion of the cleanup, DEM will issue a letter of compliance indicating that no further action is required.

Non-PRP volunteers including prospective purchasers may enter into settlement agreements with DEM to perform site assessment and remediation activities. Upon completion of the response action, DEM will issue a covenant not to sue and contribution protection.

No financial assistance is available to fund brown-field site assessment or remediation activities.

**SOUTH CAROLINA.** Under the voluntary cleanup program established by the Department of Health and Environmental Control, any person including a PRP may enter into a voluntary cleanup agreement with DHEC. Sites that are subject to a state enforcement proceeding or under the jurisdiction of other regulatory regimes such as RCRA and underground storage tank programs are not eligible for the voluntary cleanup program. The volunteer must propose a site assessment and remedial action plan, if necessary, which must be approved by DHEC. Upon successful completion of the response action, DHEC will issue a no further action letter. A covenant not to sue may be available to non-PRPs.

**SOUTH DAKOTA.** The Department of Environment and Natural Resources is developing a voluntary cleanup program under the agency's general statutory authority to enter into administrative settlements for voluntary compliance. Any person will be able to participate in the program. The scope of any liability releases is unclear at this time.

**TENNESSEE.** The Voluntary Cleanup Oversight and Assistance program is available to anyone who is willing and able to conduct an investigation and cleanup of a hazardous waste site. The program is limited to inactive hazardous waste sites. Sites with petroleum contamination are not eligible for the program. Volunteers must enter into a consent decree and must perform a cleanup consistent with the superfund National Contingency Plan. Upon successful completion of the cleanup,

the Department of Environment and Conservation will issue a no further action letter. No financial assistance is available at this time.

**TEXAS.** The Texas voluntary cleanup program is available to any party who is willing to enter into a cleanup program agreement with the Texas Natural Resource Conservation Commission. Any site is eligible to participate in the voluntary cleanup program. After entering into a voluntary cleanup program agreement, a volunteer must prepare a site investigation report and a response action workplan which must be approved by TNRCC. The response action workplan may use generic or site-specific cleanup standards that take future land use and institutional or engineering controls into account. Following completion of the remedial action, the volunteer must submit a Response Action Completion Report. If the remedial action is satisfactorily completed, TRNCC will issue a certificate of completion that releases non-PRPs from liability for matters addressed by the agreement. PRPs may only be released for future liability and not for past contamination.

Texas also recently allowed municipalities to grant a four-year tax abatement to owners of property located in a reinvestment zone that is remediated under the voluntary program.

**UTAH.** Utah adopted a Voluntary Environmental Cleanup Program in 1997. The program is available to owners of property that are not listed on the NPL, are not subject to regulation under RCRA and are not subject to a federal or state administrative order. To participate in the program, a volunteer must submit an application and an environmental site assessment and information relating to the financial ability of the applicant to the Department of Environmental Conservation.

If the agency approves the application, the volunteer must then enter into a cleanup agreement with DEC. The volunteer must then prepare a remedial action plan for approval by DEC. Site-specific cleanup standards may be used which take into account future land use. Upon completion of the cleanup, DEC will issue a certificate of completion within 30 days. If DEC does not approve the cleanup, the volunteer may appeal that determination. The certificate of completion will release non-PRPs from any liability for contamination addressed by the voluntary cleanup program. However, the release is not available to an owner who was responsible for the release or who changes the land use specified in the agreement to one that would increase the risks to human health and the environment.

Anyone who performed a response action prior to the effective date of the voluntary program and who would have qualified for the program may also submit an application to the DEC to obtain a certificate of completion.

**VERMONT.** The Contaminated Properties Redevelopment Program is only available to prospective purchasers of sites that are abandoned, vacant, or underutilized. Sites that are listed on the NPL or subject to RCRA or underground storage tank regulation are not eligible for the program. Volunteers must submit a site investigation and remedial action plan for approval by the Department of Environmental Conservation. Site-specific cleanup standards may be used. Upon completion of the cleanup, DEC will issue a certificate of

completion that will release the volunteer from liability for contamination addressed by the voluntary cleanup.

**VIRGINIA.** Any person who is an owner, operator, prospective purchaser, or has a security interest in property contaminated with hazardous substances or petroleum may participate in the Voluntary Remediation Program. Sites that are not currently subject to a remediation obligation under other state or federal programs are eligible. To enter the program, a volunteer must submit a certificate of eligibility stating that the site meets the criteria; it also must contain a basic site history. After approval by the Department of Environmental Quality, the volunteer must enter into a voluntary cleanup program agreement. The volunteer must prepare a site investigation and remedial action plan for approval by DEQ. Site-specific risk-based cleanup standards may be used. Upon completion of the work, the volunteer submits a Demonstration of Completion. If the cleanup is approved, DEQ will issue a certification of satisfactory completion, which shall constitute immunity from further enforcement under state environmental laws.

The state also has established a Remediated Property Fresh Start Program. Under this program, persons who acquire an interest in property that has been successfully remediated under CERCLA shall not be subject to any enforcement action by DEQ or subject to liability from private parties for contamination that was addressed by the CERCLA program.

**WASHINGTON.** The Department of Ecology has established two kinds of voluntary cleanup program programs. Under the Independent Remedial Action Program, volunteers simply notify DOE that they intend to perform a cleanup, but will only submit a final report to DOE. The final report must be submitted within 90 days of completion of the work, and the agency has 90 days to respond. If the agency approves the cleanup, a no further action letter will be issued. The volunteer will pay limited oversight costs to DOE under this approach.

The "prepayment agreement" program is used when the volunteer wants to perform a voluntary cleanup under DOE supervision. Under this program, the volunteer will submit a letter to the DOE proposing to perform a remediation pursuant to either a consent decree or an agreed order. The volunteer will then submit an investigation report and remedial action plan for approval by DOE. The volunteers will receive a no further action letter when the cleanup has been successfully completed. If the volunteer is a prospective purchaser, it may receive a covenant not to sue following completion of the work.

The state Toxic Control Account may be used to provide grants and loans to municipalities to fund remedial actions.<sup>39</sup> In addition, financial assistance may be available to potentially liable parties who enter into a settlement agreement with the state and agree to perform a remedial action that will lead to a more expeditious or enhanced cleanup than would otherwise occur and to mitigate or prevent an undue economic hardship.<sup>40</sup>

<sup>39</sup> Wash. Rev. Code § 70.105D.70(3)

<sup>40</sup> Id. at § 70.105D.70(2)



**WEST VIRGINIA.** The Voluntary Remediation and Re-development Act authorizes any person willing to perform a cleanup to participate in the voluntary cleanup program. Sites that are not currently under a federal or state cleanup order may participate in the program so long as the release was not created through gross negligence or wilful misconduct. To participate in the program, a volunteer must enter into a cleanup agreement with the Department of Environmental Protection. The volunteer must then submit an investigation and remedial action plan prepared by a licensed remediation specialist. Upon completion of the remedial action plan, the remediation specialist must submit a final report to DEP. If the agency approves the cleanup, a certificate of completion will be issued relieving the volunteer of liability to the state and third parties for the contamination addressed by the voluntary cleanup program.

There are also separate provisions dealing with brownfields. Only non-PRPs may participate in the brownfield program. Volunteers planning to redevelop a brownfield must file a "Notice of Intent to Remediate" to allow the local community to comment on the project. The remediation process is the same under the

voluntary cleanup program. However, low interest loans are available for the assessment and remediation of brownfields.

**WISCONSIN.** The Land Recycling Act applies to prospective purchasers and innocent landowners who conduct a "thorough investigation of the property" and perform a cleanup. Volunteers must submit an application to the Department of Natural Resources, which will determine if the applicant is eligible. After the volunteer is notified that it may participate in the program, the volunteer must submit a Phase I and Phase II Environmental Assessment. The volunteer must then submit a Remediation Work Plan for approval by DNR. The volunteer may use generic cleanup standards for industrial or residential properties or develop site-specific risk-based cleanup levels. Upon satisfactory completion of the work, DNR will issue certificate of completion, which will insulate the volunteer from liability under the state superfund law. However, the release does not apply to other state environmental laws such as the state administered RCRA program.